Africa, Asia & Australia Enforcement Update

Update by Kate Wallace

Japan's Antimonopoly Act Sees Drastic Overhaul in 2009

On June 3, 2009, the Japanese Diet passed a bill that amended Japan's Antimonopoly Act ("AMA") to, *inter alia*, allow the antitrust regulator to impose larger surcharges (administrative fines) on companies engaged in certain types of unilateral conduct.[1] Prior to the amendments, only "controlling" types of single-firm conduct were subject to surcharges under the AMA. The amendments authorized the Japanese Fair Trade Commission ("JFTC") to impose surcharges on "exclusionary" unilateral conduct, including:

- Monopolization, by excluding competitors from the market (subject to surcharges of 6% of turnover during the violation);
- Unfair business practices, such as sales below cost, if a violator is found to have engaged in such conduct more than once within a ten-year period (subject to surcharges of 3% of turnover during the violation); and
- Abuse of dominant bargaining position (subject to 1% of the amount of transactions with the other party).

Offering further clarity to the amendments, on October 28, 2009, the JFTC issued its Guidelines for Exclusionary Private Monopolization under the AMA (the "Guidelines"). The Guidelines were released after the JFTC received recommendations from other regulating committees and professional organizations from around the world. The Guidelines shed light on how the JFTC will prioritize investigations, the types of major exclusionary conduct that it deems problematic and the factors that will be considered to determine whether competition is being restrained in a particular field of trade.[2]

The JFTC announced that it will give investigative priority to matters where the entity's share of the product or market in question exceeds 50% and where the entity's conduct is deemed to have a *"serious impact on the lives of national citizenry."*

The JFTC defined exclusionary conduct as conduct that *"make[s] it difficult for other entrepreneurs to continue their business activities or for new market entrants to commence their business activities."* This would include below-cost pricing, exclusive dealing, refusal to supply or tying, although this list is not intended to be exhaustive.

Finally, whether a company's conduct amounts to a substantial restraint on competition depends on the scope of the product and/or the relevant geographic market as it relates to offender's market control. The JFTC will therefore consider the position and conditions of the company and its competitors, potential competitive pressure, user's countervailing bargaining power, efficiency and any exceptional circumstances that benefit consumers' interests, the JFTC said.

JFTC Issues Cease and Desist to Qualcomm

On September 30, 2009, the Japanese Fair Trade Commission issued a cease and desist order to Qualcomm, Inc. ("Qualcomm"), a United States-based mobile phone chipmaker, requiring that Qualcomm rescind license provisions that required licensees to cross-license their patents to Qualcomm and refrain from asserting their own patents against Qualcomm or Qualcomm licensees.[3]

The patents in question bear on the standards for cellular equipment that had been adopted for use in Japan. In 2000, the Association of Radio Industries and Businesses ("ARIB"), the organization responsible for communications standards in Japan, promulgated the standards for third-generation ("3G") wireless telecommunications devices. ARIB announced that any company owning intellectual property rights essential to the manufacture and sale of 3G ARIB standards-compliant devices ("Essential IP Rights") must submit a letter to ARIB describing its ownership interest and commit to license the IP unconditionally or under fair, reasonable and non-discriminatory terms. Qualcomm owned Essential IP Rights and submitted a letter to ARIB stating that it would license its IP rights under fair, reasonable and non-discriminatory terms.

Given Qualcomm's declaration, Japanese handset manufacturers recognized that they had to obtain licenses from Qualcomm to manufacture or sell their own wireless telecommunications products. The JFTC alleged that despite its commitment to license under fair, reasonable and non-discriminatory terms, Qualcomm used unreasonable cross-license agreements and non-assertion provisions ("NAPs") with the manufacturers. The cross-license agreements allowed

[1] *See* Japan Fair Trade Commission ("JFTC"), *Approval to Amend Antimonopoly Act*, June 3, 2009, available here; *See also*, JFTC, *Summary of the Amendment to the Antimonopoly Act*, June, 2009, available here.

[2] *See* JFTC, *Guidelines* available here (factors for assessing exclusionary conduct).

[3] *See* The Japan Fair Trade Commission, *Cease and Desist Order against Qualcomm Incorporated*, September 30, 2009, available here.

Qualcomm to gain access, royalty free, to the manufacturers and sellers' intellectual property, while the NAPs prevented the manufacturers or sellers from asserting any claims, including infringement of patents, against Qualcomm or any Qualcomm licensee. According to the JFTC, the manufacturers and sellers had no choice but to enter into these agreements because Qualcomm owned Essential IP Rights that were needed to manufacture standards-compliant devices. Further, the JFTC found that, if the manufacturers/sellers did not agree to the terms, Qualcomm had threatened to file lawsuits to enjoin the Japanese manufacturers from selling 3G standards-based wireless devices.

After a thorough investigation, the JFTC concluded that the licenses negatively impacted fair trade by reducing the incentive of manufacturers and sellers to conduct research and development related to products using this technology while further strengthening Qualcomm's position in the market, thereby impeding competition. The JFTC thus ordered Qualcomm to rescind the royalty-free cross-license provisions, to rescind the NAPs, and to refrain from similar conduct regarding Qualcomm IP rights related to wireless telecommunications. Qualcomm was also ordered to notify the Japanese manufacturers of the measures it has taken to comply with the rescissions of the cross-license and NAPs. The order applies to Qualcomm licenses with Japanese handset manufacturers, Japanese handset sellers, Japanese base station (antenna equipment which supports mobile service) manufacturers, and Japanese base station sellers.[4]

For its part, Qualcomm acknowledged use of the licenses, but has stated its disagreement that the licenses impede fair trade. Qualcomm noted that the JFTC's concern centered around what Qualcomm characterized as common, industry-standard licensing terms and has stated that the terms of the licenses were pro-competitive and were settled upon after intense, arm's-length negotiations between sophisticated parties.

Under the AMA, Qualcomm may request a hearing on the matter to challenge the JFTC's factual and legal conclusions. On September 30, 2009, Qualcomm announced it "will exercise its right under Japanese law to have a full evidentiary hearing. If the JFTC affirms the order following administrative review, Qualcomm will pursue an appeal before the Japanese courts."[5]

[4] *See* Law360, *JFTC Orders Qualcomm to Drop Licensing Provisions*, September 30, 2009, available here. (only available to subscribers of Law360, author: Allison Grande)

[5] *See* Qualcomm press release, *Qualcomm Provides Update on JFTC Investigation*, August 13, 2009, available here.

Telecom Found to Have Blocked Competition in High-Speed Data Transmission Markets

On October 9, 2009, the High Court of New Zealand found that Telecom Corporation of New Zealand and Telecom New Zealand Limited (together, "Telecom") used its substantial market power to prevent and deter competition in markets involving high-speed data transmission.[6]

The Commerce Commission alleged that, between December 1, 1998 and late 2004, the wholesale price charged by Telecom to other telecommunication service providers ("TSPs") for access to data tails (the connection between the customer's premises and the TSP's own network) was so high relative to Telecom's retail price, as to cause what is known as a "price squeeze." A price squeeze occurs when a dominant, vertically integrated supplier sets prices in the upstream wholesale market in a manner that prevents equally or more efficient competitors from profitably operating in the downstream retail market.[7]

The High Court in Auckland agreed with the Commerce Commission and found that Telecom violated Section 36 of the Commerce Act of 1986 by using its dominant position in the wholesale market for data tails to set wholesale prices and other terms on which it supplied data tails to TSPs at a level that would prevent or deter existing or potential TSPs from competing in the relevant retail market. In particular, the Court found that Telecom's wholesale data pricing to competitors was consistent with its strategy to deny competitors access to prices that would permit the rivals to utilize and develop their own networks for the purpose of data transmission.

"The Commission is pleased with the Court's decision, which confirms that dominant firms must price essential inputs to a competitor in a downstream market so as to enable efficient competitors to compete," said Commerce Commission Chair Dr. Mark Berry.

The Court reserved the imposition of a penalty against Telecom for separate consideration.

Qualcomm Faces More Sanctions in Korea

On July 23, 2009, the Korean Fair Trade Commission ("KFTC") fined Qualcomm 260 billion won ($208 million) and ordered the U.S. wireless chip and technology company to stop discriminating against companies using competitor's

[6] *See* New Zealand Commerce Commission, *Telecom Blocked Competition in High-Speed Data Transmission Markets*, October 14, 2009, available here. (press release by New Zealand Commerce Commission)

[7] *See* Commerce Commission v. Telecom Corp. of New Zealand (2009) at § 3., available here.

products.[8] The fine is the largest that the antitrust agency has ever imposed against a single company.

The KFTC found that Qualcomm abused its dominant market position—a 99.4% market share—by charging higher royalties for its code division multiple access ("CDMA") technologies to companies that bought modem chips from Qualcomm's competitors and by giving rebates to companies that used Qualcomm's chips. Claims relating to the company's business practices with respect to wideband code division multiple access ("WCDMA") were dropped for lack of evidence.

The ruling concludes a three-year investigation into anticompetitive practices by the KFTC. In 2006, KFTC officials raided the company's offices in Seoul as part of a series of regulatory actions by the Commission against U.S. technology firms operating in Korea.

In a prepared statement, Qualcomm stated that the KFTC's findings were the result of *"factual and legal errors"* and complained that the KFTC ignored the fact that Qualcomm's *"practices in Korea have been lawful, highly beneficial to its customers and the Korean wireless industry, and pro-competitive."*

Microsoft Escapes Two Korean Antitrust Actions Unscathed

Two separate trial courts in the Seoul Central District have ruled against Microsoft for trying to monopolize the market by selling the Windows program and the Windows Media Service ("WMS") program as a bundle, but both times the courts refused to assess a penalty, citing lack of evidence.[9]

Most recently, on September 14, 2009, presiding Judge Hwang Jeok-hwa found that "[b]y selling the WMS as a mandatory option of the Windows program, Microsoft limited consumers' rights to choose and violated the rule of fair competition."[10] The court, however, rejected the applicant's claim that Microsoft, through such tie-in sales, caused 100 billion won ($81.7 million) in damages. "*Though the market share of the application, a maker of a video player program, may have fallen, there is not sufficient proof that it was directly due to the tie-in sales by Microsoft*," said the court.

The Seoul Central District Court similarly ruled in June that Microsoft unlawfully abused its dominant position in the market and promoted an illegal combination sale, but held Microsoft not liable for compensation.

The losing parties have vowed to appeal the decision.

Telkom May Face Fines for Abuse of Dominance

On October 28, 2009, the South Africa Competition Commission (the "Commission") referred its findings of abuse of dominance against Telkom, the largest fixed-phone company in Africa, to the Competition Tribunal for adjudication. The Commission asked that the Tribunal levy an administrative penalty of 10% of Telkom's annual turnover for its financial year ending March 31, 2009.[11]

The Commission commenced an investigation following complaints by several Internet service providers ("ISPs"), including Verizon South Africa (Pty), Multichoice Subscriber Management Services (Pty) Ltd and Internet Solutions. The complaints were lodged at various times between 2005 and 2007, but the Commission combined the complaints for purposes of the investigation because they raised overlapping concerns. Throughout the investigation, the Commission enjoyed cooperation from the Independent Communications Authority of South Africa, the governing body regulating the communications sector.

The Commission found that Telkom abused its near-monopoly position by charging its downstream competitors, the ISPs, excessive prices for the basic infrastructure needed to access a range of telecommunications services while keeping its own ISP service charges low. In this way, Telkom raised its downstream competitors' costs, making it difficult for them to sell cost-effective services to end-consumers. As a result, Telkom's downstream competitors consistently lost market share while the company's own shares increased, *"pointing to an inability on [the ISPs'] part to compete effectively with Telkom,"* the Commission said.

The Commission determined that Telkom prices to ISPs were excessive after comparing the company's *"prices to its costs, prices in other countries, prices of other operators offering similar services and prices to customers of Telkom who posed a competitive threat to it."*[12] The Commission found that in 2006, Telkom's prices were more than double the average of South Africa's major trading partners. Given the prevalent

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8 *See* Korean Fair Trade Commission, *Qualcomm's Abuse of Dominance*, July 23, 2009, available here.

9 *See e.g.*, Law360, *Microsoft Escapes Payout for S. Korea Market Abuse*, June 11, 2009, available here (June Case) (only available to subscribers of Law360, author: Morgan Bettex). *See also*, Korean Post, *Court Rules Against MS Monopoly*, September 14, 2009, available here (September Case) (article published in The Korea Times, by Park Si-soo); Korean Herald, *Local Court Blames MS for Abusing Leading Status*, September 15, 2009, available here (article published in the Korean Herald, by Bae Hyun-jung) .

10 *See* Korean Herald, *Local Court Blames MS for Abusing Leading Status*, September 15, 2009, available here. (article published in the Korean Herald, by Bae Hyun-jung) .

11 *See* South Africa Competition Commission, *Competition Commission Refers Abuse of Dominance Findings against Telkom*, October 28, 2009, available here. (press release by South Africa Competition Commission)

12 *Id.*

use of the Internet worldwide, the Commission found that Telkom's high prices adversely affected consumers and burdened economic development in South Africa. As a result of these findings, the Commission sent its recommendations to the Tribunal.

Telkom indicated that it would prepare its response to the referral in accordance with the relevant rules and procedures applicable to the proceedings before the Competition Tribunal.