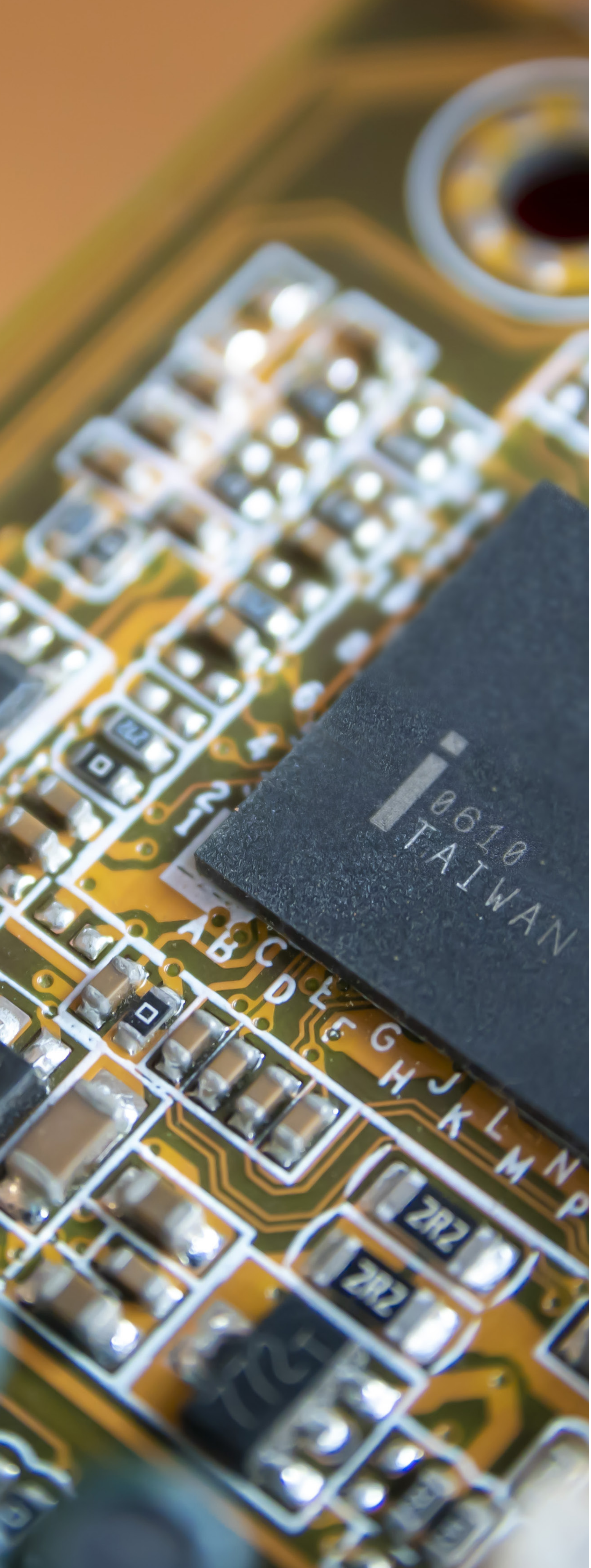
WHITE & CASE

Taiwan in the changing global landscape

Significant legal and business developments during 2020



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Executive summary

2020 witnesses a year filled with significant changes to all of our professional and personal lives

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Businesses and individuals worldwide are witnessing significant geopolitical fractures that have resulted in significant changes to various aspects of the global legal landscape, such as financing, trade, sanctions, foreign direct investment (FDI), intellectual property and antitrust. The COVID-19 pandemic has also negatively affected many aspects of deal-making, with general corporate finance transactional activity levels significantly lower than last year. On the other hand, distressed M&A, restructuring and financing activities are on the upswing, as is the case for investments in sectors that are primed to take center stage in a post-COVID-19 world.

Taiwanese companies and financial institutions are not immune to these global developments. Indeed, Taiwan's unique positioning in the global supply chain and other areas warrants special attention to some of these issues faced by other players globally.

While the COVID-19 pandemic has prevented us from seeing clients in person in Taiwan this year, we continue to focus on the latest legal issues and trends affecting our Taiwanese clients and other contacts globally. Through a series of webinar presentations and online meetings, our objective this year is to deliver to you updates on the following key topics of interest:

- A series of key antitrust developments in Europe and the US highlight the continuing focus on regulatory enforcement in those jurisdictions
- The convergence of adversarial capital and COVID-19 is ratcheting up FDI controls worldwide in a growing list of sectors
- While the current de-coupling trend between the US and the People's Republic of China (PRC) is creating opportunities for Taiwanese exporters, it also raises significant risks for companies caught in the middle, particularly if they ship finished goods to the US that contain non-Taiwan-origin parts
- A new "rocket docket" for patent litigation in the US serves as a potential obstacle for Taiwanese companies that maintain operations in and around Austin, Texas, a growing US technology hub
- Finally, we discuss the current state of Asia-Pacific lending markets, with insights for Taiwanese businesses on where regional credit activity may focus in the coming months, and explore what current private equity and M&A trends in the Asia-Pacific region may mean for Taiwanese investors

We hope this report and our recent webinars are helpful in navigating a swiftly changing landscape.

Europe again has the technology sector in its target zone

Guidance for Taiwanese companies

By James Killick

For many years, the European Commission (the Commission) has been the global leader in applying antitrust law to the technology sector. This year is no exception. Indeed, there have been a number of new European enforcement initiatives in 2020, with the technology sector a primary focus of the Commission's enforcement activity right now.

Understanding the Commission's current approach to antitrust scrutiny can help Taiwanese companies both avoid becoming the target of an enforcement investigation and identify potential sources of help if they suffer anti-competitive or abusive conduct from others.

This article provides a summary of key recent antitrust developments in Europe, including high-profile cases, the Commission's new powers to stop subsidized foreign acquisitions and foreign direct investment (FDI) and how Europe's debates on FRAND no longer center around mobile phones, but are increasingly about cars.

EUROPE'S REPUTATION AS GLOBAL TECHNOLOGY SHERIFF WAS – AND REMAINS – WELL DESERVED

Given its enforcement activity over the last two decades, the European Union (EU) became known as the global technology sheriff.

This began with two major EU cases:

- In 2004, Microsoft was found to have abused its dominant position by refusing to supply interoperability information to its competitors and by tying Windows Media Player to Windows. A compulsory license and unbundling remedy was imposed
- In 2009, the Commission found Intel had abused its dominant position on the x86 CPU market by granting rebates conditioned on exclusivity and imposing so-called "naked restraints." Intel's court case against the decision is still ongoing: There was a three-day hearing in March 2020, and a judgment on the merits should come in the next 12 months

The Commission has remained equally active in recent years, adopting important decisions in cases involving Google and Qualcomm:

- In *Android*, the Commission found Google had abused its dominant positions by requiring manufacturers to pre-install the Google Search app and Chrome as a condition for licensing the Google Play app store. The case also concerns certain provisions in the anti-fragmentation agreement. An appeal is ongoing, with a hearing expected in the next six months or so
- The Commission also found against Google for self-favoring (a novel theory) its own Shopping services compared to rival comparison-shopping services. Google appealed, and a judgment is expected within the next 12 months
- The Commission has adopted two decisions finding Qualcomm guilty of abusing its dominant position. One concerned exclusivity clauses in one of Qualcomm's contracts, and the other was about predatory pricing. Qualcomm has appealed both decisions

In addition to its casework, the Commission is very active on the policy front. Since the start of 2020 alone, it has published "Communication on Shaping Europe's digital future, a White Paper on AI and a Communication on a European strategy for data." This shows that the technology sector continues to be an area of enforcement focus in Brussels, as several recent cases highlight.

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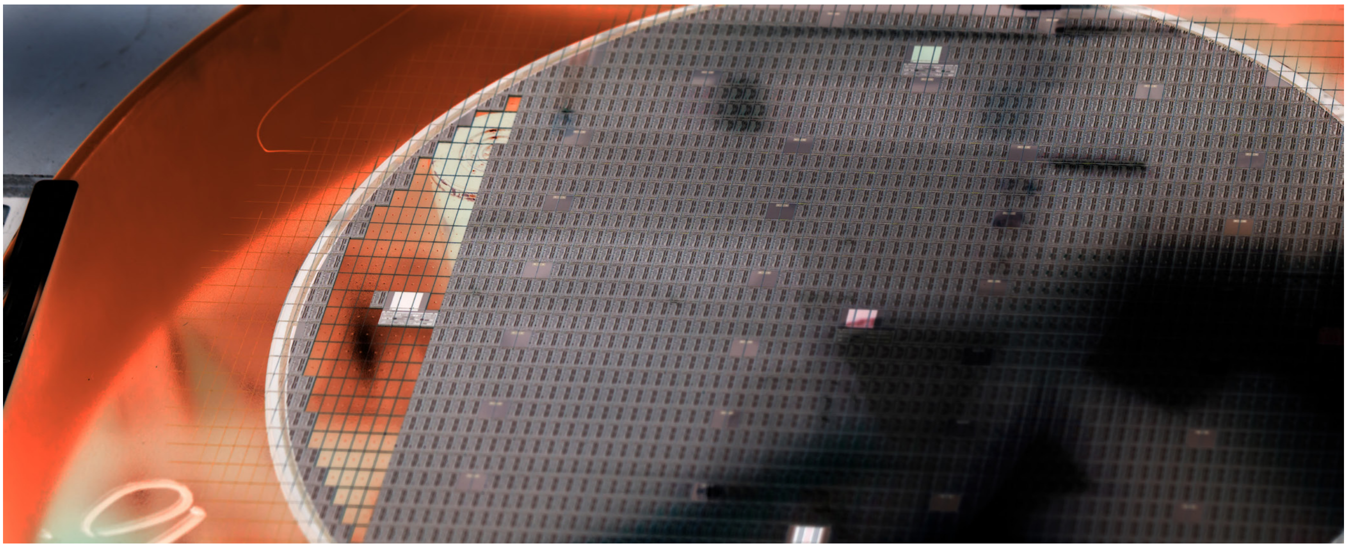
> **2020 – New European enforcement initiatives**

Investigating the Apple App Store

In June 2020, the Commission formally opened an investigation to assess whether Apple's rules for app developers on the distribution of apps via the App Store violate EU competition law. The investigation's concern, in particular, is the mandatory use of Apple's own proprietary in-app purchase system and restrictions on the ability of developers to inform iPhone and iPad users of alternative cheaper purchasing possibilities outside of apps.

Broadcom: Interim measures, then commitments

In June 2019, the Commission opened proceedings into alleged anticompetitive practices by Broadcom, covering both exclusivity arrangements and IP/interoperability issues. In October 2019, the Commission imposed interim measures that prevented Broadcom from imposing exclusivity and quasi-exclusivity arrangements on six of



its main customers for Systems-on-a-Chip (SoCs) for TV set top boxes, xDSL modems and fiber modems.

In April 2020, Broadcom offered a package of commitments in order to address the Commission's competition concerns about the exclusivity arrangements. These commitments would lead to the case in relation to the exclusivity arrangements being closed, based on Broadcom respecting the undertakings it has given for five years. But although the commitments would bring a speedy end to the exclusivity part of the case, they do not address the other aspect of the investigation into IP/interoperability.

The Commission's IoT sector inquiry

In July 2020, the Commission opened a sector inquiry on the Internet of Things (IoT), covering products such as wearable and connected consumer devices used in the smart home context. It has sent out multiple questionnaires, based on its concern that certain practices may structurally distort competition, by restricting data access and interoperability. It is also examining self-preferencing and practices linked to the use of proprietary standards. A preliminary report is due in spring 2021–and then could be followed by investigations into specific companies.

THE COMMISSION'S NEW POWERS TO STOP SUBSIDIZED FOREIGN ACQUISITIONS AND FDI

In March 2020, the Commission issued Guidelines to coordinate the EU's approach to FDI screening in light of the COVID-19 crisis and to protect the EU's critical assets and technologies from potential hostile takeovers and investments by non-EU companies. The technology sector is one of the key sectors in which the Commission suggests increased use of new FDI screening mechanisms.

In addition, the Commission published a June 2020 white paper about a proposed new tool to control the acquisitions and activities of foreign-subsidized companies in the EU. The proposed tool contains three elements: (i) an ex post control mechanism to review competitive distortions; (ii) a mandatory ex ante notification mechanism that would allow the Commission to review foreign subsidized acquisitions, including certain minority investments; and (iii) the possibility to exclude bidders that have received distortive foreign subsidies from public contracts. This proposed tool is still far from becoming law, but the technology sector will likely be a key area of focus for the second pillar of the tool.

FRAND IS NOW ALL ABOUT CARS

The debates in Europe about FRAND license terms are now firmly anchored in the automotive sector. One debate is about whether FRAND licenses for components used in cars should be offered to any company in an automotive manufacturer's supply chain. Carmakers filed an antitrust complaint with the Commission based on Nokia's refusal to grant a license to automotive suppliers, arguing that it is an abuse of a dominant position.

The Commission's ruling on this topic will obviously be of great relevance to the technology sector, as the Commission has not previously answered this question in a pure technology context. Nokia responded by seeking royalties and an injunction against certain car manufacturers and suppliers. This case is ongoing, and while Nokia recently won an initial ruling, the carmakers have appealed. What is clear is that the rules on FRAND will increasingly be driven by cars, not phones!

CONCLUSION

Since the Commission continues to focus its antitrust enforcement efforts and scrutiny on the technology sector, Taiwanese companies need to keep Europe in mind when thinking about antitrust. This can both help them avoid becoming caught up in an investigation and serve as a source of assistance if they are victimized by anti-competitive or abusive conduct by others.

New US antitrust implications for your supply chain

What *Quanta Storage* and *Qualcomm* mean for Taiwan's businesses

By Noah Brumfield

Antitrust litigation in the US continues to focus on competitor interactions. Companies that participate in multiple levels of a supply chain must consider how to engage with their competitors and even whether that engagement should take place in the first place.

RECENT HIGH-PROFILE CASES

Two prominent US Circuit Court rulings in 2020 highlight the continuing risks of entering into agreements with competitors and other types of competitor interactions and coordination at all levels of a supply chain. They also show that price-fixing allegations and follow-on private actions remain a potentially fertile source of antitrust litigation in the US.

In 2020, one influential US appellate court confirmed an extraordinary US$439 million award against Taiwan-based Quanta Storage in private litigation over alleged antitrust conspiracy. The complaint in that case followed a government investigation of the company's competitors. Soon afterwards, a different appellate court relieved Qualcomm—a leading modern chip supplier—of antitrust liability, while potentially leaving options open for further antitrust theory development.

Both of these cases are potentially relevant to Taiwanese companies conducting business in the US.

HP v. Quanta Storage

Before the *HP v. Quanta Storage* case was brought, the US Department of Justice (DOJ) investigated multiple suppliers of optical disc drives (ODDs) for an alleged bid-rigging conspiracy to exchange confidential pricing and related information, set prices and allocate customers and markets. After the DOJ obtained a guilty plea from Hitachi-LG, private plaintiff lawsuits followed, including an October 2013 lawsuit by HP.

The case is notable for a number of reasons. First, the DOJ case did not allege a violation by the entire ODD industry. Yet the private plaintiffs named others, including Quanta Storage. All of the defendants in the case eventually settled with HP, except Quanta Storage, which claimed it had not participated in the conspiracy.

In 2019, a Houston, Texas jury ruled against Quanta Storage in favor of HP and awarded HP US$176 million in damages. Since the US Sherman Antitrust Act provides for automatic treble damages, the trial court ended up increasing the award to US$439 million and entered a harsh order requiring Quanta Storage to turn over business assets valued at US$439 million to satisfy this judgment.

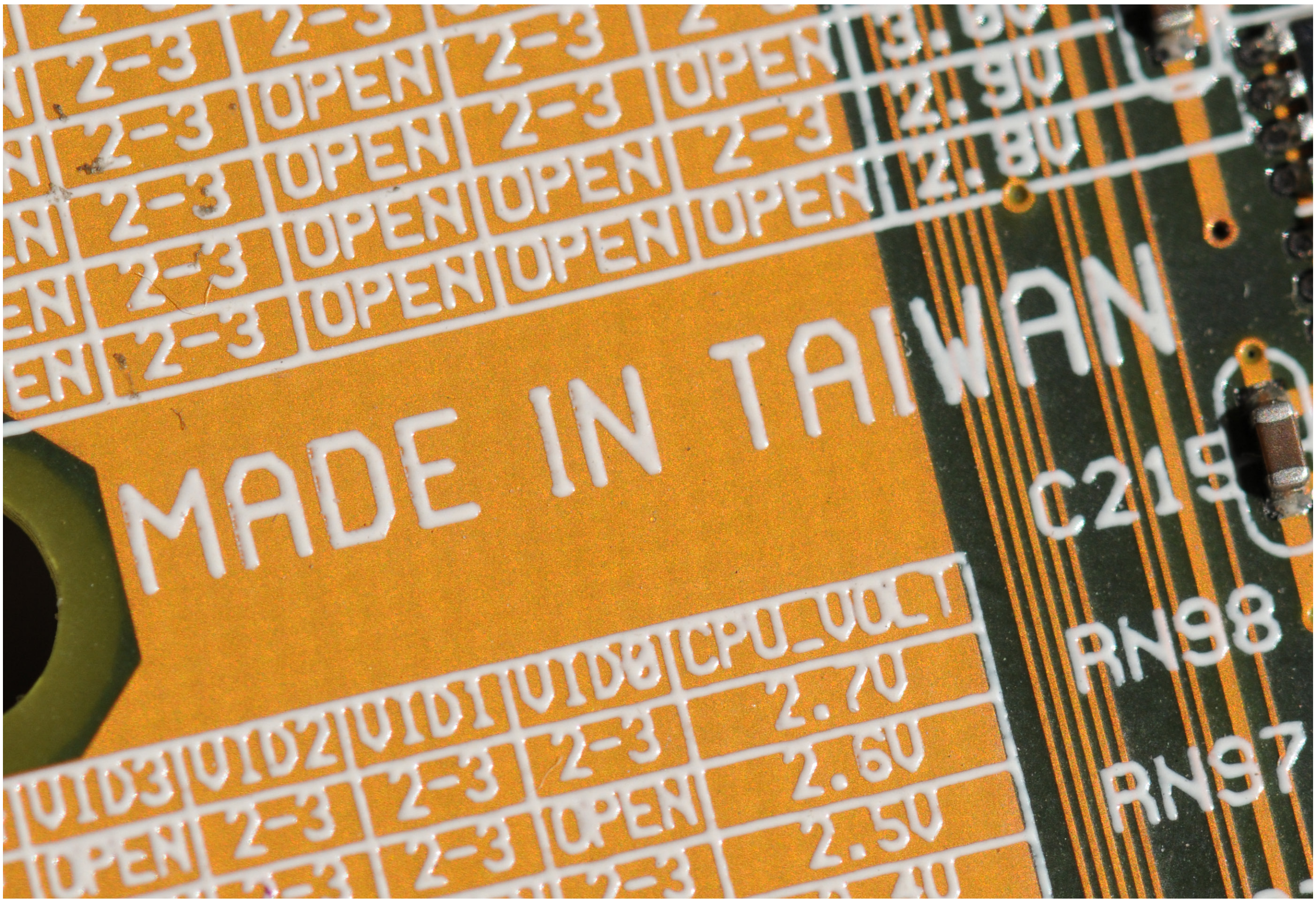
In reviewing the case, the US Fifth Circuit Court of Appeals focused on extraterritoriality, damages and unique Texas procedural rules on judgments. In June 2020, the Fifth Circuit upheld the judgment for HP, finding that the jury had sufficient evidence to justify the damages award, but the appeals court set aside the turnover order to allow more time to complete the procedural steps required under Taiwanese and PRC law to turn over assets located in Taiwan and the PRC. Soon afterwards, HP and Quanta settled out of court for an undisclosed amount.

> "Companies that participate in multiple levels of a supply chain must consider how to engage with their competitors and even whether that engagement should take place in the first place.

FTC v. Qualcomm

In *FTC v. Qualcomm Inc.*, the US Federal Trade Commission (FTC) challenged Qualcomm's licensing practices, alleging that Qualcomm had engaged in exclusive dealing and leveraged its chip modem monopoly to obtain unreasonable licensing fees by requiring its customers to license Qualcomm's patents in order to purchase its modem chips ("No license, no chips").

The FTC argued that because Qualcomm participated in the chip supply chain as a chip supplier, its refusal to license its patents to rival OEMs breached its FRAND commitment and resulted in a violation of the US antitrust laws. The FTC's theory was that participating in a standards-setting process limits technology competition (members agree on a single standard, rather than compete by offering different technologies). This lost technology competition would be an acceptable business practice, according to the FTC, only if FRAND licensing could prevent a patent holder like Qualcomm from abusive standards capture.



The trial court reframed the case as an issue of Qualcomm's general "duty to deal" apart from its standards setting. The trial court's analysis was based on an exceptional obligation owed by monopoly holders under the US Supreme Court's 1985 *Aspen Skiing* decision. Then in August 2020, the US Ninth Circuit Court of Appeals reversed the trial court's ruling and rejected its analysis that Qualcomm had met the *Aspen Skiing* duty-to-deal standard.

According to the Ninth Circuit, a dispute over FRAND licensing should be viewed as a contract or patent dispute, and Qualcomm had not engaged in illegal exclusive dealing (having entered into the challenged agreement before it had any competitors). The appeals court did not need to address the FTC's trial theory that participating in a standards-setting process altered Qualcomm's freedom to refuse to license OEMs as a matter of antitrust law.

KEY TAKEAWAYS FOR TAIWANESE BUSINESSES

Although the Quanta Storage loss and the Qualcomm reversal produced different results for those companies, several lessons emerge from these two cases for Taiwanese companies.

Be vigilant about competitor agreements – First, realize that agreements with competitors will continue to face significant US antitrust scrutiny. Coordinating on how to compete for even a single customer's purchases (potentially risking bid-rigging allegations) could be equated with price-fixing. Companies can also face possible strict liability for entering into agreements with competitors about market allocations, outputs and no-hire decisions.

Expect plenty of private lawsuits – As with *HP v. Quanta Storage*, runaway private lawsuits may seek to target an entire industry after one company reaches a criminal plea deal with regulatory authorities, even if that plea does not implicate every supplier in the industry.

Pay attention to framing essential patent licenses – How you frame a license for a standard-essential patent (SEP) remains important for US antitrust analysis. Since the Ninth Circuit's Qualcomm ruling did not definitively address the FTC's antitrust theory, it remains open whether a FRAND dispute could be deemed an antitrust violation when viewed through the lens of standards-setting abuse or traditional antitrust theories (such as exclusive dealing or tying).

No matter how the year ahead unfolds, Taiwanese innovators doing business in the US should continue to pay attention to antitrust pitfalls. Otherwise, growth and expansion could lead to significant risks.

Adversarial capital and COVID-19 converge to expand FDI regimes – Watch this space!

Already burgeoning, foreign direct investment regulations worldwide are bulking up still more in response to emerging threats

By Farhad Jalinous and Tilman Kuhn

Over the past few years, countries around the globe have started to either implement or ratchet up their foreign direct investment (FDI) controls. Once the exclusive domain of sectors traditionally associated with national security, FDI reviews are ramping up in healthcare, high technology (especially "dual use" technology), real estate and a growing list of other sectors. Indeed, FDI considerations now reside among the top-five major issues in any cross-border M&A transaction, and have become a real string of regulatory reviews in addition to merger control.

The ongoing global expansion of FDI controls stems from many sources. Two, in particular, have come to the fore in 2020 to intensify review activity: adversarial capital and, of course, COVID-19.

ADVERSARIAL CAPITAL GRABS THE SPOTLIGHT

Broadly speaking, adversarial capital (or adversarial investment) describes investments made by foreign rivals that buy into nascent technology or financially vulnerable companies whose work may have applications in sensitive industries but doesn't yet fall under the radar of the local national security review regime. Adversarial investments potentially position foreign adversaries to ultimately own assets in sensitive industries without having had to undergo and pass a thorough national security review.

> **"Countries around the globe have started to either implement or ratchet up their foreign direct investment (FDI) controls.**

Adversarial capital is most often framed as a US concern, particularly regarding inbound investment from the People's Republic of China (PRC). But FDI regimes worldwide are not just watching the US response but are beginning to prepare—or already have prepared and are broadening and stepping up enforcement of—their own.

In March 2020, the US Department of Defense (DoD) raised the alarm regarding adversarial investments in US companies. Ellen Lord, the US Undersecretary of Defense for Acquisition and Sustainment, told reporters, "It's critically important that we understand that during this crisis the [defense-industrial base] is vulnerable to adversarial capital, so we need to ensure companies can stay in business without losing their technology." Lord warned that struggling small businesses may be more likely to enter into problematic arrangements with foreign investors during the pandemic, when they can't count on renewal of their defense contracts.

As a hedge against adversarial capital, the DoD is steering US companies in sensitive industries and financial institutions to its "Trusted Capital Marketplace," a funding ecosystem that offers vetted opportunities to explore mutually beneficial partnerships that align with US national security goals.

In the United States, pressure from lawmakers and increased attention from the Committee on Foreign Investment in the United States (CFIUS) and its member agencies will largely foreclose any relaxation on the types of deals that will be approved or escape the attention of CFIUS. While concerns had been raised that the COVID-19 pandemic would dramatically slow the work of CFIUS, resulting in stifled investment and/or adversarial transactions slipping through the cracks, CFIUS has continued its work largely unabated, with little or no delay.

Of course, the very definition of what constitutes "adversarial capital" is not carved in stone.

Is an investment adversarial if it has no apparent goal other than financial gain? What if the investment can serve to open doors to new markets, or advocates for cutting of R&D that shows little chance of profitability? What if it is the only source of venture capital for emerging technologies that would otherwise not be funded? As governments struggle to lock out adversarial capital, they will need to ensure that they do not inadvertently shut off beneficial investment streams.

Similarly concerning is the moving target of what constitutes a "sensitive sector" forming a "greater attack surface," as the DoD has put it. The trajectory of expanding national security review regimes shows that sensitivity is no longer limited to the traditional sectors associated with national security at a macro level; the threat does not stop at defense, energy and telecommunications, but now extends to steel, sand, data and more.

While there is no substantive FDI screening at the EU level (and FDI regimes currently exist in only about half of the EU member states), in October 2020 a European FDI Screening Regulation will come into force. The new regulation will establish a novel procedural framework and give the European Commission (EC) and member states the opportunity to comment on ongoing national FDI reviews. We also expect member states to introduce their own regimes, and expect those that have a regime to further broaden and toughen them.

An intense debate has also arisen about the need for "European Champions," especially after the Siemens/Alstom merger that the EC blocked under its merger control regime, on how to deal with PRC state-sponsored competition. Also under debate are trade and market access relationships with the PRC, as well as the EU's innovation and digital, high-technology and sustainability agenda. All of these topics feed into FDI strategies across the EU.

In response to some of these concerns, on June 17, 2020, the EC published a white paper seeking views on three powerful new tools to control the acquisitions and activities of foreign subsidized companies in the EU: a general ex post control mechanism to review competitive distortions; a mandatory ex ante notification mechanism that would allow the EC to review foreign subsidized acquisitions, including certain minority investments; and the possibility of excluding bidders that have received distortive foreign subsidies from public contracts tendered by the EU and member state authorities.

The three new tools, if they were to result in legislative measures, would have significant implications for companies operating in the EU that receive some form of foreign subsidy as well as acquisitions of EU companies financed by foreign subsidies.

> **Expanding national security review regimes are no longer limited to the traditional sectors associated with national security, but now extend to steel, sand, data and more.**

COVID-19 INTENSIFIES—AND SLOWS—OVERSIGHT

Then there is COVID-19. The pandemic brought FDI restrictions into sharper focus and accelerated movement on a national level across the US, Europe and elsewhere. The US, Germany, Italy, Spain, France and additional countries have increased their FDI control measures in response to the pandemic, while others are set to do likewise.

The dependency of US companies on foreign supply chains to satisfy COVID-19 needs—such as personal protective equipment (PPE) and pharmaceuticals—has become an area of focus for US regulators, including not only CFIUS but also federal agencies such as the US Department of Health and Human Services.

In light of the pandemic, the EC recently issued formal guidelines to EU Member States that aim to ensure a "strong EU-wide approach to foreign investments screening in a time of public health crisis and related economic vulnerability," reminding Member States that they are empowered to impose measures to address identified risks to security or prohibit a foreign investor from consummating a transaction. The EC has stated, "The EU is and will remain an open market for foreign direct investment. But this openness is not unconditional." The EU's position has already been echoed by several national governments.

With the recent revisions of national FDI regimes following the outbreak of the pandemic, we would expect almost any significant healthcare deal to face FDI scrutiny now, with governments concerned about the supply security of critical products and medicines, vaccines and similar goods for their domestic populations, and to keep research and development and production capabilities in their country. Healthcare transactions will likely face lengthy reviews. (The same continues to be the case for state-owned or state-sponsored investors, especially in the high-technology sector, and even more so where a military use of the technology seems conceivable.)

For the duration of the pandemic, and surely for years afterward, parties to cross-border transactions will need to redouble their due diligence in assessing whether their transaction will require (and pass) an FDI review, either voluntary or mandatory. Given the curtailed response time of authorities, those expecting only voluntary review may be tempted to close without waiting for a government response, but doing so exposes parties to penalties and delays if their internal assessment proves too optimistic.

In any case, with FDI reviews intensifying globally and regulatory regimes presenting a fast-changing target, the watchwords for successful cross-border transactions remain caution and patience.

Managing the US-PRC "de-coupling" risks for Taiwanese exports

A protective strategy includes understanding new US rules, identifying the risk factors and taking proactive steps to prevent problems

By Christopher F. Corr

The current de-coupling trend between the US and the People's Republic of China (PRC) is creating opportunities for Taiwanese exporters, while also raising significant risks for companies caught in the middle.

Just months away from a US presidential election and more than two years into an unprecedented US-PRC trade dispute, there is a troubling trend toward "de-coupling" the world's two largest economies, making them less interdependent in sensitive areas. Growing bilateral trade tensions have called into question the reliability of sole-source supply arrangements. These issues and others, such as rising costs in the PRC, have been a factor in global companies' decisions to diversify their supply chains by moving some or all production out of the PRC.

Many businesses, including PRC companies, have relocated manufacturing operations from the PRC to other Asia-Pacific countries, primarily Taiwan and members of the Association of Southeast Asian Nations (ASEAN) region. Some businesses have relocated in the belief that obtaining a certificate of origin for their finished goods from a third country such as Taiwan will keep them safe. But US regulatory scrutiny of imports containing parts made in the PRC has never been higher, and a certificate of origin alone will not satisfy US customs authorities predisposed to doubt the certificate's authenticity.

Shipping finished goods to the US that contain non-Taiwan-origin parts, particularly PRC-made parts, entails significant and growing risks. A wise strategy includes proactively understanding these risks, assessing potential exposure and taking action to protect access to US markets.

THE RISKS FOR TAIWANESE EXPORTS TO THE US USING NON-TAIWAN-MADE PARTS

Under emerging US trade regulations, Taiwanese exporters—and the US importers they work with—may be accused of trying to evade duties on PRC-made finished goods or parts if they ship Taiwanese goods containing parts from the PRC or other countries that would be subject to higher duties if they were imported directly into the US. The penalties can be harsh, including high, previously unanticipated duties, blocked or limited access to US markets and, in some cases, other civil or even criminal charges.

Importantly, these risks also apply to Taiwan's increasing investment in ASEAN countries, where exports by Taiwan-owned facilities to the US could also encounter such risks.

These trade regulations include:

Country of origin (CoO) inquiry or penalty action by US Customs and Border Protection (CBP) – When goods arrive at a US port for importation or "entry," CBP may investigate the accuracy of the CoO declarations that the goods originated in Taiwan.

In particular, CBP may check whether the production or assembly processes in Taiwan "substantially transformed" the PRC-made parts enough for the finished goods to have originated in Taiwan for purposes of duties that both depend on CoO. Complex and sometimes inconsistent "substantial transformation" rules and precedents guide CBP's inquiry. If applicable legal authorities do not support the importer's CoO claim, CBP may demand underpaid duties, assess significant penalties and, in some instances, detain, exclude or seize the goods.

> **Shipping finished goods to the US that contain non-Taiwan-origin parts, particularly PRC-made parts, entails significant and growing risks.**

Formosa Boulevard Station,
Kaohsiung, Taiwan

Scope inquiry by US Department of Commerce (DOC) – DOC may conduct its own CoO assessment, using its own rules, if PRC-made parts in Taiwanese goods are subject to anti-dumping (AD) and countervailing duty (CVD) actions or if the finished product would be subject to AD/CVD duties if the CoO were the PRC.

DOC's rules for assessing "substantial transformation" differ from those of CBP. So, even if a CoO is correct for CBP purposes, DOC could still issue a conflicting determination and rule—sometimes even retroactively—that the finished goods from Taiwan are subject to PRC AD/CVD duties.

Anti-circumvention inquiry by DOC – Even if both CBP's and DOC's CoO rules deem specific goods as having originated in Taiwan, DOC can inquire whether the goods otherwise "circumvent" US AD/CVD duties.

If it determines the Taiwan operations were minor and/or would otherwise defeat the purpose of those duties in the future, DOC may enter an adverse finding. AD/CVD duties will then apply, beginning on the date that DOC initiated its inquiry. In the future, as explained below, such duties might affect earlier entries as well.

Anti-evasion inquiry by CBP – Under the US Enforce and Protect Act (EAPA), CBP may investigate whether Taiwanese goods are "evading" AD/CVD duties through false or omitted statements to CBP.

In most EAPA cases, CBP initially checks only whether the goods were actually produced in Taiwan, not merely transshipped through Taiwan via false CoO labeling. Although most EAPA allegations thus far have focused on CoO alone, claimed irregularities in classification and valuation could also support an allegation of duty evasion. However, even before deciding whether an importer made false statements, CBP may demand AD/CVD cash deposits on entries made during the investigated period. These cash deposits and the burden of responding accurately and fully to CBP's requests for information can substantially disrupt the normal course of business.

According to CBP's annual Trade and Travel Report for 2019, CBP received 38 new EAPA allegations in fiscal year 2019 alone, initiated 36 EAPA investigations as a result, imposed trade-disrupting interim measures in 31 cases, and conducted 21 onsite audits of producers in Asia-Pacific (Thailand, Vietnam, Malaysia and the Philippines).[1]

Recent proposals for harsher rules – In August 2020, DOC announced a proposal to toughen these measures even further. If implemented, the proposal would authorize DOC and CBP to impose punitive AD or CVD tariffs retroactively on goods deemed "evading" or "circumventing" under any of the inconsistent standards. A CBP suspension of liquidation based on a transshipment allegation—even if evidence later disproved it—could nevertheless result in duties based on a subsequent circumvention finding. Indeed, an adverse DOC determination based on any later "scope," "circumvention" or "covered merchandise" inquiry could potentially claw back years of imports made before DOC initiated its inquiry. This could prove ruinous to importers.

Finally, proponents of de-coupling also have proposed expanding EAPA to include imports subject to duties other than AD/CVD tariffs, such as Section 301 tariffs under which most of the "trade war" duties were imposed in the past several years. In July 2019, for example, CBP told reporters that the agency wants Congress to amend EAPA by expanding its scope to cover all alleged "duty evasion" (including in Section 301 and Section 232 matters).[2] This could have enormous liability consequences for importers and exporters of covered products.

HOW CAN YOU MANAGE THESE RISKS?

If goods you produce contain significant parts made outside of Taiwan, US authorities may investigate whether the finished goods "originate" in Taiwan or should be subject to duty treatment based on the country where the parts were made.

Identify your risk factors

To manage these significant risks, start by understanding your company's exposure. This includes assessing:

- The origin and value of all of your inputs and components. Expert assistance can be very helpful in performing this technical analysis.
- The relative value and importance of your foreign-made inputs.
- The nature and extent of your production or assembly operations in Taiwan (or a Taiwan-invested third country).
- The tariffs applicable to these parts or goods if they had been exported directly from the PRC, including normal most-favored nation (MFN) duties, special duties from the trade war—including under Section 301 (unfair practices) and Section 232 (national security threats)—as well as AD, CVD and Section 201 duties (safeguards against injurious import surges).
- Shifts in trade flows from the PRC to Taiwan (or a Taiwan-invested third-country facility), indicating a diversion in exports to the US.

Steps to mitigate your business risks

Depending on your circumstances, consider taking some or all of the following protective actions:

Obtain a CBP CoO ruling if existing precedent might be distinguishable or unclear –This generally takes approximately one month and prospectively binds CBP on the facts presented, but is also public. The requesting party can persuade CBP to redact certain proprietary information, but the public version's online publication is unavoidable.

Keep adequate records – Your production, accounting and shipping recordkeeping systems should enable you to trace particular exports of finished goods through production or assembly from the parts and components purchased, including those obtained from unrelated suppliers, which may have obtained their inputs from the PRC or a third country subject to higher duties. It is advisable to involve expert consultants for this exercise.

Request a DOC advisory opinion – Asking DOC to apply its own CoO rules for purposes of AD/CVD can give some assurances of DOC's likely views. This may be especially useful when your inputs would be subject to AD/CVD if shipped directly to the US, your finished goods would be subject to AD/CVD if they originated in the PRC under the DOC's applicable CoO rules or US domestic industries might claim that your goods are circumventing US duties. Seeking DOC's likely views can involve complex factual and legal issues, again making consultation with knowledgeable analysts advisable, in particular because the new rules may limit an exporter/importer's right to request such an opinion.

Conduct EAPA due diligence – This can include assessing the sensitivity of the exports, recent trade patterns and the nature of your operations and recordkeeping in the context of evolving CBP precedents, especially as EAPA investigations involving duty evasion allegations against assemblers throughout Asia-Pacific have increased significantly. An alleger must satisfy only a very low burden of proof—"reasonably supported" and "reasonable suspicion," respectively—before CBP must initiate an EAPA investigation and impose onerous EAPA interim measures.

Adjust your export or assembly operations – If other measures do not sufficiently address your risks, then make appropriate changes to your production arrangements, including enhanced or more extensive production operations and/or changes to how you source inputs.

BRACE FOR CONTINUED US-PRC TRADE DE-COUPLING

No matter how current US-PRC negotiations unfold, the bilateral trade relationship will probably remain volatile, at least in the short-term, with US regulators continuing to scrutinize goods containing PRC-made parts. Both major US political parties have now taken a "tough on trade" posture with respect to the PRC. Regardless of who wins the presidential election in November 2020, there is unlikely to be a meaningful near-term de-escalation.

Prudent exporters must therefore plan for continued de-coupling and take thoughtful, proactive steps to protect their US market share.

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1 https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/CBP%20FY2019%20Trade%20and%20Travel%20Report.pdf.

2 https://www.quickcalleronline.com/roundup-of-developments-at-the-cbp-trade-symposium/

A new "rocket docket" for patent litigation in the US

Successful defense strategies for Taiwanese businesses

By Bijal Vakil and Henry Huang

Over the past two years, many technology companies have become patent infringement defendants in the US District Court for the Western District of Texas (the "Western District"). This includes many corporations with operations in and around Austin, Texas, a growing US technology hub.

Importantly, many Taiwanese technology companies maintain operations within the Western District.

Patent litigation moves rapidly in this jurisdiction, compared to other US venues, making it the latest US patent "rocket docket." Defending against patent infringement charges in the Western District creates two major concerns for technology companies. First, fast-paced adversarial proceedings create pressure to respond and adapt quickly. Second, most companies historically have found it difficult to transfer their cases to another venue.

We recommend that a technology company sued in the Western District seek to avoid litigation in this venue and follow a well-planned strategy to improve the chances of obtaining a successful outcome on the merits. Here is an overview of what you could face:

THE RISE OF THE WESTERN DISTRICT AS A NEW PATENT ROCKET DOCKET

Patent lawsuits in the US have increased in the past year for multiple reasons, including financial pressure to monetize patents, recent bankruptcies (where companies liquidate patents) and the continuing rise of litigation funding. Finally, the technology sector has generally remained strong amid the COVID-19 pandemic, thus posing a target for potential plaintiffs.

Amid these trends, the Western District is quickly becoming an important patent litigation venue in the US. Technology companies that maintain offices in the Austin area will likely face more patent infringement lawsuits amid the overall increase in patent disputes and related litigation funding. This has happened for several reasons.

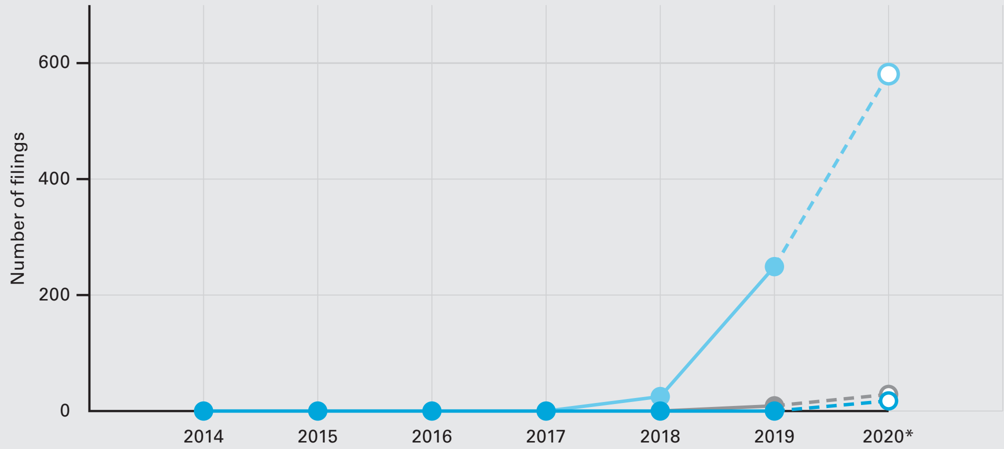
First, the rules for venue in patent litigation have become more restrictive. A 2017 US Supreme Court ruling held that patent lawsuits can occur only where a defendant has a "regular and established place of business."[1] A number of technology giants maintain offices in Austin, which falls within the Western District. As a result, by 2019, the Western District counted the fourth-highest total load of new patent cases in the US, with one particular judge—Judge Alan Albright—overseeing the vast majority of these new patent filings[2] (See Figure 1).

Second, Judge Albright's procedural schedule is particularly rapid, making it attractive to patent plaintiffs (with a fast schedule and relatively low risk of early defense-oriented motions). Since his appointment in September 2018, Judge Albright has received more patent cases than all judges in the Northern District of California combined. His schedules, procedures and outcomes tend to favor patent owners by modifying the incentives to settle early. Judge Albright focuses on resolving patent cases rapidly, has denied almost all requests to transfer a case to another district, allows most cases to proceed into discovery and typically denies defense-oriented motions. As examples, he has generally denied requests for a stay pending a validity challenge before the Patent Trial and Appeal Board (PTAB) and early motions to dismiss.

Since patent litigation in the Western District will likely accelerate, many technology corporations may find themselves forced to litigate before Judge Albright in Waco, Texas.

> **"Defending against patent infringement charges in the Western District, where many Taiwanese companies maintain operations, creates two major concerns for technology companies.**

Figure 1: Judge Albright patent cases in the Western District (2020 estimated)



Source: Lex Machina

STRATEGIES FOR ACCUSED INFRINGERS

Two general approaches when sued in the Western District include (1) finding ways to remove your case from this venue and (2) maximizing the chances of achieving the best possible outcome there.

Consider moving your case

First, a company can try to change venue, primarily by seeking transfer for convenience under 28 U.S.C. § 1404(a). Defendants can request dismissal or transfer, and then petition the US Court of Appeals for the Federal Circuit for a writ of mandamus to change venue. While Judge Albright has denied most transfer requests, the Federal Circuit recently ordered transfer in one of his cases,[3] and he then granted transfer in another patent case.[4]

When seeking a transfer, try to highlight that:

- Your business is located elsewhere (preferably in your destination venue)
- Key third-party witnesses and evidence for your case are located outside Texas
- Employees in your Texas operations lack connections to any accused product
- The plaintiff's evidence or witnesses are located outside Texas

As an alternative, an intra-district transfer (such as to Austin) could be significantly more convenient for company witnesses and may change jury atmospherics. Even when refusing transfer to another district, Judge Albright has generally allowed transfers to the Austin division while keeping jurisdiction himself.

Another strategy to control your venue, if there are sufficient threats of litigation, is to sue first for a declaratory judgment against the potential plaintiff in a more defendant-favorable jurisdiction—such as the Northern District of California—before the plaintiff can sue in the Western District. For example, if a patent owner sends your business letters threatening litigation, then you could sue first in another district for a declaration of non-infringement. If the patentee is a practicing entity, then accused infringers can also consider filing countersuits in other venues, or even in the Western District itself.

A third valuable strategy can be challenging the validity of the asserted patents at the PTAB through inter partes review (IPR), post-grant review (PGR), or ex parte re-examination. The PTAB has specialist judges who resolve patent validity, with almost no discovery other than testimony from expert witnesses. The PTAB typically provides a final written decision within 18 months. Although Judge Albright does not grant stays for a case pending IPR, and he has even accelerated case schedules after defendants file IPRs, an early IPR could still invalidate key patent claims and force the plaintiff to take inconsistent positions.

> Follow a well-planned litigation strategy to improve the chances of obtaining a successful outcome on the merits.

The city skyline,
Austin, Texas

Tips for patent litigation in the Western District

Finally, several techniques can maximize your chances of success in the Western District:

- **Choose expert witnesses who speak effectively to a Texas jury**: Witnesses with local connections or prior experience before Judge Albright can be helpful, and prior experience testifying in the Western District can be as important as technical expertise
- **Coordinate with other defendants in a joint defense group**: Joint defendants can share costs—such as for invalidity and non-infringement analyses—although coordination can also sometimes reduce efficiency and create conflicting positions
- **Pursue countersuits in other venues**: If the plaintiff is an operating company, you might be able to increase your leverage by suing them on other patents in other jurisdictions, such as before the US International Trade Commission (where a case can finish in 14 to 16 months) or in Europe (where there generally is more limited discovery and invalidity defenses)
- **Consider involving your suppliers or customers**: If your suppliers are contractually obligated to indemnify you and defend you against lawsuits, make sure to send them any indemnification demands early to minimize your costs
- **Claim a customer suit exception**: US courts sometimes allow a case against a manufacturer to proceed before a case against customers. However, in a recent ruling, the Federal Circuit did not order Judge Albright to apply the customer suit exception to delay a case pending another lawsuit in Delaware.[5]

CONCLUSION

As always, technology companies must remain vigilant about understanding popular venues for US patent litigation and the strategies for winning there. With the prevalence of litigation in the Western District, those strategies have become especially important.

1 *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017)

2 Lex Machina

3 *In re Adobe*, No. 2020-126 (Fed. Cir.)

4 *Parus Holdings Inc. v. LG Elecs. Inc.*, No. 6:19-CV-00432

5 *In re: Sprouts Farmers Market, Inc.*, No. 2020-116

Financial markets in Asia-Pacific

What next for Taiwanese banks and businesses?

By Alexander McMyn and Eugene Man

The COVID-19 pandemic's severe impact on the global economy dominated news headlines through the first half of 2020. Many commentators believe that Asia-Pacific's financial markets–which already started to look overstretched in late 2019 before the pandemic began–are due for a prolonged, painful downturn.

In fact, syndicated lending in much of Asia-Pacific declined precipitously in 2020, as most nations struggle to recover from the pandemic. Many banks currently focus on preserving capital and supporting their clients with cash accumulation, bridge financing and supply chain assistance, leaving reduced appetite for new corporate loan transactions. Debt repayment and refinancing continue to serve as primary drivers of lending activity, while major M&A lending markets, such as Taiwan, suffer significant declines. At the same time, there are areas of resilience, assisted to a degree by changing foreign direct investment (FDI) laws in Southeast Asian countries, which may succeed in attracting increased FDI.

This article considers the current position of Asia-Pacific lending markets and offers insights for Taiwanese businesses on where regional credit activity may focus in the coming months.

DISRUPTION AND NARROWED TRANSACTION SCOPE

The Asia-Pacific loan market suffered significant disruption during the first half of 2020 and beyond. One example showing the depth of this downturn is the Hong Kong syndication market's 75 percent decline in the first half of 2020, compared with the same period in 2019.[1]

Confidence drained away as governments unleashed unprecedented economic stimulus efforts, attempting to shore up regional economies. These efforts, coupled with a number of well-reported adverse events, such as the uncovering of commodities finance fraud at Hin Leong in Singapore and the, bankruptcy of a number of high profile businesses regionally, depressed lending activity. Asia-Pacific syndication transactional activity for the first half of 2020 dropped 23 percent compared with the same period in 2019–with all key markets quieter (except Australia).[2]

As markets worsened during 2020, Asia-Pacific banks understandably reduced underwriting capacity and tightened their focus on supporting key clients in their core businesses. This had the ancillary effect of narrowing the purposes of completed transactions. Recent bank lending transactions in Asis-Pacific primarily include refinancings, new facilities made available to assist borrowers in building their cash reserves, and a run of margin calls and covenant resets. All of these are typical of a market encountering difficult conditions.

Corporate finance aside, a number of other key drivers of financing transactions have subsided, putting further downward pressure on deal volume and size.

Most significantly, private equity activity–which has powered finance deals regionally as the size of Asia-Pacific's private equity market blossomed–was already declining before the market experienced any effects of the COVID-19 pandemic. Private equity fundraising in Asia-Pacific was lower in both 2018 and 2019 than in the record 2017.[3] The contraction was also reflected in a drop in private equity deal volume in 2020.[4] Together with a decline in the use of leverage, as creditors demonstrated a more conservative perspective, this has reduced opportunities to deploy credit in private equity-driven acquisitions.

22%

private equity participants who say the COVID-19 crisis had a significant positive impact on healthcare transactions in Asia-Pacific.

LEK Consulting

SOURCES OF RESILIENCE FOR FUTURE LENDING

While all of the above factors increased downward market pressures, areas of resilience remain.

A number of sectors throughout Asia-Pacific have enjoyed a surge in investor sentiment due to the pandemic. In a recent survey by LEK Consulting, 22 percent of private equity participants responded that healthcare transactions on which they were active in Asia-Pacific during the pandemic had received a "significant positive impact" from the COVID-19 crisis. The outcome was even more strongly positive in relation to deals in the education sector, with 27 percent of respondents seeing benefits from the pandemic.[5]

> **Corporate finance aside, a number of other key drivers of financing transactions have subsided, putting further downward pressure on deal volume and size.**

These hotspots are too narrow to drive a market-wide recovery by themselves, particularly as other sectors have suffered long-lasting damage from the pandemic and the actions taken in response to it.

However, these areas of optimism suggest that some sectors where Asia-Pacific has historically had a strong track record may offer robust performance through the crisis, and that this may drive deal activity for the remainder of 2020 and into 2021.

Future demand for Asia-Pacific lending transactions may also come in the form of pent-up financing needs from private equity firms and other borrowers seeking to deploy leverage on M&A transactions that closed during the first half of 2020, when available debt multiples were reduced or financing was not available.

Recent M&A deals across Asia-Pacific, where the acquirer is Taiwanese, indicate potential opportunities for financing many types of regional M&A activity.

Since Taiwan launched its "Guidelines for the New Southbound Policy," trade with member countries has expanded, and Taiwan's banks have increased their exposure to Southeast Asia. It may well be that the pandemic will offer the chance to make well-priced acquisitions–with the resultant need for financing. The combination of pent up-demand and new opportunities could support the market successfully over the coming term.

In addition, other medium-term and long-term trends may also provide additional support for the loan market, despite the current pandemic. These include the increasing availability of sustainable finance and the broadening context in which it is applied. Recent months have demonstrated a shift within Asia-Pacific from bond capital markets products, which were the genesis of much sustainable finance activity, into other areas of the finance market, including infrastructure finance, subscription lines for funds of a variety of types and corporate finance. As this shift in investor enthusiasm grows, carbon-intensive businesses may need to compete harder for smaller amounts of available financing, potentially pushing them towards more structured solutions than they previously had to contemplate–even if their credit has not deteriorated.

Another driver of financing activity may be reforms in FDI regimes across a number of Asia-Pacific jurisdictions, as countries compete to attract international capital in a post-COVID-19 world. Diplomatic difficulties between long-term trading partners, such as the US and China, could provide new opportunities for Asia-Pacific countries historically considered "second tier" in terms of FDI to garner significant inward investment. Indonesia, Thailand and Vietnam have all announced FDI regulatory reform packages, and they may require material financing to support the resulting investment and trade flows.

Finally, adverse market conditions often result in significant numbers of distressed deals. High levels of government support and the strong financial position of Asia-Pacific banks heading into the crisis have prevented the distressed market from becoming as busy as many commentators predicted in the second quarter of 2020. Still, as government support measures lift and the full extent of economic damage becomes apparent, it is inevitable that businesses will encounter further financial distress.

Distressed deal opportunities, combined with historically high levels of dry powder currently available to corporate investors, could result in significant transactional activity by private equity firms, alternative capital providers and other non-traditional lenders. This could encompass not only distressed M&A activity but also refinancing solutions applied to businesses seen as viable in the long term but likely to encounter significant difficulties during the economic recovery phase.

A FORWARD PATH

The scope and depth of Asia-Pacific's recovery will be influenced in large part by how effectively COVID-19 risks are managed by the world's leading economies, which drive much activity in Asia-Pacific. Market observers will look closely at those countries in the coming months.

Nonetheless, despite headwinds from a number of directions and a resulting drop in activity in core areas during the second and third quarters of 2020, several factors indicate that transactional activity may recover in a number of sectors and geographies across Asia-Pacific during the remainder of 2020 and into 2021.

Aerial view of a city crosswalk in Taipei

1 https://www.reuters.com/article/apac-first-half-lending-tumbles-to-eight/apac-first-half-lending-tumbles-to-eight-year-low-idUSL4N2E72BI

2 Asia-Pacific (ex Japan) Loans Monthly Report, Debtwire, July 2020

3 Preqin, AVCJ

4 Preqin, AVCJ

5 https://www.consultancy.asia/news/3340/covid-19s-impact-on-ma-and-private-equity-in-southeast-asia

Key private equity and M&A trends in Asia-Pacific

What they mean for investors in the region

By Daniel Yeh and Steven Sha

The COVID-19 pandemic has taken a toll on the world's economies and investment activity in 2020—including Asia-Pacific. This black swan event has exacerbated previous market threats, including rising geopolitical tensions, regulatory protectionism and tumbling fundraising, suggesting a potentially broader stagnation in 2020 and beyond.

In a time of unprecedented challenges, many corporations and investors in Asia-Pacific are looking for both shelter and new opportunities in all directions. Despite a notable decline in Asia-Pacific cross-border M&A overall, private equity (PE) firms have still been able to capitalize on investment opportunities through the region in sectors that have both thrived and withered during the pandemic.

NICHE OPPORTUNITIES IN ASIA-PACIFIC'S CURRENT MARKETS

Asia-Pacific M&A stalled during the first half of 2020, with a 17 percent decrease in deal value (year-on-year), reaching the lowest level since the same period in 2013.[1] Taiwan M&A activity, in particular, nearly halved.

This is attributable to a range of factors, most notably the global pandemic, which ravaged many industries and raised roadblocks to deal-making fundamentals. Travel restrictions, quarantine requirements and similar issues posed serious hurdles to even basic activities necessary to develop many transactions—such as management meetings, on-site diligence, and signing and exchanging physical documents. In addition, escalating trade and political tensions and uncertain credit and financial markets played significant roles among the constellation of factors that drove more cautious investing.

Nevertheless, despite these challenges, a number of niche opportunities still emerged.

Recent transactions

Depressed valuations have led to waves of take-private transactions, share buybacks, private investments in public equity (PIPEs) and similar opportunistic deals across public markets in Hong Kong and the US. In particular, US-listed People's Republic of China (PRC) companies have become popular candidates for sale by controlling shareholders, especially in light of increasing scrutiny of such issuers by the US Securities and Exchange Commission (SEC) and other regulatory authorities. Distressed and "special situations" deals, such as bankruptcy and insolvency restructurings reminiscent of the 2009 global financial crisis have also increased many-fold. Corporate divestitures, carve-outs and similar shedding of corporate dead weight have also become prevalent where belt-tightening is warranted.

In addition, smaller, minority and growth investments that are generally less risky and do not require access to credit markets have become more pervasive. Several sectors have notably flourished in the current market environment – such as technology, healthcare, online education, software as a service (SaaS) and infrastructure – creating attractive capital-raising or exit opportunities for businesses and investment opportunities for PE funds looking to deploy excess dry powder.

Even though Taiwan cross-border activity has declined, the pandemic has boosted many larger Taiwanese industries (semiconductors, other electronics, light manufacturing, offshore wind, etc.), positioning these businesses for deal opportunities if deemed desirable.

Private equity in Asia-Pacific

PE buyouts experienced some growth in the first half of 2020, buoyed by a combination of the sector deals mentioned above, an excess of dry powder that has amassed slowly over the last few years and investors seeking niche opportunities, including deals funded by equity (given uncertain or insufficient credit markets). Overall, we saw funds taking a cautious and opportunistic approach to investing.

However, PE exits all but dried up during the first half of 2020, having dropped 90 percent by deal count and 50 percent by deal value in comparison to the previous year[2]. Fewer exits have translated to an evaporation of cash flow to limited partners and accordingly resulted in a slowdown in PE

"

In a time of unprecedented challenges, many corporations and investors in Asia-Pacific are looking for both shelter and new opportunities in all directions.

Taiwanese road winding it's way down a mountain to the coast

fundraising (which was 45 percent lower in 2019, compared to the previous five-year average[3].

In this uncertain market, we saw funds shift their focus to more actively managing and growing existing portfolios (rather than force exits at potentially depressed valuations) and optimizing their debt and liquidity needs, priming portfolios for future sales.

FUTURE OUTLOOK: A BUYER-DRIVEN MARKET

As 2019 ended, record levels of dry powder and ever-increasing valuations prescribed a frothy, seller-driven PE marketplace, though overshadowed by the uncertainties of the PRC-US trade war, Brexit, stricter implementation and enforcement of regulations by the Committee on Foreign Investment in the United States (CFIUS), increasing global scrutiny of foreign direct investments and fiercer competition for deals among investment managers.

The COVID-19 pandemic crystallized many of these uncertainties with escalating PRC-US tensions, higher geographical barriers among many countries, global macro-economic concerns and a shrinking supply of PE-owned portfolio targets for sale. At the same time, new challenges have arisen, including increased SEC actions targeting US-listed PRC companies and geopolitical instability both in Asia-Pacific and the US. Taiwan, in particular, could suffer significant collateral damage from many of these factors.

So what do all these mean for 2020 and beyond? The theme of more cautious investing while refocusing on internal growth, combined with fewer "traditional" sales processes and more bespoke or niche opportunities, indicate a broader shift towards a buyer's market, or at least a market where bilateral or proprietary transactions become more prevalent.

Looking towards Taiwan in particular, for mature businesses that have thrived in the pandemic and seek a future partner or a generational change-driven exit, the current environment may be optimal to take advantage of opportunistic PE funds sitting on a mountain of equity ready to deploy.

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1 Mergermarket

2 Based on data from Mergermarket

3 Bain & Company

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