



Antitrust in Asia.

The business impact of
fast-evolving competition laws

October 2017



Freshfields Bruckhaus Deringer

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Competition becomes more and more a guiding principle in Asia. And while globalization and digitalization enhance worldwide competition there is also an expanding common understanding that this guiding principle needs safeguards.

These developments are not only reflected in the growing number and activity of Competition Agencies in Asia but also in the efforts to align competition law and policy among Asian countries, in particular through ASEAN. The increasing importance of the principle of competition in Asia also shows within the International Competition Network (ICN). In 2016 the ICN held its Annual Conference for the first time in Southeast Asia. More than 500 participants from more than 75 jurisdictions met in Singapore to have in-depth discussions about competition law and competition policy.

Andreas Mundt
Chair of the International Competition Network
and President of the Bundeskartellamt



Asia now crucial for global deal planning and compliance

Overview

Some of the most complex mandates we have ever taken on have involved significant Asian challenges. With new competition regimes in place and existing regimes getting tougher, antitrust in Asia is now a consideration that no one can afford to ignore in global deal planning or corporate compliance. Our own resources in the region have grown substantially over the last few years.

This publication summarises the recent highlights of competition law enforcement activities in some of the largest economies in Asia. Similar to our 2013 edition, we wield our ‘crystal ball’ to identify the enforcement trends we’re likely to see in the region over the next three to five years. We also include a standalone chapter featuring the remaining Asian jurisdictions, a set of regional enforcement ‘heat maps’ and an at-a-glance reference table for 19 jurisdictions in the region to provide the full picture of Asian competition laws and enforcement.

Besides our own competition law practices in Beijing, Hanoi, Hong Kong and Tokyo, several other firms with whom we work regularly have contributed to this project. We would like to thank them and a number of our clients for their enthusiastic response to this publication.

As well as legislative reform, enforcement activity has increased considerably.

Our special thanks also go to Mr Andreas Mundt, Chair of the International Competition Network and President of the Bundeskartellamt, and Mr Han Li Toh, Chief Executive of the Competition Commission of Singapore, for sharing their valuable observations on competition law enforcement in Asia from the authorities’ point of view.

We trust that you will find this publication useful for deal planning and compliance work, and we look forward to sharing our regional experience and expertise with you in person and in future publications.

New enforcers and greater enforcement

The past five years have seen a number of Asian jurisdictions enter the realm of competition law enforcement – especially Hong Kong and ASEAN members such as Brunei, Laos, Myanmar and, perhaps most notably, the Philippines – as part of the establishment of the ASEAN Economic Community in 2015. Today, with only the exception of Bhutan, Cambodia (which does have an advanced draft law) and North Korea, competition laws have been enacted in all South and East Asian jurisdictions and have become effective across most of Asia.

The jurisdictions that already had competition laws in place are taking steps to develop their existing laws and enhance the power of their competition authorities. In particular, Taiwan has made sweeping changes to its competition laws recently. China, Indonesia, Japan, Mongolia, Thailand and Vietnam are all considering or are in the process of making substantial amendments to their competition laws.

As well as legislative reform, enforcement activity has increased considerably. Well-established authorities such as the Japan Fair Trade Commission (JFTC) and the Korea Fair Trade Commission (KFTC) have grown increasingly robust and are exploring new targets for future enforcement. In the short time since its competition law came into force, China has already established itself as one of the world’s most active competition law regimes, intervening in global transactions and aggressively pursuing cartel, resale price maintenance and abuse of dominance infringements by both domestic and foreign companies. Singapore and India have also evolved markedly, leading competition law

It is clear that Asia is a key focal point for global competition law enforcement. A decade ago, many of our clients were focusing on antitrust risks in the US and Europe. Today, we are answering their questions on competition law enforcement in Asia on a daily basis.

enforcement in the ASEAN region and South Asia, respectively. Malaysia's and Indonesia's appetites for cartel investigations continue to grow. In Hong Kong, one of the youngest Asian competition law regimes, the Competition Commission is also proving to be a serious enforcer, bringing its first two cartel cases before the court only 20 months after its laws took full effect in late 2015. In the medium term, a number of highly sophisticated competition authorities will likely emerge in Asia, exerting significant influence on the business world together with their more mature counterparts in the West. This is already the case with China.

The past five years have also seen Asian competition laws amended to provide for more severe sanctions and enhanced enforcement powers. The KFTC imposed total fines of US\$760m in 2016, almost double that of the US, and in 2017 imposed a fine of circa US\$900m on Qualcomm. The authority has also been actively pursuing criminal penalties against individuals in cartel investigations. Between 2015 and 2016, it made more than 30 referrals for criminal prosecution, with prison sentences ranging from several months to one year. Indonesia is expected to remove its relatively low financial penalty cap

It is clear that Asia is a key focal point for global competition law enforcement.

and adopt the (more internationally accepted) approach of calculating fines based on the company's revenue, which is expected to lead to higher fines. Malaysia imposes a financial penalty of up to 10 per cent of the company's worldwide revenue over the entire infringement period, which is only capped by the year the competition law became effective in 2012.

Mongolia, starting from July 2017, is now able to impose community service and travel bans against individuals for cartel and abuse of dominance infringements. In addition, competition authorities in Taiwan and Indonesia are working towards including the power of search and seizure into their new competition laws to enhance the authorities' evidence-gathering ability. These new developments signal more vigorous enforcement in Asia going forward, especially as previously less active competition authorities gain momentum.

However, in line with the disparate economic and political development in the region, the competition law enforcement climate varies considerably across Asian jurisdictions. Competition law remains dormant in a few jurisdictions in South and Central Asia, and infringement findings and penalties in some countries are frequently annulled as a result of political influence or domestic interests. Different economic contexts may also result in drastically different enforcement priorities. For instance, competition authorities in China have been taking a strict stance towards resale price maintenance, whereas vertical agreements are excluded altogether from Singaporean competition law (unless there are dominant parties involved). So, conduct blessed by one regime may be punished by another.

Although enforcement is not consistent throughout the region, some distinct themes have emerged in Asian competition law enforcement over the past five years. We describe these in more detail below.

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With the number of jurisdictions in Asia with antitrust statutes proliferating and the increasing active enforcement of the statutes, antitrust compliance in Asia has become a very important part of doing business. Going forward, we think global compliance is likely to be driven largely by such jurisdictions and understanding how common antitrust concepts are being interpreted in ways that challenge the status quo becomes key. We all have to consider how to develop a training program that takes this into account, including sometimes having different rules for different regions and sometimes applying the lowest common denominator. This trend, of course, means more legal uncertainty for companies. We can no longer rely on principles established by the historic antitrust jurisdictions as the primary basis for our competition compliance efforts. Therefore, we strongly encourage continued harmonisation and coordination by agencies across the globe on both substance as well as processes and procedures, including timelines and due process principles.

Camilla Jain Holtse
Chief Legal Counsel, Head of Competition Compliance,
Maersk Line





Although the antitrust policies of our various lines of business are designed to comply with the highest global standards, we also need to be mindful of local regulations and practices. In other words, it is absolutely critical for us to maintain a clear understanding of national and regional antitrust law and enforcement wherever we do business. The challenges in this regard may be even greater in Asia due to the rapid and yet uneven pace of economic and regulatory change across a region with extremely diverse legal systems.

J T Murphy
General Counsel, Head of Asia Pacific Legal, JPMorgan Chase



Cartels, leniency and whistleblowers

Cartels remain an enforcement focus in most Asian jurisdictions. In countries such as Hong Kong, India, Indonesia, Japan, South Korea, Malaysia and the Philippines, bid-rigging is one of the most commonly targeted types of cartel behaviour. In 2016, South Korea handed down a fine of US\$306m on 13 construction companies for bid-rigging in the market for liquefied natural gas tanks. Trade associations play a very active and prominent role in many business communities across Asia, so it is not unexpected that jurisdictions such as China and Malaysia have investigated and fined such associations for their participation in cartel conduct.

Most Asian jurisdictions have now adopted leniency programmes, which, to the surprise of some, have proven to be an effective tool in obtaining key evidence to combat cartels in Asia. Japan and South Korea are among the jurisdictions that have benefited most from

Cartels remain an enforcement focus in most Asian jurisdictions.

leniency applications, now receiving about 50 applications per year on average. China, India, Singapore and Taiwan have also recently concluded some of their most high-profile cartel investigations based on leniency applications.

Some jurisdictions are exploring other, more creative ways to bolster their investigatory effectiveness. China and Singapore, for instance, permit lighter fines for companies under investigation that co-operate with the competition authorities by volunteering admissions. Taiwan, following the South Korean

approach, became the second jurisdiction in Asia to adopt a whistleblower reward scheme for individuals, offering financial rewards to cartel informants. To date, Taiwan has already completed two cartel investigations based on evidence obtained from whistleblowers. And to help overcome the Taiwan Fair Trade Commission's (TFTC's) lack of search and seizure powers in dawn raids, Taiwan has amended its competition law to shift the burden of proof on to cartel defendants when it has sufficient circumstantial evidence. In China, a hotline ensures that whistleblowers can file anonymous infringement claims.

Targeting new theories and adding new tools

As Asian competition authorities become more sophisticated, they tend to take on more complex cases, which in turn require enhanced enforcement powers to meet the challenge. A number of Asian competition authorities have developed a remarkable enforcement record against non-cartel types of antitrust infringements, most noticeably in relation to abuse of dominance. Some regulators have also demonstrated a strong interest in novel antitrust issues involving the digital economy and intellectual property rights.

In 2015, China's National Development and Reform Commission (NDRC) imposed its largest ever antitrust fine of RMB 6.1bn (approximately US\$975m) on Qualcomm for abusing its dominance by, inter alia, charging discriminatory royalties for access to its portfolio of standard essential patents (SEPs) relating to 3G and 4G mobile telecommunication standards.

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Although the decision prompted debate in the international antitrust community (the EU and US had not, at the time, made a similar finding against Qualcomm), it showcased China's willingness to pursue not only contentious, but also cutting-edge, cases. Shortly after the NDRC decision, the KFTC handed down a fine of comparable magnitude on Qualcomm in respect of similar conduct (the decision is currently being appealed). The JFTC also recently took a stance on the application of fair, reasonable and non-discriminatory (FRAND) licensing terms, becoming one of the first competition authorities to establish that refusal to license an SEP, or seeking an injunction against a willing licensee after declaring an intention to license the SEP on FRAND terms, may violate competition law. India, Japan and Singapore have also indicated that e-commerce will be an enforcement priority going forward.

Asian competition authorities are also taking on cases involving other complex theories of harm. China's 2016 infringement decision in Tetra Pak, for instance, was based on detailed analysis of the effect of loyalty rebates. In the same year, the JFTC for the first time challenged the legality of most favoured nation clauses in Amazon's agreements with its retailers. The Competition Commission of Singapore (CCS) also recently looked at the use of exclusivity obligations in the cord blood banking and online food delivery services markets.

Merger control broadening and deepening

Merger control enforcement has been very active in a number of Asian jurisdictions since 2012. By 31 August 2017, China's Ministry of Commerce (MOFCOM) had cleared a total of 1,936 transactions since the inception of the law in 2008, approximately 70 per cent of which have been reviewed since 2013. The KFTC has reviewed more than 500 merger filings in each of the past five years. The number of annual merger filings in Japan has decreased since its filing thresholds were revised in 2010, but the JFTC nevertheless reviews approximately 300 cases per annum. The Competition Commission of India and the

TFTC have also each reviewed around 300 to 500 cases over the past five years. Impressively, the Philippines has already reviewed over 100 transactions since its first comprehensive competition law entered into force in 2015.

Today, most jurisdictions in Asia prevent parties from closing a transaction before receiving clearance from the relevant competition authority. The most noticeable exceptions being Singapore, Hong Kong and Malaysia, with the latter two also being limited to the telecommunications and aviation sectors, respectively. Indonesia still requires a merger filing only after closing although this may change in the future.

Although most Asian competition authorities are relatively young, some have demonstrated a willingness to intervene in foreign-to-foreign transactions when their domestic markets or national interests are at stake. MOFCOM exemplifies this. Of the 30 transactions in which MOFCOM has imposed remedies, 28 relate to foreign-to-foreign transactions. MOFCOM is also known for not always acting in concert with its more mature peers. This is demonstrated by its imposition of remedies that differ from those sought by other authorities in the same transactions, such as in Dow Chemical/DuPont; or even blocking a deal when no other jurisdictions chose to do so, as it did in 2014 in the P3 Network shipping alliance.

Elsewhere, in 2016 the KFTC imposed remedies upon the Dow Chemical/DuPont transaction in line with those required by competition authorities globally. The JFTC imposed remedies upon NXP Semiconductors' merger with Freescale Semiconductor in 2015. The TFTC cleared Microsoft's proposed acquisition of Nokia's phone business subject to behavioural remedies being imposed on both Microsoft and, unusually, the seller, Nokia. Singapore, despite its voluntary filing regime, has in the past three years cleared two transactions subject to remedies, and is comfortable imposing both structural and behavioural remedies. Indonesia and India have also required remedies on a couple of transactions to date.



Despite the headwinds against globalisation and free trade in other parts of the world, economic growth and market liberalisation in ASEAN is strong, along with the rest of Asia. ASEAN remains committed to regional economic integration and competition policy and law is a key pillar of this strategy as captured in the ASEAN Economic Community blueprint 2025. In particular, ASEAN is the new hotspot for the digital economy, with tremendous growth in e-commerce with the digital giants from the United States and China competing for market share with home grown ASEAN companies.

Han Li Toh
Chief Executive of the Competition Commission of Singapore



Asia has seen huge growth in competition law enforcement in recent years as new regimes have come on line and older regimes become more active. As an in-house practitioner monitoring several jurisdictions in this part of the world, it's become increasingly important to keep up with competition law developments in the region where the current enforcement practice can vary dramatically from country to country.

Ben Bleicher
Senior Competition Counsel, Rio Tinto



Our experience shows that Asian competition authorities' increasing sophistication is not limited to their assessment of anti-competitive agreements and abuse of dominance, but has also extended to merger review. China and Japan now frequently conduct detailed economic analyses when reviewing transactions with complex market dynamics.

Rigorous monitoring and sanctions for failure-to-notify cases is another common theme among Asian jurisdictions with mandatory filing requirements. Under the newly amended Taiwan competition law, the TFTC now has the power to impose a fine of up to NT\$50m (approximately US\$1.64m) on parties that fail to file notifiable transactions (including foreign-to-foreign transactions), and it has already imposed fines and even ordered the unwinding of transactions in a number of failure-to-notify cases. As of July 2017, China's MOFCOM had published 17 decisions fining companies for failure to notify reportable transactions – including its decision to fine Canon in relation to its multistep acquisition of Toshiba Medical Systems – the first time it has fined parties in a foreign-to-foreign transaction for failure to file. South Korea has boosted its monitoring of unreported transactions as part of its efforts to ramp up enforcement in 2017. Indonesia, despite its post-merger filing requirement, has also been closely monitoring omitted notifications and has imposed fines in seven transactions, with the highest fine being approximately US\$600,000.

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With such an active enforcement record, growing sophistication of review and intensified supervision and investigation of transactions that are not duly notified, merger control in Asia has already become a key consideration for transaction parties and their advisers around the globe. We expect this trend to continue.

The role of non-competition concerns and foreign investment rules

While we are seeing a clear move towards increasing protectionism around the globe, the position in Asia is less clear cut. It's true that a number of Asian jurisdictions have the ability to consider non-competition issues related to the public interest or industrial policy in their merger control laws, but in practice it appears that these considerations are rarely taken into account by competition authorities.

For example, in China, such industrial policy considerations are understood to arise more often during MOFCOM's consultation process with other ministries, trade associations or other third-party market players, which can sometimes affect the predictability of the authority's decision-making. As has been well documented, China has in recent years intervened in several global transactions seemingly on the basis of industrial policy as well as antitrust considerations, for example Glencore's acquisition of Xstrata (2013), Marubeni's acquisition of Gavilon (2013), Microsoft's acquisition of Nokia's phone business (2014) and Nokia's acquisition of Alcatel-Lucent (2015). That being said, there is currently little indication of China adopting a more interventionist approach on this basis, despite the changes we are seeing elsewhere.

Leaving aside non-competition considerations, a number of Asian jurisdictions have rules restricting foreign investment. Restrictions include, for example, prohibiting investments in certain sensitive industries, or limiting the level of shareholdings foreign investors are allowed to acquire in domestic companies. However, similar to the merger control arena, while it appears that foreign investment controls in other parts of the world may be tightening, there does not appear to be any such trend in Asia at present. In fact, several countries, such as China and Vietnam, are in the process of loosening rather than tightening their foreign investment regulations. As a result, our current expectation is that Asia will, if anything, become more open to foreign investment.

Active international co-operation and co-ordination

Co-operation among competition authorities around the world has never been as active as it is today – Asia is no exception. Over the past few years, Asian competition authorities have been engaging in regular bilateral and multilateral meetings with other competition authorities, both within and beyond Asia, to discuss general issues in competition law as well as specific cases.

For instance, Japan has signed bilateral co-operation agreements with the US, the EU and Canada and has also entered into economic partnership agreements with a number of South and Central Asian jurisdictions. In South Korea, the KFTC is a very active member of the International Competition Network and other international organisations such as the Organisation for Economic Co-operation and Development. In Hong Kong, the Competition Commission signed a memorandum of understanding with the Canadian Competition Bureau in 2016 to enhance co-operation between the two authorities. Competition authorities in China have signed memoranda of understanding with counterpart authorities in Australia, Japan and South Korea as well as further afield in the US, Europe and certain BRICS countries, among others. And despite a tendency sometimes to diverge from its peers in terms of its substantive assessment, MOFCOM sometimes collaborates with other competition authorities for specific merger reviews. In Southeast Asia, the establishment of the ASEAN Economic Community in 2015 has brought closer co-operation and greater alignment of broader strategic enforcement goals among ASEAN members, although co-ordination on actual cases tends to be less common at present.

In addition, some more developed regimes are now reaching out to help neighbouring jurisdictions develop their competition law enforcement. For example, the JFTC is currently co-operating with the Mongolian authority in revising and developing the Mongolian competition law. And competition authorities in a number of jurisdictions, including Australasia, Japan, Singapore and Europe, are assisting ASEAN countries by way of capacity building and technical assistance funds.

Co-ordination and co-operation among competition authorities has also facilitated cross-border investigations in Asia and beyond. As competition authorities in Asia have gained experience, they have become more confident in joining competition authorities in other regions to crack down on multijurisdictional infringements when there is a local nexus. The investigations into auto parts and bearings, roll-on/roll-off shipping and capacitors are some of the most recent examples of Asian competition authorities launching investigations in parallel with, or immediately following, investigations in other parts of the world. Competition authorities in China, Japan, South Korea and Singapore have all conducted investigations against the auto parts and bearing manufacturers, with an aggregated fine in Asia close to US\$500m. China, South Korea and Japan investigated the roll-on/roll-off shipping cartels, imposing an aggregated fine of more than US\$310m. Companies can no longer assume that Asian regulators will take a back seat when European or American authorities are involved in a global investigation.

Co-ordination and co-operation among competition authorities has also facilitated cross-border investigations in Asia and beyond.



The expansion of antitrust legislation and enforcement in Asia is changing the compliance landscape for Chinese companies seeking overseas growth opportunities. Asia has become increasingly important and developing an antitrust compliance culture has become an imperative for in-house counsel to protect their companies' interests in this part of the world.

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Looking forward

Without doubt, the centre of gravity of global competition law enforcement has shifted closer to Asia. While the region still features countries at diverse stages of economic and political development, it is clear that Asian jurisdictions are gearing up for more vigorous and sophisticated competition law enforcement.

More specifically, in the short to medium term, we expect China's enforcement to increase, taking on more complex cases and participating in co-ordinated international investigations. Other more established jurisdictions such as Japan, South Korea and Taiwan will remain active. In Japan, while procedural reforms are in the pipeline and should offer enhanced due process protection to companies under investigation, the JFTC is expected to enforce more aggressively against international companies and pursue cases with more sophisticated theories of harm. Meanwhile, South Korea will focus enforcement on restraining the power of South Korea's 'chaebol' conglomerates while also undertaking more rigorous merger reviews. And in Taiwan, amendments to the competition law will give the TFTC greater ability to enforce more aggressively against cartels and failure-to-notify merger cases. Singapore will continue to lead competition enforcement in the ASEAN region, and is likely to target anti-competitive issues in new sectors, including

the digital economy. Newer regimes such as Hong Kong and the Philippines will quickly find their feet, focusing in particular on hard-core cartels such as price-fixing and bid-rigging. Finally, older regimes such as Indonesia will become more aggressive as a result of new reforms, giving greater powers of investigation and sanctions to the authority; or more active such as Vietnam, as a result of new draft merger control thresholds that, if implemented, will result in a potentially significant increase in the number of notifiable transactions.

With competition regimes emerging and strengthening in Asia, it is also anticipated that companies doing business there will increasingly invest resources into competition law compliance in Asia. Managing the demands of diverse laws across the region will remain crucial, and the costs of ignoring them will be high. Companies will need to have an overarching competition compliance policy, including, for example, appropriate training, policies, procedures and guidelines, and internal reporting mechanisms, designed to raise awareness among employees and mitigate the risk of infringement. In-house counsel will also need to constantly review their internal compliance policies, adapting them as necessary to the specific requirements of a given Asian jurisdiction, so as to keep pace with the region's rapid and diverse development.

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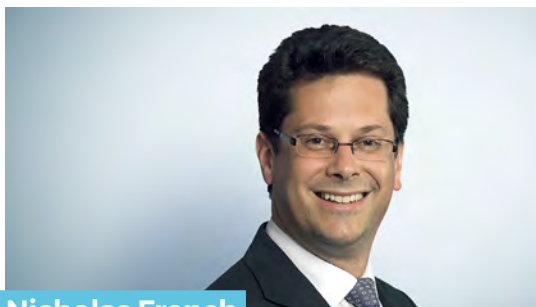


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Asian antitrust milestones

2016

- Fines in India reach almost US\$1bn
- ASEAN Competition Action Plan published
- New competition law enacted in Kazakhstan
- Merger regulations amended in Pakistan
- Filing thresholds amended in Taiwan
- Competition Commission of Singapore imposes remedies on a proposed merger

2015

- Competition laws enacted in Brunei, Laos, Myanmar and Philippines
- Hong Kong competition law takes full effect
- China fines Qualcomm nearly US\$1bn
- Whistleblower reward scheme introduced in Taiwan
- China includes amendment to competition law in its legislative plan

2017

- New law comes into effect in Thailand
- Enforcement begins in the Philippines
- Merger control thresholds amended in India
- Korea Fair Trade Commission fines Qualcomm approximately US\$900m
- Malaysia Competition Commission issues record fines in insurance sector
- New sanctions come into effect in Mongolia
- Hong Kong Competition Commission brings its first two cartel cases before the Competition Tribunal

2018

- New competition law expected to be enacted in Vietnam
- Draft text of changes to fining procedures expected to be introduced in Japan
- Amendments to competition laws in Indonesia and Mongolia to be considered
- Various rules on antitrust investigations and abuse of intellectual property rights to be considered in China

2020

- New ASEAN Regional Guidelines for Competition Policy to be issued
- Study on recommended procedures for joint investigations and decisions among ASEAN countries on cross-border cases to be completed

2019

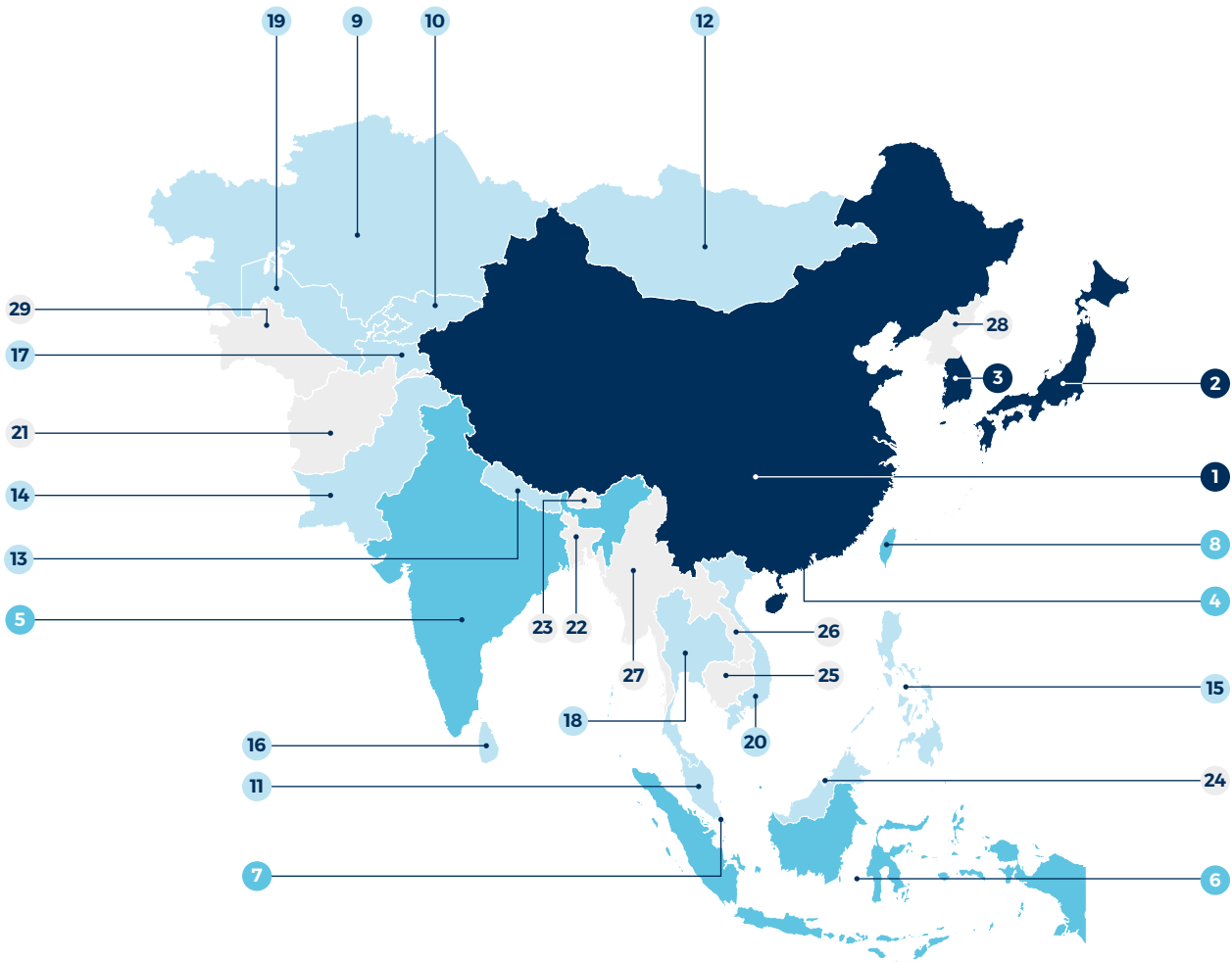
- Expected establishment of ASEAN Competition Enforcers' Network
- Philippine Competition Commission expected to complete its investigation into the cement industry

Future milestones

- New competition laws to come into force in Brunei, Laos and Myanmar
- Draft competition law to be enacted in Cambodia

Asian competition laws at a glance

Enforcement

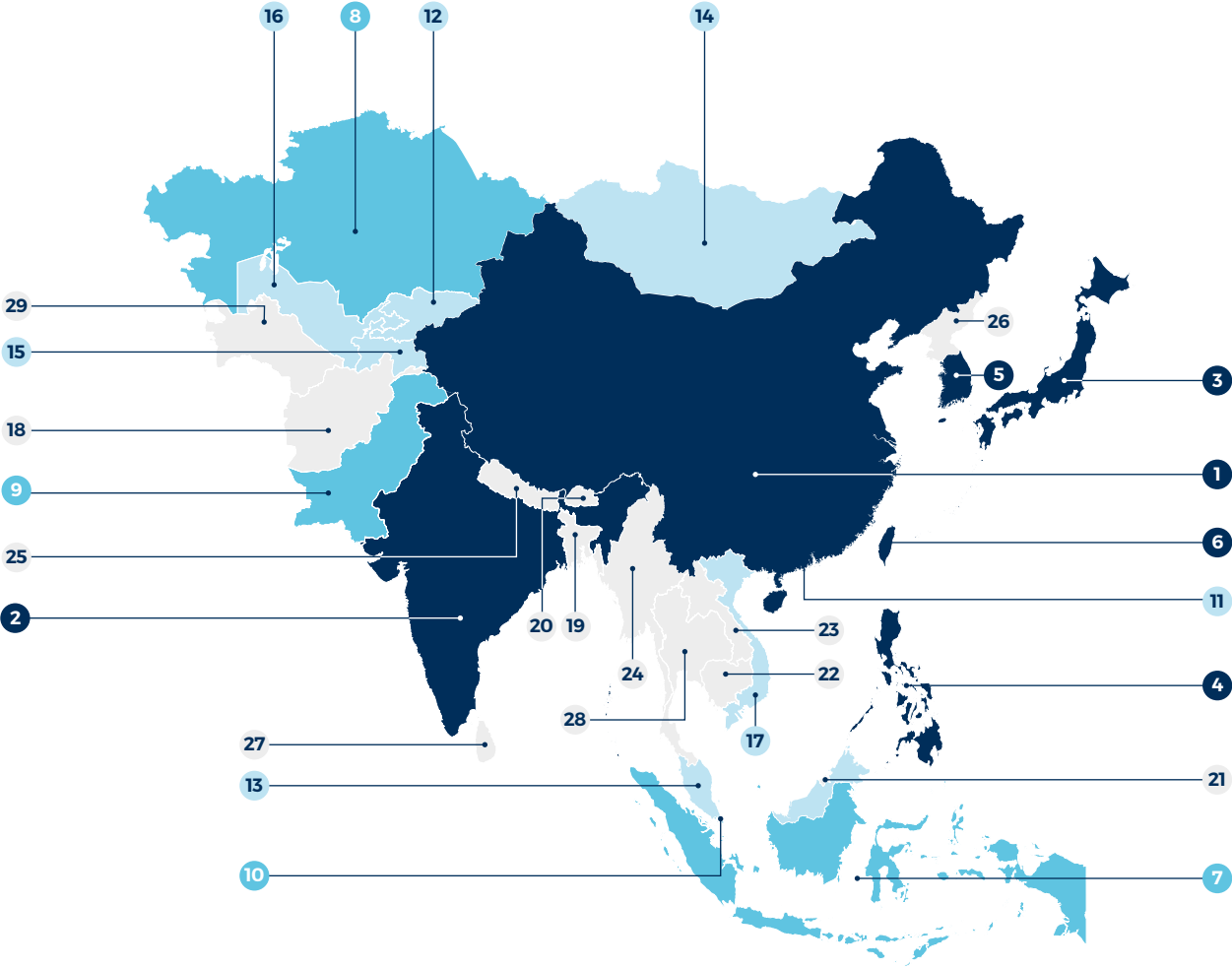


- | | | |
|---------------|----------------|-----------------|
| 1 China | 9 Kazakhstan | 21 Afghanistan |
| 2 Japan | 10 Kyrgyzstan | 22 Bangladesh |
| 3 South Korea | 11 Malaysia | 23 Bhutan |
| 4 Hong Kong | 12 Mongolia | 24 Brunei |
| 5 India | 13 Nepal | 25 Cambodia |
| 6 Indonesia | 14 Pakistan | 26 Laos |
| 7 Singapore | 15 Philippines | 27 Myanmar |
| 8 Taiwan | 16 Sri Lanka | 28 North Korea |
| | 17 Tajikistan | 29 Turkmenistan |
| | 18 Thailand | |
| | 19 Uzbekistan | |
| | 20 Vietnam | |

Enforcement
Level of enforcement activity

- High
- Moderate
- Low
- No competition law/
competition law enacted
but not yet in force

Merger control



1 China	11 Hong Kong	18 Afghanistan
2 India	12 Kyrgyzstan	19 Bangladesh
3 Japan	13 Malaysia	20 Bhutan
4 Philippines	14 Mongolia	21 Brunei
5 South Korea	15 Tajikistan	22 Cambodia
6 Taiwan	16 Uzbekistan	23 Laos
7 Indonesia	17 Vietnam	24 Myanmar
8 Kazakhstan		25 Nepal
9 Pakistan		26 North Korea
10 Singapore		27 Sri Lanka
		28 Thailand
		29 Turkmenistan

Merger control
No of transactions caught

- High
- Moderate
- Low/sectoral filings only
- No merger control regime/merger control regime not yet in force



China

Gaining momentum
as one of the three
major antitrust regimes



The past five years have seen a steep uptick in China's competition law enforcement. With its aggressive enforcement activities in terms of merger review, cartel investigations, resale price maintenance and abuse of dominance, China has established itself as one of the world's major antitrust regimes alongside the EU and US. Industrial policy concerns continue to play an important role in China.

Although competition law enforcement in China outside of the merger control arena was not particularly active in the early years following the promulgation of China's Anti-Monopoly Law (the AML) in 2008, more recent years since 2013 have seen China gain momentum with an intensified legislative programme and a steep uptick in its competition law enforcement. The competition authorities that enforce the AML have become increasingly sophisticated and confident. Today, China has established itself as one of the most active competition law regimes in the world, although certain aspects of this young regime still call for further development. Recent leadership changes at China's authorities underscore the authorities' resolve to actively enforce the AML – a trend that is expected to continue for many years to come.

Continued intervention in global transactions

China's Ministry of Commerce (MOFCOM), responsible for merger review in China, has grown to become one of the key merger control authorities in Asia and the world – by 31 August 2017, MOFCOM had cleared a total of 1,936 transactions since the inception of the law in 2008, among which 30 were cleared with remedies and two were blocked (with interventions representing roughly only 2 per cent to date of deals reviewed).

Despite being a relatively young authority, MOFCOM has not hesitated to intervene in a number of global transactions, including foreign-to-foreign transactions. Of the 30 transactions where MOFCOM has demanded remedies, 28 relate to foreign-to-foreign transactions. Recent examples include Nokia/Alcatel Lucent (2015), NXP/Freescale (2015), ABI/SABMiller (2016), Abbott/St. Jude Medical (2016), Dow Chemical/DuPont (2017) and Brocade/Broadcom (2017).

Although it enjoys well-established relationships with merger control authorities around the world, with whom it exchanges views on a regular basis, MOFCOM has also demonstrated confidence in acting differently from other competition agencies. Most notably, MOFCOM blocked the proposed P3 Network shipping alliance in 2014, after both the EU and US had given the green light, and not infrequently it requires different types of remedies from those sought by other authorities in the same transactions. The decision in P3 also marked MOFCOM's first ever decision to block a foreign-to-foreign transaction outright. It is expected that MOFCOM will continue to intervene in global transactions when it identifies significant concerns in China.

As MOFCOM's caseload and experience increase, it will become more sophisticated still in reviewing global transactions. This has already been demonstrated in its recent Dow Chemical/DuPont decision, where MOFCOM examined the transaction's potential impact on technological innovation, and found that innovation in the market for pesticides for rice would be likely to be reduced following the combination of the R&D functions of Dow and DuPont. In the following Brocade/Broadcom decision, MOFCOM raised concerns over the potential misuse of third-party competitors' confidential information and the risk of undermining interoperability of complementary products in the fibre channel switches and fibre channel adapters markets.

1,936

transactions reviewed by MOFCOM since 2008.

US\$ 975m

Largest ever antitrust fine imposed by the NDRC.

More streamlined merger review process

In 2014, MOFCOM introduced its much anticipated ‘simple case’ rules, which provide a less burdensome and shortened review process for transactions that do not raise significant competition concerns. Unlike the typical 4–8 month review timeline for a normal (and non-problematic) MOFCOM filing, on average a simple case is now cleared within 30 days following case acceptance (with case acceptance marking the start of the statutory review period).

To further speed up the overall review process, MOFCOM also has undertaken a series of other internal administrative reforms in recent years, including an internal restructuring in 2015 to ensure that a filing is reviewed by the same case team throughout the process. MOFCOM is also working on reducing the time for its pre-acceptance review (which is not bound by any statutory deadline) to one month. We expect that in the short to medium term, MOFCOM’s overall review timeline will be shortened further, and that merging parties will benefit from a less burdensome procedure as compared with now.

Intensified investigation against failure-to-notify cases

Since 2014, MOFCOM has sent a strong signal to merging parties that choose not to file by intensifying its enforcement against failure-to-notify cases. As at August 2017, MOFCOM had published 17 decisions fining companies for failure to notify reportable transactions – including its decision to fine Canon in relation to its multiple-step acquisition of Toshiba Medical Systems. This was MOFCOM’s first decision relating to a failure to notify a foreign-to-foreign transaction. While the current maximum fine for failure to notify in China is only RMB 500,000 (approximately US\$75,000), MOFCOM is reportedly contemplating substantially increasing the maximum fine to RMB 5m. Moreover, MOFCOM has included a set of detailed procedural rules on investigating failure-to-notify transactions in its draft amended merger review measures. As such, it is foreseeable that transactions caught by the Chinese merger control regime will be exposed to a higher enforcement risk if they are not duly notified.

‘The Anti-Monopoly Bureau of MOFCOM has attached great importance to the application of economic analysis in its antitrust enforcement. It aims to improve the case teams’ professionalism with the help of economic analysis tools. It will seek for third-party economic consultancies’ scientific analysis and support in major cases and will apply its limited resources to significant cases that may have an impact on the relevant markets.’

Wu Zhenguo

Director-General of the Anti-Monopoly Bureau of the Ministry of Commerce – October 2016

Aggressive enforcement against cartels and RPM

In the initial years following the promulgation of the AML, China's National Development and Reform Commission (the NDRC), responsible for price-related antitrust investigations, and the State Administration for Industry and Commerce (the SAIC), responsible for non-price-related antitrust investigations, pursued only a few domestic cases and imposed modest fines. In the past five years, however, the NDRC and the SAIC have come to the fore on the global antitrust stage with some notable investigations and decisions, focusing on unlawful cartels (mainly price-fixing) and resale price maintenance (RPM).

'The [NDRC] would not tolerate any antitrust violations, and only unwavering enforcement of the law could lead to a fundamental change in the competition landscape.'

Zhang Handong

Antitrust Chief of China National Development and Reform Commission – March 2017

As in many other jurisdictions in Asia and beyond, cartels are an enforcement priority in China. Among others, in August 2014 and 2015, the NDRC conducted two high-profile cartel investigations against international companies in the auto parts/bearings sector and in the car carrier shipping sector. Although detailed procedural rules of China's leniency programme are still not in place, it is noteworthy that, in both investigations, the whistleblowers obtained full immunity from fines.

RPM is another key focus of the NDRC. The NDRC has consistently taken a tough stance towards RPM. The most recent notable case involved NDRC's investigation in 2016 of the US medical device company Medtronic, which was fined RMB 118.5m (approximately US\$17.2m) for RPM.

'The [SAIC] will continue to investigate significant antitrust cases, and actively look into anticompetitive agreements and conduct that amounts to abuse of dominance.'

Zhang Mao

Minister of China State Administration for Industry and Commerce – December 2016

More experience with abuse of dominance

In addition to cartel and RPM cases, there has been a noticeable increase in abuse of dominance cases handled by China's antitrust agencies.

In 2015, the NDRC imposed China's largest ever antitrust fine (and one of the largest fines imposed by competition authorities across Asia) – a huge RMB 6.088bn (approximately US\$975m) – on Qualcomm for abuse of its dominant market position by charging excessive royalties for access to its portfolio of standard essential patents relating to 3G and 4G mobile telecommunication standards. In November 2016, the SAIC fined Tetra Pak RMB 668m (approximately US\$97m) for abuse of market dominance, including in relation to its use of loyalty rebates. This was the first time that one of China's antitrust agencies considered the effect of loyalty rebates. The SAIC has also in recent years fined a number of Chinese state-owned enterprises in the public utility sector for abuse of dominance. Vigorous enforcement of abuse of dominance is expected to continue going forward, especially with the competition authorities' increased focus on the abuse of intellectual property rights and the abuse of administrative power.

Contributors:

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Industrial policy concerns play an important role

Industrial policy concerns play an important role in the enforcement of the AML. In recent years, it is notable that MOFCOM has imposed some remedies or blocked deals in circumstances where parties would not normally expect this outcome based on competition considerations alone. The AML, however, allows non-competition factors to be considered in merger review. Such industrial policy concerns are understood to more often arise during MOFCOM's consultation process with other ministries, trade associations or other third-party market players, which may influence the predictability of the substantive outcome of the reviews. It is important therefore to carefully anticipate potential public interest and industrial policy concerns when planning for the China merger review process.

Looking ahead

China is drafting guidelines concerning dawn raids, calculation of fines and illegal gains, commitments/settlements, leniency applications, the suspension of investigations, and exemptions for anti-competitive agreements. A set of amended merger review measures is also on the way. These guidelines and measures are expected to provide more guidance and improve the transparency and predictability of competition law enforcement in China. In terms of future sector focus, the NDRC has indicated that it will target sectors ranging from pharmaceuticals to media devices, intellectual property rights and the auto sector, as well as industrial or raw materials and financial services. The SAIC will continue to focus on sectors relating to people's daily lives, with a special focus on public utilities.

While China's overall enforcement focus is expected to remain on price-related cartels and RPM, its competition agencies are likely to take on more sophisticated cases and theories of harm, and more international cases.

Finally, China's State Council listed amendment of the AML in its legislative work plan in 2015. While the details and timetable of the proposed amendments are still unclear, it is expected that the amendments will address gaps in the current AML and further streamline competition law enforcement in China.



Since the implementation of the Anti-Monopoly Law, the three competition law enforcement agencies in China have been conducting their enforcement work on a proactive, steady, prudent and effective basis.

Zhang Qiong

Convener of Advisory Group of Experts on the Antimonopoly
Commission of China's State Council



Hong Kong New Competition Ordinance off to strong start



The Hong Kong Competition Commission has had an active two years since its Competition Ordinance took effect in 2015. It has already brought two cases before the Competition Tribunal and looked at a large number of complaints, enquiries and cases across a variety of sectors.

It is expected to continue focusing on cartel and resale price maintenance, and become more aggressive in terms of antitrust enforcement in the future.

The Hong Kong Competition Ordinance (the HKCO), which took full effect on 14 December 2015, is the first economy-wide competition law in Hong Kong and has already affected the way local companies conduct business. Following the ‘three pillars’ model, the HKCO prohibits anti-competitive agreements, abuse of a substantial degree of market power and mergers that would substantially lessen competition – though merger control is limited to the telecommunications sector.

Prior to the HKCO’s activation, some feared the Hong Kong Competition Commission (the HKCC) – the main agency charged with enforcing the HKCO – would lack clout. But after initially taking a softer approach, which saw warnings issued to businesses and a focus on education and advocacy, the HKCC is slowly proving to be a serious authority. It has adopted a harder-line enforcement style, conducting a number of ‘dawn raids’ and bringing two cases to the Competition Tribunal (the Tribunal), Hong Kong’s specialist competition court.

HKCC acting quickly on enforcement

In its first 20 months of enforcement, the HKCC has brought two cases before the Tribunal:

- on 23 March 2017, the HKCC took five IT companies to the Tribunal for allegedly rigging bids in a tender for the supply and installation of a new IT server system. The case was brought before the Tribunal just nine months after the HKCC received the complaint, although the substantive trial is not expected to begin until more than a year after court proceedings commence; and

- on 14 August 2017, the HKCC took 10 local construction and engineering companies to the Tribunal for an alleged market-sharing and price-fixing cartel relating to the renovation of over 800 flats in a public housing estate. The 10 companies allegedly divided the renovation projects in three residential blocks in the public housing estate and advertised renovation services under the same prices to the tenants.

HKCC issues first block exemption order

The HKCC also issued its first block exemption order on 8 August 2017. Just three days after the HKCO came into effect, the Hong Kong Liner Shipping Association applied for a block exemption from the application of the HKCO for two types of liner agreements – vessel sharing agreements (VSAs) and voluntary discussion agreements (VDAs). VSAs allow carriers within a shipping consortium to operate a liner service along a specified route using a specified number of vessels (akin to an airline code-sharing arrangement). VDAs allow carrier members to exchange information, including supply and demand forecasts, freight rates and surcharges. In the block exemption order, the HKCC exempts VSAs where the parties do not collectively exceed a market share limit of 40 per cent in light of the economic efficiencies generated by VSAs. However, the HKCC did not exempt VDAs on the basis that VDA activities have not been demonstrated to meet the terms of the efficiency justification. This view contrasts with the approach taken in other Pacific Rim jurisdictions such as Malaysia and Singapore where VDAs are covered in the block exemption orders. The block exemption order is effective for five years and will be reviewed by the HKCC on or before 8 August 2021.

December 2015

The Hong Kong Competition Ordinance took full effect.

2,000

complaints and enquiries received, about half relating to alleged anti-competitive agreements.

‘I think we’re probably just coming to the end of the honeymoon period, where we don’t actually have some enforcement action as a driver for change... We’re quite focused on the need to do some enforcement.’

Rose Webb

Chief Executive Officer of the Hong Kong Competition Commission – March 2017



Market studies and educating trade associations

As part of its enforcement powers, the HKCC may conduct market studies into matters that alter competition in Hong Kong. To date, the HKCC has conducted market studies in two sectors – residential building maintenance and renovation, and auto fuel – both prompted by public outcry over high prices. The HKCC’s evaluation of maintenance and renovation tender data (all of which pre-dated the HKCO) revealed patterns consistent with bid manipulation. The HKCC warned that similar data would very likely prompt further investigation. It should hence come as no surprise that the HKCC has picked its second case before the Tribunal in the renovation services sector. In its auto fuel investigation report, the HKCC stated that it had found no evidence of anti-competitive conduct among market players, but did identify some aspects of the market that could hinder competition and contribute to high prices. To address these issues, the HKCC suggested various measures to the government that are under consideration.

Even before the HKCO entered into force, the HKCC launched its engagement and education programme for trade associations. In the months following, it worked with trade associations to encourage compliance and reviewed the published practices of 350 of them. This led to the identification of a large number of such associations with practices potentially contravening the HKCO. About 20 of these associations have since removed their price restrictions or fee scales in order to comply. Consistent with its tougher enforcement, the HKCC has warned that, in future, non-compliant trade associations and their members may face enforcement action.

Conduct ‘causing significant harm to competition in Hong Kong’ a priority

Typical of a young competition authority, the HKCC has thus far focused on conduct ‘causing significant harm to competition in Hong Kong’, chiefly cartel conduct and resale price maintenance. Among all kinds of cartel conduct, bid-rigging has been described by the HKCC chairperson as one of the most blatant and harmful forms of anti-competitive conduct with the potential to cause major harm to consumers and the economy as a whole, with price-fixing and market-sharing also being described as ‘serious anti-competitive practices which lead to reduced consumer choices and un-competitively high prices’. In addition to anti-competitive agreements, the HKCC has indicated that it will scrutinise potential ‘abuse of substantial market power involving exclusionary behaviour by incumbents’, although no investigations had become public in the first 18 months of HKCO enforcement.

The authority is likely to focus, at least initially, on local issues, and not join international investigations. This approach has been reflected in the first two cases the HKCC took to the Tribunal. According to a prior HKCC CEO, the authority should not be taking on the likes of Google and Amazon, especially when larger, more mature authorities in other jurisdictions are already investigating those companies. This is not entirely surprising as other competition authorities in the region, such as China’s antitrust agencies and the Competition Commission of Singapore, also focused on local issues in their formative years, before partaking in cross-border investigations.

‘We are looking at taking up to two more cases within this calendar year, covering conduct similar to the first... Our priority is to go after cartel conduct and cases that affect society in general and have a public interest angle.’

Anna Wu

Chairperson of the Hong Kong Competition Commission – June 2017

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In terms of sector focus, according to the HKCC's 2015/16 Annual Report, the HKCC had conducted 17 initial assessments in professional and technical services, 10 in transport, logistics and storage, and 10 in food and groceries, as well as many others in construction and infrastructure, banking and financial services, travel and education. By mid-December 2016, the HKCC reported that real estate and property management had joined professional and technical services as the top two sectors for cases under initial assessment.

By March 2017, the HKCC had already received more than 2,000 complaints and enquiries, about half relating to alleged anti-competitive agreements. Around 130 of these were examined, of which 13 per cent proceeded to an 'in-depth investigation' stage.

A tale of two authorities

As the Hong Kong merger regime applies only to the telecommunications sector, the HKCC shares jurisdiction with the Hong Kong Communications Authority (the HKCA), though – as per a memorandum of understanding between the two authorities – the HKCA will typically take the lead in reviewing mergers.

To date, the HKCA has reviewed two notified transactions – Hong Kong Broadband Network's acquisition of New World Telecommunications, and private investment firms MBK Partners and TPG's acquisition of Wharf T&T. In both cases the HKCA concluded that the transaction was not likely to substantially lessen competition and the HKCA declined to investigate. It was reported that the HKCA also looked at a third transaction – the proposed sale of Hutchison Telecommunications' fixed-line telecommunications businesses to Asia Cube Global Communications – but decided to take no formal action following an initial review.

Engagement with overseas authorities

The HKCC has already started to engage with other competition authorities around the world, including in the run-up to the entry into force of the HKCO. In December 2016, the authority entered into its first memorandum of understanding with an overseas authority, the Canadian Competition Bureau, to enhance co-operation, co-ordination and information sharing on issues of mutual concern. The authority has also engaged with representatives from the competition authorities in mainland China and is a member of the International Competition Network. These types of engagement are expected to benefit the authority as it seeks to develop into a fully fledged, effective competition authority.

Looking ahead

Recent recruits to the HKCC's leadership team, who have impressive local and overseas (eg the US, the EU and New Zealand) experience in both antitrust and general law enforcement, are likely to invigorate enforcement, helping the HKCC to meet its stated target of taking two or three cases to the Tribunal each year. The HKCC is expected to maintain its focus on cartels and bid-rigging and resale price maintenance in consumer-facing markets, and to increase the use of its investigatory powers (in particular dawn raids) as it continues moving towards a harder-edged enforcement approach.

Whether improvement will be made in the future to the regime, such as the introduction of an economy-wide merger control regime or the right to bring stand-alone and not just follow-on actions (as is the case now), will likely depend on whether the HKCC can make a success of the current set-up, thereby demonstrating that Hong Kong's economy is benefiting from an active and effective competition law.



India

India's competition authority continues to grow



The Indian competition authority has handled an impressive caseload in the first eight years of its existence. It is becoming increasingly sophisticated in its enforcement, and initial jurisdictional uncertainty is being resolved. However, challenges still remain.

The Indian competition law regime has evolved markedly in the eight years since it was introduced, though it still has some way to go to reach the levels of sophistication seen in other, more developed, jurisdictions. The Indian authority, the Competition Commission of India (the CCI), has fared well in its relatively brief existence, developing a cohesive body of rules and deciding a large number of cases, thereby laying the groundwork to fulfil its mandate to promote and sustain competition.

More than 600 competition cases have so far been investigated or otherwise disposed of without investigation by the CCI during this eight-year period. The Indian merger control regime has been in place for just over six years, and even in this short time span the CCI has dealt with more than 500 merger filings.

Indeed the CCI can already be considered one of the most powerful authorities in India given the unprecedented levels of fines it has imposed on companies engaging in anti-competitive or abusive conduct. Even where merger control is concerned, the CCI has begun to take a more stringent approach towards imposing penalties for delayed or missed merger filings and gun-jumping.

The CCI's enforcement priorities turning to more advanced sectors

The CCI's top priority remains enforcement of cartels and bid-rigging cases. In addition, it will continue to seek out abusive practices by dominant companies. Several abuse of dominance cases are currently pending investigation before the CCI's investigative arm (the Office of the Director General (the DG)) as well as before the appellate tribunal and the Supreme Court.

So far the CCI's enforcement activities have spanned several sectors, including cement, pharmaceuticals, gas, real estate, transportation, automobiles, agriculture, mines and minerals, and entertainment. In the future, the CCI is expected to focus increasingly on anti-competitive and abusive practices in more advanced sectors, such as digital and high-technology markets, telecommunications and e-commerce.

Enforcement against international companies is likely to increase

The CCI has extraterritorial jurisdiction and can investigate entities outside of India if their conduct has harmed, or is likely to harm, competition in India. Between mid-2016 and mid-2017 alone the CCI ordered investigations into anti-competitive or abusive practices involving several international companies, including leading seed and agrochemicals, digital technology and pharmaceutical companies. Given that the CCI is increasingly co-operating with competition authorities in other jurisdictions under various newly signed co-operation agreements, enforcement efforts against international companies and parallel investigations into international cartels alongside other authorities are likely to increase in the coming years.

500

merger filings reviewed in the past six years.

'Coming to enforcement, "cartels" remain [the CCI]'s top priority. Horizontal agreements entered into between competitors to fix prices, share markets and/or customers or rig bids, raise a presumption of causing anti-competitive harm under the [Competition] Act.'

Shri D K Sikri

Chairperson of the Competition Commission of India – February 2017

Leniency applications likely to play a bigger role going forward

The CCI recently granted a reduction in fine following a leniency application for bid-rigging related to procurement for Indian Railways. The order was the first under India's leniency system and provides an insight for future applicants into the criteria that the CCI may apply before granting reductions in fines. The order also sets the stage for several leniency applications understood to be pending and could open the floodgates for more applications in the future (including the possibility of India's first grant of full immunity). The CCI has committed to have a leniency regime that is at par with global best practice.

Continuous reforms bringing merger review in line with international standards

In recent years, India's merger control rules have been amended several times in an attempt to simplify the regime. In July 2017, for example, the government relaxed the requirement that a merger filing must be made within 30 calendar days of the execution of the relevant trigger documents. Parties to a notifiable transaction can now make a merger filing at any time as long as approval is obtained prior to consummation.

Prior to that, in 2016, the government not only renewed the *de minimis* exemption for a further five years but also increased the *de minimis* thresholds by around 25 per cent. Since March 2017, this exemption applies equally to mergers as well as acquisitions. At the same time, the original jurisdictional thresholds were doubled. The government has also clarified that, for the purposes of assessing the *de minimis* and/or jurisdictional thresholds in transactions involving an asset or business transfer, only the value of the assets and turnover of the target assets or business need be taken into account, and not those of the selling entity (as was previously the case). As a result of these reforms, a high bar has been set in order to trigger the requirement for a merger filing in India, thereby also keeping the CCI's tendency to take an expansive view of its own jurisdiction in check. Accordingly, the number of merger filings with the CCI is likely to fall going forward. If the trend continues, the pressure on the CCI's merger control division is also likely to ease in the future, potentially leading to speedier decisions.

Overall, recent reforms reflect an unequivocal effort on the part of the government to make it easier to do business in India, and help align the domestic regime more closely with globally accepted best practice. However, in order to balance the dual objectives of facilitating business and maintaining competitive markets, the CCI has redoubled its efforts to ensure strict compliance with the merger control regime. It has, as a result, actively started sending 'show cause' notices to companies it suspects have failed to submit a merger filing despite the thresholds having been met.

'Recently, we have issued our first order in a case where 75 per cent reduction in penalty has been granted to an applicant under the Lesser Penalty provisions. Through this decision, we have tried to convey our intention as well as provide clarity regarding the criteria used for determining the reduction in penalty... We expect that more and more enterprises will come forward and help us unravel cartels in many more areas.'

Shri D K Sikri

Chairperson of the Competition Commission of India – February 2017

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CCI continues to face organisational and jurisprudential challenges

The CCI has faced, and continues to face, many challenges. It is hampered by resource constraints and bureaucratic inertia, with more than 100 cases pending investigation before the DG for more than a year.

The interplay between the CCI and the appellate tribunal has resulted in significant jurisprudential uncertainty. The CCI's enforcement decisions are frequently challenged, with many set aside by the appellate tribunal and/or remanded back to the CCI for fresh adjudication, including on technical grounds. In a few cases, the appellate tribunal has also reversed the CCI's *prima facie* finding of no violation of the law, and directly ordered the DG to investigate the matter. The CCI, in turn, ends up challenging most of the orders of the appellate tribunal before the Supreme Court of India.

In a recent judgment, the Supreme Court, while upholding the CCI's findings on bid-rigging and other cartel behaviour, resolved several important ancillary issues, including the criteria for imposing penalties, the effective date of application of the law, and the limits of the authority of the CCI and the DG. However, there are several important issues – such as the applicability of principles of natural justice, the standard of proof and individual liability – that the Supreme Court is yet to settle. There will continue to be legal uncertainty until these issues are resolved.

Looking ahead

The CCI has become one of the most active authorities in Asia in a relatively short period. Over time, it is likely to become more internationally aligned in its enforcement priorities and approach, and increasingly to pursue international companies. However, the extent to which it can succeed in becoming a major global authority will depend in part on resolving its internal organisational challenges and on limiting judicial challenges to its authority.



Indonesia

Focusing on cartels and bid-rigging



Indonesia has been focusing on cracking down on cartel and bid-rigging activities, and has been actively monitoring parties that fail to duly notify transactions under the merger control regime. Anticipated legislative changes are expected to lead to increased enforcement.

Indonesia adopted an economy-wide competition law in 1999 (Law 5/1999), which is enforced by the Business Competition Supervisory Commission (Komisi Pengawas Persaingan Usaha/the KPPU). After 15 years of enforcement, competition law has become an important pillar of Indonesia's economy.

Focusing on bid-rigging cartels

Since the creation of the KPPU, it has been very active in investigating and examining bid-rigging cartels, an area which has recently attracted enforcement attention in other ASEAN jurisdictions such as Malaysia and Singapore. To date, 70 per cent of the cases handled by the KPPU have been bid-rigging cases. Agreements between producers to fix prices or limit output are also an enforcement focus. To date, there have been 25 cartel investigations carried through to a final decision by the KPPU. In 2016, the KPPU levied fines totalling IDR 107.3bn (approximately US\$8m) in a beef cartel case, and imposed a record fine of IDR 119.7bn (approximately US\$9m) in a poultry cartel case.

Since 2012, the KPPU has focused on five sectors (food, healthcare, energy, infrastructure and banking), in the following provinces: Jakarta, West Java, East Java, North Sumatra, Riau Islands (Batam), East Kalimantan and South Sulawesi. After a trial period, investigations and enforcement in these seven provinces will be reviewed and used as benchmarks for nationwide enforcement.

'Currently Indonesia is moving toward the amendment of their competition law, with an aim to improve the enforcement power of competition agency. One of the aspects is the improvement of legal power by the commission, especially in conducting dawn-raids.'

Muhammad Syarkawi Rauf

Chairman of the Komisi Pengawas Persaingan Usaha (KPPU) – May 2016

Continued supervision of partnership agreements in the context of abuse of dominance

To date, the KPPU has handled at least 15 cases of abuse of a dominant position, and it is anticipated that investigations into such behaviour will increase in the next three to five years. This is especially the case in view of the KPPU's continued supervision of partnership agreements, which is aimed at preventing abuse of a dominant position by large-sized enterprises via their partnership agreements with small and middle-sized enterprises (SMEs).

Getting ready for more vigorous merger control

Indonesia currently applies a post-closing mandatory merger filing regime: notifiable transactions need to be notified to the KPPU within 30 working days of the effective date of closing. In the past five years, the KPPU has given its opinion on 200 mergers. The KPPU monitors missed notifications, and has been aggressive in imposing fines in this regard – companies that fail to notify within the prescribed deadline will be fined IDR 1bn (approximately US\$75,000) per day of delay up to IDR 25bn (a little under US\$2m). As of early 2017, the KPPU had fined merging parties (both domestic and foreign) in seven transactions, with the highest fine being IDR 8bn (approximately US\$600,000).

KPPU opinions given on

200

mergers over the last five years.

US\$ 9m

record fine imposed by the KPPU in a single investigation in 2016.

The KPPU has the discretion to unwind a transaction or impose remedies if it determines that the transaction substantially reduces competition. Although to date the KPPU has never ordered any transaction to be unwound, the KPPU has imposed remedies in at least seven transactions, mostly in the form of behavioural remedies, such as reporting of market information.

Under the current law, establishing a new joint venture company and asset acquisitions are not considered mergers and are therefore not subject to the merger control regime.

Anticipating legislative changes that are expected to lead to increased enforcement

Since 2014, Indonesia has been in the process of amending its competition law. Potential changes include:

- **enhanced powers of investigation for the KPPU.** Despite its active enforcement agenda, a number of the KPPU's cartel decisions have been overturned by the courts on the grounds that the decisions lacked direct evidence of anti-competitive activity. This is partially due to the fact that the KPPU lacks certain key enforcement powers, in particular in relation to the gathering of evidence. In order to address this weakness, and more generally to enhance its enforcement powers, the KPPU has been working with the People's Representative Assembly to amend the competition law so as to extend the KPPU's rights and authority to include search and seizure rights in dawn raids, and the ability to issue a recommendation to revoke the business licence of companies breaching the competition law. In addition, it is also expected that the KPPU's status within the government will be enhanced by having its level in the government's institutional hierarchy confirmed as being equal to that of other state institutions;
- **introduction of a leniency programme.** This is intended to encourage companies engaged in anti-competitive activity to come forward proactively and voluntarily with evidence of any such behaviour for which they will receive lenient treatment. It is expected that the leniency programme, once in place, will facilitate the KPPU in gathering key evidence in its cartel investigations;
- **abuse of superior bargaining position.** This would be a new provision directed at the abuse of a superior bargaining position in certain relationships between SMEs and large companies. This would allow the KPPU to take action against companies for certain unilateral behaviour where they do not satisfy the usual dominance criteria. This type of law, which seeks to protect smaller companies, exists in other countries in Asia such as Japan, South Korea and Taiwan as well in Europe (eg France) and could have a material impact for large companies, both domestic and international, in Indonesia;
- **the competition law is expected to include a broader definition of 'business actor'** to include entities established and domiciled or engaged in business either inside or outside Indonesia that affect the Indonesian market – unlike the current law which excludes foreign companies not doing business in Indonesia. It is expected that in the future more foreign companies will become the target of the enforcement of Indonesian competition law;

'Most of the cases [handled by KPPU at the moment] were cartel and bid-rigging.'

Muhammad Syarkawi Rauf

Chairman of the Komisi Pengawas Persaingan Usaha (KPPU) – May 2016

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- **increased fines.** The maximum exposure to administrative fines for companies breaching the competition law will be increased, potentially very significantly. Under the current law, there is a financial cap (IDR 25bn or approximately US\$2m), which is relatively low compared to international standards. However, under the amendments, companies will be fined a proportion (between 5 and 30 per cent) of their sales in Indonesia during the period of the infringement. This could have a very significant impact on the level of fines imposed on companies and therefore have a greater effect on deterring companies from engaging in anti-competitive activity; and
- **acquisitions of assets and formations of joint ventures are expected to fall within the jurisdiction of the merger rules** (provided that they meet the relevant filing thresholds).

Looking ahead

Assuming these amendments (which may change as they go through the legislative process) come into force, they will clearly give the regime greater ‘teeth’ and bring the competition law more in line with international standards for competition enforcement. In particular, the increased powers of investigation, the ability to impose higher fines and the introduction of a leniency regime, taken together, are expected to result in a step change in the number of cases investigated by the KPPU.

Comparison of Asian competition law enforcement (scope of the law)

	Brunei ¹	China	Hong Kong	India	Indonesia	Japan	Kazakhstan	Laos ¹	Malaysia	Mongolia
Does the law apply to 'concerted practices' as well as agreements?	○	○	○	○	○	○	○	▲	○	○
Does the law apply to vertical arrangements?	▲ ²	○	○	○	○	○	○	▲	○	○
Is there a separate provision for abuse of dominance?	○	○	○	○	○	○	○	○	○	○
Also below dominance (eg 'abuse of superior bargaining position')?	○	X	X	○	X	○	X	X	X	X
Do dominance rules apply to purchasers as well as sellers?	○	○	○	○	○	○	○	○	○	○
Is there a statutory market share test for presumed dominance?	X	○	X	X	○	X	○	○	○	○
Does jurisdiction extend to conduct overseas with effects in the country?	○	○	○	○	▲ ⁴	○	○	▲	○	○
Are certain types of conduct considered 'per se' infringements?	○	○	○	○	○	○	○	▲	○	○
Does the authority conduct economic analysis as to the effects of conduct?	N/A	○	○	○	○	○	○	N/A	○	○
Is a market share-based 'safe harbour' available for certain types of conduct?	X	▲ ⁵	X ⁶	X	X	○	○	X	○	X
Are there exemptions for certain co-operation (eg joint research)?	○	○	○	▲ ⁷	X	○	○	○	○	X
Are certain industries exempted from competition law?	○	X	X	○	○	▲ ⁸	X	X	○	X
Is there a potential defence for conduct with countervailing 'pro-competitive' effects?	▲ ¹⁰	○	○	▲	X	○	○	X	○	○
Is there a defence for government-sanctioned/regulated conduct?	○	○	○	▲	○	○	○	▲ ¹¹	○	○
Can companies seek 'comfort' by consulting with the authority on arrangements?	X	X	○	X	○	○	○	▲	○	○

○ Yes | ▲ Qualified yes, or position unclear | X No | N/A Not applicable

1. Competition law enacted but not yet in force
2. Minister has power to designate certain types of vertical agreements as subject to law
3. Abuse of dominance only
4. Only for merger control
5. Only available for IPR-related abuses
6. Exemptions are based on the undertakings' turnover
7. Applies to joint ventures only
8. Certain types of conduct within specific industries exempt
9. Government has power to exempt industries, but has not exercised it
10. Excludes abuse of dominance
11. Potentially for abuse of dominance only

Comparison of Asian competition law enforcement (scope of the law)

	Myanmar ¹	Pakistan	Philippines	Singapore	South Korea	Sri Lanka	Taiwan	Thailand	Vietnam
Does the law apply to 'concerted practices' as well as agreements?	▲	○	○	○	X	○	○	○	○
Does the law apply to vertical arrangements?	▲	○	○	▲ ³	○	○	○	○	○
Is there a separate provision for abuse of dominance?	○	○	○	○	○	○	○	○	○
Also below dominance (eg 'abuse of superior bargaining position')?	▲	○	X	X	○	○	○	○	X
Do dominance rules apply to purchasers as well as sellers?	▲	○	○	○	○	○	○	○	○
Is there a statutory market share test for presumed dominance?	X	○	○	X	○	X	○	○	○
Does jurisdiction extend to conduct overseas with effects in the country?	▲	○	○	○	○	○	○	X	○
Are certain types of conduct considered 'per se' infringements?	○	○	○	○	○	○	X	○	○
Does the authority conduct economic analysis as to the effects of conduct?	N/A	▲	○	○	○	○	○	○	X
Is a market share-based 'safe harbour' available for certain types of conduct?	X	X	X	X	○	X	○	X	○
Are there exemptions for certain co-operation (eg joint research)?	○	○	X	○	X	○	○	X	○
Are certain industries exempted from competition law?	X	▲ ⁹	X	○	X	X	X	X	X
Is there a potential defence for conduct with countervailing 'pro-competitive' effects?	○	X	○	○	○	○	○	X	○
Is there a defence for government-sanctioned/regulated conduct?	X	X	X	○	○	○	X	X	○
Can companies seek 'comfort' by consulting with the authority on arrangements?	▲	○	○	○	○	○	○	○	○

○ Yes | ▲ Qualified yes, or position unclear | X No | N/A Not applicable

Comparison of Asian competition law enforcement (procedure)

	Brunei ¹	China	Hong Kong	India	Indonesia	Japan	Kazakhstan	Laos ¹	Malaysia	Mongolia
Does the competition authority have the power to carry out 'dawn raids'?	○	○	○	○	X	○	○	○	○	○
Can the authority compel employees to submit to questioning?	○	○	○	○	X	○	○	○	○	○
Are in-house legal communications protected by client/lawyer privilege?	○	X	○	X	X	X	X	X	X	▲
Is the authority active in identifying/investigating infringements?	N/A	○	○	○	○	○	X	N/A	○	○
Is a leniency/immunity system available?	○	○	○	○	X	○	○	▲	○	○
Is (reduced) leniency also available for subsequent applicants?	○	○	○	○	X	○	X	▲	○	○
Can the authority resolve without sanctions (eg cease-and-desist orders?)	○	○	○	○	○	○	○	X	○	○
Are criminal sanctions available against individuals?	○	▲ ³	▲ ³	X	○	○	○	○	▲ ³	○
Are criminal sanctions against individuals imposed in practice?	N/A	X	X	N/A	X	X	X	N/A	▲	X ⁴
Do individual sanctions include disqualification from being a director?	X	○	○	▲ ⁵	○	X	X	▲	○	X
Is prosecution adjudicated separately (eg by courts)?	X	X	○	X	▲ ⁷	▲ ⁷	○	▲ ⁷	X	▲ ⁷
If applicable, does the authority have discretion in setting fines?	○	○	X	○	○	X	X	▲	○	○
Can fines be reduced due to co-operation with the authority's investigation?	○	○	▲	○	○	X	X	▲	○	X
Can fines be reduced due to the existence of a compliance programme?	▲	X	▲	○	○	X	X	▲	○	X
Is settlement possible?	○	○	○	X	X	X	X	○	○	X
Is a decision against a company decisive in follow-on damages claims?	○	X	○	○	○	○	○	○	X	○
Are follow-on damages claims common in practice?	N/A	X	X	X	X	○ ¹¹	X	N/A	X	X
Are stand-alone damages claims possible?	X	○	X	X	X	○	X	X	○	○
Are class actions available for either follow-on or stand-alone claims?	X	X	X	▲	○	X	X	X	○	○

○ Yes | ▲ Qualified yes, or position unclear | X No | N/A Not applicable

1. Competition law enacted but not yet in force
2. Previous law was not strictly enforced in practice
3. Criminal sanctions only for obstruction of investigations
4. Law providing for criminal sanctions has been newly enacted
5. Issue is currently under consideration by the courts
6. Not a sanction under competition law, but corporate law may disqualify for unlawful conduct generally

7. The authority has the power to apply administrative sanctions only
8. Imposition of serious sanctions is carried out by a separate Competition Council
9. Competition Council only
10. Settlement not possible for cartel matters
11. For bid-rigging cases only



Comparison of Asian competition law enforcement (procedure)

	Myanmar ¹	Pakistan	Philippines	Singapore	South Korea	Sri Lanka	Taiwan	Thailand	Vietnam
Does the competition authority have the power to carry out 'dawn raids'?	○	○	○	○	○	○	X	○	○
Can the authority compel employees to submit to questioning?	○	○	○	○	○	○	○	○	○
Are in-house legal communications protected by client/lawyer privilege?	▲	X	X	○	X	○	X	X	X
Is the authority active in identifying/investigating infringements?	N/A	○	○	○	○	○	○	X ²	○
Is a leniency/immunity system available?	○	○	○	○	○	X	○	X	X
Is (reduced) leniency also available for subsequent applicants?	▲	○	○	○	○	X	○	X	X
Can the authority resolve without sanctions (eg cease-and-desist orders?)	○	○	○	○	○	○	○	○	X
Are criminal sanctions available against individuals?	○	○	○	▲ ³	○	○	○	○	X
Are criminal sanctions against individuals imposed in practice?	N/A	X	X	X	○	○	○	X ²	N/A
Do individual sanctions include disqualification from being a director?	X	X	▲ ⁶	X	▲ ⁶	▲ ⁶	X	X	X
Is prosecution adjudicated separately (eg by courts)?	▲ ⁷	X	○	X	▲ ⁷	○	▲ ⁷	X	○ ⁸
If applicable, does the authority have discretion in setting fines?	▲	○	○	○	○	X	○	○	○ ⁹
Can fines be reduced due to co-operation with the authority's investigation?	○	○	○	○	○	X	○	○	○ ⁹
Can fines be reduced due to the existence of a compliance programme?	▲	○	X	○	○	X	▲	○	X
Is settlement possible?	▲	○	○	○	▲ ¹⁰	○	○	○	○
Is a decision against a company decisive in follow-on damages claims?	▲	X	○	○	○	X	○	○	▲
Are follow-on damages claims common in practice?	N/A	X	X	X	○	X	X	○	X
Are stand-alone damages claims possible?	X	○	X	X	○	○	○	○	X
Are class actions available for either follow-on or stand-alone claims?	X	○	X	○	X	X	X	○	X

○ Yes | ▲ Qualified yes, or position unclear | X No | N/A Not applicable

Comparison of Asian merger control regimes

	Brunei ¹	China	Hong Kong ²	India	Indonesia	Japan	Kazakhstan	Laos ³	Malaysia ⁴	Mongolia
Is filing mandatory?	X	○	X	○	○	○	○	○	X	○
Is filing pre-merger/suspensory?	X	○	X	○	X	○	▲ ⁵	▲ ⁵	X	○
Can fines be imposed for failure to file/'gun-jumping'?	X	○	X	○	▲ ⁶	○	○	▲	X	○
Does the competition authority monitor/catch missed filings?	N/A	○	X	○	○	○	X	N/A	X	○
Is the fact of filing published?	X	○	▲ ⁸	○	○	X	X	▲	X	X
Is there a local effects test for 'foreign-to-foreign' mergers if thresholds met?	X	X	X	○	○	X	○	▲	○	○ ¹¹
Is there a change of control test?	○	○	○	▲ ¹²	○	X	○	▲	○	○
Are non-'full function' joint ventures caught?	X	○	X	○	○	○	○	▲	X	▲ ¹³
Does the authority meet decision deadlines in practice?	N/A	○	X ¹⁴	○	X	○	○	N/A	▲	○
Is there an accelerated procedure for less problematic transactions?	X	○	X	X	X	○	X	X	X	○
Are non-competition issues taken into account in review?	○	○	X	▲	X	X	X	○	▲	○
Does the authority accept remedies in practice?	N/A	○	○	○	○	○	X	N/A	▲	X
If so, is there a preference for behavioural over structural remedies?	N/A	X	X	X	○	○	X	N/A	▲	X
Is it possible to implement elsewhere while review is pending?	○	X	○	X	○	X	○	▲	▲	○ ¹¹
Is the authority's decision published?	X	▲ ¹⁶	▲ ⁸	○	○	▲ ¹⁰	▲ ¹⁰	▲	▲ ¹⁷	○
Can parties request redaction of confidential information from decisions?	N/A	○	○	○	○	○	X	▲	▲	○

○ Yes | ▲ Qualified yes, or position unclear | X No | N/A Not applicable

1. Merger control regime enacted but not yet in force
2. Merger control regime applies to telecommunications sector only
3. Merger control regime applies to aviation sector only
4. Merger control regime not yet enacted (position to be clarified by implementing regulations)
5. Filing is post-closing in certain circumstances
6. Fines can be imposed for failure to file only
7. Not yet tested
8. Only filings made under 'formal decision route' are published
9. Simplified filings or decisions waiving jurisdiction are not published (no public consultation)

10. Publication at the authority's discretion in significant cases only
11. In practice, merger control rules are applied to purely domestic mergers only
12. Thresholds can still be met without change of control
13. Law is silent as to whether JVs need to be notified at all
14. There are no deadlines for decisions
15. Effective deadline may be extended in practice by issuing RFIs
16. Only prohibition decisions and remedy decisions are published
17. Malaysian Aviation Commission can publish cases, but has not done so to date

Comparison of Asian merger control regimes

	Myanmar ³	Pakistan	Philippines	Singapore	South Korea	Sri Lanka ⁴	Taiwan	Thailand ¹	Vietnam
Is filing mandatory?	▲	○	○	X	○	▲	○	○	○
Is filing pre-merger/suspensory?	▲	○	○	X	▲ ⁵	▲	○	▲ ⁵	○
Can fines be imposed for failure to file/'gun-jumping'?	▲	○	○	N/A	○	▲	○	○	○
Does the competition authority monitor/catch missed filings?	N/A	○	X ⁷	○	○	N/A	X	N/A	○
Is the fact of filing published?	▲	X	X	○	X	▲	▲ ⁹	X	▲ ¹⁰
Is there a local effects test for 'foreign-to-foreign' mergers if thresholds met?	▲	X	○	X	X	▲	○	X	X
Is there a change of control test?	▲	○	○	○	X	▲	X	X	○
Are non-'full function' joint ventures caught?	▲	○	○	X	○	▲	○	X	X
Does the authority meet decision deadlines in practice?	N/A	○	○	○	▲ ¹⁵	N/A	○	N/A	X
Is there an accelerated procedure for less problematic transactions?	▲	X	X	X	○	▲	○	X	X
Are non-competition issues taken into account in review?	▲	X	X	X	X	▲	▲	○	○
Does the authority accept remedies in practice?	N/A	X	X ⁷	○	○	N/A	○	N/A	X
If so, is there a preference for behavioural over structural remedies?	N/A	X	○	X	○	N/A	X	N/A	X
Is it possible to implement elsewhere while review is pending?	▲	○	▲	○	X	▲	X	○	X
Is the authority's decision published?	▲	○	○	○	▲ ¹⁰	▲	▲ ⁹	○	▲ ¹⁰
Can parties request redaction of confidential information from decisions?	▲	○	○	○	○	▲	○	X	▲

○ Yes | ▲ Qualified yes, or position unclear | X No | N/A Not applicable



Japan

Asia's oldest competition
authority modernises



Japan's competition authority is trying to assert itself internationally. In terms of both enforcement priorities and procedural reforms the authority appears to be following the European Commission most closely.

The Japan Fair Trade Commission (the JFTC), which has 70 years of enforcement history, is undergoing a modernisation process. Over the last decade or so, the JFTC has been progressively working towards the revision of its enforcement and procedures to be more closely aligned with the European Commission (the EC). These efforts are still ongoing. The JFTC's enforcement priorities had long been focused on the types of infringements common within the Japanese domestic sphere, such as bid-rigging in public works projects. This saw the JFTC fall behind overseas regulators, which have increasingly investigated complex, global infringements. The JFTC is now trying to catch up with competition authorities in other advanced economies, as well as with emerging regulators. The scope of its enforcement is being widened to encompass international cartels and conduct taking place outside of Japan with effects on the Japanese market. To this end, reforms currently being contemplated by the JFTC primarily focus on two areas: substance of enforcement and procedure.

Japan regularly features as a key filing jurisdiction for major global deals so the JFTC has been particularly active in merger control. It is now making further efforts to match other authorities' assessment tools. The JFTC's increasing use of economic analysis in its assessment is an obvious example. The new practice of reviewing internal documents is another area that has increasingly come into play in recent cases.

New tools to 'catch' foreign companies

The JFTC currently relies heavily on interviews – and 'confessions' obtained through interviews – as a key tool in antitrust investigations. This makes investigating the conduct of foreign companies particularly difficult for the JFTC: language and geographic location of key persons can create technical barriers, as can the JFTC's inability to conduct dawn raids on foreign companies' overseas offices. To overcome these issues, in some cases (although still to a limited extent), the JFTC appears to have begun adopting EU-style procedures when dealing with foreign companies, which use written information requests and do not heavily involve interviews. The JFTC appears to have been 'testing the water' with this new approach in recent investigations in the financial services and energy sectors.

'[We will] not only keep working on typical violations such as cartels and bid-rigging, but also we are going to actively work on issues of anti-competitive unilateral conduct in order to promote and maintain competitive markets.'

Kazuyuki Sugimoto

Chairman of the Japan Fair Trade Commission – January 2017

More than
300

merger filings reviewed in 2016.

US\$
60m

Recent fine imposed on manufacturers of emergency digital communication devices.

'In our society, business activities are getting more and more globalized, and there exist increasing needs to detect and deter international cartels and to review international mergers and acquisitions... We work on [a] daily basis to build and promote systems for sharing information with foreign competition authorities.'

Kazuyuki Sugimoto

Chairman of the Japan Fair Trade Commission – January 2017

Pursuing new enforcement targets

The JFTC is moving away from its traditional investigational focuses, such as bid-rigging in the construction sector. It is expanding into new areas of enforcement, taking its cue in some cases from the EC. One recent example is the JFTC's joint e-commerce industry market survey with the Ministry of Economy, Trade and Industry (METI). Another is the JFTC's first ever challenge of the legality of most favoured nation clauses in Amazon's agreements with independent retailers, informally ending its investigation after commitments were offered by Amazon. Both examples were prompted by earlier, similar investigations in Europe.

Liquefied natural gas (LNG) distribution seems to be another recent area of interest for the JFTC, which may have been indirectly influenced by the EC's probe into destination clauses in the early 2000s, and closely linked to METI's energy policy. The JFTC has recently conducted an investigation, under the auspices of a 'market survey', into destination clauses in LNG trade contracts. Its report, released in July 2017, found that under certain conditions such clauses are unnecessary and potentially anti-competitive, although the JFTC has stopped short of suggesting that such clauses in existing contracts are illegal. It is expected that the JFTC's global enforcement priorities will continue to track those of the EC.

At the same time, the JFTC is showing a clear interest in investigating the digital economy, while other regulators, particularly in Asia, have been hesitant to investigate this area. The JFTC seems to have had no hesitation in declaring its interest in scrutinising business areas involving the internet of things, artificial intelligence and 'big data'. Consistent with this, the JFTC has recently taken a stance on the application of fair, reasonable and non-discriminatory (FRAND) terms, becoming one of the first competition authorities to make clear that refusal to license a standard essential patent (SEP), or seeking an injunction against a willing licensee after declaring an intention to license that SEP on FRAND terms, may infringe Japanese competition law. In late 2016 it made its first such finding against a US-based patent pool for Blu-ray disc-related patents.

'With the expansion of the fields of the digital economy by the day, new business models such as platform-type business are appearing one after another. In such fields, a monopoly on information can give certain companies a dominant position, and it is conceivable that some kinds of corporate behavior impedes fair competition, so we think ongoing monitoring of such behavior is necessary.'

Kazuyuki Sugimoto

Chairman of the Japan Fair Trade Commission – January 2017

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Enhancing due process

Enhancement of due process is one of the dimensions to the JFTC's procedural reforms to bring Japan into line with Europe. A recent reform abolished the JFTC-led appeals tribunal (hearing proceeding, or *shimpan*) and replaced it with an independent judicial review process whereby the Tokyo District Court is given the exclusive jurisdiction to hear appeals of JFTC decisions in the first instance. This new check-and-balance mechanism has increased procedural protections for companies.

The absence of attorney–client privilege protection in an investigation context (since privilege is not recognised under Japanese law more generally) is also under close review, and in the most recent report by a JFTC panel established to examine possible reforms to fining procedures, it was indicated that the introduction of privilege protection (in whatever format) is likely to be on the table in the near future. This topic is still being hotly debated in the context of broader plans to reform the calculation of fines.

Potential reform of fine calculation system

In another procedural reform, the JFTC is considering revisions to the penalty calculation system in order to give the JFTC more flexibility and discretion in setting fines in return for companies' co-operation. It will most likely be modelled (more or less) on the European system. The existing system in Japan does not allow any room for the JFTC to use its discretion in calculating fines. This is a serious drawback in terms of failing to provide incentives for companies to co-operate. Some critics believe that the excessive reliance on interviews as an investigation tool, as outlined above, is a result of this lack of incentive for co-operation. (Interviews lasting 10 hours are not unknown.)

Looking ahead

While the direction of reforms currently under contemplation in Japan is still unclear, European practices may provide valuable guidance in predicting and understanding the JFTC's likely new approach to enforcement, in terms of both substantive approach and where to prioritise its resources (eg in terms of sectors and behaviours).

'In the future, we will carry out more surveys in fields including those in which innovation is accelerated and those in which high growth is expected. Also, we will provide guidance from the view point of competition policy on trade practices and methods of regulation.'

Kazuyuki Sugimoto

Chairman of the Japan Fair Trade Commission –
January 2017



Malaysia

Increased enforcement
appetite



Although a young antitrust agency, the Malaysia Competition Commission already has an impressive enforcement track record. Its vigorous enforcement against cartels and abuse of market dominance, including an appetite to pursue both foreign and major domestic companies, suggests that the MyCC is set to become a significant enforcer in the region.

In 2012, Malaysia joined more than 130 countries worldwide and became the fifth ASEAN nation (after Indonesia, Singapore, Thailand and Vietnam) to establish a competition law regime. The Malaysian Competition Act 2010 (Competition Act) is enforced by the Malaysia Competition Commission (the MyCC). The Competition Act introduces competition law for all markets in Malaysia except for a small number of sectors that remain subject to sectorial regulation. As well as applying to commercial activities within Malaysia, the Competition Act catches commercial activities undertaken outside Malaysia that have an effect on competition in any market within the country. There is no requirement for any of the parties involved in the conduct to be domiciled in Malaysia.

The Competition Act contains prohibitions on anti-competitive agreements and abuse of a dominant market position, but it does not provide for general regulation of merger control. There is, however, a voluntary merger notification regime for mergers in the aviation services sector under the Malaysian Aviation Commission Act 2015. These are reviewed by the Malaysian Aviation Commission.

Aggressive cartel enforcement

The MyCC has built an impressive track record since the Competition Act took effect. In the past five years, its enforcement activities have focused on cartel conduct, particularly price-fixing in the context of trade associations. Following its first cartel case in 2012, involving the Cameron Highlands Floriculturist Association, the authority has investigated several high-profile alleged cartels in various sectors.

In 2014, the MyCC fined two major Malaysian airlines (MAS and AirAsia) MYR 10m (approximately US\$2.3m) each for market-sharing in relation to Malaysia's air transport services sector. In 2015, it imposed fines totalling MYR 252,250 (approximately US\$59,000) on 24 ice manufacturers for fixing the price of edible tube ice and block ice. In 2016, it fined an information technology service provider to the shipping and logistics industry and four container depot operators for price-fixing, and imposed a financial penalty of MYR 645,774 (approximately US\$150,000). It also imposed an additional penalty of MYR 7,000 (approximately US\$1,630) a day for failure to comply with remedial actions within 30 days from the date of the decision.

In its most significant case to date, in February 2017 the MyCC proposed a decision against the General Insurance Association of Malaysia and 22 general insurers for alleged fixing of parts trade discounts and labour rates for workshops. The authority proposed a total penalty of approximately MYR 213m (approximately US\$49.6m) – its highest ever proposed fine.

The MyCC has steadily increased the level of fines imposed. Although current fine levels remain relatively low compared with other Asian jurisdictions, the gradual increase highlights the MyCC's enforcement appetite. In setting fines, it will take into account the seriousness of the infringement, duration of the infringement and mitigating factors such as co-operation during the investigation.

1
January
2012

Date competition law in Malaysia came into force.

US\$
49.6m

fine against the General Insurance Association of Malaysia and 22 general insurers for alleged price-fixing.

Enforcement against anti-competitive vertical agreements

While the MyCC's enforcement focus over the past five years has been on cartels, it has also taken action against other anti-competitive agreements, including vertical restraints. The authority completed its first vertical restraints case in 2014 relating to exclusivity agreements entered into by two major providers of logistical and shipment services by sea – Giga Shipping and Nexus Mega Carriers – with vehicle manufacturers, distributors and retailers. It was concerned that these agreements would foreclose competition in the provision of such services. The case was settled after the parties adopted separate undertakings to stop including exclusivity clauses in their agreements. The MyCC accepted the undertakings without imposing any financial penalties or finding an infringement.

'We will be more aggressive in our enforcement next year particularly against price fixing cartels as they are the most notorious in breaching the Competition Act 2010.'

Iskandar Ismail

Enforcement Division Director,
the Malaysia Competition Commission –
December 2016

Increased scrutiny in abuse of dominance cases

In more recent years, the MyCC has also stepped up enforcement against abuses of dominant market positions. In 2012, it initiated an investigation against Megasteel on the grounds that Megasteel abused its dominant market position by engaging in margin squeeze. In its final decision in 2016, the authority eventually concluded that Megasteel did not infringe the law following evaluation of the parties' further arguments.

In October 2015, the MyCC adopted a proposed decision against My EG Services (MyEG) for abusing its dominant position in the provision and management of online foreign workers' permit renewals by imposing discriminatory trading conditions. In 2016, the authority adopted a final decision and imposed an MYR 2.27m (approximately US\$530,000) fine on MyEG.

In 2016, the MyCC also initiated investigations against seven pharmaceutical companies for alleged discriminatory pricing. It is concerned that the companies allegedly apply different prices to different suppliers for the same medicine and are attempting to monopolise medicine supply. The case is currently ongoing.

The cases highlight the MyCC's willingness to pursue difficult theories of harm and to conduct complex economic analyses. They also show that the authority will not hesitate to investigate companies with perceived market power. Although its dominance cases have targeted domestic companies to date, the MyCC's enforcement record suggests that it will not hesitate to pursue foreign companies in appropriate cases.

Contributors:

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Increasing financial penalties

On finding an infringement, the MyCC may impose a financial penalty of up to 10 per cent of an enterprise's worldwide turnover during the period in which the infringement occurred – with the caveat that companies cannot be fined for behaviour before 2012 (when the Competition Act came into effect). The financial exposure is potentially higher than in other jurisdictions where the fine is limited to a specified number of years. Companies that infringe the Competition Act, therefore, should be prepared to pay potentially heavy fines based on their turnover over the entire period of infringement. Although not all infringing enterprises have been fined, the MyCC is increasingly taking a stricter stance with a view to strengthening the deterrent effect of fines.

'Currently we are investigating companies in the pharmaceutical industry, general insurance industry, financial institutions, as well as the services industry.'

Iskandar Ismail

Enforcement Division Director, the Malaysia Competition Commission – December 2016

Looking ahead

Price-fixing cartels and the activities of trade associations are expected to remain an enforcement priority. The MyCC is expected to continue to investigate companies with significant market positions where it suspects possible abuses. It is also expected to continue to focus enforcement on the pharmaceutical, logistics, transportation, financial services, consumer services and fast-moving consumer goods sectors. The MyCC remains a young agency but it is expected to gradually establish itself as an important enforcement agency in the region.

An aerial photograph of a city in Mongolia, likely Ulaanbaatar, showing a dense urban landscape with numerous high-rise buildings and residential blocks. In the background, there are large, rugged mountains partially covered in snow under a clear sky. A yellow construction crane is visible on the right side of the image. The text is overlaid in the center of the image.

Mongolia

Focusing on domestic monopolies



Mongolia continues to focus on abuse of dominance in sectors that are prone to state monopoly. While fining levels for infringements are low by comparison with international standards, new penalties on individuals have been introduced in an effort to enhance deterrence. Potential reforms to the law are expected to result in greater enforcement activity.

The Competition Law of Mongolia (the Competition Law), enacted in 2010, regulates cartels, abuse of dominance, control of natural monopolies, and merger control. It focuses on competition within Mongolia, but also captures activities outside of the country if they impact its market. However, the Competition Law applies to Mongolian-registered entities only, including Mongolian-registered entities operating outside of the territory. Foreign-registered entities are therefore exempt, regardless of the effects of their conduct.

The Authority for Fair Competition and Consumer Protection (the AFCCP) is tasked with enforcing the Competition Law. Despite facing obstacles (eg its cartel decisions are prone to challenge and it has limited evidence-gathering powers), the AFCCP is likely to continue to focus on domestic sectors such as communications, energy, and air and railroad transportation, and on companies with a monopoly or dominant position. Cartel enforcement is also anticipated to be an enforcement focus, especially in view of recent changes, which have increased the level of penalties.

Additionally, it is expected that an amended and restated Competition Law, which is currently being considered, will bring about significant changes to enforcement in Mongolia.

Broad criteria for abuse of dominance decisions

Although the AFCCP's track record of investigations against abuses of dominance in recent years is not particularly impressive, this area has traditionally been a hotbed of AFCCP enforcement, especially in the context of restricting state monopoly. Activities prohibited under the Competition Law as abuses of dominance include setting unjustifiably high or low prices, territorial restrictions, imposing exclusivity purchasing obligations on customers, and creating a false shortage for the supply of goods. Resale price maintenance is also prohibited when a company holds a dominant position.

The AFCCP adopts a broad view when determining whether a company is dominant in the relevant market. There is a rebuttable presumption of dominance if a company holds a 33.3 per cent market share, alone or jointly with other competitors. A company holding less than a 33.3 per cent market share may also be considered dominant if the AFCCP decides it may hinder market entry. By 2015, the AFCCP had found 172 companies incorporated in Mongolia as 'dominant business entities' in 19 product markets. As such, companies registered in Mongolia are advised to be mindful of enforcement risk, especially given the broad criteria for what constitutes a position of dominance.

The most recent publicly known abuse of dominance case was the investigation against Mobicom Corporation (Mobicom), a dominant firm in the communications sector. It was fined MNT 2.3bn (approximately US\$1m) by the AFCCP on 4 September 2015 for selling products at excessively low prices with the aim of excluding competitors from the market and obstructing other companies' entry into it.

**Approx
US\$1m**

fine imposed against communications company for selling products at excessively low prices.

**Up to
720**

hours' community service can be imposed on individuals for abuse of dominant position.

'Our main focus is to stop violations of the [Competition Law] of state authorities, provincial authorities, provincial self-governing bodies and business owners, and inspect issues causing the most damage and discontentment among consumers.'

T Ayursaikhan

Director of the Mongolia Authority for Fair Competition and Consumer Protection – May 2015



Cartel enforcement faces challenges

Anti-competitive horizontal agreements such as price-fixing, market and customer allocation, and bid-rigging are per se illegal under the Competition Law. In practice, however, the AFCCP's cartel enforcement is constantly challenged by market participants: infringement findings and fines of the AFCCP are often appealed to the court, and the court has, in the past, often sided with the alleged violators. For instance, in 2011, the AFCCP fined each of the 10 leading Mongolian banks an amount equalling approximately US\$7,000 for an alleged cartel. On appeal, the court ruled that there had been no infringement and, accordingly, the fine was annulled. Similarly, eight Mongolian petroleum import and distribution companies were fined an aggregate US\$12.1m in 2012, but the fine was subsequently annulled on procedural grounds.

To facilitate the AFCCP's evidence gathering, the Competition Law introduced its first leniency programme for the purposes of cartel investigations in 2010, which was later placed under Mongolia's Violations Law. According to the Violations Law, if a company voluntarily reports a cartel in which it participates, it may be exempted from up to 100 per cent of any fines; and if the company admits its wrongdoing within 30 days from the initiation of an investigation, the fine may be reduced by up to 50 per cent. However, as of June 2017, the AFCCP has not received any leniency applications.

Intensified sanctions

New sanctions, taking effect from 1 July 2017, will apply to individuals as well as companies for violations of the Competition Law. In addition to administrative penalties for companies, individuals and companies may be subject to community service and a travel ban. Specifically, individuals of companies that abuse a dominant position may be subject to community service of up to 720 hours and a travel ban of up to one year, and similar penalties where the company is in a cartel. Companies involved in such conduct will be subject to criminal fines ranging from MNT 10m (approximately US\$4,200) to MNT 80m (approximately US\$33,000). It is expected that these additional sanctions will strengthen the role of the AFCCP in deterring anti-competitive violations and create incentives for potential violators to comply with the Competition Law.

Merger filing for dominant companies

Merger review is still at an early stage in Mongolia, as the focus of the AFCCP to date has been on combating abuses of dominance and cartels. To date, we are not aware that the AFCCP has ever blocked any transactions on substantive grounds.

Unlike many jurisdictions where the merger control filing obligation is assessed against turnover-based thresholds, the filing threshold in Mongolia essentially requires that the company acquiring shares is in a dominant position in the relevant market and that the merger/acquisition meets relevant shareholding thresholds. Filings are mandatory and suspensory in Mongolia – if the dominant business entity completes the transaction before the transaction is cleared by the AFCCP, it can be fined up to MNT 40m (approximately US\$16,500).

Contributors:

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Ariuntuya Rentsen
Mahoney Liotta

Looking ahead

The AFCCP has undertaken to co-operate with the Japan International Cooperation Agency and the Japan Fair Trade Commission on the improvement of its Competition Law. In this connection, it is expected that a proposed amended and restated Competition Law will be submitted to the government of Mongolia in the near future, following the receipt of comments from international organisations and the public.

Although the details of the draft and the timeline of when the amended law will take effect are unclear, it is anticipated that the Competition Law will be revised in its entirety and there will be significant changes, such as the following:

- intellectual property rights will be made subject to competition law;
- merger review rules will apply to all business entities (including non-Mongolian companies and companies without a dominant market position);
- the number of companies that can receive lenient treatment under the leniency programme will be limited; and
- more detailed procedures and timings for inspections and the activities and powers of the inspectors will be provided.

These proposed changes, if successfully adopted, will bring competition law enforcement in Mongolia more closely in line with international standards, and result in increased enforcement activity by the AFCCP.

An aerial night view of a city skyline, likely Manila, Philippines. The image is dominated by tall skyscrapers, many of which are illuminated with bright lights, creating a vibrant blue and white glow against the dark night sky. The buildings are densely packed, and the perspective is from a high angle, looking down on the city. The overall atmosphere is one of modern urban development and economic growth.

Philippines

A new era under the Philippine Competition Act



The adoption of a comprehensive competition law in 2015 aligns the Philippines with other key countries in the ASEAN region. Although young, the competition authority is already showing signs of activism and, with the law having come into full effect after a two-year grace period in August 2017, enforcement levels are expected to increase.

The Philippine Competition Act (PCA), the first comprehensive competition law in the Philippines, came into force on 8 August 2015. In February 2016, the Philippine Competition Commission (PCC) was established to implement the PCA.

Over the past two years, the PCC has primarily focused on merger review and institutional capacity building. Enforcement against anti-competitive agreements and abuse of market dominance has yet to take off to a material extent. This is mainly due to the two-year grace period that the PCA provided for anti-competitive conduct arising before the PCA came into full effect. This grace period ended on 8 August 2017 and it is expected that the PCC will step up enforcement against all forms of anti-competitive conduct, particularly bid-rigging and price-fixing cartels.

Impressive track record in merger review

In early 2017, the PCC published a set of merger review guidelines that outline, among other things, its enforcement policy and practices – including the analytical techniques it will use when conducting merger review.

As of 8 August 2017, only 17 months after its establishment, the PCC has received 114 merger filings and cleared 95 of them. The majority of the filings relate to the financial, manufacturing, electricity and transportation sectors, and account for about 62 per cent of the total number of notifications to date. The large number of filings is mainly due to the low filing thresholds in the Philippines. A transaction must be notified to the PCC for pre-merger clearance if the applicable transaction value and turnover thresholds are met. Foreign-to-foreign transactions are also caught if the local nexus test is satisfied. This requires parties to have turnover or assets in the Philippines.

Failure to file a reportable transaction or closing before clearance can render the transaction void, and parties are liable to an administrative fine equivalent to 3–5 per cent of the value of the transaction. The fine can be varied depending on the gravity and duration of the infringements. No fine has been imposed to date.

The PCC has *ex-officio* powers to investigate a reportable transaction that parties fail to notify. It has sought to assume jurisdiction in hotly contested cases. For example, in 2016, the PCC sought to assume jurisdiction to review PLDT and Global Telecom's PHP 69.1bn (approximately US\$1.38bn) joint bid to acquire San Miguel's telecommunications assets. PLDT and Global Telecom obtained a court injunction to halt the PCC's review, and the PCC petitioned the Supreme Court to lift the injunction.

Getting ready for active enforcement in the non-merger arena

The PCC's enforcement in the non-merger arena has been relatively slow in the past two years due to the grace period. It has, nonetheless, already demonstrated an enforcement appetite beyond merger review. In February 2017, it launched an investigation into the local cement industry over alleged collusion and unreasonably high prices. Just before the PCA came into full effect, the PCC also announced its intention to investigate an alleged cartel in the local garlic and onion industry – a significant industry for Filipino households. The PCC is also reportedly considering possible investigations into the international shipping, energy and agriculture industries. In terms of enforcement priorities, it is anticipated that the authority will step up enforcement against bid-rigging and cartels, particularly price-fixing, and predatory pricing by dominant companies.

8
August
2015

The Philippines Competition Act was enacted.

The PCC has reviewed

114
merger filings.

Contributors:

Emmanuel M Lombos
 Franco Aristotle G Larcina
 Arlene M Maneja

SyCip Salazar Hernandez & Gatmaitan

The PCC has also been working with other government agencies and departments to enforce the law, including the Department of Justice's Office for Competition (DOJ-OFC) in the Philippines and the Office of the Ombudsman. The PCC works with the DOJ-OFC to enforce criminal liabilities in cartel cases. In addition to administrative fines that the PCC can impose, companies that engage in cartels and bid-rigging face criminal fines ranging from PHP 50m (approximately US\$1m) to PHP 250m (approximately US\$5m). Individuals (the responsible officers and directors of the company) can be subject to imprisonment with sentences ranging from two to seven years. The PCC works with the Office of the Ombudsman (which has jurisdiction over corruption cases) to combat price-fixing cartels and bid-rigging in government procurement processes.

'While still young, the PCC has been vigilant in safeguarding market competition to ensure consumer benefit.'

Arsenio M Balisacan
 Chairman of the Philippine Competition Commission
 – August 2016

Looking ahead

The PCC is expected to become increasingly active on the mergers front. With the two-year grace period having come to an end, it is also expected that the PCC will ramp up enforcement with respect to non-merger cases. Both domestic and foreign companies that engage in anti-competitive conduct in the Philippines are expected to be targets. The PCC may also join other competition authorities in the region to fight international cartels. It has already shown an interest in international co-operation and is expected to continue to actively engage with other competition authorities in and beyond the ASEAN region (such as the Australian Competition and Consumer Commission and the Competition Commission of Singapore).

The PCC is drafting its Merger Procedure, which is expected to contextualise and further improve its merger review process, including introducing detailed rules on Phase II review and remedy proposals. The PCC also is seeking to introduce a set of procedural rules to govern the conduct of investigations and enforcement activities. These rules, once adopted, will further streamline competition law enforcement in the Philippines.



**With the full force of the antitrust law, this shall serve as a warning to companies that continue to engage in unfair business practices or harbor anticompetitive behavior...
The PCC is your partner in progress but remember that we will also do whatever it takes to fulfill our mandate.**

Arsenio M Balisacan
Chairman of the Philippine Competition Commission
August 2017

A photograph of the Singapore skyline at night, featuring numerous illuminated skyscrapers and a prominent white building with a red roof in the foreground. The lights from the buildings are reflected in the water in the foreground. The text "Singapore Getting tougher and more sophisticated" is overlaid in white on the image.

Singapore

Getting tougher and more sophisticated



Singapore has become increasingly active as the leader of competition law enforcement in the ASEAN region. Apart from aggressive enforcement against international cartels, it has been accumulating experience with more complex theories of harm, and is likely to target anti-competitive issues in the emerging e-commerce sector.

The Competition Commission of Singapore (the CCS) has become increasingly active and sophisticated in enforcement over the past five years. Alongside its ongoing focus on cartels, it has investigated other types of anti-competitive conduct and potential abuses of dominance. The emerging e-commerce sector and its impact on competition has become a particular focus. The CCS also made breakthroughs in the area of merger review and has sought to introduce a new fast-track procedure to expedite antitrust investigations.

International cartels on the rise

The CCS has continued its aggressive enforcement against cartels over the past five years. It also started to participate in the investigation of multijurisdictional cartels. In 2014, it issued its first two international cartel infringement decisions in the ball and roller bearings sector and the freight-forwarding sector. In April 2017, it issued a provisional decision against five capacitor manufacturers, which is part of a global cartel investigation by competition authorities in the EU, the US, Japan, Taiwan, South Korea, Brazil and China. It is also notable that all these cases originated from leniency applications, and further leniency applications involving multijurisdictional cartels are expected in the future.

In addition, in the context of cartel penalties, businesses should not assume that sales made from Singapore to foreign customers will not be affected by Singapore's competition regime. In a 2016 decision the Competition Appeal Board (the CAB) determined that sales made by a cartel participant to an independent distributor in Singapore should be included in the penalty calculation process, even though they related to goods that were intended to be (and were) exported. This was because the local distributor had a direct buyer-seller relationship with the relevant supplier, and did not act as an agent of the supplier in respect of the export sales. As a result the CAB found that the distributor was subject to the full brunt of the supplier's anti-competitive conduct in Singapore.

The CAB's decision has a major impact on the calculation of penalties involving any business that uses an independent Singaporean distributor to sell across the region. This is because such a business would face a higher penalty for cartel infringements compared to one that handles its export sales internally (as such sales to foreign customers would normally be excluded for purposes of penalty calculations). This should be particularly of interest to manufacturers that derive a large portion of their turnover in Singapore from sales to customers outside the country.

The CCS has participated in

3

international cartel investigations since 2014.

60

merger filings to date, with conclusion of the first two remedy cases in the past three years.

'Robust and credible enforcement will always remain a cornerstone of our work. In this regard, we will continue to enforce against cartels, especially hard core cartels that harm competition.'

Toh Han Li

Chief Executive of the Competition Commission of Singapore – April 2016

CCS taking on more complex cases

In recent years the CCS has taken on more cases involving non-cartel types of anti-competitive conduct as well as potential abuses of dominance. For example:

- it recently issued an infringement decision against 10 financial advisory firms in Singapore that had collectively pressured a competitor to withdraw its offer of a 50 per cent commission rebate on life insurance products. Fines totalling more than S\$900,000 (approximately US\$655,000) were imposed; and
- it investigated the use of exclusivity obligations by first-movers in the cord blood banking and online food delivery services markets, in particular exploring whether such obligations adversely affected competitors. In particular, the cord blood banking investigation resulted in the relevant party agreeing to cease the offending practices. We expect the CCS to continue to monitor relatively concentrated markets in Singapore for potential abuses of dominance, particularly new markets where first-movers are, or may become, dominant. Businesses in these markets should be mindful of actions that they may take in trying to protect their position.

Focusing on the emergence of e-commerce

The CCS has focused on the emergence of e-commerce and its impact on competition in Singapore, commissioning an independent study on the subject in 2015. It also appears to be leading the charge on the issue in ASEAN. In a statement by the CCS's chief executive during an event to showcase the findings of the study, he said the CCS 'hope[s] that the idea of a level e-commerce playing field can move across national boundaries and be extended to the ASEAN Economic Community and the vision of a single market integration'.

To this end we have seen the CCS scrutinising practices adopted by first-movers in digitally driven markets, to try to pre-empt any potential abuses when they become dominant.

Increase in number of mergers blocked/cleared conditionally by the CCS

Given the voluntary nature of Singapore's merger control regime, the CCS typically reviews fewer than 10 merger filings each year.

To date it has received 60 such filings, but its first two conditional merger clearances have come only in the past three years. The first was issued in November 2014 when the proposed merger of two online recruitment advertising providers (which would have resulted in a post-merger market share of more than 70 per cent) was only cleared after the CCS accepted both structural and behavioural commitments proposed by the parties. In January 2016, the proposed merger of two airfield lighting suppliers (which would have accounted for more than 80 per cent of supply in the relevant Singaporean market) again was cleared only after behavioural remedies were proposed and accepted.

In addition to the high post-merger market shares and concentrations involved, the fact that the merging parties in both cases were each other's closest competitor appears to have been a key concern. It is also notable that the CCS each time accepted behavioural commitments. Given the relatively small size of the Singaporean market, structural remedies may be difficult to implement and it is therefore expected that the CCS will continue to be receptive to behavioural commitments that can address the relevant competition concerns.

Contributors:Ameera Ashraf
Chan Jia Hui

WongPartnership

Alongside this, the CCS announced in 2015 that it had made a provisional decision to block a proposed transaction that would have created a monopoly in the commercial supply of radiopharmaceuticals. Although the parties eventually abandoned the transaction, it was the first time the CCS had publicly disclosed its intention to block a proposed transaction. In future, therefore, parties involved in transactions that would create high post-closing market shares should anticipate the CCS's likely concerns and consider what commitments they could offer to attempt to pre-empt them.

The CCS introduces a new fast-track procedure

In 2016 the CCS made several amendments to its guidelines, including introducing a fast-track procedure that allows parties being investigated for infringements to cut their penalty by 10 per cent if they unequivocally admit liability and agree to limit their representations during the CCS's decision-making procedure.

The CCS has indicated that it will generally only apply the procedure where all parties under investigation agree to use it – it does not appear willing to take on 'hybrid cases' in which only some of the parties are involved. It is also worth noting that the procedure is available in relation to all infringements of sections 34 and 47 of the Competition Act (ie, respectively, the prohibitions on anti-competitive agreements and abuse of dominance) rather than just cartels.

Looking ahead

The CCS has launched a series of sector-specific market studies. While none has uncovered anti-competitive conduct thus far, it is interesting that the focus has been on goods and services whose price is the subject of public debate (eg formula milk and petrol). While the CCS does not see itself as a price regulator, it believes that market studies help identify structural problems that may cause markets not to work as well as they should.

It is expected that the CCS will continue to use market studies as a tool to examine competitive conditions in markets that are of public interest. Businesses involved in such studies should keep in mind that even if no substantive competition issues are uncovered, their responses and the CCS's findings may still lead to regulatory changes.

'The [CCS] will continue to focus on markets which have significant impact on our economy. To this end, it recognises that digitisation of the global economy has led to rapid growth of e-commerce activities which have changed the nature of competition and created new market opportunities... Network effects can easily lead to dominance and if the dominant entity adopts measures to exclude rivals, this can lead to an undesirable monopoly. It is therefore important for CCS to maintain a competitive ecosystem that allows digital markets to be vibrant and innovative with entry and exit of market players.'

Toh Han Li

Chief Executive of the Competition Commission of Singapore – July 2016



South Korea

One of Asia's
toughest
regulators



The South Korean competition authority is regarded as one of the region's toughest and most active, imposing some of the world's highest fines and increasingly pursuing individual criminal sanctions. Under South Korea's new president, its focus is expected to shift to restraining the power of South Korea's 'chaebol' conglomerates.

The Korea Fair Trade Commission (the KFTC) is the ministerial competition authority with the power to investigate and enforce violations of the Monopoly Regulation and Fair Trade Law (FTL), the primary competition law in South Korea, which governs (among others) merger control, anti-competitive agreements and abuse of dominance. Along with its investigative powers, which include conducting dawn raids, the KFTC also functions as a quasi-judicial body. The KFTC also has the exclusive jurisdiction to enforce various special laws that govern franchising, distributorship, subcontracting, consumer protection in e-commerce, labelling and advertising, and standardised contracts, in addition to its traditional competition law enforcement role.

The KFTC is widely regarded as one of the most active competition authorities. It was recognised in 2016 by *Global Competition Review* as one of the five 'elite' (top-ranked) global regulators, alongside the US Department of Justice and Federal Trade Commission, the French Competition Authority and the German Federal Cartel Office. It is, therefore, one to be watched among Asian authorities in terms of both policy development and enforcement.

'I hope [conglomerates] will change themselves on their own and meet social and market expectations... But if some of the businesses do not budge an inch and fail to meet expectations, the [K]FTC will not tolerate such actions and take appropriate measures.'

Kim Sang-jo

Chairman of the Korea Fair Trade Commission – June 2017

Globally high fine levels for collusive conduct

The KFTC vigorously monitors collusive conduct, including international cartels that may have a significant impact on the South Korean market. The agency has shown a willingness to play an important role in the enforcement of international cartel cases, closely co-ordinating with competition authorities in the US, the EU and Japan. Examples include the continued investigation into the auto parts industry, the financial services sector and the marine transportation sector. The leniency system under the FTL plays a critical role, with an increasing number of investigations initiated through leniency applications each year.

The KFTC has been one of the world's highest fining authorities for several years. In 2016, total fines imposed by the KFTC topped US\$760m – almost double that imposed in the US – as well as a fine of circa US\$900m against Qualcomm in 2017.

Criminal enforcement against cartel conduct rising

The KFTC has increasingly referred companies and individuals implicated in cartel cases to the Public Prosecutor's Office for criminal investigation. This is in contrast with other jurisdictions in the region, where criminal penalties are not imposed, or sentences are commuted to lesser sanctions such as community service. In recent years, criminal cases have been brought against individual officers and employees in South Korea, with prison sentences ranging from several months to over one year. Referrals for prosecution have been made in more than a quarter of cartel cases investigated by the KFTC, and the number has steadily increased each year, with the KFTC's annual statistics reporting that the number of referrals jumped from nine to 22 from 2015 to 2016.

**US\$
760m**

total fines imposed in 2016.

22

referrals for criminal prosecution in cartel cases in 2016.

Comprehensive merger review processes

The KFTC continues to engage in rigorous merger review, particularly for large-scale domestic and international mergers, with increased co-operation with competition authorities for global transactions. In 2017, for example, in the Dow/DuPont merger, the KFTC imposed remedies that were in line with those issued by competition authorities globally.

The KFTC has also announced that, as part of its 2017 enforcement objectives, it would strengthen monitoring of failure-to-notify cases as well as compliance with behavioural remedies.

While the KFTC generally tries to complete its review of non-problematic cases within the initial 30 calendar day review period, the overall review period may be somewhat longer than 30 calendar days where requests for information are issued. Review of transactions that raise significant anti-competitive concerns may continue for up to a year. The KFTC has shown a tendency to verify the information in notification forms through multiple requests for information, particularly with respect to competitive conditions in the relevant South Korean market. As a result, parties have seen increased delays to the total review period. This includes foreign-to-foreign mergers with limited impact on the South Korean market.

As such, it has become increasingly important to map out the merger filing strategy in South Korea at an early stage, as well as maintain continuous engagement with the KFTC, to manage effectively the overall timescale for global transactions.

'The KFTC relies on three methods for combating international cartels: administrative enforcement, criminal enforcement and private civil action.'

Ahn Byung-hoon

Director of the International Cartel Division,
the Korea Fair Trade Commission – July 2017

Abuse of dominance remains an important area of enforcement

Traditionally, the KFTC has actively challenged suspected abusive conduct by large corporations or multinationals with a dominant market position. It is expected to continue monitoring abusive conduct, with a particular focus on abusive conduct by dominant South Korean conglomerates (chaebols). Following its amendment to its Intellectual Property Rights (IPR) Abuse Review Guidelines, the KFTC is also likely to monitor potential IPR abuses, such as abuse of standard essential patents (SEPs) and collusive agreements with competitors/patent licensees to foreclose competitors.

The KFTC's special attention to IPR abuses is highlighted by its recent decision against Qualcomm for alleged abuse of dominance. Imposing a record administrative fine of KRW 1.03tn (approximately US\$900m) in early 2017, the KFTC found that Qualcomm had violated its fair, reasonable and non-discriminatory (FRAND) terms commitments by, among other things, refusing or restricting the licensing of mobile communications SEPs to rival chipmakers and tying the supply of chipsets and patent licence agreements.

The fine levied was nearly as high as the fine imposed on Qualcomm in a parallel abuse of dominance investigation in China (where Qualcomm generates almost 50 per cent of its revenues), after Qualcomm agreed to a settlement that included reducing royalty rates for Chinese licensees. The case in South Korea is currently pending at the Seoul High Court following Qualcomm's appeal.

Given the importance attached to enforcing the FTL in the area of IPR abuses, the KFTC recently established a new division within its Anti-Monopoly Bureau, specifically for the investigation of IPR abuse cases. This means that the KFTC's close monitoring and enforcement activities relating to IPR are likely to continue, particularly in the information and communication technology and pharmaceutical sectors. Indeed, the new KFTC Chairman Kim Sang-jo recently stated that the KFTC is carefully monitoring online monopolies.

Contributors:

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Enforcement priorities under the new Moon administration

The special election of President Moon Jae-in in May 2017 is expected to result in a new agenda for the KFTC's enforcement priorities. In order to fulfil President Moon's campaign promises to create a fairer economy that bridges a growing economic gap between rich and poor, the KFTC can be expected to engage in more aggressive enforcement against perceived abusive or exploitative behaviour by strong market players in order to support the growth of economically weaker actors.

Under President Moon, the KFTC is expected to investigate stronger measures to protect, among others, franchisees, subcontractors and distributors. This may include increased actions for abuses of dominance as well as enforcement actions against perceived unfair trade practices (which in South Korea can be based on the existence of a superior bargaining position vis-à-vis transaction counterparties and does not require market dominance).

The KFTC is also likely to play a more active role in mitigating the effects of economic concentration by chaebols by regulating the practice of providing undue support through affiliate transactions and enhancing corporate governance structures. President Moon's selection of Professor Sang-jo Kim, known as an expert in conglomerate reform and corporate governance, as the next KFTC chairman reinforces such expectations.

Finally, to enhance the methods of redress for private individuals, there are also discussions on implementing a statutory punitive damages system (which currently is only available for specific violations under the Fair Franchise Transactions Act and Fair Trade in Subcontracting Act), as well as further facilitating standalone damages suits.

Looking ahead

While the KFTC continues to actively engage in cartel enforcement as well as enhancing merger review, under the new Moon administration it is expected to focus in particular on abuses of dominance and unfair trade practices by parties with a superior bargaining position. Accordingly, strong market players even in the absence of dominance need to be vigilant now and over the coming years.

A vertical photograph of the Taipei 101 skyscraper at night, illuminated with green and yellow lights. The building is the central focus, with a dense cityscape of other lit-up buildings visible in the background and foreground. The sky is a mix of purple and blue. The image is framed by dark vertical bars on the left and right sides.

Taiwan

Sweeping changes to the law



Recent amendments to Taiwan's Competition Law have brought significant changes to the regime and how companies do business in Taiwan. Competition enforcement is likely to be more robust in the future, and the competition authority is expected to become increasingly sophisticated and powerful.

Taiwan's competition law, the Fair Trade Act (TFTA), has recently undergone the most significant set of amendments since its entry into force in 1991. These amendments, which cover key areas such as merger control, cartel enforcement, other restrictions of competition and unfair competition, will have a significant impact on how companies do business in Taiwan.

A more permissive approach to resale price maintenance?

The rule on resale price maintenance (RPM) has been amended from a per se prohibition to a rule-of-reason test. The change was designed to allow suppliers greater pricing flexibility with their distributors. However, examining the Taiwan Fair Trade Commission's (the TFTC) practice over the past two years, it seems the authority has taken a conservative approach in assessing when RPM may be acceptable. As such, companies should still be prudent in imposing any (direct or indirect) RPM measure.

More aggressive cartel enforcement

The updated TFTA contains enhanced measures to help the TFTC combat cartels.

The TFTC is now permitted to presume the existence of a cartel agreement on the basis of circumstantial evidence, such as market

conditions, characteristics of the products or services involved, and profit and cost considerations. This substantially shifts the burden of proof regarding the absence of a cartel agreement among competitors from the TFTC to the companies under investigation. As a result, it will be easier for the TFTC to discover the existence of a cartel and to penalise the cartellists. However, to date, it has not been clear how this presumption rule is being applied in practice (for instance, the level of evidence required for the TFTC to make such a presumption and whether/how the parties under investigation can rebut it) due to the lack of publicised decisions.

A new whistleblower reward scheme

In mid-2015, the TFTC adopted a whistleblower reward scheme, described as an 'antitrust fund'. This financial reward scheme aims to encourage individuals to report illegal activities carried out by their employers and is seen as a complement to the pre-existing leniency programme. By obtaining information from whistleblowers that would otherwise be kept secret, the TFTC hopes that its chances of detecting and proving a cartel will be materially enhanced. Indeed, in 2016, the TFTC completed two cartel cases involving evidence obtained from third parties who received a financial reward for their assistance.

**US\$
190m**

fines imposed on 10 international capacitor suppliers.

Power to impose
**US\$
1.65m**

in administrative fines for failure to notify transactions.

'The [TFTC] continued to sharpen its legal tools in 2016 after amendments to the [TFTA] took effect in February 2015. These amendments represent the most comprehensive overhaul of the TFTA since the TFTC was established in 1992. Following this sweeping reform, the TFTC has been better equipped to maintain its independence and take enforcement action effectively against anticompetitive practices.'

Chia Lin Yen

Head of the International Affairs Section at the Taiwan Fair Trade Commission – April 2017

More generally, since the leniency programme came into effect in 2011, the TFTC has concluded several cartel cases through it, including the high-profile capacitor case in 2015 where the TFTC imposed fines totalling NT\$5.8bn (approximately US\$190m) on 10 international capacitor suppliers for price-fixing. This is the highest fine ever imposed on foreign enterprises by the TFTC. Its decision in that case was reached following parallel investigations launched in 2014 in the EU, Singapore and the US. Among those agencies investigating the cartel, the TFTC was the first to render a decision and its fines were higher to date than those imposed in any other jurisdiction.

Catch-all exemption for pro-competitive co-operation

There is now a catch-all exemption under the amended TFTA to cover all types of pro-competitive co-operation. In the past, concerted actions could only be exempted when they were related to specific types of co-operation, such as product specifications or product models, joint research and development, or joint importation of foreign goods. Under the amended TFTA, the provision is now very broad, covering ‘any other joint acts for the purposes of improving industrial development, technological innovation, or operational efficiency’. This is positive for companies although it remains to be seen how the provision will be applied in practice.

Gearing up for dawn raid powers

The TFTC does not currently have the power to conduct dawn raids in its investigations. However, the agency is proposing a draft amendment to the TFTA that will give it these powers in the context of investigating abuses of market power and cartel cases. According to the draft amendment, the TFTC will (with a court warrant) be able to search the work premises (including electronic records, etc) of any company under investigation and those of a relevant third party, as well as the personal residences of relevant employees. The TFTC will also be able to seize any items it discovers that may serve as evidence. While there is no definite timeline for the amendment, the proposal reflects the TFTC’s continued focus on aggressive enforcement of abuse of market power and cartel cases, and its goal of keeping pace with its peers in other jurisdictions.

More rigorous merger control

The TFTC has been fairly aggressive on the merger control front in recent years and this is expected to continue in terms of both its substantive review and sanctions for failure-to-notify cases.

In December 2016, the TFTC announced an amended jurisdictional test, adding a new threshold regarding ‘global revenues’. As a result of this amendment, merging parties now need to consider their global revenues as well as their revenues in Taiwan when assessing whether a filing is triggered.

‘[We] hope to add [into the law] the investigative power to conduct search-and-seizure operations. In this way, [we] can have direct access to key evidence of the illegal behaviour of companies or access a company’s internal production and marketing materials, so that we can achieve the purpose of improving the effectiveness of investigations.’

Huang Mei-ying

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Before the recent amendments to the TFTA, the TFTC did not aggressively investigate failure-to-notify cases and, where it did, it imposed only small fines – generally NT\$3m (approximately US\$100,000) or less. Under the amended TFTA, however, for transactions (including foreign-to-foreign transactions) that fail to notify, the TFTC has the power to impose an administrative fine of up to NT\$50m (approximately US\$1.65m).

In addition, the TFTC is now able to exercise its power to impose remedies, including prohibiting the transaction, ordering divestiture, transferring of shares/business, and/or the removal of personnel designated by the companies in failure-to-notify cases. Based on publicly available information, the TFTC has already imposed penalties in a number of domestic transactions.

As yet, the highest fine imposed in the TFTC's enforcement history for violation of merger control rules is NT\$10m (approximately US\$330,000). In addition to fines, there are also cases where the TFTC has ordered the unwinding of a transaction, disposal of the shares acquired or removal of directors designated by the acquirer. It is anticipated that similar penalties will be imposed on foreign-to-foreign transactions in the future.

Possible exemption for foreign-to-foreign transactions

Since December 2016, the TFTC has been able to waive jurisdiction over a pure foreign-to-foreign transaction where it anticipates no local effect on the Taiwanese market. In practice, parties to an offshore transaction are free to assess and decide whether a filing is required in Taiwan. However, the TFTC reserves the discretion to determine ultimately whether a waiver should be granted. To date, the TFTC has not published any waiver decision, nor detailed guidelines on assessing local effect. However, in view of the intensified enforcement against failure to notify, parties to an offshore transaction should seek advice before determining whether a filing can be avoided in Taiwan.

Extended waiting period and information rights for targets of hostile takeovers

Since June 2017, the waiting period for a TFTC merger filing has been extended to 30 business days with a possible extension of an additional 60 business days. In addition, the TFTC is now required to provide necessary information to, and seek opinions from, the target in a hostile takeover so as to safeguard the target's right to information and to express opinions.

The TFTC's decision in the Nokia/Microsoft case

The TFTC has demonstrated that it is ready to handle complex cases and is confident in imposing remedies in its merger reviews. On 19 February 2014, the TFTC cleared Microsoft's proposed acquisition of Nokia subject to two behavioural remedies, one imposed on each company. In August 2016, in ruling on an appeal by Nokia, the Supreme Administrative Court of Taiwan upheld the TFTC's decision and held that the TFTC has the legal authority to impose conditions that ensure that the overall economic benefit of a transaction outweighs the adverse impact of restricted competition.

Looking ahead

The amended TFTA has already been making an impact on Taiwan's competition law enforcement. With enhanced investigation powers, the TFTC is expected to be more aggressive, especially in terms of cracking down on international cartels. The TFTC is also expected to become increasingly sophisticated in merger review, and take a harder stance towards failure-to-notify cases.

A nighttime aerial view of a city in Vietnam, showing a dense cluster of buildings with lights on, situated along a river or canal. The lights are reflected in the water. The sky is a deep blue, and the overall scene is illuminated by the city's lights.

Vietnam

**A new, more active regime
in the pipeline**



After relatively low levels of enforcement since its introduction, the Vietnamese government is currently contemplating major changes to the country's competition law. If these are passed as expected in 2018, we anticipate a more active regime.

The first competition law regime in Vietnam (the Competition Law) came into effect in July 2005. However, in the 12 years following its enactment, there has been limited enforcement practice.

According to the annual reports of the Vietnam Competition Authority (the VCA), in the past 12 years the authority has reached decisions in only around 10 cases of conduct restricting competition (although the actual number may be slightly higher). These are split evenly between abuse of dominance cases and cases involving anti-competitive agreements.

Of these 10 cases, we understand that a fine of VND 3.4bn (approximately US\$150,000) was imposed on Vietnam Air Petrol for abuse of dominance in 2009, and aggregate fines of VND 1.8bn (approximately US\$80,000) were imposed on a group of 19 insurance companies for price-fixing in 2010. However, there is little official information about the remaining cases. Consequently, it is uncertain whether there were any infringement decisions or settlements, fines or other penalties, or if these cases were simply dropped.

In terms of merger control, the VCA is understood to have reviewed around 34 cases during this time. There is no report of any transaction being blocked by the authority.

The Vietnamese government is now contemplating amendments to the Competition Law (the Draft Amendments), proposed to be adopted in May 2018 with a view to strengthening the legal framework and the role of the competition authority in enforcement practice. Although amendments to the law have been mooted before, several foreign competition authorities have been consulted this time, which indicates that the Vietnamese government may be serious about this effort.

Broadened scope of application will extend to extraterritorial conduct

According to the Draft Amendments, the amended Competition Law will explicitly regulate offshore conduct that may restrain competition in Vietnam. Although the current regime does not have such a provision, the VCA, in practice, has required filing of a number of offshore transactions in a merger control context.

Harder line on 'hardcore' infringements

Under the Competition Law, an agreement in relation to price-fixing, market allocation and restricting or controlling output is only prohibited if the combined market share of the parties to the agreement is 30 per cent or more on the relevant market. Aside from the practical difficulties of determining market shares with any certainty in Vietnam, this exemption is out of step with other jurisdictions, where such agreements ordinarily fall under the heading of 'hardcore' infringements. Accordingly, under the Draft Amendments, such agreements are prohibited regardless of the market position of the parties (although, as currently proposed, exemptions will be available).

'There [is] a lack of coordination among relevant organisations in competition investigation – there [are] two agencies in charge of handling competition violations – the Vietnam Competition Authority and the Competition Council – which would lead to overlapping and difficulties in implementation.'

Phùng Văn Thành

Deputy Head of the Vietnam Competition Authority's Investigation Department – November 2016

Decisions reached in around

10

cases of conduct restricting competition to date.

Proposal for a new leniency programme

The Draft Amendments also introduce, for the first time, a leniency programme. The competition authority will grant immunity or a reduction in penalty to 'enterprises that voluntarily inform to help the National Competition Commission detect and handle prohibited anticompetitive agreements'.

As in other jurisdictions, the success of the leniency programme will substantially depend on transparent, comprehensive and clear provisions on how leniency applicants will be treated. According to the Draft Amendments, the competition authority will 'consider granting immunity or reduction of penalties' to eligible applicants, but there is currently no clarity on the criteria that will be taken into account when making this consideration. If the proposed statutory language is not further clarified prior to enactment, these will instead only be set out in future implementing regulations.

More sophisticated definition of market power in abuse of dominance cases

The Competition Law currently defines the market power of an enterprise primarily by its market share. The Draft Amendments contemplate a more sophisticated test, taking into consideration a number of factors in addition to market share, although how the competition authority will evaluate these factors is unclear. The factors will include, among others:

- ability to access or control the supply or consumption market;
- financial capacity of the group companies;
- technical capacity;
- intellectual property rights;
- market entry conditions; and
- other factors of the specific industry.

More transactions will be notifiable under revised merger control rules

Under the Competition Law, an economic concentration is notifiable where the parties have a combined market share of 30 per cent or more in any relevant market. The uncertainty surrounding this threshold has meant that, in practice, very few transactions have been notified, except in cases of clear market power.

One of the objectives of the Draft Amendments is to increase certainty at the same time as broadening the scope of notifiable transactions. The Draft Amendments, as they currently stand, require filing of a transaction if:

- any of the parties to the transaction have a market share of 20 per cent or more in a relevant market;
- the value of the transaction is VND 300bn (approximately US\$13.2m) or greater; or
- any of the parties have a total revenue in Vietnam of VND 500bn (approximately US\$22m) or greater in the preceding fiscal year.

The above thresholds are both relatively low and also, as drafted, based on the position of only one party without taking into account any overlaps between the parties, or any increment in market shares after the transaction. If these amendments are adopted in their current form, it is anticipated that many more transactions will be notifiable. However, we understand that these criteria may be revisited to avoid overloading the authority with a large number of substantively non-problematic cases.

'[Regarding the proposal to define market power with reference to various factors,] the Vietnam Competition Authority cannot set thresholds for these factors and must determine an entity's dominance on a case-by-case basis.'

Phùng Văn Thành

Deputy Head of the Vietnam Competition Authority's Investigation Department – July 2017

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‘Materially restraining competition’ test in merger review

In contrast with the relatively mechanical substantive standard under the current Competition Law, where an economic concentration will be automatically prohibited if the combined market share of the parties is equal to 50 per cent or more in any relevant market, the Draft Amendments introduce a more qualitative test so that ‘any economic concentration that has or may have the effect of materially restraining competition on the Vietnamese market shall be prohibited’. The implementing regulations should provide further guidance as to how this test of ‘materially restraining competition’ will operate, including, for example, whether factors such as market concentration or closeness of competition will be taken into account in addition to market share.

One centralised competition authority

Under the current regime, there are two competition authorities: the VCA under the Ministry of Industry and Trade, which regulates unfair competition practices, and the Vietnamese Competition Council (the VCC) under the central government – the executive branch of the state vested with law enforcement and execution powers. The VCC makes decisions on cases relating to anti-competitive practices (anti-competitive agreements, abuses of dominance and economic concentration) based on investigations conducted by the VCA. The Draft Amendments consolidate these two authorities into one single centralised ‘National Competition Commission’ directly under the central government.

This proposal, if adopted, may shorten the process of handling competition cases as there will only be one competition authority involved in their investigation and determination. Being a committee directly under the central government instead of a department of the Ministry of Industry and Trade (as in the current regime) will also give the competition authority more independence and freedom to take action, especially where the potential violating parties are state-owned companies controlled by ministerial agencies.

Looking ahead

The Draft Amendments show the Vietnamese government’s efforts to strengthen the competition law regime. Although more work needs to be done, and much will require clarification under the implementing regulations, it is expected that the enforcement of the competition law will be more vigorous following these proposed changes in the legal framework.

A satellite night-time photograph of South and Central Asia, showing city lights and geographical features. The image is presented in a vertical, narrow format with a dark blue background. The text is overlaid in white, bold font.

South and Central Asia

A multi-speed continent



Almost every country in Asia has or will soon have competition laws on the books. While some are moving towards more active and globally aligned enforcement, others have been slower to catch up.

It is a truism that Asia is a land of contrasts. No other continent contains so much diversity, not only culturally and geographically, but also in terms of economic and political development. The same can be said for competition law in Asia. While the region is home to some of the world's oldest and some of the world's most active competition regimes, it is also home to some of the newest and of the least enforced.

Association of Southeast Asian Nations (ASEAN) – making progress across the region

A key milestone to have passed since the previous edition of this guide is the establishment of the ASEAN Economic Community in 2015, and with it the agreed deadline under the ASEAN Economic Community Blueprint for member states to introduce competition laws.

Currently nine of the 10 ASEAN members (Brunei, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam) have introduced laws, while the remaining member, Cambodia, has a law in draft form that is understood to be quite advanced. Three of the newest of these laws (those of Brunei, Laos and Myanmar), while enacted, are not yet in force, and leave quite a bit of detail to be determined in the form of implementing regulations. Authorities in Laos and Myanmar have not yet been established, although the Bruneian authority has been and is understood to be recruiting staff. As described elsewhere in this guide, the Philippines, which passed its law at the same time as Laos, Myanmar and Brunei, has been far quicker to catch up with the rest of ASEAN.

In addition to these newer laws, Thailand has passed substantial reforms to its laws to enable more effective enforcement, while, as we describe elsewhere, Vietnam and Indonesia are also considering wide-scale reforms. In the case of Thailand, despite having one of the oldest competition regimes in the region (dating back to 1999), the authority has yet to see any investigations through to prosecution, or pass

various implementing regulations including those needed for the introduction of merger control. One key reason for this is the perceived influence of political and business interests, while another is the authority's current lack of enforcement powers and the need instead to refer any infringements to the public prosecutor. Under Thailand's new law, coming into effect in October 2017, the current authority will be replaced by a new independent and full-time Office of the Trade Competition Commission (the OTCC), with the power to impose administrative fines.

After such a long period of limited enforcement, the new OTCC may well seek to vigorously assert its authority. The creation of the OTCC is likely to also be followed by the introduction of a new merger filing regime (which will be post-closing in many cases).

ASEAN – towards 2025

The ASEAN Experts Group on Competition, comprising representatives of member state competition authorities, is the ASEAN body responsible for setting competition law implementation priorities. Its 2016 Competition Action Plan sets out five broad strategic goals to be achieved by 2025: (i) establishing not only competition laws, but also effective competition regimes; (ii) building capacity within national authorities; (iii) putting in place effective regional co-operation arrangements (including the creation of a 'Competition Enforcers' Network'); (iv) fostering competition awareness throughout the ASEAN region; and (v) harmonisation of existing legal rules and practices.

In addition to co-ordination between member state authorities, currently led largely by the Competition Commission of Singapore, a number of outside authorities have invested in capacity building through workshops, study tours and staff exchanges (in particular with the Australian and New Zealand authorities). Most recently, both the Japan Fair Trade Commission and European Commission (the EC) have rolled out generous technical assistance funds for ASEAN member states. The long-term

9/10

ASEAN members have introduced laws.

upshot of this is likely to be a region of increasingly sophisticated, outward-looking competition authorities to which international companies should pay caution.

Harmonisation is seen as a more distant end goal once legal structures and capacity have been put in place. The Competition Action Plan foresees the adoption of a new set of Regional Guidelines for Competition Policy, as well as an eventual model law. The former would replace the current Regional Guidelines, which are based largely on European law, and have largely not been followed in practice. The new Lao and Myanmar laws, for example, as well as the Cambodian draft law, appear to borrow more from the existing Thai and Vietnamese laws (in spite of these now being subject to significant amendment).

Yet while ASEAN member state regimes develop and converge, as yet there is no serious discussion of cross-border competition rules or a supra-national regulator equivalent to the EC's Directorate General of Competition or the COMESA Competition Commission. Such a development is unlikely to come any time before 2025.

Harmonisation is seen as a more distant end goal once legal structures and capacity have been put in place.

South Asia – enforcement remains limited

As noted in the relevant country chapter, India's competition authority has been notably active in its relatively short life. The Competition Commission of Pakistan (CCP) is the other major authority in the region, albeit that it focuses more on domestic matters and the exercise of its consumer protection functions. The CCP reviewed 69 merger filings in 2016, including a number of foreign-to-foreign transactions, which it routinely reviews. Amendments to the CCP's merger regulations in late 2016 have provided greater clarity as to when transactions, including foreign-to-foreign transactions, are notifiable.

However, despite calls for the CCP to include a nexus provision in the merger regulations limiting filings to those transactions with effects in Pakistan, it ultimately did not do so, although in practice it clears non-problematic foreign-to-foreign transactions relatively swiftly. The CCP is expected to continue to monitor and penalise missed filings.

In our previous edition it was noted that the CCP had taken a hard-line approach to enforcement, and had imposed multimillion-dollar fines against infringing companies. Since then, fine levels have fallen, with the CCP imposing only token fines in several recent abuse of dominance cases. Fines in 2016 totalled just under US\$3m, and in 2015 less than US\$2m, almost half of which were from consumer protection infringements.

Similar to the case in India, the CCP has also faced multiple judicial challenges to its authority, many of which have yet to be resolved. However, a new competition appellate tribunal has been established with the objective of stemming appeals against the CCP's decisions and leading to speedier outcomes than in the national courts. Its first cases have tended to side more often with the CCP. Separately, the CCP has clashed with the national telecommunications regulator in connection with policies regarding the promotion of competition among telecommunications companies, and more recently with respect to proposed telecommunications competition rules currently before parliament.

Elsewhere in South Asia competition enforcement is essentially dormant. As anticipated by the previous edition of this guide, competition law remains largely unenforced by authorities in both Nepal and Sri Lanka, and both remain without a merger control regime. The same is true of Bangladesh, where a competition law was enacted in 2012, but the authority has yet to be created. Bhutan, on the other hand, has opted against a competition law, due to capacity constraints. In Afghanistan, a draft law replacing its current inactive statute has been under consideration since 2011 with few signs of being adopted.

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Without the same impetus towards enforcement among South Asian countries as among the ASEAN member states, this situation is unlikely to change in the near future.

Central Asia – still largely domestically focused

Although competition laws are in force throughout Central Asia, its competition authorities remain largely under-resourced, and, as in other former control economies, focused largely on exercising price controls over former state monopolies. For international companies, competition law in the region will continue to be of interest mainly to those companies with significant local investments. Merger control in Uzbekistan, for example, is limited to the financial services and commodities markets, and so is inherently domestically focused, while Kyrgyz merger control applies to mergers between Kyrgyz-incorporated companies only.

Leading the way in the region is Kazakhstan, which in the past five years has investigated several hundred behavioural cases, and captures merger filings in more and more international transactions. In 2016 Kazakhstan replaced its older competition law, and in early 2017 amended the law again on OECD recommendations to move from a prescriptive, price control-focused system towards one based more on compliance and effects analysis.

Central Asia – a new supra-national regulator

Whereas ASEAN has so far not looked to introduce a supra-national regulator, Kazakhstan's membership of the new Eurasian Economic Union (the EEU), together with neighbouring Kyrgyzstan, brings it under the jurisdiction of the EEU's administrative arm, the Eurasian Economic Commission (the EEC). Formed in 2015, the EEU models itself as a European Union-style single market for former members of the USSR, with the Moscow-based EEC, similar to the EC, having both competition enforcement functions as well as oversight over member state compliance with EEU-wide

competition rules. While no EEU-wide merger control system exists as yet, the EEC does have jurisdiction over competition violations with effects on cross-border markets, which as defined under the EEU Treaty include 'monopolistic pricing' as well as 'unfair competition'.

The EEC is already bolstering the capabilities of regional authorities. In 2016, for example, at the request of the Kazakh Ministry of Economy, the EEC (together with the Russian Federal Antimonopoly Service) investigated Caterpillar for parallel import restrictions on mining equipment between Russia and Kazakhstan. The investigation led to commitments by Caterpillar to amend its distribution agreements not only in Kazakhstan, but also throughout the region.

For international companies, competition law in Central Asia will continue to be of interest mainly to those companies with significant local investments.

Looking ahead

With such wide contrasts, companies with interests across Asia should be careful when formulating regional policies. The move towards a coherent regional competition policy in the ASEAN region and the creation of the EEU (which also spans to Belarus and Armenia in Europe) means companies cannot afford to take a silo approach to compliance. Moreover, conduct that is overlooked by authorities in less active jurisdictions may well be policed more rigidly in neighbouring countries. Companies should also pay attention to rapid developments, particularly in the ASEAN region, so as not to be caught out by new enforcement or merger control regimes coming online.

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