CHINA

MOFCOM publishes third round of penalty decisions for non-filers

On May 4, the Ministry of Commerce ("MOFCOM") published administrative penalty decisions (dated April 21) regarding three transactions for which the parties failed to make required merger control filings. The relevant transactions were: (i) Biggain Holdings' acquisition of 50% of Jilin Sichang Pharma; (ii) the formation of a joint venture by Beijing CNR Investment and Hitachi; and (iii) the formation of a joint venture by Bombardier and New United Group. In connection with the first two transactions, the relevant parties ultimately made voluntary filings and cooperated with MOFCOM's investigation. MOFCOM considered these mitigating factors and fined the relevant parties (Biggain Holdings, Beijing CNR Investment, and Hitachi) RMB 150,000 each (~$22,000; €20,000). The fines on Bombardier and New United Group were larger, RMB 300,000 (~$45,000; €41,000) for New United Group and RMB 400,000 (~$60,000; €54,000) for Bombardier, as MOFCOM determined that the parties intentionally avoided their filing obligation and that Bombardier had previously been fined for a similar violation. In all three cases, MOFCOM determined that the transaction would not eliminate or restrict competition.

This is the third round of penalty decisions regarding failure to make required merger control filings publicized by MOFCOM since it announced in March 2014 that it would make such rulings available to the public. Nonetheless, MOFCOM has not consistently published these decisions. While MOFCOM announced in October 2015 that it had imposed penalties with respect to 15 transactions, only eight penalty decisions were made public.

NDRC seeks comments on draft guidelines regarding monopoly agreement exemptions

On May 12, the National Development and Reform Commission ("NDRC") posted for public comment the Draft Guidelines on General Conditions and Procedures for the Exemption of Monopoly Agreements ("Draft Exemption Guidelines"). The Draft Exemption Guidelines describe the prerequisites and review process for seeking exemptions for certain presumptively anti-competitive agreements under Article 15 of the Anti-Monopoly Law ("AML"). Notably, the Draft Exemption Guidelines do not include examples or case studies, although they do contemplate the future promulgation of categorical or industry-specific guidance.

The Draft Exemption Guidelines specify two procedures for seeking an exemption: exemption applications and exemption consultations. Because of concerns about agency resources, both procedures are limited in scope. Operators would be eligible to request exemption consultations only prior to the conclusion of any agreement and may only file exemption applications following the initiation of an investigation by enforcement authorities.

Exemption consultations

Opinions issued in response to requests for consultation will not be legally binding and will not estop authorities from pursuing enforcement actions. Enforcement authorities would have discretion to accept or reject requests for exemption consultations, as well as to refer the request to another agency.

In order to be accepted by an enforcement authority, requests would generally need to relate to a matter that is substantial, in terms of size, global impact, or industry precedent. Requests also would have to result in an opinion that would be legally significant in some respect, (*e.g.*, questions of first impression or clarifications of the AML or its corresponding regulations), "certain" (*i.e.*, factually developed and not conjectural), and not address a matter that is the subject of a pending case.

Agencies would issue a written, or in some cases oral, opinion within 60 business days. This opinion could include the enforcement authority's areas of concern, suggestions for addressing the same, and

examples of cases that would likely receive exemptions.

Exemption applications

Business operators seeking to file exemption applications would be required to do so in writing, following the initiation of an investigation but (1) before receipt of the prior notice of administrative penalty or (2) after receipt of the prior notice of administrative penalty, within the time specified therein. Agencies would be required to review the application for completeness and respond within seven days.[1] Among other things, applicants would be required to provide detailed information about the applicants, the agreement, and supporting evidence for the exemption.

Under Article 15 of the AML, the exemption analysis turns on whether: (1) the agreement's purpose is consistent with those enumerated in Article 15 (*e.g.*, environmental protection, standardization); (2) the agreement does not materially restrict competition in the relevant market; and (3) consumers can enjoy benefits generated by the agreement. The Draft Exemption Guidelines list the critical elements the agency would consider under each prong.

The review process will take place at the provincial level with oversight at the national level. If social and public interests were implicated, the enforcement authorities could also seek public comments on the proposed exemption opinion.

Enforcement authorities that grant exemption applications would be required to submit to the applicants a written explanation that includes the basis for their decision, as well as provide notice to the public within 20 days. Applicants would be able to designate certain information as confidential prior to public notice.

Upon notice to the applicants, enforcement authorities would have the authority to withdraw an exemption if the underlying facts that served as the basis for the exemption were to change, further investigation were to reveal contravention of the AML, or underlying laws or regulations were to be amended.

MOFCOM lifts conditions on Walmart/Yihaodian

On May 30, MOFCOM announced that it had lifted the restrictive conditions imposed on Walmart in 2012 in connection with its acquisition of a controlling stake in Niuhai Holdings (the "Transaction").[2] MOFCOM reviewed competitive conditions in the relevant market, the value-added telecommunications business, and determined that: (i) barriers to market entry have continually decreased, including new Ministry of Industry and Information Technology rules allowing foreign investors to own up to 100% of a company engaged in e-commerce; (ii) the Chinese retail e-commerce industry has rapidly expanded since 2012; (iii) certain competitors have been growing market share while Yihaodian's share has remained flat; and (iv) Walmart had remained in full compliance with the conditions. As a result, MOFCOM concluded that there was no longer a need for the conditions imposed on the party as a result of the Transaction.

MOFCOM merger review statistics

MOFCOM unconditionally cleared 93 transactions during the second quarter of 2016. This is a 15% increase over the first quarter. Almost 90% of the transactions cleared were reviewed using the simplified procedure, with an average clearance period of 29 days from publication of the notice for public comment to clearance. While most of the transactions utilizing the simplified review process have enjoyed expedited review, a handful of cases have faced extended reviews (up to 280 days), been moved from the simplified review track to the normal procedure, or may have been pulled and refiled.

[1] Operators would also be given the opportunity, at this stage, to supplement their application with additional information requested by the agencies.

[2] For more information regarding the Transaction, please refer to the Asian Competition Quarterly Report for the Third Quarter of 2012, available at https://www.clearygottlieb.com/news-and-insights/publication-listing/asian-competition-report-q3-2012.

HONG KONG

Trade association changes practices after meeting with HKCC

On May 31, the Hong Kong Competition Commission ("HKCC") announced that the Hong Kong Newspaper Hawker Association ("NHA") withdrew a letter that it previously issued to its members that recommended retail pricing for cigarettes. After receiving notice that the NHA issued the letter, the HKCC met with the association to discuss its practice. The HKCC informed the NHA that a trade association that recommends prices at which its competing members should sell products is likely engaging in serious anticompetitive conduct in violation of the Hong Kong Competition Ordinance ("the HKCO"). Following the meeting, the NHA withdrew its letter and issued a new letter to its members noting that each should set its own prices.

Because the relevant conduct was public, the HKCC determined that the NHA was simply ignorant of the relevant law, and the NHA moved quickly to rectify its conduct, the HKCC decided not to take any further action.

HKCC enforcement statistics

In its first six months, the HKCC has received over 1,250 complaints either directly, anonymously, or through an intermediary, *e.g.*, through an external legal adviser, about potentially anticompetitive practices. Of the 1,250 complaints, 272 relate to potential cartel behavior, 238 concern resale price maintenance, 267 concern abuse of dominance, and 224 relate to the general state of competition.

The HKCC has begun 111 initial assessments, which have led to the opening of ten in-depth investigations. The HKCC has not disclosed which industry sectors the investigations concern.

Personnel reshuffle at the HKCC

In March, Rose Webb replaced Stanley Wong as the HKCC Chief Executive Officer. Mr. Wong stepped down due to health issues and was to remain an honorary adviser to the HKCC but sadly passed away in April. Ms. Webb previously held the position of Senior Executive Director of the HKCC and before that served as Executive General Manager for mergers and adjudications at the Australian Competition and Consumer Commission. In April, Rasul Butt was appointed to take Ms. Webb's previous position as Senior Executive Director. Mr. Butt previously was the Executive Director for corporate services and public affairs at the HKCC.

In April, the HKCC also announced that Dennis Beling, who previously served as consultant to the chief economist, was promoted to Chief Economist, replacing Derek Ritzmann who left for the private sector.

On May 1, the Hong Kong Chief Executive appointed two new Commissioners to the HKCC and reappointed all of the 14 serving Commissioners, including Chairwoman Anna Wu, for a term of two years. The HKCC is thereby served by 16 Commissioners, which is the statutory maximum under the HKCO.

INDIA

COMPAT overturns CCI's air cargo cartel decision

On April 18, the Competition Appellate Tribunal ("COMPAT") set aside an infringement decision by the Competition Commission of India ("CCI") against air cargo companies for fixing fuel surcharges.

In November 2015, the CCI ruled that five air cargo companies acted in a concerted manner in fixing and revising fuel surcharges and imposed a penalty of 1% of each company's average turnover for the three preceding financial years. In reaching its ruling, the CCI disagreed with the findings of the Director General ("DG"), the CCI's investigative branch, that there was insufficient evidence to confirm the existence of a cartel.

Three of the airlines appealed the CCI's decision to the COMPAT arguing that the decision should be overturned due to violations of the principles of natural justice. The COMPAT reviewed the records of the proceedings and found that the CCI failed to indicate to the airlines, which had been provided copies of the DG report, that it disagreed with the findings of the DG. As a result, the CCI caused

serious prejudice to the airlines by depriving them of an opportunity effectively to defend themselves.

COMPAT remanded the case to the CCI and ordered that the CCI reconsider the DG report and, in case of disagreement, indicate the reasons for such disagreement and give the airlines an opportunity to file replies.

CCI issues record late notification fine against GE

In April, the CCI made public that, on February 16, it fined General Electric ("GE") INR 50 million (~$750,000; €650,000) for failure to file a notification within the statutory time limit regarding its acquisition of certain business units of Alstom. This is the largest such fine to date.

GE announced on May 5, 2014 its intention to acquire the equity share capital of two Alstom Indian subsidiaries (the "Announcements"), as part of its offer to acquire the thermal power, renewable power, and grid businesses of their parent company Alstom S.A (the "Transaction"). A bilateral master purchase agreement with respect to the Transaction was subsequently executed on November 4, 2014 (the "Master Purchase Agreement").

Under the Competition Act 2002, the Transaction met the thresholds for notification, and the notification was due within 30 days of the "execution of any agreement or other document" regarding the Transaction. GE, jointly with Alstom, did not file the notification until November 24, 2014, arguing that the obligation to notify arose only upon the execution of the Master Purchase Agreement.

The CCI rejected GE's argument and held that, on a proper interpretation of the rules, the obligation to notify arose upon the publication of the Announcements and notice of the Transaction should have been given to the CCI by June 4, 2016. The CCI added that GE could have approached the CCI under a pre-filing consultation procedure if it required any guidance, and that large corporations were deemed to be aware of the merger control requirements in India.

The CCI could levy a maximum penalty of 1% of the combined value of worldwide assets of GE and Alstom in respect of the violation. However, taking into account GE's bona fide intent to notify, and the fact that the merger was not consummated without the CCI's approval, the CCI imposed a fine amounting to approximately 0.0001% of the combined value of the parties' worldwide assets.

CCI gas cylinders cartel fine quashed

On May 2, COMPAT set aside a fine imposed by the CCI in 2012 on Hyderabad Cylinders, a manufacturer of LPG cylinders, that was found to be part of a cartel.

On February 24, 2012, the CCI held that Hyderabad Cylinders and other manufacturers of LPG cylinders formed a bid-rigging cartel for the supply of 14.2 kg capacity LPG cylinders. The CCI imposed fines of 7% of the average turnover of the three preceding financial years on all the cartelists other than Hyderabad Cylinders. Hyderabad Cylinder's fine amounted to 2.1 times its net profit. The CCI argued that Hyderabad Cylinders faced a larger fine due to its failure to provide details of its turnover.

Hyderabad Cylinders appealed the CCI's decision in relation to both the finding of a cartel and the fine. The COMPAT rejected the substantive appeal. In relation to the fine, however, the COMPAT held that it should be quashed for being "wholly arbitrary and discriminatory".

The COMPAT noted that the calculation of the fine on the basis of Hyderabad Cylinders' net profit was contrary to the plain language of the Competition Act 2002, which provides for calculation based on the average turnover for the preceding three financial years. The COMPAT held that the CCI could not apply a different yardstick for penalising Hyderabad Cylinders simply because it failed to file its financial statements.

Further, the COMPAT invoked its finding in an earlier, successful appeal against the fines brought by other cartelists, which Hyderabad Cylinders did not join. There, the COMPAT analyzed the case law and the relevant provisions in concluding that, in the case of a cartelist that manufactures multiple products, only turnover attributable to the specific product to which an infringement relates should be used in the calculation of the fine.

The COMPAT remanded the matter to the CCI for reconsideration of the fine, and noted that if the CCI concluded that a fine should be imposed, it should calculate the fine only by reference to Hyderabad Cylinders' turnover attributable to 14.2 kg LPG cylinders.

CCI bid rigging decision reversed

On May 10, the COMPAT set aside a CCI infringement decision against manufacturers of CN containers with disc, an explosive component, on both substantive and procedural grounds.

The CCI ruled in June 2015 that thirteen manufacturers of CN containers with disc rigged bids on tenders to supply three ordnance factories and imposed a penalty of 3% of their average annual turnover between 2011 and 2013. Six of the manufacturers appealed the CCI's decision.

In relation to one appellant, the COMPAT held that the CCI's investigative branch exceeded its jurisdiction by recording an infringement finding against it, because it had not been specifically named in the CCI's investigative direction.

In relation to all appellants, the COMPAT found that the CCI violated the principles of natural justice in allowing the participation of a CCI member in the decision-making process despite him not having attended one of the oral hearings. Further, the COMPAT found that there was a lack of evidence of any agreement between the manufacturers and that the mere quoting of identical or near identical prices by the appellants could not support an inference of collusive bidding. Instead, the COMPAT found that the similarity in prices might be attributable to the manufacturers' tendency to quote the successful bid prices in previous tenders.

Interestingly, in 2013, COMPAT ruled in CCI's favor with respect to similar issues regarding the scope of DG's investigative authority and the evidentiary value of identical pricing.[3]

COMPAT reverses abuse of dominance decisions against Coal India

On May 17, the COMPAT reversed three separate decisions by the CCI against Coal India and its subsidiaries for abuse of dominance in the production and supply of non-coking coal.

In December 2013, after receiving complaints from Coal India's customers, the CCI found that Coal India abused its dominance in the relevant market for the production and supply of non-coking coal in India by imposing unfair or discriminatory terms upon its customers. The CCI imposed a fine on Coal India equivalent to 3% of the average turnover for the preceding three years (~INR 17.7 billion; $290 million; €210 million).[4] In April 2014 and February 2015, after similar complaints by other Coal India customers, the CCI reiterated its findings against Coal India but did not impose any further punishment. Coal India appealed all three decisions, which the COMPAT addressed together.

The COMPAT set aside each of the CCI decisions on the ground that CCI violated the principles of natural justice, finding that, in each case, one or more CCI members involved in the decision-making process failed to attend one or more of the oral hearings. Citing its and the Supreme Court's precedents, the COMPAT rejected the CCI's argument that the CCI was not bound by the principles of natural justice and fairness as an executive/administrative body.

COMPAT remanded the matters to the CCI and ordered that the CCI hear the parties and pass appropriate orders afresh as early as possible and not later than 2 months after the COMPAT's ruling.

INDONESIA

LG International fined for late merger control filing

On April 26, the Commission for the Supervision of Business Competition ("KPPU") fined LG

[3] For more information regarding the 2013 COMPAT decision, please refer to the Asian Competition Quarterly Report for the Fourth Quarter of 2013, available at https://www.clearygottlieb.com/news-and-insights/publication-listing/asian-competition-report-q4-2013.

[4] For more information regarding CCI's 2013 decision against Coal India, please refer to the Asian Competition Quarterly Report for the Fourth Quarter of 2013, available at https://www.clearygottlieb.com/news-and-insights/publication-listing/asian-competition-report-q4-2013.

International IDR 8 billion (~$600,000; €550,000) for failure to make a timely merger control filing regarding its acquisition of PT Binsar Natorang Energy. After a hearing, the KPPU found that both the combined asset value (IDR 3.8 trillion) and the combined turnover (IDR 5.3 trillion) of the parties exceeded the thresholds for notification (IDR 2.5 trillion and IDR 5 trillion, respectively) and that LG International was late to notify the acquisition by 20 working days.

JAPAN

JFTC to release information regarding successful leniency applications

Beginning June 1, the Japan Fair Trade Commission ("JFTC") will release the names and the percentage fine reduction for companies that successfully participate in its leniency program. Previously, companies could elect to keep this information confidential and approximately 10-20% made this choice.

JFTC alleges that Coleman engages in resale price maintenance

On June 15, the JFTC issued a cease-and-desist order against Coleman Japan for alleged resale price maintenance. According to the regulator, from at least 2010, Coleman Japan imposed several restrictions on retailers selling its camping equipment. It set an annual minimum price and restricted the ability of retailers to offer discounts to consumers. The decision did not reference the imposition by Coleman of any sanctions for customers that deviated from the policy.

Coleman Japan must adopt a board resolution ending the alleged conduct and preventing its recurrence and notify wholesalers, retailers, and employees of the board resolution. Coleman Japan also must develop an antitrust compliance program governing its transactions with wholesalers and retailers and provide training to its employees regarding the compliance program. The legal department must engage in regular audits to ensure ongoing compliance.

We understand that this was the first resale price maintenance investigation in Japan since 2011 and the first under the JFTC's revised distribution guidelines adopted in March 2015.

THE PHILIPPINES

PCC enacts competition rules

In May 2016, the Philippine Competition Commission ("PCC"), which was established in July 2015, adopted detailed rules ("Rules") regarding the implementation of the Philippine Competition Act ("Act").[5] In respect of the prohibition of anti-competitive agreements and abuses of a dominant market position, the Rules largely replicate the provisions of the Act. In respect of the regulation of mergers and acquisitions, the Rules provide useful guidance on the application of the PHP 1 billion (~$21 million; €19 million) notification threshold, the pre-notification consultation process, the procedures for notification and review, and the treatment of confidential information.

SOUTH KOREA

KFTC finds that Oracle did not abuse its dominant position

On April 12, after a nearly year-long investigation, the Korean Fair Trade Commission ("KFTC") found that Oracle did not abuse its dominant position in database systems. It will impose no fines or administrative orders. The KFTC was investigating whether Oracle unfairly bundled its database systems with maintenance service products, as well as whether Oracle was compelling customers to pre-purchase future upgrades of the databases by contractually bundling the upgrades with the original database system and maintenance services.

Following hearings, the KFTC commissioners ruled that Oracle's database system and its maintenance service products were "essentially one product". They reasoned that because the products were not in two different markets to begin with, no tying could

[5] For additional information about the establishment of the Philippine Competition Commission, please refer to the Asian Competition Quarterly Report for the Third Quarter of 2015, available at https://www.clearygottlieb.com/~/media/cgsh/files/publication-pdfs/cleary-gottlieb-asian-competition-report-q3-2015.pdf.

have occurred. Moreover, the commissioners found that Oracle did not compel customers to pre-purchase future database upgrades, reasoning that the purchases were designed to prevent prohibited copying of the database systems and thus a justifiable means to protect Oracle's intellectual property rights.

New requirements for leniency applicants

On April 15, the KFTC established more stringent requirements for companies seeking to take advantage of the agency's leniency program. Under the new rules, an executive of the applicant company must attend a KFTC committee meeting to testify as to pertinent facts. By requiring an executive to testify, the KFTC hopes that its committee will be more equipped to determine the merits of the application. In addition, if the leniency applicant discloses to a third party that it has applied for KFTC leniency, it will be disqualified, unless the disclosure was required by law or was made in connection with leniency applications to foreign authorities. By limiting disclosure, the KFTC seeks to prevent colluding parties from maintaining relationships of trust with each other. The leniency application form also now requires that applicants identify other jurisdictions where leniency is being pursued and lists the ongoing cooperation obligations of the applicant.

Thirteen construction companies fined for collusion

On April 26, the KFTC fined thirteen construction companies KRW 351.6 billion (~$310 million; €280 million) for coordinating their behavior with respect to bids to build LNG storage tanks for Korea Gas Corp. It also referred all thirteen companies to prosecutors. The companies allegedly colluded on pricing before participating in numerous bids for construction projects.

KFTC reduces burden of merger control notification

Amendments to the KFTC's Business Combination Report Preparation Guideline, proposed on April 4, became effective on June 20. Per the amendments, filings no longer need to provide general corporate and shareholder information for Korean listed companies. In addition, market information may be omitted for certain categories of transactions that are unlikely to result in antitrust issues, such as certain intra-person transactions. Moreover, where a shareholder of more than 20% of the shares of the target is acquiring additional shares to become the largest shareholder, the filing need not provide information on the initial share acquisition, but, instead, may simply reference the fact of the initial share acquisition. The amendments are designed to reduce the burden of filing for transactions that likely pose minimal antitrust concerns.

TAIWAN

TFTC makes first award to a whistleblower

On April 21, for the first time since the program was established in June 2015, Taiwan's Fair Trade Commission ("TFTC") granted an award to a whistleblower.[6]

Based on a tip from the whilstleblower, whose identity remained confidential, the TFTC launched an investigation into 21 companies active in the market for container freight services. The TFTC found that the companies exchanged sensitive pricing information at secret meetings and fixed charges for container handling services in violation of the Taiwan Fair Trade Act. On April 21, the TFTC ordered the cessation of such conduct and imposed total fines of NTD 72.6 million (~$2.3 million; €2 million) on the companies.

The whistleblower was awarded NTD 0.5 million (~$15,000; €14,000) for his or her contribution. The TFTC noted that the size of the reward was a function of the size of the total fine and the value of the whistleblower's evidence. In this case, the whistleblower's evidence constituted "evidence that is helpful to the initiation of the investigation" – the lowest category – and the reward was capped at 5% of the total fine.

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[6] For additional information about the legislative history of the whistleblowing reward program, please refer to the Asian Competition Quarterly Report for the Second Quarter of 2015, available at https://www.clearygottlieb.com/~/media/cgsh/files/publication-pdfs/cleary-gottlieb-asian-competition-report-q2-2015.pdf.

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), or Robbert Snelders (rsnelders@cgsh.com).

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