Linklaters

Asia Pacific Competition Law Bulletin

No.4 of 2018

Introduction

Welcome to the 4th 2018 edition of our bi-monthly Asia Pacific Competition Law Bulletin. This bulletin is a collaborated product with our Linklaters colleagues (China) and our Allens colleagues (Australia). Expert local law firms who contributed to this edition include: TT&A (India), Mori Hamada & Matsumoto (Japan), Allen & Gledhill LLP (Singapore), Lee & Ko (South Korea) and Tsar & Tsai Law Firm (Taiwan). We hope that you continue to find this newsletter a useful source of information on competition law issues across the Asia Pacific region.

In this edition, cartel enforcement in the region take the headlines. In Australia, the regulator brought criminal cartel charges against several major banks and imposed a record fine of AUD 46 million in an automobile manufacturing cartel. In China, the competition authorities cracked down price-fixing in the port industry. The Hong Kong Competition Commission had its first trial before the local judiciary regarding alleged bid-rigging in the IT sector. In Japan, local competition watchdog brought criminal charges against four mega construction companies involved in the maglev project from Tokyo to Nagoya. The Indian competition authority decided not to investigate the complaint against Uber and Ola due to the lack of evidence.

We also looked at some legislative and institutional developments. The Japanese and Singaporean legislatures recently empowered their competition authorities to accept commitments to settle an investigation. The Korean authority published its proposals to tackle the abuse of bargaining power in the retail industry.

Last but not least, we also cover some other interesting new developments. Hong Kong court for the first-time transferred part of its case to the Competition Tribunal, while India authority approved the Bayer acquisition of Monsanto with considerable structural and behavioural remedies.

Robert Walker and Nikita Harrison, Allens

Record penalty for cartel conduct

Australia's Full Federal Court ordered Japanese company Yazaki to pay AUD 46 million (USD 34 million) for engaging in cartel conduct. This is the highest penalty ever handed down for a contravention of the Competition and Consumer Act 2010 (**CCA**).

On 16 May 2018, the Full Federal Court ordered Japanese company Yazaki to pay AUD 46 million (USD 34 million) for engaging in cartel conduct in connection with a tender for the supply of wire harnesses used in the manufacturing of Toyota Camrys.

This is the highest penalty ever handed down for a contravention of the CCA. The penalty was an increase from the original AUD 9.5 million (USD 7 million) imposed on Yazaki by the trial judge.

The Full Federal Court found that Yazaki and its Australian subsidiary had taken five steps to reach a cartel agreement and give effect to it. Each step was treated as an individual contravention giving rise to a penalty, assessed between AUD 8 million (USD 6 million) and AUD 14 million (USD 10 million) for each contravention.

Related links:

The ACCC's press release is available here.

Court rejects ACCC allegations against Pfizer

On 25 May 2018, the Full Federal Court found against the Australian Competition and Consumer Commission (**ACCC**) and in favour of Pfizer in relation to misuse of market power and exclusive dealing allegations.

Pfizer, in 2011, established a supply model that involved supplying community pharmacies directly, in lieu of doing so through wholesalers. Pfizer made offers to community pharmacies as to the terms on which it would supply Lipitor and its generic version, 'Atorvastatin Pfizer', on expiry of the atorvastatin patent. This offer, among other things, tied rebates to the quantity of these products purchased by the pharmacy.

The ACCC alleged that Pfizer used its market power for an anti-competitive purpose (section 46 of the CCA) and engaged in exclusive dealing conduct for the purpose of substantially lessening competition in the atorvastatin market (section 47 of the CCA).

The case turned on the question of Pfizer's purpose. The trial judge found that Pfizer's purpose in seeking to ensure a significant number of community pharmacies took up its offers was to allow it to compete in the atorvastatin market post patent expiry. In essence, the trial judge found that Pfizer was seeking to protect its own commercial position. The Full Federal Court agreed.

Following the Full Federal Court's judgment, the ACCC sought special leave from the High Court to appeal the decision. In its press release, the ACCC said it is 'seeking clarity from the High Court on how to assess anti-competitive purpose'.

Allens acted for Pfizer at trial and on appeal to the Full Federal Court.

Related links:

The ACCC's press release is available here.

ANZ, Citigroup and Deutsche Bank face criminal cartel charges

Citigroup, Deutsche Bank and ANZ have been charged with criminal cartel offences following an investigation by the ACCC. Criminal charges have also been laid against six senior executives.

The charges involve alleged cartel arrangements relating to trading in ANZ shares held by Deutsche Bank and Citigroup. ANZ and each of the individuals are alleged to have been knowingly concerned in some or all of the alleged conduct.

The cartel conduct is alleged to have taken place following an ANZ institutional share placement in August 2015. The placement involved $2.5 billion worth of shares and was organised and underwritten by Citigroup, Deutsche Bank and JPMorgan.

Charges have not been brought against JPMorgan, and newspaper reports suggest that JPMorgan has received immunity from the ACCC.

Related links:

The ACCC's press release is available here.

Fay Zhou, Xi Liao and Yumeng Li, Linklaters

Intensified enforcement in the port industry

Since as early as 2017, following large-scale investigations into alleged abuse of dominance in the port industry by the National Development and Reform Commission, a number of Chinese ports have already committed to reduce the terminal handling charges to ease the authority's concern. Yet the port industry remains on the radar of the antitrust enforcers. Even after the restructuring of Chinese antitrust authorities, both the newly established State Administration of Market Regulation (**SAMR**) and its local counterparts have continued taking enforcement action in the sector, including:

- **Four Shenzhen tugboat companies fined for price-fixing.** On 25 June 2018, SAMR fined Yuntian Tugboat, Alliance Tugboat, Chiwan Tugboat and Dachan Bay Tugboat for engaging in price-fixing. The fine was equal to 4% of the respective turnover of each company in the previous year. According to SAMR, the four companies have been holding meetings since 2010 or earlier, to discuss and implement the general pricing strategies. The four companies have continuously raised their handling charges at proximate time and similar amount. While the four companies operate ports in different localities in Shenzhen City, SAMR nonetheless held that they were competing with each other at the same relevant geographic market due to proximity of the ports.

- **23 Tianjin container yard operators fined for collusion.** According to the national news agency Xinhua, the Tianjin Municipal Development and Reform Commission (**Tianjin DRC**) is to impose fines up to USD 7.5 million on 23 local container yard operators for cartel conduct. After investigations by a total of 206 officials, the authority found that the 23 companies had concluded to introduce and raise the container handling surcharges and unloading fees. It is also found that other competitors had followed those 23 in introducing comprehensive surcharges and unloading fees, which in turn increased the overall logistics costs for enterprises in Tianjin Port area.

- **Tianjin published rules on port pricing.** In parallel with the cartel investigations, the Tianjin DRC also released a set of rules to regulate pricing for port services, especially the Rules on Port Pricing Behaviours in Tianjin. The Rules elaborate on the prohibitions under the AML and Price Law and specifically prohibit a total of 34 price-related conducts, including failure to specify a price, prices exceeding the government-mandated prices (where applicable), monopoly agreements and abuse of a dominant market position.

In line with its Belt and Road Initiative, the Chinese government is aiming to cut down logistics costs for imports and exports. Chinese antitrust enforcers are expected to closely scrutinize the antitrust conduct of market players in the port sector to achieve that national policy.

Related links:

The report on the upcoming Tianjin DRC enforcement is available here.

The draft Rules on Port Pricing Behaviours in Tianjin is available here.

Clara Ingen-Housz, Marcus Pollard and Alexander Lee, Linklaters

First competition law enforcement trial in Hong Kong

The Hong Kong Competition Tribunal (the **Tribunal**) had its first trial brought by the Competition Commission (**HKCC**) in June 2018, just two and a half years after full commencement of the Competition Ordinance (the **Ordinance**). This case concerned alleged bid-rigging in the Hong Kong IT sector. An IT server supplier and four IT companies were alleged to have rigged a single tender conducted by the Hong Kong Young Women's Christian Association (**YWCA**) in July 2016. YWCA complained to the HKCC shortly after noticing alleged similar mistakes in submitted bids.

The opening submissions and the evidence part of the trial lasted for 9 days. Closing arguments are now adjourned till September this year. The Tribunal will then need to make a determination on a number of key questions of law:

- **Did the alleged conduct amount to serious anti-competitive conduct (SAC)?** Under the Ordinance, the HKCC must issue a "warning notice" before bringing Tribunal proceedings, unless there is no reasonable cause to believe the alleged conduct does not amount to SAC, i.e. if there is such reasonable cause, then a "warning notice" must be issued. The HKCC did not issue a warning notice in the present case. The question turned on whether there was such reasonable cause when the proceedings were first lodged. As the statutory definition of "bid-rigging" for purposes of determining SAC excluded situations where the alleged arrangement was "made known" to the person calling for the tender, parties at trial focused on whether, at the time of lodging the proceedings, there was sufficient evidence to show reasonable cause to believe that YWCA knew about the alleged arrangement. In determining whether the HKCC was entitled to bring the case without first issuing a warning notice, the Tribunal will be setting the future standard for determining and resolving this key jurisdictional issue.

- **A civil standard of proof or a criminal one?** The Ordinance is silent on both the burden of proof and standard of proof. While the burden for proving the contravention is no doubt on the HKCC by virtue of the presumption of innocence enshrined in the city's mini-constitution, the Basic Law, the question of whether the HKCC is required to meet the criminal standard (beyond reasonable doubt) or the civil one (on the balance of probabilities) remains open for argument. Being the first enforcement decision in Hong Kong, this question was amongst the first issues raised in this case. Naturally, the HKCC is arguing that the standard of proof should be the civil standard, while all respondents in the case are arguing the contrary. The question of whether competition law enforcement requires proof beyond reasonable doubt for compliance of human rights requirements has been controversial around the world. While there is local jurisprudence establishing a civil standard of proof in competition law enforcement in the context of regulating the telecommunications sector, the Tribunal will have to grapple this tricky question in the context of competition law that is applicable across all sectors of society.

- **Vertical bid-rigging?** The common allegation made by the HKCC against the parties is that the IT server supplier made separate "vertical bilateral agreements" with its customers to submit "dummy bids" in the subject tender. The HKCC claims that, even in the absence of any horizontal element between the customers, such "vertical bilateral agreements" between supplier and customer are sufficient for establishing bid-rigging. Interestingly, the HKCC did not cite any vertical bid-rigging case law from any overseas jurisdiction and merely relied on

arguing on basic principles. Whether the Tribunal would accept such arguments remains to be seen, but if it does, that would entail opening a whole new chapter of “vertical bid-rigging” to the competition law world.

While we will need to wait for the judgment to take full stock of the case substantively, this first case already demonstrates the limitations of contested outcomes in Hong Kong competition law enforcement. Faced with limited resources, including budgetary constraints, the HKCC may need to consider alternative means of enforcement. At a recent conference, the CEO of HKCC actively promoted the idea of pursuing other forms of enforcement outcomes that would not require a full trial, such as commitment and consent orders. This will be a space to watch as the HKCC may favour this approach for future enforcement.

Linklaters represents Innovix Distribution, one of the Respondents in the case.

Related links:

The notice of application of the case published by the Tribunal is available here.

The first transfer of civil proceedings to the Competition Tribunal

The Hong Kong Court of First Instance (**CFI**) accepted for the first time an application for a transfer of a competition issue in a civil claim to the Tribunal. In response to an application for summary judgment, the CFI accepted an argument to transfer the case to the Tribunal on grounds that the defence raised competition law issues. This case is notable as the first case to successfully make a transferral application in Hong Kong.

The underlying litigation concerns a claim by Taching Petroleum against Meyer Aluminium for the sums payable for the diesel sold and delivered. In its defence, Meyer claimed that Taching had been fixing prices with another supplier for nearly 20 years. Meyer therefore argued that the diesel supply contracts were "tainted by illegality and unenforceable" and counter-claimed Taching for damages for the amount overcharged over the years.

Meyer argued that the civil proceedings before the court should be transferred to the Tribunal because of the Taching's collusion with another supplier. While the court had previously been invited to transfer a matter to the Tribunal in a previous case, this was the first occasion where a transfer had granted.

Although there was no direct evidence of collusion between the Taching and the other supplier, the defendant was able to show "a general parallel trend" between the net price charged by the Taching and the other supplier. While the judge recognised that parallel conduct cannot by itself be equated with concerted practice, he accepted that it may be evidence of such practice in certain circumstances. In the absence of contrary evidence, the court accepted that there is a triable allegation of a competition law issue and the defendant's case cannot be summarily dismissed.

However, the judge had "serious misgivings" about the defendant's allegations. In consideration of the fact that the plaintiff had yet to present evidence to contradict the defendant's allegations, the court gave leave to defend subject to a condition of the defendant's payment of a sum equal to the claimed price of diesel.

Following the High Court's judgment in May 2018, the proceedings were transferred to the Tribunal in July 2018. It will be interesting to see how the Tribunal assesses an alleged cartel on the basis of parallel conduct, and whether the Competition Commission would intervene in the Tribunal proceedings, given that a complaint had already been made in 2017.

Related links:

The judgment of the case is available here.

The notice of the transfer of proceedings to the Tribunal is available here.

TT&A

Bayer/Monsanto deal approved with significant structural and behavioural remedies

The Competition Commission of India (**CCI**) recently gave its approval to Bayer Aktiengesellschaft's (**Bayer**) acquisition of Monsanto Company (**Monsanto**), subject to divestments and behavioural commitments from both parties. This marks the CCI's third approval of agriculture transactions, after *ChemChina/Syngenta* and *Dow/Dupont*, which were both cleared subject to divestments.

The CCI noted that the acquisition would create one of the largest vertically integrated players in the agriculture sector, as Bayer and Monsanto are present across the entire food value-chain, from agricultural inputs (such as crop protection, seeds and traits) to digital farming solutions. The CCI assessed horizontal and vertical overlaps, as well as possible portfolio/conglomerate effects resulting from the combination. In its preliminary opinion, the CCI identified competition concerns in several relevant markets in India. It also noted that the acquisition would lead to a loss of innovation and raise concerns in the licensing industry. The CCI finally noted that the complimentary portfolios of the parties could enable bundling and result in increased strength in digital agricultural applications and solutions.

Given these concerns, the CCI directed Bayer to divest its global businesses in glufosinate ammonium, seeds & traits and hybrid vegetable seeds. The CCI further directed Monsanto to divest its minority shareholding in a leading Indian hybrid seed company. In addition to these structural remedies, the CCI also directed the parties to comply with certain behavioural commitments for a 7-year period; these address the CCI's concerns in licensing, access to digital farming data/solutions and potential exclusivity and bundling of products in India.

This has been arguably the most intense scrutiny of a merger by the CCI. However, this is not surprising given the size of the deal, the immense opposition from various stakeholders and the increasing consolidation in the agriculture sector. The CCI's approval also marks a shift from its previous preference for purely structural divestments, to its current approach to rectifying competition concerns by a mixture of both structural and behavioural remedies.

Related files:

The CCI's decision can be accessed here.

CCI rejects case against Ola and Uber, but will keep a 'close watch'

The CCI recently rejected allegations of anti-competitive conduct filed against Ola and Uber, both cab aggregators in India. The case was filed by a competing radio cab service operator in India, Meru. The complaint concerned, amongst other things, allegations of price co-ordination due to shareholdings of common investors in Ola and Uber.

The CCI, while recognizing that common ownership could lead to unilateral and coordinated effects, declined to investigate as there was no evidence of a lessening of competition.

This is the first time the CCI has set out its opinion on structural links and common shareholdings in competitors. Whilst the CCI ultimately rejected Meru's complaint, it has clearly expressed its intention to "keep a close watch" as to whether companies, by virtue of common investors, would indulge in anti-competitive conduct.

The CCI's approach and analysis are also much welcomed, as they evidence a maturing regulator, eager to address new and evolving issues that concern competition authorities worldwide.

Related files:

The CCI's decision can be accessed here.

Kenji Ito and Aruto Kagami, Mori Hamada & Matsumoto

Criminal prosecution against maglev bid-rigging

Earlier this year, the Japan Fair Trade Commission (**JFTC**) filed a criminal case with the Public Prosecutors' Office against the four biggest construction companies in Japan (Taisei Corporation, Kajima Corporation, Obayashi Corporation, and Shimizu Corporation) and two executives for alleged bid-rigging in a magnetic levitation high-speed railway project.

The four companies are alleged to have entered into agreements to designate successful bidders for the tenders for the construction of certain terminal stations and coordinated their bidding prices.

Of the four companies, it is reported that Obayashi and Shimizu applied for leniency and recently pleaded guilty to the charges, while Taisei and Kajima decided to contest the JFTC's allegation.

Related Links:

The JFTC public release is available here.

Japan amends Anti-Monopoly Act to introduce commitment procedures

On June 29, 2018, the Japan National Diet approved amendments to the Anti-Monopoly Act to introduce the commitment procedures for competition law enforcement (**Commitment Procedure**). This development is understood to be in response to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**).

The Commitment Procedure enables the JFTC and the relevant parties to settle alleged anti-competitive violations voluntarily, except for the hardcore cartel violations such as price-fixing and bid-rigging. Under the Commitment Procedure, the investigated company will have an opportunity to come up with a proposal to address all JFTC's concerns. If JFTC approves the proposal, no enforcement action will be taken.

The JFTC has also initiated a public consultation for its draft policy. Companies are invited to comment by 10 August 2018.

The amendment is expected to take effect when CPTPP enters into force.

Related Links:

The JFTC public release on the amendment is available here.

The JFTC public release on the public consultation is available here.

Daren Shiau, Elsa Chen and Scott Clements, Allen & Gledhill LLP

Singaporean competition law amended to codify authority's current practices

The Singaporean legislature approved amendments to the Competition Act proposed by the Competition and Consumer Commission of Singapore (**CCCS**) to bridge the gap between CCCS's practices and the competition law. The amendments came into effect on 16 May 2018.

There are three key amendments to the Competition Act:

- **Accept binding and enforceable commitments.** CCCS is empowered to accept binding and enforceable commitments for cases involving anti-competitive agreements and abuse of dominant position. Before the amendment, CCCS was only able to accept commitments in merger review. The amendments aligned the CCCS' approach for all the three main prohibitions under the Act, and also bring the CCCS' practices in line with other jurisdictions such as the United States and the European Union.

- **Allow CCCS to provide confidential advice on anticipated mergers.** The new law formalised the CCCS' provision of confidential advice on anticipated mergers. CCCS would assess the anticipated merger on the information provided by the merging entities. No request for information from any third party or public consultation would be conducted. The advice would not be binding on the CCCS. This approach is adopted in other voluntary notification regimes such as Australia and United Kingdom.

- **Conduct general interviews during inspections and searches.** CCCS enforcement officers are now empowered to enter any premises and orally examine any individual within for investigation. The amendment brings the CCCS' practices in line with that of the European Union.

The amended Competition Act is expected to enhance the efficiency of competition enforcement in Singapore.

Related Links:

Further details can be found on the Singapore Statutes Online website here.

Yong Seok Ahn, Hwan Jeong and Bryan Hopkins, Lee & Ko

KFTC to tackle abuse of superior bargaining power in the retail industry

The Korea Fair Trade Commission (**KFTC**) published in May this year the Comprehensive Solution to Eradicate Unfair Trade Practice to tackle the rampant unfair trade practices in retail industry. The Comprehensive Solution was published following the sector-wide study last year, and set out five goals for the KFTC:

- **Strengthen the supervision mechanism.** The KFTC will conduct annual detailed sector studies by issuing tailor-made questionnaires to the industry and will establish a complaint centre where a retail agent can report alleged violations by the large suppliers.

- **Impose strong sanctions.** The KFTC will expand the reach of the Fair Retail Agency Transaction Act (**FRATA**) to include some conducts that are previously not regulated and conduct actively investigation *ex officio* on its own initiatives.

- **Draft a standard form of distribution agreement.** The KFTC will issue a standard form containing terms and conditions to protect retail agents for specific types of industries. For example, the standard distribution agreement form guarantees the contract renewal right of retail agent for at least 3 additional years and requires the suppliers to bear certain portion of the initial decorating costs for business and also participate in promotional event for certain industries. The standard distribution agreement form will also mandate the suppliers to notify the existing retail agent in advance in case new retail agent opens within the close proximity and substantially affect the revenue of the existing agent.

- **Stipulate the formation of associations**. Hoping that associations of retail agents would strengthen their bargaining power vis-à-vis large suppliers, KFTC is proposing to amend the FRATA to prohibit suppliers from barring the formation of retailer agent associations.

- **More procedural protections.** The KFTC will push forward the introductions of more procedural protections in FRATA for small and medium-sized retail agents, including (1) a private injunctive relief procedure where the agent can apply for an injunction before the court without going through the KFTC, (2) a punitive damages procedure against any retaliatory measures taken by suppliers against the retail agents, and (3) a request for information power for the retail agents in order to enable them to acquire sufficient information from suppliers to establish the claim.

The KFTC has taken a substantial step forward in protecting the rights of retail agents. However, it is yet to be seen if such amendments will receive the green-light from Korean legislature. Companies are strongly advised to keep an eye on the issue and the coming amendment to the FRATA and the standard distribution agreement form.

Matt Liu and Elvin Peng, Tsar & Tsai Law Firm

TFTC cracked down resale price maintenance

On May 23, 2018, the Fair Trade Commission of Taiwan (**TFTC**) imposed a fine of NT$100,000 (USD 3,300) on Chun Shin Limited (**Chun Shin**) for restricting the resale price of vehicle roof rack.

Chun Shin was alleged to have inserted contract terms in the distribution agreement for vehicle roof rack. These terms include (1) the resale price is suggested to be identical with the list price; (2) the distributor may not set the resale price lower than 95% of the list price without Chun Shin's prior approval; and (3) Chun Shin has the right to terminate the agreement if the distributor violates the price policy.

The TFTC refused to accept Chun Shin's justifications, such as prevention of inter-reseller disputes and the lack of enforcement by Chun Shin. Considering the evidence given by several resellers, TFTC determined that the resale price was restricted by those contract terms and imposed the fine on Chun Shin.

The enforcement shows that resale price maintenance is not tolerated by TFTC. Even if the restrictive contract terms have never been enforced by the supplier, the terms in and of themselves would constitute an infringement.

Related Links:

The TFTC news release can be found here.