CHINA

MOFCOM fines Canon for failure to notify

On January 4, the Ministry of Commerce ("MOFCOM") published a penalty decision fining Canon Inc. ("Canon") for failure to notify its acquisition of Toshiba Medical Systems ("Toshiba"). According to MOFCOM's decision, the acquisition was structured as a two-step transaction, whereby Canon first acquired one non-voting share and certain convertible rights of Toshiba, and then, as a second step, Canon converted such rights to voting shares while Toshiba repurchased and cancelled all of its pre-existing voting and non-voting shares. While the second step was conditioned on MOFCOM clearance and had not yet been completed as of the date MOFCOM issued its penalty decision, MOFCOM was of the view that the two steps were closely related and thus inseparable. As the companies had completed the first step of the transaction, MOFCOM found that Canon violated Article 21 of the Anti-Monopoly Law ("AML"). Since the transaction did not give rise to any anticompetitive concerns, MOFCOM imposed a fine of RMB 300,000 (~$45,000; €40,000), significantly less than the RMB 500,000 maximum fine.

NDRC penalizes pharma company for obstructing investigation

On February 17, the Price Supervision and Anti-Monopoly Bureau of the National Development and Reform Commission ("NDRC") announced that the Shandong Provincial Price Bureau issued a penalty decision on December 25, 2016, imposing a fine of RMB 120,000 (~$17,000; €16,000) on Weifang Longshunhe Pharmaceutical ("Longshunhe") for obstructing an investigation.

According to the press release, during an onsite investigation, Longshunhe's employees disposed of a device containing information relevant to the enforcement officials, and the employees further obstructed the officials' attempts to retrieve the device. In an interview, Director General Zhang Handong commented that this is the first case of its kind and that the NDRC hopes it will have a deterrent effect on future obstruction.

Shipping lines announce price drop in response to NDRC investigation

On March 1, eleven shipping lines committed to reduce terminal handling charges ("THC"). The announcement followed last year's joint NDRC and Ministry of Transport probe into the shipping industry. Seven additional shipping lines joined the THC reduction commitment on March 27. The THC reduction took effect on April 1 for the first group and April 24 for the second group.

It is understood that as a result of these commitments, NDRC has suspended its investigation into the global shipping industry. While there were allegations of price-fixing regarding the THC, as NDRC has not published a commitments decision, it is unclear whether NDRC's investigation was conducted based on NDRC's role as a price regulator, as an enforcement agency under the AML, or both.

State Council publishes draft IPR antitrust guidelines

On March 23, the Antimonopoly Commission of China's State Council published the draft Anti-Monopoly Guideline on Abuse of Intellectual Property Rights (the "IPR Guidelines") for public consultation. While the draft IPR Guidelines closely resemble guidelines regarding the abuse of IPR previously published by NDRC, the current draft IPR Guidelines reflect the collaboration of various departments, including MOFCOM, the State Administration for Industry and Commerce, the State Intellectual Property Office, and NDRC. The IPR Guidelines are divided into five sections:

1) General principles and analytical framework;
2) Anticompetitive agreements involving IPR;
3) Abuse of a dominant position involving IPR;

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4) Merger control analysis of transactions involving IPR; and
5) Other areas of intersection between antitrust and IPRs (e.g., patent pools).

As compared to NDRC's previous draft, the IPR Guidelines explicitly acknowledge that regulators must consider procompetitive effects and balance such effects against any alleged anticompetitive harm. The IPR Guidelines also provide for a market-share based safe-harbor such that agreements, such as joint R&D, cross licensing, and grant back arrangements, among parties falling below the threshold will not be considered anticompetitive.

Unfortunately, minimal guidance is provided regarding the analysis of IPRs in the merger control context. The draft IPR Guidelines state that MOFCOM shall take into consideration factors such as: (i) whether the IPR constitutes an independent business; (ii) whether the IPR generates turnover; and (iii) the terms of any exclusive license to the IPR.. Otherwise, the draft IPR Guidelines merely reference that the merger control review of transactions for which any IPR constitutes a significant part of the overall transaction should be conducted in accordance with the AML and that after a fact-specific assessment, structural or behavior remedies could be imposed.

More generally, the IPR Guidelines provide lists of factors for consideration when analyzing the intersection of antitrust and IP. While the effort of the State Council and contributing agencies in providing guidance on the application of the AML to these complex topics must be commended, the lists may not provide practical guidance to assist companies as they evaluate their day-to-day activities.

NDRC publishes draft guidance for trade association

On March 24, NDRC published draft antitrust guidelines for trade associations (the "Trade Association Guidelines") for public comment. The Trade Association Guidelines acknowledge that trade associations play a vital role in the economy, but warn that trade associations also generate legal risks, particularly with respect to the restriction of competition and anticompetitive agreements. The Trade Association Guidelines aim to provide guidance to trade associations regarding possible infringements of relevant laws and regulations (including the Price Law and AML).

The Trade Association Guidelines identify various activities that may run afoul of the AML, such as: (i) organizing collusion regarding price or other terms of sale, (ii) publishing future prices of market leaders or industry guidelines regarding prices, including standard, reference, or average prices, (iii) publicizing historical pricing, particularly when costs or pricing are relatively stable and the market is highly concentrated, and (iv) implementing regulations or decisions that have the effect of eliminating and restricting competition. The Trade Association Guidelines note that the specifics of each situation must be assessed on a case-by-case basis.

Merger review statistics for the first quarter of 2017

MOFCOM unconditionally cleared 71 transactions during the first quarter of 2017. This is a 22.8% decrease compared to the fourth quarter of 2016. Almost 78.9% of the transactions cleared were reviewed using the simplified procedure. Of the simple cases, 98.2% were cleared within 30 days from publication of the notice for public comment, with an average clearance period of 23.8 days.

HONG KONG

Eight cases under review by the Communications Authority

On February 9, the Hong Kong Communications Authority ("CA") announced that since the coming into force of the Competition Ordinance in December 2015, it has received 108 antitrust related complaints and enquiries, of which 100 have been closed without the need for further action and eight are being further investigated. The CA further announced that it has cleared three mergers since the Competition Ordinance came into effect, including the acquisition of New World Telecom by the Hong Kong Broadband Network in March 2016 and the acquisition of Wharf T&T by MBK Partners and TPG in November 2016.

The CA and the Hong Kong Competition Commission ("HKCC") have concurrent jurisdiction over telecoms and broadcasting licensees under the Competition Ordinance. Under a memorandum of understanding signed by the two authorities on December 14, 2015, the CA will generally take the lead in handling cases involving the telecommunications and broadcasting sectors.

The HKCC is expected to conduct more in-depth investigations in 2017

On February 22, the budget for 2017-2018 delivered by Hong Kong Financial Secretary Paul Chan revealed that the HKCC plans to launch more in-depth investigations of potential infringements of the Competition Ordinance with the aim of settling cases by issuing warning notices or commitments or bringing cases to the Competition Tribunal. The HKCC will also continue to consider exemption applications and conduct market studies in the coming year. The work plan of the HKCC also includes policy advice and public advocacy.

Personnel reshuffle at the HKCC

In February, the HKCC announced that Philip Monaghan will step down as the Executive Director of Legal Services of the HKCC in June. The departure of Philip Monaghan is the latest announcement of a wholesale top management reshuffle of the HKCC that is expected to take place this year. The HKCC has previously confirmed that the Chief Executive Officer, Rose Webb, and the Executive Director for Operations, Timothy Lear, will leave the HKCC as their terms come to an end later this year.

The HKCC also announced that Lilla Csorgo will join the HKCC as the Head of Economics & Policy in early May. Ms. Csorgo, with a background as the chief economist of New Zealand's Commerce Commission, will replace Dennis Beling who left the position as Chief Economist of the HKCC for the private sector in November 2016.

It was further announced that Andrea McAuley will join the HKCC from Canada's Competition Bureau as a special adviser for enforcement for six months.

HKCC brings first case to the Competition Tribunal

On March 23, the HKCC commenced proceedings in the Competition Tribunal against five companies in the IT sector for an alleged infringement of the First Conduct Rule of the Competition Ordinance. This marks the first case brought to the Competition Tribunal since the Competition Ordinance came into effect on December 14, 2015.

The HKCC alleges that Nutanix Hong Kong Limited ("Nutanix"), BT Hong Kong Limited, SiS International Limited, Innovix Distribution Limited, and Tech-21 Systems Limited conspired to submit so-called "cover bids" in relation to a tender that was issued by the Hong Kong Young Women's Christian Association in July 2016. The tender was issued for the supply and installment of an IT server system based on Nutanix's technology. Cover bids are not intended to win a tender but to reduce the number of competitive bids and thereby restrict competition in respect of a particular tender. The HKCC alleges that the conduct had the object of preventing, restricting, or distorting competition in Hong Kong.

The HKCC has asked the Competition Tribunal to declare that the conduct contravened the First Conduct Rule of the Competition Ordinance and to impose monetary penalties. The Competition Ordinance allows for fines up to 10% of an infringing undertaking's turnover in Hong Kong for each year that the infringement took place, for a maximum of three years.

INDIA

CCI awards first leniency reduction in fan makers cartel

On January 18, the Competition Commission of India ("CCI") imposed total fines of INR 24.4 million (~$380,000; €340,000) on three manufacturers of brushless DC fans for bid rigging. For the first time since the establishment of the leniency policy in 2009, the CCI reduced the fine to one of the infringers on the basis of its leniency application.

The CCI found that the manufacturers coordinated the submission of bids in response to tenders by Indian Railways for the procurement of brushless

DC fans in 2013 by exchanging quote prices in advance.

Under the Competition Act, the CCI may impose fines up to three times the profit of an infringer or 10% of its turnover for each year of the infringement, whichever is higher. In calculating the fines, the CCI took into account the duration of the cartel (one year), and the volume and value of the tenders affected by the cartel. For each participant, the CCI evaluated whether a fine based on profit or turnover would yield a higher fine. For two of the infringers, including the leniency applicant, the CCI imposed fines equalling their profits in 2012-2013. For the other infringer, the CCI imposed a fine calculated at 3% of its turnover in 2012-2013.

In recognition of the co-operation provided by the leniency applicant in the CCI's investigation, the value it provided in establishing the existence of the cartel, and its admission of liability, the CCI granted a 75% reduction in the fine payable by it. The CCI did not award a 100% reduction despite the applicant being the first to approach the CCI, as the CCI was already in possession of sufficient evidence to launch the investigation.

CCI rules on anticompetitive agreements in pharmaceutical sector

On March 2, the CCI ordered the Karnataka Chemists and Druggists Association ("KCDA") to cease and desist from engaging in practices found to restrict the supply of medicines and the ability of pharmaceutical wholesalers and retailers to price freely.

The ruling stemmed from a complaint in August 2009 by the Belgaum District Chemists and Druggists Association that pharmaceutical companies Abbott India Ltd. and Geno Pharmaceuticals had stopped supplying certain of its members that did not have a "No Objection Certificate" ("NOC") from the KCDA.

The issue of Chemists and Druggists Associations requiring stockists to have a NOC as a pre-requisite to obtaining supplies has been a recurring one in India. In a number of past cases, including one involving the KCDA in 2013, the CCI established that the practice is anticompetitive and amounts to a restriction on the supply of pharmaceutical drugs. In the March 2 order, the CCI reiterated its previous findings on NOCs and strongly criticized Chemists and Druggists Associations for continuing to engage in the practice despite the CCI case law.

In the course of its investigation, the CCI also found evidence of further anticompetitive practices, namely that the KCDA (i) required pharmaceutical companies to pay it a certain amount to provide various advertising services as a condition to launching a new medicine; and (ii) prescribed trade margins for wholesalers and retailers of 10% and 20%, respectively. The CCI considered that these practices effectively fixed the prices at which medicines could be sold, and that, absent these practices, competition among wholesalers and retailers would have resulted in medicines being sold at lower prices.

The other defendants in the case, the All India Organisation of Chemists and Druggists ("AIOCD") and pharmaceutical companies Abbott India Ltd. and Geno Pharmaceuticals, were found not to have engaged in anticompetitive practices on the evidence. However, the CCI has in the past found pharmaceutical companies liable along with the Chemists and Druggists Associations for acquiescing in and enforcing the latter's policy of requiring stockists to have a NOC before receiving supplies.

India abolishes the COMPAT

On March 22, the lower house of India's parliament passed a bill abolishing the specialist Competition Appellate Tribunal ("COMPAT") and transferring its appellate functions to the more generalist National Company Law Appellate Tribunal ("NCLAT"), which until this point only heard cases brought under company law. As the measure was inserted into a revenue legislation, the upper house will not be able to veto its passing.

Since its establishment in 2009, the COMPAT has overturned a significant number of decisions of the CCI, frequently on procedural but also on substantive grounds. It is unclear whether the transfer of appellate functions to the NCLAT will lead to any changes to the degree of judicial scrutiny of CCI decisions.

CCI imposes reduced penalty on Coal India following COMPAT's overruling of previous fine

On March 24, the CCI imposed on Coal India a penalty of INR 5.9 billion (~$89.6 million; €83.9 million) for abusing its dominant position by imposing unfair conditions on the supply of coal to power producers. The amount represents 1% of the company's average annual turnover for the three years preceding the CCI's infringement decision.

The decision follows the CCI's initial finding of infringement, and imposition of an INR 17.7 billion (~$286 million; €209 million) fine, in December 2013, which was overturned by the COMPAT in May 2016 for procedural reasons.[1]

In setting the revised penalty amount, the CCI took into account changes that Coal India has effected in its conduct, including prior to the CCI's December 2013 order and pending the outcome of the appeal to the COMPAT.

India clarifies De Minimis Exemption for merger control

On March 27, the Indian government announced significant changes to the reporting rules for mergers and acquisitions. Importantly, the changes expanded the scope of the De Minimis Exemption and clarified that only the value of assets or turnover of the enterprise being transferred need be taken into account in an acquisition.

The government clarified that the De Minimis Exemption applies not only to acquisitions, as the CCI previously held, but also to "mergers or amalgamations", understood as situations where only one enterprise remains after the transaction.

The government also clarified that, where only a portion of an enterprise is being acquired, only the value of assets or turnover attributable to that portion being acquired needs be taken into account in calculating the reporting thresholds. Previously, the CCI took the view that the value of assets or turnover of the selling entity was relevant for the assessment of the notification requirements.

MALAYSIA

MyCC issues record fine against 22 insurance companies

On February 22, the Malaysia Competition Commission ("MyCC") issued a MYR 213.4 million (~$49.2 million; €45.0 million) fine against 22 car insurance companies. This is not only the largest fine ever imposed by the MyCC, but also the largest antitrust fine ever imposed in Southeast Asia. Previously, the largest fine that the MyCC had issued was for MYR 10 million ringgit (~$2.3 million; €2.1 million) against Malaysian Airlines and Air Asia for colluding to share travel markets.

The 22 insurers are members of the General Insurance Association of Malaysia ("PIAM"). The insurers allegedly colluded with car repair shops that are members of the Federation of Automobile Workshop Owners' Association of Malaysia ("FAWOAM") under an agreement that set discount rates for car parts and hourly labor rates for car repair shops. The MyCC alleged that the arrangement amounts to price fixing, while the insurers argued that the arrangement is in response to a Malaysian central bank directive.

In 2011, Malaysia's central bank, Bank Negara, issued a directive to insurance companies to resolve disputes between car insurers and car repair shops over insurance claims for repairs. It is reported that car insurers refused to compensate repair shops at rates that would be profitable for the repair shops. These disputes caused delays in repairs, unsatisfactory repair work, high repair costs, and inconvenience to consumers. The 2011 directive called on PIAM members to engage with FAWOAM to resolve disputes arising out of discount rates for car parts and hourly labor rates.

Siding with the insurers, Bank Negara has criticized the MyCC's fine. Bank Negara believes that the rate arrangements are necessary to resolve disputes between insurers and car repair shops, and that the MyCC's fine is against consumers' interest. In its press release, Bank Negara vowed to "continue to

[1] For additional information about the COMPAT's 2016 decision, please refer to the Asian Competition Report for the Second Quarter of 2016, available at https://clients.clearygottlieb.com/rs/alertmemos/Asian_Competition_Report_2Q_2016.pdf.

pursue a resolution of this matter in the best interest of the general public."

SOUTH KOREA

KFTC outlines its 2017 agenda

On January 5, the Korea Fair Trade Commission ("KFTC") issued its agenda for the upcoming year. The KFTC forecasts decreasing investment, consumption, and domestic demand, coupled with protectionist trade measures abroad and rising U.S. interest rates. The KFTC fears that a declining economy might incentivize collusion and abuse of dominance. The following are some highlights of the KFTC's 2017 agenda:

- Investigate exclusionary conduct and abuse of dominance through ownership of standard essential patents and the practice of delaying the release of medical products;
- Carefully review and monitor significant mergers and acquisitions and aggressively investigate failures to notify;
- Prevent and monitor collusive activity, particularly in electronics, car parts, and shipping industries often associated with international cartels;
- Systematically analyze and periodically publish ownership structures of large enterprises;
- Sanction large enterprises' practice of conferring unfair competitive advantage to their affiliates;
- Cooperate with other agencies, including the patent office and the Ministry of Industry, to protect SMEs' IP rights; and
- Encourage anonymous reporting of unfair practices.

KFTC fines auto parts producers for bid rigging

On January 16, the KFTC issued fines and corrective orders against two producers of exhaust gas sensors for automobiles, Denso Corporation and NGK Spark Plug. The fines issued against the producers totaled KRW 1.78 billion (~$1.6 million; €1.4 million).

In 2008, General Motors sought bids globally for exhaust sensors. The KFTC found that Denso and NGK colluded so that Denso would win the bid for front sensors and NGK would win the bid for rear sensors.

Denso later announced that the company had cooperated with the KFTC's investigation, and that the KFTC chose to waive the fine against Denso. In a press release, Denso further explained that the company was exempted from the KFTC's orders because it successfully applied to the regulator's leniency program and eliminated the suspected anticompetitive conduct before the KFTC began its investigation. The KFTC vowed to continue to investigate global cartels that impact markets in South Korea, even when the collusion occurs abroad.

Qualcomm appeals KFTC record fines and applies for a stay motion

On February 21, Qualcomm appealed the KFTC's abuse of market dominance decision, which included record fines of KRW 1.03 trillion ($875 million; €825 million) on Qualcomm and moved for a stay of the KFTC's enforcement action at the Seoul High Court.[2] Qualcomm is expected to argue, among other things, that the KFTC failed to credit the value of Qualcomm's patent portfolio and its contribution to the growth of the mobile communications industry. Samsung Electronics, Apple, and Intel have applied to join the KFTC's opposition to the appeal. The Seoul High Court is expected to review the case *de novo* over multiple hearings.

National Assembly approves harsher penalties for failure to cooperate with KFTC investigations

On March 30, South Korea's National Assembly approved amendments to the Monopoly Regulation and Fair Trade Law ("FTL") that will enable the KFTC to impose more severe sanctions for failure to cooperate with its investigations.

- Before the amendment, the KFTC could only impose administrative fines for interfering with the KFTC's access to

[2] For additional information about the KFTC's 2016 decision, please refer to the Asian Competition Report for the Fourth Quarter of 2016, available at https://clients.clearygottlieb.com/rs/alertmemos/Asian_Competition_Report_Q4_2016.pdf.

documents in a dawn raid, failing to provide requested documents, or producing false information. The amendment allows the KFTC to also impose a criminal fine of up to KRW 150 million (~$130,000; €120,000) or up to two years in prison.

- The amendments allow the KFTC to enact an "enforcement levy", a penalty the regulator can impose on a firm to incentivize compliance with the investigation. The maximum enforcement levy is 0.3% of the firm's average revenue per day and would apply to each day that a firm delays in cooperating with the regulator.
- The amendments also formalized the KFTC's recent practice of disclosing its decisions in writing. Regardless of whether the regulator finds an antitrust violation, the amendments require that the KFTC's Commission-level decisions be released publically.

The various components of the amendments to the FTL will become effective after Cabinet approval.

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We hope that you find the Asian Competition Quarterly Report of interest and would welcome any questions that you may have. Please reach out to your regular firm contacts or Matthew Bachrack (mbachrack@cgsh.com), Leah Brannon (lbrannon@cgsh.com), Jeremy Calsyn (jcalsyn@cgsh.com), George Cary (gcary@cgsh.com), Cunzhen Huang (chuang@cgsh.com), Nicholas Levy (nlevy@cgsh.com), Anita Ng (ang@cgsh.com), or Robbert Snelders (rsnelders@cgsh.com).

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