CPI Columns

2023

Asia

Edited by Elizabeth Xiao-Ru Wang, Kun Huang & Aston Zhong

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LETTER FROM THE EDITOR

Dear Readers,

Thank you for following the CPI Asia column for yet another interesting year. Throughout the past twelve months, our distinguished authors shared their unique insights on the latest trends in Asian antitrust. This includes China's new guidelines on regulating the digital economy, a review of disputes concerning standard essential patents ("SEPs"), and a discussion on cross-border collaboration among Southeast Asian countries for the enforcement of competition law, just to name but a few.

We encourage our readers to catch up on any article you may have missed over the last year. A brief summary of each column is provided below.

Last September, **Professor Bing Chen**, who focuses on economic law at Nankai University School of Law, contributed an in-depth insight into China's renewed efforts to expand their antitrust regulations on digital platforms. In his article, Professor Chen, with the help of research assistant Xiaou Fu, first sets the scene by discussing how the recently introduced Revised Anti-Monopoly Law in 2022 along with additional guidelines published by SAMR on Internet platforms indicates that regulating the digital and platform economy has become an important issue in China. The article then explores the significance of recent investigations into tech giants such as Alibaba and Tencent, as well as key trends concerning online platforms.

Wei Huang, Fan Zhu, Bei Yin & Xiumin Ruan of Tian Yuan Law Firm in Beijing discuss the first ever anti-monopoly case heard by the Supreme People's Court of China. Their article reviews a variety of disputes concerning standard-essential patents ("SEPs") that have emerged since the judgment in the Huawei v. InterDigital Corporation of 2013. With its in-depth evaluation of landmark cases concerning SEPs, the article is a must-read for anyone interested in this developing field in China.

Rounding out our columns from 2022, **Atsushi Yamada** of Anderson Mori & Tomotsune in Tokyo examines the increased attention that the concept of an Abuse of a Superior Bargaining Position ("ASBP") is drawing in Japan. As an idea that is rarely discussed in competition law or legislation outside of East Asia, ASBP is often misconstrued as being similar to abuse of dominance. This insightful column examines the various, but admittedly vague, ASBP guidelines issued by the Japan Fair Trade Commission ("JFTC") and investigates how they have been enforced in practice. It then discusses recent trends in the JFTC's enforcement of its ASBP guidelines, with a look towards potential shifts in enforcement moving forwards.

Yvonne Hsieh, Erica Chiu & Alex Chu of Lee and Li provide a guide to understanding the Taiwan Fair Trade Commission ("TFTC")'s latest White Paper on Competition Policy in the Digital Economy. Their column breaks down key issues in the White Paper, such as how markets should be defined in two-sided/multisided platforms, and how to assess market power in zero-price markets. Additionally, they detail the TFTC's stance on abusive conduct in the digital economy through behavior that has received widespread attention by international regulators (e.g. self-preferencing/search bias, price discrimination via extensive data analysis, Most-Favored-Nation clauses, and data privacy, among others). With the TFTC's White Paper touching on some of the issues at the forefront of the conversation on digital economy regulation, this column positions itself at the center of any discussion on the future of regulating the digital economy.

Elsa Chen, Scott Clements & Daren Shiau from Allen & Gledhill present an article that detail the current state of antitrust enforcement in the region and examine notable cases of antitrust enforcement in each of member states at ASEAN. As a major global hub of manufacturing and trade, Southeast Asia has increasingly found itself to be a key region for competition enforcement against global corporations. As these entities increase their exposure across Southeast Asia, member states within the Association of Southeast Asian Nations ("ASEAN") have been pushing to cooperate concerning competition law enforcement, despite the inherent variation in the legal framework among these countries. The article highlights the increased focus on regulating the digital economy, the growing collaboration amongst member states, and the need for clear regulatory frameworks and guidelines within ASEAN.

Rounding out our columns over the last year is an analysis of the role that market shares play in the enforcement of resale price maintenance ("RPM") enforcement in China, an issue that has been hotly discussed in China's antitrust sphere over the last decade. **Peter J. Wang, Qiang Xue, Yizhe Zhang & David Wu**, from Jones Day, take a deep dive into the differences in how RPM cases have been enforced by the State Administration of Market Regulation, compared to its predecessor, the National Development and Reform Commission. Through their analysis, the authors hope to answer a practical question - how is a company with a modest market share exposed to RPM risks in China through the different lenses of antitrust enforcement authorities and courts? This article provides comprehensive insight into the changes in RPM enforcement in China over the last decade.

We would like to thank all of our contributors for their thoughtful perspectives on the developments in Asia. We similarly hope that you continue to enjoy our authors' insights at the CPI Asia column over the next year.

Sincerely,

Elizabeth Xiaoru Wang, Ph.D.
Kun Huang, Ph.D.
Aston Zhong, Ph.D.

ANTITRUST REGULATION INSIGHT: CHINA'S DIGITAL PLATFORMS' NEW PHASE

By Bing Chen & Xiaou Fu[1]

The digital economy is rapidly growing across the world. While it greatly freed up and optimized the allocation of resources and stimulated the innovative development of new forms of business and technologies, the digital economy is observing a large number of disputes. In particular, problems in the platform economy such as compulsory "either-or" choice, self-preferencing, data monopolization, algorithm discrimination, and algorithm abuse have emerged from the rise and innovative application of digital platforms. For this reason, the effort to regulate the digital platform economy through antitrust law has taken over the world, which also gives rise to concepts such as the New Brandeis movement in the United States, the gatekeeper platform's obligations in the European Union, and the notion of cross-market impacts in the platform sector in Germany, calling for new ways of approaching the matter by the legislative, enforcement, and judicial branches.

As one of the world's leaders in the development of the digital economy, China's massive user base provides a strong and continuous market demand for digital applications, which has led China to become the world's second-largest digital economy in 2020 and the first in overall growth rate. Along with the rapid growth in the platform economy, cases of restrictions, exclusion of competition, unfair competition, and unfair trading have also increased.

Since the end of 2020, China has promoted and guaranteed the stable and healthy development of the platform economy by optimizing antitrust law and maintaining strong regulation. For example, on February 7, 2021, the Anti-Monopoly Commission of the State Council issued the Antitrust Guidelines on Platform Economy, the world's first government-issued normative document specifically governing competition in the digital platform economy. In April and October of the same year, Alibaba and Meituan were slapped with administrative penalties for compulsory "either-or choice" practices. These measures have produced substantial results for the implementation of the explicit requirements of the CPC Central Committee and the State Council to strengthen antitrust enforcement and prevent the disorderly expansion of capital, and laid a solid foundation for fostering new development pattern and smoothing the dual circulation economy.

The CPC Central Committee and the State Council jointly released a guideline on accelerating the establishment of a unified domestic market on April 10. This document seeks to "cultivate new advantages in international competition and cooperation. Make better use of global factors and market resources to better connect the domestic market with the international market, supported by the major domestic circulation and unified market" and to "[c]ultivate a group of digital platform enterprises with global influence." China should pay attention to the standardization, specialization. and improvement of rule of law in China's governance in the digital platform economy. China should keep up with international standards, summarize our own experience, refine our own experience and voice our viewpoints in the international arena.

On June 24, 2022, the 35th Session of the 13th National People's Congress Standing Committee passed the Revised Ani-Monoply Law("the RAML") on the premise that opinions were fully coordinated and the conditions were ripe. The RAML was officially implemented on August 1 of the same year. Anti-monopoly regulation over key elements of the platform economy has attracted widespread attention, and responded to general concerns over all sectors of the society in a timely and effective manner. At the same time, the RAML also provides a legal basis for the next steps in refining and delivering an effective supervision of the platform economy.

The RAML not only directly responds to the demand for regulation of digital platforms– it also focuses on refining the fundamental aims, [economic and legal] principles, and key next-steps for Chinese anti-monopoly law in the long term. Particularly, the RAML pays much attention to the characteristics and justification for competition practices. RAML is in an effort to incorporate these policies into the legislature to reduce uncertainty.

For example, Article 9 of the RAML reads: "[o]perators shall not use data, algorithms, technologies, capital advantages and platform rules to engage in monopoly activities prohibited by this Law." This article has been seen as a direct response to the prevalence of these issues in the digital platform econo-

1. Bing Chen is Professor of Economics Law, Director of Center of Competition Law, Nankai University School of Law, e-mail: bing.chen@nankai.edu.cn. Xiaou Fu is Research Assistant, Center of Competition Law, Nankai University School of Law.

my. We can say that antitrust regulation in the digital economy has focused on the specific, rather than general, elements of digital platform activities. From which can be found that the digital platform of antitrust regulation of the economy has been focused on the specific elements, the precise type legislation rather than in general about the digital platform of antitrust regulation of the economy, fully embodies the legislature, the national antitrust law enforcement agencies and other relevant departments on the digital platform economy antitrust legislation and law enforcement to strengthen professional next. Only by linking the specific behaviors with effects can the authorities adapt to the characteristics and needs of competition regulation in the digital economy.

I. THE BASIC CONTEXT OF CHINA'S PLATFORM ANTITRUST REGULATION

China's antitrust policies and laws for platform enterprises are also formulated and improved intensively and rapidly. The implementation of the Anti-Monopoly Law has been sustained and normalized, while precise regulatory concepts, principles, methods, and technologies are constantly adjusted and improved.

Since November 2020, a series of political meetings, including that of the Political Bureau of the CPC Central Committee, the Central Economic Work Conference, and the 9th Meeting of the Central Financial and Economic Committee, have clearly demonstrated the attitude and determination of the Chinese authorities to strengthen antitrust regulation and prevent the disorderly expansion of capital. The 21st Meeting of the Commission for Deepening Overall Reform of the CPC Central Committee, held in August 2021, deliberated and approved the *Opinions on Strengthening Anti-Monopoly and Furthering the Implementation of the Policy of Fair Competition*, stressing that they "attach equal importance to both regulatory norms and development promotion." The Central Economic Work Conference held in December 2021 proposed the goal as "to boost the confidence of market entities, further promote the implementation of fair competition policy, strengthen antitrust and anti-unfair competition, and ensure fair competition with fair regulation", further confirming a push for the implementation of normalized and standardized antitrust oversight.

On January 19, 2022, the National Development and Reform Commission and nine other departments jointly issued the document entitled *Several Opinions on Promoting the Standardized, Sound and Sustainable Development of Platform Economy*. In view of the current focal issues in the platform economy, building on the new advantages of this sector and promoting its high-quality development is required. In March 2022, Premier Li Keqiang also mentioned in his government work report that in 2022, China would "further promote the implementation of fair competition policies, fight against monopoly and unfair competition, and maintain a fair and orderly market environment." Li also called for the "timely improvement of regulatory rules in key areas, emerging areas and foreign-related areas, innovation of regulatory methods, and improvement of regulatory accuracy and effectiveness."

In the formulation of relevant supporting regulations such as the *Antitrust Guidelines on the Platform Economy* released in February 2021. Those supporting regulations are comprehensive responses to the highly controversial "either-or choice" and "big data-based price discrimination" practices in the platform economy was mounted, covering hot issues including the relevant market definition, the determination of antitrust violation through most-favored-nation clauses, and emerging innovative corporate takeovers. Those supporting regulations were significant efforts in strengthening antitrust regulation for the platform economy, as well as a helpful guide for operators in the platform economy to act in accordance with the law and promote orderly innovation and the healthy development of the platform economy.

On August 20 of the same year, the 30th Session of the Standing Committee of the 13th National People's Congress voted to pass the Personal Information Protection Law, which also put forward special requirements on data processing for large platforms, stipulated the system of information disclosure, external audit, and regulation of the platform subject, increased their responsibilities, and reduced their monopoly risks. These supporting rules have further strengthened the standardization and rigor of digital governance.

China's antitrust policies and laws for platform enterprises are also formulated and improved intensively and rapidly

As what is said above, on June 24, 2022, the 35th Session of the 13th National People's Congress Standing Committee passed the RAML. The RAML further refined the applicable rules and provided stronger institutional support for the next steps of platform regulation. For example, Article 9 and Article 22 of the RAML include special provisions on platform antitrust.

Article 22 of the RAML states that "[o]perators with a dominant market position [that] use data, algorithms, technologies and platform rules to set up barriers and impose unreasonable restrictions on other operators" will violate the law by their abuse of dominant market position.

In addition, the State Administration for Market Regulation ("SAMR") published *Guidelines for the Classification and Hierarchy of Internet Platforms (Exposure Draft*) and *Guidelines for the Implementation of Main Responsibilities of Internet Platforms (Exposure Draft)* on October 29, 2021. The guidelines provide that the operation, behavior, and responsibility of various types of platforms should be regulated "comprehensively, multi-dimensionally, and hierarchically."

It can be inferred from the policy positioning of the CPC Central Committee that revising the antitrust policy and the implementation thereof in the digital and platform economy has become a top priority for competition regulation in the Chinese market.

II. UNDER THE GUIDANCE OF ANTITRUST REGULATORY POLICIES AND LAWS, CHINA CONTINUES TO CARRY OUT ANTITRUST REGULATION OF DIGITAL PLATFORM ENTERPRISES

On December 14, 2020, SAMR announced its decision to impose the maximum administrative penalty available on three illegal business concentration cases, including Alibaba's investment in acquiring equity in Yintai Commercial, Yuewen's acquisition of Xinli Media, and Fengchao's acquisition of Zhongyouzhidi. This is the first time that China's antitrust authority has imposed an administrative fine over the concentration of operators in the digital economy.

In addition, according to the Antitrust Working Conference of the National Market Regulation System on March 17, 2022, 176 monopoly cases were investigated and resolved nationwide in 2021, and the total amount of fines was of 23.586 billion yuan (roughly 3.4 billion US Dollars). The court system reviewed 727 business concentration cases, conditionally approved four cases and enjoined one. The Chinese antitrust regulators achieved remarkable results, along with significant law enforcement breakthroughs, especially new developments in the field of digital and platform economy.

What is particularly noteworthy is that on April 10, 2021, the SAMR issued an administrative penalty decision on Alibaba's monopolistic behavior of compulsory "either-or choice". On July 10 of the same year, the SAMR issued an antitrust review decision on the concentration of operators in the merger of Huya and Douyu declared by Tencent, forbidding the concentration and rejecting Tencent's promise of additional restrictive conditions. This is the first case of Internet platform merger and acquisition prohibition in China, effectively strengthening the antitrust regulation of the digital and platform economy.

On July 24, 2021, the SAMR issued an administrative penalty for illegal concentration in the case of Tencent Holdings' acquisition of China Music Corporation, ordering Tencent and its affiliates to take measures to reinstate competitive order in the relevant market, notify the authority of any concentration in accordance with the law, and pay a fine of 500,000 yuan. This is the first case involving an illegal merger that has been ordered to restore competition in the market in over thirteen years since the implementation of the Anti-Monopoly Law and marks a significant step toward maintaining fair competition and promoting innovation and growth in the industry.

SAMR has also held several administrative guidance meetings with industry-specific regulators in the digital economy to present specific guidelines and requirements for *ex ante* regulation. On the eve of "Double 11" in the past two years, a digital sale day in China like the Amazon Prime Day, SAMR cohosted with other agencies the Administrative Guidance Symposium on Regulating Online Business Activities and Administrative Guidance Conference on Regulating Online Economic Order which was also attended by major digital platform enterprises. It attaches great importance to the supervision of centralized network promotion activities. In the meeting, for the false discount misleading consumers, false publicity and illegal advertising, unfair format terms, "brush single fried letter", restrictions on the choice of commercial platform and other issues were explained. It hope that the major digital platform enterprises will carefully examine the above issues, respond to consumer demand, and earnestly fulfill their responsibilities in terms of platform governance, information disclosure, fair competition and consumer rights protection.

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The agencies in charge of regulating various industries have also put forward relevant work requirements for strengthening antitrust law enforcement and standardizing the healthy devel-

opment of new business models in the industry. On July 30, 2021, the Joint Inter-Ministerial Meeting on Transportation and Coordinated Regulation of New Forms set out "to strengthen antitrust regulation and oversight over unfair competition, investigate and punish online car-hailing and freight transportation platforms for monopolizing, excluding and restricting competition . . . to further strengthen network and data security regulation, [and] to protect consumers' personal information." Local market regulatory departments have also organized administrative guidance meetings for digital platform enterprises to help them operate within the parameters set by law. At present, a comprehensive, multi-level and multi-dimensional digital platform governance system and implementation mechanism are shaped into existence by local and central governments.

III. THE MAIN CHARACTERISTICS AND DEVELOPMENT TREND OF CHINESE PLATFORM ANTITRUST REGULATION

It is worth noting that although China's attitude towards digital platform governance is similar to that of other major nations, there are differences with regard to regulatory concepts, methods, and specific measures. In practice, China usually pays more attention to policy guidance and multilateral governance, stressing the importance of maintaining "stability" while making progress. In line with the general direction of policies, China pursues coordinated governance at a multi-level, multi-faceted and multi-field approach in an orderly fashion and under the rule of law. This is achieved through the scientific and prudent diversification of accurate and effective measures, where enforcement is characterized by consistency, science, and transparency.

Both the current legislation and agencies have fully implemented the central government's directions in strengthening antitrust regulation and enforcement against unfair competition, promoting fair competition, setting useful guideposts for market entities, and introducing systematic, holistic and scientific decision-making. The interpretation of specific laws and regulations and the implementation of regulatory measures should be more objective and based on scientific principles. Focusing on "regulations" aims to prevent the disorderly expansion of capital, promote fair market competition and help in the healthy development of China's digital economy.

In other words, the regulation of digital platform enterprises should focus on scientific, accurate, and effective regulation strategies and methods, stimulate the innovation in the market, and enhance the sustainable growth in the digital and platform economy. Meanwhile, it is necessary to balance the relationship between short-term policy goals and long-term, high-quality development requirements, avoid the excessive pursuit of short-term regulatory benefits, form a long-term sustainable model that assigns equal weight to development and regulation so as to build a fair and orderly digital market.

Recently, the safeguarding of free, fair, and orderly competition and the standardized development of the digital market have become the indispensable requirement of China's "14th Five-Year plan" and its guiding mission, which is to promote the sustainable and high-quality development of the digital economy and to create new advantages in international competition. Faced with increasingly fierce competition in the regulation game, China should take the initiative and adapt to the new trend of competition and regulation in the global digital economy. On the basis of improving and strengthening the rule of law and its own regulation strategy, China should clarify the key direction for adjusting the concept, subject matter, and methodology of its digital antitrust regulation.

In terms of regulatory philosophy, China should implement the concept of science-based and prudent supervision subsidized by the rule of law, attach equal importance to development and regulation, and seek a dynamic equilibrium among cracking down on monopolistic behaviors, containing the risks of unfair competition, and encouraging the innovation and development of digital platform enterprises. China should also strive to provide clear demarcation of liability and regulatory boundaries to facilitate transparent antitrust enforcement and avoid overlapping liabilities or enforcement crossover between regulators. Tailoring to the characteristics and principles of the digital market and preventing market harms caused by stringent or improper enforcement through multi-disciplinary regulatory cooperation that improves the efficacy and efficiency of digital oversight would also befit the Chinese regulators and the Chinese society as a whole.

It can be said that China's current legislation and law enforcement have fully implemented the central government's decision to "strengthen antitrust" deployment. However, our understanding of "strengthening antitrust" should not go to extremes. "**Strengthening antitrust" cannot be simply equivalent to "strengthening platform antitrust", nor can it just strengthen antitrust law enforcement with regard to platforms**. As the 26th Meeting of the Commission for Deepening Overall Reform of the CPC Central Committee stressed on June 22, 2022:

> [t]o strengthen the regulation of platform enterprises against monopoly and unfair competition, strengthen the regulation of platform enterprises over sediment data, and regulate the big data-based price discrimination and algorithm discrimination, China needs to consolidate the regulatory responsibilities of all relevant departments, improve the coordinated regulatory framework between the central and local

governments, strengthen functional, **penetrating, and sustained oversight, strengthen regulatory coordination and joint law enforcement, and maintain consistency between online and offline oversight**.

On June 24, 2022, the 35th Session of the 13th National People's Congress Standing Committee passed the RAML. Compared with Article 10 of the first draft , article 11 of the RAML adds the goal of "strengthening anti-monopoly law enforcement and judiciary, hearing monopoly cases fairly and efficiently in accordance with the law, and improving administrative law enforcement and judicial connection mechanisms." Specifically in the field of platform regulation, it is clear that antitrust is a part of platform regulation, but platform regulation cannot be equated with platform antitrust. At the same time, platform antitrust should not be understood as merely involving antitrust law enforcement, but should also include platform antitrust justice, as well as platform enterprises and other participants' compliance with the anti-monopoly law, such as platform enterprises' compliance and supervision of other participants.

The interpretation of specific laws and the implementation of regulatory measures should be objective and scientific. The purpose of focusing on "regulations" is to prevent the disorderly expansion of capital, promote fair market competition, and encourage the healthy development of the digital economy. In other words, China should pay attention to scientific, accurate, and effective regulation strategies and methods for digital platform enterprises, adhere to both development and regulation as guiding principles, stimulate innovation among market entities, and enhance the driving force and sustainability of growth within digital platform enterprises.

At the same time, it is necessary to balance the relationship between phased policy goals and long-term high-quality development requirements, avoid excessive pursuit of short-term regulatory benefits, form a long-term sustainable development model that pays equal attention to development and regulation, and build a unified, fair and orderly digital market.

The interpretation of specific laws and the implementation of regulatory measures should be objective and scientific

In terms of regulation subjects, taking market operation as the starting point and respecting the basic laws of market operation, an all-round, multi-level and multi-dimensional regulation system led and regulated by the General Administration of Market Regulation and coordinated with other actors and local regulation departments should be established to improve regulation efficiency.

The SAMR was set up through the institutional reform of 2018, integrating anti-monopoly law enforcement powers originally scattered across three departments, thus offering a partial solution to the problem of overlapping functions and a more efficient antitrust regulation. At the same time, it should be noted that compared with traditional physical platforms, digital economy platforms are more convenient for expansion. Hidden monopolies, complex competition mechanisms, and a diversified operation with cross market competition are more serious issues. Therefore, all industries and market entities are required to participate in the multi-faceted regulation. This approach links market entities with industry-specific authorities, forms a complete set of regulatory chains, establishes regulatory coordination in the finance, manufacturing, information technology, Internet, and other industries, and encourages the sharing of information, joint enforcement, and regulatory cooperation. China will open channels for market entities to report, attach importance to supervision by public opinion, improve correspondence procedures, and emphasize the disclosure of results. Under the overall management of the SAMR, the regulatory subjects in all fields and on different regulatory levels should play active roles in improving regulatory efficiency.

In terms of regulatory methods, China's authorities could improve the anti-monopoly review mechanism to form a chain of supervision and control over consolidations *ex ante* and *ex post*. To achieve this goal, it is necessary not only to clarify the rules regulating business conduct in the platform market and strengthen structural control and other obligations through legal norms, but also to introduce scientific and technological tools to link regulatory authorities and platform operators to establish a real-time, digital, intelligent and full-cycle regulation mechanism as well as to respond to the digital economy in the whole cycle, the whole airspace, the whole scene, the whole chain, the whole value of the new competition paradigm and the new requirements of antitrust regulation.

In terms of regulatory logic and procedures, China should promote scientific and prudent *ex ante* regulation, encourage and support platform entities to actively participate in compliance governance, and take accurate measurements to ensure effective prevention and control while fully respecting the independent operation of platform entities. China can make comprehensive use of administrative guidance,

interview, investigation and other administrative methods to link industry regulation departments and market regulation departments, increase input in science and technology regulation, and enhance capacity for prior regulation. Concrete measures including but not limited to scientifically issued relevant policy documents in time, strengthen communication between enterprises and government authorities, provide policy explanations and consultation for all platform entities, provide scientific and timely behavioral guidance, advocate for guidance first, encourage platform subjects to combine self-compliance with external regulations so as to improve efficiency in advance. Regarding ex post regulation, this should be strictly in accordance with the law, setting up a list of positive and negative scientific management systems. Policy makers should also clarify and publicize start-up procedures, investigation procedures, hearing procedures, and result disclosure procedures, which would enhance the authority's position in its enforcement to deliver open, fair, and equitable regulation.

In terms of regulatory content, China should pay attention to the balance of diverse interests in the dynamic process of data collection, use and management to effectively deter and regulate data monopolization, blockade, and abuse by players in the platform economy. At the same time, it should standardize and provide guidance for the lawful operation of cross market digital platform enterprises, incentivize their innovation, creativity and competitiveness on a global scale, and seize the vantage point of international competition in the digital economy. In accordance with the *Guidelines for Overseas Antitrust Compliance* issued by SAMR in November 2021, Chinese digital platform enterprises should raise their awareness of overseas regulation compliance by establishing and improving international antitrust compliance solutions, as well as accurately identifying and assessing the potential risks in the international arena including antitrust risks and the associated risks relating to data security, financing, and IP infringement.

Due to the highly dynamic, cross-industrial, and transnational activities of competitions among digital platform enterprises, the effective antitrust regulation of the digital economy in an international context depends on countries and regions to continuously deepen bilateral, multilateral, and regional cooperation in antitrust enforcement. On the basis of safeguarding the sovereignty, national security and economic interests of all countries in the digital field, it is necessary that authorities promote the establishment of practical international governance rules for competition in the digital economy that will reflect the interests and demands of all countries, so as to build a new regime for global competition in the digital economy featuring joint construction, joint governance, and shared benefits. These subjects need to be considered and further explored in the future research and practice.

In terms of regulatory methods, China's authorities could improve the anti-monopoly review mechanism to form a chain of supervision and control over consolidations ex ante and ex post.

A REVIEW OF THE DEVELOPMENT OF SEP-RELATED DISPUTES IN CHINA AND OUTLOOK FOR THE FUTURE TREND

By Wei Huang, Fan Zhu, Bei Yin, & Xiumin Ruan[1]

Since the issuance of the judgment of *Huawei v. InterDigital Corporation* ("IDC") in 2013, disputes concerning standard essential patents ("SEPs") have been developing for over 10 years in China while China has grown into an important battlefield for international SEP disputes by establishing its own standards of reviewing the substantive and procedural issues.

Particularly, courts in China have granted anti-suit injunctions consecutively in cases such as *Huawei v. Conversant, ZTE v. Conversant,* and *Xiaomi v. IDC* since the end of 2020, which on the one hand provided important support for legal actions of enterprises in China, whilst on the other hand also triggered concerns from various competition jurisdictions including the European Union and the United States.

The strategic position of China in the global SEP dispute settlements is becoming more and more important today. Against the background that the 5G standard's implementation is entering full commercialization with technologies related to IoT developing dynamically, jurisdictions like the US, EU, UK, Japan, and South Korea have actively amended their SEP policies starting from 2021 in response to this industrial development and migration.

All these appear to indicate that a new wave of SEP disputes around the world is arising, as exemplified by the patent infringement lawsuits filed recently by traditional right holders such as Nokia and IDC against OPPO, Vivo, OnePlus, etc. Under this context, an analysis of the development of China's SEP disputes and future trend is of great significance for both the right holder's and the implementer's commercial success in China.

I. OVERVIEW OF SEP-RELATED DISPUTES IN CHINA

A. Cases in recent years are centered on jurisdictional issues while standards in reviewing substantive issues do not appear to make material development

Disputes related to SEPs arise from time to time in recent years in China. Regardless, only in early cases did the court and law enforcement authority touch upon substantive issues like whether the terms and conditions under dispute violate antitrust law, and whether they are compliant with the fair, reasonable and non-discriminatory "FRAND" licensing commitment made by the SEP holders when they had their relevant patents incorporated into a standard.

The focus of the recent cases is more related to procedural issues, for instance, anti-suit injunction, anti-anti-suit injunction, and whether a national court would have the jurisdiction to determine the licensing terms and conditions of all SEPs held by the right holder, i.e., determination of global licensing terms and conditions despite that the evaluation of patents is closely related to specific stipulations of the patent law of each country and therefore has the so-called territorial characteristics, etc. Illustrative to this is that parties to the disputes have all settled their disputes before the cases could have moved into the substantive phase after the bargaining carried out during the procedural phase.

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1 Wei Huang and Fan Zhu are partners of Beijing Tian Yuan Law Firm, Antitrust Department. Bei Yin and Xiumin Ruan are associates of Beijing Tian Yuan Law Firm, Antitrust Department.

For the US initiative , see USPTO, DOJ, NIST "Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments", December 6, 2021, https://www.justice.gov/opa/press-release/file/1453826/download; for the UK initiative, see "Standard Essential Patents and Innovation: Call for View" which was published on December 7, 2021, https://www.gov.uk/government/consultations/standard-essential-patents-and-innovation-call-for-views/standard-essential-patents-and-innovation-call-for-views; for the EU initiative, see "Commission Seeks Views and Input on Fair Licensing of Standard Essential Patents", https://www.gov.uk/government/consultations/standard-essential-patents-and-innovation-call-for-views/standard-essential-patents-and-innovation-call-for-views, and Japan Patent Office, "Guide to Licensing Negotiation Involving Standard Essential Patents", https://www.jpo.go.jp/e/support/general/sep_portal/document/index/guide-seps-en.pdf.

B. Although the focuses of legal actions filed by the right holder relative to vis-à-vis the implementer are different, the influence of antitrust action is not negligible

In China, SEP-related disputes generally take the form of three types of legal actions: lawsuits concerning licensing terms and conditions that are centered on FRAND commitment of SEP holders ("FRAND lawsuit"), antitrust actions which focus on whether the licensing terms are compliant with the provisions set forth in the Anti-Monopoly Law ("AML"), and patent actions which are concerned with the determination of infringement.

In practice, there are cases in which the SEP holder or implementer files all three kinds of legal actions simultaneously. For example, Qualcomm had filed an action which merged the FRAND claim and antitrust claim together, along with several patent infringement actions against Meizu.[2] There are also cases where the SEP holder or implementer only chooses to file one type of action. For instance, in its dispute with Apple, IWNCOMM only filed a patent infringement action.[3] Despite that both the right holder and the implementer can take different types of legal actions simultaneously, the focus of their actions would be very different.

In practice, there are cases in which the SEP holder or implementer files all three kinds of legal actions simultaneously

For the right holder, antitrust action is rarely the choice given that in China effective judgment and administrative decision have both found that the relevant SEP holder has the dominant position in the market for licensing relevant SEPs.[4] Such findings have relieved the burden of proof from the implementer in showing the SEP holder's dominant position when arguing that the SEP holder had engaged in conducts that abused its dominant market position in licensing its IPs. It would be very difficult for the SEP holder intends to argue that it is the implementer who abused its position in the market for products that apply the relevant SEPs, as the holder needs to prove that the implementer has the dominant position in the relevant product market. Consequently, patent actions and FRAND lawsuits become the primary choices of SEP holders. And as will be explained in the following, since antitrust action is favorable for the SEP implementers, defensing antitrust legal action has become the critical focus of SEP holders.

For the SEP implementer, antitrust action is favorable for not only the favorable findings established in prior cases but also the potentially severe penalties to be faced by the SEP holder for AML violations. Such severe penalties would include a [confiscation/disgorgement] of illegal gains and a fine up to 10% of the sales revenue of the previous year of the SEP holder, which will impact the economic incentive of the SEP holder to persist to the disputed licensing terms and conditions.

FRAND lawsuit also plays a critical role as analysis of the licensed SEPs would inevitably be conducted in a FRAND lawsuit. When the licensed SEPs are not of high value, the result of the FRAND lawsuit would probably contrast with the expectation of the SEP holder. In further consideration that the result of such a lawsuit will be published, other SEP implementers may leverage the result in their licensing negotiations with respective SEP holders.

II. DEVELOPMENT AND OUTLOOK OF SEP-RELATED ANTITRUST ACTION IN CHINA

In recent years, the major antitrust actions concerning SEPs are the *Apple v. Qualcomm* case, the *Hytera v. Motorola System Inc.* case, the *OPPO v. Sharp* case, the *OPPO v. Sisvel* case, and the *Xiaomi v. Sisvel* case. As no judgments on the merits were issued, it would be difficult to estimate how a court will rule on the issues on the merits presented in these cases, which also indicates that studying these SEP-related antitrust cases can be of little help in predicting future developments in antitrust actions concerning SEPs.

In adjudicating antitrust cases, the Chinese courts do refer to findings from other developed antitrust jurisdictions. Despite the similarities shared in those cases, Chinese courts made different findings in SEP-related antitrust actions from courts in other countries. A comparative study of the different

2 See the press release published on Qualcomm's official website: "Qualcomm Files Complaint against Meizu in China", June, 23, 2016, https://www.qualcomm.com/news/releases/2016/06/qualcomm-files-complaint-against-meizu-china.

3 Xinyi Intellectual Property, "Patent Involved in Case of IWNCOMM Suing Apple for Infringement Upheld by Court", July 4, 2020, https://www.ipxinyi.com/newsinfo/559579.html?templateId=41085.

4 See the reasoning of the abuse of dominance case of Huawei v. IDC provided by the Guangdong Higher Court and the administrative sanction decision against Qualcomm issued by the NDRC.

findings in these similar cases seems to provide some help in understanding how the Chinese courts in the future could deal with the issues on the merits in SEP-related antitrust actions.

Additionally, antitrust cases related to the exercise of intellectual property rights ("IPRs") other than SEPs ("IP-related antitrust cases") are also increasing in China. As SEPs are a special type of intellectual properties ("IPs"), it would be possible that the findings in IP-related antitrust cases could provide some referential value to antitrust cases concerning SEPs.

Consequently, a feasible approach to predict the trend of the judgments on the merits in SEP-related antitrust cases would be to compare the analyses made by different courts in similar cases and consider the referential value provided by IP-related antitrust cases.

A. Chinese courts to adopt an approach to define the relevant market which totally contrasts the current approach appears to be unlikely while future market definition could highlight the substitutability and switching costs between technologies.

1. Foreign courts have defined the relevant product market as the market only for products using SEPs, which would be more favorable to SEP holders compared with the current relevant product market definition approach adopted in China

Both the Guangdong Higher Court and the AML enforcement authority have defined the licensing market of the SEP as the relevant product market in cases concerning the licensing behaviors of holders of the relevant wireless communication SEPs. This market definition at least seems to be contrary to the holdings in *FTC v. Qualcomm* in the US in 2020 and in *IP Bridge v. Huawei* in Germany in 2018.

FTC v. Qualcomm is concerned with the licensing behaviors of wireless communication SEPs. The FTC, however, defined only the downstream cellular modem chip markets, i.e., the market for the code division multiple access ("CDMA") modem chips and the market for premium long-term evolution ("LTE") modem chips, without defining the upstream market concerning the licensing of wireless communication SEPs which are owned by Qualcomm and implemented by chip manufacturers.[5] In *IP Bridge v. Huawei*, the SEPs are related to H.264, a video decoding standard. The German court held that the relevant market is not the market for licensing the relevant H.264 SEPs but rather the market for smartphones implementing the H.264 standard.[6] The reason for the German court to define such a relevant market was that unless the implementer is able to prove that the SEPs concerned are very important for the implementer to provide a competitive product, the proprietary right of a patent itself cannot enable the patent holder to foreclose competition in the downstream market.[7]

If the relevant market was defined as the market for products using the relevant SEPs, as in *FTC v. Qualcomm* and *IP Bridge v. Huawei*, as the SEP holder could not be a producer of the product, there would be no basis for the argument that the SEP holder abuses market power in this product market. In addition, since a market for licensing the SEP is not the relevant market, a foundation for arguing that the SEP holder engages in abusive licensing conduct in violation of the AML seems non-existent, too. Therefore, defining the relevant market as that of *FTC v. Qualcomm* and *IP Bridge v. Huawei* would be much more favorable to SEP holder compared with defining a market for licensing the SEPs.

2. The findings of the Chinese courts in the recent IP-related antitrust cases indicate however, that defining market only for product using SEPs seems unlikely in SEP-related antitrust action in China

As explained, one feature of SEP disputes is the intertwined legal actions between the SEP holder and implementer. It is very likely that the relevant SEP holder would argue for an approach to market definition different from that of the Chinese jurisprudence to attain favorable results in its actions against the implementer. The issue, therefore, would be whether and how likely the Chinese court or enforcement authority would accept the alternate market definition approach in other jurisdictions that focuses only on the downstream market.

Additionally, antitrust cases related to the exercise of intellectual property rights ("IPRs") other than SEPs ("IP-related antitrust cases") are also increasing in China.

5 See *FTC v. Qualcomm Incorporated,* No. 19-16122, D.C. No. 5:17-cv-00220-LHK.

6 See the judgment issued by the Dusseldorf Regional Court on December 12, 2018, at 52, 53.

7 *Id.*

Based on other IP-related antitrust cases in China which are concerned with the licensing behaviors of patentees, we have noticed that the relevant product markets defined in these cases never only consist of the products that implement the relevant IPs. Rather, the upstream market for licensing the relevant IPs is also defined as the relevant product market. For example, in *Ketian Magnet et al. v. Hitachi Metals* concerning abuse of dominance, one critical issue in the appeal is whether the court drew the relevant market too narrowly for the licensing of the essential patents related to sintered NdFeB (a rare-earth magnet alloy widely used in parts for planes, autos, and other products) owned by Hitachi Metals.[8] This, nevertheless, does not challenge the lower court's approach to define the upstream market for licensing the relevant technologies.

During the hearing of the appeal organized by the Supreme People's Court ("SPC"), the parties were required to provide supplementary explanations regarding the substitutability between different technologies after the hearing.[9] This requirement appears to indicate that the SPC does take into consideration the substitutability between essential patents related to sintered NdFeB and other sintered NdFeB-related technologies.

It seems highly unlikely that courts in China would skip defining the upstream market for licensing IPs in antitrust cases concerning the licensing behaviors of the right holder. Consequently, in antitrust cases concerning the licensing of SEPs, the critical issues in market definition in the future could be analysis of the substitutability of different standards, the switching costs faced by implementers when the standards are interchangeable, etc.

B. The critical issue in determining whether the patentee has dominant market position could be that whether implementers engaged in hold-out behaviors based on patentees' FRAND commitment

When the relevant market was defined as the market for licensing the relevant SEPs and conducted analysis according to the factors stipulated by the AML for considering market dominance,[10] the SEP holder to have dominant market position seemed to be a necessary conclusion. This is because, in this market the SEP holder would have 100% market share. The concept of SEP already implies its indispensability to implementers' production of standard-compliant products. Furthermore, for the stability of the standard, even though technologically feasible, it is almost impossible that other undertakings can enter into the market by introducing technologies competing with the concerned SEPs.

However, "market dominance" under the AML refers to "the market position of the undertaking which has the ability to control the product price, quantity or other trading conditions in the relevant market". According to this definition, if the trading conditions, that is, the licensing terms and conditions of SEPs concerned, were not determined unilaterally by the SEP holder, or the SEP implementer as the trade counter-party had sufficient countervailing power, the SEP holder would not necessarily have dominant market position.

For the determination of the licensing terms and conditions of SEPs in practice, as the standard-setting organization (SSO) generally requires the patentee to make a FRAND commitment, a guarantee in the system appears to exist for the SEP implementers to countervail SEP holders in licensing negotiation. Meanwhile, in recent years, discussions concerning FRAND hold-out are on the rise as SEP implementers do make use of the FRAND commitment in license negotiation to lower royalties to SEP holders.

In reality, it is undeniable that for a SEP holder to finalize a license, several rounds of negotiations with the SEP implementer are normally required. Accordingly, although it is possible that a patentee may somehow lock the implementer in a standard by incorporating its patent into the standard that the implementer needs to use, it is equally possible that such SEP implementer can make good use of the FRAND commitment to fight for licensing terms and conditions in its favor.

In *Unwired Planet v. Huawei*, the UK High Court held that "the market is covered by the FRAND undertaking which does weaken the SEP owner's position. It is a market in which licensees can engage in holding out and there is some evidence that they do, particularly given the relative weakness of Unwired Planet."[11] However, as Unwired Planet failed to provide economic analysis to repudiate the issue of its market dominance, the UK

8 Parr, "Hitachi Metals antitrust appeal: 'Essential facility' concept in focus; judge proposes in-court mediation"26 November 2021

9 *Id.*

10 The factors are provided in Article 18 of the AML, which include: 1) the market share of the undertaking and the competition status in the relevant market, 2) the power of the undertaking to control the sales market or the market for purchasing the raw material, 3) the financial and technical strength of the undertaking, 4) the degree of reliance by other undertakings on the undertaking in terms of the trade, 5) the level of difficulty face by other undertakings to enter into the relevant market, and 6) other factors relevant to the determining dominance of the undertaking.

11 See Unwired Planet v. Huawei, HP-2014000005, decided on April 5, 2017, at para.670. Although this case was appealed to the Supreme Court, the finding of the High Court regarding market dominance issue was upheld.

High Court held that Unwired Planet, as the holder of relevant SEPs, had the dominant position in the market for licensing the SEPs.

In other IP-related antitrust cases handled by the SPC in China, IPR holders already argued from the perspective of buyers' power that they did not hold dominant market positions. The SPC did not outright reject this argument simply because the AML does not consider the buyer's power for determining market dominance.

On June 27, 2022, following the amendment of the AML, the State Administration of Market Regulation (SAMR), which is the Antitrust Enforcement Agency under the State Council, also issued the *Provision on Prohibition of Conducts Abusing Intellectual Property Rights to Exclude and Eliminate Competition (Draft for Public Comments).*[12] Compared with the currently enforced version, Paragraph 3 of Article 6 clearly stipulates the countervailing power of the counterparty as one factor to be considered for determining the market dominance of undertakings in the IPR area.

Consequently, when the relevant market is defined narrowly to be the market for licensing relevant SEPs, to what extent can the right holder argue that the FRAND commitment has weakened its bargaining power, that the implementer has buyer's power, and that the implementer has engaged in holding out, would probably become the most critical issues in market dominance determination.

C. Debate on licensing at chip level could revive if SEP was considered as essential facility

When the *Provision on Prohibition of Conducts Abusing Intellectual Property Rights to Exclude and Eliminate Competition* was issued in 2015, the Provision's stipulation on abuse of IPR which is related to refusal to deal already provided that: "when the IPRs constitute the essential facility for production and operation, the undertaking which has dominant market position shall not refuse to license other undertakings under reasonable terms for the use of the IPR to eliminate or restrict competition."[13] This has made it possible from the legislative perspective to regard IPRs as essential facility in China. In the first-instance judgment of *Ketian Magnet et al. v. Hitachi Metals*, the Ningbo Intermediate Court held that the relevant essential patents owned by Hitachi Metals constituted an essential facility and that Hitachi Metals' refusal to license the patents constituted refusal to deal that abused its market dominance.

Compared with Hitachi Metals' patents which are essential but not related to any standard, the possibility for SEPs to constitute essential facilities is even higher because of the commercial success of the standard and the lock-in effect resulting from the patents being incorporated into the standard. As a result, if the SPC upholds the finding of the Ningbo Intermediate Court in the judgment, it is likely that SEPs would be deemed as essential facilities in SEP-related antitrust cases.

One important issue in the essential facility doctrine is to explain, against the common understanding that enterprises are free to choose with whom to deal, why the undertaking needs to deal with a counterparty, even its rivals. Applying this doctrine in antitrust disputes relating to SEPs would, therefore, trigger another issue that used to be heatedly debated, that is, when the relevant SEPs are deemed as essential facility, whether the SEP holder would accordingly have the obligations to license to component manufacturers such as chip makers?

High Court held that Unwired Planet, as the holder of relevant SEPs, had the dominant position in the market for licensing the SEPs

For this issue, it is interesting to note that on 28 February 2022, the Fifth Circuit in *Continental Group v. Avanci* dismissed the plaintiff's claim, which argued that "refusal to directly sell [Continetal Group] a license on FRAND terms constituted not only a contractual breach but also anticompetitive conduct in violation of the Sherman Antitrust Act of 1890." [14]The dismissal was on the ground that Continental Group failed to meet its burden of proof, i.e. Continental Group suffered a cognizable injury in fact. Therefore, although the claim was dismissed,

12 See the SAMR, "Provisions on Prohibition of Conducts Abusing Intellectual Property Rights to Exclude and Eliminate Competition (Draft for Comment)", published for comment on June 27, 2022, online available at: https://www.samr.gov.cn/jzxts/tzgg/zqyj/202206/P020220627392766952008.pdf.

13 See the SAMR, "Provisions on Prohibition of Conducts Abusing Intellectual Property Rights to Exclude and Eliminate Competition", promulgated on April 7, 2015, effective on August1, 2015, Article 7. On June 24, 2022, the AML Amendment was passed by the Standing Committee of the National People's Congress and as a result, the Provision will be amended accordingly. A Draft for Comment of the Provision was published on June 27, 2022, and its stipulation on essential facility is substantially the same with the current enforced stipulation.

14 Continental Automotive Systems v. Avanci, LLC, No. 20-11032 (5th Cir. 2022), at 5.

this does not indicate that the court would reject considering licensing at the component level in future when evidence on injury is sufficient.

Court in the US is one of the most important forums for SEP-related disputes settlement in the world, and its judgment provides referential value for China's AML enforcement. Courts and enforcement authorities in China may feel less stressed to re-consider the licensing level issue when court in the US does not reject considering the idea of licensing at the component level. While the essential facility doctrine provides a theoretical basis for arguing that component makers should be licensed, when an SEP is deemed as an essential facility, the long-debated topic of licensing at the chip level could revive, which again may break the peace reached as a result of the U.S. Court of Appeals for Ninth Circuit's finding in *FTC v. Qualcomm.*

III. DEVELOPMENT AND OUTLOOK OF FRAND LAWSUITS IN CHINA

A. The world competition for jurisdiction over FRAND lawsuits is turning fierce, and anti-suit injunctions become the implementers' important counter measure adopted in China actions

Since the issuance of the first anti-suit injunction in *Huawei v. Conversant* on the basis of Article 103 of China's *Civil Litigation Law* by the SPC on 28 March 2020, the Chinese courts granted anti-suit injunctions consecutively in *ZTE v. Conversant, Xiaomi v. IDC, Samsung v. Ericsson*, and *OPPO v. Sharp*.[15] Among the anti-suit injunctions, some enjoined the relevant SEP holder from enforcing the injunction issued by the foreign court prohibiting the sale of relevant products,[16] whereas some enjoined the filing of both the patent infringement lawsuit and FRAND lawsuit when the Chinese court was adjudicating the relevant FRAND dispute.[17] In some rare circumstances, the anti-suit injunctions also ordered the relevant SEP holder to withdraw its legal action filed to courts in other jurisdictions.[18]

The important function anti-suit injunction is to prevent the impact of foreign actions on the Chinese jurisdiction over cases The anti-suit injunctions granted, therefore, serve a purpose of reinforcing the jurisdiction of the Chinese courts over FRAND lawsuits. Responding to the Chinese courts' actions, the EU submitted a negotiation request to China through WTO, alleging that the relevant anti-suit injunctions granted, and their publishing, are not in line with the Agreement on Trade-related Aspects of Intellectual Property Rights.[19]

Aside from whether the EU's request for negotiation is well-founded, the request itself indicates that competition for jurisdiction over FRAND lawsuits in the world is rising. While China began to enforce the *Law Against Foreign Sanctions* on 10 June 2021, which on the level of national legislation clearly supports countermeasures against actions taken by foreign countries, organizations, and individuals which are to the detriment of the development benefits of China, China will unlikely change its stance to jurisdiction matters over FRAND lawsuits in the short run, as China's economic development is necessitated by sectors that typically need to implement relevant SEPs such as consumer electronics and automobiles.

Although foreign jurisdictions including India, Germany, US, and UK granted anti-anti-suit injunctions in response to the Chinese courts, SEP holders such as Conversant eventually settled with Chinese implementers, which indicates that the Chinese anti-suit injunctions have some effects in limiting the proceedings filed by SEP holders in jurisdictions abroad.

Particularly, the fines imposed by the Chinese courts for violating the anti-suit injunctions can be as high as 1 million Chinese Yuan per day without cap. The fine will seriously affect the economic interests of SEP holders, which pushes them to carefully consider the cost efficiency to continue their foreign actions. Anti-suit injunctions have become one of the most important measures for SEP implementers in China to counter SEP holders' actions oversea.

15 Article 103 of the Civil Litigation Law provides that: "The people's court may, according to the parties' request, to rule property preservation or order one party to conduct or not conduct a certain behavior, when for the conduct of this party or other reasons, the judgment will be difficult to enforce or causes damages to the other party. The people's court can also grant to adopt preservation measures when it deems necessary.

16 For instance, the SPC in *Huawei v. Conversant* Case only ordered to enjoin the application for enforcing the injunction granted by the German court.

17 See e.g., the Ruling of Shenzhen Intermediate Court in *OPPO v. Sharp*, Civil Ruling of (2020) Yue 03 Min Chu No. 689.

18 See e.g., the Ruling of Wuhan Intermediate Court in *Xiaomi v. IDC*, Civil Ruling of (2020) E 01 Zhi Min Chu No. 743.

19 World Trade Organization, "China-Enforcement of Intellectual Property Rights, Request for Consultations by the European Union", WT/DS611/1/IP/D/43/G/L/1427, 22 February 2022, online available https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/611-1.pdf&Open=True.

B. The SPC for the first time clarified the nature of FRAND lawsuit and the standard for ascertaining whether the Chinese courts would have jurisdiction, whereas the legal basis for determining the substantive issues of the FRAND lawsuit is yet to be further developed

1. Chinese courts' jurisdiction over FRAND cases and the standards for deciding jurisdiction are well-established

Under the Chinese law, the court often determine jurisdiction according to the nature of cases, and therefore, the nature of FRAND lawsuit directly affects how courts in China decide whether they have jurisdiction over the case. For instance, if the FRAND lawsuit is considered to be tortious, the appropriate court, according to China's *Civil Litigation Law*, should be the court where the defendant is domiciled, or the jurisdiction of the tortious acts.[20] On the flipside, to consider the FRAND lawsuit as possessing a contractual nature, the appropriate courts should be the court where the contract is performed in addition to the court where the defendant is domiciled.[21]

Nonetheless, for a long time, a consensus had not been reached on the nature of FRAND lawsuit, as some court opinions considered it as contractual while some courts consider such lawsuit involves the determination of patent infringement and violations of FRAND commitment as an infringement on rights held by implementers of relevant SEPs. It was not until in the second-instance jurisdictional objection ruling of the *ZTE v. Conversant* case dated 21 August 2021 that the SPC made this issue clear:

The FRAND lawsuit has the characteristics of both the features of contractual dispute and patent infringement lawsuit and thus is a special type of dispute. When dispute arise as to the licensed IP or the licensing terms and conditions, the competent court should probably consider the legal effects of the licensed patents, whether the patent at issue is essential for implementing the standard, the situation of the implementer to use the standard and the SEP concerned, the specific contents of the license agreement, etc. Having considered all these, the determination of which Chinese courts should exercise the jurisdiction of the SEP dispute could take into account such nexuses as the places where the licensed IP is located, where the patent is implemented, where the contract is executed, where the contract is performed, etc.[22]

2. The legal basis for determining FRAND licensing terms and conditions is still to be developed

Having determined the jurisdiction of the Chinese courts over the FRAND lawsuit and the standards for deciding which of the Chinese courts would have the jurisdiction, the procedural trial of the FRAND lawsuit would end and commence the merit trial. At the merit trial, the unavoidable issue would be the legal basis for the court to decide whether the terms and conditions of licensing the relevant SEPs are FRAND, and if not, what terms and conditions should be FRAND.

This is particularly difficult as the concept of FRAND is vague without clarification from either an SSO which introduced this concept or law of any country. In China, the two documents that provide the basis for the courts to determine FRAND licensing terms and conditions are the Interpretation Concerning Several Issues of Law Application in Adjudication of Patent Infringement II and the Working Guideline for the Adjudication of SEP cases of the Guangdong Higher Court ("Working Guideline of Guangdong Higher Court"). Nevertheless, each document has its respective limitations.

This is particularly difficult as the concept of FRAND is vague without clarification from either an SSO which introduced this concept or law of any country.

For the former, the precondition for the court to determine the FRAND-compliance of licensing terms and conditions of SEPs is that the patentee has filed the patent infringement lawsuit

20 See Article 29 of the *Civil Litigation Law*.

21 See Article 24 of the *Civil Litigation Law*.

22 The Ruling of Supreme People's Court in ZTE v. Conversant, Civil Ruling of (2019) Zui Gao Fa Zhi Min Xia Zhong No. 157.

against the alleged infringer.[23] A court does not have jurisdiction when the claim in the FRAND lawsuit does not involve any patent infringement issue. That perhaps explains why in the case filed by Huawei against Conversant before Nanjing Intermediate Court, Huawei did not simply petition the court to determine the FRAND licensing terms and conditions of all the Chinese SEPs held by Conversant but also included a claim that Huawei did not infringe upon the relevant SEPs held by Conversant.[24]

For the latter, although the determination of FRAND terms and conditions is not preconditioned with filing a patent infringement claim, which rather generally allows a determination of FRAND terms and conditions when the right holder and implementer cannot reach a consensus after full negotiation,[25] this Working Guideline of Guangdong Higher Court is only an internal document within the court system of Guangdong Province, so its legal effect as well as jurisprudence is relatively limited. As a consequence, if a court outside the Guangdong Province needs to try a FRAND case on the merits, it would be inappropriate for it to refer to the Working Guideline of Guangdong Higher Court.

Consequently, even though seven years have passed since the issuance of the judgment in Huawei v. IDC, the substantial basis for deciding FRAND licensing terms and conditions has not materially developed in China.

C. Development of approaches to calculate FRAND royalties

The smallest salable patent practicing unit ("SSPPU") approach was used as a damage calculation method in several U.S. patent infringement cases. When this approach was most popular, implementers also used it when negotiating FRAND royalty with patentees. In China, this approach once gained some popularities, too, partly because China's antitrust law enforcement authority stated in the decision against Qualcomm that although Qualcomm's SEPs were not implemented in the mobile terminal's screen, camera, battery, operation system, etc., Qualcomm nevertheless charged royalties of these SEPs based on the price of the entire product.[26]

However, the U.S. Court of Appeals for the Ninth Circuit in *FTC v. Qualcomm* supported Qualcomm's model of not licensing at the chip level and held that Qualcomm is not obliged to license to chip manufacturers. As a result, although a chip is the smallest salable patent practicing unit, its sale price does not comprise of the licensing royalty for implementing relevant SEPs by the chip manufacturers, which is to say, the price itself does not reflect the value contribution of relevant SEPs. Therefore, applying the SSPPU approach to calculate the reasonable royalty would clearly lead to a detachment of the royalty from the value contribution of SEPs to products, which would be a fundamental departure from the logic underlying the calculation of a reasonable royalty.

SSPPU was never truly accepted by courts in China. From earlier cases like *Huawei v. Samsung, IWNCOMM v. Sony (China)*, to the more recent ones like *Huawei v. Conversant*, no Chinese court adopted the SSPPU approach to calculate FRAND royalty. According to the judgments of *Huawei v. Samsung* and *Huawei v. Conversant*, the main approaches of royalty calculation used in China are the top-down approach and the comparable license approach, which is similar to the approaches used in *TCL v. Ericsson* in the U.S.

For the top-down approach, the underlying logic of the courts inside and outside China are somehow similar, which basically would calculate the upper limit of FRAND royalties to be borne by a product for all the SEPs implemented, and appor-

23 Article 24(3) of the Interpretation *Concerning Several Issues of Law Application in Adjudication of Patent Infringement II* provides that: "Licensing terms referred to in the second paragraph of this Article shall be negotiated and determined by the patentee and the accused infringer. Where the patentee and the accused infringer are unable to reach consensus after full negotiation, they may request a people's court to determine. In the determination, the people's court shall base on the principle of FRAND and take into account the factors such as the innovativeness of the patent its function in the standard…" This stipulation is subject to the "second paragraph" limitation. While the second paragraph provides for the standard deciding whether an injunction enjoining the implementation of standard in patent infringement lawsuit should be granted per the request of the patentee against the accused infringer, it is clear that the condition for the court to determine in accordance with the FRAND principle the licensing terms of SEPs is that there is a patent infringement claim.

24 The claims of Huawei in the lawsuits are that: a) request the court to declare that the conducts of the three plaintiffs to manufacture, sell and offer to sell mobile terminals do not infringe upon the proprietary rights of the three patents held by Conversant, and b) request the court to determine the licensing terms that are compliant with the FRAND principle for all the Chinese SEPs practically mapping with the standard or technical specifications which in fact are implemented by the plaintiffs that Conversant owns or is authorized to license. For detail, see (2018) Su 01 Min Chu No. 232, 233, 234 Civil Awards.

25 Article 15 of the Working Guideline of Guangdong Higher Court provides that: "The dispute between the SEP holder and implementer in determining the royalty during the negotiation of the SEP license is an SEP license royalty dispute. If the SEP holder and the implementer have fully negotiated but still cannot agree on the royalty, they may file a lawsuit according to law."

26 See the Administrative Sanction Decision of Fa Gai Ban Jia Jian Chufa [2015] No. 1

tion the royalty per the number, essentiality ratio, geographic strength, etc., of the SEPs held by the patentee.[27] This approach largely relies on counting the number of patents rather than delving into a very nuanced and specific evaluation of the value of the SEPs under dispute, which drew some skepticism.[28]

For the comparable license approach, because the subject matters of the licenses are different, and the royalty structure agreed between the parties also varied, the agreements provided by the patentee and the implementer are often not necessarily comparable and need to be "unpacked" accordingly. Judging from the current judicial practice in China, the courts have gradually gone into the phase of developing relevant factors and standards for qualitative analysis of whether the licenses are comparable. However, so far there has not yet been any case that a license was unpacked for evaluation. Further development of this approach remains to be observed in the future.

IV. CONCLUSIONS

SEP-related disputes would keep on rising in China and in other countries in the world. While in other countries, antitrust action seems no longer a real issue in SEP-related disputes settlement, it always plays an important role in China given the potential leverage that it may provide to the Chinese SEP implementers for attaining favorable licensing terms and conditions.

However, for the past nine years, substantive findings of SEP-related antitrust actions were not developed by the Chinese courts and the AML enforcement authorities. Even though, referring to the findings of the Chinese courts in IP-related antitrust cases, it is very unlikely that the approach to the definition of relevant market in SEP-related antitrust action would significantly depart from the currently adopted method. SEP holders still face a high risk of being deemed as having the dominant market position, and the key point for lowering such risk could be proving that it is the SEP implementers that made use of the FRAND commitments of the relevant SEP holders and engaged in hold-out. In the context that a legislative basis for applying the essential facility doctrine in the area of exercising IPRs is in place, it is always possible that an SEP constitutes essential facility for producing standard-compliant products. Further considering that the Chinese courts already applied the essential facility doctrine in IP-related antitrust cases, when an SEP is deemed as an essential facility, the long-debated topic concerning the level at which SEP holders license their SEPs could revive.

For SEP-related FRAND lawsuits, behind the rising of anti-suit injunctions granted by the Chinese courts is the fierce world competition for the jurisdiction over FRAND lawsuits. The relevant areas that currently emerge the disputes concerning SEP licensing terms and conditions in China are important for China's economic development. Under this context, it is unlikely that China changes its stances to jurisdiction matters at least in the short run. Against this background, the standard for determining jurisdiction over FRAND cases is clarified by the SPC. However, since all the FRAND cases other than *Huawei v. Conversant* ended with settlement reached prior to the closing of merit trial for first instance, the criteria for substantive matters, i.e. the legal basis for deciding FRAND terms and conditions, the methods for calculating FRAND royalties, need further observation.

For the past nine years, substantive findings of SEP-related antitrust actions were not developed by the Chinese courts and the AML enforcement authorities

27 Please be noted that this is a very simplified way to describe what the basic issue for using the top-down approach for calculating FRAND royalty would be. The application of this method in practice needs to take into account many factors according to the circumstances of each case.

28 See e.g. Keith Mallinson "Unreasonably-low Royalties in Top-down FRAND-rate Determination for TCL v. Ecrissson" https://www.wiseharbor.com/wp-content/uploads/2018/04/Mallinson-Critique-of-TCL-Ericsson-Decision-30-April-2018.pdf.

ABUSE OF SUPERIOR BARGAINING POSITION IN JAPAN - ITS DEVELOPMENT AND CURRENT POSITION

By Atsushi Yamada[1]

INTRODUCTION

Abuse of Superior Bargaining Position ("ASBP") is drawing increased attention in Japan. While this concept can also be seen in some jurisdictions outside of Japan, such as Korea and Taiwan, many significant jurisdictions including the US and the EU do not have such a concept ingrained within their competition laws and legislation.[1] The use of the term "abuse" together with the term "superior position", may at a first glance, give an impression that ASBP might be similar to the concept of abuse of dominance seen in some major jurisdictions. However, for ASBP to come into play one does not require to have a dominant position in the market, and the concept of ASBP may rather be better understood in comparison with the concept of abuse of economic dependence seen in jurisdictions such as France and Germany.[2] Indeed, even in Japan there has been a controversy as to how to understand this concept in its competition law regime. As such, it may be better to distinguish this from abuse of dominance, at least at the outset.

In this regard, there are some scholars in Japan who suggest ASBP is actually similar to exploitative abuse of dominance.[3] However, such reading does not seem to have gained the support of the legal community at large, nor the Japan Fair Trade Commission ("JFTC"), or the judicial courts, and this shows that there are still some controversy and lack of clarity even in Japan about the concept of ASBP. With such a lack of clarity in mind, a sensible approach to understanding the concept of ASBP may be through the structure of the statute and the focus on the actual enforcement history and recent activities of the JFTC to curb ASBP. In the latter regard, as discussed in detail below, we have recently witnessed an increased use of the law on curbing ASBP both on the enforcement side and on the advocacy side. At the same time, given that ASBP is coming more and more to the forefront despite the vague nature of the provision of the law and the concept, we should also bear in mind that such increased use may lead to an abuse of the use of ASBP and strangulation of healthy competition by the agency.

ASBP IN JAPAN

In Japan, ASBP is provided as a type of Unfair Trade Practice (Article 19) by the Anti-Monopoly Act ("AMA").[4] The unique feature of the AMA is that besides the two categories of competition law concepts that respectively capture horizontal collusion (Unreasonable Restraint on Trade) and unilateral conduct by an entity with market power (Private Monopolization), both imposing a substantial restraint on competition, the AMA provides for a third category called Unfair Trade Practices. Unlike what the name suggests, Unfair Trade Practices cover various conducts that harm competition, some of which overlap with private monopolization. However, for the required level of harm on competi-

1 Atsushi Yamada is a partner in the Tokyo office of Anderson Mori & Tomotsune. The views expressed are those of the author and not necessarily those of any organizations or clients with which Anderson Mori & Tomotsune are or have been associated. See *ICN Special Program for Kyoto Annual Conference Report on Abuse of Superior Bargaining Position*, available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP_ASBP2008.pdf.

2 See *Vassili Moussis, Atsushi Yamada, Abuse of Economic Dependence, Global Dictionary of Competition Law, Concurrences, Art. N° 86372* available at: https://www.concurrences.com/en/dictionary/abuse-of-economic-dependance.

3 See Tadashi Shiraishi, The Exploitative Abuse Prohibition: Activated by Modern Issues, Antitrust Bulletin Vol. 62(4) p737 (2017)

4 Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947) . English translation available here: https://www.jftc.go.jp/en/legislation_gls/AMA.pdf.

tion, Unfair Trade Practices only require a lower threshold, namely all those conducts that have a "tendency to impede competition."[5]

Although the definition of Unfair Trade Practices is provided for in Article 2(9) of the AMA, and the provision sets out several types of conduct in Items (i) to (v), there are also some types of conduct provided separately under the JFTC rules. Pursuant to the rule-making authority granted by Article 2(9)(vi) of the AMA, the JFTC has framed a detailed list that expands Unfair Trade Practice to a further 15 types of conduct under its rules called the Designation of Unfair Trade Practices ("General Designations").6 This framework is a bit complex as compared to before 2009, where a list of all types of conduct that fell under Unfair Trade Practices was provided solely under General Designations framed by the JFTC. Upon the introduction of administrative fines targeting certain types of Unfair Trade Practices in 2009, changes were introduced to the AMA to specifically bring certain types of conduct subject to administrative fines. ASBP is one such type of conduct that was previously provided as an Unfair Trade Practice under the General Designations but since the 2009 amendment, it is now being defined under the AMA itself (Article 2(9)(v)).

Even though ASBP now has a separate provision within the AMA, the provision itself remains far from clear. In an effort to provide clarity upon making ASBP subject to administrative fines in 2010, the JFTC issued "Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act" ("ASBP Guidelines"). However, even with such an effort, there is still a lack of clarity in understanding ASBP. Further, in 2019, with the rising concern of digital platform operators collecting and making use of consumers' data, the JFTC has decided to address this from an ASBP perspective, and issued a new guideline, Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc. ("Consumer ASBP Guidelines"), to address such concerns.7 However, rather than clarifying the concept of ASBP, the focus here was more on stating that data transactions with consumers would fall within the scope of the ASBP scrutiny and therefore the vagueness of ASBP provision itself was left untouched.

Even though ASBP now has a separate provision within the AMA, the provision itself remains far from clear

THE ASBP PROVISION AND THE ASBP GUIDELINES

I. Elements of the ASBP provision

Article 2(9)(v) of the AMA provides that if a party who has a superior bargaining position over the counterparty makes use of such superior bargaining position and unjustly, in light of normal business practices, engages in certain types of con-

5 This comes from the language in Article 2(9)(vi), which functions as a catch-all provision for Unfair Trade Practices in the AMA, which provides as follows: "any act falling under any of the following items, which tends to impede fair competition."

6 Designation of Unfair Trade Practices (Fair Trade Commission Public Notice No. 15 of June 18, 1982). English translation is available here: https://www.jftc.go.jp/en/legislation_gls/unfairtradepractices.html. The General Designations is provided pursuant to the rule making power granted to the JFTC to specify conduct that fall in as Unfair Trade Practices pursuant to Article 2(9) Item (vi) of the AMA. There are two types of designation, one which is applicable to a specific industry/sector and another which is generally applicable across all industries/sectors. The General Designations is the latter type.

7 Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc. English translation available at: https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217DPconsumerGL.pdf.

duct that is disadvantageous to the counterparty, such conduct would constitute an unfair trade practice.8 This category of conduct is defined as ASBP, and is prohibited under Article 19 of the AMA.

The elements of ASBP could be broken down as follows:

1. Superior bargaining position;
2. Conduct that imposes a disadvantage on the counterparty (or abusive conduct); and
3. The conduct is unjust in light of normal business practices.

The ASBP Guidelines further expand on these three elements and also provide some examples:

1. Superior bargaining position:

- Finding of a superior bargaining position is done on a case-by-case basis, and therefore what matters is whether Party A has a superior bargaining position vis-à-vis the counterparty (Party B) in the context of the transaction between the Parties. In other words, Party A does not need to have a market-dominant position nor an absolutely dominant bargaining position, and having a relatively superior bargaining position over Party B in its transactions with Party B would be sufficient. Further, the scope is not limited to transactions between large enterprises and small or medium-sized entities ("SMEs") (i.e. depending on the facts of the case, ASBP may be applicable in transactions between large enterprises, or transactions between SMEs)
- When determining whether Party A has a superior bargaining position over Party B, the following factors would be considered:
    - Party B's degree of dependence on the transactions with Party A, typically measured by looking at the ratio of Party B's number of sales with A to Party's B's total amount of sales
    - Party A's position in the market, typically considering its market share and ranking within the market
    - Party B's possibility of changing its business counterpart from Party A, typically considering the possibility of Party B starting or increasing its transactions with parties other than Party A, and the investments made by Party B in relation to its transactions with Party A
    - Any other facts indicating the need to carry out transactions with Party A on Party B's side, including factors such as the number of sales with Party A, the future growth potential of Party A, the importance for Party B to handle the goods or services subject to the transactions with Party A, the possibility of Party B increasing its credibility through transactions with Party A, and the difference in business sizes between Party A and Party B

2. Disadvantageous conduct (abusive conduct):

- The AMA provides examples of disadvantageous conduct (Article 2(9)(v) Items (a)–(c)) and the AMA Guidelines further elaborate on this. However, the latter portion of Item (c) functions as a catch-all provision providing as follows: "otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty." As such, the key indicator for abusive conduct would be whether the conduct is "disadvantageous to the counterparty".
- The examples provided by the AMA and the ASBP Guidelines include:

    (1) Causing Party B, with which Party A has regular transactions, to purchase goods or services other than the one pertaining to the said transaction (Item (a) of Article 2(9)(v)) (forced purchase/use)

    (2) Causing Party B, with which Party A has regular transactions, to provide for Party A money, ser-

8 Article 2(9)(v) provides as follows:

(9)The term "unfair trade practices" as used in this Act means an act falling under any of the following items:

(v) engaging in any act specified in one of the following by making use of one's superior bargaining position over the counterparty unjustly, in light of normal business practices:

(a) causing the counterparty in continuous transactions (including a party with whom one newly intends to engage in continuous transactions; the same applies in (b) below) to purchase goods or services other than those to which the relevant transactions pertain

(b) causing the counterparty in continuous transactions to provide money, services or other economic benefits

(c) refusing to receive goods in transactions with the counterparty, causing the counterparty to take back such goods after receiving them from the counterparty, delaying payment to the counterparty or reducing the amount of payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty

vices, or other economic benefits (Item (b) of Article 2(9)(v)) (Request for economic benefits)

- The term "economic benefits" in these provisions refers to the provision of money as a monetary contribution, financial assistance, or under any other title, the provision of labor services, and the like.

(3) Establishing or changing trade terms or executing transactions in a way that is disadvantageous to the counterparty (Item (c) of Article 2(9)(v)), such as:

- Refusing to receive goods pertaining to transactions from the said party
- Causing the said party to take back the goods pertaining to the transactions after receiving the said goods from the said party (Return of goods)
- Delaying the payment for the transactions to the said party
- Reducing the amount of the said payment (Price reduction)
- Unilateral decision on a consideration for transactions
- Request for recalling and resending of goods or services even though there is no defect or default

- Based on these examples, commentators consider the following as the core aspects of disadvantageous conduct: (i) whether the disadvantage imposed is such that the counterparty could not calculate in advance; and (ii) whether the disadvantage places a burden on the counterparty in excess of what is deemed reasonable considering the direct benefit. While these help in identifying abusive conduct, given that there is a catch-all provision, the boundaries of abusive conduct remain unclear, especially for conduct that does not squarely fit into the examples provided above.

3. Unjust conduct (in light of normal business practices)

- This last element is abstract and does not add clarity by itself, but it is generally understood that this element provides for the abusive aspect of the conduct, in other words, the lack of justifiable grounds for such conduct.
- The ASBP Guidelines simply provide that "normal business practices" means business practices that are endorsed from the viewpoint of the maintenance and promotion of fair competition (fair competition here means business operators competing to provide better quality or lower price) and thus simply complying with currently existing business practices in place would not immediately rule out ASBP from the conduct.
- While the ASBP Guidelines do not explicitly provide guidance for the vague term "unjust", they do state that

> if a party, who has a superior bargaining position against its counterparty, makes use of such position to impose a disadvantage on the counterparty, unjustly in light of normal business practices, such act would impede transactions based on the free and independent choice of the counterparty, and put the counterparty in a disadvantageous competitive position against its competitors, while putting the party having superior bargaining position in an advantageous competitive position against its competitors.

This is generally understood as the JFTC's view on the theory of harm of ASBP, and the courts seem to agree with the JFTC's point of view.[9] With this in mind, if there is disadvantageous conduct that impedes the free and independent choice of the counterparty, in the absence of justification, the conduct is likely to be considered unjust, but the lack of clarity continues to exist.

II. Consequences of the finding of a violation of ASBP

1. Cease-and-desist order: The JFTC may order the party to cease and desist from engaging in the relevant act, delete the relevant clauses from the contract, or take any other measure necessary to eliminate ASBP conduct which may include not engaging in similar conduct in the future, and establish systems to ensure compliance (Article 20(1) of the AMA).
2. Surcharge payment order: If the party is deemed to have engaged in abusive conduct on a "continuous basis", the JFTC must order payment of a surcharge (administrative fine). The surcharge will be calculated as an amount equivalent to one percent of the party's sales to the counterparty to the act in violation (Article 20(6) of the AMA).
3. Injunction: A person whose interests are infringed upon or

9 A recent example is the March 3, 2019, Tokyo High Court decision in the Ralse retail store case

likely to be infringed upon by an act of Unfair Trade Practice (including ASBP) and who is thereby suffering or likely to suffer extreme damage is entitled to seek the suspension or prevention of such infringements with the judicial court(Article 24).

4. Civil litigation: A party may claim for damages based on the general torts provision of the Civil Code (Article 709), or claim that a certain agreement should be deemed against the principles of public policy and declared void based on the public policy provision of the Civil Code (Article 90). In either case, violation of ASBP would be considered as one factor in deciding whether the relevant conduct is unlawful or against public policy.

III. Relevant Regulations

1. The Subcontract Act

While ASPB is provided for in the AMA, which is the main competition law legislation in Japan, a separate law, so-called the Subcontract Act,[10] also covers the same types of conduct that are listed as examples in the ASBP Guidelines. Enacted in 1956, the Subcontract Act aims to ensure that transactions between large procuring business operators and their subcontractors are fair and aims to protect the interests of the subcontractors. The Act seeks to achieve these by requiring the documentation of key items of the subcontract agreement and prohibiting specific types of conduct that harm the interests of the subcontractors such as delay in payment of subcontract fees. In contrast to the ASBP provision which is ambiguous in many respects as mentioned above, the Subcontract Act defines contractors and subcontractors that are subject to the Act based on an objective criterion (i.e., the size of capital), so a finding of a superior bargaining position is not required. Further, the Act also specifically lists the types of conduct that constitute a violation and does not require a finding of harm to competition (unjustness). As such, finding a violation under the Subcontract Act is more straightforward. Therefore, for ASBP type conducts between procuring business operators and their subcontractors where the Subcontract Act is applicable, the JFTC's enforcement is mostly conducted through the issuance of administrative guidance pursuant to the Subcontract Act. In the beginning, the focus of the Subcontract Act was on the manufacturing sector, but in 2003, the scope was expanded to procurement of information-based products (e.g., software, audio/video content, designs, etc.) and procurement of services, with the current number of cases handled under the Subcontract Act being around 8,000 every year. Among these, in a handful of cases (about 5-10 cases every year), the JFTC issues a formal administrative recommendation ("Kankoku"). The JFTC does not have the authority to issue fines, but for the formal administrative recommendations it would make the case public, and may instruct restitution as part of the recommendation. However, the majority of the cases are handled more informally, by way of providing guidance ("Shidou") to urge voluntary compliance. Such enforcement has been indirectly supporting the curbing of ASBP by the JFTC.

While ASPB is provided for in the AMA, which is the main competition law legislation in Japan, a separate law, so-called the Subcontract Act, also covers the same types of conduct that are listed as examples in the ASBP Guidelines

2. Special Designations

There are some JFTC rules addressing certain ASBP-type conduct for specific industries. Currently, there are three such special designations: (i) the newspaper business;[11] (ii) transactions between large scale retailers and its suppliers;[12] and (iii) transactions where certain shippers assign transport and storage of goods.[13] What these three have in common is that they specifically define the target and the type of conduct, which enables easier interpretation and thus easier enforcement. Of these, the special designation

10 Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors (Act No. 120 of June 1, 1956). English translation available here: https://www.jftc.go.jp/en/legislation_gls/subcontract.html.

11 Designation of Specific Unfair Trade Practices in the Newspaper Business. English translation available at: https://www.jftc.go.jp/en/legislation_gls/index_files/spaper.pdf.

12 Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers: English translation available at: https://www.jftc.go.jp/en/legislation_gls/index_files/dsutp.pdf.

13 Designation of Specific Unfair Trade Practices when Specified Shippers Assign the Transport and Custody of Articles. English translation available at: https://warp.ndl.go.jp/info:ndljp/pid/286894/www.jftc.go.jp/e-page/legislation/ama/specifiedshippers.pdf.

for large scale retailers, which was originally introduced in 1954 targeting department stores and supermarket chains was expanded in 2005 to include other types of large scale retailers that have emerged over time (such as do-it-yourself ("DIY") stores, clothing and home appliance store chains, drug store chains and convenience store franchises), and has played a significant role in terms of enforcement against ASBP type conduct.

ASBP IN PRACTICE AND ENFORCEMENT TRENDS

I. Early days of ASBP (1953-1982)

ASBP finds its origin in the AMA when it was introduced by way of an amendment in 1953 to strengthen enforcement against Unfair Methods of Competition. One key feature of the amendment was to add a novel category of conduct to address situations where large scale business operators took advantage of their superior position to unjustly place pressure on SMEs. When this new category of conduct was introduced, what was previously called Unfair Methods of Competition in the AMA was renamed to Unfair Trade Practices, and this novel category was added as one type of Unfair Trade Practice in the amended law.[14] This AMA provision authorized the JFTC to enact rules and define what would constitute an Unfair Trade Practice. The JFTC then under Item 10 of the then General Designation provided for "Abuse of Economic Power", which formed the origin of the current ASBP.[15] This provision was intended to address cases such as delay of payment to its subcontractors by large companies, unjust return of goods to its suppliers by department stores, and use of compulsory deposit for loans and/or discounting bills by financial institutions.

ASBP finds its origin in the AMA when it was introduced by way of an amendment in 1953 to strengthen enforcement against Unfair Methods of Competition

Some early cases were directed toward intervention in management of other companies by financial institutions and control of distribution channels by manufacturers. However, enforcement, especially enforcement by way of issuing a formal order, was not necessarily active. This was presumably due to the difficulty of implementation of the vague provision and the controversy over the interpretation that entailed. Further, for transactions between large business operators and their subcontractors, after a new law (Subcontract Act) was introduced in 1956 to specifically address bullying of subcontractors, the use of the Subcontract act gradually increased. Against such a background, the enforcement of ASBP gradually shifted to focus on abusive conduct by large scale retailers against their suppliers. Indeed, the first formal measure taken by the JFTC solely based on the grounds of violation of ASBP was the *Mitsukoshi* case in 1982, where the largest department store in Japan then (Mitsukoshi) pressured its suppliers to purchase certain goods and show tickets from Mitsukoshi and also urged its suppliers to bear the cost of renovation and promotion activities of the department store.

II. Increased enforcement of ASBP-type conduct

In the same year (1982), the General Designations was amended to provide clarity and reflect changes in the economy. With respect to ASBP, Item 10 of the General Designations was clarified by adding specific examples of abusive conduct

14 Item (v) was added to the provision providing for definition of Unfair Trade Practice (then Article 2(7), later renumbered to Article 2(9)) as follows:

"The term "unfair trade practices" as used in this Act means any act falling under any of following items, which tends to impede fair competition and which is designated by the Fair Trade Commission:

[(i)-(vi) omitted]

(v) Dealing with another party by unjust use of one's bargaining position"

15 Item 10 provided as follows:

"Engaging in transactions with terms unjustly disadvantageous to the counterparty in light of the normal business practices by making use of one's superior bargaining position over the other party".

In contrast to the current provision, Item 10 did not provide any examples of conduct that would fall in as "transactions with terms unjustly disadvantageous to the counterparty."

and was renumbered to Item 14.[16] After the introduction of the new General Designations, the enforcement of ASBP picked up, however, with a focused target. The vast majority of the cases (19 out of 22 cases where the JFTC issued formal orders during the period from 1982 until 2010) were directed toward large scale retailers (such as supermarket chains, convenience store franchises, home appliance store chains) and hotel operators for their conduct against suppliers. In parallel, the Special Designation for large scale retailers was frequently utilized as well (9 out of the 19 cases above were solely based on the Special Designations.)

III. Introduction of administrative fines in 2009

The 2009 amendment to the AMA introduced surcharges (administrative fines) as a sanction for ASBP. Prior to 2005, the AMA did not provide for any fines for categories other than Unreasonable Restraint on Trade which covered cartel/bid-rigging type of conduct. In contrast, for violation of Private Monopolization and Unfair Trade Practices, the only sanction under the AMA by the JFTC was a cease-and-desist order. However, voices calling for stronger enforcement of competition law led to the introduction of administrative fines for conducts other than cartels/bid-rigging that have substantial impact on competition. First, in 2005, administrative fines were introduced for control-type Private Monopolization, and subsequently, in 2009, administrative fines were further expanded to exclusionary-type Private Monopolization and certain types of Unfair Trade Practices that could be regarded as an early sign of Private Monopolization (e.g., Joint Refusal to Trade, Discriminatory Pricing, Predatory Pricing, and Resale Price Maintenance). These types of conduct were selected on the basis that their unlawfulness was rather explicit, and only a repeated violation was subject to fines in order to avoid imposing a stifling effect on business activities. However, although the government did not consider ASBP an early form of Private Monopolization, the government nevertheless saw a necessity to impose administrative fines given the significant harm SMEs suffer, and thus included it within the scope for imposition of administrative fines. As such, the administrative fines for ASBP fines were treated differently and were provided as an administrative fine that could be imposed for even a first-time violation.

IV. Cases after the introduction of administrative fine in 2009

During the first five years after the introduction of administrative fines (the amendment came into effect in 2010), the JFTC brought five cases, all of which concerned large scale retailers. In all five cases, the parties challenged the JFTC's decision. This was partly because under the AMA, once the JFTC finds a violation, there is no discretion on the JFTC's side to adjust the amount of fines, so from the party's perspective it had to choose whether to accept or challenge the decision. In addition, the provision for the calculation of fines lacked clarity and left room for interpretation as to what the basis should be, and this also led the parties to challenge the JFTC's formal orders.

The parties challenging the JFTC's decision placed a significant burden on the JFTC, especially given that each of these ASBP cases involved a significant number of suppliers and there were numerous transactions with each supplier. As a result, the JFTC appears to have become careful if not hesitant to bring up ASBP cases by way of issuing a formal order. Indeed, the JFTC has not issued any formal orders for ASBP cases after 2014.

That said, in terms of overall enforcement against ASBP, JFTC remains active, mainly through its ASBP Task Force established in 2009. The ASBP Task Force focuses on handling ASBP cases, which allows for the efficient gathering of information and building experience, and strives to intervene at an early stage by way of issuing informal warnings, leading to early detection and resolution. The ASBP Task Force has been handling around 50 cases every year, and the average period required for intervention and issuing an informal warning has significantly improved from the average of 122 days prior to the introduction of the Task Force to roughly 40 to 50 days after the introduction. As such, the JFTC

16 Item 14 provided as follows:

"(Abuse of Superior Bargaining Position)

(14) Engaging in any act specified in one of the following items, unjustly in light of the normal business practices, by making use of one's superior bargaining position over the counterparty unjustly:

(i) Causing the counterparty in continuous transactions to purchase goods or services other than those to which the relevant transactions pertain;

(ii) Causing the counterparty in continuous transactions to provide money, services or other economic benefits

(iii) Establishing or changing trade terms in a way disadvantageous to the counterparty;

(iv) Imposing a disadvantage on the counterparty regarding trade terms or execution of transactions other than the acts falling under any of the preceding items; or

(v) Causing a corporation which is one's counterparty to a transacting to follow one's instruction in advance, or to get one's approval, regarding the appointment of officers of the said corporation (meaning those as defined by paragraph 3 of Article 2 of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade….)."

has been quite successful in implementing this approach to dealing with ASBP.

V. Recent developments and the potential shift in enforcement

Besides the success of the ASBP Task Force, there have been several notable developments.

1. **Introduction of the Commitment Procedure**: In 2017, the AMA was amended to introduce the Commitment Procedure. Under the Commitment Procedure, the party under the JFTC's investigation may engage in discussions with the JFTC and request approval of voluntary commitments to address the JFTC's concerns, and if approved, the case will be closed without the finding of a violation and thus no formal orders such as a cease-and-desist order and/or a surcharge payment order (administrative fine order) would be issued.

   The Commitment Procedure provides leeway for the JFTC and the party to reach a negotiated resolution, without going all the way to the final order and any challenges at judicial courts. This could allow the JFTC to proceed with its investigation without being too concerned about the party challenging the JFTC's decision and fighting it to the end.

   Indeed, shortly after the introduction, the Commitment Procedure was used in three recent ASBP cases.[17] In addition, in two other recent cases, while the Commitment Procedure was not utilized, the JFTC closed the case without any finding of violation when the party under investigation made commitments to change its business practice that addressed the JFTC concerns adequately, achieving a similar result as the Commitment Procedure.

   Such development suggests that with the introduction of the Commitment Procedure which brought about flexibility in enforcement, the JFTC has become more willing to open ASBP investigations.

2. **Increased use of advocacy through market studies:**

   Traditional targets of market studies: The JFTC conducts market studies to gain a better understanding of a certain market and identify potential competition law issues. In the past, with respect to ASBP, market studies in areas such as transactions between large scale retailers and suppliers, franchisors and franchisees, hotels and suppliers, shippers and logistic companies, and financial institutions and companies were quite common and frequent.

   New areas of focus: However, in the past 5 years, the JFTC has suggested placing greater emphasis on advocacy through market studies as a means to enhance competition policy and facilitate enforcement. The JFTC has increased the frequency of launching such market studies and also expanded the sectors within its radar. Just to name a few novel sectors, areas such as the following were addressed by the JFTC's recent market studies: liquid natural gas ("LNG") trade, human resources industry, e-commerce, credit cards, various digital platforms (online shopping malls, mobile app stores, digital ads, cloud services, and distribution of news contents), restaurant ranking sites using algorithms, financial services utilizing fintech (household accounting services and cashless payment services using QR codes and barcodes), working conditions for freelancers and transactions with startups (transactions with business partners and with brokerage firms).

   New types of conduct: Further, together with the expansion of target sectors, the JFTC appears to suggest that certain types of conduct that it had not focused on much in the past could come into the scope of ASBP. To give some notable examples, first of all, there is frequent reference to unilateral changing of contract terms by the superior party, such as raising of price or service fees. The second type of conduct that is frequently referred to is unilaterally obligating the other party to bear certain costs and/or losses, take certain actions such as providing data/technology/IP, use certain services, and even develop new customers. Third, there are cases where the JFTC focuses on instances where the superior party imposes unfavorable obligations (e.g., non-compete, exclusive dealing, and restriction on the use of output) to the counterparty. Finally, in relation to algorithms, the JFTC suggested that changing an algorithm arbitrarily and using that as leverage to have the counterparty enter into an agreement more favorable to the superior party could be in violation of ASBP.

   Things to note moving forward: However, it is important to note that these suggestions are made in the context of a market study. Whether a conduct described in these market reports would indeed be deemed as a violation would also depend on various other factors such as whether the conduct was taken without any justifiable reason and whether the counterparty was unfairly disadvantaged in light of normal business practices. The JFTC acknowledges this, usually noting that the conduct it identified has "potential concerns of violating the AMA," carefully choosing words so as not to give a definitive impression and leave room for interpretation

17 Approval of the Commitment Plan submitted by Genky Stores, Inc., August 5, 2020, Japan Fair Trade Commission. See: https://www.jftc.go.jp/en/pressreleases/yearly-2020/August/200805.html; Approval of the Commitment Plan submitted by Amazon Japan G.K., September 10, 2020, Japan Fair Trade Commission. See: https://www.jftc.go.jp/en/pressreleases/yearly-2020/September/200910.html; Approval of the Commitment Plan submitted by BMW Japan Corp., March 12, 2021, Japan Fair Trade Commission. See: https://www.jftc.go.jp/en/pressreleases/yearly-2021/March/210312.html.

based on the specific facts of a case. As such, it is fair to say that JFTC does bear in mind that there is tension between ASBP and the parties' freedom of contract to some extent, and a case-by-case analysis would be important. Therefore, whether the JFTC will indeed pursue ASBP enforcement for the conducts it has identified is yet to be seen and would depend on the circumstances of each case. That said, we should expect that the JFTC is now more open to looking into ASBP in areas other than the classic examples where large scale retailers are bullying their suppliers.

3. **Application of ASBP vis-a-vis consumers:** While the language of the ASBP provision does not limit its application to transactions between business operators, ever since its introduction in 1953, the JFTC had only applied ASBP to transactions between business operators. However, the JFTC changed its position in 2019 when it newly introduced the Consumer ASBP Guidelines as part of its efforts to regulate digital platform operators. In the Consumer ASBP Guidelines, the JFTC suggested that acquiring or using personal information could also fall under ASBP, and ASBP is applicable in transactions between a digital platform operator and consumers concerning personal data. We have not yet seen a case where the Consumer ASBP Guideline was applied, and what kind of interplay with existing personal data privacy laws would take place is yet to be seen, but with the increased focus on digital platform operators, this is an area to keep an eye on.
4. **Utilization of ASBP as a tool to address competition law issues concerning digital platforms:** In line with other competition authorities around the globe, the JFTC has been focusing on how to address potential competition concerns in relation to digital platforms that are gaining power in various markets. As part of such efforts, the JFTC has conducted various market studies into the digital sector, and has identified potentially problematic conduct in its final reports. The potential competition harm and potentially applicable AMA provision identified in these final reports vary depending on the type of conduct identified, but the types of conduct where ASBP is considered as a potential concern is increasing.

Further, there have been several cases where the JFTC has indeed opened ASBP cases against digital platform operators (the *Amazon* case and the *Rakuten* case[18]), and one of these cases (*Rakuten*) was a novel one in terms of the type of ASBP conduct. In contrast to the typical ASBP cases that the JFTC had been pursuing for the last 20-30 years, the issue in question was whether introducing a change to the terms and conditions would be deemed as an ASBP.

Besides the success of the ASBP Task Force, there have been several notable developments

This is a novel issue, and is directly related with the freedom of contract and the underlying principle of private autonomy, which forms the basis of competition in the private sector. In this case, Rakuten, an operator of a major online shopping mall Rakuten Ichiba, planned to introduce a new rule requiring that merchants offer free shipping to customers placing orders above a certain price threshold. The JFTC alleged that such change would leave the merchants to shoulder the shipping costs themselves, and thus introduction of such a uniform free shipping threshold constituted ASBP. When Rakuten showed moves to go ahead with the change even though the JFTC had commenced its investigation, the JFTC chose to file a petition for an emergency injunction[19] with the Tokyo District Court.20 Rakuten gave in before the court held hearings and changed its plan to allow for merchants to opt out of the proposed plan, and the petition was withdrawn. The JFTC continued with the investigation to confirm that the merchants indeed had the freedom to choose, and thereafter the investigation was closed without any finding of violation taking into consideration the fact that *Rakuten* had changed its plan. This case is unique given that the JFTC has chosen to utilize its power to file for an emergency in-

18 See: id.; Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Rakuten Group, Inc., December 6, 2021, Japan Fair Trade Commission. See: https://www.jftc.go.jp/en/pressreleases/yearly-2021/December/211206.html.

19 The JFTC may file a petition with the Tokyo District Court for an emergency injunction to prohibit a company from violating the AMA. The JFTC needs to show (i) the existence of such alleged violation of the AMA; and (ii) the urgent necessity of the injunction order (Article 70-4 of the AMA).

20 The JFTC has Filed a petition for an Urgent Injunction against Rakuten, Inc., February 28, 2020, Japan Fair Trade Commission. See: https://www.jftc.go.jp/en/pressreleases/yearly-2020/February/200228.html.

junction which had rarely been used in the past.[21]

It is notable that the JFTC has taken quite an aggressive approach, going as far as to file a petition for an emergency injunction. It should also be noted that the type of conduct that was concerned in this case was a unilateral change of contract terms, which as mentioned above appears to be a new area where the JFTC intends to curb ASBP violations. While we have yet to see whether the JFTC would continue to make use of the emergency injunction and whether the court would indeed grant injunction in similar cases, given its success in the Rakuten case, we should expect that at least for now, filing for an emergency injunction has become part of the JFTC's tool kit for enforcement of competition law.

CONCLUSION

As examined above, the ASBP provision itself is vague, and even though efforts have been made through amendments and the JFTC's ASBP Guidelines, there still remains a lot of room for interpretation, and it is still far from a crystal-clear provision that allows for enforcement with a reasonable degree of predictability. While in some aspects the JFTC has addressed this lack of clarity by way of introducing a clear-cut provision targeting specific types of entities and conduct (e.g. the Subcontract Act and the special designations), more clarifications and simplifications need to be made. While we have seen active enforcement by the JFTC in those areas, for areas not covered, the JFTC's ASBP enforcement was not necessarily active. This shows the difficulty of enforcement of ASBP, and also explains the trend in the past where a large ratio of cases pertained to transactions between large scale retailers and its suppliers. This trend became more evident, especially after the introduction of administrative fines and the burdensome experience of fending off the parties' challenges at court that followed.

As one alternative to tackle this, the JFTC shifted towards a more informal and soft approach in the name of early intervention. Given its success, this route of ASBP enforcement is likely to continue. As another route, with the newly introduced Commitment Procedure, now the JFTC seems to have become less hesitant to formally push forward ASBP cases. At the same time, the scope of types of conduct and sectors that the JFTC intends to cover with ASBP seems to have broadened. During the course of launching market studies in a wide range of sectors, the JFTC has shown its eagerness to put various new types of conduct under its ASBP radar. Although the JFTC seems to be taking a cautious approach by not giving definitive answers as to what types of conduct would be a violation absent specific facts of a case, the lack of clarity poses a problem. We should bear in mind that the enforcement history of ASBP has shown the difficulty of applying ASBP without clear guidance. If the JFTC were to push forward aggressively in the absence of such guidance, it would inevitably come into odds with the concept of freedom of contract which is the keystone of a market-based economy, which in turn may pose a stifling effect on business operators. To avoid such a situation, it would be prudent to introduce a clearer and more concrete guidance before moving ahead with enforcement. However, in the Rakuten case, the JFTC chose to take the aggressive approach of filing for an emergency injunction before any clarification or guidance. Fortunately for the JFTC, in the Rakuten case, the move worked, and the party had changed its practice. However, as a result, neither the JFTC nor the judicial court had the chance to put forward their interpretation, and thus the lack of clarity remains. In fact, some commentators suggest that it might have been difficult to find a violation of ASBP. If the JFTC were to continue with similar moves without any clear guidance (i.e. utilizing filing of an emergency injunction as a means to impose pressure, essential), the lack of predictability would have a detrimental effect on business activities and competition. Therefore, efforts to provide clarification is warranted here. We have yet to see what the JFTC's next move will be after so many market study reports frequently referring to ASBP as a potential issue, but exercising due care around the negotiation process to mitigate ASBP risks would be the sensible approach. At the end of the day, for the purpose of preserving the basis of the market-based economy and enhancing business activities, the JFTC should give weight to providing predictability to business operators, and make efforts to provide more clarity in advance regarding its ASBP enforcement.[22] Otherwise, the enforcement efforts could end up as an overuse of ASBP by the authorities.

21 There have been only eight cases in total where the JFTC filed a petition for emergency injunction since the procedure was introduced in 1947, and after 2000, there have been only two cases (in 2004 and 2020). In both cases the JFTC withdrew its filing after the party voluntarily changed its conduct. The latter 2020 case concerns the ASBP case against Rakuten.

22 Further, while not addressed in this article, we should also keep our eyes on developments of use of ASBP in private litigation. Though it has not yet become mainstream, ASBP can be used as a basis of claims in private litigation, and indeed in a recent Tokyo district court decision, manipulation of an algorithm was considered as ASBP (case pending on appeal at the Tokyo High Court). See: Atsushi Yamada, "The Rise of Antitrust Private Enforcement in Japan: The *Tabelog* Case" available at: https://chambers.com/legal-trends/antitrust-private-enforcement-in-japan.

INSIGHTS ON TAIWAN DIGITAL ECONOMY WHITE PAPER

By Yvonne Hsieh, Erica Chiu, & Alex Chu[1]

I. IN THE ERA OF DIGITAL ECONOMY

With the increasing awareness of the competition issues arising from the emergence of novel business models in the digital economy, regulators in different jurisdictions have started to amend the related regulations or promulgated new ones in order to address the potential competition issues. The Taiwan Fair Trade Commission ("TFTC"), likewise, is dedicated to establishing an optimal regulatory framework to handle competition issues and big technology companies. Hence, TFTC released the White Paper on Competition Policy in the Digital Economy in early March 2022. After taking into account the opinions collected from various parties, the TFTC finalized the White Paper and released the official version thereof on December 20, 2022 ("White Paper").[1]

The White Paper is the TFTC's first comprehensive overview of competition issues specific to the digital economy along with its relevant enforcement stance and policy direction. Therefore, it will definitely play a crucial role in shaping the future trends and development of Taiwan's regulatory regime on competition issues. In this article, we will provide a quick guide to the White Paper and share some implications from all the explored regulatory issues.

II. OVERVIEW OF THE WHITE PAPER

The digital economy, as defined hereunder, includes the business activities driven by the digital sector, and the innovative activities involving digital technology in the non-digital sector. To elaborate, there are four main features of the digital economy: (i) use of multi-sided business models; (ii) reliance on data; (iii) volatility (by merging with new businesses and launching new products in order to maintain its dominant position and leverage into other markets); and (iv) tendency toward a monopoly or oligopoly.

In the White Paper, the TFTC has explored the competition issues and categorized those issues into five major areas. This article will summarize the major points stated in the White Paper and provide some key takeaways.

2.1 Definition of Market and Assessment of Market Power

Given the two-sided/multisided nature of digital platforms, it is challenging to define the market and assess the market power of the businesses. The White Paper mainly focuses on four relevant issues: how the number of "relevant markets" should be defined for two-sided/multisided platforms, the best way to define the market when the price of the product/service concerned is zero, how to define the scope of the relevant markets in the Internet and digital ecosystems, and what the appropriate indicators are for assessing market power when the price of the product/service concerned is zero.

Under the current enforcement stance, the TFTC will consider that a "two-sided non-transaction platform" can be divided into two relevant markets while a "two-sided transaction platform" constitutes a single relevant market. In addition, if the price of the product/service concerned is zero, the modified SSNIP test, SSNDQ test, or SSNIC test can be applied. The TFTC also tends to define the scope of the relevant markets by considering the digital economy's impact on substitution and cost of switching between geographical areas.2 As for the indicators for assessing the market power, the TFTC will take into account the market share, profit or revenue, indirect

1 Yvonne Hsieh is a partner at Lee and Li, Attorneys-at-Law. Erica Chiu is an associate partner at Lee and Li, Attorneys-at-Law. Alex Chu is an associate at Lee and Li, Attorneys-at-Law.

The White Paper is available at https://www.ftc.gov.tw/upload/d83b5225-d541-44ec-a61f-568ab6109d56.pdf.

2 *See* the TFTC Commissioners' Meeting No. 1078 (July 4, 2012).

network effect, single/multi-homing, critical mass, switching costs, and other competition indicators for each side of the platform.

The White Paper also indicates that the TFTC will continue monitoring the latest development in different jurisdictions. Moreover, the TFTC will step up the collection of information on factors relating to the digital economy, and review the TFTC's guidelines on defining the relevant markets.

2.2 Abuse of Dominant Position

Platform operators' business practices (for example, self-preferencing, tying-in, predatory pricing/illegal inducement with low prices, price discrimination, Most-Favored-Nation Clause, resale price maintenance, and restrictions on online sales) may all involve activities that constitute the abuse of dominant position. Hence, the White Paper emphasizes the competition issues in this aspect and concludes with up to nine sub-issues. We will explain below the TFTC's current enforcement stance and future enforcement direction on each sub-issue.

- *2.2.1 Self-Preferencing and Search Bias*

Since technology giants (e.g., large platforms) often use the ecosystem that they have built in favor of their own products/services, competitors may not enjoy the same treatment under such an ecosystem. The White Paper indicates that such self-preferencing or search bias may not be deemed illegal *per-se*; whether the products/services provided by a platform operator constitute essential facilities should be determined. In addition, self-preferencing and search bias can be placed in the following framework for analysis: tying-in, price discrimination, refusal to deal, and whether such behavior raises the costs for the competitors.

To enforce corrective measures against self-preferencing and search bias, the TFTC aims to engage external experts to assist in the monitoring of the corrective measures. In the future, the TFTC would conduct research on the business models and operation of online search platforms in order to identify the means and consequences of self-preferencing and search bias.

- *2.2.2 Tying-In*

Tying-in practices may restrict market access or raise the economic costs of competitors, thereby having an anti-competition effect. The tie-in activities in the digital industry will make the determination of legitimate causes more complicated. Factors such as cross-subsidization make it even more difficult to assess the effect of competition restrictions.

The TFTC's current view is that a tying-in practice constitutes a violation only when the market power of the main product has been leveraged into the market of the "tied product" and anti-competition concerns have arisen therefrom. The TFTC also considers whether businesses have been locked in due to the dominant position of the platform on the main product market should be determined, and the impact on the efficiency of market competition and the reasonableness of the tying-in practices should be evaluated.

To establish a more optimal regulatory regime, the TFTC will conduct in-depth case studies on the three main aspects: (i) product relationship and nature of tying-in; (ii) network effect and economy of scale; and (ii) impact on competitors and consumers.

The White Paper also indicates that the TFTC will continue monitoring the latest development in different jurisdictions

- *2.2.3 Predatory Pricing/ Inducement of Low Price*

A digital platform may offer free or low-price products/services or even subsidies to rapidly increase the number of its users and foreclose competitors. The TFTC considers that anti-competition concerns will only arise when a platform with a monopoly or substantial market power has been consistently selling its products/services below cost without legitimate reasons. Moreover, the overall profit and loss of the platform are considered to determine the legitimacy of the conduct. The market share of competitors and barriers to market access are also analyzed to determine whether short-term low prices will result in long-term high prices.

Other than the current regulatory strategy, whether the requirement to prove that the platform that has implemented predatory pricing would adopt monopolistic pricing in the future to compensate its previous losses may need to be further evaluated by the TFTC. To avoid misjudging low prices that are beneficial to consumers as predatory pricing or inducement of low prices, the TFTC may use the market structure and the market position of individual businesses as the preliminary criteria for determination.

- *2.2.4 Price Discrimination*

Through data analysis, platform operators can learn consumers' purchase habits, preferences, purchase history, price sensitivity, etc., and pinpoint the "maximum willingness-to-pay" prices for each consumer, thereby charging each consumer

different prices. However, such differences may trigger discrimination concerns. While Article 20 of the Taiwan Fair Trade Act ("TFTA") does not apply to personalized pricing, the White Paper states that Subparagraphs 1 and 2, Article 9 and Subparagraphs 2 and 3, Article 20 of the TFTA may apply to cases involving price discrimination.

In addition, the distinction between price discrimination and loyalty rebates should be addressed. The White Paper indicates that when determining whether the offering of loyalty rebates has the effect of foreclosure, not only the market position of the platform and its network effect are considered, whether the products/services concerned constitute essential facilities should also be taken into account.

In the future, the TFTC aims to more precisely understand how platform operators obtain big data and use algorithms and data analyses, as well as the mechanism of personalized pricing. Furthermore, the TFTC will properly update the cost structure of the personalized pricing implemented by platform operators, the operating models, and the cost and economic value of the products/services.

- *2.2.5 Most-Favored-Nation Clauses ("MFNs")*

It is not uncommon to find platform operators asking their suppliers not to sell on other platforms or via other channels at lower prices or more favorable transaction terms. Problems arise from MFNs, such as whether online platforms and brick-and-mortar channels should be included in the same relevant market, should the geographic market be defined as nationwide, and if a platform operator's market share has reached the threshold of vertical restraints based on the TFTC's practice, can such platform be considered as having anti-competition concerns, need to be considered and addressed.

According to the White Paper, in terms of market definition, there is "asymmetric substitution" between online platforms and brick-and-mortar channels. However, the TFTC considers that conducting a market survey on demanders (including consumers) may be one of the optimal approaches to determine the product and geographic markets. In addition, factors such as legitimacy and impact on market competition should be taken into account. The TFTC will also identify the characteristics of the exact types of the MFNs involved as different types of MFNs create varying degrees of anti-competition effect.

- *2.2.6 Resale Price Maintenance (RPM)*

Since digital platform operators can use AI and algorithms to monitor downstream distributors' compliance with RPM agreements, the RPM may be deemed a related issue in the digital economy. The TFTC's focus is not only on the effect on intra-brand competition, but also on competition among brands. Whether the RPM agreements have the effect of encouraging the downstream businesses to improve the efficiency or quality of pre-sales services will also be taken into account.

The White Paper also indicates that the TFTC will take market power into consideration due to the following reasons: (i) both the legal requirements and the TFTC's practice take market power into consideration; (ii) US precedents expressly provide that serious attention must be given to RPM agreements implemented by businesses with market power; and (iii) the legitimate causes and positive effects specified under Article 25 of the Enforcement Rules of the TFTA depend largely on the market power of the businesses involved.

- *2.2.7 Restrictions Relating to Online Sales Channels*

Platform operators may use their dominant position to implement customer foreclosure or input foreclosure. As such, manufacturers might selectively exclude online platforms from their distribution channels. However, it is challenging to assess a platform's indirect network and identify whether online platforms are imposing geographical restrictions/geo-blocking in Taiwan. Furthermore, platform operations are cyclical, and it is not easy to determine what stage of the life cycle a platform is in.

Currently, when the TFTC determines whether the restriction above constitutes a violation of the TFTA, an assessment is conducted based on the relevant business relationship, purchasing pattern, network effect, the economies of scale, and the impact on consumers. On the other hand, when determining whether "preventing free riders" is a legitimate reason for imposing such a restriction, the decision is based on the percentages of consumers who opt for a platform "with pre-sale service and high prices" and a platform "with no pre-sale service and low prices".

For future regulatory development regarding market position, a specific threshold for initiating investigation may be set by referring to the cases in the US and the EU. In addition, the TFTC plans to conduct an in-depth study on the characteristics of the online sales platforms to effectively explore other types of restrictions on accessing such platforms.

- *2.2.8 Data Privacy and Market Competition*

A privacy dispute may arise where a digital platform fails to obtain consumers' consent to use their data or the platform and the consumers have different perceptions on the scope of use of the consumer data. In practice, the TFTC can intervene only when such a privacy dispute also gives rise to undue restrictions on market competition. Disputes that arise from unclear

contractual terms are subject to the Personal Data Protection Act. For future enforcement, the TFTC may generally maintain the current stance. However, the TFTC will be following the development in these areas both domestically and internationally. As the Ministry of Digital Affairs ("MODA") has been established, the TFTC will pay special attention to the allocation of rights and responsibilities in relation to data privacy between the TFTC and the MODA.

- *2.2.9 Profit-Sharing of Digital Advertising and Payments to News Media*

If digital platforms monetize the online traffic that they have attracted using the content created by news media, it is disputable whether they need to share their profit with the news media. The White Paper states that the TFTC fully cooperates with the efforts and tasks assigned by the Executive Yuan's coordination group and will provide opinions on competition issues thereto.

In the event that the news media outlets wish to pool their bargaining power through collective bargaining, as it may involve concerted actions among industry peers, they may apply to the TFTC for a waiver of concerted action pursuant to the TFTA. The TFTC will facilitate the negotiation between the news media outlets and the digital platforms as a part of its ex officio duties as the competent authority.

2.3 Merger

According to the White Paper, technology giants tend to acquire start-ups in their infancy to eliminate potential competitors. Also, platform operators will acquire businesses that own data in order to obtain more personal data of consumers. The TFTC illustrates its regulatory tendency and future enforcement directions in the following two areas:

- *2.3.1 Killer Acquisition*

The unresolved issue is whether digital technology giants' acquisitions of potentially competitive start-ups constitute a violation of the competition law. Thus far, the TFTC has no experience in handling killer acquisitions, even though it has dealt with conglomerate merger cases of technology giants and has accumulated law enforcement experience in examining merger cases from the perspective of potential competition. For future enforcement, the TFTC will continue to monitor international development trends and adjust relevant review standards. Moreover, when dealing with the issues of killer acquisitions, the TFTC should also consider the benefits arising from technological innovations.

- *2.3.2 Role of Privacy in Merger Review*

One of the issues addressed in the White Paper is whether personal data protection is a parameter for assessing competition when reviewing the establishment of a new joint venture. Thus far, the TFTC has not included privacy protection in its analysis but will start to consider how privacy protection can be internalized in a merger review from the perspective of "quality" competition. Nonetheless, the White Paper indicates that if the TFTC wants to examine privacy issues in a merger filing case, it must first determine whether there is competition by the means of privacy protection, and such privacy issues should be considered only when the parties use privacy protection as a way to retain or attract users. In the context of protecting privacy and maintaining competition, the TFTC should consider not only the potential disadvantage of reduction in privacy protection after the merger, but also the potential disadvantage to competition that may result from enhancing privacy protection.

The White Paper also recognizes the difficulty of quantifying the extent and necessity of privacy protection which can pose a challenge to law enforcement in terms of seeing privacy protection as a "competition on quality". In the short term, the TFTC may seek the views of privacy and consumer protection authorities in order to apply the rule of reason test properly and to allow for a more comprehensive analysis in merger reviews. In addition, the TFTC will continue to look at how other countries develop a more objective and even quantitative analysis with a view to improve enforcement.

2.4 Algorithm and Concerted Action

In the digital economy, the use of algorithmic technology has become a facilitating mechanism for concerted action and a tool for collusion and mutual supervision between the parties. The difficulty of proving that the existence of collusion has increased and there is a risk that algorithms may become a tool for concerted action.

The TFTC currently examines the facts and evidence specific to the case comprehensively and will engage external experts when necessary to review the programs or commands related to the algorithms. The TFTC also states that concerted actions through algorithms are still within the scope of the TFTA.

Given the ongoing development of the algorithm, the TFTC will conduct market research and industry survey to facilitate case reviews. Moreover, relevant laws and regulations should be amended to strengthen the TFTC's authority on conducting market survey.

2.5 Online False Advertising

Internet advertising helps to enhance consumers' ability to obtain information about products and services, expand opportunities for businesses to enter new markets, and reduce business operating costs. However, if businesses use false advertisements to promote their products/services, they might not only prevent consumers from making transaction

decisions based on accurate information, but also hinder fair competition with other law-abiding competitors.

Under the current regulatory framework, the provisions on false advertising under the TFTA also apply to the new types of online advertising with target audiences. The TFTC has also worked with other agencies to raise the general public's awareness on advertising laws and regulations.

In the future, it is expectable that the capability and capacity to investigate and address online false advertising and new types/technologies of advertising activities will be strengthened. In addition, the TFTC would proactively amend relevant laws and regulations in this area.

III. CONCLUSION

The White Paper states the following principles regarding the competition issues in the era of digital economy:

(i) local nexus is more important than replicating the experience of others;

(ii) commitment to construct the contestability of the digital market;

(iii) careful assessment of the need for and role of *ex-ante* control;

(iv) international cooperation and domestic collaboration;

(v) further explore the essence of competition and enhance analytical capability; and

(vi) strengthen digital enforcement capability through the cultivation of IT ability and talent.

Following the principles above, in the short term, there are three immediate changes that can be realized. First, "relative market dominance" will be excluded as one of the criteria for determining the "anti-competition concern" under Article 20 of the TFTA. Second, the market power of the businesses involved in the relevant market will be included as one of the factors to be considered when reviewing cases involving RPM agreements. Third, the TFTC's handling guidelines relating to market definitions will be reviewed. In the long run, amendments should be made to the relevant laws:

(i) when the TFTA is being amended in the future, including vertical collusion into the scope of concerted actions under Article 14 of the TFTA;

(ii) amending the relevant laws and regulations to strengthen the TFTC's authority on conducting market survey;

(iii) after amassing relevant enforcement experiences, the TFTC will establish principles for handling cases involving digital economy; and

(iv) reviewing the TFTC's Disposal Directions (Guidelines) on Online Advertisements and incorporating the issue of KOL/influencer marketing therein.

Following the release of the White Paper, the TFTC stated that the content of this White Paper only reflects the TFTC's position at this moment in time and does not preclude future adjustments to varying degrees in response to economic development and changes of the industry.

The White Paper also recognizes the difficulty of quantifying the extent and necessity of privacy protection which can pose a challenge to law enforcement in terms of seeing privacy protection as a "competition on quality"

KEY LESSONS FROM THE RISE OF ANTITRUST ENFORCEMENT IN SOUTH-EAST ASIA

By Elsa Chen, Scott Clements & Daren Shiau[1]

I. ANTITRUST LAWS IN SOUTH-EAST ASIA

The Association of Southeast Asian Nations, or "ASEAN," comprises ten Member States: Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam (collectively, the "ASEAN Member States"). Further to the commitment by ASEAN Member States in the ASEAN Economic Community Blueprint to endeavour to introduce national competition policy and law ("CPL") by 2015, all the ASEAN Member States have, as of 2022, introduced competition laws.

While all ASEAN Member States have competition laws in place, the framework of competition laws and enforcement levels vary from jurisdiction to jurisdiction. There is no supra-national competition law framework in ASEAN; however, there is growing cooperation between ASEAN Member States. In August 2007, the ASEAN Economic Ministers endorsed the establishment of the ASEAN Experts Group on Competition ("AEGC") as a regional forum to discuss and cooperate on competition policy and law. The AEGC will continue to ensure a level playing field and foster a culture of fair business competition, for enhanced regional economic performance. At the 54th ASEAN Economic Ministers Meeting held in 2022, the Negotiations for the ASEAN Framework Agreement on Competition was launched, which will serve as a formal cooperation agreement that would facilitate cross-border cooperation and coordination on CPL matters among ASEAN Member States.

South-east Asia is a major global hub of manufacturing and trade (collectively the size of the fifth largest economy in the world by GDP), and is on track to becoming the fourth largest economy by 2030. It accounts for almost one-fifth of the global foreign direct investment inflow annually. South-east Asia also has robust population growth, with higher population growth rate relative to the global average across every age group. Overall, there is growing investment in South-east Asia and interest by corporates in growing their presence in South-east Asia. With global corporates increasingly exposed to South-east Asia, they now also have to navigate competition laws in the region.

The Association of Southeast Asian Nations, or "ASEAN," comprises ten Member States: Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam (collectively, the "ASEAN Member States")

II. CURRENT STATE OF ANTITRUST LAWS IN SOUTH-EAST ASIA

Notwithstanding the differences in the competition law framework in each South-east Asian Member State, the framework is still generally organized around the three main prohibitions of anti-competitive agreements, abuse of dominance, and mergers that substantially lessen competition.

Below is a brief overview of the current state of competition law regimes in South-east Asia.

Singapore

The Competition Act 2004 of Singapore ("Competition Act") was enacted in 2004, and it regulates anti-competi-

1 Allen & Gledhill LLP. Elsa Chen, Partner (Chief Economist) and Regional Co-Head, Scott Clements, Partner, and Daren Shiau, Partner and Regional Co-Head. The authors would like to thank Priscilla Seah, Associate at Allen & Gledhill LLP for her assistance in the production of this article.

tive agreements, abuse of dominance, and includes merger control. There is active enforcement of competition laws in Singapore, with the Competition and Consumer Commission of Singapore ("CCCS") conducting frequent competition law reviews of proposed merger transactions, dawn raids, and cartel decisions. As of March 31, 2022, the CCCS has completed a total of 700 competition cases, which includes investigations, leniency, merger notifications, and market studies.

In 2018, the CCCS issued its largest fine to date of approximately S$26.95 million (approx. US$18.76 million) to 13 distributors in the agricultural sector for fixing prices and agreeing not to compete during a seven-year period, which highlights its growing enforcement prowess against cartel activities and parties with large market shares and with protracted, serious infringements of the Competition Act.

The CCCS has also to-date conducted 20 complex Phase 2 merger reviews, issued five conditional merger clearances (*SEEK/JobStreet, ADB/Safegate, Times/Penguin, PAH/Innovative/Quest, and LSEG/Refinitiv*), issued three statements of decision (provisional) to block mergers (*Greif/GEP, Parkway/Radlink, and WMS/Drew Marine*), and one merger infringement decision (*Grab/Uber*).

Malaysia

The Malaysian Competition Act 2010 was enacted in 2010 and came into force in 2012. It regulates anti-competitive agreements and abuse of dominance. The Malaysian Competition Commission ("MyCC") is active in enforcement, with several high-profile price-fixing and abuse of dominance cases over the years. In 2017, the MyCC issued a fine against insurance companies amounting to approximately RM173 million (approx. US$37.2 million).

On April 25, 2022, the MyCC also initiated a public consultation relating to proposed amendments to the Competition Act 2010 which introduce a pre-notification merger regime. The MyCC has expressed that it expects the new merger control regime to be in force by 2023.

Indonesia

Indonesia was one of the first jurisdictions in ASEAN to introduce competition laws in 1999. It prohibits anti-competitive agreements, abuse of dominance, and includes a merger control regime for transactions which may result in monopolistic practices or unfair business competition. The Indonesian Competition Commission ("KPPU") is active in enforcement, receiving around 100 complaints every year relating to various industries.

In 2019, the KPPU imposed its highest level of fines of IDR20.66 billion (approx. US$1.46 million) against a company for failing to notify the KPPU of two transactions relating to its acquisition of two mining companies within the required timeframe.

Vietnam

Competition law has been in effect in Vietnam since 2004, but a new Law on Competition came into effect on July 1, 2019. The Law on Competition regulates anti-competitive agreements, abuse of dominance, economic concentrations, and unfair practices. There is active enforcement of competition laws in Vietnam, with the Vietnam Competition and Consumer Authority ("VCCA") Report of 2021 highlighting that the VCCA received and processed 130 notifications of economic concentrations in 2021.

Philippines

The Philippine Competition Act was enacted in 2015 and came into force in 2017. It regulates anti-competitive agreements, abuse of dominance, and mergers and acquisitions which substantially lessen competition in the Philippines. The Philippine Competition Commission ("PCC") is active in enforcement, actively opening investigations into alleged anticompetitive conduct, and it increased the fine in 2021 for anti-competitive behavior to a maximum of PHP110 million (approx. US$1.87 million).

Thailand

Thailand's competition law was enacted in 1999, which has since been superseded by the Trade Competition Act B.E. 2560, which came into force in 2017. It regulates anti-competitive agreements, abuse of dominance, mergers which may cause a monopoly, result in a dominant position or substantially reduce competition, and unfair trade practices. Thailand's Trade Competition Commission ("TCCT") has been increasing its enforcement. In 2019, the TCCT imposed fines amounting to 12 million baht (approx. US$0.32 million), for abuse of dominance and unfair trade practices.

Myanmar

Myanmar's competition law was enacted in 2015 and came into force in 2017. It regulates anti-competitive agreements, abuse of dominance, mergers and unfair trade practices. However, there has not been any significant level of enforcement in Myanmar, as further detail and guidance is required from various guidelines and rules to be issued by the Myanmar Competition Commission to ensure effective implementation of the competition law.

Cambodia

The Cambodia Competition Law was enacted in 2021, and regulates anti-competitive agreements, abuse of dominance and anti-competitive business combinations. How-

ever, the competition law regime is not active yet, with the Cambodia Competition Commission just established in February 2022.

Laos

The Laos Business Competition Law came into force in 2015 and regulates anti-competitive agreements, abuse of dominance and anti-competitive mergers. While the Laos Competition Commission has been established, the competition law regime is not active yet.

Brunei

The Brunei Competition Act came into force in 2015 and regulates anti-competitive agreements, abuse of dominance and anti-competitive mergers. However, the competition law regime in Brunei is not active yet, and there has also been no formal announcement on the establishment of the Competition Appeal Tribunal and its members.

III. NOTABLE CASES OF ANTITRUST ENFORCEMENT IN ASEAN

In navigating the competition law regimes in South-east Asia, it would be relevant to consider recent notable cases of antitrust enforcement, which can provide some indication of the priorities for antitrust enforcement and the enforcement approach in this region.

Singapore

In Singapore, the recent noteworthy antitrust enforcement activity includes the following:

(a) In 2018, the CCCS investigated the Grab/Uber transaction. Grab had acquired the South-east Asia business of Uber, following which Uber held a 27.5 percent interest in Grab. Both provide ride-hailing services in Singapore. The CCCS disagreed with the parties' definition of the relevant market, and found the failure to notify pre-completion and the implementation of the transaction, among other things, to be an intentional and negligent infringement of Singapore competition laws, and imposed financial penalties of around S$13 million (approx. US$9 million), in addition to other directions. This has led to market observations that the Singapore merger regime is "not truly voluntary."

The *Grab/Uber* investigation also demonstrated that:

- the CCCS can reject a post-completion notification even though the Singapore merger control regime allows it, and conduct an investigation instead;
- the CCCS can refuse to accept commitments offered by parties, but elect to impose these as directions instead;
- the CCCS can impose financial penalties in a voluntary regime as a percentage of turnover (not capped at an absolute dollar figure), as it considers that the failure to make a pre-completion notification is a basis that the infringement is intentional or negligent; and
- if the CCCS disagrees with the parties' self-assessment (e.g. market definition), even though the parties did duly conduct a self-assessment, the CCCS can find that there was an intentional or negligent infringement by the parties in entering into the transaction.

(b) In May 2018, the CCCS also issued a provisional statement of its decision to block a foreign-to-foreign merger on the proposed acquisition by WMS of Drew Marine Group Coöperatief U.A. and Drew Marine Partners L.P.'s technical solutions, fire, safety, and rescue businesses in the marine chemicals sector in Singapore. This is the first foreign-to-foreign merger that the CCCS has proposed to block. Both parties were foreign-incorporated companies, but the CCCS was prepared to block the acquisition on the basis that it potentially resulted in a substantial lessening of competition in Singapore, and prior to other jurisdictions having made their decisions.

(c) More recently on May 24, 2021, the CCCS conditionally approved the proposed acquisition by London Stock Exchange Group plc ("LSEG") of Refinitiv Holdings Limited ("Refinitiv") in the financial markets sector after accepting commitments from LSEG. The parties were both foreign companies with business activities in financial information and risk management services in the global market. The CCCS identified competition concerns in Singapore arising from the transaction, which led to the Parties proposing the accepted commitments.

Malaysia

In 2021, the MyCC issued a proposed infringement decision against Grab Inc, GrabCar Sdn Bhd and MyTeksi Sdn Bhd (collectively, Grab) for allegedly abusing its dominant position. The proposed decision followed Grab's merger with

Uber in South-east Asia in March 2018, following which the MyCC announced that it would look into the merger. The decision was built on the basis that Grab has abused its dominant position by preventing its driver-partners from promoting and providing advertising services for Grab competitors to Grab passengers in the e-hailing and transit media advertising markets. The MyCC proposed to impose a financial penalty of RM86.8 million (approx. US$18.6 million) against Grab as well as a daily penalty of RM15,000 (approx. US$3,210.62) from the date of service of its proposed decision (predating its finalized decision) should it fail to take remedial actions as directed by the MyCC. As of 2022, the proposed decision is currently pending judicial review which was applied by Grab. If a finding of infringement is eventually made against Grab, the proposed financial penalty would be the highest financial penalty imposed against a single company to date for an abuse of dominance in Malaysia.

Indonesia

On September 15, 2022, the KPPU announced that it is initiating an investigation into the alleged violations of Law No. 5/1999 conducted by Google and its subsidiaries in Indonesia, in relation to a potential abuse of dominant position, by conducting conditional sales and discriminatory practices in the distribution of digital applications in Indonesia.

In particular, Google's policies require the use of Google Pay Billing ("GPB") in the purchases of in-app digital products and services on certain applications distributed on the Google Play Store. The various types of applications that users of the GPB are subjected to include (i) applications that offer subscriptions (such as education, fitness, music, or video); (ii) applications that offer digital items that can be used in games; (iii) applications that provide content or benefits (such as an ad-free version of the application); and (iv) applications that offer cloud software and services (such as data storage services, productivity applications, and others). The GPB usage policy requires that applications downloaded from the Google Play Store must use GPB as the transaction method, and Google also does not allow the use of other payment alternatives.

Additionally, the KPPU also suspected that Google has practiced conditional sales, or tying, by requiring application developers to purchase in bundle the Google Play Store application (the digital application marketplace) and Google Play Billing (the payment service). It was also found that for in-app purchases, Google only cooperated with one payment gateway/system provider, whereas several other providers in Indonesia did not have the same opportunity to negotiate the financing method. The allegation is that this differs from the treatment intended for global digital content providers, where Google gives opportunities to providers to cooperate with alternative payment systems.

Philippines

In August 2018, the PCC approved the acquisition by Grab of Uber's business in South-east Asia for a 27.5 percent. stake in Grab's operations in the region, after accepting Grab's voluntary commitments which relate to non-exclusivity, upholding service quality and transparency of fares. The PCC has since imposed a series of penalties on Grab for violating its voluntary commitments ranging from PHP50,000 to PHP2 million (approx. US$846.98 to US$33,879).

Thailand

In 2020, the TCCT approved a landmark merger transaction which involved CP Group's acquisition of Tesco's Lotus business. This was the first case in which the TCCT imposed behavioral remedies on the parties. In 2021, the TCCT also imposed its first penalty on an unfair pricing practice by a fruit wholesaler, where the fine amounted to more than 5 percent. of its annual revenue.

In 2021, the MyCC issued a proposed infringement decision against Grab Inc, GrabCar Sdn Bhd and MyTeksi Sdn Bhd (collectively, Grab) for allegedly abusing its dominant position

IV. GENERAL LEARNING POINTS

The key lessons that can be gleaned from the introduction of competition laws in South-east Asia, and the notable cases of antitrust enforcement over recent years are as follows:

A. Increased Competition Law Enforcement in ASEAN

As highlighted above, there is an overall increase in enforcement activity across ASEAN jurisdictions, with new guidelines, strategic plans and amendments to competition laws being introduced to enhance the enforcement abilities of competition authorities. Based on past enforcement activity in ASEAN in 2021, the priority sectors for enforcement include digital platforms, e-commerce, logistics and distribution, technology, financial services, land transport, food delivery and supermarkets.

In Singapore, the CCCS received the highest number of merger notifications in 2021 since 2014, including four in the semiconductor sector, and three on-going reviews in aviation cooperation agreements. In the past five years (2017 to 2021), more than 1 out of every 5 (over 24 percent.) merger notifications have proceeded to a Phase 2 review. For Vietnam, the VCCA reported that it received and reviewed 130 merger notifications, which is almost double the figures for 2020. In Indonesia, the KPPU reported that it decided 15 cases and imposed a total fine of approximately IDR66 billion (approx. US$4.3 million).

B. Strong Regional Cooperation in ASEAN

The ASEAN Experts Group on Competition ("AEGC") noted that it will continue to strengthen cooperation among ASEAN competition authorities, ensure timely exchange of information, and facilitate sharing of best practices among by member states to address anti-competitive activity. The Chief Executive of the CCCS, Sia Aik Kor, has noted that strong regional cooperation is a priority for the CCCS, and that she would like the CCCS to be able to share its thinking on more complex issues involving digital markets with its counterparts in the region.

As part of the ASEAN Competition Action Plan 2025, various competition authorities in ASEAN discussed the progress and developments of regional cooperation on competition policy and law in ASEAN, with new deliverables introduced, including a new ASEAN Information Portal on merger cases, and a new ASEAN Investigation Manual on Competition Policy and Law for the Digital Economy.

As of December 31, 2021, the CCCS has entered into five cooperation agreements with foreign competition authorities, including Indonesia's KPPU and the Philippine's PCC. These cooperation agreements foster greater cooperation between competition agencies on competition law enforcement, including areas such as notification of cases of mutual interest or significant impact, coordination of enforcement activities, exchange of information, as well as technical cooperation and experience sharing. The cooperation agreements also enhance the capabilities of competition authorities to handle a broader spectrum of cases, including many which have a cross-border dimension.

In the light of this, entities engaged in transactions with a cross-border element should understand the new regulatory frameworks across jurisdictions and plan their transactions accordingly.

The ASEAN Experts Group on Competition ("AEGC") noted that it will continue to strengthen cooperation among ASEAN competition authorities, ensure timely exchange of information, and facilitate sharing of best practices among by member states to address anti-competitive activity

C. Sharpened Enforcement Against Big Data and the Digital Economy

The CCCS, together with other jurisdictions including Indonesia and Thailand, is taking an active interest in the implications of data issues and the digital economy on competition policy.

In an interview for the April 2018 edition of the Asia-Pacific Competition Update (a publication by the OECD/Korea Policy Centre), Toh Han Li, the former chief executive of the CCCS, noted that "with the rise of the digital economy, more sophisticated business models have emerged and CCCS is seeing an increase in the complexity of the cases handled." The current Chief Executive of the CCCS, Sia Aik Kor, also expressed that the CCCS will "closely examine deals" in markets where innovation is an important feature of competition. The CCCS has, over the years, also issue multiple occasional papers and market studies into the role of competition policy in the digital economy and competition issues around e-commerce platforms. Similarly, the TCCT has also been scrutinizing the e-commerce platform market for anti-competitive conduct, and has issued the Guidelines on Unfair Trade Practices between Digital Platform Operators for Food Delivery and Restaurant Operators. Iskandar Ismail, the Chief Executive Officer of MyCC, further stated in a press release that the MyCC will "ensure rigorous and robust enforcement of com-

petition law and policy" in the e-commerce sector and the digital market, which they expect to be the "mainstay of the Malaysian economy."

This has manifested in new legislation and enforcement against entities in the digital sector. Accordingly, firms in the digital sector should review their structures and operations and conduct a risk assessment of its transactions to ensure that they are compliant with competition laws in ASEAN.

In addition, there are also other regulatory trends that will likely impact antitrust enforcement in South-east Asia moving forward.

D. Greater Role of Sustainability

Sustainability is expected to play a bigger role in competition law policy in ASEAN. In Singapore, the CCCS has stressed that businesses are encouraged to make the shift towards more sustainable practices, and to capture opportunities in the green economy. Additionally, the CCCS has launched a research grant and invited research proposals on the topic of "Sustainability, Competition and Consumer Protection in Singapore" on September 17, 2021. In Malaysia, the MyCC expressed that as part of its strategic plan for 2021 to 2025, it will promote the environmental, social and governance agenda along with championing competition in markets, for long-term economic sustainability.

Firms are encouraged to consider how competition laws may apply to its sustainability initiatives, in terms of potential infringements.

Sustainability is expected to play a bigger role in competition law policy in ASEAN

MARKET SHARES AS AN IMPORTANT FACTOR IN CHINA'S RESALE PRICE MAINTENANCE ENFORCEMENT

By Peter J. Wang, Qiang Xue, Yizhe Zhang & David Wu[1]

I. OVERVIEW

Resale price maintenance ("**RPM**") has been a hotly discussed issue in China's antitrust sphere over the last decade. While China's Anti-Monopoly Law ("**AML**") includes articles whose text generally prohibit RPM while offering limited exemptions, competition authorities and courts have adopted diverging approaches in practice. The newly-amended AML introduced a market share-based safe harbor rule and authorized the antitrust enforcement authority to quantify the market share standard[1]. However, a 15 percent market share standard proposed in a previous draft made available for public comments was not adopted in the *Regulation on Prohibiting Monopoly Agreements* of the State Administration for Market Regulation ("**SAMR**") – the Chinese antitrust authority[2], reflecting an unsettled debate in this regard.

Against this backdrop, this article attempts to answer a practical question – how is a company with a market share (i.e., 10-15 percent) exposed to RPM risks in China through the different lenses of antitrust enforcement authorities and courts?

II. THE "PROHIBITION PLUS EXEMPTIONS" APPROACH IN EARLY PUBLIC ENFORCEMENT

A. NDRC's Practices

The National Development and Reform Commission ("**NDRC**"), one of China's legacy competition authorities, pioneered RPM enforcements by probing into companies from a wide range of sectors including the liquor, infant formula, contact lenses, automotive, home appliances, and medical device sectors, among others, between 2013 and early 2018. The NDRC's aggressive enforcement and heavy penalties against RPM have provoked wide discussion as to whether RPM ought to be treated under the *per se illegal* or *rule of reason* approach. NDRC had insisted that the "prohibition plus exemptions" approach was neither *per se illegal* nor *rule of reason*, but many observers tended to compare the antitrust agency's approach to *per se illegal*, as the exemptions were seldom applied in practice.

B. Key Features of the Early Public Enforcement Cases

Chart 1 below shows all RPM cases concluded by antitrust authorities during this time period, and reveals several enforcement tendencies. First, antitrust authorities had failed to define a relevant market or calculate the market shares of the parties subject to penalty decisions, although in some cases such as *Medtronic* (2016) and *Eastman* (2017) antitrust authorities concluded that the relevant companies held a relatively strong market position. Second, the majority of cases related to competitive industries in which parties appeared unlikely to enjoy significant market power. Finally, most cases did not discuss RPM's alleged anticompetitive effects at all, or only touched this point briefly. There are 4 exceptions to this pattern, i.e., *Medtronic* (2016), *Smith & Nephew* (2016), *Eastman* (2017) and *Nordic Communications* (2017), which included relatively detailed discussions of the alleged restriction of competition, including the purported restriction of intra-brand and inter-brand competition, and the alleged harms to customers and consumers.

As a whole, the early public enforcement cases tend to show that antitrust authorities had been focusing on the RPM con-

1 Peter J. Wang, Qiang Xue and Yizhe Zhang are partners of Jones Day, and David Wu is an associate of the firm. The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated. The authors are very grateful for Dr. Kun Huang and Dr. Aston Zhong's kind comments on this article. All errors are our own. *See*, Article 18.3 of the Anti-Monopoly Law, available at http://www.gov.cn/xinwen/2022-06/25/content_5697697.htm.

2 *See*, SAMR's Provisions on Prohibiting Monopoly Agreements, available at https://www.gov.cn/gongbao/content/2023/content_5754538.htm. In China's *Antitrust Guidelines for Automotive Sector* (2019), a 30 percent market share is deemed as a safe harbor presumption for vertical non-price agreements, such as vertical geographic restrictions and customer restrictions. The Antitrust Guidelines are available at https://www.samr.gov.cn/zw/zfxxgk/fdzdgknr/fldj/art/2023/art_c349cba8055045c197efcef5d84e8182.html.

duct, rather than on parties' market position and purported anticompetitive effects of RPM. This means companies with a low market share were still likely to be penalized for RPM during the early days of AML enforcement.

Chart 1 – Early Public Enforcement RPM Cases

No.	Case	Products Concerned	Discussion on Market Share or Similar Facts	Restriction of Competition Analysis
1	Maotai case (2013)	Maotai brand Chinese liquor	None	③
2	Wuliangye case (2013)	Wuliangye brand Chinese liquor	As a leading Chinese liquor company, Wuliangye has great brand reputation and consumer loyalty.	①
3	Infant formula case (9 firms, 2013)	Infant formula	None	②
4	Contact lenses case (7 firms, 2014)	Contact lenses	None	②
5	Chrysler case (2014)	Automotive	None	③
6	FAW-Volkswagen case (2014)	Automotive	None	②
7	Mercedes-Benz case (2015)	Automotive	None	②
8	Dongfeng-Nissan case (2015)	Automotive	None	②
9	Hankook Tire case (2016)	Tire	None	③
10	Haier case (2016)	Home appliances	None	③
11	Medtronic case (2016)	Cardiovascular, restorative and diabetes care medical devices	Medtronic had a leading position in cardiovascular, restorative and diabetes care medical devices, based on its market share etc.	①
12	Smith & Nephew case (2016)	OTC products	None	①
13	SAIC-General Motors case (2016)	Automotive	None	②
14	Lingxian Logistics case (2016)	Milk	None	②
15	Yutai case (2017)	Fish feed	None	②
16	Wandersun case (2017)	Infant formula	The company was the sole wholesaler of Wandersun brand infant formula in a local county.	③
17	Baisheng Electronics case (2017)	Vivo cellphone	Vivo had some market power in China, including Jiangsu mobile phone markets.	②
18	Eastman case (2017)	Turbo oil	Eastman was in a highly concentrated duopoly market.	①
19	Nordic Communication case (2017)	Jabra earphone	None	①
20	PetroChina case (2018)	CNG	None	③

Source: NDRC official press releases, case decisions and news reports

Note:

① means the decision had a detailed discussion on restriction of competition.

② means the decision only briefly discussed the restriction of competition.

③ means no discussion of restriction of competition at all.

III. The *Rule of Reason* Approach Adopted by the Courts Before 2018

A. The Johnson & Johnson Case

The *Johnson & Johnson* (2013) case established the *rule of reason* approach for courts to analyze the legality of RPM in civil lawsuits. In this case, the plaintiff Rainbow sued Johnson & Johnson for damages due to an alleged RPM clause with punitive measures. The Shanghai High Court, in its appellate ruling, proposed a four-factor framework to determine whether a RPM clause is illegal or not: (i) whether competition in the relevant market is adequate, (ii) whether the company has a strong position in the relevant market, (iii) whether the company has the motive to restrict competition, and (iv) the balance of pro- and anti-competitive effects[3]. The court eventually ruled for the plaintiff, finding that competition in China's medical staplers and medical suture products markets was inadequate, Johnson & Johnson had a strong market position (more than 20.4 percent market share), had motive to restrict competition, and the anticompetitive effects outweighed any procompetitive effects.

The Johnson & Johnson (2013) case established the rule of reason approach for courts to analyze the legality of RPM in civil lawsuits

B. Observations of the Early Court Cases

After *Johnson & Johnson* (2013), there were a few civil cases as shown in Chart 2 that strictly followed the *rule of reason* approach. For example, in *Hengli Guochang v. Gree* (2016)4, the Guangzhou IP Court ruled in favor of the defendant on the basis that (i) Gree competed with many leading household air conditioner brands, and did not have a superior or even dominant market share in the Dongguan region; (ii) Gree had no motive to restrict competition; and (iii) consumers had adequate choices among Gree dealers even though Gree's RPM practice restricted intra-brand competition.

Tian Junwei v. Beijing Carrefour (2016) was a follow-on civil litigation after **NDRC** imposing penalty against Abbott's **RPM** practices in 2013. The plaintiff in this case claimed that a Carrefour branch in Beijing reached infant formula RPM agreements with Abbott which resulted in the plaintiff paying a higher price. To prove the existence of a RPM clause the plaintiff referred to the prior NDRC penalty decision. The Beijing IP Court and the Beijing High Court, however, concluded that the plaintiff had failed to meet their burden of proof as the NDRC penalty decision did not specify whether there had been a RPM agreement between Abbott and the Carrefour branch concerned, even if a general RPM had been proven by the NDRC decision. Furthermore, the distribution contracts submitted by the Carrefour branch did not contain any RPM clause5.

It seems clear that, the plaintiff's success in *Johnson & Johnson* (2013) notwithstanding, the courts' *rule of reason* approach made it difficult for plaintiffs to prevail in a civil RPM case, especially when the defendants lacked a high market share.

IV. The *"Prohibitions plus Exemptions"* Approach Modified by SAMR

A. SAMR's Recent Cases

Since March 2018, SAMR has imposed penalties on 7 companies for RPM practices (see Chart 3). In *Yangtze River Pharma* (2021)[6], SAMR rejected the company's low market share argument and found the object of the RPM was to exclude competition. It is evident that SAMR, like its predecessor NDRC, insisted on the "prohibition plus exemptions" approach.

3 *See*, [2012] Hu Gao Min San [Zhi] Zhong Zi No. 63, Shanghai High Court's Civil Judgment of Rainbow v. Johnson & Johnson Case (August 1, 2013), available at http://gongbao.court.gov.cn/Details/55d47a6027b07c2b5ffcf9b458d1a8.html.

4 *See*, [2015] Yue Zhi Fa Shang Min Chu Zi No. 33, Guangzhou IP Court Civil Judgment (August 30, 2016).

5 *See*, [2016] Jing Min Zhong No. 214, Beijing High Court Civil Judgment (August 22, 2016).

6 See, SAMR Penalty Decision of Yangtze River Pharma Case (April 15, 2021), available at https://finance.sina.com.cn/chanjing/gsnews/2021-04-15/doc-ikmyaawa9778051.shtml.

Chart 2 – Pre-2018 Court RPM Civil Cases and Major Factors Considered

No	Case	Relevant Market	Market Share or Similar Facts	Restriction of Competition Analysis
1	Rainbow v. Johnson & Johnson (Shanghai High Court, 2012)	Medical staplers, and medical suture products in China	More than 20.4%	①
2	Tian Junwei v. Beijing Carrefour (Beijing IP Court, 2014)	Infant formula in China	n/a	n/a
3	Hengli Guochang v. Gree (Guangzhou IP Court, 2016)	Household air conditioner market in Dongguan	n/a	①

Source: Courts' public judgments and decisions

Note:

① means the decision had a detailed discussion on restriction of competition.

② means the decision only briefly discussed the restriction of competition.

③ means no discussion of restriction of competition at all.

Chart 3 – SAMR RPM Cases and Major Factors Considered

No	Case/Court	Specific Products	Market Share or Similar Facts	Restriction of Competition Analysis
1	Bull (2021)	Converters, wall switch sockets, LED lighting, digital accessories and other power connection and power extension products	Bull's converters and wall switch sockets ranked 1st in terms of sales in Tmall, Alibaba's e-commerce platform, with 62.4% and 30.7% market share in Tmall in 2020.	②
2	Yangtze River Pharma (2021)	Lanqin oral liquid, Bailemian capsules, Astragalus extract, Epalrestat tablets, and Suhuang cough capsules.	Lanqin Oral Liquid ranked first in the category of throat medicines, Huangqijing ranked third in the category of nourishing medicines, and Bailemian Capsules ranked fourth in the category of tranquilizing sleep medicines.	①
3	Straumann (2022)	Oral implants	Straumann had a relatively high market share, and its sales and volume of oral implants were in a leading position.	①
4	Geistlich (2022)	Bone filling material and resorbable biofilm	Geistlich was in a leading position in terms of its sales and volume of relevant products.	①
5	Sesame Street English (2022)	English education	Sesame was the licensee of US Sesame Street English, and has exclusive use and sub-license rights in China.	①
6	E-Shun Pharma (2022)	Lianzhi anti-inflammatory dropping pills	100%	①
7	Zizhu Pharma (2023)	Emergency contraception pill	The product ranked 2nd on China OTC list's chemical medicine lifestyle product	②

Source: SAMR's public decisions

Note:

① means the decision had a detailed discussion on restriction of competition.

② means the decision only briefly discussed the restriction of competition.

③ means no discussion of restriction of competition at all.

B. New Features of SAMR's RPM Enforcement

Despite this consistency, SAMR's decisions showed a few new features, as shown in Chart 3.

First, a relatively high market share or the mere fact of holding a leading market position is becoming a critical element in SAMR's decisions. For example, in *Bull* (2021)7, SAMR concluded that Bull owned 62.4 percent and 30.7 percent shares in Tmall's (the e-commerce platform operated by China tech giant Alibaba) converters and wall switch sockets sales. In *E-Shun Pharma* (2022)8, the company was found to have a 100 percent market share in the sale of Lianzhi anti-inflammatory pills. In *Straumann* (2022)9, SAMR did not provide the market share, but claimed Straumann's sales and volume of oral implants were in a leading position. Similarly, in *Geistlich* (2022)10 and *Sesame Street English* (2022)11, SAMR found that both companies had leading market positions.

A relatively high market share or the mere fact of holding a leading market position is becoming a critical element in SAMR's decisions

Second, a more detailed discussion of restrictions of competition seemed to be an integral part of an RPM decision. With the exception of *Bull* (2021) and *Zizhu Pharma* (2023), SAMR has explained restrictions of competition from three aspects, i.e., the restriction of intra-brand competition, the restriction of inter-brand competition, and harms to consumers and end customers, which is similar to the analysis of alleged competition effects in *Johnson & Johnson* (2013).

Those features illustrate that the antitrust enforcement authority is now paying more attention to parties' market positions and their potential anticompetitive effects. However, since SAMR usually doesn't define a relevant market, a company with a modest market share is still likely to be exposed to public enforcement, especially when the agency finds other evidence showing the company's market power and anticompetitive effects.

V. The *Rule of Reason* Approach Adjusted by the Courts After 2018

A. Post Johnson & Johnson cases

The court system has been largely consistent with the *rule of reason* approach established by the *Johnson & Johnson* (2013) case after 2018. However, there have also been a few new developments. Chart 4 below shows the post-2018 court cases and major factors considered.

B. The New Developments after 2018

First, courts seem to still require a relatively high market share. As discussed in the previous section, in *Hengli Guochang v. Gree* (2016)[12], the Guangzhou IP court ruled that, among other things, Gree did not have a superior market share or even a dominant position. In the appeal, Guangdong High Court further concluded that the China household air conditioner market was quite competitive and there was no serious anticompetitive effect, even though Gree owned a 25-40 percent share in that market. This market share was higher than 20.4 percent in *Johnson & Johnson* (2013), which found competition in China's medical staplers, and medical suture products market was inadequate. For another

7 *See*, Zhejiang AMR's Penalty Decision of Bull Case (September 27, 2021), available at https://www.samr.gov.cn/fldys/tzgg/xzcf/202204/t20220424_341615.html.

8 *See*, Hainan AMR's Penalty Decision of E-Shun Pharmaceutical Case (June 24, 2022), available at https://www.samr.gov.cn/fldys/tzgg/xzcf/202207/t20220722_348871.html.

9 *See*, Beijing AMR's Penalty Decision of Straumann Case (December 28, 2022), available at https://www.samr.gov.cn/fldys/tzgg/xzcf/202212/t20221230_352562.html.

10 *See*, Beijing AMR's Penalty Decision of Geistlich Case (February 9, 2022), available at https://www.samr.gov.cn/fldys/tzgg/xzcf/202204/t20220424_341747.html.

11 *See*, Beijing AMR's Penalty Decision of Sesame Street English (July 12, 2022), available at https://www.samr.gov.cn/fldys/tzgg/xzcf/202207/t20220727_348944.html.

12 *See*, [2016] Yue Min Zhong No. 1771, Guangdong High Court's Civil Judgment of Dongwan Hengli Guochang Electronic Shop v. Dongwan Shengshi Xinxing Gree Trade Co., Ltd. Case (July 19, 2018), available at https://www.gdcourts.gov.cn/index.php?v=show&cid=236&id=54702.

Chart 4 – Court RPM Civil Cases after 2018 and Major Factors Considered

Year	Case/Court	Relevant Market Defined	Market Share or Similar Facts	Restriction of Competition Analysis
1	Hengli Guochang v. Gree (Guangdong High Court, 2018)	China household air conditioner market	In 2013, Gree had 25-40% share in air conditioner market, followed with competent rivals.	①
2	Guangming Trade v. Hankook Tire (Shanghai High Court, 2018)	China passenger car tires market, passenger car tire replacement market, wholesale market in passenger car tire replacement market	Hankook's tire sales were less than 5% market share, and it was not among top 10 tire producers in mainland China.	①
3	Miuchong v. SAIC General Motors (Shanghai High Court, 2018)	Chevrolet 1.4AT Tracker	Plaintiff referred to Shanghai Price Bureau's RPM penalty decision against SAIC General Motors	③
4	Kangjian Miaomiao v. Dentsply (Hangzhou Intermediate Court, 2019)	Dentsply Sirona products	The plaintiff claimed that the defendant had more than 13% market share in global dental market	①

Source: Court's public civil judgments

Note:

① means the decision had a detailed discussion on restriction of competition.

② means the decision only briefly discussed the restriction of competition.

③ means no discussion of restriction of competition at all.

example, in *Guangming Trade v. Hankook Tire* (2018)[13], Shanghai's High Court dismissed the plaintiff's appeal due to the failure to prove Hankook (with less than 5 percent market share) had a strong market power. Similarly, in *Kangjian Miaomiao v. Dentsply* (2019)14, the Hangzhou Intermediate Court emphasized that the 13 percent market share held by the defendant in the global dental product market was far from representing strong market power.

Second, the follow-on litigation seems to have provided the plaintiff with an alternative vehicle for bypassing the rigid market share requirement. For example, in the recent *Miuchong v. SAIC General Motors* (2018)15 case, the Supreme People's Court ruled that the plaintiff's direct reference to the antitrust authority's prior penalty decision was adequate to prove the existence of RPM and its anticompetitive effect. Therefore, the plaintiff only has to prove the damages suffered from the defendant's RPM practice regardless of the fact that the defendant is not likely to have a strong market position given the competition landscape of China's automotive market.

Therefore, it remains challenging for plaintiffs to prevail in RPM civil cases when the defendants lack strong market power. However, the courts seem to attach less importance to defendants' market shares in follow-on cases as long as the administrative penalty decisions successfully withstand administrative reconsideration or judicial review or become unchallengeable due to statute of limitations.

13 *See*, [2018] Hu Min Zhong No. 475, Shanghai High Court's Civil Judgment of Wuhan Hanyang Guangming Trade Co., Ltd. v. Shanghai Hankook Tire Sales Co., Ltd. Case (July 13, 2020), available at http://yxcpws.court.gov.cn/wspx/hundred/detail?oid=ac020201-229e-11ec-874a-286ed488c78e.

14 *See*, [2019] Zhe 01 Min Chu No. 3270, Zhejiang Hangzhou Intermediate Court Civil Judgment of Kangjian Miaomiao v. Dentsply Case (October 13, 2020), available at https://cclp.sjtu.edu.cn/Show.aspx?info_lb=672&info_id=4805&flag=648.

15 See, [2018] Hu 73 Min Chu No. 537, Civil Judgment, Shanghai Intellectual Property Court (Feb 28, 2020); and [2020] Zui Gao Fa Zhi Min Zhong No. 1137 Civil Judgment, Supreme People's Court (Dec 25, 2022).

VI. CONCLUSIONS

A company with a market share (i.e., 10-15 percent) that implements RPM clause may face different degrees of antitrust risks depending on the individual development of public enforcement or judicial proceedings.

On the one hand, although SAMR has attached more importance to the party's market power and competition effects analysis than NDRC, it's still likely to apply the RPM articles of the AML to companies with modest market shares in practice.

On the other hand, the courts, which have consistently observed the *rule of reason* approach, have shown great reluctance to rule for plaintiffs when the defendants lack strong market power. However, in follow-on civil lawsuits, plaintiffs may be more likely to circumvent the high bar under the *rule of reason* approach and prevail, as the recent *Miuchong v. SAIC* (2018) indicates.

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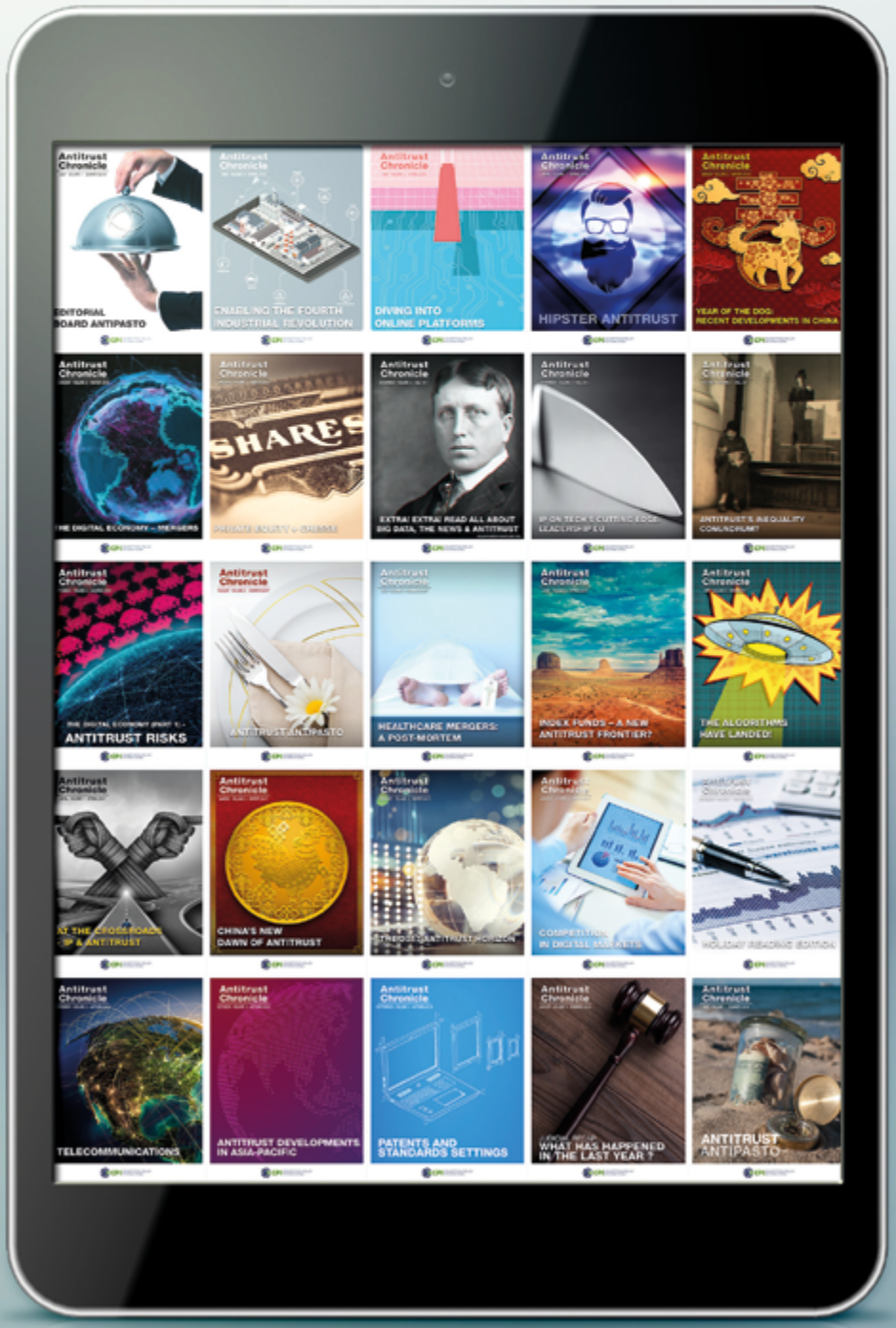


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