CLEARY GOTTLIEB

Asian Competition Report

OCTOBER–DECEMBER 2012

www.clearygottlieb.com

CHINA

NDRC fines sea sand price-fixing cartel

On October 16, the National Development and Reform Commission ("NDRC") reported on an investigation by the Guangdong Provincial Price Bureau into price-fixing activities of sea sand companies based in Guangdong, a province in the south of China.

According to the NDRC, beginning in November 2010, a group of more than 20 companies organized a series of four meetings to coordinate the price of sea sand. The increase in the price of sea sand affected the price of concrete and consequently the cost of several ongoing construction projects, including the Hong Kong-Zhuhai-Macau Bridge, which then attracted the attention of the government of Guangdong province.

Two of the companies received the maximum possible fine under the Anti-Monopoly Law, 10 percent of sales revenue for the preceding year, resulting in fines of RMB 134,500 (~$20,000; €15,000) and RMB 479,400 (~$75,000; €60,000). A third company had its fine reduced by 50 percent, to RMB 145,300 (~$25,000; €20,000), for voluntarily providing important evidence to the authorities under NDRC's leniency program. These three companies were identified as organizers of the cartel and the primary beneficiary of the cartel. Other participants received a warning. As with prior cartel investigations, NDRC did not provide any additional clarification regarding the operation of its leniency program.

MOFCOM drafting "fast track" merger control review rules

On November 1 and 2, the Expert Advisory Panel of the State Council's Anti-Monopoly Committee held a meeting to discuss a draft *Provisional Rules on Applying Simplified Procedure for the Review of Undertakings' Concentration*. The draft was prepared by the Ministry of Commerce ("MOFCOM") and is designed to provide an expedited review of non-problematic transactions. Under the simplified procedure, MOFCOM will use market share and Herfindahl-Hirschman Index (HHI) market concentration thresholds to distinguish between transactions with little or no impact on competition and deals that could raise antitrust issues. Early drafts of the rules would apply an expedited review to transactions presenting a combined horizontal market share of less than 20% and the fastest process to transactions involving companies with a combined share of less than 10%. Similar thresholds will be established for vertical transactions.

While the rules are a good first step towards simplifying the pre-merger review, many uncertainties remain. For example, it is not clear what kind of information MOFCOM will require from the parties in order to establish that a transaction meets the thresholds for application of the simplified procedure. Defining a relevant market can be a burdensome process. In addition, MOFCOM's "expedited" review may take an extended period of time if MOFCOM continues its practice of reviewing a file in detail and asking follow-up questions before it "accepts" a file as complete and begins the review clock. Finally, the filing itself will continue to be a burden, as it requires the submission of a substantial volume of information, some of it irrelevant to the review of non-problematic transactions, and the draft rules do not appear to create a simplified filing form.

MOFCOM publishes information relating to unconditionally approved merger cases

On November 15, MOFCOM announced that in accordance with the *Regulation of Information Disclosure of the People's Republic of China*, it will publish "certain relevant information" regarding merger cases that MOFCOM approved without conditions. Prior to this, MOFCOM only provided details regarding transactions that were cleared with conditions or blocked. The information published includes the names of the transacting parties. On the following day, November 16, MOFCOM published the aforementioned information for 458 cases approved from August 1, 2008, when China's Anti-Monopoly Law took effect, to September 30, 2012. According to MOFCOM, the same information will be published on a

© Cleary Gottlieb Steen & Hamilton LLP, 2012. All rights reserved.
This report was prepared as a service to clients and other friends of Cleary Gottlieb to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice. Under the rules of certain jurisdictions, this report may constitute Attorney Advertising.

quarterly basis. Most recently, MOFCOM published a list of 59 cases cleared without conditions in the fourth quarter of 2012. In this list, MOFCOM disclosed both the transacting parties' names and the decisional date for each case.

MOFCOM clears JV between ARM, G&D, and Gemalto with conditions

On December 6, MOFCOM cleared with conditions the establishment of a joint venture among ARM, Giesecke & Devrient ("G&D"), and Gemalto. This is the sixteenth conditional clearance decision issued by MOFCOM. The behavioral remedies imposed by MOFCOM are very similar to those imposed by the European Commission.

ARM licenses intellectual property ("IP") for application processors ("APs"). ARM's AP design includes an integrated security feature called "TrustZone". The JV will acquire existing Trusted Execution Environment ("TEE") software offerings of G&D and Gemalto and develop a new open-standards-based TEE software solution that will support post-issuance downloads of secure applications.

MOFCOM determined that the creation of the JV might have the effect of eliminating or restricting competition on the TEE market. MOFCOM stated that ARM is the recognized leader in the area of licensing IP rights for APs for home electronic appliances. MOFCOM argued that in order to be competitive, third parties will need access to TrustZone and other information from ARM regarding the development of software to use with TrustZone. After the establishment of the JV, MOFCOM was concerned that ARM might have the incentive and ability to discriminate in favor of the JV.

MOFCOM therefore decided to impose the following behavioral remedies:

- Upon completion of the transaction, ARM shall timely release the security monitoring codes and any other information, including the standards and conditions for relevant licenses and authorizations, necessary for research and development of TEE software based on ARM's TrustZone technology.
- ARM shall not design its IP so as to reduce the performance of third-party TEE solutions.

HONG KONG

Dates announced for commencement of key provisions of Competition Ordinance

On November 23, the Secretary for Commerce and Economic Development published the Competition Ordinance (Commencement) Notice. The Notice establishes commencement dates for certain sections of the Competition Ordinance. As expected, implementation will occur in phases and will begin with the establishment of relevant institutions. The provisions enabling the establishment of the Competition Commission, an independent body charged with investigating anti-competitive conduct and initiating antitrust proceedings, will be effective on January 18, 2013. On August 1, 2013, the sections enabling the establishment of the Competition Tribunal, a special judicial body created to adjudicate disputes under the Competition Ordinance and issue financial penalties, will become effective. After its establishment, the Competition Commission will begin preparing guidelines explaining the Competition Ordinance's substantive provisions and its own procedures. Full implementation of the Competition Ordinance's substantive provisions is not expected until after the relevant guidelines are in place.

INDIA

COMPAT upholds CCI decision in Microsoft case

On October 9, the Competition Appellate Tribunal ("COMPAT") upheld an order passed by the Competition Commission of India (the "CCI") affirming that Microsoft's licensing practices did not violate India's antitrust law.

Singhania & Partners LLP ("Singhania") alleged that Microsoft's selling similar licenses at differing prices was an abuse of its dominant position as it led to Microsoft "artificially controlling prices" in violation of section 4(2)(a)(ii) of the Competition Act 2002 (the "Act"). In particular, it was argued that the price for a volume license for 'Microsoft Operating System' and 'Microsoft Office 2007' was almost twice the price of the nearly identical original equipment manufacturer license ("OEM license").

On June 22, 2011, the CCI dismissed the complaint at a preliminary stage. Microsoft successfully argued that it was the license itself that determined the nature of the product granted to the customer and that its three distribution channels (OEM, volume license, and retail chain) had distinct and

different licensing rights in order to maximize distribution efficiency. Microsoft contended that the volume license was different in nature from the OEM license and was accordingly priced differently. Microsoft pointed out that OEM license distribution was its highest volume distribution channel, involving sales to branded personal computer manufacturers, and it was only because of the size of the channel that it could offer the lowest prices for its software. The CCI found that Microsoft's practice of charging different prices for different types of licenses did not raise any competition concerns.

In Singhania's appeal against the CCI's order, the COMPAT rejected the arguments put forward, upholding the CCI's findings that the licenses in question were in fact different in nature, as each gave rise to a different set of rights, and were therefore separate products that could be priced differently.

CCI concludes tire manufacturers not engaged in cartel activity

On October 20, the CCI concluded that five major Indian tire manufacturing companies (Apollo Tyres Limited, MRF Ltd., Ceat Tyre Ltd., Birla Tyre Ltd., and JK Tyre Ltd.) were not engaging in cartel activity through the Automotive Tyre Manufacturers' Association ("ATMA").

In 2007, the All India Tyre Dealers' Federation alleged that tire manufacturers were engaging in anti-competitive activity by working together to appropriate excise duty reductions and indulging in other pricing malpractice. The CCI's subsequent investigation considered the existence of a cartel agreement, whether ATMA provided a platform for cartel activity, and whether price parallelism is sufficient to establish cartel activity.

The CCI concluded that the ATMA discussions did not involve price-fixing or other anti-competitive activities and that tire manufacturers meeting to discuss issues such as the levy of anti-dumping duties could not be regarded as evidence of cartel activity. The CCI considered the primary objective of ATMA to be lobbying for the welfare of the tire industry and that other discussions were general in nature and not in contravention of the Act.

Regarding price parallelism, the CCI considered the structure of the tire industry and noted the following characteristics: the oligopolistic nature of the industry, the high degree of concentration in the market, the cyclical nature of demand and the homogeneous nature of the product. The CCI concluded that a distinction must be drawn between price parallelism arising from the interdependence of firms' strategic decisions and parallelism arising from concerted practice. The CCI reasoned that price parallelism alone is not sufficient to establish an allegation of cartel activity and that in the absence of evidence demonstrating the existence of a cartel agreement, it could not infer such an agreement, as any price parallelism may simply result from a competitive market.

The CCI reached its conclusion despite the Director General ("DG") finding in its report that the tire manufacturers had acted in concert and that ATMA did provide a platform for the exchange of information. The CCI did not agree with several aspects of the DG's report.

CCI approves merger between JSW Steel Limited and JSW Ispat Steel Limited

On October 24, the CCI approved the merger between JSW Steel Limited ("JSW Steel") and JSW Ispat Limited ("JSW Ispat"). The merger is by way of a composite scheme of arrangement and amalgamation, involving a series of steps, and will create the country's second largest steel producer.

JSW Steel is the single largest shareholder of JSW Ispat, with a shareholding of 46.75%, and also has management control. It is of note that mergers involving entities with majority shareholdings and control are not exempt from India's filing requirements. The CCI's Combination Regulations provide that for certain categories of transactions that are not likely to have an appreciable adverse effect on competition in India, notice under section 6(2) of the Act need not normally be filed. The categories include "a merger or amalgamation involving subsidiaries wholly owned by enterprises belonging to the same group" but do not include mergers involving subsidiaries majority owned and majority controlled.

The CCI noted that a series of transactions which are inter-related or inter-dependent and that constitute a composite whole are to be filed as a composite scheme of combination, notwithstanding the fact that some of the transactions on a stand-alone basis may not ordinarily be required to be filed.

In concluding that the proposed combination is not likely to have an appreciable adverse effect on competition in India, the CCI considered the presence of large, integrated and non-integrated domestic steel producers, the absence of major

trade barriers for import of steel products, and plans for further capacity expansion by steel producers in India.

Competition (Amendment) Bill 2012 introduced in lower house of Parliament

On December 7, the Government of India introduced the Competition (Amendment) Bill 2012 (the "Bill") in the lower house of Parliament, the Lok Sabha. The Bill aims to amend the Act, in light of suggestions put forward by the National Competition Policy Committee.

A primary proposal set out in the Bill is the introduction of the concept of joint dominance. In its current form, section 4 of the Act does not provide for joint or collective dominance but rather seeks to prohibit abusive unilateral conduct by an enterprise or its group. The proposed amendment would allow the CCI to investigate the market conduct of an individual enterprise regardless of whether it is itself dominant or whether dominance may be established on the basis of actions by two or more enterprises acting together on the market.

The Bill also proposes that the merger control section of the Act be amended to allow the flexibility to specify industry-specific asset or turnover thresholds that would trigger the pre-merger notification requirement. The Government hopes that the proposed provision will enable the CCI to scrutinize the conduct of smaller companies including, for example, smaller Indian pharmaceutical companies, which despite not meeting higher asset turnover thresholds are considered sensitive and which the CCI would like to monitor.

Under section 41 of the Act, the DG currently requires the permission of the Magistrate First Class or the Chief Metropolitan Magistrate in order to carry out "search & seizure" during an investigation. Under the proposed Bill, the Chairperson of the CCI instead will have the power to sanction raids, potentially helping to expedite cartel or bid rigging investigations. The Bill also seeks to expand the trigger point for conducting dawn raids to include instances where the DG considers that a person or enterprise has omitted or failed to provide information required, as opposed to only when it considers that certain evidence is likely to be destroyed, altered, falsified, or secreted. Other proposed amendments include changes to the definition of a "group" (to include two or more enterprises which directly or indirectly exercise more than 50% of the voting rights in an enterprise – an increase from 26%) and amendments to the prescribed period for merger notification including, for example, a reduction in the waiting period for any merger notification from 210 days to 180 days.

INDONESIA

KPPU issues first fine for late merger control notification

In December, Honda retailer Mitra Pinasthika Mustika was fined for filing its merger control notification regarding the acquisition of a local car rental company after the relevant deadline. This is the first such fine under the Indonesian merger control regime. Pursuant to Indonesian law, companies must notify the Indonesian Commission for the Supervision of Business Competition (the "KPPU") within 30 working days of completing a transaction. If a transaction notification is not filed before the deadline, the KPPU may impose a fine of IDR 1 billion (~$105,000; €80,000) per day for each day of delay, up to a maximum of IDR 25 billion (~$2.6 million; €1.9 million). The notification of the concerned transaction was filed about one month after the deadline. The retailer was fined even though the transaction ultimately received regulatory clearance, and the KPPU did not think the late notification was deliberate.

JAPAN

JFTC fines auto parts makers for collusion

On November 22, Japan's Fair Trade Commission ("JFTC") fined four car parts makers JPY 3.4 billion (~$40 million; €30 million) for price-fixing. Between June 2000 and March 2003, Mitsubishi Electric, Mitsuba, T.RAD, Calsonic Kansei, and Hitachi Automotive Systems are alleged to have colluded to fix the prices of a variety of auto parts, including windshield wiper systems, radiators, and electrical fans. At JPY 1.4 billion (~$15 million; €10 million), Mitsubishi Electric received the highest fine. Hitachi Automotive was not fined as the investigation did not reveal that it received any extra revenue as a result of its actions. Denso also was investigated but received immunity from fines in exchange for being the first reporter of the conduct to the JFTC and its ongoing support of the JFTC investigation.

Guilty verdict in bearings antitrust case

On December 28, the Tokyo District Court found Nachi-Fujikoshi and two former executives guilty of forming a price-fixing cartel regarding bearings. Nachi-Fujikoshi was fined JPY 180 million (~$2 million; €1.5 million) and the two former

executives were given suspended prison sentences of 14 and 12 months.

MALAYSIA

MyCC issues first price-fixing infringement decision

On December 6, the Malaysian Competition Commission ("MyCC") issued its first price-fixing infringement decision under the Competition Act 2010. The investigation was launched based on a local media report in which the Cameron Highlands Floriculturist Association ("CHFA") president announced that its members had agreed to increase flower prices by 10%. The CHFA cooperated with the MyCC investigation. The MyCC issued a cease-and-desist order, required that the CHFA commit that its members will comply with the antitrust laws in the future, and required that the CHFA issue a public statement listing these sanctions. There was no monetary penalty.

SOUTH KOREA

KFTC amends reward program for reporting of cartels

In a move designed to encourage insiders to report cartel and related illegal activities, the Korea Fair Trade Commission (the "KFTC") increased the financial incentives provided to whistle-blowers. As of November 6, the maximum reward for reporting cartels was increased from KRW 2 billion to KRW 3 billion ($2.8 million; €2.1 million). The KFTC plans a budget increase of 37.7% to finance this amended reward program.

Seven South Korean steelmakers fined for price-fixing

On December 30, the KFTC levied KRW 291.7 billion (~$275 million; €210 million) in fines against seven South Korean steel companies, including POSCO, Hyundai Hysco, and Dongbu Steel Co., for price-fixing. The KFTC stated that for the six years to 2010, the companies held regular meetings to fix prices for cold-rolled steel plates, galvanized steel sheets, and color steel sheets to be sold in Korea. POSCO, at KRW 98.3 billion (~$90 million; €70 million), received the largest fine. POSCO denied its involvement in price-fixing and plans to file an administrative suit against the KFTC. The case also has been referred to prosecutors for criminal punishment of certain involved individuals.

[HONGKONG 194069 -4]

CLEARY GOTTLIEB

Offices

OCTOBER–DECEMBER 2012

www.clearygottlieb.com

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: 1 212 225 2000
F: 1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: 1 202 974 1500
F: 1 202 974 1999

PARIS
12, Rue de Tilsitt
75008 Paris, France
T: 33 1 40 74 68 00
F: 33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: 32 2 287 2000
F: 32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: 44 20 7614 2200
F: 44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow 115054, Russia
T: 7 495 660 8500
F: 7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: 49 69 97103 0
F: 49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50668 Cologne, Germany
T: 49 221 80040 0
F: 49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: 39 06 69 52 21
F: 39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: 39 02 72 60 81
F: 39 02 86 98 44 40

HONG KONG
Bank of China Tower
One Garden Road
Hong Kong
T: 852 2521 4122
F: 852 2845 9026

BEIJING
Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022
T: 86 10 5920 1000
F: 86 10 5879 3902

BUENOS AIRES
CGSH International Legal
Services, LLP-Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
T: 54 11 5556 8900
F: 54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP 04511-060
T: 55 11 2196 7200
F: 55 11 2196 7299

ABU DHABI
Al Odaid Tower
Office 1105, 11th Floor
Airport Road; PO Box 128161
Abu Dhabi, United Arab Emirates
T: 971 2 414 6628
F: 971 2 414 6660

SEOUL
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210
T: +82 2 6353 8000
F: +82 2 6353 8099