CHINA

MOFCOM conditionally approves Dow/DuPont merger

On May 2, the Ministry of Commerce ("MOFCOM") announced conditional approval (dated April 29) of the proposed merger of equals between E.I. du Pont de Nemours and Company ("DuPont") and The Dow Chemical Company ("Dow"). The $130 billion transaction will create DowDuPont, which will eventually be split into three separate, independent companies. MOFCOM's conditional approval of the deal follows the European Commission's ("EC") conditional approval on March 27.

After an in-depth review, MOFCOM raised concerns in the following product areas – selective herbicides for rice, pesticides for rice, acid copolymers, and ionomers. MOFCOM defined a China-wide market for the agricultural products and a global market for the materials science products.

Interestingly, MOFCOM highlighted the potential for lost innovation as a result of combining the R&D efforts of Dow and DuPont with respect to the listed agricultural products.

MOFCOM imposed structural remedies that were consistent with those required by the EC. Specifically, DuPont agreed to divest certain parts of its crop protection business and research and development pipeline and organization, and Dow agreed to divest its global acid copolymers and ionomers businesses.

MOFCOM also imposed a number of behavioral remedies. These were:

- Requiring the two companies over the next five years to sell certain crop protection products to Chinese buyers on a non-exclusive basis and at a reasonable price; and
- Prohibiting the two companies, for five years, from requiring that Chinese distributors act as exclusive distributors of certain crop protection products.

MOFCOM took a little more than 13 months to complete its review and conditionally approve the merger.

MOFCOM issues fines for failure to notify

MOFCOM has ramped up efforts to punish firms that fail to file merger notifications for transactions that meet MOFCOM's merger control thresholds. MOFCOM has recently issued a number of fines for failure to notify.

The penalties include :

- On May 3, MOFCOM fined OCI, a South Korean energy and chemical company, RMB 150,000 (~$22,000; €20,000) for failing to notify its acquisition of Tokuyama Malaysia, a producer of polycrystalline silicon. MOFCOM penalized OCI for failing to notify the first step of the transaction, which involved the purchase of only 16.5% of Tokuyama Malaysia's shares on October 7, 2016. Although the remaining shares were not going to be transferred until March 31, 2017, MOFCOM found that the separate transfers were part of the same transaction and that failure to notify the agency before completing the first transfer therefore violated the Anti-Monopoly Law ("AML").
- On May 11, MOFCOM fined Guangdong Rising H.K., a wholly-owned subsidiary of the state-owned Guangdong Rising Assets Management, RMB 150,000 (~$22,000; €20,000) for failing to notify its acquisition of PanAust, a gold and copper producer. MOFCOM determined that the transaction would not have any anticompetitive effects.
- Also on May 11, MOFCOM fined Meinian Onehealth RMB 300,000 (~$44,000; €40,000) for failing to notify its acquisition of Ciming Health Checkup. Both Meinian and Ciming are China-based providers of health check-up services. As above, MOFCOM concluded that the transaction was unlikely to result in any harm to consumers.

- On April 12, MOFCOM fined Zhongshan Broad-Ocean Motor, a producer and seller of micro motors, RMB 150,000 (~$22,000; €20,000), for failing to notify its acquisition of 77.77% of Prestolite Electric (Beijing), a developer and manufacturer of electricity generator starters used for motors. Again, MOFCOM concluded that the transaction was unlikely to eliminate or restrict competition.

In its decisions relating to OCI and Guangdong Rising, MOFCOM noted the parties' voluntary reporting as a key reason for the lower fine.

The current maximum penalty is RMB 500,000. MOFCOM is considering increasing the maximum fine and adopting a penalty system based on the infringing company's turnover.

SAIC wins administrative lawsuit

A municipal court in Beijing ruled in favor of the State Administration for Industry and Commerce ("SAIC") in China's first administrative lawsuit challenging the decision of an antitrust regulator. In May 2016, the SAIC and the Shandong AIC fined 23 accounting firms for participating in an anticompetitive agreement designed to divide the market. The accounting firms filed suit in Beijing seeking to vacate the fine and arguing that the regulator failed to provide sufficient evidence and reasoning for its decision. The Beijing court dismissed the lawsuit, finding that the SAIC's investigation and decision followed appropriate procedure, was supported by clear facts, and properly applied the relevant laws.

HONG KONG

Competition Tribunal offers broad confidentiality protections

In the first lawsuit before the Hong Kong Competition Tribunal, Justice Lam sided with two of the defendants and offered broad confidentiality protections.

The Competition Commission ("HKCC") was seeking a decision against several technology companies for allegedly colluding in offers for the supply of a server system in 2016. A hearing on the merits will not take place until May or June of 2018. In the meantime, however, Justice Lam issued a ruling following a case management conference with the parties that clarified the scope of a previously issued confidentiality order.

In March, the HKCC asked the tribunal to allow for confidential treatment of information related to the prices the companies offered, the identities of current and former employees at the companies, and the identity of the original complainant. Justice Lam granted the HKCC's request and ordered that the information not be available for public viewing without the tribunal's permission.

Following this order, it was unclear whether all the documents produced pursuant to the matter were subject to the confidentiality order, or whether only the portions that were redacted were protected. This caused a dispute between the respondent companies. Justice Lam ruled that that all parts of documents produced in the proceedings would be subject to the confidentiality restriction. Justice Lam was concerned that one respondent company could have access to confidential materials produced by another respondent.

Under the order, a respondent can now only use another respondent's confidential documents with that respondent's consent or under the direction of the tribunal. The expansive confidentiality protection is likely precedent-setting and will allow future respondents to reduce the public disclosure of information in cases before the tribunal.

Competition Commission announces new hires

The HKCC has appointed Brent Snyder as its next chief executive officer. Snyder was previously the deputy assistant attorney general for criminal antitrust enforcement in the U.S. Department of Justice ("DOJ"). Snyder was actively involved in some of the DOJ's most important criminal antitrust matters during his tenure, including investigations and trials involving auto parts, coastal water freight, air transportation, and thin-film transistor liquid crystal display panels. He also served as acting assistant attorney general for the DOJ's Antitrust Division after President Trump took office in January 2017. Snyder's three-year term begins on September 4, 2017.

The HKCC also appointed Steven Parker, an experienced litigator, as Executive Director (Legal

Services). This newly created legal position will likely be responsible for recent lawsuits initiated by the HKCC, including cases against British telecom giant BT and U.S. software supplier Nutanix. Mr. Parker has limited antitrust experience, but significant litigation experience. He has worked in litigation roles in Canada and England, and recently left his position as chief litigation counsel of Hong Kong's Monetary Authority.

Both appointments signal that the Hong Kong regulator may be embracing more enforcement and courtroom litigation. While there is no criminal antitrust law in Hong Kong, civil enforcement actions may increase.

Court rejects standalone private action

On April 27, the Hong Kong Court of First Instance ("HKCFI") ruled that it had no jurisdiction to determine whether a trade association violated the Competition Ordinance. The HKCFI rejected the plaintiffs' claim and confirmed that only the HKCC is eligible to file a complaint regarding an infringement of the Competition Ordinance's conduct rules, that the complaint must be filed with the Competition Tribunal, and that the Competition Tribunal is the only statutorily authorized party to determine whether there has been a breach of the Competition Ordinance.

Further, the HKCFI found that the plaintiff failed to establish a *prima facie* case for its claim and, therefore, declined to transfer the case to the Competition Tribunal. While the HKCFI did not establish a clear threshold for such a transfer, it discussed several relevant factors. With reference to several cases, the HKCFI stated that when examining if a breach exists, a court should (i) identify the relevant market; (ii) estimate the degree of harm caused to the market; and (iii) consider any counterfactual reports or findings. Further consideration should also be given to the commercial elements, *e.g.*, the nature and the structure of the market.

INDIA

India's Supreme Court holds that antitrust penalties should be based on product-specific turnover

On May 8, the Indian Supreme Court ruled in *Excel Crop Care v. Competition Commission of India* that antitrust penalties should be based on the products that are the subject of the litigation ("relevant turnover") and should not factor in the revenue generated by other products produced or sold by the company ("overall turnover"). Currently, India's Competition Act allows for penalties of up to 10% of annual overall turnover or three times net profit during the period of the anticompetitive agreement.

The Supreme Court noted that the use of overall turnover could lead to vast inequities. In particular, if a multi-product and single-product company conspired to rig bids, the former could end up paying a significantly higher fine than the latter for the same illegal conduct.

NCLAT stays fine in long-running Coal India matter

In one of its first antitrust actions, on May 31, the National Company Law Appellate Tribunal ("NCLAT"), which took over antitrust jurisdiction from the Competition Appellate Tribunal ("COMPAT") in March 2017, [1] stayed the Competition Commission of India's ("CCI") most recent penalty decision against Coal India.

In May 2016, COMPAT set aside the CCI's 2013 fine (INR 17.7 billion (~$270 million; €245 million)) against Coal India for using its allegedly dominant position to impose unfair and discriminatory terms in fuel supply agreements. [2] and asked the CCI to reconsider the complaint. [3] Following COMPAT's

[1] For more information on the abolition of the COMPAT and transfer of its jurisdictional powers to NCLAT, please refer to the Asian Competition Report for the First Quarter of 2017, available at https://www.clearygottlieb.com/~/media/cgsh/files/asian-competition-reports/asian-competition-report--q1-2017.pdf.

[2] For more information regarding this CCI decision, please refer to Cleary Gottlieb's Asian Competition Quarterly Report ("Asian Competition Report") for the Fourth Quarter of 2013, available at https://www.clearygottlieb.com/~/media/cgsh/files/asian-comp-report-q4-2013.pdf

[3] For more information regarding this decision, please refer to the Asian Competition Report for the Second Quarter of 2016, available at https://www.clearygottlieb.com/~/media/cgsh/files/asian-competition-report-2q16.pdf

direction, CCI held fresh hearings and again concluded that Coal India violated competition law. However, given Coal India's recent amendments to its fuel supply agreements and other changes to its conduct, the CCI imposed a lower, INR 5.9 billion (~$90 million; €80 million) fine.[4]

CCI conditionally approves Dow/DuPont merger

On June 13, the CCI conditionally approved the proposed merger between Dow and DuPont. To obtain clearance from the CCI, in addition to the global remedies discussed above, Dow and DuPont agreed to implement several remedies specific to India. The remedies address the CCI's concerns regarding the supply of fungicides used on Ascomycota, a type of fungi that causes mildew to grow on grapes, and the supply of "low graft" MAH grafted polymers, an adhesive product.

CCI fines Hyundai Motor for resale price maintenance

On June 14, the CCI issued its first-ever penalty for resale price maintenance ("RPM"), fining a subsidiary of South Korean automaker Hyundai Motor INR 870 million (~$14 million; €12 million), 0.3% of the average relevant turnover in India. The CCI found that Hyundai set the maximum discount that dealers could offer to end customers. This was also the CCI's first imposition of a penalty based on the investigated party's "relevant turnover."

JAPAN

JFTC releases annual review

In 2016, the Japan Fair Trade Commission ("JFTC") levied fines against 33 companies and business owners totaling JPY 9.8 billion (~$90 million; €80 million), a slight increase from 2015. Additionally, the JFTC delivered 11 cease-and-desist orders and announced warnings in 48 abuse of dominance cases. Of the 124 leniency applications received, the JFTC granted amnesty or reduced the penalty in nine cases.

The annual report touted the JFTC's newly established IT, electrical, and agricultural taskforces to monitor and investigate potential antitrust violations in these sectors as one of its main accomplishments in 2016. The IT taskforce investigated Amazon Japan for its alleged use of "Most Favored Nation" clauses that arguably stifled competition and innovation in the online retail market. The agricultural taskforce issued a cease-and-desist order against Tosa Aki, a farm co-operative that refused to admit members, and delivered five warnings. The work of each task force is furthered by hotlines that enable whistleblowers to report suspected violations. The JFTC announced that it has received 50 tips in the last six months.

JFTC drops investigation into Amazon Japan

On June 1, the JFTC announced that it is no longer investigating Amazon Japan for suspected antitrust violations. In 2016 it was announced that the JFTC and the Ministry of Economy, Trade, and Industry ("METI") were joining forces to probe online technology companies for anticompetitive behavior. The JFTC suspected that Amazon Japan was violating Japan's Antimonopoly Act by requiring its online vendors, as a condition for selling their products on Amazon, to market their products on Amazon at a price no higher than that offered by the vendors for similar products through other online retailers. Amazon was also allegedly requiring its vendors to offer every type of product that the vendors offered through other retailers.

These types of provisions, known as Most Favored Nation ("MFN") clauses, may harm competition and consumers by providing a disincentive for Amazon's vendors to offer their products on other online retailers at low prices, by hampering innovation, and by imposing barriers to entry for new potential vendors.

The JFTC's investigation ended, however, after Amazon Japan volunteered to remove MFN clauses from its vendor contracts. Amazon will monitor the application of these changes and issue progress reports to the JFTC for the next three years.

As this was the JFTC's first investigation into a company that used MFN clauses, it is currently

[4] For more information on the CCI decision, please refer to the Asian Competition Report for the First Quarter of 2017, available at https://www.clearygottlieb.com/~/media/cgsh/files/asian-competition-reports/asian-competition-report--q1-2017.pdf.

unclear whether these types of price-parity provisions in fact violate the law.

MALAYSIA

New chairman and commissioner appointed to MyCC

Mohamad Zulkify Jusoh and Ruzaina Wan Haniff have been appointed as chairman and commissioner, respectively, at the Malaysia Competition Commission ("MyCC"). Zulkify Jusoh is a politician and member of the Prime Minister's United Malays National Organization ("UMNO") party. Wan Haniff is a lawyer and chairwoman of Women Civil Servants. Some have criticized these appointments due to the appointees lack of experience with competition law. At this point, it is unclear what policies the new MyCC members will advance.

PHILIPPINES

PCC announces deadline for compliance with competition law

The Philippine Competition Commission ("PCC") has announced that companies have until August 9 to remedy any anticompetitive conduct proscribed by the Republic Act. Passed in 2015, Philippine's competition law included a two-year transitional period during which companies would be immune from penalties for violations while reordering their structures and conduct to comply with the law.

SINGAPORE

CCS to apply revised penalty guidelines

The Competition Commission of Singapore ("CCS") will apply its revised 2016 penalty guidelines to all proposed infringement decisions issued after December 1, 2016.[5] In November 2016, the CCS adopted several changes to its penalty guidelines, including calculating penalties based on the financial year prior to the date when the infringement ended, rather than the financial year prior to the issuance of the CCS infringement decision. The regulator also confirmed that it is applying the new penalty guidelines in a price-fixing case involving five capacitor manufacturers.

SOUTH KOREA

New chairman of KFTC appointed

New President Moon Jae-in has appointed Kim Sang-jo as the new chairman of the Korea Fair Trade Commission ("KFTC"). A former economics professor and civic leader, Mr. Kim is reported to have played a significant role in shaping President Moon's economic agenda. Based on his public statements, Mr. Kim is expected to implement ambitious new investigative and enforcement policies at the KFTC and strictly enforce the Monopoly Regulation and Fair Trade Act, particularly against family-owned conglomerates ("chaebols"). During his inaugural address, Mr. Kim echoed the views of President Moon by stressing the need to create a fairer economy in South Korea. Mr. Kim attributed the country's recent economic struggles to a lack of vigorous antitrust enforcement and vowed to bolster the KFTC's regulatory activities with the aim of invigorating economic growth.

During his speech at his inauguration ceremony, Mr. Kim stressed that none of his proposals could be implemented by the KFTC alone. Rather, Mr. Kim will need to persuade the National Assembly to work with the KFTC and to ratify his reforms into law.

KFTC conditionally clears Dow/DuPont merger

On April 7, the KFTC granted conditional regulatory approval to the proposed merger of equals between Dow and DuPont. In response to concerns expressed by the KFTC regarding the market for acid copolymers, Dow agreed to divest its global acid copolymers business.

Seoul High Court upholds KFTC bid rigging fine

On May 16, Seoul's High Court rejected Samsung's challenge of a KRW 29.2 billion (~$26 million; €23 million) fine imposed by the KFTC. Samsung was one of 22 companies fined by the KFTC in 2015 for suspected bid rigging in connection with the

[5] For more information on CCS's revised penalty guidelines, please refer to Cleary Gottlieb's Asian Competition Report for the Fourth Quarter of 2016, available at https://www.clearygottlieb.com/~/media/cgsh/files/asian-competition-reports/asian-competition-report-q4-2016.pdf

construction of natural gas pipelines ordered by Korea Gas Corp. Samsung sought to invalidate the fine in court, alleging that because the collusion in the setting of bid prices occurred in 2009, the five-year statute of limitations set in the Monopoly Regulation and Fair Trade Act had expired by the time the KFTC levied the fine. However, the High Court concluded that, since the KFTC had already launched its investigation in 2013, the fine imposed in 2015 was legal.

THAILAND

National Legislative Assembly establishes merger-review committee

Thailand's National Legislative Assembly has passed a bill amending the Trade Competition Act to form a committee that will review proposed mergers between large companies with the goal of promoting fair competition. The seven-member committee will reject proposed mergers that would have a significant adverse effect on competition or that could result in a combined firm with the ability to manipulate the market. The committee members will serve four-year terms, and no member will serve more than two terms.

In addition to reviewing mergers, the committee will serve as an advisor on rule issuance and will have the ability to levy fines against violators of the Trade Competition Act.

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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 to 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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