CHINA

MOFCOM merger review statistics

On July 14, the Ministry of Commerce ("MOFCOM") reviewed its case load for the first half of 2017. During this period, MOFCOM received 202 merger control notifications and cleared 156 of them. Of the 156 transactions cleared, the agency reviewed 112—approximately 72% of the total—using its expedited procedure for "simple" cases. Among the transactions notified, MOFCOM observed that (i) there was a trend toward increased transaction size; (ii) over half of the transactions involved companies in the manufacturing sector; and (iii) around 43% of the notifications concerned foreign-to-foreign transactions, 29% involved transactions between foreign and Chinese parties, and 28% were purely domestic.

In the third quarter of 2017, MOFCOM unconditionally cleared 106 transactions. This is a new record. Around 77% of the transactions cleared were reviewed under the simplified procedures. Of these simple cases, 98% were cleared within 30 days of the publication of the notice for public comment, with an average clearance period of 21.6 days.

MOFCOM fines companies for failure to notify

On July 20, MOFCOM published penalty decisions against the companies involved in the establishment of two separate joint ventures, namely: (i) the 2015 joint venture between Svitzer Asia Pte. Ltd. (49%) and Binhai County Binhai Port Investment and Development Ltd. (51%); and (ii) the 2016 joint venture between Wuhu Construction Investment (15%), Chery New Energy (45%) and Yaskawa Electric (40%). The parties closed the joint venture formations without notifying MOFCOM in advance and observing the relevant waiting periods.

Each company was fined RMB 150,000 (~$25,000; €20,000). MOFCOM noted that it took into consideration the parties' cooperation with MOFCOM's investigation when assessing the level of the fine.

NDRC fines two pharmaceutical firms for abuse of dominance

On July 28 and August 15, the National Development and Reform Commission ("NDRC") published two penalty decisions fining Zhejiang Second Pharma RMB 289,516 (~$45,000; €40,000) and Tianjin Handewei Pharmaceutical RMB 154,400 (~$25,000; €20,000). Both firms were alleged to have abused a dominance position by charging unfairly high prices and refusing to deal with certain customers.

The two firms enjoyed a combined market share of greater than 66.7% in the market for the sale of raw materials used in isonicotinic acid hydrazide, an ingredient in the production of tuberculosis drugs. NDRC alleged that the two firms significantly increased their prices without any evidence of increased production cost or changes in market conditions.

NDRC also found that the two firms entered into exclusive dealing agreements with Longshunhe Pharmaceutical and refused to supply ingredients to other isonicotinic acid hydrazide producers without the prior approval of Longshunhe Pharmaceutical.

NDRC stated that taking these steps in a market with high barriers to entry forced some isonicotinic acid hydrazide producers to stop production.

Relatedly, in 2016, Longshunhe Pharmaceutical was fined RMB 120,000 (~$20,000; €15,000) for hindering NDRC's investigation of this matter. A business manager is reported to have thrown a USB flash drive containing potential evidence out of the building when law enforcement officials arrived to collect evidence. Company staff later tried to prevent the regulatory officials from retrieving the device.

NDRC has identified the pharmaceutical industry as one of its enforcement priorities in 2017 and announced its plan to closely monitor fluctuations in prices of raw ingredients for drugs and relevant industrial materials.

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MOFCOM conditionally approves Brocade/Broadcom

On August 22, MOFCOM announced conditional approval of the proposed acquisition of Brocade Communications Systems, Inc. ("Brocade") by Broadcom Limited ("Broadcom"). MOFCOM's investigation uncovered both vertical and horizontal concerns.

MOFCOM first defined three relevant markets: fiber channel storage area network switches ("FC SAN switches"), application-specific integrated circuits ("ASICs") for FC SAN switches, and fiber channel host bus adapters ("FC HBAs"). FC SAN switches and FC HBAs are building blocks for storage area networks. Considering the low freight costs and limited restrictions on global trade for the relevant products, MOFCOM defined global relevant geographic markets.

MOFCOM identified a vertical concern resulting from the combination of Brocade's position in FC SAN switches and Broadcom's position in ASICs. MOFCOM found that Brocade's global market share in FC SAN switches is 70–80% and that Broadcom's share in the market for ASICs used in FC SAN switches is 30–40%. Because ASICs for FC SAN switches are customized to a particular switch supplier, producers of ASICs gain confidential information from FC SAN switch suppliers during the production process. MOFCOM expressed concern that post-transaction Broadcom may improperly use the confidential information of other FC SAN switches producers to benefit its enhanced position in FC SAN switches.

Furthermore, MOFCOM stated that end users may only establish and operate a fiber channel storage area network if they have both FC HBAs and FC SAN switches. MOFCOM worried that the combination of Brocade's position in FC SAN switches with Broadcom's 40–50% global market share in FC HBAs might allow Broadcom to limit competition in FC HBAs by (i) hampering the interoperability between competing FC HBAs and Brocade's FC SAN switches; (ii) improperly using the confidential information of FC HBA competitors; and (iii) bundling and tying FC SAN switches and FC HBAs.

MOFCOM approved the acquisition conditioned on the parties agreeing to the following behavioral remedies for the next ten years:

- Maintaining the interoperability between Brocade FC SAN switches and third-party FC HBAs at the same level as the interoperability between Brocade's switches and Broadcom's FC HBAs, and refraining from discriminating against third-party FC HBAs.
- Firewalling confidential information related to third-party FC HBAs and third-party FC SAN switches.
- Maintaining existing sales conditions in China for the sale of FC SAN switches, and refraining from any form of tying or bundling.

SAIC enforcement overview

On August 30 and 31, at the China Competition Policy Forum, the State Administration for Industry and Commerce ("SAIC") provided an overview of its enforcement efforts since the Anti-Monopoly Law was enacted on August 30, 2007. SAIC reported that it has officially commenced investigation of 82 cases, of which 40 concerned anticompetitive agreements and 42 concerned abuse of dominance. As of August 30, SAIC had completed the investigation of 50 of these cases. The investigations covered a wide range of sectors, including pharmaceuticals, tobacco, broadcast television, insurance, oil and gas, electricity supply, computer software, and construction materials.

MOFCOM seeks public opinion on draft revised merger control rules

On September 8, MOFCOM published the draft Revised Measures on Review of Concentration of Undertakings ("Revised Rules") for public comment. The draft Revised Rules, when adopted, will supersede the two merger control rules adopted in 2009 (the "2009 Rules").

The draft Revised Rules combine the provisions contained in the 2009 Rules as well as various provisions in MOFCOM's other merger control guidelines, such as the Guidance Opinion on

Notification of Concentration of Undertakings adopted in June 2014, and the rules regarding the notification and review of simple transactions adopted in April 2014.

The Revised Rules also attempt to clarify various aspects of China's merger control regime. Notable new provisions include:

- Article 4 of the draft Revised Rules clarifies that any acquisition of assets, a business, legal rights, or other compositions of another undertaking, which can be operated in a market and generate revenues, constitutes a concentration of undertakings. This provision introduces the concept of "legal rights" but does not explain what it intends to cover. If a broad interpretation is to be applied that includes the transfer of all kinds of licenses of intangible assets, such as patents, it would deviate from the merger control rules in other major jurisdictions (such as the EU and United States) where only transfers of certain types of licenses of intangible assets constitute a reportable transaction.
- Article 8 provides that multiple simultaneous or sequential transactions by the same acquirer of different acquired entities that are conditioned on each other "in law or in fact" will be deemed as one concentration. It is concerning that there is no time limit on such aggregation in this provision and that no examples of how this aggregation would work in practice are provided.
- In Article 47, MOFCOM codified its existing practice regarding the approach to "fix-it-first" divestitures and "upfront buyer" divestitures. The approach adopted is similar to that used in the EU. It is helpful to have the distinction in writing since MOFCOM has applied both types of divestitures in its recent conditional approvals.
- Articles 50–52 permit MOFCOM to investigate transactions that are below the turnover thresholds and thus, not reportable. Although the Anti-Monopoly Law does not specifically provide for such investigations, the State Council's Rules on Notification Thresholds do allow it. In 2009, MOFCOM published for public comment draft rules regarding such investigations, but the rules have not been adopted.

As shown above, although the new provisions in the draft Revised Rules provide some additional clarity regarding MOFCOM's merger control review, some of the provisions are so broad or vague as to potentially create new ambiguities.

NDRC fines PVC firms for price fixing

On September 25, NDRC imposed a total fine of RMB 457 million (~$70 million; €60 million) on 18 polyvinyl chloride ("PVC") manufacturers for price fixing. The two ringleaders were fined 2% of their respective relevant sales in 2016, while the other cartelists' fines amounted to 1%–2% of each company's relevant sales in 2016.

According to NDRC's announcement on September 27, the 18 PVC manufacturers held six meetings between March and December of 2016 to discuss market conditions and output and reached price fixing agreements 13 times through group chats on WeChat, a Chinese messaging app.

HONG KONG

HKCC grants first block exemption order

On August 8, the Hong Kong Competition Commission ("HKCC") issued a conditional, five-year block exemption order ("BEO") for vessel sharing agreements ("VSAs"). As previously reported, the Hong Kong Liner Shipping Association ("HKLSA") applied for BEOs for both VSAs and voluntary discussion agreements ("VDAs") in December 2015 and submitted a supplementary

application for VDAs with a revised scope in September 2016.[1]

The HKCC rejected the HKLSA's application for a VDA BEO. VDAs allow carriers to discuss commercial information on trade routes, including sensitive market data, trade flows, supply and demand forecasts, and business trends. HKCC determined that VDAs may facilitate rate increases and surcharges and that there was insufficient evidence to show that VDAs enhance overall economic efficiency.

VSAs allow ocean carriers to agree on operational arrangements relating to the provision of liner shipping services, such as joint operation of shipping services and the exchange of vessel space. The HKCC considered that VSAs may enhance the frequency and range of services in the market and contribute to ensuring the attractiveness of Hong Kong as a hub for transshipment.

Therefore, subject to three conditions, the HKCC exempted VSAs from application of the First Conduct Rule (prohibition of anticompetitive agreements): (i) the parties to the VSA do not collectively exceed an aggregate market share of 40% or have not held a combined market share exceeding 45% for two consecutive years; (ii) the VSA does not authorize or require shipping lines to engage in cartel conduct (price fixing, exchange of pricing information, certain limitations on capacity, market or customer allocations); and (iii) shipping lines are free to withdraw from VSAs without incurring a penalty, upon giving reasonable notice. The HKCC also issued guidance explaining which VDA activities may run afoul of the Competition Ordinance.

The BEO is immediately effective. The HKCC has allowed a grace period of six months ending on February 8, 2018 during which parties may renegotiate or terminate any existing VDAs to which the BEO may not apply. The BEO is in place for five years. HKCC may review the BEO at any time and has scheduled a review after four years.

In reaching its decisions, the HKCC conducted two rounds of consultations and took into account submissions from the HKLSA and industry stakeholders, as well as the exemption practices for VSAs and VDAs in other jurisdictions.

The BEO has given legal certainty regarding VSAs and is consistent with the approach taken in other jurisdictions. HKCC's position on VDAs also follows a regulatory trend towards stricter controls on these agreements.

HKCC files second case with Competition Tribunal

On August 14, the HKCC commenced proceedings in the Competition Tribunal against ten contractors in the construction and engineering sector for an alleged market allocation and price fixing arrangement in violation of the First Conduct Rule. This is the second case brought by the HKCC to the Competition Tribunal. The Hong Kong Housing Authority assisted with the investigation of the case.

The case involves renovation services at a newly developed residential project. The HKCC alleges that the ten contractors engaged in a "floor allocation arrangement" pursuant to which the contractors agreed not to actively seek or accept business from tenants on floors allocated to another contractor and would allegedly even direct tenants to the designated contractor.

The HKCC also alleges that the contractors agreed to renovation pricing, which was then circulated on promotional leaflets jointly prepared by the contractors. According to the HKCC, the contractors gave tenants the impression that the leaflet's pricing was indicative of standard pricing for the work.

INDIA

Supreme Court upholds COMPAT's ruling setting aside fines against GSK and Sanofi

On August 8, the Supreme Court of India upheld the now-defunct Competition Appellate Tribunal's ("COMPAT") November 2016 decision overturning

[1] For additional information about the HKCC's consultation and previous work on the BEO, please refer to the Asian Competition Reports for the Third and Fourth Quarters of 2016, available at https://www.clearygottlieb.com/news-and-insights/publication-listing/asian-competition-report-q3-2016 and https://www.clearygottlieb.com/news-and-insights/publication-listing/asian-competition-report-q4-2016.

the Competition Commission of India's ("CCI") June 2015 imposition of INR 635 million (~$10 million; €9 million) in fines against GlaxoSmithKline ("GSK") and Sanofi for rigging bids in government tenders for meningitis vaccines.[2]

The Supreme Court agreed with COMPAT's determination that the CCI had failed to satisfy the burden of proof required to establish collusion between GSK and Sanofi.

CCI amends leniency policy

On August 22, the CCI implemented changes to its leniency policy, which was established in 2009 and first applied in January of this year.[3] The amendments are designed to enhance the effectiveness of the leniency program.

The amendments expand the scope of the leniency policy to allow individuals to seek leniency by providing information about cartels. Prior to the amendments, only businesses were eligible to make leniency applications.

Also, as a result of the amendments, the cap on the number of applicants eligible to seek leniency was removed. Previously, the CCI could only grant leniency to a maximum of three parties. From now on, the third and any subsequent applicants may be granted up to a 30% reduction in penalty.

PHILIPPINES

Philippine Competition Act takes full effect

After a two-year transition phase designed to give companies sufficient notice to come into compliance with the Philippine Competition Act's new antitrust standards, the Act took full effect on August 9.

Moving forward, the Philippine Competition Commission ("PCC") has stated that it will focus on evaluating specific industries for anticompetitive behavior, including the garlic-onion (a key component in local cuisine) and the cement manufacturing sectors.

The PCC is expected to collaborate with other government divisions, including the Office for Competition at the Philippines' Department of Justice on criminal cases. The PCC is also responsible for conducting merger review and has received 114 notifications.

SOUTH KOREA

KFTC launches new department for chaebol oversight

On September 21, the Korea Fair Trade Commission ("KFTC") established a new unit to monitor family-owned conglomerates, or chaebols, for signs of unfair trade practices. The cabinet approved the KFTC's proposed plan for the new unit on September 12.

Shin Bong-sam, the current head of the KFTC's anti-monopoly bureau, will head the new unit, which will focus on monitoring conglomerates for evidence that they are unfairly favoring their affiliates.

KFTC fines Mercedes-Benz and eight dealerships for price fixing

According to a KFTC regulatory release on September 26, the KFTC imposed corrective orders and combined fines of KRW 1.79 billion (~$1.6 million; €1.3 million) on Mercedes-Benz Korea and eight of its local dealerships for price fixing.

The KFTC alleged that in 2009, Mercedes-Benz Korea suggested that the dealerships share financial documents and fix rates for labor costs. Mercedes-Benz then held a meeting with the dealers in May 2009 and announced the details of the price increase. According to the KFTC, a month later, the dealerships began charging KRW 58,000 per hour for general repairs and KRW 55,000 for maintenance services.

The KFTC found that the alleged conduct violated Article 19 of the Monopoly Regulation and Fair Trade Act ("MRFTA") and fined Mercedes-Benz

[2] For more information regarding the COMPAT ruling, please refer to the 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.

[3] For more information regarding the CCI's first leniency award, 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.

Korea KRW 1.32 billion (~$1.2 million; €1 million) and the dealers a total of KRW 468 million (~$415,000; €350,000). Mercedes-Benz Korea has denied the allegations and announced that it would challenge the fine, noting that the KFTC misunderstood the company's relationship with its dealers.

KFTC to increase financial penalties

On September 27, the cabinet approved an amendment to the MRFTA enforcement ordinance. The KFTC claimed that the previous system did not provide adequate deterrence. The amendment increases fines for noncompliance with administrative orders from KRW 100 million (~$90,000; €75,000) to KRW 150 million (~$130,000; €110,000). It also allows the KFTC to charge additional penalties until a company complies with KFTC orders. For repeat offenders, the regulator can now impose up to 100 percent of the original fines, up from 50 percent. The new regulations are effective as of October 19.

KFTC asks prosecution to probe Airbnb

In a September 28 regulatory release, the KFTC announced that it referred Airbnb Ireland Unlimited and its director Eoin Hession to the prosecutors' office for failing to implement the KFTC's administrative orders. This is the first time that the KFTC has reported a foreign entity to the prosecutors' office for neglecting administrative orders.

In November 2016, the KFTC determined that Airbnb's cancellation and refund policies were unfair. Airbnb was ordered to revise its clauses to offer full refunds to customers who cancel up to 30 days before the scheduled stay and offer 50% refunds to customers who cancel up to seven days before the scheduled stay, up from 50% and zero before the revision. The KFTC also determined that the 6 to 12% service fee should be fully refunded upon cancellation.

Airbnb revised the relevant clauses, but made the revised clauses applicable only to Korean guests and included a clause providing that service fees would not be refunded to a user after the user cancelled more than three reservations in a year or in the case of double bookings. The KFTC found these revisions to be inconsistent with its administrative order and inadequate to address the KFTC's concerns. The KFTC also noted that the provisions were not discussed with the KFTC prior to implementation.

KFTC fines global auto shipping firms for cartel conduct

The KFTC imposed KRW 43 billion (~$38 million; €32 million) in combined penalties on nine global auto shipping companies for alleged bid-rigging and price-fixing. The KFTC also referred Nippon Yusen Kabushiki Kaisha (NYK) and Eukor Car Carriers to the prosecutors' office. The Seoul Central District Prosecutors' Office has decided to indict the two companies.

In addition to NYK and Eukor, the other companies fined are Mitsui O.S.K. Lines (MOL), Kawasaki Kisen Kaisha (K Line), Nissan Motor Car Carrier (NMCC), Eastern Car Liner, Wallenius Wilhelmsen Logistics (Wallenius), Compania Sudamericana de Vapores (CSAV), and ZIM Integrated Shipping Services (ZIM). Hoegh Autoliners also allegedly participated in the collusion but was not fined because the KFTC found no evidence of it benefiting from the alleged collusion.

The auto shipping companies allegedly colluded on bids arranged by 13 carmakers. The companies are alleged to have submitted uncompetitive bids intentionally and divided up marine routes to avoid competition.

The KFTC's investigation was one in a series of probes conducted by competition regulators around the world.

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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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