CHINA

SAIC confirms first abuse of dominance investigation

On July 5, the State Administration for Industry & Commerce ("SAIC") publicly confirmed its ongoing abuse of dominance investigation of Tetra Pak. This is SAIC's first publicly announced abuse of dominance investigation. The investigation was launched after SAIC received various complaints against Tetra Pak. Some reports indicate that the complaints were made by two of Tetra Pak's competitors in China.

SAIC provides information on closed investigations

On July 29, 2013, SAIC announced that since August 2008 when the Anti-Monopoly Law ("AML") took effect, it has completed its investigation of 12 antitrust matters. All of the matters concerned anti-competitive agreements. Interestingly, nine of the cases involved trade associations. Separately, SAIC has announced that it has authorized 23 antitrust investigations since implementation of the AML.

Shanghai court rules against Johnson & Johnson in first RPM case

Rainbow Medical, a Chinese distributor, alleged that Johnson & Johnson ("J&J") engaged in resale price maintenance ("RPM") by setting minimum resale prices for surgical products. On May 18, 2012, the Shanghai First Intermediate People's court ruled in favor of J&J, holding that Rainbow failed to provide sufficient evidence to prove (i) the anti-competitive effect of J&J's RPM (considering factors such as market share, the competitive landscape, the supply situation, and price fluctuation); (ii) Rainbow's antitrust damages; or (iii) the causal link between J&J's conduct and any damages.

On August 1, the Shanghai High People's Court applied a similar analytical approach but reversed the lower court's decision, ruling that J&J was in violation of the AML. The Court held that Rainbow had successfully proved the anti-competitive effect of J&J's price floors.

Interestingly, while they reached different conclusions, both courts clearly were of the view that plaintiffs in a RPM case must establish the anti-competitive effect off the conduct. The Court considered:

- The degree of competition in the relevant market;
- J&J's market position;
- J&J's business justification for engaging in RPM; and
- Whether the anti-competitive effects of the RPM were outweighed by any proffered pro-competitive justifications.

As noted further below, this approach seems to diverge from that taken by the National Development and Reform Commission ("NDRC").

NDRC fines infant formula manufactures for RPM

On August 7, NDRC announced that it fined six infant formula manufacturers for RPM, including Mead Johnson, Danone, Fonterra, Abbott Laboratories, FrieslandCampina, and Biostime. The total fine was approximately RMB 668 million (~$110 million; €80 million). This is the largest fine ever issued for a violation of the AML.

NDRC found that nine infant formula companies fixed the resale price or set a minimum resale price for their products. NDRC determined that the manufacturers employed a variety of methods to impose these resale prices, including the application of penalties, reducing rebates, and limiting or stopping supply.

Three companies, Wyeth, Meiji, and Zhejiang Beingmate, were not fined because, according to NDRC, they reported the RPM to NDRC, provided material evidence, and took action to remedy any harm caused by the RPM.

Biostime received the largest fine (6% of last year's revenues), as NDRC alleged that it had "seriously violated anti-monopoly law and failed to actively rectify its behavior".

All the involved companies further committed to: (i) cease all illegal activities; (ii) amend sales agreements and policies so that they comply with the law; (iii) conduct AML training for all employees; and (iv) take necessary actions to remedy the impact of the RPM on consumers.

Like the February 22, 2013 RPM decisions by local NDRCs fining two premium liquor producers,[1] the publicly available infant formula decision is short and lacks any analysis of possible business justifications for the alleged conduct. This may suggest that NDRC takes the view that RPM is a *per se* violation of the AML (in other words, the conduct is illegal regardless of its impact on competition/consumers) or, at least, that it will be very difficult for any proposed justification to overcome NDRC's view of RPM's impact on competition/consumers.

Moreover, recently, NDRC has focused its investigative efforts on RPM. Each of the automobile, home appliance, and eye glasses sectors have been rumored to be under investigation, though the NDRC has publicly confirmed only the ongoing RPM investigation in the eye glasses sector. These investigations follow the referenced premium liquor decisions. At the time, the premium liquor fines were the largest ever imposed by NDRC under the AML.

MOFCOM conditionally approves Baxter's acquisition of Gambro

On August 8, the Ministry of Commerce ("MOFCOM") conditionally approved Baxter International's acquisition of Gambro. The decision came over seven months after MOFCOM received the parties' initial filing.

MOFCOM found that the transaction would eliminate or restrict competition in China in three product markets related to continuous renal replacement therapy ("CRRT") and a hemodialysis ("HD") market.

[1] For additional information about the premium liquor fine, *see* Cleary Gottlieb's Asian Competition Quarterly Report for the first quarter of 2013, available at http://www.cgsh.com/news/List.aspx?practice=2&geography=3.

MOFCOM determined that, in 2012, the combined worldwide market shares of Baxter and Gambro in each of the three CRRT product markets were 64%, 59%, an 62%, while the combined market shares in China were 57%, 84%, and 79%. MOFCOM concluded that because the remaining competitors in these markets were relatively small, the transaction would increase Baxter's ability to raise prices unilaterally.

With respect to the HD market, MOFCOM found that Baxter and Nipro would be the primary remaining competitors in China with a combined market share of 49%. MOFCOM also held that an existing original equipment manufacturing ("OEM") agreement between Baxter and Nipro could facilitate the exchange of sensitive information (such as production costs and volumes) and increase the likelihood of Baxter and Nipro coordinating their competitive behavior.

As a result, MOFCOM required that Baxter divest its worldwide CRRT business and terminate the OEM production agreement within China.

On July 22 (about two weeks earlier), the European Commission also required the divestiture of Baxter's CRRT business, but did not impose a remedy in the HD market. Instead, the Commission found that Baxter and Gambro were not particularly close competitors in this market and would continue to face significant competition from other market participants.

NDRC fines gold trade association and retailers for price fixing

On August 13, NDRC announced that its local agency in Shanghai fined the Shanghai Gold and Jewelry Trade Association (the "Trade Association") and five local retail stores for price fixing. The five stores were fined approximately RMB 10.1 million (~$1.6 million; €1.2 million) or 1% of their relevant revenue in the previous year. The Trade Association was fined RMB 500,000 (~US$82,000; €60,000), the highest fine allowed for a trade association that organized or coordinated price fixing.

NDRC found that the Trade Association organized meetings among the retailers where they reached an agreement regarding pricing of jewelry. NDRC also determined that the actual retail prices were within the ranges agreed to during these meetings.

MOFCOM imposes fourth "hold-separate" merger remedy

On August 27, MOFCOM conditionally approved the $3.8 billion merger between Mediatek and MStar Semiconductor. As a condition to its approval, MOFCOM required that MStar Taiwan remain in the market as a separate company. This is the fourth time that MOFCOM has conditioned a merger approval on the parties' holding separate at least some portion of the target company.[2]

The parties filed their initial notification on July 6, 2012. After MOFCOM expressed concerns with the transaction, the parties submitted proposed remedies. As the review clock was about to expire and the parties and MOFCOM could not reach agreement on potential remedies, the parties, on February 22, 2013, withdrew their filing and then refiled. The review lasted more than a year.

MOFCOM's review focused on the LCD TV control chip market in China. MOFCOM determined that the parties were the two largest players in China and had a combined 80% share. MOFCOM also found that other LCD TV control chip makers would not be able to compete effectively with the merged firm and that high barriers made new entry unlikely. MOFCOM therefore concluded that the transaction likely would lead to increased prices and reduced innovation. Finally, MOFCOM found that the potential efficiencies did not outweigh the possible anti-competitive effects of the transaction.

As a result, MOFCOM required that MStar transfer its LCD TV control chip business to MStar Taiwan and that MStar Taiwan remain independent of the merged firm. In addition:

- The parties cannot close their transaction until they submit and MOFCOM approves a detailed operations plan;
- MOFCOM limited MediaTek's shareholder rights with respect to MStar; and
- While each of the four hold-separate remedies required the appointemnt of a monitoring trustee, the MediaTek/MStar hold-separate order requires that the trustee be given expansive powers. For example, the trustee may attend relevant board meetings of either party, review board minutes, agendas, and other documents, and interview any employee of either party and other third parties.

These requirements arguably make the MediaTek/MStar hold-separate order, in some ways, more stringent than the previous three.

After three years, the parties may apply to MOFCOM for release from the hold-separate obligations. However, unless some "material change" occurs in the market (this term has not been defined or explained by MOFCOM), the separate commitments made by the parties regarding price reductions, maintenance of pre-transaction practices regarding after-sales services and open source code, and restrictions on future transactions, are indefinite.

MOFCOM unconditionally cleared 54 transactions in the third quarter of 2013

On October 8, MOFCOM announced that during the third quarter of 2013, it unconditionally cleared 54 transactions. The transactions include Carlsberg Brewery's $466 million acquisition of a controlling stake in Chongqing Brewery and Michael Dell's / Silver Lake's $24 billion buyout of Dell Inc.

[2] The other cases were Seagate/Samsung, Western Digital/Hitachi, and Marubeni/Gavilon.

HONG KONG

Enforcement unlikely before mid-2015

In July, Hong Kong Competition Commission ("HKCC") Chairperson Anna Wu said that competition enforcement is unlikely before mid-2015. She explained that before the substantive provisions of Hong Kong's Competition Ordinance enter into force, HKCC must draft more detailed guidelines. Moreover, Chairperson Wu said that before drafting the guidelines, she and her team of Commissioners would like to visit regulators outside Hong Kong for consultations. As a result, the HKCC plans to take 18 months, or until December 2014, to complete its drafting. After that, the guidelines will be presented to Hong Kong's Legislative Council ("LegCo") for vetting and comments by both LegCo and other third parties. While drafting the guidelines, Chairperson Wu said she would like to increase the HKCC's staff from eight to over fifty. In addition, the HKCC is searching for its directors and CEO.

INDIA

CCI fines parties for delayed notification of transaction later abandoned

On August 1, 2013, the Competition Commission of India ("CCI") imposed a fine of 5 million rupees (~$80,000; €60,000) on Temasek Holdings Private Ltd. ("Temasek") and its subsidiaries, Zulia Investments ("Zulia") and Kinder Investments ("Kinder"), for a "delayed filing" in relation to the then-proposed acquisition of DBS Group Holdings ("DBSH"), an Asian financial services group. The filing, which was made on June 6, 2013, was considered by the CCI to have been delayed by 399 days.

According to the CCI, the filing requirement arose 30 days after the execution of a share purchase agreement (the "SPA") between Fullerton Financial Holdings (Private) Ltd. ("Fullerton") (an indirect wholly-owned subsidiary of Temasek) and DBSH, dated April 2, 2012. On May 13, 2013, Fullerton directed DBSH to transfer the purchased shares to Zulia and Kinder on the date of completion of the SPA.

The acquirers claimed that the delay in filing was caused by incorrect advice received from their initial Indian counsel regarding the notification requirement. They claimed that they were only made aware of the requirement to file much later, when receiving advice on a separate and unrelated matter. Upon learning of the requirement to file, they voluntarily submitted the filing. The acquirers further submitted that the transaction had been abandoned and the SPA had been terminated, arguing that in such circumstances no penalties for delayed filing ought to be imposed. Finally, the parties argued that the transaction was "entirely offshore in nature".

The CCI rejected the acquirer's claim of ignorance of the requirement to file, stating that the provisions of the Competition Act, 2002 (the "Act") were clear. Further, the CCI rejected the argument that abandonment of the transaction vitiated the need for a penalty.

Interestingly, the CCI also took into account the following aggravating factors when setting the amount of the fine: (i) the e-mails submitted by Temasek to the CCI demonstrated that they had not treated compliance with Indian competition law with any degree of seriousness throughout the transaction, either before or after the signing of the SPA; (ii) the acquirers showed no sense of urgency in making their filing even once they were made aware of the requirement to file (according to the CCI, there was a delay of five months between the date on which Temasek was made aware of the filing requirement and the date on which the filing was made); (iii) both Temasek and DBSH had been operational in India for a reasonably long time and could not validly claim ignorance of prevailing Indian law; and (iv) a failure by Temasek to notify an earlier transaction.

The mitigating factors considered by the CCI were: (i) the acquirers had voluntarily notified before the consummation of the transaction; and (ii) the transaction would likely have no effect on competition in India. Taking these factors into account, the CCI did not impose the maximum penalty possible (1 per cent of the total combined assets of the acquirers and DBSH, which would amount to 310 million rupees. Given that the CCI has not to date issued any fining guidelines, there remains considerable uncertainty as to how the level of any fine imposed for failure to file will be assessed in the future.

The CCI has not to date imposed a penalty for failure to file in respect of a transaction it has uncovered of its own initiative. However, the CCI has issued three fines for "delayed filing" in one calendar year, which may demonstrate growing confidence and an emboldened approach to defending the integrity of the Indian merger control regime.[3]

CCI issues decision regarding shoemakers' bid rigging

On August 6, 2013, the CCI imposed a total penalty of 62.5 million rupees (~$1 million; €700,000) against 11 shoe manufacturers for bid rigging and market allocation in the supply of rubber-soled ankle boots to the Directorate General of Supplies & Disposals ("DGSD"). The fine amounted to 5% of each Party's average turnover during the preceding three years.

On June 14, 2011, the DGSD put out to tender a contract to supply rubber-soled ankle-boots for the period of December 2011 to November 2012. Once the tenders were returned, it became clear to DGSD that (i) the prices quoted were within a narrow range of one another; and (ii) all the bidders bar one had imposed quantity restrictions. DGSD alleged that these factors were indicative of a pre-determined, collusive, and restrictive bidding pattern.

The bidders argued that there was no evidence of an agreement and that that the mere existence of a trade association attended by the bidders, the Federation of Industries of India ("FII"), plus parallelism in the bidding is not sufficient to justify an infringement of Section 3 of the Act. The bidders also argued that the price parallelism was due to commonalities in input costs, product specification, and delivery times. Finally, they noted that the prices submitted by the bidders were simply quotes, not final prices. After the bidding round, there would usually be significant bilateral negotiation regarding a final price.

The CCI found that the bidders were unable to provide a reasonable explanation for the similarity in the submitted prices. In addition, it stated that it did not have to find direct evidence of an agreement, but could infer an agreement based on the "preponderance of probabilities", in part because evidence of the existence of an anti-competitive practice or agreement is rare. In addition, the CCI found that the FII provided a forum where the bidders were able to, and did, meet. The CCI did not explain in detail what conclusions might be inferred from such meetings. It did note that the fact that at least one document was exchanged in connection with the FII that provided a competitor with the details of another competitor's orders received and orders due for supply, revealed mutual sharing and exchange of information among the bidders prior to the submission of bid documents.

In addition, the CCI held that the Parties had not shown how their conduct could result in benefits accruing to consumers or improvements to supply and distribution processes nor had they explained how their conduct did not foreclose competition.

This case is the latest in a line of cases where the CCI has sought to impose a fine for cartel behavior based on the existence of a forum for competitors to meet (*e.g.*, a trade association) and price (or other) parallelism (the other cases involved cement, soda ash, and tires). In two of the cases (soda ash and tires), the CCI did not impose a fine. It is not entirely clear why fines were imposed here and in the cement case but not in the soda ash and tires cases. However, it may relate to the CCI's opinion regarding the plausibility of the explanations provided for price parallelism and/or the nature and extent of information exchange at the trade associations in question.

[3] For additional information about this and other CCI enforcement actions regarding delayed filings, *see* Cleary Gottlieb associate Ruchit Patel's article, available at http://indianlawyer250.com/features/article/247/the-treatment-late-filings-indian-merger-control/.

INDONESIA

KPPU imposes merger remedies for the first time

On September 12, 2013, the Indonesian Commission for the Supervision of Business Competition ("KPPU") conditionally approved Nestlé's $12 billion acquisition of Wyeth Nutrition. This is the first time the KPPU has imposed conditions on a transaction. Both companies have significant sales of baby formula, particularly formula for babies under six months old. The KPPU found that regulatory requirements for formula used by babies from zero to six months make new entry difficult. The KPPU also held that the transaction increased the likelihood of competitive coordination among the remaining suppliers of such formula. In order to help it monitor the market, the KPPU required that Nestlé, for three years, submit to it monthly pricing and sales reports.

SINGAPORE

CCS appoints new CEO

On September 24, 2013, Mr. Toh Han Li was appointed Chief Executive Officer of the Competition Commission of Singapore ("CCS"). Mr. Li moves into the role after having served as the CCS' Assistant Chief Executive from 2009-2013, and he is the first CCS CEO with legal training. Mr. Li has emphasized strengthened cooperation with the International Competition Network and ASEAN competition group.

SOUTH KOREA

KFTC drops antitrust case against Google

In July, the Korea Fair Trade Commission ("KFTC") ended its two-year-long investigation of Google Inc. The KFTC launched the investigation in 2011 after receiving complaints from the providers of Korea's two largest search engines, NHN Corp. and Daum Communications Corp., that Google was requiring cellphone manufacturers using the Android operating system to install the Google mobile search box as the default search engine on their smartphones. The KFTC found that this action had little impact on the market because Google's market share in Korea did not substantially increase and cellphone users could easily use other search engines on their mobile devices.

KFTC fines makers and distributors of commercial vehicles for price-fixing

On July 29, the KFTC announced that it fined Hyundai Motor Co. and six competitors, including Scania Korea Ltd., Tata Daewoo Commercial Vehicles Co., and Volvo Group Korea Co., KRW 116 billion (~$109 million; €79 million) for colluding to fix prices of large commercial vehicles. The KFTC found that these companies met regularly from December 2002 to April 2012 to exchange price and inventory information in order to manipulate sales prices of large commercial vehicles.

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