CHINA

NDRC publishes fining guidelines for public comment

On July 17, the National Development and Reform Commission ("NDRC") published the draft Guidelines on Illicit Gain and Penalty Determination ("Penalty Guidelines") for public comment. The draft Penalty Guidelines introduce a framework to calculate antitrust fines, which we view as a positive step to improving the transparency and predictability of antitrust enforcement in China. Here, we briefly introduce the most significant topics covered by the Penalty Guidelines.

Illicit gains

If an undertaking has violated the provisions of the Anti-Monopoly Law ("AML") related to "monopoly agreements," Article 46 arguably requires that NDRC confiscate any illicit gains ("the anti-monopoly enforcement agency shall…confiscate the illegal gains"). While NDRC has not always enforced this provision, the Penalty Guidelines lay out a mechanism for the calculation of illicit gains—additional income or reduced expense as compared to the hypothetical situation where the anticompetitive conduct had not occurred. This may be difficult to apply in practice, and in any event, the calculation will be complicated.

Probably realizing these difficulties, NDRC identifies a number of situations for which no illicit gains might be found. Moreover, NDRC recognizes that the relevant data for calculating illicit gains may not always be available. In such cases, NDRC may decide not to seize the illicit gains and instead consider this factor when determining the appropriate fine.

Antitrust fines

Antitrust fines are calculated by multiplying a fine percentage by the relevant "sales value." The AML permits antitrust fines from 1% to 10% of the sales value and lists a number of general factors that will be considered in setting the percentage. Interestingly, with an important exception related to the setting of the base fine percentage, the Penalty Guidelines do not distinguish between horizontal and vertical conduct when advising on the calculation of the relevant sales or the appropriate fine percentage. This may result in disproportionate penalties on abuses of a dominant position or non-hardcore horizontal violations.

- Relevant sales value

The Penalty Guidelines make clear that the "sales value" usually means the revenue of the relevant products within the geographic area of the infringement, which if larger than China is then limited to China, in the year preceding the formal launch of the investigation. However, when the fine based on the relevant sales value is too small to reflect the harm caused by the anticompetitive conduct, the Penalty Guidelines permit NDRC to expand the scope of the relevant sales to include other products or other countries. Additional clarity on how and when this will occur would be helpful. The relevant sales may not exceed the total aggregate sales of the undertakings involved.

In general, NDRC will target the undertaking directly responsible for the anticompetitive conduct. NDRC may pursue a parent company when it has decisive influence over the implementation of the anticompetitive conduct. The Penalty Guidelines list several factors to consider when determining whether a parent company has decisive influence.

- Fine percentage

The Penalty Guidelines provide additional insight on the determination of the appropriate fine percentage.

First, the Penalty Guidelines establish base percentages determined by the type of violation—3% for hardcore horizontal violations (price-fixing, output restriction, and market division) and abuse of market power involving statutory monopoly, 1% for vertical violations, and 2% for other violations. These base percentages reflect a general understanding of the relative harm caused by such violations.

Next, the agency will adjust the base percentage based on the duration of violation and a consideration of listed aggravating or mitigating factors. These listed factors mostly concern the undertaking's role in the illegal scheme or whether it is being cooperative. This step appears quite mechanical—a 1% increase for each year of duration, and a 1% or 0.5% increase or decrease for each specific aggravating or mitigating factor. There is also a catch-all clause that allows other factors not on the list to be considered.

Finally, the fine percentage may be adjusted up or down so that the fine more closely matches the seriousness of the offense, taking into account factors such as market share, difficulty of entry, market situation, market power, geographic area, price changes, consumers' losses, etc. It is unclear how these factors should be weighed or when they should be considered.

As noted, the final percentage shall not be less than1% or greater than 10%.

Conclusion

While there are certainly things that can be improved (*e.g.*, more clarity on how market factors will be considered in setting fines), on balance we applaud the Penalty Guidelines as a step toward more transparency and predictability for the antitrust enforcement in China.

NDRC penalizes three drug manufacturers

On July 27, NDRC released penalty decisions against three pharmaceutical companies, Huazhong Pharmaceutical, Shandong Xinyi Pharmaceutical, and Changzhou Siyao Pharmaceutical, for allegedly entering into and implementing monopoly agreements regarding sales of estazolam.

According to the penalty decisions, estazolam is listed as a Class II psychotropic drug and its active pharmaceutical ingredients ("APIs") are manufactured only by the three subject companies. NDRC found that the three companies met in September and October 2014 and unanimously agreed to (i) refrain from selling estazolam APIs to other manufactures; and (ii) increase the price of estazolam tablets by RMB 0.10 per unit.

The parties did not enter into an express agreement to increase prices. Instead, NDRC found an agreement based on the following actions: (i) none of the parties objected or filed a report with NDRC when Huazhong Pharmaceutical proposed a RMB 0.10 price increase for estazolam tablets during a meeting among the three manufacturers; and (ii) shortly after the meeting, in December 2014, each company announced a RMB 0.10 price increase.

NDRC also found that prior to reaching their agreement, the three companies supplied estazolam APIs to 16 estazolam tablet manufacturers. After the implementation of the agreement, the three companies ended sales to these 16 companies, which, NDRC determined, made it easier to increase estazolam tablet prices. NDRC concluded that during 2015 the companies' prices increased from 88% to 329%.

NDRC identified Huazhong Pharmaceutical as the leader of the cartel. As a result, it was subject to a fine of 7% of its 2015 sales of estazolam tablets. Shandong Xinyi Pharmaceutical cooperated with NDRC's investigation and, therefore, faced a lower fine of 2.5% of its 2015 sales of estazolam tablets. Changzhou Siyao Pharmaceutical was not credited with the same level of cooperation, and its fine level was 3%. The total fine was RMB 2.6 million (~$390,000; €350,000).

MOFCOM conditionally approves Anheuser-Busch InBev acquisition of SABMiller

On July 29, the Ministry of Commerce ("MOFCOM") conditionally cleared the acquisition of SABMiller plc ("SABMiller") by Anheuser-Busch InBev NV ("ABI"). ABI and SABMiller were the world's largest and second largest multinational brewers by revenue, respectively. Both companies were active in the production and sale of beer in China. SABMiller was predominantly active in China through its 49% interest in China Resources Snow Breweries Limited ("CR Snow").

MOFCOM assessed the effects of the transaction on the market for beer, and the sub-markets for (i) popular beer; and (ii) premium/super-premium beer. The sub-markets were defined by a sales price benchmark of RMB 5 per 500ml. We understand that this is the first time MOFCOM has defined price-based, high- and low-end sub-markets. MOFCOM analyzed both provincial and national geographic markets.

MOFCOM held that the transaction raised competitive concerns in each of the three product markets. It determined that, at a national level, ABI and CR Snow would have a combined market share of 43% of beer, 41% of popular beer, and 52% of premium/super-premium beer. At a provincial level, the post-transaction market shares would exceed 70% in certain provinces. MOFCOM explained that by combining the number one and number three brewers in these markets, the transaction would significantly reduce competition, increase market entry barriers by giving the merged company more control over sales channels, and weaken the bargaining power of downstream distributors, which to a large extent act only locally. MOFCOM therefore concluded that the transaction would have a detrimental effect on Chinese consumers. MOFCOM did not provide any detailed analysis of its rationale.

To address MOFCOM's concerns, SABMiller committed to divest its interest in CR Snow to its joint venture partner, China Resources Beer (Holdings) Company Limited. This is only the second time that MOFCOM has imposed a "buyer up front" remedy, requiring a divestiture to an identified purchaser. The remedy is consistent with the conditions imposed by MOFCOM in connection with the Anheuser-Bush / InBev transaction. At that time, InBev agreed that it would not acquire any interest in CR Snow.

The decision follows antitrust clearances in the EU and the U.S., which also required structural remedies.

NDRC fines Haier subsidiaries for resale price maintenance

On August 12, the Shanghai Price Bureau of the NDRC fined three subsidiaries of Haier Group RMB 12.3 million (~$1.8 million; €1.7 million) for engaging in resale price maintenance ("RPM") in violation of the AML. RPM has been a priority of NDRC, and NDRC has treated agreements regarding minimum RPM as *per se* illegal since 2013.[1]

In June 2015, NDRC received a report of the RPM via its online reporting system. NDRC conducted an investigation from November 2015 to July 2016.

NDRC found that from 2012 to 2015, through sales policies, agreements, and communications in WeChat chat groups, the subsidiaries required that their distributors impose a minimum resale price. If the distributors failed to adhere to the minimum price, the subsidiaries imposed penalties and stopped supplying the distributor.

The fine amounted to 3% of the subsidiaries' sales revenue in the relevant market for the previous year. NDRC can impose a fine of up to 10% of a company's sales revenue in the previous year.

NDRC has increasingly used WeChat chats as evidence against investigated companies. It is unclear how NDRC obtained this evidence. However, according to WeChat's privacy policy and service agreement, Tencent may hand over messages posted by users in compliance with China's laws or pursuant to governmental requests. As the use of mobile devices and messaging apps for business purposes continues to gain popularity, companies may face compliance blind spots unless steps are taken to monitor or prohibit the use of such applications.

MOFCOM merger review statistics

MOFCOM unconditionally cleared 85 transactions during the third quarter of 2016. This is an 8.6% decrease from the second quarter. Almost 75.3% of the transactions cleared were reviewed using the simplified procedure, with an average clearance period of 23.7 days from publication of the notice for public comment to clearance.

[1] For additional information about NDRC's treatment of RPM, please refer to the Asian Competition Report for the First Quarter of 2013, available at https://www.clearygottlieb.com/~/media/cgsh/files/cleary-gottlieb-asian-competition-report-1st-quarter-2013.pdf; and the Asian Competition Report for the Third Quarter of 2013, available at https://www.clearygottlieb.com/~/media/cgsh/files/publication-pdfs/asian-competition-report-3q-2013.pdf.

HONG KONG

HKCC investigates IT sector

The Hong Kong Competition Commission ("HKCC") has opened a number of formal investigations into companies in the IT sector for suspected cartel activity. The HKCC has been in touch with software vendors and system integrators.

While the HKCC has not yet announced details, the investigation into the sector is likely to have been started by a third-party complaint relating to bid-rigging concerns. Pursuant to the Hong Kong Competition Ordinance (the "Competition Ordinance"), bid-rigging is considered serious anticompetitive conduct, and the HKCC has identified bid-rigging as an enforcement priority.

The HKCC has a broad range of powers to conduct investigations. It may request documents and data and ask that employees respond to questions. It may also seek a search warrant from the court to enter and search specific premises for evidence without prior notice to the occupier, particularly where the investigation involves secretive conduct or the possibility that evidence may be destroyed or interfered with should the HKCC seek them through other means. The premises need not relate to the party under investigation. The HKCC is not required to have first used one of its other investigative powers before applying for the warrant, nor is the HKCC required to wait for a person's legal advisers to arrive at the premises before commencing the search. However, where parties have requested that their legal advisers be present, the HKCC will wait a reasonable time for their arrival before the search.

Government reappoints Competition Tribunal president and deputy

The Hong Kong government reappointed Justice Godfrey Lam Wan-ho and Justice Queeny Au-Yeung Kwai-yue as president and deputy president of the Competition Tribunal, respectively, for three-year terms with effect from August 1.

HKCC publishes draft block exemption order for liner shipping vessel sharing agreements

On September 14, the HKCC published a draft block exemption order ("BEO") and a Statement of Preliminary Views for certain liner shipping agreements. The proposal is now open for consultation until December 14.

The Competition Ordinance allows the HKCC to issue a BEO for a category of potentially anticompetitive agreements that can be shown to enhance overall economic efficiency. Agreements that fall within the scope of a BEO are exempt from the application of the First Conduct Rule, which prohibits anticompetitive agreements and concerted practices.

Discussions between the Hong Kong Liner Shipping Association ("HKLSA") and the HKCC regarding the possible BEO commenced in August 2015, before the Competition Ordinance came into effect. On December 17, 2015, the HKLSA formally applied for a BEO for vessel sharing agreements ("VSAs"), pursuant to which ocean carriers agree on operational arrangements, and voluntary discussion agreements ("VDAs"), pursuant to which ocean carriers agree to certain commercial matters related to shipping routes. The HKCC conducted a preliminary consultation and received responses from almost 30 parties, including customers, trade associations, chambers of commerce, container terminal operators, non-HKLSA shipping lines, and Government bodies. The HKCC also considered different approaches to exemptions for liner shipping agreements in other jurisdictions.

After a nine-month preliminary assessment, recognizing the role of VSAs in the efficient operation of the liner shipping industry, the HKCC now proposes to issue a BEO for VSAs subject to certain conditions, including a controversial market share cap of 40%. This cap is lower than the cap in neighboring ports, such as Singapore. The cap may be indicative of a "safe harbor" under the First Conduct Rule (particularly certain vertical agreements) and the Second Conduct Rule, as this is left unanswered in the existing regime.

The proposed duration for the BEO is five years. The HKCC proposes to review the BEO four years from its commencement date, but has the discretion to review it at any time it considers appropriate.

The HKCC will consider submissions from interested parties before issuing its final decision on the BEO application. There will then be a six-month grace period to allow parties to agreements not benefiting from the BEO to make any changes they may consider necessary to their commercial arrangements. The BEO is unlikely to be effective until late 2017.

The HKCC has not proposed a BEO for VDAs. The HKCC has indicated that there is insufficient evidence showing that VDAs enhance overall economic efficiency. This echoes the approach in jurisdictions such as the EU and India, which have recently concluded that VDAs do not merit exemption. That said, a number of countries around the world, including Hong Kong neighbors Singapore and Malaysia, do exempt VDAs. In Singapore, VDAs protected by the BEO cannot require carriers to adhere to a particular tariff. In Malaysia, the BEO, issued in 2014 for a period of three years, does not apply to agreements involving price-fixing, price recommendations, or tariff imposition. International liner shipping agreements involving mainland Chinese ports are subject to specific legislation and are required to be filed with the Ministry of Transport for possible investigation.

INDIA

CCI re-imposes record fine on cement companies

On August 31, the Competition Commission of India ("CCI") re-imposed fines totaling more than INR 67 billion (~$1.25 billion; €980 million) on 11 cement companies and a trade association for engaging in alleged cartel activity, including price-fixing and output restrictions.

The CCI initially fined the parties in June 2012.[2] In December 2015, however, the Competition Appellate Tribunal ("COMPAT") set aside the CCI's 2012 decision, finding that, in violation of the principles of natural justice, the former CCI chair participated in the decision-making process despite not having attended the oral hearing.

Following the COMPAT's ruling, the CCI conducted a fresh oral hearing in January 2016. The substantive analysis in the CCI's new decision remains materially identical to that contained in its 2012 decision. In particular, the CCI did not adduce any direct evidence of coordination, but instead inferred collusion from circumstantial evidence, including alleged price, production, and dispatch parallelism.

Most of the parties have announced their intention to appeal the CCI's new decision.

INDONESIA

KPPU fines beverage maker for abuse of dominance

On August 30, the Commission for the Supervision of Business Competition (the "KPPU") imposed a fine of IDR 11.5 billion (~$0.9 million; €0.8 million) on a beverage manufacturer, Forisa Nusapersada ("Forisa"), for abusing its dominant market position. The KPPU found that Forisa (i) entered into exclusive agreements with retailers that prohibited the sale of rival products; and (ii) offered rewards to retailers that did not display or sell rival products.

Recent bid-rigging decisions

In September, the KPPU issued three bid-rigging decisions related to bids for public infrastructure. The KPPU imposed fines totaling IDR 4.9 billion (~$0.4 million; €0.3 million) on six construction firms for colluding in a road construction tender in Makassar, fines totaling IDR 14 billion rupiah (~$1 million; €1 million) on three construction firms for colluding in road construction tenders in West Nusa Tenggara, and fines totaling IDR 7.8 billion (~$0.6 million; €0.5 million) on seven construction firms for colluding in public tenders to install street lights in Sidoarjo.

A large majority of the KPPU's cases involve bid-rigging. A common feature of these cases is the existence of family affiliations and cross-ownership among the colluding companies.

JAPAN

Japan considers new fines system

The Japan Fair Trade Commission ("JFTC") is looking to revise how it calculates penalties for antitrust violations. Moving away from a strictly

[2] For additional information about the CCI's 2012 decision and its substantive analysis, please refer to the Asian Competition Report for the Second Quarter of 2012, available at https://www.clearygottlieb.com/~/media/cgsh/files/publication-pdfs/cleary-gottlieb-asian-competition-report-q2.pdf.

mechanical calculation, the JFTC aims to set more tailored fines based on the particular facts of a case. In short, the new penalty guidelines would give the JFTC more discretion regarding the factors to consider when issuing a fine.

The new guidelines address several problems. Currently, the JFTC has little discretion to consider the global and diversified nature of the business activities it fines. In addition, compared to other competition authorities, the JFTC also has little power to incentivize parties to cooperate with investigations or increase fines when parties obstruct investigations.

The changes also aim to make the Japanese fine system more consistent with the fine systems in other countries. Antitrust investigations increasingly involve multiple jurisdictions. As JFTC Chairman Kazuyuki Sugimoto noted, these changes will help the JFTC keep pace with the global economy. The JFTC requested public comment, and we will provide further updates as the new guidelines take shape.

SINGAPORE

CCS ball bearing fine significantly reduced

Singapore's Competition Appeal Board ("CAB") reduced by 37% the fine imposed by the Competition Commission of Singapore ("CCS") on Nachi-Fujikoshi ("Nachi"), a participant in a ball bearings cartel.

In May 2014, the CCS fined three Japanese ball bearings manufacturers for fixing the prices of ball bearings. Nachi received the highest fine of SGD 7.6 million (~$6 million; ~€4.5 million).[3]

Nachi appealed the fine to the CAB, and the CAB reduced the fine to SGD 4.8 million (~$3.8 million; ~€2.9 million). The CAB found that the CCS had wrongly applied its own fining guidelines, which provided that the CCS should use the party's turnover from the most recent financial year preceding the infringement decision. Rather than using Nachi's 2013 turnover, the CCS used Nachi's higher 2012 turnover, which the CSS obtained in connection with its issuance of a proposed infringement decision in December 2013. The CAB rejected the CCS' argument that it would be administratively unworkable to request updated turnover figures prior to issuing the final infringement decision.

SOUTH KOREA

KFTC blocks SK Telecom's proposed acquisition of CJ Hellovision

On July 18, the Korea Fair Trade Commission ("KFTC") blocked SK Telecom, a wireless telecommunications operator and small player in pay-television, from acquiring CJ Hellovision, a television content provider. The KFTC concluded that the proposed KRW 500 billion (~$440 million; €390 million) transaction may limit competition in the paid broadcasting market and telecommunications retail and wholesale markets. The KFTC found that the combined firm would be the largest operator in 21 of 23 pay television broadcast regions, which could result in higher rates for these services. The KFTC also found that the transaction would bring together Korea's largest mobile operator and largest budget mobile service provider, which would strengthen SK Telecom's monopoly in telecommunications. Given the horizontal and vertical concerns, the KFTC reasoned that it would be difficult to allay the anticompetitive impact with either behavioral remedies or divestitures.

KFTC amends Leniency Guidelines

The KFTC amended its Leniency Guidelines, effective September 30. The amendment, among other things, clarifies the KFTC's "amnesty plus" program, imposes a clearer process for the effective succession of a leniency position, and clarifies the timing of leniency applications.

Clarification of "amnesty plus" program

Sometimes while investigating conduct related to a cartel for which it does not qualify for amnesty

[3] For additional information about the CCS's 2014 decision, please refer to the Asian Competition Report for the Second Quarter of 2014, available at https://www.clearygottlieb.com/~/media/cgsh/files/publication-pdfs/cleary-gottlieb-asian-competition-report-2014-2nd-quarter.pdf.

(Cartel A), an applicant uncovers information relating to a new cartel (Cartel B) for which it does qualify for amnesty. An "amnesty plus" program grants amnesty to the applicant for its participation in Cartel B and enhanced leniency related to its actions regarding Cartel A.

Under the former Monopoly Regulation and Fair Trade Act ("MRFTA"), the KFTC's "amnesty plus" program was applied based on a vague standard with no detailed criteria. This discouraged participation. The amendment provides objective criteria to determine "amnesty plus" applicants' eligibility for mitigations and exemptions.

Process for effective succession of leniency position

The amendment also clarifies the process for leniency applicants who are second to report a cartel, but are seeking to succeed the first leniency applicant's position. This might occur when the first leniency applicant rescinds its application or forfeits its leniency status. The second applicant can then seek to assume the position and benefits of the first leniency applicant.

The amendment allows second applicants to benefit from succession in only two scenarios. The second applicant must have provided information to the KFTC (i) before the KFTC was aware of the cartel; or (ii) before the KFTC had enough evidence to substantiate its charges.

Clarification of timing of leniency applications

Additionally, the amendment clarifies how to deliver leniency applications and when such applications are deemed submitted. The amendment provides that the only acceptable ways to deliver leniency applications to the KFTC are by email, dedicated fax transmission, or in-person delivery. Furthermore, an application is deemed submitted when received by the KFTC, not when sent by the applicant.

Seoul court rules against the KFTC in autoparts cartel case

Seoul's High Court recently reversed the KFTC's fines on two autoparts manufacturers, Hanwha and Schaeffler Korea. At the conclusion of its 2014 investigation, the KFTC accused the manufacturers of fixing sale prices for automobile bearings from April 1998 to March 2012.[4] The High Court disagreed with the KFTC's timeline for the cartel. The Court did not find enough evidence of collusive conduct after January 2006 because of significant divergences in the timing, frequency, and extent of price increases between 2008 and 2012. Therefore, the Court found that the collusive conduct ceased in 2005 at the latest and the five-year statute of limitations had expired.

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

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[4] For additional information about the KFTC's 2014 decision, please refer to the Asian Competition Report for the Fourth Quarter of 2014, available at https://www.clearygottlieb.com/~/media/cgsh/files/publication-pdfs/cleary-gottlieb-asian-competition-report-4th-quarter-2014.pdf.

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