

# Antitrust Chronicle

OCTOBER · VOLUME 1 · AUTUMN 2016

## ANTITRUST DEVELOPMENTS IN ASIA-PACIFIC

# TABLE OF CONTENT

---

03

**Letter from the Editor**

05

**Summaries**

07

**CPI Talks  
CPI Spotlight  
Announcements**

08

**CPI Talks:  
Interview with FTC commissioner Terrell  
McSweeney**

11

**Recent Developments in Antitrust  
Enforcement in Singapore**

*By Yeo Hui Chuan & Jaime Pang*

16

**Market Structure Still Matters: the KFTC  
Blocks a Merger between Top Firms in  
Broadcasting and Communications**

*By Youngsoog Na*

24

**Indian Merger Control– One Step Forward,  
Two Steps Back**

*By Naval Satarawala Chopra & Aparna Mehra*

28

**Competition Alive & Kicking in New Zealand**

*By Andrew Matthews & Gus Stewart*

32

**Off and Running: the Hong Kong Competition  
Commission Commences Full Operations**

*By Rose Webb, Rasul Butt, Tim Lear  
& Dennis Beling*

36

**At the Cutting Edge of PRC AML Private  
Litigation**

*By Dr. Zhan Hao & Song Ying*

42

**Rethinking the CCA: Draft Legislation Lays  
Groundwork for Significant Change**

*By Elizabeth Avery, Simon Muys & Matt Rubinstein*

49

**Recent Developments in Japanese Cartel  
Enforcement – Time for a Change?**

*By Atsushi Yamada*

53

**Making Markets Work for Development through  
Effective Competition Policies: Recent Experience  
from the World Bank Group in East Asia Pacific**

*By Martha Martinez Licetti,  
Graciela Miralles Murciego & Georgiana Pop*

## Editorial Team

### CEO & Founder

David S. Evans

### Editor in Chief

Elisa V. Mariscal

### Managing Director

Aitor Ortiz

### Managing Editor

Nancy Hoch

### Latin America Editor

Jan Roth

### Desk Manager

Samuel Sadden

## Editorial Advisory Board

Rosa Abrantes-Metz, Global Econ. Group, Stern

School of Bus. at NYU

Kent Bernard, Fordham School of Law

Rachel Brandenburger, New York, NY

Adrian Emch, Hogan Lovells

Kyriakos Fountoukakos, Herbert Smith

Jay Himes, Labaton Sucharow

James Killick, White & Case

Stephen Kinsella, Sidley Austin

Ioannis Lianos, University College London

Robert O'Donoghue, Brick Court Chambers

Aaron Panner, Kellogg, Huber, Hansen

# LETTER FROM THE EDITOR

## Dear Readers,

This month, the Antitrust Chronicle ("AC") brings you the Antitrust Developments in the ASIA-PACIFIC region thanks to our guest editor Daniel Sokol\* who also wrote this letter.

In 2011, the Asian Development Bank famously predicted that by 2050, an additional 3 billion people in the Asian regions could reach European living standards, thereby making the 2000s the "Asian Century."<sup>1</sup> In a world full of promise of Asian growth and innovation, competition law and policy play an important role. The current issue of CPI Antitrust Chronicle explores some of the cutting edge issues that competition authorities, courts, companies and their lawyers are grappling with in the early years of the Asian Century. Many of the issues addressed in the Asian context are issues of first impression.

We begin with perhaps the most important jurisdiction in Asia based on the size of the economy and its geopolitical position – China. The Chinese Anti-Monopoly Law provides for private rights of action. Private enforcement is an important part of antitrust enforcement. Private firms may have better information than government enforcers and may bring cases that a government enforcer may not. In this context, Zhan Hao and Song Ying analyze private litigation in China. First, they note that private antitrust litigation is at an early stage. Next, they identify that to date, most private cases have involved an abuse of dominant behavior. Yet, they observe that the types of parties involved in litigation now vary from private firms to state owned enterprises ("SOEs") and from traditional industrial firms to high tech firms. Next, Hao and Ying work through the particularities of Chinese private litigation from a procedural perspective before focusing on the high stakes antitrust-IP litigation that has become high profile worldwide. They find that the reasons for bringing such cases vary but the volume and speed at which such claims have been brought has been significant.

Developments in India also have moved at a fast pace. In their contribution to the special issue, Naval Satarawala Chopra and Aparna Mehra take a critical view of India's merger policy regarding merger review exemptions. They argue that CCI's current approach does not fit within the ICN's merger best practices. They find fault with the de minimis target based exemption, CCI's approach to "control" and the investment only exemption. They also examine issues that have emerged with late merger filings (and fines related to such filings), problems with merger remedies, invalidation of filed notices and rigidity by CCI with regard to filing formalities. Taken in total, these critiques of current CCI merger policy suggest a need for modifications to the Indian Competition Act and how CCI treats merger cases.

Changes to the structure of a competition law are not unique to the Indian context. In Australia, Elizabeth Avery, Simon Muys and Matt Rubinstein examine the most important changes to the draft legislation to amend the Competition and Consumer Act 2010 based on the Harper Review. The trio provide an incredibly useful summary and analysis of the changes. These include changes such as the inclusion of a new misuse of market power section, as well as modifications to sections of the Act that address price signalling and concerted practice; cartels; vertical relations; mergers, authorization, notification and class exemptions; private actions; an increase in the ACCC's power to obtain information, documents and evidence; and access to infrastructure issues. Further, the article explores what is missing on the amendments.

The next article focuses on Japanese cartel enforcement. In recent years, the Japanese Fair Trade Commission ("JFTC") has become more aggressive in cartel enforcement. The result has been a leniency program that recently celebrated its ten-year anniversary. During this period, a total of 938 applications were made of which the JFTC determined that 136

\* UF Foundation Professor of Law, University of Florida Levin College of Law and Senior Of Counsel, Wilson Sonsini Goodrich & Rosati.

<sup>1</sup> Asian Development Bank, Asia 2050: Realizing the Asian Century (2011).

# LETTER FROM THE EDITOR

---

cases qualified for leniency and of those 109 leniency applications were made. Yet, even if the total number of cases is high, the number of cases in the past few years has been fewer than in prior years. The article by Atsushi Yamada explores the nuances of recent cases and changes in institutional design in the JFTC's anti-cartel efforts.

Like Australia, New Zealand is in the process of change. Andrew Matthews & Gus Stewart examine the Commerce Commission's recent merger jurisprudence in some high profile deals - CallPlus/Orcon, SKY/Vodafone, and NZME/Fairfax. These cases have potentially significant impact in the TMT sector. Matthews and Stewart also analyze developments in consumer protection law, where the Commerce Commission is becoming increasingly active. The Commission has brought a number of high profile fair trading proceedings and also focused on repeat offenders.

CPI also solicited views of two of the most small and dynamic competition authorities – Singapore and Hong Kong. In Singapore, the Competition Commission of Singapore (“CCS”) has issued infringement decisions against international cartels in ball bearings manufacturers and freight forwarders. The CPI article, written by the CCS, examines the issues that arose in these two cartels and analyze the legal arguments. The article also examines CCS's infringement decision against a group of financial advisors, the CCS's first enforcement action in the financial services sector. Finally, the CSS highlights commitments by undertakings that remedied anti-competitive conduct, particularly in the high profile cases of F&N/Heineken, Cordlife, APBS and restrictive practices in the supply of lift spare parts.

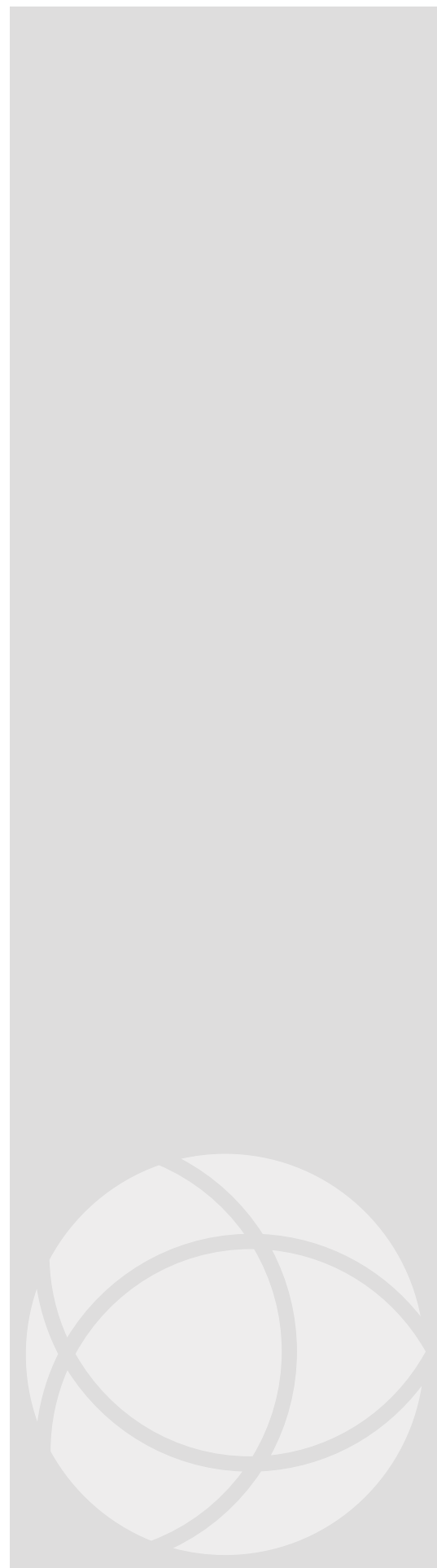
The new Hong Kong Competition Commission also provides insights into their activity in the current issue of CPI Antitrust Chronicle. Rose Webb, Rasul Butt, Tim Lear & Dennis Beling highlight the work of the Competition Commission of its various projects. In addition to policy projects, the Competition Commission outlined its enforcement priorities through the Conduct Rules. The early results in Hong Kong have been impressive. The Commission received 1,250 complaints and queries about potentially anti-competitive conduct in the first six months of the commencement of the law.

Our final article of the special issue highlights the work of the World Bank in the region. The World Bank uses two complementary objectives in its work in the region – “(1) fostering pro-competition regulations and government interventions; (2) developing the necessary measures to guarantee competitive neutrality in markets and promote effective economy wide enforcement of competition law.” In the first area, the World Bank has been active in the Philippines shipping sector. In the second area, the World Bank has highlighted its work involving the Trans-Pacific Partnership.

Overall, this special issue of CPI Antitrust Chronicle highlights a number of complex and exciting developments across Asia-Pacific. Given the continuing growing importance of the region, these developments are worth monitoring closely.

We sincerely hope you enjoy reading this special issue of our AC magazine.

Thank you, Sincerely,  
**CPI Team**



11

## **Recent Developments in Antitrust Enforcement in Singapore**

*By Yeo Hui Chuan & Jaime Pang*

The enforcement of competition law in Singapore has grown in scope and complexity in recent years, reflecting the development of the Competition Commission of Singapore from a nascent competition authority to one whose capabilities match the challenges posed by complex issues faced by other more experienced competition authorities. This article provides an update on recent case developments in Singapore, spotlighting interesting aspects of international leniency cases and a novel domestic case

16

## **Market Structure Still Matters: the KFTC Blocks a Merger between Top Firms in Broadcasting and Communications**

*By Youngsoog Na*

It is difficult to determine a perfect balancing point in the trade-offs between the need to positively readjust an industry structure and the concern for maintaining a competitive market structure. These issues and others came to a head recently in July when the Korea Fair Trade Commission decided to ban the transaction involving SK Telecom's acquisition of shares of CJ HelloVision, and the merger of SK Broadband and CJHelloVision. This article addresses the KFTC's analysis of the anticompetitive aspects of the transaction in the main relevant markets, and the justifications for the remedy imposed.

24

## **Indian Merger Control – One Step Forward, Two Steps Back**

*By Naval Satarawala Chopra & Aparna Mehra*

This article addresses the trends and challenges of the merger control regime in India. The merger control regime in India has been in place for the last five years. When the regime was introduced, practitioners and academics feared that the approval process adopted by the Competition Commission of India would delay transactions and be costly. The CCI has, to a large extent, allayed such fears by clearing close to 350 merger notifications within a much shorter time-frame than expected.

28

## **Competition Alive & Kicking in New Zealand**

*By Andrew Matthews & Gus Stewart*

New Zealand's competition regulator, the Commerce Commission, has had a busy first three quarters of 2016, actively investigating and enforcing a wide range of competition and consumer laws. The Commission, on the back of its increased advocacy and media engagement, has been influential in driving an increased awareness of competition and consumer laws in New Zealand. In this update, the authors discuss the Commission's activity in relation to recent and impending consolidation in the media & communications sector, and its more active enforcement action in the consumer law space.

32

## **Off and Running: the Hong Kong Competition Commission Commences Full Operations**

*By Rose Webb, Rasul Butt, Tim Lear & Dennis Beling*

The Competition Commission in Hong Kong began enforcing Hong Kong's first economy wide competition law on December 14, 2015. Although less than a year has passed since full operations commenced, the Commission has already conducted a number of publicity campaigns, published a report of research into a market of great public interest, issued a draft block exemption order and has some substantial enforcement activity underway. This article outlines some of the Commission's activities over the past nine months.



36

## **At the Cutting Edge of PRC AML Private Litigation**

*By Dr. Zhan Hao & Song Ying*

On August 1, 2008, China launched the Anti-Monopoly Law (“AML”), establishing a dual enforcement system comprising both public and civil enforcement measures. China’s private antitrust enforcement regime remained relatively quiet during its first four years. Since then, however, an increasing level of private antitrust enforcement action in China, accompanied by some high-profile cases, has prompted an increased level of attention and scrutiny. Generally speaking, Chinese courts are still at an early stage in implementing the AML. Nevertheless, they have garnered a great deal of experience in the intervening eight years since implementation began, and are now stepping up the pace.

42

## **Rethinking the CCA: Draft Legislation Lays Groundwork for Significant Change**

*By Elizabeth Avery, Simon Muys & Matt Rubinstein*

Australia’s competition laws have been under review for over two years. The Competition Policy Review chaired by Professor Ian Harper “the Harper Review” deliver its final report on March 31, 2015. It then took another 12 months for the Commonwealth Government to finalize its response to the Harper Review. The Australian Government has finally released exposure draft legislation, to amend the Competition and Consumer Act of 2010 in line with the majority of the recommendations of the Harper Review. This article addresses the draft legislation.

49

## **Recent Developments in Japanese Cartel Enforcement – Time for a Change?**

*By Atsushi Yamada*

This year, the Japan Fair Trade Commission celebrated the 10-year anniversary of the leniency system in Japan. As of March 2016, there had been a total 938 applications since the system’s introduction in January 2006. This article outlines a number of recent cartel enforcement developments in Japan.

53

## **Making Markets Work for Development through Effective Competition Policies: Recent Experience from the World Bank Group in East Asia Pacific**

*By Martha Martinez Licetti, Graciela Miralles Murciego & Georgiana Pop*

The majority of countries share a common vision to become prosperous and competitive nations and raise the quality of life for their citizens. Effective and healthy competition is an indispensable ingredient in achieving that vision. The World Bank Group has two goals: eliminating extreme poverty by the year 2030, and building “shared prosperity.” This article presents some practical experiences on how to promote pro-competition policy reforms within East Asia that help countries achieve their development goals.

# CPI TALKS

---

## CPI - Interview with FTC Commissioner Terrell McSweeney – July 2016

In this interesting interview, Commissioner McSweeney addresses questions concerning unilateral conduct section investigations, the Sunshine laws, the Sharing economy and Brexit, among other topics.

You can also watch the video of the interview at: <https://vimeo.com/competitionpolicyint>

# CPI SPOTLIGHT

---

## NEW ANTITRUST CHRONICLE 2017

Starting in January 2017, the CPI Antitrust Chronicle adopts a new format offering more content to readers and a unique opportunity for writers to publish their academic and professional papers.

CPI Editorial Team will continue selecting the topics for the Antitrust Chronicle and sending selective invitations to antitrust experts to contribute to our magazine. However, beginning in January 2017, the Antitrust Chronicle becomes an open-submission publication where practitioners, academics and regulators could show their interest in participating in any monthly issue.

In addition, the best contributions to the CPI Antitrust Chronicle will be part of a special CPI Journal released at the end of 2017 (ISBN index).

For this new Antitrust Chronicle, the CPI Editorial Team will publish the upcoming topics two months in advance on our website and social networks along with the instructions for interested authors to register and participate.

# ANNOUNCEMENTS

---

## CPI ANTITRUST CHRONICLE JANUARY 2017

The first Antitrust Chronicle of 2017 will address Competition in Digital Markets, a highly debated topic nowadays, mostly in Europe, but with worldwide effects.

CPI encourages authors to address this topic from the angle they consider most interesting or especially relevant. However, the CPI Editorial Team will prioritize papers on the following sub-topics:

1. Big data and competition
2. Market definition in fast moving digital markets
3. Dominance and digital markets - what does it mean?
4. Merger control in digital markets (context of DG Comp consultation on merger review guidelines)
5. Enforcement in digital markets
6. Measuring consumer value and welfare in digital markets
7. How should competition policy evolve for digital markets?
8. The digital consumer - how to take account of consumer benefit

Contributions to the new Antitrust Chronicle are roughly 2,500 – 7,500 words long, lightly cited (follow bluebook style for footnotes) and without references or bibliography.

Authors interested should send an email by October 25, 2016 to Sam Sadden ([ssaden@competitionpolicyinternational.com](mailto:ssaden@competitionpolicyinternational.com)) or Aitor Ortiz ([aitor.ortiz@competitionpolicyinternational.com](mailto:aitor.ortiz@competitionpolicyinternational.com)) with the subject line "Antitrust Chronicle- January 2017," an abstract of no more than 400 words explaining the topic they would like to write about and a short bio or CV of the author(s).

The CPI Editorial Team will evaluate all submissions and will reply to the successful candidates before October 30, 2016. The deadline to submit final drafts is December 15, 2016. Co-authors are welcome.

Contributions to this CPI Antitrust Chronicle will be considered for our CPI Journal (ISBN index).

# WHAT IS NEXT?

---

This section is dedicated to those who want to know what CPI is preparing for the next month. Spoiler alert!

The November edition of the AC will address telecommunications. For this issue we will have articles addressing a variety of topics in this sector, from merger analysis, to the role of the OTT in traditional markets to net neutrality or the deployment of the 5G network.

# CPI TALKS:

## INTERVIEW WITH FTC COMMISSIONER TERRELL MCSWEENY

---



**Aitor Ortiz:** Hello, Commissioner McSweeney. Thank you for inviting CPI to your house for this short interview. I want to ask a few questions about the latest FTC policies on enforcement and international cooperation. I would like to start with one - might be a bit tough, but perhaps you can give us a good answer.

**There are allegations that the US agencies are not taking a lot of action in the unilateral conduct section investigations. How does that happen, or what can you tell us about that?**

**T.McSweeney** - First of all I want to thank you very much for taking the time today to come over to the FTC to have a chat. As you say, I don't mind answering hard questions, I think they're important ones to ask.

I would push back a little bit on those allegations. I was actually looking at this and I think the FTC has brought Section 2 cases at least once a year for the last few years prior to my time here at the Commission and also more recently. So I think Section 2 enforcement is in fact alive and well in the U.S. Thinking about our McWanecase, which was a case in which access to distributors was essential for entry into the iron pipe fitting market; our Bit-tracks case, which was announced last month and which involved again, medical device customers not being able to take advantage of lower prices because they were locked into long-term exclusive contracts with Bit-tracks; and also Cardinal Health, which was a case that was settled a couple of years ago in which we alleged that Cardinal had illegally monopolized the market for the sale and distribution of radiopharmaceuticals. So I think that actually the FTC has a good track record of using its authority to bring cases when it sees anti-competitive unilateral conduct.

**AO** - Definitely there were more than I thought originally, but I'm sure people will be waiting in some markets to see if the FTC and other agencies will keep moving forward in this section, but that is for a different interview.

**Now for something more political, but I think very interesting.**

At the time of this interview there are only three commissioners of the FTC - all of them women, which actually speaks very well about the FTC when compared to other agencies. How has this affected the decision-making and day-to-day work? I seem to recall - and please correct me if I'm wrong - three years ago there was a Microsoft case that was deadlocked 2-2 because there weren't enough commissioners to make a decision. How has this affected you?

**TM:** I think it's a great question and I'm glad you put it out that the FTC is run by women right now. It actually has been really for the past year. Before my colleague Julie Brill left we were four women, and all of our bureau directors - Economics, Competition and Consumer Protection - are all women. So it's really an agency in which we have a lot of leadership by women, which is unique I think, and very interesting. Although I suppose it's less unique now, because we have Commissioner Vestager at DG Comp, we have Renata Hesse now as the acting Attorney General for the Antitrust Division at the DOJ and of course Chairwoman Ramirez running the FTC, so we're starting to see quite a lot of women enforcers in competition, which I think is very exciting.

In terms of what it means to have 3 commissioners: I think the only real difference is that it does sometimes make communication between us a little bit more challenging. I cannot talk to my individual colleagues, even in a one-on-one conversation, about a decision we are going to make without noticing a meeting, because of our Sunshine Laws. So one of the procedural changes I think people who follow the agency have observed is that we are noticing a lot more meetings. Those are very often meetings we're noticing just so we can individually talk to each other about a case and a proceeding. That makes it a bit more clunky sometimes, to try to understand each other's views and make a resolution. But we've been managing it quite well, and I can't even think of a case since Commissioner Brill departed in April where we have actually not been able to reach a consensus. So the FTC continues to be a very consensus-oriented decision making entity.

**AO:** I would like to ask you about the Sunshine laws, which I think is something that will be surprising for our non-American listeners. So this is a law that doesn't allow you to talk to the other commissioners?

**TM:** The way that a Sunshine law works - and it's a very important law, because it's meant to promote transparency in decision-making - is that we're expected to be transparent about when we're meeting to make a decision about cases. The reason, when there are only three of us, that we have to start noticing far more meetings is that when a majority - which would be two - meet, we have to notice it as



an actual meeting. When there's a quorum present that could make a decision for the FTC we have to notice that under Sunshine laws. When there are four or five commissioners we can individually meet with each other and talk about our views. Again, when you get to the point where there is a quorum present for a decision, that would be a meeting as well. But it continues to be the case that the FTC continues to be a very consensus-oriented commission. And I was trying to think of any cases where we haven't been able to reach consensus in the last four months, and I can't think of any off the top of my head. I think that's a really important quality to this institution. That we really do try to come together and understand each other's points of view, and reach compromise in our decision-making. Even though there are just 3 of us it continues to be a very important principle.

**AO: When I talk to other agencies they always say that, to have only 3 commissioners would be very interesting - and they wish they were only three, because having to reach an agreement with five or seven people is more complicated, so some would say that 3 commissioners would be the perfect number.**

**TM:** I would defer to our staff on whether it is a bit more efficient. Certainly there are fewer points of view they have to take into account and for parties coming in, fewer meetings. We don't have five meetings, only three meetings. So maybe it is helpful for people.

**AO: Can we expect any appointments before the election?**

**TM:** I really don't have any information about appointments. It's a decision that'll be made by the White House and by the Senate. So I'll spare you any predictions that would be based on pure speculation.

**AO: Now I would like to jump to one of the topics that is on the table in practically every agency in the world - the Sharing economy. It seems that the EU is taking the lead in regulating this market - perhaps some of them wrongly. Not even at a EU level, but at a national level - some agencies are very active on that. We heard that the FTC is conducting a new study on this topic. Could you tell us more about this study?**

**TM:** Absolutely. Last year we hosted a workshop on the sharing economy, looking especially at the competitive aspects of it and the innovation that's occurring in the space. There are obviously also consumer protection issues associated with it, and our focus has been more on the competitive dynamic. So we're in the process of assessing all the comments that were made in the course of that workshop and pulling them together, and I hope to see something on that soon.

It is a hot topic, and one of the things the FTC has been very proactive about in this space is advocating on behalf of new entrants. Companies that are coming in with new business models, whether they're ride-sharing platforms or in our country Tesla coming with a direct-sales model for automobiles, can be providing some very good competition and some good consumer benefits and innovation.

So one of the things that we have been very active in doing is expressing in comments to either state lawmakers or local regulators, that as they're thinking of how to draw the appropriate consumer protection rules or laws around these businesses that they be careful not to overcorrect. So that they don't take a step to simply ban entry of a new business simply because they may or may not have incumbent interests at stake or may or may not be thinking about the narrowest, pro-innovation way of writing rules and regulation. So the FTC has been quite an active advocate on behalf of competitive entry for really the last 10 to 12 years, so we continue to be very active in that space.

**AO: You mention a couple of things, like wanting to promote entry, avoid any kind of ban restrictions to entry, but also to protect consumers. So there's a question surrounding these markets - normally market entry requires less intervention, consumer protection requires more intervention - to make sure their rights are protected. What is your opinion on the dichotomy between ex-ante and ex-post regulation in all of this?**

**TM:** I think this is a really important area. I think there are advantages to both - in some situations having clear ex-ante rules that are properly narrowly tailored to the harms that they're trying to protect consumers from. And I think ex-post enforcement can be incredibly important as well, you generally need both these things working together.

So when it comes to issues in the Sharing economy of course we strongly support consumer protection enforcement, to protect consumers if there are harms, and narrowly-tailored regulations that are appropriate to the kinds of concerns a local authority might have around public safety for example, or public health. But at the same time we don't want to overly-chill innovation and new businesses from entering simply by prohibiting them altogether. So I think that striking the right balance can be very challenging, and we've been talking a little bit about the sharing economy models - the Airbnb's, the Ubers, the Lyfts of the world, I mentioned Tesla which is really just a new business model, and I think we see this experimentation as having a lot of benefits for consumers, because they get the benefit of the innovation and the competition from a new entrant. Of course there is broader debate about some even trickier policy issues -and by tricky I mean multi-dimensional - and those would be the issues around privacy and data security as well.

**AO: I think no one has found the right balance between these two views, so let's see who is the first to actually tackle all these problems.**

Just returning to the last thing you mentioned regarding privacy issues: One of the questions we wanted to raise, and I think you are a strong advocate for this, is about Big Data and privacy. We saw some countries, like France and Germany, recently release a joint report on Big Data. These countries are concerned that dominant companies such as Facebook or Google are collecting too much data, and that

the way they handle it could raise some privacy issues and anti-competitive effects. So the question would be, even including that Germany recently opened an investigation on Facebook on privacy grounds (and apparently with some links to competition issues, but we'll learn more about that soon). How does the FTC promote a competitive environment including competition and privacy standards?

**TM:** The FTC is a uniquely-situated agency when it comes to how we're trying to undertake our mission to both protect competition and innovation and also protect consumers, because we're on the one hand an antitrust enforcer and on the other hand a broader consumer protection and data protection enforcer as well.

So one of the things that we've been trying to do is to make sure that we're understanding the competitive dimensions of privacy and data, and that tends to be a very fact-specific inquiry, based on the cases or issues that are presented by either a certain transaction or a certain set of facts in a conduct case.

Against the broader privacy and data use policy debate -which is in my view far broader than a simply competition policy debate. It involves notice, choice, consent, use of data - which is really a very complicated set of policy choices. On the one hand, data is the life-line for innovation in a lot of these new digital economy markets and you want to facilitate the use of it. We also see a lot of benefits coming from open data initiatives in the US government for example, data being used to provide precision medicine and better health outcomes. So we see a lot of benefits to the use of data and we don't want to foreclose the development and innovation of all that. But at the same time, as a privacy and data protection enforcer we understand that there can be harms to consumers as well, and the consumers need to have clear notice, choice, transparency and control over their individual data as well. So the FTC has actually brought over 100 data security and privacy cases over the last decade involving, usually, deception or unfair practices around the handling and collection of consumer data. We are very vigorous and forceful on the consumer protection side.

In a way I think it can be a bit trickier to try to combine these things. We tend here at the FTC to think of antitrust enforcement and anti-trust rules as Competition tools, and then think about privacy policy, data security policy and consumer protection in that area by using our consumer protection tools, or advocating for legislative or regulatory changes to provide greater protection to consumers. Obviously sometimes these areas can intersect, and certainly as a competition enforcer if we saw companies competing on security or privacy I would assess that as a form of innovation for quality competition, and you can assess an effect there I think. But I think it can be very difficult to try to use the antitrust enforcement rules -especially in the US - to try to force a privacy policy that is broader than competition. What I mean by that is to say, that making the right choices around appropriately protecting consumer privacy and data is just a broader set of policy considerations than the Antitrust policy considerations.

**AO:** I think it will be interesting to see the way these markets evolve in different parts of the world. I have the impression that Europe is going to evolve in one way, the US is going to evolve a different way, although the decisions taken in one part of the world could affect - we are seeing that recently, with the case of the Austrian Law student, thought this is a different topic - But that also brings me to the last question, which is also a little about international relations but on how they may evolve in some markets.

Something that everybody is talking about now, not so much concerning antitrust but it has its effects on antitrust, is Brexit - The UK Brexit is having impact all over the world. How do you think Brexit will affect the relationship between the two countries in the Atlantic, in terms of cooperation and investigations?

**TM:** I think it's very early to really know what effect it will have, and obviously we're watching that process play out very carefully. I would just emphasize that we have a long history of working with the UK's CMA and its predecessor agencies on policy matters, and increasingly we've been having a lot of cooperation with them on cases as well. Like the FTC, the CMA is now also a dual competition and consumer protection authority, so we do have parallel investigations, we have had staff secondments and other ways of cooperating.

So I would note, to the extent that the CMA enforcement mandate becomes separate from the Commission in a post-Brexit world, I would expect us to continue to have a lot of opportunities to cooperate with them and continue to have a close working relationship. But again, I'm watching as a spectator like the rest of the world, and we'll have to see what's negotiated.

**AO:** And I'm sure the collaboration will continue. That was all from us. On behalf of CPI I would like to thank you once again for this interview. I hope in the future we may take these questions up again and see if there are new answers or comments about them. Thank you for sharing your views with us.

# RECENT DEVELOPMENTS IN ANTITRUST ENFORCEMENT IN SINGAPORE

BY YEO HUI CHUAN & JAIME PANG<sup>1</sup>



## I. INTRODUCTION

The enforcement of competition law in Singapore has grown in scope and complexity in recent years, reflecting the development of the Competition Commission of Singapore (“CCS”) from a nascent competition authority to one whose capabilities match the challenges posed by complex issues faced by other more experienced competition authorities such as extra-territoriality, the scope of object infringements and the single economic entity doctrine. This article provides an update on recent case developments in Singapore, spotlighting interesting aspects of international leniency cases and a novel domestic case. It further illustrates how CCS has expanded its enforcement toolkit by accepting, in appropriate cases, voluntary undertakings which directly address the anti-competitive harm, at the early stages of an investigation.

## II. INTERNATIONAL LENIENCY CASES

In the past five years, CCS has received multiple leniency applications involving international cartels. Infringement decisions were issued for two of the cartels, namely against ball bearings manufacturers and freight forwarders.

<sup>1</sup> Ms. YEO Hui Chuan is Senior Assistant Director (Enforcement), Legal & Enforcement Divisions, Competition Commission of Singapore; and Mr. Jaime PANG is Assistant Director (Legal), Legal & Enforcement Divisions, Competition Commission of Singapore.

### A. Ball Bearings Manufacturers Cartel

CCS's first international cartel infringement decision was issued against four Japanese bearings manufacturers and their Singapore subsidiaries for infringing section 34 of the Competition Act (Cap. 50B) (“the Act”) by engaging in anti-competitive agreements and unlawful exchange of information in respect of the price for the sale of ball and roller bearings sold to aftermarket customers in Singapore. Apart from Singapore, the Japanese Fair Trade Commission (“JFTC”), the European Commission (“EC”) and the Australian Competition and Consumer Commission (“ACCC”) also looked into similar conduct, and CCS cooperated with the JFTC and the ACCC at various stages of the investigation. The information gathered provided CCS with a good understanding of the status and scope of related investigations into similar conduct in other jurisdictions. The parent companies and their respective Singapore subsidiaries were found to be jointly and severally liable for the infringement.

#### 1. Brief Facts

The parties involved in the anti-competitive conduct were:

- (a) JTEKT Corporation and its Singapore subsidiary, Koyo Singapore Bearing (Pte.) Ltd. (collectively referred to as “Koyo”),
  - (b) NSK Ltd. and its Singapore subsidiary, NSK Singapore (Pte.) Ltd. (collectively referred to as “NSK”),
  - (c) NTN Corporation and its Singapore subsidiary, NTN Bearing-Singapore (Pte.) Ltd. (collectively referred to as “NTN”), and
  - (d) Nachi Fujikoshi Corp. and its Singapore subsidiary, Nachi Singapore Private Limited (collectively referred to as “Nachi”).
- Investigations commenced after CCS received an application for immunity from Koyo.

The parent companies discussed and agreed on the overall strategies for the Singapore subsidiary companies to maintain each participant's market share and protect their profits and sales. These discussions took place at meetings in Japan from as early as 1980 until 2011. At the meetings in Singapore which took place from at least 1998 until March 2006, the Singapore subsidiaries discussed the overall strategies decided by their parent companies, and the methods by which to give effect to these strategies. After the meetings in Singapore ended in March 2006, the meetings between the parties continued in Japan.

The actions by the parties included setting an agreed price, making a minimum price agreement for Singapore and agreeing on relevant exchange rates to be applied to derive the minimum prices for Singapore. Further, when the price of steel began to increase, the parties agreed on percentage price increases and exchanged information on percentage price increases to be applied to the after-market customers in Singapore.

CCS found that the conduct of the parties, which included price-fixing and the exchange of strategic information including future pricing intentions, amounted to a single overall infringement with the object of preventing, restricting and distorting competition. CCS also found that the parties had intentionally infringed the section 34 prohibition, but noted in mitigation that the parent companies took immediate steps to implement compliance programs to ensure that their officers and employees ceased anti-competitive activities with their competitors.

## 2. Penalties

When determining the appropriate financial penalties for this case, CCS set the starting point at a relatively higher level as CCS noted that the cartelized product in issue was a homogenous product, and that the parties had substantial share of the product market in Singapore. Further, the infringing conduct amounted to a secretive and sophisticated cartel where the participants engaged in covert conduct, including referring to each participant by codenames. Penalties totaling SGD \$9,306,877, after granting full immunity to Koyo and applying leniency discounts for other leniency applicants, were imposed on the parties.

## 3. Appeal by Nachi

An appeal concerning the quantum of the financial penalties was brought by Nachi, arguing that a lower financial penalty ought to have been imposed as:

(a) In calculating the financial penalty, CCS should have applied the turnover for FY 2013 and

(b) In light of the appellant's unique business model, CCS should have excluded the export sales by their exclusive local distributor.

The Competition Appeal Board found that for the derivation of the appropriate financial penalty to be imposed, CCS should have used the financial figures for the financial year immediately preceding the issuance of the infringement decision. Consequently, as Nachi's relevant turnover for FY 2013 was lower than that for FY 2012 (which were the figures used by CCS as these were available at the time the proposed infringement decision was issued), the revised financial penalty calculated based on the turnover figures from FY 2013 was accordingly reduced.

However, the Competition Appeal Board disagreed with the Nachi's contention that the turnover for the purposes of calculating financial penalties should exclude the turnover from its ball bearings sales through the Singapore distributor where the ball bearings were re-exported. The Competition Appeal Board found that the relationship between Nachi and the third-party Singapore distributor was one of seller and buyer, and not that of principal and agent. The distributor in Singapore bore the inventory risks and associated business costs, and was a victim of the anti-competitive behavior of the cartel. CCS had properly determined that the turnover from export sales should therefore be included in the penalty calculations. The Competition Appeal Board further found that CCS had properly exercised its discretion in determining the starting percentage used in calibrating the financial penalties, given the seriousness of the infringement and the impact of the infringement on the relevant market in Singapore. This ruling by the Competition Appeal Board on the relevant turnover affected by the cartel conduct is significant as Singapore is a trading hub where many goods and services are both imported and subsequently re-exported.

## B. Price Fixing by Freight Forwarders

CCS's second international cartel case involving foreign-registered companies and their Singapore subsidiaries or affiliates was in relation to the provision of freight forwarding services for shipments from Japan to Singapore by eleven freight forwarders and their Singapore subsidiaries or affiliates.<sup>2</sup> During the investigation, CCS spoke to the United States Department of Justice, and the JFTC. The cooperation with these other agencies provided CCS with valuable insights into the aspects of the investigation that CCS should focus its resources on. Upon completion of the investigations, CCS found that the parties had collectively fixed certain fees and surcharges, and had exchanged price and customer information for services related to the air freight forwarding of shipments from Japan to Singapore. The Japanese companies and their related or affiliated Singapore subsidiaries were found to be jointly and severally liable for the infringement.

---

2 The companies are: (i) Deutsche Post A.G., DHL Global Forwarding Japan K.K., DHL Global Forwarding Management (Asia Pacific) Pte. Ltd. and DHL Global Forwarding (Singapore) Pte. Ltd.; (ii) Hankyu Hanshin Express Co., Ltd. and its wholly-owned subsidiary Hankyu Hanshin Express (Singapore) Pte. Ltd.; (iii) "K" Line Logistics, Ltd. and its subsidiary "K" Line Logistics (Singapore) Pte. Ltd.; (iv) Kintetsu World Express Inc. Japan and its wholly-owned subsidiary KWE-Kintetsu World Express (S) Pte. Ltd.; (v) MOL Logistics (Japan) Co., Ltd. and its subsidiary MOL Logistics (Singapore) Pte. Ltd.; (vi) Nippon Express Co., Ltd. and its subsidiary Nippon Express (Singapore) Pte. Ltd.; (vii) Nishi-Nippon Railroad Co., Ltd. and its subsidiary NNR Global Logistics (S) Pte. Ltd.; (viii) Nissin Corporation and its wholly-owned subsidiary Nissin Transport (S) Pte. Ltd.; (ix) Vantec Corporation and Vantec World Transport (S) Pte. Ltd.; (x) Yamato Holdings Co., Ltd.; Yamato Global Logistics Japan Co., Ltd. and Yamato Asia Pte. Ltd.; and (xi) Yusen Logistics Co., Ltd. and its subsidiary Yusen Logistics (Singapore) Pte. Ltd.



## 1. Brief Facts

In 2011, CCS became aware that international freight forwarders may have been involved in anti-competitive activity with an impact in Singapore, and consequently made enquiries into the sector. CCS commenced investigations into anti-competitive agreements and/or concerted practices in respect of fees and surcharges related to the supply of air freight forwarding services for cargo shipped from Japan to Singapore following an application for immunity received from DHL Global Forwarding on March 28, 2012.

Investigations revealed that the Japanese freight forwarders, during meetings held in Japan, agreed on minimum charges for the Japanese Security Surcharge, the Japanese Explosives Examination Fee and the Japanese Fuel Surcharge. These fees and surcharges associated with the air shipment of freight from Japan to Singapore were levied on customers based in Singapore who were shipping cargo from Japan to Singapore.

## 2. Single Economic Entity

Following CCS's investigation and representations from the parties, CCS found that the Japanese companies and their related Singapore entities constituted a single economic entity even in cases where the related Singapore entities were not wholly-owned by the related Japanese companies. When assessing whether the Japanese companies and the related Singapore companies constituted a single economic entity, CCS analyzed the economic, organizational and legal links between the entities, including whether the related company is wholly-owned or effectively controlled by the parent company, whether there was unity on the market or whether the subsidiary complied with the directions of the parent company on critical matters such as sales and marketing activities and investment matters.

Penalties totaling approximately SGD \$7 million, after granting full immunity and taking into account leniency discounts, were imposed on the parties.

## 3. Conclusion

Section 33(1) of the Act provides for the extra-territorial application of the section 34 prohibition notwithstanding that an agreement and/or concerted practice has been entered into outside Singapore or that any party to such agreement is outside Singapore. Section 34 of the Act targets agreements which have as their object or effect the prevention, restriction or distortion of competition within Singapore. The extra-territorial nature of the prohibition means that CCS is able to proceed against foreign companies that are involved in anti-competitive conduct having an impact on customers in Singapore. This was highlighted in the Ball Bearings Manufacturers Case, where the representatives attending the meetings held in Singapore noted that the Act was coming into force, and so ceased the meetings in Singapore. However, CCS found evidence of the meetings in Japan continuing and considered the last known meeting in Japan to be relevant as to when the anti-competitive conduct ceased. As demonstrated in the above cases, the anti-competitive conduct itself need not have occurred in Singapore, and foreign companies and

their related Singapore companies may be held jointly and severally liable for the infringement even where the related company is not wholly-owned by the foreign parent.

# III. DOMESTIC CASE

## A. The Financial Advisers Case

On March 17, 2016, CCS issued an Infringement Decision against ten financial advisers in Singapore. The ten financial advisers were found to have infringed the Act by engaging in an anti-competitive agreement to pressure their competitor, iFAST Financial Pte. Ltd. ("iFAST"), to remove its offer of a 50 percent commission rebate on competing life insurance products on an online platform, Fundsupermart.com (the "Fundsupermart Offer").

This Infringement Decision was CCS's first enforcement action in the financial services sector. The conduct, which concerned the collective pressure to remove a competing offer, was a novel issue for competition enforcement in Singapore. Another first for competition enforcement in Singapore was the application of the principle that parties can be held liable for the entire infringement in respect of their participation in the conduct even if they were not involved from the beginning. In total, CCS imposed financial penalties of SGD \$909,302 on the ten financial advisers.

## 1. Brief Facts

On April 30, 2013, iFAST launched its Fundsupermart Offer. The Fundsupermart Offer was an offer of a 50 percent rebate on commissions received by iFAST to life insurance clients for sales enquiries made through the Fundsupermart website. This new model differed from those of other financial advisers, which generally relied on having its employees or representatives actively solicit sales leads, e.g. through referrals or activities such as roadshows to reach out to the masses. iFAST's competitive advantage stemmed from being able to reach over 50,000 existing clients of Fundsupermart as well as other visitors to the Fundsupermart website, without incurring high costs to solicit life insurance sales leads. iFAST was able to pass on substantial cost savings to clients who purchase life insurance policies via iFAST by giving them rebates using part of the resulting commissions that iFAST would receive from the insurance providers. A few days later, on May 3, 2013, iFAST withdrew its Fundsupermart Offer.

CCS's investigation revealed that on May 2, 2013, a group of eight financial advisers met as part of the Association of Financial Advisers (Singapore). During this meeting, the Fundsupermart Offer was discussed and one of the financial advisers, Financial Alliance Pte. Ltd. ("Financial Alliance"), was appointed as their representative to contact and pressure iFAST into removing the Fundsupermart Offer. From May 2, 2013 to May 3, 2013, Financial Alliance continually pressured iFAST. During this time, two other financial advisers, namely IPP Financial Advisers Pte. Ltd. ("IPP") and Professional Investment Advisory Services Pte Ltd ("PIAS"), who were copied in



the communications from Financial Alliance to iFAST, declared their support of Financial Alliance. Further, IPP and PIAS contacted iFAST directly in furtherance of Financial Alliance's efforts to have iFAST remove the Fundsupermart Offer.

Generally, the financial advisers' use of iFAST's distribution platform collectively contributed significantly to iFAST's revenues in Singapore. Under considerable pressure, iFAST removed the Fundsupermart Offer. iFAST only reintroduced a new offer for life insurance products on Fundsupermart.com in August 2015, more than a year after the withdrawal of the Fundsupermart Offer. This was also shortly after CCS issued a Proposed Infringement Decision to the financial advisers.

## 2. Collective Pressure: Anti-competitive Object and Impact

CCS found that the financial advisers were party to an agreement and/or concerted practice that had the object of pressuring a competitor, iFAST, into removing the Fundsupermart Offer, thus preventing, restricting or distorting competition in the market for the distribution of the relevant individual life insurance products. In the Infringement Decision, CCS drew guidance from European law regarding the finding of an object infringement, particularly that the categories of restrictions by object are not closed, and that the essential legal criterion is whether the agreement reveals in itself a sufficient degree of harm to competition.<sup>3</sup>

CCS observed that iFAST had adopted an innovative distribution model and had sought to pass on cost savings to clients through a significant commission rebate when there was no such practice among the financial advisers to do so. However, the financial advisers' commercial relationship with iFAST in its unit trust business contributed significantly to iFAST's revenues and placed the former in a position to exert pressure on the latter to remove the Fundsupermart offer. Had iFAST's offer remained on the market, the financial advisers might have had to make similar or new offers to respond to the competitive threat of commission rebates from the Fundsupermart Offer.

## 3. Participation by Conduct

The case was also novel in Singapore's competition jurisprudence as two of the financial advisers who were not present at the meeting where the anti-competitive conduct was agreed upon were found to nonetheless be party to the overall infringement. It is well-established in European case law that an undertaking can be found to be a party to an agreement and/or concerted practice where the undertaking knew, or should have known, that it was participating in an overall plan agreed by the other undertakings, and knew, or should have known, the general scope and the essential characteristics of the overall plan.<sup>4</sup> Further, where an undertaking can be established

to be a party to a single agreement and/or concerted practice, it may be found to be responsible also in respect of the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. The two financial advisers were copied into all correspondence between Financial Alliance and iFAST during the implementation of the anti-competitive conduct and thus knew of the overall plan to pressure iFAST to remove the competing offer, including the general scope and essential characteristics of the said plan, and actively contributed to the conduct.

## 4. Conclusion

This case demonstrates that CCS approaches its enforcement of competition law in Singapore in a dynamic and robust manner, being sufficiently nimble to adapt to new factual situations and novel points of law. One financial adviser, IPP, has filed an appeal against the quantum of financial penalties imposed.

# IV. EXPANDING THE ENFORCEMENT TOOLKIT

Besides issuing Infringement Decisions and imposing financial penalties for anti-competitive behavior, CCS has, in recent years and in appropriate cases, accepted commitments and undertakings which would remedy the harm of anti-competitive behavior in the market. This is illustrated in several cases which have generated significant public and media interest, namely F&N/Heineken, Cordlife, APBS and restrictive practices in the supply of lift spare parts.

## A. F&N/Heineken

Following Heineken International B.V.'s ("Heineken") purchase of the entire interest in Asia Pacific Breweries Limited and other assets in Asia Pacific Investment Pte. Ltd. held by Fraser & Neave Limited ("F&N"), CCS commenced an investigation into a contractual clause in the Share Purchase Agreement entered into by Heineken and F&N which restricted Heineken from engaging in the manufacture, distribution and sales of soft drinks, for a period of two years (the "Soft Drinks Non-Compete Clause"). The Soft Drinks Non-Compete Clause was due to expire in November 2014. In November 2013, CCS announced that it had accepted a voluntary signed undertaking from F&N not to enforce the clause with respect to Singapore and closed the investigation into F&N. This undertaking removed the contractual impediment to Heineken to enter the local soft drinks market in a timely manner, restoring the market to its natural competitive state.

## B. Cordlife

In June 2014, CCS commenced an investigation into the exclusive agreements Cordlife Group Limited ("Cordlife") had with baby fair organizers and hospitals. The competition concern identified by CCS was that the exclusive agreements potentially infringed the prohibition against an abuse of a dominant position by limiting competition from other providers of cord blood bank services in Singapore.

3 Case C-67/13 Groupement des cartes bancaires v. European Commission [2014] 5 CMLR 2, at [57].

4 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland A/S and Others v. Commission [2004] ECR I-0123 at [332] to [333].

In response to CCS's concerns, Cordlife provided CCS with voluntary commitments to remove the existing exclusive arrangements that were the subject of the investigation, and to ensure that it does not enter into such exclusive arrangements with any baby fairs or private maternity hospitals in Singapore going forward. Cordlife was also required to provide CCS with documentary proof that the affected baby fair organizers and hospitals had been informed of the change in Cordlife's business practices. Following these commitments, CCS closed its investigation into Cordlife.

### C. APBS

Acting on complaints received, CCS investigated Asia Pacific Breweries (Singapore) Pte. Ltd. ("APBS") in relation to its practice of supplying draught beer to retail outlets solely on an exclusive basis ("Outlet-Exclusivity Practice"). In the course of its investigation, CCS obtained information on the beer market in Singapore from retailers and beer suppliers, and also commissioned a market survey to gather information on market practices. The Outlet-Exclusivity Practice had prevented retail outlets from selling draught beers from competing suppliers and restricted the choices of draught beers available to retailers and consumers.

In 2015, following the competition concerns raised by CCS, APBS provided CCS with voluntary commitments to cease its Outlet-Exclusivity Practice. APBS undertook in its commitments that it would not impose outlet-exclusivity conditions in its supply of draught beer contracts to retailers. These commitments were extensively consulted upon with market participants and positive feedback was received regarding the removal of the Outlet-Exclusivity Practice. As the voluntary commitment adequately addressed CCS's competition concerns, the investigation ceased.

### D. Restrictive Industry Practices in the Supply of Lift Spare Parts

CCS commenced an investigation into restrictive industry practices in the supply of lift spare parts for lifts installed in public housing estates in Singapore after receiving a complaint.

In Singapore, town councils are required to carry out regular lift maintenance for lifts installed in public housing estates. There are typically multiple brands of lifts installed in each public housing estate, and town councils could either engage the original lift installer for maintenance services, or call for a tender to invite companies, including third-party lift maintenance contractors, to provide lift maintenance services for all the lift brands of lifts within a particular public housing estate.

CCS understood that there were potential cost savings to engaging a third-party lift maintenance contractor as compared to engaging the original lift installer for each lift brand. Lift maintenance contractor may require certain brand-specific lift spare parts in the process of maintenance. In the event the third-party lift maintenance

contractor is unable to obtain certain brand specific lift parts, the town councils are likely to engage the third-party lift maintenance contractor even if the contractor is able to provide lift maintenance services at lower cost and better service quality.

In light of the above, CCS was of the view that refusal to supply proprietary but essential lift spare parts to third-party lift maintenance companies by any lift company or distributor may prevent other lift maintenance companies from effectively competing for contracts to maintain and service lifts of that particular brand in Singapore, and may be an abuse of a dominant position infringing section 47 of the Act.

Following investigations into several companies for refusal to supply lift spare parts, E M Services Pte. Ltd. came forward to CCS to provide commitments to supply BLT lift spare parts in Singapore to third-party lift maintenance contractors in Singapore. After feedback from a public consultation, CCS considered the commitments fully addressed the competition concerns raised by CCS.

While these undertakings and commitments remedied the harm within the affected market in a timely manner without the need for a finding of infringement, CCS has continued to monitor practices in each market, and reserved the right to investigate any breach of the undertaking or commitment, as well as any other anti-competitive practices by the relevant parties.

## V. CONCLUSION

Developments in CCS's enforcement actions, illustrated in the cases highlighted above, are in line with recent trends observed, touching on novel issues created by cross-border trades and in markets involving technological advances.

CCS's recent enforcement actions dovetail with CCS's new mission: Making markets work well to create opportunities and choices for businesses and consumers in Singapore, and new vision: A vibrant economy with well-functioning markets and innovative businesses, which was unveiled at CCS's 10th anniversary dinner on July 23, 2015. It was noted by CCS's Chairman, Mr. Aubeck Kam, that market structures and business conduct are becoming increasingly complex with technological changes within Singapore, and beyond Singapore. CCS is also seeing more cross-border business conduct, some of which may have anti-competitive impact on Singapore markets such as international cartels.

The analyses and approach taken in the cases highlighted above encapsulate the developments in competition enforcement in Singapore. More importantly, it also provides a glimpse of and sets the tone for CCS's enforcement work in future cases, allowing for speedier resolution to restore the market to a competitive state, to realize CCS's vision of a vibrant economy with well-functioning markets and innovative businesses.

# MARKET STRUCTURE STILL MATTERS: THE KFTC BLOCKS A MERGER BETWEEN TOP FIRMS IN BROADCASTING AND COMMUNICATIONS

BY YOUNGSOOG NA<sup>1</sup>



## I. INTRODUCTION

On July 18, 2016, the Korea Fair Trade Commission (the “KFTC”) decided to totally ban the transaction involving SK Telecom Co., Ltd. (“SKT”)’s acquisition of shares of CJ HelloVision Co., Ltd. (“CJH”) (the “Acquisition”), and the merger of SK Broadband Co., Ltd. (“SKB”) and CJH (the “Merger”) (both the Acquisition and the Merger hereinafter referred to as the “Transaction”). The Transaction attracted public attention as it concerns a merger between the leader in the mobile communications industry and the leader in the cable TV industry, and creates a super-giant enterprise encompassing both communications and broadcasting for the first time in Korea’s history. As such, it was reported that the KFTC had undergone a lengthy review of the Transaction for more than a half-year, closely examining the opinions of relevant administrative branches and interested parties, various economic analysis, foreign cases, etc.<sup>2</sup>

<sup>1</sup> Chief Expert Advisor, Lee & Ko. This article is the author’s personal opinion, and does not represent the views or opinions of Lee & Ko.

<sup>2</sup> SK Telecom-CJ HelloVision- M&A Finally Failed: The KFTC is Reversing

The parties who pursued this Transaction attempted to justify the Transaction by arguing that for the pay broadcasting industry the Transaction would bring economies of scale and readjust the structure of the industry through a firm in an already waning cable TV industry being absorbed into a growing Internet Protocol Television (“IPTV”) firm. They also argued that the Transaction would build a foundation of innovation for the provision of more advanced media services by generating an enterprise with a comprehensive business scope covering broadcasting and communications.<sup>3</sup>

In the midst of the turbulence created by contradictory opinions regarding the possibility of anticompetitive effects in various markets including pay broadcasting and communications,<sup>4</sup> many predicted that even if the KFTC acknowledges that the Transaction would cause certain anticompetitive effects, it would resolve the concern by imposing behavioral remedies<sup>5</sup> or by ordering the sale of partial assets<sup>6</sup> while allowing the Transaction itself. It was because since 1981 when the KFTC’s enforcement of the Monopoly Regulation and Fair Trade Act (the “MRFTA”) had commenced, there had not been a single case where the KFTC completely prohibited a merger in the broadcasting or communications industry. Even if we count cases arising in all industries, a total ban of a merger had been extremely rare.<sup>7</sup>

However, the KFTC took an exceptionally strong stance in this case by prohibiting the entire Transaction.<sup>8</sup> The KFTC took a

the Trends, CHOSUNBIZ.COM, July 18, 2016, at 3.

<sup>3</sup> See, SKT CJ HelloVision Acquisition Expected to Realize Operational Profit of Two Trillion Won in Two to Three Years, CHOSUNBIZ.COM, Feb. 2, 2016, at 1.

<sup>4</sup> See, SKT-CJ HelloVision Acquisition is a Method to Overcome the Crisis in Cable TV Industry vs. Side-effects, CHOSUNBIZ.COM, Dec. 29, 2015.

<sup>5</sup> A “behavioral measure” refers to the corrective measure restraining the merging parties’ business condition, method, scope, internal managerial activities, etc. in a certain manner for a limited period. The Imposition Standard of Corrective Measures for Mergers, KFTC Notification, No. 2011-3, June 22, 2011, II. 10.

<sup>6</sup> A “sale of asset measure” refers to the corrective measure ordering merging parties’ assets to be separated from the parties and be sold to an independent third party. Id., II. 5.

<sup>7</sup> The following article reports that the total number of cases with prohibition measures levied is only eight. So Far Only Eight Cases were Not Allowed, MK NEWS, July 5, 2016.

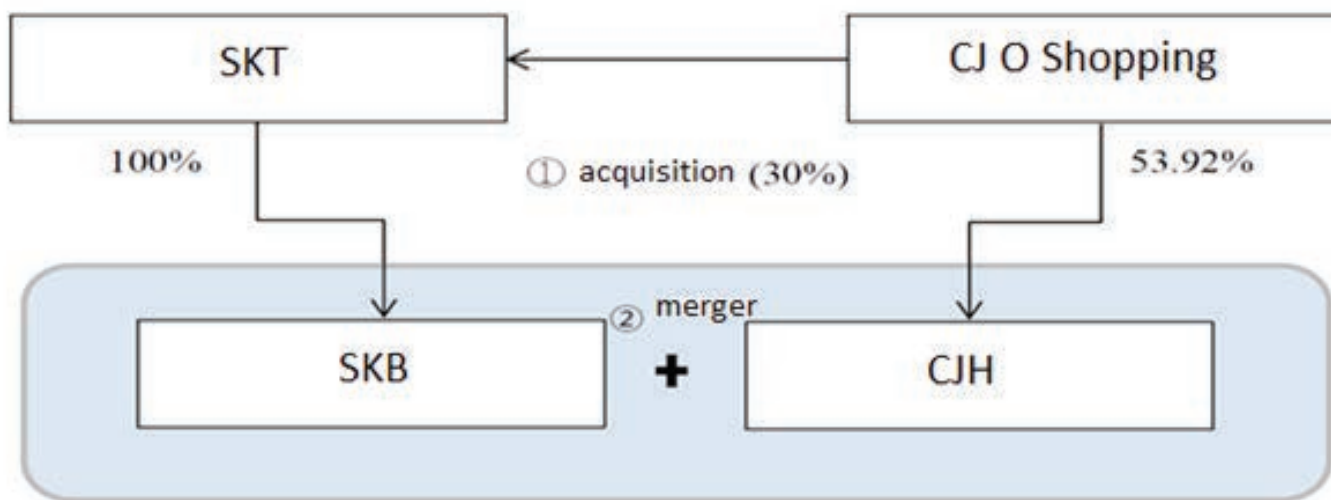
<sup>8</sup> KFTC Press Release, The KFTC, Blocking the M&A of SK Telecom and CJ HelloVision: Intercepting the Fountainhead of Anticompetitiveness in Pay Broadcasting and Mobile Communications Markets, July 18, 2016. A “pro-

fundamentally preventive decision, considering that the Transaction would have led to serious monopolistic market structures in the pay broadcasting and communications markets, that the post-merger firm would have integrated business capacity across the broadcasting and communications sectors, and that the Transaction involves a mixed dimension such as horizontal as well as vertical integration. This article addresses the KFTC's analysis on the anticompetitive effects of the Transaction in the main relevant markets, and the justifications of the remedy imposed.

## II. OVERVIEW OF PROPOSED TRANSACTION

On November 2, 2015, SKT entered into a share purchase agreement with CJ O Shopping Co., Ltd. ("CJ O Shopping") for SKT's acquisition of approximately 30 percent<sup>9</sup> of the issued shares of CJH.<sup>10</sup> On the same day, CJH entered into a merger agreement with SKB (CJH being the surviving entity).<sup>11</sup> The parties to the Transaction filed a merger notification to the KFTC on December 1, 2015.<sup>12</sup> The structure of the transaction is set forth in the image below.

Structure of the Proposed Transaction



Through the Transaction, SKT would acquire sole control over CJH (as the survivor of the merger with SKB).<sup>13</sup> According to the current status of the parties to the Transaction, SKT is in the business of mobile communications retail, mobile communications wholesale supply and high-speed internet resale, among other things; SKB is in the business of landline phone service, high-speed internet service and IPTV, among other things; and CJH is in the business of cable TV, high-speed internet service, Voice over Internet Protocol and mobile communications retail business, among other things.<sup>14</sup>

hibition measure" is the strongest measure within structural measures. A "structural measure" refers to the measure changing the structure of assets or ownership of merging parties, which includes a prohibition measure, an asset divestiture measure, and an intellectual property measure. KFTC Notification, supra note 5, ll. 3.

9 As of the date of the agreement, CJ O Shopping owns 53.92 percent of the shares of CJH. The agreement is regarding the purchase of CJH shares by SKT from CJ O Shopping. KFTC Decision, No. 2016-213, 2016KiGyeol1393, July 18, 2016 (hereinafter, the "SK Merger Decision"), p. 2, fn 1.

10 Id. at. 2.

11 SKB is the wholly-owned subsidiary of SKT. Id. at 5.

12 See, id. at 2-3 for more details regarding the Transaction.

13 Regarding the formation of control, pursuant to the Acquisition SKT would become the largest shareholder of CJH by holding 38.61 percent of the shares of CJH which is 14.69 percent more than the second largest shareholder CJ O Shopping, and through the concurrent Merger SKT would finally hold a total of 78.33 percent of CJH shares. SKT also admitted in various public documents that SKT would acquire direct managerial control over CJH through the Transaction. Id. at 7-8.

14 Id. at 3-4.



Accordingly, in the Transaction, horizontal mergers occur in various markets including the pay broadcasting and mobile communications markets, a vertical merger occurs in the mobile communications wholesale market, and conglomerate mergers occur in other various markets at the same time, as set forth in the table below.

**Table 1** Types of Mergers in the Transaction<sup>15161718</sup>

| Relevant Market  | Reporting Company |     |           | Counterparty (CJH) | Merger Type  |
|--|-------------------|-----|-----------|--------------------|--------------|
|  | SKT               | SKB | SK Telink |                    |              |
| Twenty-three broadcast regions in the pay broadcasting market  | X                 | 0   | X         | 0                  | Horizontal   |
| Broadcast advertising market   | X                 | 0   | X         | 0                  | Horizontal   |
| Broadcast channel transmission rights market   | X                 | 0   | X         | 0                  | Horizontal   |
| Communications retail market   | 0 (MNO)           | X   | 0 (MVNO)  | 0 (MVNO)           | Horizontal   |
| High-speed internet market   | 0                 | 0   | X         | 0                  | Horizontal   |
| Landline telephone market  | X                 | 0   | 0         | 0                  | Horizontal   |
| International telephone market   | X                 | 0   | 0         | 0                  | Horizontal   |
| Mobile communications wholesale market   | MNO               | X   | MVNO      | MVNO               | Vertical     |
| Pay broadcasting, mobile communications retail, high-speed internet, landline telephone market, etc. |                   |     |           |                    | Conglomerate |

### III. JUDGMENT ON ANTICOMPETITIVENESS IN THE MAIN RELEVANT MARKETS AND ON CORRECTIVE MEASURES UNDER THE MRFTA

#### A. Anticompetitive Effects of Horizontal Merger

##### 1. Pay Broadcasting Market

“Pay broadcasting” is a broadcasting service that provides a variety of channels for a fee according to an agreement with subscribers, which is currently provided by cable TV operators (also known as System Operators, or “SO”s), satellite broadcasters and IPTV enterprises.

On a national market level, the status of competition is shown in the table below. The pay broadcasting market consists of the following: 51.4 percent by cable TV (CJH is the top cable TV enterprise at 14.7 percent), 37.5 percent by IPTV (SKB is the second largest IPTV service provider at 11.3 percent) and 11.1 percent by satellite broadcasting.

<sup>15</sup> Id. at 32, Table 21.

<sup>16</sup> An affiliate of SKT.

<sup>17</sup> A “Mobile Network Operator.” For the meaning of the term, refer to p. 8 and infra note 33.

<sup>18</sup> A “Mobile Virtual Network Operator.” For the meaning of the term, refer to p. 8 and infra note 34.



**Table 2** Pay Broadcasting Market Status of Competition<sup>19</sup>  
(As of the end of June 2015; Unit: in thousands, percent)

| Category               | Enterprise | Subscriptions | Market Share |
|------------------------|------------|---------------|--------------|
| Cable TV               | CJH        | 4,160         | 14.7         |
|                        | Tbroad     | 3,272         | 11.5         |
|                        | D'LIVE     | 2,377         | 8.4          |
|                        | CMB        | 1,498         | 5.3          |
|                        | HCN        | 1,347         | 4.8          |
|                        | OTHER SOs  | 1,903         | 6.7          |
|                        | Subtotal   | 14,557        | 51.4         |
| IPTV                   | KT         | 5,061         | 17.8         |
|                        | SKB        | 3,191         | 11.3         |
|                        | LG U+      | 2,389         | 8.4          |
|                        | Subtotal   | 10,641        | 37.5         |
| Satellite Broadcasting | KT SkyLife | 3,138         | 11.1         |
| Grand Total            |            | 28,336        | 100.0        |

#### a) Defining the Geographic Market: Chain of Substitutability Needs Positive Proof

One of the core issues of the determination of anticompetitive effects in the pay broadcasting market was the scope of the geographic market. For cable TV, where CJH has conducted business, the Ministry of Science, ICT and Future Planning divided the nation into 78 different broadcast regions and currently manages these regions through a permit system (among these 78 regions, CJH conducts business in 23). As such, the supply substitutability is limited to a certain broadcast region, and likewise demand substitutability can only occur within a certain broadcast region. However, since the IPTV business (where SKB was operating) as well as satellite broadcasting are on a nationwide basis, whether the relevant market should be defined according to the whole domestic market, or the individual markets of each broadcast region, was fiercely debated.

The parties of the Transaction argued that the relevant market should be defined as the entire domestic market according to a theory of “chain of substitutability.” They argued that even in the absence of direct competition among SOs in different broadcast regions, if each SO is in competition with national enterprises including IPTV enterprises that set common prices nationwide, then through indirect demand substitutability or chains of substitutability the scope of competition will enlarge to include competition among SOs across regions. Therefore, the geographic market should be defined as the national market.<sup>20</sup>

However, the KFTC stated, “It is difficult for us to hold that chains of substitutability are sufficiently operating or established among broadcast regions as a result of common pricing constraints, considering that the actual competitive pressure and conditions among competitors are different for each broadcast region, CJH’s price levels and product composition, and the actual sale price among other things are different for each broadcast region.”<sup>21</sup>

The KFTC concluded that it was appropriate for the geographic market to be defined for this Transaction according to each broadcast region, viewing that SOs as cable TV enterprises conduct business in each broadcast region, and that SOs, satellite broadcasters and IPTV enterprises each compete for consumers in each broadcast region.<sup>22</sup>

<sup>19</sup> SK Merger Decision, p. 23, Table 12.

<sup>20</sup> For example, if an SO in a certain regional market decreases prices, then an IPTV enterprise can lower prices in the same market in response, in which case such IPTV enterprise, due to common pricing constraints must lower prices on a national level, which would pressure the SOs in competition with the IPTV enterprise to decrease prices in other regions.

<sup>21</sup> SK Merger Decision, p. 18.

<sup>22</sup> KFTC Press Release, *supra* note 8, at 4.

## b) Utilizing Various Economic Analysis Methods

The KFTC viewed that the probability of the occurrence of a cooperative effect from the Transaction was not high in the pay broadcasting market,<sup>23</sup> and therefore focused on the unilateral effect in its determination of the anticompetitive effects of the Transaction. The KFTC used various economic analyses to determine the unilateral effects on competition.

### *Correlation between Market Share and Average Revenue Per User ("ARPU")*

When the geographic market is defined according to each broadcast region, the market concentration resulting from the Transaction becomes severe. Pursuant to the Transaction, CJH, who was the top enterprise in the pay broadcasting market in 17 broadcast regions, would have an increased market share gap with the second largest enterprise after the Transaction. Also, in four broadcast regions where CJH was the second largest enterprise, CJH would be the new top enterprise after the Transaction. Therefore, CJH would become the top enterprise in 21 out of 23 broadcast regions in which it conducts business.

To determine the possibility of price increases due to the increase in market share from the Transaction, an analysis on the correlation between CJH's market share and the ARPU was conducted and showed a positive correlation.<sup>24</sup>

### *Diversification Ratio*

The higher the demand substitutability between products of merging parties, then the higher the possibility of anticompetitive effects resulting therefrom. The analysis of the "diversion ratio" in this case resulted in the following: if CJH's cable TV prices increase by 10 percent, the diversion ratio of SKB's IPTV (in the 39.1 ~ 39.4 percent range) would be higher than that of its competitors (KT in 34.0 ~ 36.5 percent range; LG U+ in the 20.7 ~ 22.4 percent range).<sup>25</sup>

The KFTC viewed the result as relevant to SKT's dominance over the mobile communications retail service market. There is a tendency for consumers who change from cable TV to IPTV to choose

the same brand as their mobile communications service provider. Among mobile communications retail enterprises, SKT has the largest market share.<sup>26</sup> Ultimately, it can be seen that SKB's IPTV, with the added benefit of SKT's wide base of subscribers, is the closest substitute to CJH's cable TV.<sup>27</sup>

This implies that current dominance over the mobile communications retail market would affect the status in the pay broadcasting market after the Transaction. In other words, although broadcasting and communications are different markets, there exists a dynamic interplay between the two markets which is relevant to consumer choices.

### *Upward Pricing Pressure ("UPP")*

Upward pricing pressure analysis<sup>28</sup> is a method that analyzes the possibility of an increase in price after a merger in markets with differentiated products. UPP analyzes post-merger incentive to increase prices as the prices change from being set by two separate firms for the maximization of their respective profits to being set by one merged firm for the maximization of common profit. The KFTC noted that the UPP analysis figure for this case was positive, which indicated there was a possibility of a price increase after the Transaction in the cable TV market.<sup>29</sup>

Meanwhile, the parties to the Transaction argued that the figure from the Gross Upward Pricing Pressure Index ("GUPPI")<sup>30</sup> analysis (which excludes the possibility of price decreases due to efficiencies and only analyzes the causes of price increases) was under five percent in most broadcast regions and under ten percent in all broadcast regions, while accounting for ten percent in efficiencies results in a negative UPP level. As such, the parties argued that there was no possibility for an increase in prices as a result of the Transaction. However, the KFTC criticized that the merging parties' economic analysis ignored the fact that CJH was a producer of various products including analog cable TV as well as digital cable TV, and as such, their UPP figure and GUPPI figure were severely underestimated.<sup>31</sup>

---

26 See, p.8.

27 SK Merger Decision, p. 40, fn 71.

28 For more details of UPP, see, Joseph Farrell and Carl Shapiro, Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition, THE B.E. JOURNAL OF THEORETICAL ECONOMICS, Vol. 10, Iss. 1 (Policies\_perspectives), Article 9, 2010.

29 Appendix 1 of the SK Merger Decision contains the UPP analysis.

30 The KFTC states that "What is important in interpreting GUPPI is not whether it is positive or negative but its size. There has not been a consensus yet as to the size of GUPPI that can be a threshold for the safety zone. However, many economists acknowledge anticompetitiveness if it is higher than 10 percent." SK Merger Decision, p. 43, fn 79.

31 Id. at 44, fn 82.

---

23 This is because pay broadcasting fees were subject to the regulations of the Ministry of Science, ICT and Future Planning, national enterprises like satellite broadcasting and IPTV enterprises compete with other SOs and SKB in markets other than the 23 broadcast regions where the Transaction takes place, and most pay broadcasting enterprises also fiercely compete in other areas such as mobile communications services and high-speed internet. SK Merger Decision, p. 43.

24 Id. at 37-8, fn 65. Also, limiting the scope of analysis to regions where CJH has the largest market share, CJH's ARPU and the market share gap with the second largest enterprise showed a significant correlation. Id. at 38, fn 66.

25 Id. at 39-40.

### c) Assessment of the Consolidation of Alternative Platforms: Creating Unbeatable Production Capacity

Pursuant to the Transaction, the parties would become the only domestic enterprise with both the cable TV and IPTV platforms. In addition to SK's capacities in the mobile communications, high-speed internet and IPTV sectors, SK would obtain a new capacity to provide cable TV services. The KFTC noted that, considering the current trend of increasing subscriptions with arrangements bundling various services from mobile communications and broadcasting, there are concerns of the strengthening of the merged-entity's dominance in the pay broadcasting market.<sup>32</sup>

### d) Overall Judgment

As seen above, the KFTC concluded that the Transaction raises anticompetitive concerns in the pay broadcasting market by considering various factors, including: CJH, the top cable TV enterprise will merge with SKB, the fastest growing IPTV enterprise; for subscribers to CJH, SKB has the highest diversion ratio among IPTV enterprises; CJH will become the market leader in 21 broadcast regions; and the UPP figure is positive.

## 2. Mobile Communications Retail Market

The mobile communications retail market is where mobile communications services are sold to the end-user. The primary enterprises in this market possess certain frequencies through which they do business as mobile network operators ("MNO"s).<sup>33</sup> However, since September 2010, it became possible to enter this market without being an MNO. Namely, an enterprise that is provided a wholesale mobile network and which engages in the reselling of the same to the end-consumer became known as a mobile virtual network operator ("MVNO").<sup>34</sup> MVNOs are also called a "frugal phone enterprise."

In this market, since the appearance of MVNOs the competitive landscape with the three oligopolistic MNOs (SK, KT, and LG U+) gradually shifted, and as of the end of 2015, subscribers to frugal phones constituted 10.3 percent of the total mobile communications retail market.<sup>35</sup> After the introduction of the frugal phones, the fees for mobile communications services continued to decline while MVNOs applied strong competitive pressure against SKT, KT, LG U+ and

other MNOs in the mobile communications retail market.<sup>36</sup>

### a) The Extinction of a Maverick and Unilateral Effects

If viewed in terms of subscriber count in the mobile communications retail market, SKT, together with its affiliate SK Telink, has a market share of 46.2 percent and is the top enterprise in the market, while CJH's market share is 1.5 percent as of 2015.<sup>37</sup> Therefore, the increase of SK's market share pursuant to the Transaction would only amount to 1.5 percent point. Furthermore, this market hosts other powerful competitors such as KT and LG U+ who each holds 25.7 percent and 19.3 percent market share respectively, and exert competitive pressure in the market.<sup>38</sup>

However, the KFTC focused on CJH's unique role as a maverick in this market. Citing the loss of such role as a main reason, the KFTC determined that substantial concerns of anticompetitive effects on the mobile communications retail market would arise from the Transaction.<sup>39</sup> A "maverick" is the enterprise that plays the role of disrupting the existing market order through the use of aggressive competitive strategies that leads to price decreases and innovation. CJH, as the top MVNO enterprise, has played the role of a maverick through progressive marketing strategies.<sup>40</sup> For example, CJH was the first to introduce LTE service for MVNOs, and it also introduced half-price, no-commitment LTE USIM plans; Korea's cheapest LTE plan; and other innovative rate plans. CJH was also the first to sell the iPhone5 with MVNO, expanding the MVNO market. As such, CJH fulfilled the leading role of boosting competition.<sup>41</sup> This can be confirmed by looking at the LTE service subscriber ratios of MVNOs: as of September 2015, the average LTE service subscriber ratio of MVNO enterprises was 12.9 percent whereas CJH's LTE subscriber ratio was at 36 percent (the second largest enterprise SK Telink's LTE ratio was at 4 percent).<sup>42</sup>

Furthermore, CJH was unique in that it was the only major MVNO that was not an affiliate of an MNO.<sup>43</sup> The Ministry of Science, ICT and Future Planning regulates the sum of market shares of MVNOs that are affiliates of the main MNOs not to exceed 50 percent

32 Id. at 41.

33 In order to conduct a mobile communications network business, certain requirements must be met and approvals must be obtained from the Ministry of Science, ICT and Future Planning. Refer to the Telecommunications Business Act, Article 6.

34 An enterprise without a mobile communications network may still do business in the mobile communications retail market by fulfilling certain conditions and registering with the Ministry of Science, ICT and Future Planning. Refer to the Telecommunications Business Act, Article 38.

35 SK Merger Decision, p. 27.

36 Id. at 47.

37 Id. at 45, Table 29. Here SKT is an MNO, SK Telink is an MVNO, and CJH is an MVNO. Id.

38 Id.

39 See, SK Merger Decision, pp. 47-52. The KFTC referred to the fact that T-Mobile US, Inc. ("T-Mobile")'s role as a maverick was considered in the previous cases that prohibited the merger between AT&T Inc. and T-Mobile in 2011, and the merger between T-Mobile and Sprint Corporation in 2014. KFTC Press Release, supra note 8, p. 10.

40 SK Merger Decision, pp. 48-9.

41 KFTC Press Release, supra note 8, p. 10.

42 Id.

43 SK Merger Decision, p. 47.

of the total frugal phone market. However, after the Transaction, CJH would become an affiliate of an MNO which would increase the total market share of MVNOs that are affiliates of MNOs to 40.15 percent,<sup>44</sup> which leaves only 9.85 percent from the allowed maximum of 50 percent. This will work as a constraining factor for the business activities of competitors.<sup>45</sup>

### **b) The Extinction of a Maverick and Cooperative Effects**

Pursuant to the Transaction, CJH would become an affiliate of one of the three MNOs. As such, it is highly possible that the MVNO affiliates of the three MNOs will not fiercely compete against each other, but rather attempt to keep or reduce the current status of the frugal phone market.<sup>46</sup> Also, aside from the three MNOs and their MVNO affiliates, most mobile communications enterprises are small and medium-sized enterprises with low market shares. Under such a market structure, it is difficult to expect that the small and medium-sized enterprises would effectively prevent cooperative acts of the main players. Therefore, the KFTC held that there was a high possibility for collusion among competitors in such market if it allowed the Transaction.<sup>47</sup>

### **B. Anticompetitive Effects of Vertical Merger**

The mobile communications wholesale market is a market where MNOs provide frequencies and mobile network equipment wholesale to MVNOs that is necessary to conduct a mobile communications business.<sup>48</sup> The Transaction also includes a vertical merger between a supplier (SKT) and a customer (CJH) in the mobile communications wholesale market.

A view of the mobile communications wholesale market shows that the upstream market consists of SKT, KT and LG U+ with market shares of 45.6 percent, 46.7 percent and 7.7 percent respectively.<sup>49</sup> Meanwhile, the downstream frugal phone market consists of CJH, SK Telink and 26 other small enterprises. CJH and SK Telink are the top two enterprises with a combined market share of 28.45 percent (CJH at 14.24 percent and SK Telink at 14.21 percent).<sup>50</sup>

#### ***Foreclosure Effect***

---

44 Before the Transaction, as of the end of December 2015, in the frugal phone market, the combined market share of the MVNOs, affiliated to the 3 MNOs, was 25.91 percent. *Id.* at 49.

45 *Id.*

46 *Id.* at 50-1.

47 *Id.* at 51.

48 *Id.* at 13.

49 *Id.* at 59. This does not include the MNO's self-supply and is calculated based on the number of subscribers using the mobile communications network supplied wholesale to MVNOs. *Id.*

50 *Id.* at 59-60, Table 36.

First, regarding the foreclosing effects on purchasing lines, SKT, as a subject to the Telecommunications Business Act, has a duty to supply telecommunications wholesale to any frugal phone enterprise that requests such supply according to the price stipulated in the administrative regulations. As such, the KFTC viewed that the Transaction had almost no possibility for foreclosing effects on purchasing lines.<sup>51</sup>

Meanwhile, regarding foreclosing effects on selling lines, pursuant to the Transaction the parties to the Transaction will secure 28.45 percent of frugal phone users. As such, the KFTC viewed that a foreclosing effect on the SKT's competitors' selling lines for mobile communications wholesale was possible. In particular, the KFTC paid attention to the fact that CJH had already acquired the high-end customers in the frugal phone market, where if calculated by revenue rather than the number of subscribers, there will be a foreclosing effect on 53.3 percent (combining both CJH and SK Telink) of the mobile communications wholesale market.<sup>52</sup>

### **C. Anticompetitive Effects of Conglomerate Merger**

The KFTC did not enter into an additional analysis of the anticompetitive effects of the conglomerate merger in the Transaction because it was unclear whether the launch of a new bundled product in and of itself would have an actual anticompetitive effect on the relevant market. Although the launch of a new bundled product could leverage the existing power over one market to another market, since bundled products often come at discounted prices which have some effect of increasing consumer welfare and competition, the KFTC viewed that the resulting anticompetitive effect is unclear.<sup>53</sup>

However, the KFTC considered the merged firm's expansion of business capacity into various sectors (which would secure the competitive advantage over competitors through the production of bundled products) as one of the factors affirming the anticompetitive effects resulting from the horizontal merger in the pay broadcasting market, as seen above.<sup>54</sup>

### **D. Whether Exceptions Apply**

The parties to the Transaction argued that the Transaction would contribute to consumer welfare and the national economy by the provision of bundled products, and the development of cable TV to digital. However, the KFTC stated that it would be difficult to confirm such would be the case since the parties failed to specifically prove that the occurrence of such efficiency effects would be imminent, manifest and merger-specific.<sup>55</sup>

---

51 *Id.* at 60, fn 111.

52 KFTC Press Release, supranote 8, p. 11

53 SK Merger Decision, p. 32, fn 54.

54 See, p. 7, (c).

55 SK Merger Decision, p. 68.



Also, the KFTC noted that the financial structure of the parties to the Transaction did not indicate that any party was insolvent or would soon be insolvent, and thus the failing firm defense which would otherwise allow the Transaction does not apply.<sup>56</sup>

### **E. Corrective Measures**

In preceding merger cases in the broadcasting or communications sector, the KFTC had been using the remedy of “conditional approvals” with behavioral constraints rather than blocking the merger itself. In pay broadcasting sectors, even when the post-merger market share would have been well above 90 percent, the KFTC imposed only behavioral remedies such as the prohibition of price increase or of reduction in the number of TV channels, or strengthening notification obligations to consumers.<sup>57</sup> In the communications sectors, for example, the SKT’s acquisition of Hanaro Telecom, Inc. was allowed despite the KFTC’s acknowledgment of the anticompetitive effects arising from bundled products, and from the comprehensive business capacity of the combined firm. In that case, only a temporary ban of certain behaviors involving the sale of bundled products was added for the approval of the deal.<sup>58</sup> The KFTC kept this stance of favoring behavioral remedies in the merger of KT Corporation and KT Freetel Co., Ltd. In that case, the KFTC viewed that the possibility of predatory pricing of bundled products can be controlled by the ex-post measures of the KFTC itself or the price regulation of the Korea Communications Commission.<sup>59</sup> In addition, in vertical merger cases which occurred in sectors outside of broadcasting or communications, even when the parties possessed strong dominance in either upstream or downstream market, the KFTC only imposed behavioral remedies.<sup>60</sup>

Furthermore, even among the structural remedies, the KFTC could have chosen a more moderate route such as ordering the sale of partial assets. Instead, the KFTC was firm in carrying out the strictest measure, i.e. totally blocking the deal. The SKT’s purchasing of CJH’s stocks and the merger of CJH and SKB were prohibited from

being implemented.<sup>61</sup>

Through its press release, the KFTC expressed its view of this Transaction that, contrary to the preceding merger cases in broadcasting or communications sector, the Transaction brings a mixture of horizontal and vertical integration, creating anticompetitive concerns that are too complicated to be resolved simply by requiring behavioral measures or partial divestitures.<sup>62</sup> We can think of additional factors that can differentiate this merger from the preceding cases. The preceding mergers occurred either between cable TV service providers within the pay broadcasting market, or between the firms within the communications market. On the contrary, the Transaction combines the top firm in the communications market with another top firm in the pay broadcasting market. Furthermore, pursuant to the Transaction, even within the pay broadcasting market, two different kinds of platforms (cable TV and IPTV) would be integrated into one entity. As such, the post-merger firm would have perhaps acquired an almost invincible status not only as a result of the high market share acquired, but also with the wide range of business capacity.

## **IV. CONCLUSION**

The remedy taken by the KFTC with regard to the Transaction is significant as it will fundamentally prevent the occurrence of anticompetitive harm and the establishment of a monopolistic structure in the pay broadcasting or mobile communications markets, thereby protecting consumers.<sup>63</sup>

It might be difficult to determine a perfect balancing point in the trade-offs between the need for positively readjusting an industry structure and the concern for maintaining a competitive market structure. The solution may also change depending on the time and place. Still, we can find meaning in the action taken by the KFTC regarding this Transaction as the KFTC’s attempt to act as a guardian of consumer welfare by showing the existence of a firm line that cannot be crossed for the maintenance of competitive order even in the face of possible justifications involving the rationalization of an industry. This case especially showed that when a transaction brings serious and complex structural concerns such as the acceleration of market concentration accompanied by the creation of a super-giant holding substantial power across different (but closely related) sectors, the KFTC would oppose it with a corresponding level of counter-

---

56 *Id.* at 68-9.

57 For example, in the Hyundai Homeshopping case the KFTC allowed the merger itself while adding certain behavioral restrictions despite that the sum of the merging parties’ market share reaches 97.9 percent in the relevant market, and the market becomes monopolized with no possibility of new entry. The KFTC Decision, No. 2006-010, 2005KiGyeol2592, Feb. 3, 2006. Also, in other cases including the CMB case (2008Seoll0562) and the HCN case (2006KyeolHap1315), the post-merger firm’s share was respectively 97.2 percent and 96.3 percent. However, only behavioral measures were levied.

58 KFTC Decision, No. 2008-105, 2008Seoll0339, March 13, 2008.

59 KFTC Press Release, KT-KTF Merger Allowed without Conditions, Feb. 5, 2009, p. 3.

60 See, KFTC Decision, No. 2015-162, 2015KiGyeol0464, May 18, 2015; KFTC Decision, No. 2007-351, 2007KyeolHap1076, July 3, 2007.

---

61 SK Merger Decision, p. 70.

62 The KFTC viewed that a partial divestiture would have a limitation in resolving the anticompetitive concerns in this case. In the pay broadcasting market, if all firms belonging to the regions with potential anticompetitive concerns are to be sold, such in fact would not be so different from a total ban of the deal in that market. In addition, it is difficult to find an appropriate purchaser only for a part of the regions since such part alone would not have synergy effects. It is also hard to find a purchaser for the frugal phone business of CJH which has an equivalent level of competitiveness of CJH playing the role of a maverick. The KFTC Press Release, *supra*note 8, at 13.

63 *Id.* at 14.



# INDIAN MERGER CONTROL ONE STEP FORWARD, TWO STEPS BACK

BY NAVAL SATARAWALA CHOPRA &  
APARNA MEHRA<sup>1</sup>



## I. INTRODUCTION

The merger control regime in India has been in place for the last five years. When the regime was introduced, practitioners and academics feared that the approval process adopted by the Competition Commission of India (“CCI”), which allowed a 210 day review process, would delay transactions and be costly. However, the CCI has, to a large extent, allayed such fears by clearing close to 350 merger notifications within a much shorter time-frame<sup>2</sup> than expected. That’s the good news!

<sup>1</sup> The authors are Partners in Shardul Amarchand Mangaldas & Co.’s Competition Law Practice. The authors are grateful to Supritha Prodaturi for her assistance in preparing this paper.

<sup>2</sup> On an average, 18-25 calendar days (Source: Annual Report of CCI, 2014-15).

From the initial pragmatic “light touch” approach, the CCI is perceived now to be taking a more aggressive approach, especially in interpreting exemptions issued by both the Government of India and the CCI itself. Not only does this approach defeat the purpose of these exemptions, but given the personnel shortage at the CCI, it has resulted in delays. Further, while the CCI has amended its regulations to simplify the notification process, there remains procedural drawbacks that require legislative intervention.

In this paper, we discuss the trends and challenges of the merger control regime in India.

## II. KEY ISSUES AND DEVELOPMENTS

### A. Erroneous Interpretation of the Target Exemption

In order to adopt a “light touch” and to ensure that insignificant transactions are not require notification to the CCI, the Ministry of Corporate Affairs, Government of India, issued and subsequently renewed the de minimis target based exemption, pursuant to which, for a period of 5 years until March 3, 2023 (as renewed), transactions where the target has either assets in India less than INR 350 crores (approx. USD \$50 million), or turnover in India less than INR 1000 crores (approx. USD \$150 million), do not need to be notified to the CCI (“Target Exemption”).

Unfortunately, the CCI has interpreted this exemption extremely narrowly. The CCI’s position is that, due to the wording of the Target Exemption, it is available only for transactions, acquisitions of shares or assets but not mergers or amalgamations. This artificial distinction makes no sense and it was hoped that the CCI would apply a purposive interpretation of the Target Exemption.

More concerning however is the fact that the CCI considers the “target” (for purposes of determining assets/turnover thresholds) to be limited to an incorporated entity as opposed to a business or division. Therefore, in case of the sale of a business or division, the assets and turnover of the seller as opposed to what is being sold has to be considered. Naturally, this has resulted in some corporations failing to notify transactions and recently the CCI fined Eli Lilly INR 1 crore (approx. USD \$150,000), for failing to notify the acquisition of the global veterinary pharmaceutical business of Novartis.<sup>3</sup> There are other cases of such non-compliance which the CCI is currently considering.

<sup>3</sup> Eli Lilly/Novartis (C-2015/07/289)

This practice is also not in line with international best practices issued by the International Competition Network, which the CCI is a part of. Ironically, if these assets/divisions were housed in a separate legal entity, the transaction would have the benefit of the Target Exemption. Such a form over substance approach is antithetical to the ease of doing business in India and defeats the purpose for which the Target Exemption was introduced in the first place.

The CCI's rationale for this interpretation is that the term "enterprise" used in the Target Exemption and defined in the Competition Act of 2002 (the "Competition Act"), does not include a business or division. This approach would imply that acquisitions of businesses or divisions would not fall within the ambit of the merger control regime, as the requirement to notify is triggered only in case of the "acquisition of one or more enterprises." This would be an equally absurd position but would follow from the CCI's interpretation.

## **B. Control**

The interpretation of "control" is critical from the perspective of examining whether a transaction may avail the benefit of exemptions. The definition of "control" has always been a sticking point in India and the merger control regime has not been immune to this phenomenon. As a starting point, "control" is defined (rather circuitously) under Section 5 of the Competition Act to include "controlling the affairs or management by (i) one or more enterprises, either jointly or singly, over another enterprise or group; (ii) one or more groups, either jointly or singly, over another group or enterprise."

The CCI, in its limited decisional practice, has interpreted control to mean "the ability to exercise decisive influence over the management or affairs and strategic commercial decisions"<sup>4</sup> of a target enterprise, whether such decisive influence is being exercised by way of a majority shareholding, veto rights (attached to a minority shareholding) or contractual covenants. In its decisions, the CCI has considered the ability to veto (or cause a deadlock in respect of) strategic commercial decisions (such as the annual business plan, budget, recruitment and remuneration of senior management, and opening of new lines of businesses) as sufficient to confer at least joint control.<sup>5</sup>

Accordingly, the guidance from the CCI on the interpretation of "control" under the Competition Act is unhelpful. One of the biggest challenges for parties to transactions in relation to the interpretation of control continues to be the question of how to differentiate mere investor protection rights from those rights which result in a situation of control/joint control.<sup>6</sup> The CCI's general observation is that a case-by-case approach needs to be adopted while assessing "control," which is of limited assistance to parties. In this climate of uncertainty, parties are often required to make a call on whether

their acquisition will, or will not, be viewed by the CCI as an acquisition of control.

## **C. Investment only Exemption**

Schedule I of the Competition Commission of India (Procedure in regard to the transaction of Business relating to Combinations) Regulations of 2011 ("Combination Regulations") was introduced to effectively exempt certain types of transactions from the filing requirement, as they are ordinarily unlikely to cause an appreciable adverse effect on competition ("AAEC"). Under the Combination Regulations, transactions falling within the categories listed in Schedule I do not normally require notification to (and prior approval of) the CCI. However, in practice, the CCI has interpreted these very restrictively and have watered down their scope to a large extent.

One of the key exemptions of Schedule I, Item 1, ordinarily "exempts" transactions that involve the acquisition of less than 25 percent shareholding, "solely as an investment" or in the "ordinary course of business," provided it does not result in an acquisition of control. The CCI's interpretation of these terms is again very narrow – the CCI views the acquisition of shares in more than one company, in the same sector, as strategic even if such acquisitions do not involve acquisition of control or are by investment funds. For example, the acquisition by a private equity fund of minority non-controlling shares in more than one company in a particular sector would not benefit from this exemption. In January 2016, the CCI amended Item 1 of Schedule I to include an explanation which clarifies that acquisition of less than 10 percent shares or voting rights would be treated solely as an investment, provided the acquirer (a) has the ability to exercise only ordinary shareholder rights commensurate with their shareholding; (b) is not a member of the board of directors of the target nor has a right or intention to nominate a director in the future; and (c) does not intend to participate in the affairs or management of the target.

The explanation therefore benefits investment companies acquiring an up to 10 percent shareholding in an enterprise even where it already has shareholdings in other enterprises competing with the target. In such a case, the acquisition can be treated "solely as an investment" and made "in the ordinary course of business" and will be exempt from the notification requirement. However, it is not clear whether the CCI would adopt the same position where such an investment company has a pre-existing controlling investment in a target in the same sector.

## **D. Strict Timeline and Failure to File**

The Competition Act has a strict deadline to make a filing with the CCI. If the parties fail to notify a merger within 30 days from the trigger event, or at all, the CCI has the power to impose a penalty of up to one percent of the total worldwide turnover or value of assets, whichever is higher, of the proposed merger. The CCI has used these powers regularly in cases where late filings have been made.

4 See Independent Media Trust/Network 18(C-2012/03/47).

5 See SPE Holdings/MSM/Grand way and Atlas (C-2012/06/63).

6 See SAAB/Pipavav(C-2012/11/95).

The CCI accepted all late filings made in the first year of operation of the merger control provisions and did not impose any penalties. Penalties have, however, been imposed since then. The CCI imposed a “relatively nominal” penalty of INR 5 lakhs (approx. USD \$7,500) for a late filing in Dewan Housing Finance Corporation Limited/First Blue (C-2012/11/92), where the parties argued that the reason for the delay in filing was incorrect legal advice.

Last year saw CCI proactively issuing show-cause notices to parties who have, (a) failed to notify a transaction; and (b) consummated the transaction before obtaining an approval from the CCI. The quantum of penalties levied by the CCI for a delayed or no filing has significantly increased in the past year with the CCI levying fines up to a maximum of INR 5 crores (approx. USD \$750,000).<sup>7</sup>

While the fines levied by the CCI are a fraction of the amount that they have the power to levy, given the continuing ambiguity in the Indian merger control regime (for example, definition of “control,” ability to carve out the Indian leg of a global transaction, availability (or lack) of exemptions), it is hoped that the CCI will be more receptive to accepting mitigating factors and have a consistent approach while levying a penalty.

### ***E. Phase I and Phase II***

On receipt of a notification, the CCI is required to form a prima facie opinion on whether a merger causes or is likely to cause an AAEC within the relevant market in India within a period of 30 working days. However, if the CCI requires the parties to remove defects in the notification or to provide additional information, it “stops the clock” until the additional information is provided.<sup>8</sup>

Even in relation to non-problematic cases, a detailed scrutiny is adopted by the CCI. The CCI is increasingly contacting customers and competitors as well as third party agencies for information or opinions even during Phase 1 reviews. The increasingly rigorous approach by the CCI means that transaction review timelines have also increased. This results in transactions taking 75-90 days to be approved, even though they ought to be cleared within 30 working days (i.e. approx. 45 calendar days).

In cases where CCI forms a prima facie opinion that a merger is likely to cause, or has caused, an AAEC within the relevant market in India, it is required to issue a show-cause notice to the parties asking for an explanation as to why an investigation in to the merger should not be conducted. Depending on the response received from the parties, the CCI may either direct the Director General to conduct an investigation or perform a detailed investigation, including public scrutiny, on its own.

---

<sup>7</sup> GE/Alstom (C-2015/01/241) and Piramal/Shriram (C-2015/02/249).

<sup>8</sup> If the CCI reaches out to third parties during Phase I, this time period is extended by 15 working days. Further, where modifications are offered in Phase I, the time period is further extended by 15 days. This is Phase I of the review period.

To date, all cases have been approved in Phase I with the exception of Sun/Ranbaxy (C-2014/05/170), Holcim/Lafarge (C-2014/07/190) and PVR/DT (C-2015/07/288).

There has been an increased use by the CCI of its powers to require remedies to address competition concerns before clearance. The CCI has cleared a number of mergers where parties have voluntarily offered modifications of a behavioral nature, which include reductions in the period of non-compete obligations, giving access to infrastructure or undertaking to comply with competition and other laws.

In all three cases which went to Phase II, the CCI had tailored the remedies to the specific circumstances in each of these cases. Accordingly, it has not followed a “one size fits all” approach. One of the most contentious decision of the CCI was PVR/DT, where by a majority of 4-3, the CCI approved a hybrid remedy of divestitures and expansion freezes and rejected a purely behavioral remedy involving price caps and expansions freezes. This demonstrates that the CCI is pushing the envelope on remedies. However, there remain concerns on the use of economics and common antitrust tools in both recognizing and addressing anti-competitive concerns.

### ***F. Invalidity of Notices***

Another recent trend is for the CCI to reject notifications after being accepted, for being defective, incomplete or filing the incorrect notification form.<sup>9</sup> Based on publically available information, the CCI rejected a notification filed by TPG / Manipal Health (C-2014/12/234), nearly at the end of Phase I, for failure to notify an interconnected (albeit exempt) step, as a result of which the basis for the competitive assessment was found to be incomplete. It is likely that the CCI is taking this approach in other cases too where it finds the information provided by the parties in the notification form to be insufficient or incomplete for undertaking the competitive assessment.

It appears that the CCI has adopted this approach because, unlike other jurisdictions, the statutory review period commences on the day when the notice is filed by the parties and there is no formal pre-acceptance period in which the CCI can assess the level of information being provided by the parties to conduct a meaningful review. Further, in case parties provide additional information which impacts the competitive assessment or if new overlaps are discovered mid-way through the review, the CCI does not want to be disadvantaged by the statutory time limit in conducting a thorough review. In such cases, the CCI requires the parties to re-file a complete notification, without requiring the fee to be paid again.

---

<sup>9</sup> GE/Alstom (C-2015/01/241), CommScope Inc. (C-2015/5/275). In case an incorrect form is filed by the parties, the CCI has directed the parties to file Form II within a period of 30 days of the said direction.

In practical terms, this has the effect of re-setting the review clock and re-commencing the 210 day statutory review period and this possibility will have to be borne in mind by parties when filing the notification form.

### ***G. Filing Formalities***

The officials at the CCI have proved to be rigid in terms of filing formalities and each filing is checked extensively before being accepted. The filing process has proved to be a cumbersome one and parties need to prepare filings with the utmost care. In an extremely welcome step in 2015, the CCI now permits (i) any person authorized by the company to sign the notification without a specific board resolution; and (ii) a declaration to be made on behalf of the notifying party (which does not require notarization and legalization). Additionally, the declaration makes a specific mention of Sections 44 and 45 of the Competition Act which lay down the penalties applicable for submitting false information or omitting to submit material information. The CCI has recently announced the introduction of an online portal for filing notification forms. However, this system is yet to take off.

## **III. CONCLUSION**

There is an urgent need to amend the Competition Act and the Combination Regulations to remove the ambiguities and issues highlighted above. This is especially important given the Government of India's desire to make India an attractive investment destination.

With its limited staff, the CCI must be commended for its efforts in implementing the merger control regime. However, it is hoped that the CCI will consider the concerns raised by various stakeholders and mature into an authority which is focused on analyzing and reviewing transactions which cause AAEC and adopt a more pragmatic approach to transactions where such concerns do not exist. The CCI itself will benefit from such a focused approach with a reduced strain on its resources.



# COMPETITION ALIVE & KICKING IN NEW ZEALAND

BY ANDREW MATTHEWS & GUS STEWART<sup>1</sup>



## I. INTRODUCTION

New Zealand's competition regulator, the Commerce Commission ("Commission") has had a busy first three quarters of 2016, actively investigating and enforcing a wide range of competition and consumer laws under the Commerce Act 1986 ("Commerce Act") and the Fair Trading Act 1986 ("FTA") respectively. The Commission, on the back of its increased advocacy and media engagement, has been influential in driving an increased awareness of competition and consumer laws in New Zealand.

In this update we discuss the Commission's activity in relation to recent and impending consolidation in the media & communications sector, and its more active enforcement action in the consumer law space – with a focus on telecommunications.

## II. MEDIA & COMMUNICATIONS: A CASE FOR CONSOLIDATION?

As with many other jurisdictions, New Zealand print media and traditional communications providers have struggled to maintain pace with new technologies, declining subscriber bases, and other international threats in recent years – particularly in the wake of a surge in "over the top" ("OTT") players. There has also been a trend

towards bundling as traditional communications players seek to reduce churn and to avoid becoming old-style utility companies, i.e. the metaphorical "dumb pipe". While those market conditions may inevitably lead to periods of consolidation in any jurisdiction, the issues seem particularly acute for a relatively small and isolated economy like New Zealand's which has likely already experienced greater levels of consolidation in media and communications markets.

One recent example of this consolidation in action is that of fixed-line operator CallPlus. After acquiring Orcon (New Zealand's fourth largest internet service provider) in 2014, CallPlus was then itself acquired twice in quick succession by Australian companies – firstly by M2 Group in April 2015, followed by the Vocus/M2 Group merger in 2016. After the merger with M2, Vocus became the third largest telecommunications company in New Zealand (CallPlus lacks its own mobile presence; the fourth telecommunications company, 2degrees, is predominantly known as a mobile player).

More immediately, the Commission is currently scrutinizing two high profile mergers in the media, communications and content space. Both mergers are conditional on the Commission's approval, with one seeking authorization on public benefit grounds if it is unable to be cleared on competition grounds.

### *A. SKY TV and Vodafone Apply for Clearance for NZMerger*

In early June 2016, SKY Television and Vodafone Group plc announced that they were considering a merger of their respective New Zealand businesses whereby Vodafone Europe B.V. would directly or indirectly own 51 percent of the shares in SKY, and SKY would own 100 percent of Vodafone NZ ("SKY/Vodafone"). In essence, Vodafone Europe B.V. would own 51 percent of the merged entity with the balance being listed on the New Zealand Stock Exchange. The Commission received two applications for clearance in relation to the proposed merger on June 29, 2016, one for each of the respective business "acquisitions."

According to the parties, the SKY/Vodafone merger would create "a leading integrated telecommunications and media group in New Zealand [with] the ability to offer New Zealand's best entertainment content across all platforms and devices in a rapidly evolving media and telecommunications market."

Vodafone's application notes that "the parties currently enjoy a successful and complementary strategic relationship, under which Vodafone resells SKY's pay television services, and SKY promotes Vodafone's broadband products and refers customers to Vodafone." It also sought to pre-empt concerns about whether the

<sup>1</sup> Andrew Matthews is Principal at Matthews Law, providing expertise in competition law (antitrust), consumer law, regulation and trade and policy issues. Gus Stewart is a Senior Associate in the same practice.



merger would allow the parties to bundle their services in an anti-competitive way, noting that the merged entity “would not have the ability or incentive to engage in any foreclosure strategy” and “will continue to make inputs available on a wholesale basis [and] offer SKY services and Vodafone telecommunication services separately.”

However, the proposed merger has certainly not been met with open arms by its competitors or other industry players. Twelve-submissions, many with supporting economists’ reports, have been published on the Commission’s website objecting to the merger. A recurring theme in those submissions was that:

- a likely counterfactual was that SKY would be forced to shift from being a “reluctant wholesaler” to a proactive one, because customers want to watch TV content everywhere and at any time; whereas
- in the “factual” scenario, the merged entity would be an “even more reluctant wholesaler” and have the ability and the incentive to engage in anti-competitive bundling, especially in relation to sports content.

In their response to submissions, Vodafone’s lawyers have rejected those arguments and questioned the objectors’ basis for making them, stating that there is “no basis for the ‘enthusiastic wholesaler’ counterfactual” and that third parties “offer no credible ‘bundling’ theory of harm.”

“[...] the third party submissions are largely premised on a wholly unrealistic counterfactual of SKY becoming an “enthusiastic wholesaler” of content in New Zealand, offering bespoke packages of content selected entirely at the option of third parties, at cut-down prices for them to use to build their own pay TV offerings [...] When objectively analysed, the [objections] are not founded on a sound premise of reduced competition to the detriment of consumer. Rather, they reflect the commercial concerns of the submitters about the improved competitive offering that the [merged entity] will have.”

A number of submitters also pointed to submissions made by Vodafone entities in other jurisdictions and the Vodafone Group 2016 Annual Report in an effort to discredit arguments about “no competition issues” that were made in Vodafone’s application. For example, a number of the submitters referenced excerpts from the Vodafone Group 2016 Annual Report to demonstrate internal inconsistencies with Vodafone’s approach to sports content in its clearance application:

“In several markets, incumbents have sought to gain exclusive access to key content rights. [...] We will also encourage regulators to prevent incumbents from using content – in addition to their dominance in fixed access markets – as a lever to reduce competition.”

In response, Vodafone’s lawyers have suggested that such arguments ignore New Zealand’s unique market structure, in particular noting that the quote from the Vodafone Group 2016 Annual Report “specifically refers to ‘incumbents’ with ‘dominance in fixed access markets’ [whereas] in New Zealand the structural separation of Chorus and other fibre companies means that no RSP has dominance in fixed access markets – which is borne out by [the] presence of some 80+ suppliers of broadband in New Zealand.”

The merger has also sparked what some might call “professional banter” among practitioners and academics about the merits of behavioral undertakings in the merger context in New Zealand. Unlike its contemporaries in other jurisdictions, the Commission is unable to accept behavioral undertakings under the Commerce Act. However, it is our view that if considered necessary, Vodafone could theoretically enter arrangements (contracts or deeds), enforceable by third parties, that effectively provided sufficient access rights to mitigate competition concerns. These could be conditional on clearance being granted. (It is a common strategy to seek to ensure that customers of a merged entity would be happy with the merged entity’s terms of supply and in many cases these are negotiated in advance of a proposed merger.) The Commission naturally has some reservations about this sort of approach and would need to be satisfied with how such a de facto behavioral undertaking may work in practice. While acknowledging those concerns, we consider that they would necessarily form part of the “factual” against which the counterfactual would need to be measured.

Further complicating matters, there are (at least) two controversial background features to the proposed merger:

- Firstly, SKY was investigated by the Commission in 2013 for (among other things) allegedly engaging in anti-competitive refusals to supply potential retailer competitors, or at least imposing restrictions forcing them to be mere “resellers.” Controversially, despite its view that “certain provisions in SKY’s contracts with telecommunications retail service providers (“RSPs”) are likely to have previously breached” the provisions of the Commerce Act prohibiting anti-competitive arrangements, the Commission declined the opportunity to take enforcement action and instead issued a warning to SKY. The Commission took this action after its investigation found that those provisions were at that time “unlikely to have” anti-competitive effects and were “unlikely to cause harm in the future.”
- Secondly, in 2006 SKY was cleared to acquire Prime Television which, at that time, was the third free to air broadcaster out of a total of five channels. A key factor in granting clearance appeared to be the Commission’s treatment of free to air and pay TV as separate markets.

Objectors have raised these and many other issues – perhaps for strategic reasons. For example, Television New Zealand (“TVNZ”), the largest free to air broadcaster which is state-owned, has sug-

gested that the merged entity would need to divest Prime in order to obtain clearance. Similarly, TVNZ and another objecting party have requested that the Commission hold a “conference” at which submitting parties would give oral evidence, and the Commission could “test” those arguments. Again, that request may be for strategic reasons – the Commission last held a conference in relation to a clearance application (as opposed to an authorization application) in 1995 when it granted Telecom (now Spark) clearance to acquire 25 percent of SKY. Submitters favor these conferences because it gives them appeal rights, which are not otherwise available in relation to a clearance (i.e. if no conference is held, a clearance can only be appealed by the merging parties). The Commission has since made it clear that it has no plans to hold conferences, explaining that it believes that its current processes, which include a public version of the clearance application, and can include public submissions and cross-submissions, are sufficient.

A number of the submissions also argue that some or all of the pay TV content currently held by SKY is an “essential input” in relation to relevant telecommunications markets. However, those arguments could face some challenges given that, in New Zealand at least, the Commission does not tend to define “overlapping” markets. Traditionally, vertical effects have been a small part of merger analysis in New Zealand competition law, and conglomerate effects have largely been ignored. The Commission’s Statement of Preliminary Issues for the Vodafone/SKY merger indicated that it would be looking at vertical and conglomerate effects, perhaps recognizing that SKY’s pay TV content may not be an essential input, but that the merged entity’s likely conduct may still have the ability to harm consumers by depriving them of innovation in pay TV packages. But again, there are obvious challenges with such arguments given OTT options and (what appears to be) a far greater fragmentation of pay TV services (for example, Spark offers its own content free of charge to its broadband and certain monthly mobile customers).

Lastly, and perhaps ironically, while one of the key concerns in the submissions appears to be about access to an essential input (where access seekers would usually rely on “abuse of market power” or monopolization laws), some of the submitters have separately made submissions in relation to the Ministry of Business, Innovation and Employment’s targeted review of the Commerce Act that the case for strengthening New Zealand’s monopolization laws has not been made out (i.e. that our monopolization laws are not broken and remain “good law”). The Commission’s decision on the proposed merger is expected in November 2016.

### ***B. NZME Applies for Clearance or Authorization to Merge with Fairfax***

In the media space, the Commission registered a joint application from Wilson & Horton, now NZME (“NZME”) and Fairfax seeking clearance or authorization to merge their media operations in New Zealand (“NZME/Fairfax”) on May 27, 2016. The merger would essentially be a “two to one” in newspaper supply (national dailies),

with overlap in community publications, magazine supply and (news) websites. The merger is in “response to the dramatically transforming media landscape [where] print readership and revenue [are] in decline and revenue from online news/information provision [is] becoming highly competitive.”

The applicants have sought “clearance, or in the alternative authorization” for the proposed merger. The practical impact of this approach is that clearance can still be granted if there is no substantial lessening of competition, but if there is a substantial lessening of competition, the transaction can be “authorized” by the Commission if the public benefits (essentially economic efficiencies) exceed anti-competitive detriments. Those benefits must be quantified, although the Commission can account for qualitative factors. The Commission applies a “total welfare” test.

The NZME/Fairfax merger attracted a significant volume of submissions. The Commission published 50 submissions on the Statement of Preliminary Issues on its website, including a late submission from TVNZ which was noticeably missing from the original tranche of submissions. Submitters included competitors, journalists and academics/public policy lobby groups, with the overwhelming majority being regional newspapers – many of which submitted similar (or identical) points in objection. A common complaint was that “a merger between the two largest media companies in the country is not in the best interests of the existing media industry and residents of this country.”

In response, the applicants’ lawyers have suggested that the submissions made no significant points to undermine the key premises of the application, and have invited the Commission to treat certain views from third party submitters with “considerable skepticism.” In particular, the response notes that:

“many of [the] submissions relate to issues that fall outside the scope of the competition framework of the Commerce Act 1986 [which] are not relevant to the substantial lessening of competition analysis and are, at best, only tangentially relevant to the authorisation process (as unquantified subjective “detriments”). These include: (a) “Fourth Estate” issues; (b) A subjective assessment of what is “valuable” news / information content; (c) Plurality of media ownership; (d) Foreign ownership of media; and (e) Reduction in employment of journalists by the merged entity.”

The Commission’s decision on the proposed merger is expected in March 2017. In the meantime, the Commission has earmarked December for a possible conference, should the matter proceed to an “authorization.” The purpose of a conference, if held, is to allow the Commissioners to ask questions of the applicants and interested parties on topics where the Commission requires further information. While participation in the conference is restricted to parties who the Commission considers it can best test its preliminary views and gain further information and evidence, the conference will be generally open to the public.

### III. CONSUMER PROTECTION LAWS: A RE-PRIORITISATION ON ENFORCEMENT?

For a number of years, consumer laws have been recognized worldwide as a valuable tool for enhancing competition (antitrust) laws, and ensuring markets are more competitive. New Zealand, by all accounts, is no exception. Whether the Commission has re-prioritized its attention towards consumer issues, or businesses have become complacent and begun pushing boundaries – or neither – we have seen an increased level of enforcement action by the Commission in this area.

#### ***A. Commission Brings a Number of High Profile Fair Trading Proceedings***

Among other things, the Commission has brought proceedings against eight (mostly) well-known companies in New Zealand in the eight weeks from August 1, alleging various breaches of the FTA: Reckitt Benckiser, peer-to-peer lender Harmoney, insurer Youi, energy and telecommunications provider Trustpower, retailers 123 Mart and Budge, discount vacuum retailer Godfreys, and Bike Barn. A number of the defendants have pleaded (or are expected to plead) guilty to their respective charges. The charges are varied, and include allegations of:

- misleading packaging and promotion of four different types of pain-specific Nurofen products (Reckitt Benckiser)
- sending misleading loan pre-approval letters (Harmoney);
- engaging in misleading sales techniques when selling insurance policies (Youi);
- misleading advertising in relation to a bundled electricity and unlimited data broadband offer (Trustpower);
- failing to meet mandatory product safety standards (123 Mart);
- misrepresenting how much alpaca fibre was in duvets (Budge);
- failing to comply with the written disclosure requirements for extended warranty agreements (Godfreys); and
- misleading consumers over sale prices (Bike Barn).

#### ***B. Prevalence of Repeat Offender Industries***

The proceedings illustrate another year in which the Commission has actively (and pro-actively) investigated potential breaches of consumer laws, particularly where vulnerable consumers may be involved. In some cases, they also highlight industries that appear to be “repeat offenders” under New Zealand’s fair trading laws. For example, in its August 24, 2016 announcement that Budge and its sole director, Sun Dong Kim, had been convicted and fined a total of

NZD \$71,250 in the Auckland District Court, the Commission noted that it “has previously prosecuted nine companies and eight individuals for selling imported alpaca rugs as “Made in New Zealand,” and for claiming duvets were predominantly alpaca or merino wool when they were not.” Mobile “truck stops” have also been a focus for the Commission, with charges being laid under both the FTA and the Credit Contracts and Consumer Finance Act of 2003 in many cases.

#### ***C. Telecommunications is the “Most Complained About” Industry***

The telecommunications industry has historically been a major source of competition and consumer related issues in New Zealand, including being the subject of protracted litigation and record fines. This has continued to be the case, particularly in relation to consumer laws. The Commission’s latest Consumer Issues Report (published September 27, 2016) notes that telecommunications providers “remain the most complained about industry to the Commission,” comprising nine percent of all consumer FTA complaints in 2015. This was followed closely by domestic appliances (also nine percent), motor vehicle retail (six percent) and airlines (three percent). Of the 459 telecommunications-related complaints, New Zealand’s two largest operators – Spark and Vodafone – accounted for more than half of those complaints, with 140 and 133 each respectively. The report notes that the complaints data “does not establish that any harm has been caused to any consumer or competitors.”

The Commission’s prosecutions have also resulted in significant fines in the telecommunications sector. In September, Trustpower was fined NZD \$390,000 after pleading guilty to misleading consumers over the price and terms of its bundled electricity and unlimited data broadband offer. A week earlier, Vodafone was fined NZD \$165,000 after pleading guilty to making false price representations in relation to invoices sent to customers who signed on to the “Red Essentials” mobile phone plan between January and December 2014. This was Vodafone’s fourth sentencing under the FTA in the past five years, with previous fines of NZD \$82,000 and NZD \$400,000 in 2011 and NZD \$960,000 in 2012 (in relation to various broadband and mobile phone promotions). Vodafone also paid out over NZD \$260,000 to customers in a settlement reached with the Commission concerning the company’s promotion of its “Broadband Lite” service in 2014.

### IV. CONCLUSION

If the first nine months of 2016 are anything to go by, one might expect that the next six months will spell an increase in the number of competition & consumer prosecutions and fines for businesses, countered by a decrease in the number of media & communications companies in New Zealand as the current phase of consolidation truly takes hold. Only time will tell.



# OFF AND RUNNING: THE HONG KONG COMPETITION COMMISSION COMMENCES FULL OPERATIONS

BY ROSE WEBB, RASUL BUTT, TIM LEAR & DENNIS BELING<sup>1</sup>



## I. INTRODUCTION

The Competition Commission (“Commission”) in Hong Kong began enforcing Hong Kong’s first economy wide competition law on December 14, 2015. This followed a long period of preparation following the passing of the Competition Ordinance (“Ordinance”) in June 2012 and the Commission’s establishment in May 2013.

Although less than a year has passed since full operations commenced, the Competition Commission has already conducted a number of publicity campaigns, published a report of research into a market of great public interest, issued a draft block exemption order and has some substantial enforcement activity underway. This article outlines some of the Commission’s activities over the past nine months.

<sup>1</sup> Rose Webb is the Chief Executive Officer, Rasul Butt is the Senior Executive Director, Tim Lear the Executive Director (Operations) and Dennis Beling the Chief Economist of the Competition Commission (Hong Kong). The views expressed in this article are those of the authors and not the Competition Commission.

## II. COMMENCEMENT OF THE COMPETITION ORDINANCE

On December 14, 2015 the substantive provisions of the Ordinance came into full effect. For the first time Hong Kong businesses were subject to a generally applicable competition law (previously there had only been a competition regime for the telecommunications sector).

Immediately prior to the coming into effect of the Ordinance, the Commission undertook a wide-ranging outreach and publicity campaign. This included launching a revamped website ([www.compcomm.hk](http://www.compcomm.hk)); conducting a series of seminars entitled “Getting Ready for Full Implementation of the Competition Ordinance” and two additional seminars specifically aimed at trade associations and the broadcast of a thirty second TV advertisement entitled the “Competition Ordinance is now in Full Effect.” Buses and trams in Hong Kong carried images heralding the implementation of the new law and posters were displayed in businesses and MTR stations.

In addition to events and publicity organized by the Commission there were many workshops, seminars and conferences organized by trade associations, chambers of commerce and law firms. Commission staff attended many of these events and outlined what steps businesses should be taking to ensure compliance with the law. It was clear to us that as December 14, 2015 approached there was increasing awareness of the Ordinance and interest in what it meant for businesses across Hong Kong.

However even we were surprised by the extent of the interest on the day. The Commission received over 200 complaints and inquiries in the first two days of operation. Our press conference was heavily attended and the new law was covered extensively in newspapers and on prime time TV. Additionally the media reported on price wars that broke out in various consumer retail goods such as sneakers and mobile phones on the same day as the law commenced, suggesting that this was due to the removal of long standing resale price arrangements.

Although the numbers of complaints and inquiries leveled off during the Christmas and New Year period, there has continued to be a steady flow of issues brought to the Commission’s attention. In addition to being reactive to matters brought to it, the Commission has conducted a number of proactive initiatives in sectors of the economy particularly at risk of anti-competitive conduct such as trade associations, and targeting conduct likely to be prevalent in Hong Kong such as bid-rigging.



### III. TRADE ASSOCIATIONS PROJECT

On July 21, 2015, shortly following the Hong Kong Government announcement that the Ordinance would fully commence on December 14, 2015, the Commission issued a press release stating its proposed approach to handling competition matters in the intervening period. This included the statement that:

As the date of full commencement approaches, the Commission will, in appropriate cases, contact businesses and other relevant parties directly if the Commission considers that their conduct or practice may be considered anti-competitive and, therefore, likely to contravene the Ordinance after full commencement.

One area where the Commission expected this would be necessary was in relation to trade and professional associations in Hong Kong. Associations have a significant role in Hong Kong's economy, with their members representing the vast majority of Hong Kong's businesses. Operating in a domestic environment without competition laws, a number of associations (including associations with global companies as members) had traditionally published fee scales and/or imposed other restrictions on price competition among their members. The Commission initiated a project in 2015 to educate trade and professional associations with a view to encouraging compliance with the Ordinance.

The project commenced with the publication of "The Competition Ordinance and Trade Associations" brochure in June 2015, which was sent to over 500 associations. This was followed by a series of seminars and direct engagement with different associations. While undertaking these advocacy and education efforts, the Commission reviewed the published practices of over 350 associations and identified over 20 associations who publicly restricted price competition and whose members were therefore at high risk of contravening the Ordinance.

The Commission wrote to a number of these high risk associations in November 2015 to ensure that they were aware of its concerns. The Commission was encouraged by the subsequent shift in business practices across a range of industries including various professional services, transport, real estate and insurance. As of September 1, 2016, the Commission is aware of 17 associations who have removed fee scales or other price restrictions from their terms of membership. These associations represent important sectors in Hong Kong and it is significant that they have taken steps to change long standing codes and policies.

However, in some cases, practices have not changed. Six months after full commencement on March 14, 2015, the Commission released an interim report on this project warning that enforcement action may follow for associations or their members who have not taken steps to comply with the Ordinance.

### IV. REPORT OF STUDY ON THE BUILDING MAINTENANCE MARKET

On May 24, 2016, the Commission published a report summarizing the results of its study into aspects of the Building Maintenance market. The market for building maintenance services is of substantial relevance to many people in Hong Kong. Before the launch of the Commission's study, the public had regularly expressed concerns about the functioning of competition in this market.

At the outset of the study, the Commission received anecdotal and other market evidence suggesting that bid-manipulation may have been common in Hong Kong in the recent past. In order to study this issue more closely and look for possible signs of bid-manipulation, the Commission applied screening techniques to tender data from actual renovation projects.

Screening techniques are well-known in competition enforcement. They were proposed in the academic literature by economists as a tool to facilitate cartel detection and have been applied by competition authorities around the world to real markets. Many screens look for patterns of behavior that appear inconsistent with competition and are therefore more likely to reflect collusion. In screening the available tender data, the Commission followed that approach and developed a number of suitable screens.

The Commission's analyses revealed certain patterns that appeared unlikely to emerge under functioning competition and that were consistent with some of the bid-manipulation practices widely suspected by many observers.

The Commission pointed out that the results are no proof that such practices were actually present in the market. The Commission also highlighted that the Ordinance had not been in effect (and hence would not have applied) at the time the tenders underlying the analyses took place. However, the Commission concluded that if it were to encounter similar patterns today it would likely be concerned about potential breaches of the First Conduct Rule (Prohibition of anti-competitive agreements, concerted practices and decisions) and would likely investigate certain tenders more closely.

### V. BID-RIGGING CAMPAIGN

Bid-rigging has been a subject of grave public concern in Hong Kong and combating this type of cartel action is a major enforcement priority for the Commission. As mentioned above, the Commission undertook an early study of bid-rigging issues in the local residential building renovation and maintenance market, but it recognized that bid-rigging can occur in any market where tender processes are used.

With an aim to raise public awareness as well as to educate on ways to detect and prevent bid-rigging, the Commission-

launched a multi-pronged “Fighting Bid-rigging Cartels” Campaign (“Campaign”) in May 2016 as its first major advocacy initiative since the commencement of the Ordinance.

The Campaign kick-started with a TV announcement and two brochures outlining common types of bid-rigging and tips for procurement officers to safeguard the tender process. A series of educational videos and radio programs were produced and broadcast to facilitate easy understanding of these messages. The Campaign was also supported by extensive online and outdoor advertising to enhance public awareness. These materials are available on the Commission’s website at [www.compcomm.hk](http://www.compcomm.hk).

To further educate and reach out to the community, a Rolling Exhibition was staged at four key locations in Hong Kong in May and June 2016. In August, publicity posters were sent to the owners’ corporations of over 15,000 residential and commercial properties in Hong Kong. Seminars on fighting bid-rigging targeting different audiences including procurement practitioners, property management companies and property owners were held between June and September.

On the enforcement front, the Commission has received complaints on suspected bid-rigging and is assessing each of them carefully. It is also working closely with other law enforcement agencies and public bodies to ensure a coordinated and effective approach to tackling bid-rigging in all sectors of the Hong Kong economy.

## VI. APPLICATIONS FOR A BLOCK EXEMPTION ORDER BY LINER SHIPPING COMPANIES

The Ordinance contains a provision allowing an undertaking or an association of undertakings to ask the Commission to make a block exemption order in respect of a category of agreements. The only grounds on which the Commission may make a block exemption order is that the category of agreements meet the so called “efficiency exclusion” which is provided in Section 1 of Schedule 1 of the Ordinance.

Undertakings and associations of undertakings do not have to obtain a block exemption order to benefit from the efficiency exclusion. They can choose to self-assess whether they fall within the terms of the exclusion. It may be for this reason that the Commission has so far received only one application for a block exemption order (and no applications under a similar process where a decision may be provided in respect of a single agreement).

On December 17, 2015, just days after the full commencement of the Ordinance, the Commission received an application from the Hong Kong Liner Shipping Association (“HKLSA”) for a block exemption order in respect of liner shipping agreements. The HKLSA

sought a block exemption in respect of both Vessel Sharing Agreements (“VSAs”) (also referred to as consortia and alliances) and Voluntary Discussion Agreements (“VDAs”).

As part of its consideration of the application, in January 2016 the Commission commenced preliminary consultation with over 30 interested parties including customers, trade associations and chambers of commerce, container terminal operators, non-HKLSA shipping lines and government bureaus.

On September 14, 2016, the Commission published notice of a proposed Block Exemption Order for VSAs together with a statement of reasons outlining the Commission’s preliminary views. In accordance with the procedure provided for in the Ordinance, the Commission must now carry out a public consultation about the proposed block exemption order, which will be open until December 14, 2016. The Commission indicated that it did not propose to issue a block exemption for VDAs.

In coming to its preliminary view, the Commission was mindful that it is tasked with reviewing the application solely by reference to the specific economic efficiencies generated by the liner shipping agreements covered by the application and the impact of those agreements on customers in Hong Kong. However, the Commission found it informative to consider the approach taken by other jurisdictions as background. It found that the scope, form and basis of the relevant exemptions varied widely from jurisdiction to jurisdiction.

## VII. ONGOING OUTREACH AND ADVOCACY

The Commission has an ongoing role to inform the Hong Kong public and businesses about the benefits of competition to the Hong Kong economy and the need for them to be aware of and to comply with the Ordinance. The Commission has been actively engaging its stakeholders through meetings and seminars, educational materials and special projects. Advocacy will remain a major focus of the Commission’s work going forward.

One of the Commission’s functions is to advise the Government on competition matters. This can be done through direct engagement with government departments and public bodies on issues of public concern that relate to competition, the making of submissions in response to public consultations on government policies or laws, and the formulation of criteria that can be incorporated into the policy making process. Our advice on the supply of liquefied petroleum gas to the public housing sector, affecting the lives of over 150,000 people, was released in September 2016.

## VIII. EARLY ENFORCEMENT ACTIVITIES

In November 2015, the Commission released its Enforcement Policy. The Enforcement Policy supplements the Ordinance and the six Guidelines the Commission has issued to provide guidance on how

the Commission intends to exercise its enforcement function in investigating possible contraventions of the First Conduct Rule and the Second Conduct Rule (collectively, the “Conduct Rules”) through:

- adhering to six core principles in conducting investigations (professional, confidential, engaged, timely, proportionate and transparent);
- prioritizing the use of the Commission’s operational resources to investigate conduct that may contravene the Conduct Rules in an efficient and timely manner; and
- identifying an enforcement response that is suitable and proportionate where the Commission considers a contravention of the Ordinance has occurred.

The three areas of compliance focus for the Commission identified in the Enforcement Policy are:

- cartel conduct;
- other agreements contravening the First Conduct Rule causing significant harm to competition in Hong Kong; and
- abuses of substantial market power involving exclusionary behavior by incumbents.

The Commission also released, following domestic and international consultation, a Leniency Policy for Undertakings Engaged in Cartel Conduct.

In the six months after commencement, the Commission received 1,250 complaints and queries about potentially anti-competitive conduct. The Commission also received intelligence from other regulators, whistleblowers and leniency applicants. These various sources have led to a number of investigations into potential contraventions of the Ordinance in areas of the Commission’s compliance focus, including alleged cartel conduct. The Commission has also made use of its Investigative Powers under Part 3 of the Ordinance in conducting investigations.

In keeping with its proportionate approach to addressing anti-competitive conduct, the Commission also resolved one early case involving newspaper hawkers. A group of these sole traders, who operate small stands in markets and in the streets in Hong Kong, agreed to fix prices of a certain brand of cigarettes. The agreement was public and lasted for a few days, ceasing immediately following the Commission meeting with the hawkers. Given the circumstances, the Commission was content to resolve the case by issuing a warning to the hawkers. In keeping with the Commission’s policy on such resolutions, the outcome of the case was also made public.

## IX. LOOKING FORWARD

One of the most commonly asked questions of the Commission is what will be its first enforcement case. Undoubtedly, this question will continue to be asked until that case commences. Under Hong Kong’s prosecutorial model, the Commission has to bring evidence proving a contravention before the Competition Tribunal in order for a pecuniary penalty to be imposed, so it may be expected that it will take some time before such a case brought. The Commission’s other remedial options such as commitments or infringement notices may be employed earlier.

In addition to a keen focus on our enforcement outcomes, we are experiencing increasing awareness by legislators, the government and the public of the importance of competition policy as well as competition law, and the Commission expects to be drawn into a number of debates on important policy issues. Like many other competition authorities, there are demands on the Commission to look at a range of sectors of the economy and commence other market studies in addition to its current study on auto fuel.

Although still in its infancy, the Competition Commission has made a good start. There are many challenges ahead, but it seems that businesses and the public have accepted that we have an important role to play in Hong Kong’s future.





# AT THE CUTTING EDGE OF PRC AML PRIVATE LITIGATION

BY DR. ZHAN HAO & SONG YING<sup>1</sup>



## I. INTRODUCTION

On August 1, 2008, China launched the Anti-Monopoly Law (“AML”), establishing a dual enforcement system comprising both public and civil enforcement measures. Article 50 of the AML provides the legal basis for private anti-monopoly enforcement and states that undertakings that violate the provisions of the AML and cause damage to others shall bear civil liability.

<sup>1</sup> Dr. Zhan Hao is the managing partner of AnJie Law Firm. Dr. Zhan Hao and Song Ying are partners with AnJie Law Firm, and have a wealth of experience practicing in the antitrust arena.

In contrast to the activity surrounding public enforcement cases, China’s private antitrust enforcement regime remained relatively quiet during its first four years. From 2008 to 2012, a total of 143 cases concerning monopolistic conducts were accepted by the courts. Since then, however, an increasing level of private antitrust enforcement action in China, accompanied by some high-profile cases, has prompted an increased level of attention and scrutiny. Over the last four years to date, more than 300 antitrust cases have been brought before the courts.<sup>2</sup> Considering that China as a jurisdiction has not traditionally hosted a competition or pro-litigation culture, these statistics are surprising to everyone, even within Chinese competition circles.

Generally speaking, Chinese courts are still at an early stage in implementing the AML. Nevertheless, they have garnered a great deal of experience in the intervening eight years since implementation began, and are now stepping up the pace. This is evidenced by the advent of several landmark cases addressing increasingly more complicated facets of competition law, such as two-sided markets, Standard Essential Patents (“SEPs”), resale price maintenance, refusal to deal and essential facilities.

According to our observations, China’s private antitrust enforcement regime has displayed the following tendencies.

First, most of the cases brought before the courts have alleged abuse of dominance. However, there are also a developing number of complaints alleging horizontal agreements, vertical restrictions and abuse of Intellectual Property Rights (“IPRs”), among others.

Second, the parties to such actions are gradually diversifying, to include a greater range of state-owned enterprises, transnational enterprises and private companies. The subjects of private antitrust litigation in China now include renowned enterprises such as Sinopec, Johnson & Johnson, InterDigital, Hitachi, Tencent and so forth. Third, the diversity of sectors involved in private antitrust litigation has increased to include both high-tech sectors such as telecommunications and information networks, and more traditional sectors such as pharmaceuticals, energy, food and home appliances.

Finally, in most antitrust cases, courts with higher jurisdiction have exercised first instance jurisdiction. According to the Provisions on Several Issues Regarding the Application of Laws to Civil Disputes Involving Monopolistic Acts (“Antitrust Litigation Rules”) published by the Supreme People’s Court in 2012, the Intermediate People’s

<sup>2</sup> The number was announced by judges of the Supreme People’s Court during an antitrust conference.



Courts of provincial capital cities, capital cities of autonomous regions, municipalities directly under the Central Government, municipalities with independent planning status and the Intermediate People's Courts designated by the Supreme People's Court, all have jurisdiction to hear an antitrust case. And it is only with the Supreme People's Court's approval, that an antitrust case can be heard before a Basic Level People's Court. The majority of the antitrust cases have been heard in the Intermediate People's Courts. Furthermore, the dispute between Qihoo 360 and Tencent was the first antitrust case to be heard before the Supreme People's Court.

In China, a private antitrust action follows the general rules governing civil liability. Whether in relation to tortious or contractual liability, plaintiffs must apply both the provisions of the general rules of civil laws such as PRC Contract Law and Tort Liability Law, and the relevant provisions under the AML. Applicable procedural rules can be found in the Civil Procedural Law and the Antitrust Litigation Rules.

## II. INTERPLAY BETWEEN PRIVATE LITIGATIONS AND ADMINISTRATIVE INVESTIGATIONS

### A. Parallel Procedures

Public antitrust enforcement actions are not preconditions for, but rather run parallel with, private antitrust proceedings in China. Any party who suffers damage from specific monopolistic behavior is entitled to initiate a lawsuit before the court, regardless of whether the antitrust enforcement authority has already launched an investigation against the potential defendant. As a matter of fact, an overwhelming majority of antitrust litigation in China is currently lodged independently rather than as follow-up litigation. But the number of the latter is forecast to grow gradually along with the plaintiff's increased awareness of the right to take self-protective measures by utilizing antitrust law in China.

In 2015, an insured party sued Ping An Insurance Company for damages in Hangzhou after the National Development and Reform Commission ("NDRC") investigated 23 non-life insurers about an auto insurance premium cartel in 2014. The first follow-up litigation eventually reached settlement.

In the meantime, some Chinese law firms are acting as watchdogs to closely scrutinize disclosed cases in other jurisdictions, with a view to solicit the damaged party to kick-off a corresponding civil action in China. The emergence of multi-national follow-up litigation within China can be expected to follow.

### B. Evidence in Private Antitrust Litigation

During antitrust investigation proceedings, one of the biggest concerns is whether or not documents, materials and information sub-

mitted to the enforcement authority may subsequently be available as evidence that could potentially be used to support a follow-up antitrust litigation against its provider. In this regard, three questions in particular are frequently asked.

First, whether statements and documents submitted to the enforcement authority in support of leniency and suspension applications in particular, could be used as evidence in potential follow-up litigation. It should be noted that currently there are no clear rules or precedents in this regard. However, the Draft Guidelines on Leniency Application<sup>3</sup> (the "Draft Guidelines") issued by the NDRC in February 2016, may be of some reference value as far as they reflect the attitude of the Anti-Monopoly Commission under the State Council. According to the Draft Guidelines, leniency application documents shall not be used as evidence in relevant civil proceedings, unless otherwise stipulated by law.<sup>4</sup> Nevertheless, there is still some uncertainty regarding the influence this provision shall have on the court. For one, the Draft Guidelines are still just a draft version; for another, they stand relatively lower than a statute in the legislative hierarchy; hence, there is some doubt as to whether the court would adhere to this provision in practice. In addition, there is room for interpretation on whether a defendant, requested by the court to submit the leniency statements, would enjoy the specific protection granted under the draft guidelines. Given that there are not as yet any existing precedents for private follow-up antitrust litigation by the Chinese courts resulting in a judgment, the attitude of the courts toward this issue should be kept under close watch.

Second, whether or not discovery rules for evidence exist in China. While U.S. or UK-type discovery rules do not exist in China, the court may, of its own motion or upon request from the party or parties to the proceeding, order an institution or an individual to produce a certain document. According to the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (the "Interpretation of Civil Procedure Law"),<sup>5</sup> where documentary evidence is under control of the other party, the party bearing the burden of proof may, prior to expiration of the time period for producing evidence, apply to the court in writing to request the latter to order the other party to submit

---

3 The Draft Guidelines on Leniency Application are available at: [http://www.sdpc.gov.cn/fzgggz/jgdyfld/fgld/201602/t20160203\\_774288.html](http://www.sdpc.gov.cn/fzgggz/jgdyfld/fgld/201602/t20160203_774288.html).

4 See Article 16 of the Draft Guidelines on Leniency Application, "Confidentiality Obligations of the Enforcement Agency. All documents and reports submitted by business operators for leniency application hereunder and documents generated therefor shall be kept in special archives by the Enforcement Agency and shall not be disclosed to any third party without the consent of the business operators concerned; no other agencies, organizations or individuals may access such information. In the meanwhile, the aforesaid documents shall not be used as evidences in relevant civil proceedings, unless otherwise stipulated by the laws...."

5 The Supreme People's Court on the Application of the Civil Procedure Law is available on: <http://www.court.gov.cn/fabu-xiangqing-13241>

the evidence. Where the reasons for the application are established, the court shall make such an order. Where the other party thereafter refuses to submit the documentary evidence without justification, the court may determine that content of concerning documentary evidence alleged by the applicant is true.<sup>6</sup> In light of this, relevant undertakings should pay close attention to the content of public releases or publicized penalty decisions by the NDRC, SAIC and MOF-COM, in case potential plaintiffs may rely on clues therein to apply to the court for an evidence order.

Third, whether or not legal privilege applies within China's judicial practice. As of yet, there are no clear rules for legal privilege between attorney and client in China, and a court order to produce a document could theoretically also cover correspondence between the defendant and its counsel. In practice however, it is unlikely to do so, in part due to the difficulty of providing the court's required level of specificity when identifying such correspondence, such as when it occurred, what it refers to and by whom it was communicated. Even if assumed that the court would accept such an application by the plaintiff, justifiable reasons for not being able to produce it can be raised by the defendant, such as self-deletion. While a court considering such reasons to be sufficiently justified would normally then refuse the application, it does not entirely dispel the risk that the court maintains its insistence on the order to produce the evidence, given its large discretion in practice. Notwithstanding, a defendant replying to the court that it does not have the evidence being requested, would be placed in an adverse position if the plaintiff actually holds a copy of the evidence it is requesting.

### ***C. Tactical Application of the AML***

In practice, the Anti-Monopoly Law of PRC is subject to tactical application by undertakings that choose to pursue such a strategy.

First, companies often strategically lodge a complaint to the antitrust enforcement authority and initiate an antitrust private litigation before the court at the same time. Where China's antitrust enforcement authority and the Chinese courts implicitly reach a consensus that one side has accepted the case first, the other side will normally hold off making a decision, so as to avoid inconsistencies in law enforcement.

Second, in practice antitrust enforcement authorities enjoy the discretion to make decisions on accepting cases or not based on their enforcement priorities, whereas in theory the court cannot

refuse to accept a case that meets the qualifying standard for acceptance. In this regard, parties can be seen to be increasingly selecting litigation as their preferred route for seeking damages or challenging competitors rather than by triggering an investigation.

Third, the option remains for companies to lodge a complaint to the antitrust enforcement authority after receiving a favorable judgment in a private antitrust litigation, such as in the *Huawei v. InterDigital* case. Following this case, the NDRC decided to suspend the investigation to avoid inconsistencies in law enforcement with the courts.

Fourth, where one party applies for arbitration outside China according to the arbitration clause concluded by the parties, the other party still has the option to file for a private antitrust litigation in China, to assert that the AML violation is against the compulsory law of the PRC, and that the Chinese court therefore has jurisdiction to handle the dispute.

To sum up, in addition to the topics discussed above, and given the relatively young history of China's public and private enforcement regime, a number of significant issues regarding the interrelation between public antitrust enforcements and private litigation still remain open, and could be addressed further through developing and clarifying the rules and establishing more valuable precedents. For China's antitrust enforcement agencies and the Chinese courts, coordinating the relations between public and private enforcement in the most efficient and legitimate way is a learning-by-doing process. Meanwhile, this developmental period also leaves open a lot of opportunity for Chinese antitrust lawyers to wield their influence, since antitrust enforcement authorities and Chinese courts remain open to many issues.

### ***D. Expert Witnesses***

Given the essence of antitrust laws, it comes as no surprise that economists have so far been the most frequently drawn upon group of expert witnesses in antitrust litigation in China.

In China, the concept of the expert witness was initially introduced by the Provisions on Evidence in Civil Proceedings<sup>7</sup> promulgated by the Supreme People's Court in 2002, which grants the parties to the action the right to apply for one or two expert witnesses to appear in court to provide expert testimony on specific issues involved in the lawsuit, subject to approval by the courts. Ten years later, in 2012, the Supreme People's Court restated the concept of the expert witness for use in antitrust litigation, namely under the Antitrust Litigation Rules.<sup>8</sup> In particular, this restatement made clear

---

<sup>6</sup> See Article 112 of the Interpretation of Civil Procedure Law: "Where a piece of documentary evidence is under the control of the other party, the party bearing the burden of proof may, prior to the expiration of the time period for producing evidence, apply to the competent people's court in writing to request the latter to order the other party to submit the said evidence. Where the reasons for the application are established, the people's court shall order the other party to submit the piece of documentary evidence, and the expenses so incurred shall be borne by the applicant. Where the other party refuses to submit such evidence without justification, the people's court may find that the facts contained in the documentary evidence as claimed by the applicant are true."

---

<sup>7</sup> Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings, Chinese original is available at <http://www.china.com.cn/chinese/PI-c/92700.htm>, Article. 61.

<sup>8</sup> Provisions on Several Issues Regarding the Application of Laws to Civil Disputes Involving Monopolistic Acts, Chinese original is available at [http://www.law-lib.com/law/law\\_view.asp?id=383641](http://www.law-lib.com/law/law_view.asp?id=383641), Article 12, 13 and 14.

that the court might allow for the involvement of economists using economic analysis reports to help address some of the specialized issues involved in antitrust litigations.

As a result, antitrust litigation in China now deploys the use of expert witnesses more frequently than in any other type of litigation, to the extent that even American economists are now active in PRC AML litigation, especially those with Chinese language skills.

### ***E. Qualification as an Expert Witness***

An expert witness is one that the court recognizes as having special knowledge of a subject through qualifications, training and/or experience, so that they are allowed to state opinion on specialized matters, as well as to introduce or explain a specialized subject matter to the court. However, Chinese laws have not explicitly set down criteria for qualifying someone as an expert witness. Rather, in practice, the Chinese court enjoys a high level of discretion in recognizing a witness' qualifications to act as an expert.

In the notable Qihoo 360 v. Tencent<sup>9</sup> case, the qualifications of an economist being relied upon as an expert witness by one party became an issue during the course of proceedings. During the court hearing, the economist in question, who was supposed to be assisting Qihoo in defining the relevant market based on his economic analysis report, was challenged by his counterpart on the court trial. The challenge was aimed at denouncing the qualification of the economist as an expert witness, alleging the economist's description of job title to be inconsistent with that presented in the first instance trial and in the appeal. However the court declined to support such a challenge, instead concluding that it is the sufficiency of the facts and data, the accountability of the market survey, the appropriateness of the methods used in the econometric analysis report and other facts pertinent to its results, that should be the focus of the court, rather than the expert's educational background, previous working experience or research achievements.

Furthermore, in order to ascertain the credentials of the economic institution with which the economist worked, the court simply referred to an appropriate piece of evidence contained in the institution's official website page. Since the evidence was found to be authentic and publicly available, these were considered acceptable grounds for proof.

### ***F. Appointment of the Expert Witness***

The economist, as an expert witness, is usually appointed by the parties themselves. Under special circumstances, where either of the parties concerned fails to make such an appointment, the court shall designate one for the party(s) concerned if necessary.

The fee for the appointment of an economist as an expert witness is initially payable by the party making the appointment, but as proceedings advance, the court may decide to apportion the expenses incurred by the plaintiff in this regard to the damages being sought.

### ***G. Admissibility of the Evidence***

Under the rules on evidence, and Chinese court rules, the economic analysis report shall be submitted to the court prior to the trial, with the economist as an expert witness participating in the trial, and whose opinions as stated in court sessions are deemed to be statements made by the party concerned themselves, subject to possible further inquiry by the court, or cross-examination by the other party concerned, before being accepted by the court.

In the Qihoo 360 v. Tencent case, it is notable that Qihoo appointed two economists. In particular, the first economist who submitted the economic analysis report did not participate in the court trial, while a second economist appointed by Qihoo did. Consequently, the court decided that they would not accept the report, due to the first economist's absence, and an economic analysis report that inappropriately addressed more of the legal, rather than economic issues. The court continued to explain that, based on the second economist's continued participation and testimony in the trial concerning the economic related issues at stake, her testimony would be admissible to the court. The Qihoo 360 v. Tencent case can be regarded as the best illustration to date of the admissibility of evidence in connection with the role of economists as expert witnesses.

## **III. IPR RELATED ANTITRUST LITIGATION**

The intersection between intellectual property rights ("IPR") and antitrust law has been an ongoing focal point for discussion worldwide, including within China. Even though AML in China is still in its infancy, IPR-related private antitrust litigation has appeared, and has exerted significant impact on the development of IPR-related antitrust issues.

One of the most significant of these cases is Huawei v. InterDigital, which is a landmark case in this regard. In December 2011, two complaints were filed by Huawei before the Shenzhen Intermediate People's Court. The first complaint alleged that InterDigital had abused its dominance, and the second, that InterDigital had failed to negotiate on fair, reasonable and non-discriminatory terms ("FRAND") regarding licensing of its SEPs. In February 2013, the Shenzhen Court made the first-instance ruling and in October 2013, the Guangdong Supreme Court made the appellate ruling.

In this case, some important issues at the intersection between antitrust law and IPR were decided by the Guangdong Court. First, that the relevant markets should be regarded as separate technology licensing markets in respect of each single SEP; in other words, that each SEP constitutes a separate market and therefore

9 The full judgment in Chinese is available at <http://wenshu.court.gov.cn/content/content?DocID=4fe3cab6-8698-4f8f-9131-3ec8b921b96c&KeyWord=奇虎公司|垄断纠纷|上诉>.

each SEP holder naturally possesses a market share of 100 percent, indicating market dominance. In reaching this conclusion, the Guangdong Court considered the uniqueness of each SEP, and reasoned from the perspective of supply substitutability and demand substitutability. Second, the case set an example for establishing a FRAND royalty rate, where in determining the applicable royalty fee, the court mainly gave consideration to the non-discriminatory element. By comparing the royalty rates and sales volumes between Huawei and Apple Inc., the court found that the royalty rates for Huawei were much higher than for Apple Inc. and thus Huawei was being treated discriminately. The court finally reduced the royalty rate of InterDigital's SEPs from 2 percent down to 0.019 percent of the actual selling price for each Huawei product.

Meanwhile, it is worth noting that after the appellate ruling was made, the antitrust investigation initiated by the NDRC was suspended and the NDRC announced that a settlement agreement between Huawei and InterDigital had been reached. From this response by the NDRC, we can observe that the ruling of the court is respected by the antitrust enforcement agency and that it tends to avoid conflicts in decision making with the court.

The repercussions of the case have been far-reaching, particularly as only general legal provisions were previously available for reference in this area. Article 55 of the AML provides a general framework for IPR, stipulating that "this law is not applicable to undertakings who exercise their intellectual property rights in accordance with the laws and administrative regulations on intellectual property rights; however, this Law shall be applicable to the undertakings who eliminate or restrict market competition by abusing their intellectual property rights." Further to the case, this framework has since been augmented by a series of legislative activities. In April 2015, the State Administration for Industry and Commerce ("SAIC") enacted the Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition, thereby establishing the legal basis for antitrust enforcement agencies. The SAIC, NDRC, MOFCOM and State Patent Office separately drafted the Antitrust Guidelines on IPR, and have submitted their own versions to the Anti-Monopoly Commission under the State Council ("AMC"). AMC will take the four versions into considerations, and is expected to release the final version.

In addition to the forgoing legislation activities, the Supreme Court issued a judicial interpretation concerning the application of FRAND when determining royalty rates, thereby serving to further confirm the ruling in the Huawei v. InterDigital case. The judicial interpretation is named Interpretations of the Supreme People's Court on Issues Concerning the Application of Law in the Trial of Patent Infringement Dispute Cases (II), Article 24 of which provides that:

[t]he licensing terms of patents relevant to the standards shall be negotiated by the patentee and the accused patent infringer; where they fail to reach a consensus through negotiation, the parties may request the people's court to make

a ruling. In the determination of the licensing terms, the people's court shall take account of the degree of innovation of the patent and the function of the patent in the standards, the technical fields of the standards, the nature of the standards, the application scope of the standards, relevant licensing terms and other factors in line with the principles of fair, reasonable and non-discrimination [...].

It can be seen therefore that the Huawei v. InterDigital case brought with it a more in depth discussion of the interrelation between IPR and antitrust in China that has carried through to the legislature. It has also revealed a willingness on the part of the courts to help domestic companies lower barriers to the development of their own indigenous technology.

## IV. CONTRIBUTIONS OF THE COURTS

Due to the short time allocated to its implementation, China's AML does not give clear answers to many significant questions, for example, how to define the relevant market in SEP-related cases; how the Chinese courts should allocate the burden of proof and collect evidence; whether the rule of reason principle should apply to monopolistic agreement cases, particularly vertical cases; how to determine dominance in the relevant market, etc. In order to seek guidance on such questions, it is necessary to seek further recourse in decisions by the Chinese courts. There are three particularly significant and high-profile cases, namely Qihoo 360 v. Tencent, Huawei v. IDC, and Rainbow v. Johnson & Johnson.

### A. Qihoo 360 v. Tencent

This case was the first private antitrust lawsuit to be decided by the Supreme People's Court and provides a fundamental reference for determining dominance in the relevant market, and establishing the following guidelines.

#### 1. Clear Definition of Relevant Market is not Necessary in Every Abuse of Dominance Case

Due to the complexity of the relevant products involved in the case, the Supreme People's Court did not provide a clear boundary of the relevant market, but instead offered a powerful new perspective instead, where it said:

[I]n abuse cases, defining a clear relevant market is merely a tool, rather than an end, to evaluate market power and anti-competitive effects. Even though the relevant market has not been clearly defined, some direct evidence showing the anti-competitive effects could be enough to evaluate the alleged undertaking's market position and the anti-competitive impact of the alleged conduct.

#### 2. Market Share Could be Rough and Misleading When Establishing Dominance

In the decision, the Supreme People's Court acknowledged the fact



that Tencent's market shares exceeded 80 percent in both of the product markets involved. Notably however, the court continued to make another significant point; namely, that the position and function of market share when assessing a position of market dominance is to be decided based on the specific circumstances. A high market share does not necessarily mean market dominance, especially in a market where the competition has dynamic characteristics.

### ***B. Huawei v. InterDigital***

The court's decision in this case set the scene for a number of regulatory and judicial actions in China against allegedly abusive conduct by SEP holders. In addition, the Guangdong Court confirmed that every licensing market for each SEP constitutes an independent relevant product market, and each country of the relevant product market constitutes an independent relevant geographical market. The Guangdong Court came to these conclusions based on the theory that every single SEP is unique and non-substitutable, and could not be replaced by other technologies.

### ***C. Rainbow v. Johnson & Johnson***

This is the first private antitrust litigation concerning vertical agreements under the minimum resale price maintenance ("RPM") clause of the AML. In this case, the courts contributed guidelines on the following issues.

#### **1. "Per Se Rule" or "Rule of Reason"**

Rainbow alleged that J&J had engaged in RPM in violation of Article 14 of the AML and that it was not necessary to prove its anti-competitive effects. The Shanghai High Court held that in order to establish a claim under Article 14, it should be proven that the RPM clause has the effect of eliminating or restricting competition; in other words, that the existence of an RPM clause is not a per se violation of the AML, but rather, that the legality of the RPM clause is to be judged in accordance with the "rule of reason."

#### **2. How to Allocate the Burden of Proof**

Rainbow claimed that according to the Antitrust Litigation Rules, the defendant should bear the burden of proof in proving that the horizontal agreements do not have the effect of eliminating or restricting competition, and that this should apply to vertical agreements as well. The Shanghai High Court held the view that the plaintiff should bear the burden of proof in proving the antitrust effects of vertical agreements.

#### **3. Whether RPM Clauses Constitute a Monopoly Agreement**

In the appellate trial, the Shanghai High People's Court determined the following considerations to be the most important in analyzing the nature of minimum RPM, and that they can be treated as a fundamental approach to assessing such conduct: (1) Whether competition in the relevant market is adequate; (2) Whether the defendant has a strong market position; (3) What the motivation of the defendant is for fixing the minimum resale prices; and (4) What the

competitive effect is of fixing minimum resale prices. Among these considerations, the first one is the most fundamental inquiry, and only when the answer is no, is any further analysis required. After a relevant and comprehensive analysis from multiple angles (including market share, pricing power, brand influence and control over distributors), and comparison of its competitive and anti-competitive effects, the Shanghai High Court concluded that the RPM clause involved in this case constituted a monopoly agreement.

## **V. CONCLUSION**

Without any assistance from tri-damage and class actions systems, Chinese private antitrust litigation has been developing at breakneck speed over the last four years, having garnered attention from the courts, various undertakings, anti-trust lawyers and scholars alike. For differing purposes, competitors, upstream and downstream partners, consumers, antitrust lawyers and consumer rights associations continue to flock to PRC courts, and file antitrust litigation under various claim. No matter what their underlying motivations; competition, revenge, compensation, reputation or influence, such litigation will continue to benefit from the increasing engagement of Chinese judges with cases arising under the AML, benefit from Chinese undertakings and individuals becoming more aware of their rights under antitrust law and benefit from the efforts of China's society as a whole to incubate its fledgling competition culture. Through these prevailing efforts, we can ensure that the shift from a centrally planned economy to one guided by the market continues to develop in the healthiest possible way.

# RETHINKING THE CCA: DRAFT LEGISLATION LAYS GROUNDWORK FOR SIGNIFICANT CHANGE

BY ELIZABETH AVERY, SIMON MUYS & MATT RUBINSTEIN<sup>1</sup>



## I. INTRODUCTION

Australia's competition laws have been under review for over two years. The Competition Policy Review chaired by Professor Ian Harper ("Harper Review") received its Terms of Reference on March 27, 2014 and proceeded briskly through its allotted 12 months to deliver its Final Report on March 31, 2015. It then took another 12 months for the Commonwealth Government to finalize its response to the Harper Review, having deferred its decision on the Section 46 (misuse of market power) recommendation to a further inquiry that ended on March 16, 2016.

The Australian Government has finally released exposure draft legislation, to amend the Competition and Consumer Act of 2010 ("CCA") in line with the majority of the recommendations of the Harper Review, including:

- The controversial proposed changes to Section 46 of the CCA (misuse of market power) will be implemented according to the "Full Harper" formulation.
- The price signaling prohibitions in the CCA will be removed, to be replaced with a new prohibition on anti-competitive concerted practices.

- The ACCC has released draft guidelines on their interpretation of these two provisions, seeking feedback. Treasury has also released a set of questions seeking specific feedback on a number of the changes.

- The cartel provisions will be simplified and their exceptions relating to joint ventures and vertical arrangements will be strengthened.

- The third-line forcing provisions of the CCA will become subject to a competition test. The ACCC will be given additional powers to:

- authorize mergers, subject to review by the Australian Competition Tribunal (which will lose its power to authorize mergers in the first instance);

- grant exemptions for conduct that would otherwise contravene the competition prohibitions of the CCA; and

- grant class exemptions in relation to common business practices that do not generate competition concerns and could otherwise be authorized individually.

- In exercising many of its powers, the ACCC will not be limited to applying a competition test, but may also assess whether the public benefit of a proposed merger or proposed conduct will outweigh any detriment.

- The legislation does not pick up recommended changes that would have extended the application of the CCA to some government activities not currently caught, including some activities of local government.

- The amendments are also limited to changes to the CCA itself, and do not address any of the wider competition policy proposals raised by the Harper Review such as introducing greater competition in health and human services, intellectual property, transport and the state and territory areas of planning and zoning, retail trading hours and taxi licensing.

- The changes also do not seek to implement a number of the institutional changes recommended by Harper, such as the introduction of a new "access and pricing regulator."

<sup>1</sup> Partners and associate respectively at Gilbert + Tobin's Competition and Regulation group in Sydney, Australia.

## II. MISUSE OF MARKET POWER

### A. The New Section

Market power is by far the most controversial reform throughout the Harper Review, the reformulation has changed very little since the Draft Report and not at all since the Final Report. The proposed Section 46 now provides that:

(1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market.

The new test removes the “take advantage” element, introduces an “effects” alternative, and replaces the specific categories of exclusionary conduct with an overall “substantial lessening of competition” standard, which is to be assessed with regard to the following factors:

(2) Without limiting the matters to which regard may be had in determining for the purposes of sub-Section (1) whether conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market, regard must be had to the extent to which:

(a) the conduct has the purpose of, or has or would be likely to have the effect of, increasing competition in that market, including by enhancing efficiency, innovation, product quality or price competitiveness in that market; and

(b) the conduct has the purpose of, or has or would be likely to have the effect of, lessening competition in that market, including by preventing, restricting, or deterring the potential for competitive conduct or new entry into that market.

The new Section 46 applies the same test as the current Sections 45 and 47, though it is not clear how that test might operate in the context of unilateral conduct. Unlike most provisions of the CCA, the new Section 46 does not apply to any specific kind or category of conduct, such as an agreement, an acquisition or an exclusive dealing. Unlike the current Section 46 and similar laws in other jurisdictions, the proposed prohibition does not explicitly target exclusionary conduct.

The new Section 46 removes the specific provisions dealing with predatory pricing, including the infamous “Birdsville amendment.” It also removes the guidance relating to the interpretation of “take advantage” but retains the guidance on establishing when a corporation has substantial market power.

### B. ACCC Interpretation

The ACCC has issued a draft Framework for Misuse of Market Power Guidelines (“Draft Guidelines”) which provides that:

The objective of a misuse of market power provision is to prohibit unilateral conduct by a corporation with substantial market power that interferes with the competitive process by preventing or deterring rivals or potential rivals from competing on their merits. Sometimes this is broadly referred to as ‘exclusionary conduct’.<sup>2</sup>

The Draft Guidelines identify refusal to deal, predatory pricing, tying and bundling and margin/price squeeze as potential misuses of market power, and list as examples:

- refusal to supply an essential input (e.g. refusing to supply cement to a rival ready-mix concrete plant);
- land banking (e.g. a fuel retailer with 7 out of 8 retail fuel sites in a major town buys the first option to purchase two new designated sites with no plans to use them);
- predatory pricing (e.g. for 12 months the publisher of a free regional newspaper reduces its advertising rates to less than 50 percent of the rates offered by a new entrant, which does not cover its printing and distribution costs); and
- bundling a competitive product with a monopoly product (e.g. a firm will only sell its patented drug to pharmacies to agree to buy all their requirements of a drug that is about to lose its patent from the firm).

The Draft Guidelines also note conduct that would not raise concerns under the new Section 46:

- innovation, regardless of how “big” the firm is;
- efficient conduct designed to drive down costs;
- responding to price competition with matching or more competitive (above cost) price offers; and
- responding efficiently to other forms of competition in the market such as product offerings and terms of supply.

As examples of this conduct, the Draft Guidelines list:

- research and development (e.g. a firm developing a substantially improved version of an existing technological product that causes many suppliers of the first generation product to close);
- standardized or national pricing by large retail chains (e.g. a firm opens a store in a new town and its above-cost prices cause small retailers to become unprofitable and close);
- price war (e.g. four large firms without market power engage in a price war that causes smaller suppliers to close); and

- investing in new production technology to increase efficiency (e.g. an iconic lawnmower manufacturer invests in new production technology to lower the cost and improve the reliability of its lawnmowers in order to prevent an international manufacturer from entering).

The ACCC's statement of the objective of a misuse of market power section is a sensible one, but it is not clear how that objective is fulfilled by the new Section 46. The ACCC's examples are a useful guide to the ACCC's interpretation and its enforcement priorities, but they will not bind third parties or a court. Early court consideration of the scope of the section will be critical.

It also remains unclear whether the mandatory factors, requiring consideration of pro- and anti-competitive purposes and effects, will provide much clarity or predictability to the new law, since there is no legislative guidance on what weight should be given to each purpose or effect. The well-accepted challenge with this law is to avoid chilling the competitive conduct of larger firms (which would leave consumers worse off) while also preventing firms with market power from excluding competitors from the market.

### III. PRICE SIGNALING AND CONCERTED PRACTICES

The Exposure Draft also amends Section 45 of the CCA to provide that a corporation must not: "engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition."

The ACCC has in some past cases found it difficult to establish the element of commitment, rather than mere hope or expectation, which is required to establish an understanding under the current Section 45. The addition of a prohibition against concerted practices is designed to capture anti-competitive information exchanges where there is no commitment to act.

The Harper Review considered that the meaning of "concerted practice" did not require any legislative definition, but described it in the following terms:

The word "concerted" means jointly arranged or carried out or coordinated. Hence a concerted practice between market participants is a practice that is jointly arranged or carried out or coordinated between the participants. The expression "concerted practice with one or more persons" conveys that the impugned practice is neither unilateral conduct nor mere parallel conduct by market participants (for example, suppliers selling products at the same price).

The Exposure Draft legislation follows the Harper recommendation and does not provide any definition of the term "concerted practice." The Explanatory Memorandum provides that:

The concept of a concerted practice is well established in competition law internationally. The amendment to introduce the concept of a "concerted practice" is made to recognize that lesser forms of coordination than what has been judicially interpreted as required for a contract, arrangement or understanding, should be captured by Section 45, provided the practice has the purpose, effect or likely effect of substantially lessening competition...

The interpretation of a "concerted practice" should be informed by international approaches to the same concept, where appropriate. Broadly, international jurisprudence suggests that coordination between competitors, where cooperation between firms is substituted for the uncertainties and risks of independent competition, is potentially a concerted practice.

International approaches to the "concerted practices" concept are complicated by the fact that in Europe the concept needs to cover all forms of coordination below an agreement – there is no separate category of "understanding" as there is in Australia. In Europe there is also an exception for concerted practices that contribute to efficiencies, and it is not clear that the Australian "substantial lessening of competition" would protect such practices.

The Explanatory Memorandum appears to focus on private disclosures of information, noting that: "The public disclosure of pricing information can help consumers to make informed choices and is unlikely to be harmful to competition."

However, the new section is not limited to private information and the new prohibition may extend to the disclosure of public information.

The ACCC has provided a draft Framework for Concerted Practices Guidelines which provides a similar definition to that set out in the Explanatory Memorandum: "A concerted practice is a form of coordination between competing businesses by which, without them having entered a contract, arrangement or understanding, practical cooperation between them is substituted for the risks of competition."<sup>3</sup>

The ACCC sets out a number of examples of conduct that would be likely or unlikely to constitute concerted practices, but does not identify clear principles beyond its initial definition. There remains a great deal for the courts and the ACCC to do before the definition of concerted practices is established in Australia with any certainty.

The ACCC has expressed concern about price signaling and information sharing conduct in relation to the boycott of beef cattle



sales,<sup>4</sup> bank rate-setting,<sup>5</sup> airline capacity,<sup>6</sup> eggs<sup>7</sup> and of course petrol prices, in relation to which the ACCC settled court proceedings in late 2015.<sup>8</sup> As with the new misuse of market power prohibition, the ACCC can be expected to take action under the concerted practices prohibition as soon as it has an opportunity to do so.

Consistent with the overall simplification of the CCA, the current price signaling provisions – which currently only apply to the banking sector – will be repealed as they will be replaced with this broader prohibition. They have never been used and are unlikely to be missed.

## IV. CARTEL PROVISIONS

One of the more significant amendments to the CCA is in relation to the cartel provisions, which are considered both overly complicated and confusing in their current form and provide only limited exceptions for joint ventures and vertical arrangements.

### A. Simplification

The Exposure Draft does not simplify the cartel provisions – which we can expect in the next round of changes – but it does remove the overlap between the new cartel provisions and the old framework by removing all references to exclusionary provisions and modifying the cartel provisions to cover collective boycotts, that is, restrictions on acquisition as well as supply.

It also removes the definition of “likely” that was specific to the application of the cartel provisions to “actual or likely competitors.” That definition provided that “likely” meant “a possibility that is not remote,” which was found to be a low threshold in *Norcast v. Bradken*.<sup>9</sup> The definition of “likely” will now be aligned throughout the CCA as interpreted by the courts.

### B. Extra-territoriality

The Exposure Draft confines the application of the provisions to cartel conduct that affects competition in Australian markets, that is, conduct occurring in trade or commerce within Australia or between

Australia and places outside Australia.

### C. Joint Venture Exception

The Exposure Draft broadens the current exception for joint ventures to provide appropriate exemptions for joint venture activity, which will no longer be limited to contracts or to supply joint ventures. Instead, the exception will apply to any restriction in a contract, arrangement or understanding that is for the purposes of, or is reasonable necessary for undertaking, a joint venture for the production, supply or acquisition of goods or services. Notably, the current drafting would not exempt a pure R&D joint venture.

### D. Vertical Arrangements Exception

The Harper Review recommended that vertical arrangements be exempted from the cartel provisions and addressed by Sections 45 or 47 to the extent that they have the purpose, effect or likely effect of substantially lessening competition. The Exposure Draft provides a broad exception for restrictions in vertical arrangements for the supply or acquisition of goods or services.

This exception is notable for its potential to exempt dual distribution models, where a supplier provides services both directly to the public and through intermediaries, from per se liability as was argued in the ACCC’s recent price-fixing cases against ANZ and Flight Centre. These arrangements would instead be assessed under the substantial lessening of competition test, which would arguably have been a more appropriate basis for the ACCC to pursue those cases.

The new exception may also lead to different results in matters such as the ACCC’s recently concluded investigation into Expedia and Booking.com, which was similar in some respects to the Flight Centre case in that the online booking agencies prevented hotels from directly offering rooms at cheaper prices through other channels including the hotels’ own offline channels.<sup>10</sup>

If these issues are, in the future, to be assessed through a substantial lessening of competition test rather than a per se prohibition, some suppliers may be more willing to defend their arrangements rather than settling.

## V. VERTICAL ARRANGEMENTS

### A. Third-Line Forcing

Under the Exposure Draft, third-line forcing will no longer be prohibited per se but will be subject to a competition test. This will bring Australian law in line with comparable international jurisdictions and other provisions of the CCA. At present the ACCC receives hundreds of notifications of third-line forcing conduct each year and has only

10 Expedia and Booking.com agree to reinvigorate price competition by amending contracts with Australian hotels, ACCC Press Release, September 2, 2016.

4 Senate Rural and Regional Affairs and Transport References Committee, Effect of market consolidation on the red meat processing sector, Interim Report, May 2016 at p 26.

5 ACCC’s Rod Sims warns of “gaps” in cartel laws, Australian Financial Review, April 23, 2015.

6 ACCC concerned by Qantas comments over price war, Sydney Morning Herald, September 3, 2013.

7 ACCC demands tougher competition laws, The Land, April 7, 2016.

8 Petrol price information sharing proceedings resolved, ACCC Press Release, December 23, 2015.

9 *Norcast S.ár.L v. Bradken Limited (No 2)* [2013] FCA 235 (March 19, 2013).

ever taken action against a handful, so this change will relieve a significant administrative burden on both business and the ACCC.

### ***B. Resale Price Maintenance***

By contrast, resale price maintenance will remain prohibited on a *per se* basis, that is, it will not be subject to a competition test. The Harper Review recognized that attitudes towards resale price maintenance had shifted internationally, notably in the US Supreme Court case of *Leegin Creative Leather v. PSKS*,<sup>11</sup> which in 2007 overturned almost 100 years of precedent and examined – and approved – resale price maintenance conduct under a “rule of reason” analysis. However, the history of third-line forcing regulation in Australia shows how long it can take for a *per se* rule to be relaxed.

However, resale price maintenance will now be able to be notified to the ACCC, immunizing notified conduct from prosecution unless the ACCC overturns the notification, and ensuring the ACCC’s notification team will be busy even without third-line forcing notifications. Resale price maintenance will become immune 60 days after notification, significantly longer than the 14 days that currently applies to third-line forcing. The Exposure Draft also includes an exception for resale price maintenance conduct between related corporate bodies.

### ***C. Section 47 Simplification***

The Harper Report recommended that Section 47 be repealed and its role taken over by its revised Sections 45 and 46, which together would address conduct by a business with market power, contracts, arrangements, understandings and concerted practices that have the purpose, effect or likely effect of substantially lessening competition. If not repealed, Section 47 should be simplified to improve its legibility and expand its coverage.

The Exposure Draft retains 47 and does not yet simplify it. Although much of Section 47 conduct will be addressable under Sections 45 or 46, there is value in a separate section that specifies forms of conduct that may contravene the CCA and gives guidance to business.

## **VI. MERGER PROCESSES**

There will be some significant changes to the formal merger process, following the Government’s acceptance of the Harper Panel’s recommendation to combine formal clearance with authorization. The current formal merger clearance process will be removed, and the merger authorization process will be reformed according to the following structure:

- the ACCC will be the decision maker at first instance and be

able to authorize a merger if it:

- does not substantially lessen competition; or
- would result or be likely to result in a benefit to the public that would outweigh any detriment;
- this process will not be subject to any prescriptive information requirements, but the ACCC will be empowered to require the production of business and market information;
- strict timelines will apply, which can only be extended with the consent of the merger parties;
- decisions of the ACCC are to be subject to review by the Australian Competition Tribunal under a process that is also governed by strict timelines; and
- the Tribunal will make its decision based upon the materials that were before the ACCC, but will have the discretion to allow further evidence or to call and question a witness.

The removal of the option of direct application to the Australian Competition Tribunal for merger authorization will be missed by a number of businesses and their advisers who have begun to see authorization as a useful alternative to the ACCC processes. Successful applications to the Tribunal in the AGL/Macquarie Generation and Sea Swift/Toll matters have demonstrated the different approaches of the ACCC and the Tribunal in assessing these mergers.

## **VII. AUTHORISATION, NOTIFICATION AND CLASS EXEMPTIONS**

In line with Harper and the Government’s overall approach to the simplification of the CCA, amendments will be made to the authorization and notification process to ensure that:

- only a single authorization application is required for a single business transaction or arrangement;
- the ACCC can grant exemptions from Sections 45, 46, 47 and 50 of the CCA; and
- the ACCC can grant a “class exemption” in respect of classes of conduct unlikely to raise competition concerns.

In determining whether to grant an authorization or exemption, the ACCC will be able to take into account both competition and public benefit considerations.

The class exemption power for “common business practices that do not generate competition concerns, or are likely to generate a net public benefit,” is particularly interesting. It mirrors the block exemption power of the European Commission, which has been ex-

11 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

exercised to exempt certain categories of vertical restraint and concerted practices,<sup>12</sup> technology transfer agreements<sup>13</sup> and cargo liner shipping.<sup>14</sup> This last area is expected to be an early application of the ACCC's class exemption power if the international cargo liner shipping framework in Part X of the CCA is repealed.

## VIII. PRIVATE ACTIONS

The CCA currently supports private actions by allowing a party to proceedings to rely on a finding of fact made by a court in civil penalty proceedings as prima facie evidence of that fact. The Exposure Draft implements the Harper Review's recommendation that parties to private proceedings will additionally be able to rely on admissions of fact made by the person against whom the proceedings are brought. This could, for example, enable parties to private proceedings to rely on evidence given by witnesses during cross-examination in civil penalty proceedings or, more significantly, in statements of agreed facts provided as part of a negotiated settlement.

## IX. POWER TO OBTAIN INFORMATION

The Exposure Draft would increase the ACCC's power to obtain information, documents and evidence under Section 155 to include investigations of alleged contraventions of court enforceable undertakings, and also increases fines for non-compliance to 100 penalty units (up from 20) or two years imprisonment (up from six months). However, it also introduces a "reasonable search" defense for a failure to produce documents on the basis that a person has undertaken a reasonable search for the documents. In determining whether they have made a reasonable search, a person may take into account:

- the nature and complexity of the matter to which the notice relates;
- the number of documents involved;
- the ease and cost of retrieving a document;
- the significance of any document likely to be found; and
- any other relevant matter.

---

<sup>12</sup> Commission Regulation (EU) No 330/2010 of April 20, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

<sup>13</sup> Commission Regulation (EU) No 316/2014 of March 21, 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.

<sup>14</sup> Commission Regulation (EC) No 906/2009 of September 28, 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia).

## X. ACCESS TO INFRASTRUCTURE

The Government simultaneously released its response to the 2013 Productivity Commission inquiry into the National Access Regime as part of its response to the Harper Review, and accepted the Productivity Commission's recommendations rather than those made by Harper. The Exposure Draft implements the Productivity Commission's proposed amendments to the declaration criteria, including the following:

- instead of assessing whether access would promote a material increase in competition in at least one market, a comparison will be made of competition with and without access on reasonable terms and conditions following declaration, which would reverse the Tribunal position in the Glencore/Port of Newcastle decision currently under appeal (though the Explanatory Memorandum occasionally slips into the "with and without access" formula-<sup>15</sup>tion);
- the test for whether it would be "uneconomical" for anyone to develop another facility will be satisfied where total foreseeable market demand over the declaration period could be met at the least cost by the facility (taking into account the costs of coordinating multiple users);
- the decision-maker must consider whether access (or increased access) would promote the public interest (taking into account investment incentives and compliance and administration costs), and not whether it would be contrary to the public interest; and
- the criterion relating to existing access regimes be replaced with a threshold clause stating that the decision-maker does not need to consider an application or recommendation if the regime is subject to an effective access regime.

There are also some process changes, such as automatic declaration where the Minister does not make a decision within the time period (rather than the opposite), and automatic revocation of certification if a state regime changes.

Finally, the changes resolve an uncertainty about the scope of what the ACCC can order a facility owner to build by making it clear that the ACCC's order can include increasing the capacity of infrastructure and not just its geographic reach (a particularly relevant debate in the pipeline sector).

---

<sup>15</sup> Explanatory Memorandum at [13.20].

## XI. COMPETITION

The Exposure Draft has changed the definition of “competition,” but this is not as dramatic as it sounds. The new definition includes competition from goods and services that are capable of importation, not only those that are actually being imported. This recognizes that credible threats of imports can exert competitive pressure on the relevant market in Australia, and is sure to be referred to extensively in merger submissions.

## XII. WHAT’S MISSING?

The Exposure Draft omits two of the Harper Review recommendations that were accepted in principle by the Commonwealth Government last year. These are:

- Recommendation 24, which would extend the competition law provisions of the CCA to the Crown insofar as it engages in any activity in trade or commerce, rather than applying only insofar as the Crown carries on a business as under the current position; and
- Recommendation 26, which would extend the extraterritorial reach of the CCA to apply to overseas conduct that has relates to trade or commerce within Australia or between places in Australia and outside Australia, rather than requiring a connection with Australia based on residence, incorporation or business presence.

By its nature, the Exposure Draft deals only with changes to the CCA and does not progress the broader competition policy reforms recommended by the Harper Review in the areas of health and human services, intellectual property, transport and the state and territory areas of planning and zoning, retail trading hours and taxi licensing. These reforms are continuing under different Commonwealth, State and Territory and intergovernmental processes.

The changes also do not pick up on significant proposals made by Harper to reform a number of the institutional arrangements, such as a proposal for a new “access and pricing regulator,” a new national competition policy body and the re-introduction of competition payments. These reforms will also require inter-governmental support.



# RECENT DEVELOPMENTS IN JAPANESE CARTEL ENFORCEMENT – TIME FOR A CHANGE?

BY ATSUSHI YAMADA<sup>1</sup>



## I. INTRODUCTION

This year, the Japan Fair Trade Commission (“JFTC”) celebrated the 10 year anniversary of the leniency system in Japan. As of March 2016, there had been a total 938 applications since the system’s introduction in January 2006.

The leniency system has become one of the main drivers of the Japanese cartel enforcement system, and indeed, today the JFTC considers the leniency system as a key investigative tool. Of the 938 applications as of March 2016, there were 136 cases where the

JFTC issued a formal order and also where leniency application was possible, therefore in roughly 80 percent of those cases where it was possible, applications were made (at least 109 in total). Leniency applications were made in all 12 cases where the total surcharge payment order (administrative fine) imposed exceeded 10 billion JPY. In addition, leniency applications were made in all five cases where the JFTC had sought criminal enforcement. Beyond the domestic sphere, the system has also enabled the JFTC to coordinate with other competition agencies such as the U.S. DOJ and the EU Commission with respect to international cartel cases.

## II. GENERAL TRENDS

Cartel enforcement by the JFTC may appear to have somewhat weakened in the past few years, with the JFTC only issuing formal orders for seven cases for each of the fiscal years (“FY”) 2014 and 2015. In the three years prior to 2014, it had been issuing orders for 15 to 20 cases annually. With respect to leniency, we have seen a similar trend. Whereas there were more than 100 applications made annually between FY 2010 to FY 2012, the number had declined to 50 and 61 respectively for FY 2013 and FY 2014.

However, this may not be an ongoing trend. In FY 2015 the number of leniency applications jumped to 102. The JFTC has also reiterated that cartel enforcement remains the agency’s main enforcement priority.

## III. OVERVIEW OF RECENT CASES

Despite the relative slowdown, the JFTC has been continuing its enforcement efforts. Here is an overview of recent cases brought by the JFTC mainly focusing on the developments in the last fiscal year (from April 2015 to March 2016) with some comments on some more recent developments.

### A. JFTC Administrative Cases

Under the Anti-Monopoly Act (“AMA”), cartel enforcement can be achieved through either an administrative route or a criminal route. However, in practice, enforcement by way of administrative orders (cease-and-desist orders and/or surcharge payment orders (or administrative fines)) has been the predominant method of enforcement by the JFTC. In FY 2015, the JFTC issued formal administrative orders for two cartel cases and five bid-rigging cases (four of which concerned public procurement).

### 1. Cartels – The Capacitor Cartel

<sup>1</sup> Atsushi Yamada is a partner at Anderson Mōri & Tomotsune in Tokyo.

The JFTC issued cease-and-desist orders and surcharge payment orders against manufacturers selling aluminum electrolytic capacitors and tantalum electrolytic capacitors on March 30, 2016. The total amount of surcharge payment orders imposed in these two cases was approximately 6.7 billion JPY (roughly \$60 million USD). These cases are the first time the JFTC issued its orders concerning the capacitor cartel. Following the JFTC case on ocean shipping in 2014, the capacitor cartel case demonstrates the JFTC is continuing pursuit of international cartels.

## **2. Bid-Rigging – Enforcement Focused on Domestic Cases**

The JFTC issued cease-and-desist orders and surcharge payment orders against the participants bidding for snow-melting equipment works for the Hokuriku Shinkansen (or the “bullet-train”) ordered by the Japan Railway Construction, Transportation and Technology Agency on October 19, 2015. This follows a criminal accusation filed in 2014 on the same case which led to criminal fines for the companies and prison sentences for the individuals (however, all prison sentences for individuals were suspended).<sup>2</sup>

The JFTC issued cease-and-desist orders and surcharge payment orders against manufacturers selling poly aluminum chloride ordered by the local governments in the Tohoku district, the Niigata district and the Hokuriku district, on February 5, 2016. The total amount of surcharge payment orders imposed for these three cases was approximately 1.6 million JPY (roughly \$14,000 USD).

The JFTC issued cease-and-desist orders and surcharge payment orders against the participants bidding for the grain elevator works ordered by the agricultural cooperatives, etc. in Hokkaido, on February 10, 2016. The total amount of surcharge payment orders imposed was approximately 671 million JPY (roughly \$5.8 million USD). This case is one example of the JFTC’s growing efforts to clamp down on the agricultural sector.

As noted before, the total number of cases remains relatively low. And except for the capacitor cartel case, all cases were domestic which appears to reflect the JFTC’s focus on sectors closely related to the national economy.

## **B. JFTC Criminal Accusations<sup>3</sup>**

The JFTC filed a criminal accusation for a bid-rigging case concerning the disaster restoration paving works for the Great East Japan Earthquake ordered by the Tohoku branch of East Nippon Expressway Company Ltd. on February 29, 2016.

With respect to criminal cartel enforcement, the JFTC adopted a policy back in 1990 which provides guidance on the kinds of cases likely to be considered for criminal enforcement. The policy basically states that the JFTC will file criminal accusations with the Public Prosecutors Office to actively seek criminal penalties in cases involving serious violations of the AMA which are likely to have a widespread influence on the national economy such as hard-core cartels; involving firms or industries that are repeat offenders or that fail to take the appropriate measures to eliminate a violation and where the administrative measures of the JFTC are not considered sufficient. Since the adoption, the JFTC has become more proactive in criminal enforcement, resulting in criminal accusations in 15 cases during the period from 1991 to 2015. The JFTC has filed criminal accusations at a steady pace roughly every one or two years, and this trend is likely to continue.

## **C. Tokyo High Court Cases**

In early 2016, the Tokyo High Court heard three appeals to JFTC hearing orders regarding the cathode-ray tube (“CRT”) cartel case. The CRT cartel case was the first case where the JFTC had imposed a surcharge payment order against a foreign company in an international cartel case, and as the subject matter related to the sale of CRTs manufactured by companies located outside of Japan to television manufacturers also located outside of Japan, there was a question of whether the Tokyo High Court would decide on extraterritoriality. However, the Court dismissed all three appeals, affirming the JFTC’s conclusion that the parent companies of the television manufactures should be essentially regarded as the purchaser. As these parent companies were all located in Japan, the Court did not decide on the issue of extraterritoriality.

## **D. Developments in FY 2016**

As of July 2016, there has been only one case, a bid-rigging case, where the JFTC has issued a formal order. On July 12, 2016, the JFTC issued cease-and-desist orders and surcharge payment orders (total of approximately 430 million JPY (roughly \$4.2 million USD)) against the participants bidding for communication equipment ordered by the Tokyo Electric Company. The case demonstrates the JFTC’s continuing pursuit of bid-rigging cases in the domestic market.

3 Under Japanese law, the Public Prosecutor has the sole authority to decide whether or not to prosecute a criminal cartel case. Therefore, while the JFTC could commence investigation of a case, in the event it deems it appropriate to have the case handled through the criminal enforcement process, it has to file a criminal accusation with the Public Prosecutors Office. Then a public prosecutor will decide whether or not to prosecute the case at the criminal court.

2 In Japan, even in the event the JFTC decides that a certain case should be considered for criminal enforcement and a criminal accusation is filed, the JFTC may also issue an administrative order. The AMA provides for how an adjustment should be made between a criminal fine and a surcharge payment order.

## ***E. Ongoing Investigations***

The JFTC does not make its investigations public, but according to press reports, the JFTC has conducted dawn raids for alleged bid-rigging concerning military equipment ordered by the Self Defense Ministry of Japan and alleged cartel activity concerning components for Hard Disk Drives. There also have been reports that the JFTC has conducted dawn raids for alleged bid-rigging for the communication equipment ordered by the Chubu Electric Company and alleged bid-rigging concerning several other disaster restoration paving works following the Great East Japan Earthquake.

## **IV. CHANGE TO THE LENIENCY SYSTEM**

While there have been no changes to the substance of the system, the JFTC recently announced, on May 25, 2016, that for leniency applications made after June 1st, 2016, it will make public the name of the applicant and the discount rate when it issues a press release of its formal order. The previous practice was that the JFTC would only make such information public if the applicant had made such a request. While it appears that in the vast majority of the leniency cases such consent was given, apparently there were some cases where the applicant chose not to do so. Nevertheless, the JFTC has decided to change its practice for the purpose of increasing transparency, and we have yet to see how this might affect future leniency applications.

## **V. ABOLISHMENT OF THE JFTC HEARING PROCEDURE**

In April 2015, a new system was introduced for procedures challenging orders issued by the JFTC pursuant to the amendment of the AMA. The amendment abolished the JFTC's previous hearing procedure where the JFTC tribunal had heard challenges to orders issued by the JFTC. The old hearing procedure was replaced by a new system where challenges to the JFTC's cease-and-desist orders and surcharge payment orders will be reviewed by the judicial court and shall be subject to the exclusive jurisdiction of the Tokyo District Court. While we have yet to see a decision rendered by a district court under the new system, the involvement of a first instance judicial court might bring about a more robust development of legal theories based on case law.

In addition, changes have been made with respect to the appellate court procedure as well. Under the previous hearing procedure, in the event that a party chose to further challenge a decision made by the JFTC, this appeal would be heard by the Tokyo High Court. Further, the AMA required that in these circumstances, the Tokyo High Court give deference to the decision made by the JFTC and there were also limitations on the submission of new evidence to the Tokyo High Court. However, under the new system, such restraints have been abolished allowing the Tokyo High Court greater leeway to hear appeals. Again, we have yet to see an actual case to

test this new procedure.

## **VI. PROGRESS IN TERMS OF DUE PROCESS**

### ***A. Introduction of a New Hearing Procedure Prior to Issuing a Formal Order***

The amendment to the AMA also introduced a new procedure called, "Procedures for Hearing of Opinions" where the JFTC hearing officer will conduct a hearing for opinions from the party prior to the issuing of a cease-and-desist order and/or a surcharge payment order. Even before this amendment, the AMA had provided the party an opportunity to express its opinions on the JFTC's draft order and to submit evidence. However, the amendment requires a neutral hearing officer to preside over the process, thus further clarifying the process, and granting the party certain rights (although limited) to review and copy evidence that supports the findings by the JFTC.

### ***B. Enhancement of Due Process during the Investigation Stage***

With respect to the investigation procedure, the JFTC has published "Guidelines on Administrative Investigation Procedures under the Antimonopoly Act" in order to ensure the appropriateness of its administrative investigation procedures. The Guidelines clarify the standard steps and key points to note in the JFTC's administrative investigation procedures. While the main purpose of the Guidelines is to inform the JFTC officers engaged in case investigations, the Guidelines were made public to enhance the transparency of the JFTC's investigation procedures and contribute to the smooth progress of case investigations. However, as the Guidelines are not much more than a confirmation of the JFTC's previous practices, there is room for more work yet to be done to this end, as discussed further below.

## **VII. PROPOSED REFORMS**

The JFTC has been arguing that the current surcharge payment system, which is the main method of deterrence of cartels in Japan, is rigid and lacks flexibility. Under the current system, the amount of surcharge payment is calculated by multiplying a statutorily fixed rate to the party's turnover of the relevant product, and the JFTC has no discretion to adjust the amount of the fine. Further, with respect to leniency, the discount rate is fixed according to the "rank" of the leniency applicant which is basically determined by the timing of the filing of the application. Provided the applicant meets the statutory requirements by making the application and providing certain information, the rank and the discount rate are fixed. The JFTC claims that these procedures prevent the JFTC from evaluating the timing and additional value of the evidence provided by the leniency applicant to determine the discount rate, and also prevents the JFTC from taking into consideration the degree of cooperation of the applicant to determine the amount of any fine. The JFTC also claims that the current system provides less incentive for a leniency applicant to cooperate, and this results in a less effective leniency system compared to other jurisdictions.



Based on this understanding, in February 2016 the JFTC set up the “Study Group on the Anti-Monopoly Act.” In July 2016, the JFTC published the Study Group’s interim report titled “Summary of Issues Concerning the Modality of the Administrative Surcharge System”<sup>4</sup> and reached out for public comments. The report sets out various issues that the Study Group intends to consider further, and we are yet to see to what extent there will actually be changes to the current system.

## VIII. CHALLENGES – ENHANCING DUE PROCESS

In 2014, the Japanese Government (the “Cabinet Office”) set up an “Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act,” for the purpose of enhancing fairness and transparency in the JFTC’s administrative investigation process. After discussing and examining the JFTC’s current investigation procedures and addressing such issues as the possibility of introducing a right to have an attorney present at dawn raids and at interviews conducted by the JFTC, and the possibility of introducing attorney-client privilege; the Advisory Panel published its report in December, 2014<sup>5</sup>. While the business community and attorneys had hoped that meaningful measures to enhance due process in the JFTC’s administrative investigation procedure would be proposed by the Advisory Panel, the outcome failed to meet such expectations: for example, neither of the above items (i.e. the right to have an attorney present at dawn raids and interviews conducted by the JFTC, and attorney-client privilege) were recommended. A marginal improvement was the JFTC putting in writing its investigation practice and publishing it as the “Guidelines on Administrative Investigation Procedures under the Antimonopoly Act” as mentioned above. This outcome was met by disappointment in the business community and among defense attorneys.

However, the Advisory Panel did leave some room for discussion that might lead to progress in the near future. In its conclusion, the Advisory Panel stated that:

[It] did not come to the conclusion that attorney - client privilege, presence of an attorney during deposition<sup>6</sup>, and other rights to defense should be allowed, due mainly to a concern that the JFTC’s fact - finding ability is affected. However, if discretionary surcharge or other systems for securing incentives to cooperate in the JFTC’s investigation and disincentives not to cooperate in or obstruct it are introduced, com-

panies will be further encouraged to provide cooperation. As a result, a situation that impairs the fact-finding ability, which is concerned under the current circumstances, will be less likely to arise. Thus, if strengthening the right to defense is to be considered in ways other than the one to be implemented under the current system by the Advisory Panel, the Advisory Panel concluded that it is appropriate to conduct studies concurrently on the possibility of introducing the above systems.

Essentially, the Advisory Panel concluded that rather than strengthen the rights of defendants by simply adding new processes (such as attorney-client privilege) to the current system, policymakers should consider introducing these measures concurrently with broader systematic changes designed to secure cooperation and disincentivize obstruction in JFTC investigations.

There remain controversies over whether it is sensible to take the view that there should be a trade-off between enhancement of due process during the course of an investigation procedure and strengthening of the fact-finding ability of the JFTC. However, given that the JFTC has set up the “Study Group on the Anti-Monopoly Act” to explore the possibility of modifying the current surcharge payment order system including the possibility of introducing a discretionary surcharge system, we might see further developments with respect to enhancing of due process in the near future.

## IX. CONCLUSION

This article has outlined a number of cartel enforcement developments in Japan in the past year or two, and there are likely to be more to come. Although the JFTC has not brought a high number of new cartel enforcement cases in the past few years, the JFTC is far from dormant. It has maintained a watchful eye on its main policy priority rigorous cartel enforcement – and alongside bringing new cases, the JFTC has been very proactive in introducing new reforms to further strengthen and bring efficiency to its enforcement efforts. Now is a critical time for lawyers and businesses to carefully monitor any legal and policy developments, as well as keeping a close eye on whether due process and procedural fairness are ensured and enhanced along the way.

4 English translation is available at: [http://www.jftc.go.jp/en/pressreleases/yearly-2016/July/160713\\_2.files/160713\\_2.pdf](http://www.jftc.go.jp/en/pressreleases/yearly-2016/July/160713_2.files/160713_2.pdf).

5 English translation is available at: <http://www8.cao.go.jp/chosei/dokkin/finalreport/body-english.pdf>.

6 The translation in FN 4 uses the term “deposition,” however, the original term covers both voluntary interviews and compulsory interrogations, so the use of the term “deposition” might be misleading.



# MAKING MARKETS WORK FOR DEVELOPMENT THROUGH EFFECTIVE COMPETITION POLICIES: RECENT EXPERIENCE FROM THE WORLD BANK GROUP IN EAST ASIA PACIFIC

BY MARTHA MARTINEZ LICETTI,  
GRACIELA MIRALLES MURCIEGO  
& GEORGIANA POP<sup>1</sup>



<sup>1</sup> The authors are part of the Competition Policy Thematic Group of the Trade and Competitiveness Global Practice of the WBG. The views expressed in this article are those of the authors and do not necessarily reflect the views of The WBG. This article also features the work and contributions of Guilherme de Aguiar Falco, Tania Begazo, Tanja Goodwin, Roberto Martin Nolan Galang, Sara Nyman, and Leandro Zipitria. More information regarding the work of the Trade & Competitiveness Global Practice of the WBG on competition policy is available at: [www.worldbank.org/en/topic/competitiveness/brief/competition-policy](http://www.worldbank.org/en/topic/competitiveness/brief/competition-policy).

## I. INTRODUCTION

The World Bank Group (“WBG”) has two goals: eliminating extreme poverty by the year 2030, and building what we call “shared prosperity” – focusing especially on the needs of the bottom 40 percent of each country’s income distribution. Achieving those twin goals will require vigorous economic growth – along with job creation on a vast scale. To employ and empower the poor, the global economy must create 600 million new jobs by the year 2027, according to World Bank research. And 90 percent of those jobs must be created in the private sector.<sup>2</sup> Therefore, ensuring that markets can function with flexibility and in a healthy manner – free from the anti-competitive practices that can stifle dynamism and suppress growth – is a key part of our work, as a development institution.

Within the broad agenda of institutional priorities, East Asia-Pacific<sup>3</sup> is without a doubt one of the regions where client countries have significantly increased their demand for WBG’s advisory services and analytical work that contributes to better understand the effects of competition policies. Accounting for nearly two-fifths of global economic growth, East Asia constitutes one of the main growth drivers of the world economy.<sup>4</sup> However, the region is highly heterogeneous in terms of economic development, with countries ranking at the top of the world in income levels per capita like Australia, Hong-Kong, Japan and Korea – while others remain at the bottom – i.e. Timor, Cambodia and Laos.<sup>5</sup> On the one hand, growth rates of GDP are among the highest in the world, with an expected

<sup>2</sup> See generally Klaus Tilmes (2015) “Does competition create or kill jobs?” WBG external web resources. Available at: <http://blogs.worldbank.org/psd/does-competition-create-or-kill-jobs>.

<sup>3</sup> This classification follows the regional division used by the WBG according to which East Asia Pacific

<sup>4</sup> See WBG Press Release, October 4, 2015 “Growth in East Asia Pacific Likely to Moderate But Still Remain Solid, Says World Bank Report.” Available at: <http://www.worldbank.org/en/news/press-release/2015/10/04/growth-in-east-asia-pacific-likely-to-moderate-but-still-remain-solid-says-world-bank-report>.

<sup>5</sup> Compared to Singapore, the country in the region with the largest GDP per capita (PPP adjusted), Timor-Leste is 3 percent, while Cambodia is 4 percent and Lao PDR is 7 percent. Data from World Bank Development Indicators series “GDP per capita, PPP at (current international \$)” for year 2015. Available at: <http://databank.worldbank.org/data/>.

GDP growth for the region of 6.5 percent in 2015<sup>6</sup> and region exports representing 28 percent of world exports in real terms in 2014. On the other hand, East Asia Pacific faces huge infrastructure needs on account of rapid urbanization and as many as 142 million people have no access to power. In this setup, an estimated 379 million people lived in poverty in 2014,<sup>7</sup> and were vulnerable to falling back into extreme poverty.

Therefore, inclusive growth in East Asia has the potential to change global poverty. Building on the global practice and studies conducted by the WBG, this article presents some practical experience on how to promote pro-competition policy reforms within East Asia that help countries achieve their development goals.

## II. SHAPING WELL-FUNCTIONING MARKETS THROUGH COMPETITION POLICY<sup>8</sup>

In recent years, some developing countries have successfully reformed their rules affecting the business environment— including their competition regulatory frameworks. Yet markets in many developing economies are still not functioning smoothly, private-sector participation is restricted and consumers' choice remains restricted in terms of price and quality.

- Many markets underperform due to entry barriers and anti-competitive behavior by a few dominant players. Although more than 120 countries have enacted competition laws, the lack of effective enforcement allows anti-competitive practices to persist.
- Even though many countries have opened up to international trade, regulatory frameworks in many developing economies

are more restrictive of competition. This is especially true in the “non-tradable” and service sectors.

- Anti-competitive practices are many times allowed, supported or even created by the public bodies themselves. In many countries there are regulatory frameworks that support statutory monopolies, discriminatory treatment favoring dominant incumbents and lack of competitive neutrality.

The case of East Asia-Pacific is paradigmatic in this sense. Both developed as well as less developed Asian countries have adopted domestic antitrust laws, set up competition Authorities and pledged to promote competition at the regional level in Fora such ASEAN and APEC, yet the levels of competition in key markets remain relatively low.

First, less developed countries and emerging markets in the region present a particular set of characteristics that have the potential to shape and influence market outcomes. In some cases, these characteristics may constitute challenges for the development of a level playing field in which firms can thrive on their own merits, and consumers can benefit with better goods and services. The direct participation of the state in the economy is significant. According to the OECD, State Owned Enterprises (“SOEs”) account for 30 percent of GDP in China, 38 percent in Vietnam and 25 percent in Thailand<sup>9</sup>, while Malaysia and Singapore have some of the largest SOEs in the world<sup>10</sup> and have opted to promote a model of SOE internationalization and portfolio diversification.<sup>11</sup> Private investment in key industries remains limited. This is the case of electricity distribution

6 Data from World Bank Development Indicators, series “GPD growth (annual percent)” for year 2015, country “East Asia & Pacific.” Available at: <http://databank.worldbank.org/data/reports.aspx?source=2&country=EAS>.

7 Data from World Bank Development Indicators series “Exports of goods and services (constant 2010 USD \$)” for year 2015. Available at: <http://databank.worldbank.org/data/>.

8 The text of this section is based on the offering of the Trade & Competitiveness Global Practice of the WBG on Competition Policy: “Making Markets Work for Development through Effective Competition Policies.” Available at: [http://www.worldbank.org/content/dam/Worldbank/document/Trade/Trade\\_Competition.pdf](http://www.worldbank.org/content/dam/Worldbank/document/Trade/Trade_Competition.pdf). Moreover, the section builds on other documents produced by the WBG on competition Policy including Kitzmuller, Markus; Martinez Licetti, Martha. 2012. Competition policy : encouraging thriving markets for development. Financial and private sector development; note no. 331. Washington, DC: World Bank. <http://documents.worldbank.org/curated/en/778181468328582034/Competition-policy-encouraging-thriving-markets-for-development> and Goodwin, Tanja K.; Pierola Castro, Martha D.. 2015. Export competitiveness: Why Domestic Market Competition Matters. Public policy for the private sector; Note no. 348. Washington, D.C. :WBG. <http://documents.worldbank.org/curated/en/432141468189538318/Export-competitiveness-Why-Domestic-Market-Competition-Matters>.

9 See OECD (2010): “Policy Brief on Corporate Governance of State-Owned Enterprises in Asia,” at page 5. Available at: <http://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/45639683.pdf>.

10 The Numbers of the Khazanah Nasional Berhad (“Khazanah”), largest Malaysian sovereign wealth fund, give an idea about the magnitude of the government presence in the economy: in 2015, it controlled more than 30 companies in 14 different sectors throughout more than 15 countries; its adjusted net worth amounted to RM109 billion, around 10 percent of the Gross Domestic Product of Malaysia. RM1,156.9 billion at current prices. See for Malaysian GDP, see Malaysian Department of Statistics at [https://www.statistics.gov.my/index.php?r=column/ctwoByCat&parent\\_id=99&menu\\_id=TE5CRUZCblh4ZTZMODZlbnk2aWRRTQ09](https://www.statistics.gov.my/index.php?r=column/ctwoByCat&parent_id=99&menu_id=TE5CRUZCblh4ZTZMODZlbnk2aWRRTQ09). For Khazanah, see the company's official website at <http://www.khazanah.com.my>.

11 See Ministry of Trade and Industry of Singapore (2002). “Report of the Entrepreneurship and Internationalization Subcommittee.” Economic Review Committee, page 20. Available at: [https://www.mti.gov.sg/Research-Room/Documents/app.mti.gov.sg/data/pages/507/doc/6%20ERC\\_EISC.pdf](https://www.mti.gov.sg/Research-Room/Documents/app.mti.gov.sg/data/pages/507/doc/6%20ERC_EISC.pdf).

in Indonesia<sup>12</sup> and Thailand<sup>13</sup>, oil and gas in Vietnam<sup>14</sup>, airlines in Singapore<sup>15</sup>, or even rice in Malaysia<sup>16</sup>. Concentration is high in important sectors, especially in banking and network industries, e.g. telecommunications in the Philippines<sup>17</sup>, China<sup>18</sup> and Indonesia<sup>19</sup>; banking in Indonesia and Malaysia<sup>20</sup>, including in market segments not subject to natural monopoly characteristics. Finally, some countries such as Myanmar just started opening their economy, and in certain economies many sectors still remain closed to new investment.

Second, antitrust enforcement remains limited in a number of countries in the region. The Philippines just passed a competition law in 2015 after many years in the making. However, this law delays enforceability against anti-competitive practices for two years until

---

12 Electricity distribution in Indonesia is carried out by SOE Perusahaan Listrik Negara (PLN). Source: <http://www.indonesia-investments.com/business/indonesian-companies/perusahaan-listrik-negara-pln-soe/item409>.

13 Electricity distribution in Thailand is run by the Electricity Generating Authority of Thailand. Source: [http://www.egat.co.th/en/index.php?option=com\\_content&view=article&id=140&Itemid=178](http://www.egat.co.th/en/index.php?option=com_content&view=article&id=140&Itemid=178).

14 The main SOE in the market is the State-Owned Company Limited-Vietnam Oil and Gas Group (also known as Vietnam Oil and Gas Group). More information at: [http://english.pvn.vn/?portal=news&page=detail&category\\_id=8&id=1056](http://english.pvn.vn/?portal=news&page=detail&category_id=8&id=1056).

15 The government of Singapore owns 55.46 percent of shares of Singapore Airlines through Temasek Holding, an investment company. More information at: [https://www.singaporeair.com/en\\_UK/us/about-us/information-for-investors/shareholding-info/](https://www.singaporeair.com/en_UK/us/about-us/information-for-investors/shareholding-info/).

16 The main firm in the domestic market, Padiberas Nasional Berhard ("BERNAS"), has the monopoly to import rice to Malaysia.

17 In the Philippines there are two main operators in the cellular market, Smart Communications INC (41 percent) and Globe Telecom (34 percent), according to the National Telecommunication Commission. See the Annual Report 2014 of the National Telecommunication Commission, pages 15 and 16. Available at: [http://ntc.gov.ph/wp-content/uploads/2015/10/reports/Annual\\_Report\\_2014.pdf](http://ntc.gov.ph/wp-content/uploads/2015/10/reports/Annual_Report_2014.pdf).

18 The telecommunication industry in China is dominated by three firms: China Telecom, China Unicom and China Mobile. The largest in the mobile market is China Mobile see <https://www.budde.com.au/Research/China-Telecoms-Infrastructure-Operators-Regulations-Statistics-and-Analyses>.

19 The main telecommunication firm in Indonesia is PT Telekomunikasi Indonesia Tbk ("Telkom"), with a market share between 45-50 percent of mobile subscribers. See <http://www.indonesia-investments.com/business/indonesian-companies/telekomunikasi-indonesia/item201>.

20 For Indonesia, the banking industry is dominated by four banks: Bank Mandiri, Bank Rakyat Indonesia, Bank Central Asia ("BCA") and Bank Negara Indonesia ("BNI"). See Ernst and Young "Indonesian banking industry: challenging yet promising" page 10. Available at: [http://www.ey.com/Publication/vwLUAssets/EY-Indonesian-banking-industry-challenging-yet-promising/\\$FILE/EY-indonesian-banking-industry-challenging-yet-promising.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Indonesian-banking-industry-challenging-yet-promising/$FILE/EY-indonesian-banking-industry-challenging-yet-promising.pdf). For Malaysia the main banks according to assets, are Maybank, CIMB and the Public Bank Berhad. See <http://www.relbanks.com/asia/malaysia>.

2017<sup>21</sup>. Broad exclusions and exemptions from antitrust scrutiny in several antitrust frameworks makes it difficult to tackle anti-competitive conducts effectively. For instance, in Vietnam, hard core cartels are not prohibited if the market share of the participants remain below 30 percent and even those above 30 percent might still be exempted on the basis of reasons not strictly related to the overall efficiency of the agreement<sup>22</sup>; In Thailand, with SOEs exempted from competition scrutiny, major players in key sectors characterized by strong SOE presence would be able to abuse their market power and engage in collusive behavior.<sup>23</sup> Finally, implementation appears to be somehow scattered with just a few final decisions in Malaysia, Vietnam and Indonesia and none in Thailand.

Within this context, fostering competitive markets in the region shall necessarily go beyond competition law and enforcement. Instead, it requires to leverage the synergies among different mechanisms and instruments designed to reduce and eliminate impediments to well-functioning markets that arise from public policy interventions and restrictive business practices at the sector and economy level.

From the WBG's perspective, an effective competition policy framework should be based upon two complementary pillars: (1) fostering pro-competition regulations and government interventions; (2) developing the necessary measures to guarantee competitive neutrality in markets and promote effective economy wide enforcement of competition law. These pillars, summarized by Figure 1, rely on an effective institutional set up that is able to foster and guarantee healthy market conduct.

---

21 See Section 53 of the Competition Law of the Philippines, Republic Act No. 10667 from July 2015. Available at: <http://www.gov.ph/2015/07/21/republic-act-no-10667/>.

22 See Competition Law No. 27/2004/QH11, Article 10.

23 Section 4.2 of the Competition Act of Thailand B.E. 2542 (1999).

Figure 1. A Comprehensive Competition Policy Framework

| FOSTERING COMPETITION IN MARKETS   |   |
|--|---|
| PRO-COMPETITION REGULATIONS AND GOVERNMENT INTERVENTIONS:<br>OPENING MARKETS AND REMOVING ANTI-COMPETITIVE SECTORAL REGULATION<br>(Pillar 1)   | EFFECTIVE COMPETITION RULES AND ANTITRUST ENFORCEMENT<br>(Pillar 2)   |
| Reform policies and regulations that strengthen dominance: restrictions to the number of firms, statutory monopolies, bans towards private investment, lack of access regulation for essential facilities. | Tackle cartel agreements that raise the costs of key inputs and final products and reduce access to a broader variety of products |
| Eliminate government interventions that are conducive to collusive outcomes or increase the costs of competing: controls on prices and other market variables that increase business risk                  | Prevent anti-competitive mergers  |
| Reform government interventions that discriminate and harm competition on the merits: frameworks that distort the level playing field or grant high levels of discretion                                   | Strengthen the general antitrust framework to combat anti-competitive conduct and abuse of dominance                              |
|  | Control state aid to avoid favoritism, ensure competitive neutrality, and minimize distortions on competition*                    |

Source: Adapted from Kitzmuller M. and M. Licetti, "Competition Policy: Encouraging Thriving Markets for Development" Viewpoint Note Number 331, WBG, August 2012. \*This sub-topic is included under Pillar 2 since it comprises economy-wide rules. However, it could be considered to be a separate pillar since it is often developed outside of rules on anti-competitive behavior of firms and merger control.

Building on this approach, this article presents some examples on how the competition policy agenda can be strengthened in the region taking into consideration previous and current work conducted by the WBG and the respective countries. These examples illustrate the connections between the analytical, convening and implementing layers of competition policy reforms and shed light on how the two pillars of a comprehensive competition policy framework (figure 1) have been and can be implemented in practice.

### III. PILLAR 1: OPENING MARKETS AND REMOVING ANTI-COMPETITIVE SECTORAL REGULATION

A key lesson learnt from the experience of the WBG in promoting effective competition policies across less developed economies and emerging markets is that the lack of an antitrust regulatory framework or significant gaps in the existing one, should not preclude embedding competition principles in key markets of the economy through sector-specific lenses.

Interventions under Pillar 1— which focuses on promoting pro-competition regulations and government interventions- comprise regulation of network sectors to simulate competitive market outcomes; initiatives to infuse competition principles in different public policies (e.g. public procurement, trade, investment, and industrial policies); and the development of competition assessments as well as regulatory impact assessments of procedures, regulations or policies in order to understand their impact in a sector and to identify more pro-competitive alternatives.

The work in the Philippines shipping sector illustrates how even prior to the adoption of a competition law, modifying anti-competitive regulatory provisions improved logistics performance and benefited exporters.

*Paving the Way for Competitive Domestic Shipping in the Philippines*<sup>24</sup>

The national agribusiness sector was confronted by the twin challenges of increased internal demand due to a growing population and unrealized export potential of its agricultural products. Among the factors preventing the cost competitiveness of the Philippines agricultural

24 This section builds on the content of the Trade & Competitiveness Project Brief "Paving the Way for Competitive Domestic Shipping in the Philippines."



products was the country's weak logistics system, particularly for inter-island shipping across the Philippines' archipelagic geography.

Domestic shipping in the country was generally more expensive than in Malaysia or Indonesia: the average port-to-port cost per nautical mile in the Philippines was USD \$1.47, higher than Indonesia's USD \$0.77 and Malaysia's USD \$1.36. In the East Asia region, the Philippines trailed behind its neighbors in various logistics performance and connectivity indices<sup>25</sup>.

Among the causes of the poor state of the domestic shipping industry appeared to be a number of limitations to market competition. Few operators served most shipping routes, with over 40 percent of routes served by a single operator. Therefore, it was clear that removing competition constraints and enhancing the competitiveness of shipping companies could result in greater efficiency, increased capacity, improved quality of ships and shipping services, as well as lower costs and freight rates that would help boost the export potential of Philippine agricultural products.

The WBG's Trade and Competitiveness Global Practice helped the Philippine Department of Transportation and Communications, the Maritime Industry Authority, and the Philippines Ports Authority to remove the regulatory barriers to competition in the domestic shipping sector and supported the government's efforts to:

- Revamp the application process for obtaining a license (a certificate of public convenience) to operate a shipping service in the Philippines, in order to remove the opportunity for incumbent firms to contest the entry of new firms on domestic routes.
- Reshape the Philippine regulations that required domestic vessels to undertake all dry-docking and ship repair requirements in domestic shipyards, even if foreign shipyards were available to conduct the same services for up to one-third of the costs.
- Review regulations that made short-term chartering costly in many cases, including those that restricted vessel importation and those that imposed tax payments for chartered vessels.
- Review the dual role of the Philippines Port Authority—operator and regulator—by setting up concession fee systems that eliminate the conflict of interest stemming from the government benefiting from fee increases for port services.
- Enhance transparency on available industry data by establishing a single maritime database connecting the Maritime Industry Authority, the Philippine Ports Authority, and the Coast Guard to facilitate government regulation and private sector planning.

The Philippines project captures the hands-on approach of the Competition Policy cluster of the WBG regarding actual implementation of

pro-competition reforms which have already shortened the average processing time for licensing vessels from an average of 40 to 20 days and resulted in estimated cost savings of up to USD \$300,000 for each large vessel. Moreover, conservative estimations on the impact of amending the domestic shipping regulations point to an additional USD \$18 million in investment in the domestic shipping sector.

This project exemplifies the potential to achieve significant results and shape competitive market outcomes either within suboptimal competition regulatory frameworks or even absent any framework at all as in the case of the Philippines. Moreover, this sector specific work became an entry point to better understand the conditions of Philippines markets and cemented a larger engagement on competition policy in the country.<sup>26</sup>

## IV. PILLAR 2: EFFECTIVE COMPETITION RULES AND ANTITRUST ENFORCEMENT

Effective economy wide competition rules, including those tackling competitive neutrality, paired with a functional competition authority can significantly complement economic market regulation, as discussed under Pillar 1. Therefore, interventions under Pillar 2 support countries in developing the necessary regulatory and institutional tools to ensure effective competition enforcement, not only regarding antitrust but also the control of state aid to avoid favoritism, ensure competitive neutrality and minimize distortions on competition. Given, the market characteristics in East Asia Pacific, the synergies among these topics will be key for shaping competitive market outcomes.

The analysis of the competition-related commitments of the Trans-Pacific Partnership ("TPP") confirms the need to connect competition enforcement and competitive neutrality in order to foster open markets and limit anti-competitive behavior, either from private or public operators. Additionally, the TPP emphasizes the role of sector-specific regulation to embed competition principles in the market, thus connecting the 2 pillars of an effective competition policy framework.

*Building Better Functioning Markets for Trade and Investment in the Pacific Rim through Competition Policy Commitments*<sup>27</sup>

The TPP, signed on February 4, 2016 after several years of negoti-

---

26 LLanto, G. & E. Basilio (2005) "Competition Policy and Regulation in Ports and Shipping," Research Paper Series No. 2007-04, Philippine Institute for Development Studies.

27 This section is broadly based on the text of Martinez Licetti et al. (2017) "The implications of the Trans-Pacific Partnership for competition policy in Latin America: Can Deep and Comprehensive Trade Agreements promote deeper and more comprehensive competition policies?" Ed. Kluwer International, forthcoming. The section also builds on the findings of country specific analysis of the implications of the TPP for Malaysia and Vietnam, among others.

---

25 LLanto, G. & E. Basilio (2005) "Competition Policy and Regulation in Ports and Shipping," Research Paper Series No. 2007-04, Philippine Institute for Development Studies.

ations, constitutes an explicit recognition that effective implementation of trade related commitments demands a pro-competitive environment that fosters open markets and penalizes anti-competitive behavior.<sup>28</sup>

The agreement requires parties not only to establish and enforce a procedurally fair and transparent competition law framework (Chapter 16) but also to level the playing field between public and private operators (Chapter 17), advising for measures able to implement competition throughout all economic sectors. At the same time, the TPP requires parties to promote pro-competition regulatory environments in key sectors for the economy such as telecommunications (Chapter 13), financial services (Chapter 11) and public procurement (Chapter 15). In this sense, the TPP presents itself as an opportunity to foster effective national competition policies covering both horizontal and vertical perspectives.

Shortly after the signature of this agreement a number of client countries, both parties as well as non-parties to the TPP, requested the assistance of the WBG to better understand the implications of the various chapters of the text. The work of the Competition Policy Cluster focused on how deep and comprehensive trade agreements such as the TPP can promote more effective competition policies. This approach supports the role of the TPP as a key tool to foster competition on the merits in key sectors as well as economy-wide in the Pacific Rim and beyond<sup>29</sup>.

Read in conjunction, horizontal chapters like the ones on Competition Policy and SOEs together with vertical chapters on Telecommunications and Financial Services offer the basic elements to build comprehensive competition policy frameworks that account for the necessary interplay between antitrust and regulation. In this sense, the sector specific chapters reinforce the promotion of competition by setting regulatory frameworks that eliminate entry barriers and foster a level playing field between public and private operators as well as between national incumbents and firms from other TPP parties.

One of the key aspects of the TPP when it comes to antitrust enforcement is that instead of promoting substantive convergence by defining the notion of anti-competitive practices<sup>30</sup>, the Competi-

tion Chapter of the TPP focuses on formal commitments necessary to ensure procedural fairness and thus further support transparency and enhanced collaboration among authorities. Interestingly, this is not the case on consumer protection matters where the parties define what conduct will be considered fraudulent or deceptive<sup>31</sup>.

Given this procedural focus, a large number of TPP parties seem to be fairly aligned with the competition related commitments under Chapter 16, at least on paper. It shall be noted that when it comes to procedural fairness actual implementation can only be assessed on a case by case basis and even the most advanced competition authorities often face allegations regarding breach of due process allegations.<sup>32</sup>

What some considered a missed opportunity to foster a (somewhat utopic) substantive convergence might become the secret of the TPP success. The focus on procedural convergence might be instrumental to emphasize the importance of procedural fairness as a minimum common denominator for workable competition policy frameworks not only among TPP parties themselves but within the region. This approach is confirmed by the significant efforts of the International Competition Network (“ICN”) to encapsulate and promote procedural fairness in antitrust investigations.<sup>33</sup>

And even more so, substantive aspects of competition obligations under Chapter 16 could potentially be drawn from the text of the TPP itself since the commitment under the TPP goes beyond simply having a competition law and requires the objective of this law to be the promotion of economic efficiency and consumer welfare. In this sense, substantive provisions offering broad exclusions from the scope of application of the law, potentially prohibiting pro-competitive practices on the basis of a structural definition of dominance or allowing for non-efficiency based exemptions could raise concerns regarding compliance with Article 16.1.2 of the TPP.

In addition, the TPP is also the first Free Trade Agreement (“FTA”) that seeks to address comprehensively the commercial activities of SOEs competing with private companies in international trade and investment. Even though the chapter’s commitments build on principles from the World Trade Organization (“WTO”) and previous

---

28 Twelve countries signed the agreement: Australia, Canada, Japan, Malaysia, Mexico, Peru, United States, Vietnam, Chile, Brunei, Singapore and New Zealand. See the full text of the agreement made available by the Office of the United States Trade Representative at: <https://ustr.gov/tpp/>.

29 The purpose of the work was to provide ex-ante guidance on the scope of application of TPP commitments and the potential risks associated with non-compliance. Authoritative interpretation of the text of the TPP can only be provided by the dispute resolution panel set up and consulted following the legal means provided by the treaty itself as complemented by the principles of International Public Law.

30 For instance, Article X-01.5 of the Comprehensive Economic and Trade Agreement (“CETA”) between the EU and Canada, an instrument that has significantly influenced the drafting of Chapter 17 of the TPP does provide

---

guidance in terms of substance by defining “anti-competitive business conduct” as means anti-competitive agreements, concerted practices or arrangements by competitors; anti-competitive practices by an enterprise that is dominant in a market; and mergers with substantial anti-competitive effects.

31 See article 16.6, Chapter 16, TPP.

32 See Anne MacGregor and BogdanGecic (2012), “Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings” *Journal of European Competition Law & Practice*,

33 See generally the ICN Guidance on Investigative Process: Text available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>.

U.S. FTAs, notably the Canada-EU Comprehensive Economic and Trade Agreement (“CETA”), the TPP significantly expands the scope of commercial consideration and non-discrimination commitments as it advances on the control of distortive public support and subsidies through non-commercial assistance obligations. In other words, the chapter works to promote competitive neutrality and non-distortive public aid support.

More specifically, under Chapter 17 of the TPP, SOEs and designated monopolies should be bound to compete on the basis of quality and price rather than benefitting from discriminatory regulation and distortive subsidies. Basically, the obligations established by the SOE Chapter and designated monopolies tap on three main commitments by TPP parties: (i) avoiding discrimination and applying commercial considerations by SOEs, including a limitation for designated monopolies to engage on anti-competitive practices; (ii) parties must NOT concede non-commercial assistance capable of causing adverse effects or injury to the interests of another Party, meaning to economically support SOEs in terms more favorable than those commercially available; (iii) parties must offer an impartial regulatory and institutional framework for SOEs, yet making them accountable for their actions in other TPP countries.

The TPP obligations crystalize basic concerns of TPP parties regarding the threat and potential market distortions that heavily subsidized national public champions may bring about when competing internationally. This framework leverages the experience of the implementation of the competitive neutrality principle<sup>34</sup> by some of the TPP parties, notably, Australia and the U.S.

To that end, these obligations shall be read in a broader regional and international framework than the TPP itself since they will affect other trading partners having a significant number of SOEs competing in the markets of TPP parties, both from the region, notably the case of Brazil, as well as beyond such as China, India or Russia. First, these benefits can become a sort of standard to influence and be replicated across international trade agreements currently under negotiation. Second, while direct claims on non-discrimination and commercial considerations can only be made by TPP parties, the other two (non-commercial assistance and impartial regulator) will indirectly benefit any (private/public) firm from a non-TPP party competing in a market covered by TPP obligations.

Moving forward, the spirit of the TPP as a tool to increase economic integration in the region should be the guiding principle in designing policy options that will enable signatory countries to fully leverage the benefits of enhanced trade and investment. In other words, the economic rationale of the horizontal and vertical chapters of the TPP read in conjunction aims at opening markets for the

benefit of trade by eliminating either behavioral or regulatory constraints to competition and removing privileges either for public or private operators thus fostering effective national competition policy frameworks.

These vertical obligations —aimed at fostering pro-competitive sectoral regulation as described under Pillar 1 supra — are essential to guarantee a comprehensive competition approach to trade in the context of significant carve outs in horizontal commitments, especially given the extensive exceptions applied to the SOE Chapter and some strategic activities eventually excluded from the scrutiny of national competition laws. Therefore, even those firms escaping the scrutiny of the SOE or the Competition Policy Chapter of the TPP, may be caught by the obligations established under the sector-specific chapters.

Interestingly, the rationale behind sector-specific commitments of the TPP is to foster the removal of policies and rules that are harmful to the development of competition. Using the WBG’s Market and Competition Policy Assessment Toolkit (“MCPAT”) framework, Figure 3 shows how sectoral commitments on the financial services, telecommunications and procurement sectors have been designed to eliminate rules that (i) reinforce dominance or limit entry, (ii) are conducive to collusive outcomes or increase costs to compete in the market and (iii) discriminate and protect vested interests. In this sense, the TPP explicitly advances on a comprehensive approach to competition by setting rules that intend to eliminate those regulations having harmful effects on competition.

Specifically, and as example, following the Financial Services Chapter, each Party shall not limit market entry by adopting or maintaining quotas about number of institutions, number or value of transactions or require economic need tests.<sup>35</sup> In other words, the TPP commitments are avoiding that parties impose conditions that constitute either an absolute or a relative ban for market entry which in turn will have the general effect of reinforcing dominance or limiting entry. Similarly, the Telecommunication Chapter demands from each Party independent and impartial telecommunications regulatory bodies that do not hold financial interests or operating/management roles in any supplier of public telecommunications services<sup>36</sup>. Such commitment addresses potential lack of competitive neutrality vis-a-vis government entities. Therefore, this commitment intends to mitigate the anti-competitive effects of those rules that discriminate or protect vested interests as identified by the WBG MCPAT. Finally, the Government Procurement Chapter requires parties to adopt measures that fight corruption and fraudulent behavior in public procurement process, which, by nature, implies a prohibition of bid rigging.<sup>37</sup> This type of commitment is intended to counteract rules that facilitate agreements among competitors in the sense of the MCPAT and therefore have the general effect of being conducive to collusive outcomes or increase the costs to compete in the market.

34 The principle of competitive neutrality which, as first proposed in Australia, requires that government business activities do not enjoy net competitive advantages over their private sector competitors simply by virtue of their public ownership. For a detailed discussion, see generally 2011 OECD Working Paper on “Competitive Neutrality and State-Owned Enterprises.”

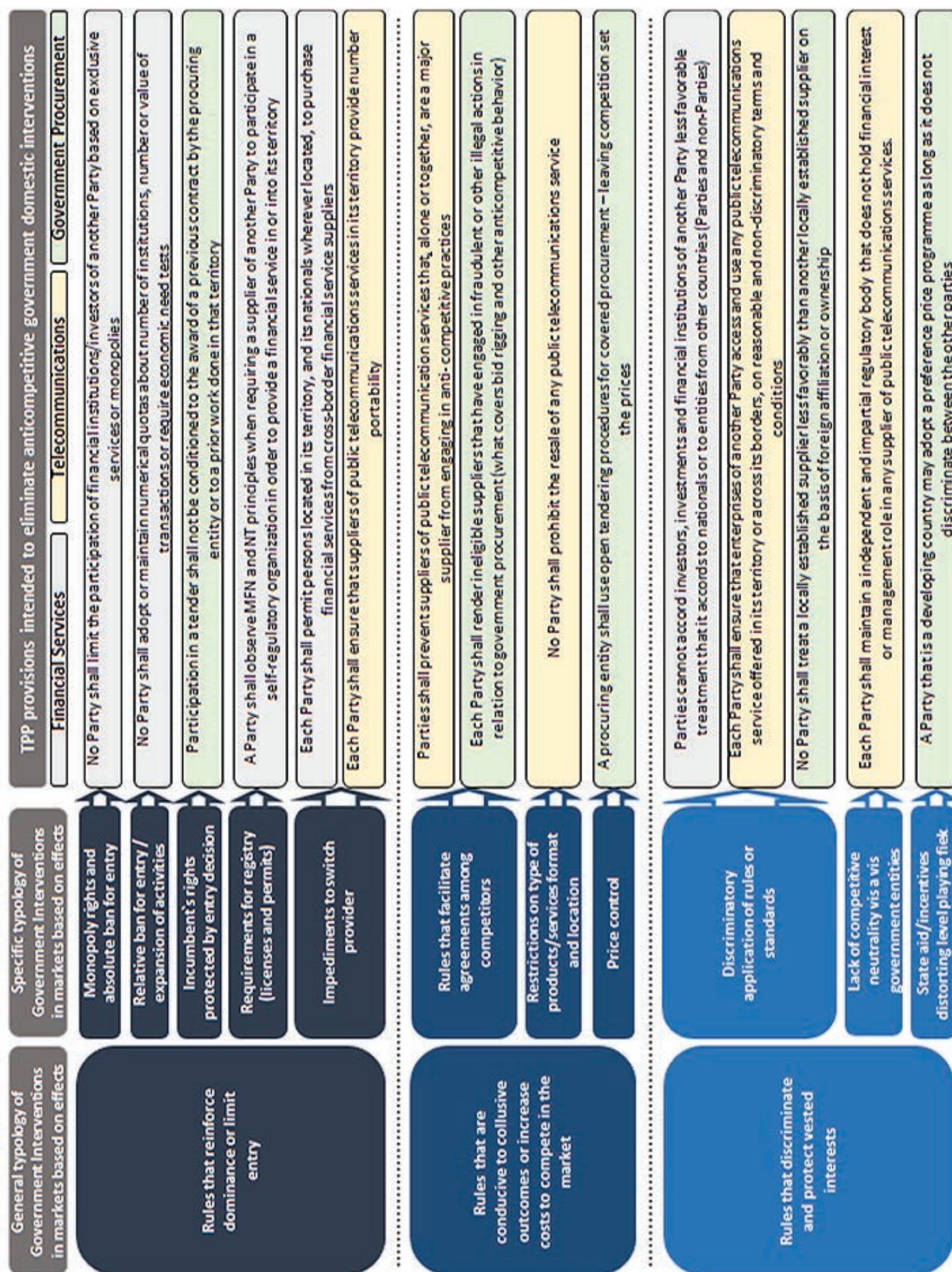
35 See Article 11.5, Chapter 11, TPP.

36 See Article 13.6.1, Chapter 13, TPP.

37 See Article 15.18, Chapter 15, TPP.



Figure 3 –How TPP sector specific obligations foster the removal of government interventions that harm competition



Source: Built by authors based on the Markets and Competition Policy Assessment Tool, World Bank Competition Policy Team and TPP text.



Therefore, beyond a mere analysis of compliance the work of the Competition Policy Cluster of the WBG has focused on how to capitalize the TPP Competition Policy Provisions in order to shape market outcomes. As expected, many signing parties are fairly compliant with certain aspects of the TPP, such as the establishment of procedural fairness rules in the enforcement of competition laws. However, the competition policy implications of the TPP go far beyond this chapter. Indeed, the competition policy implications of the TPP go beyond the text of the TPP itself. Understanding and evaluating these provisions can contribute to a country's efforts on building markets that work for development.

## V. FINAL REMARKS

This article has presented a few practical examples on how the approach of the WBG can contribute to countries efforts on achieving better developmental outcomes in the East Asia and Pacific Region. From the impact of a sectoral reform in the Philippines absent a competition law to the analysis of the competition policy dimension of a mega-regional trade agreement as the TPP, the approach of the WBG on Competition Policy is targeted to meet the needs of less developed economies and emerging markets from a very practical perspective and considering their respective context.

In this sense, the experience in East Asia Pacific shows that there is significant room for competition policy tools to support the development agenda by opening markets, fostering private sector development and unlocking investment, in a region that has the potential to change the face of global growth, in the "Century of Asia."



