

CHINA

MOFCOM conditionally approves Toyota joint venture

On July 2, the Ministry of Commerce (“MOFCOM”) approved the proposed joint venture between Toyota Motor (China) Investment (“Toyota”), Toyota Tsusho Corp., Hunan Corun New Energy Co., Ltd. (“Corun”), Primearth EV Energy Co. (“PEVE”), and Changshu Sinogy Venture Capital. The joint venture company (“JVCo”) will utilize nickel-metal hydride battery technology and patents from PEVE to produce hybrid electric vehicles.

MOFCOM defined two relevant markets: nickel-metal hydride car batteries and hybrid electric vehicles. MOFCOM concluded that the proposed transaction would raise competition concerns in the market for nickel-metal hydride batteries. MOFCOM found that the four primary producers of nickel-metal hydride batteries (PEVE, Panasonic, Corun, and Johnson Controls) account for 97% of production and that the barriers to entry for this market are very high. MOFCOM also found that Panasonic owns 19.5% of PEVE’s shares. MOFCOM was concerned that cooperation between PEVE and Corun via the JVCo would reduce incentives for PEVE, Panasonic, and Corun to compete.

MOFCOM also concluded that the transaction would bolster Toyota’s competitive position in hybrid electric vehicles, as it would align Toyota, which it determined has an 80.3% share of sales of hybrid electric vehicles in China, with PEVE, which is responsible for sales of 66.4% of the world’s nickel-metal hydride car batteries. MOFCOM expressed concern that Toyota’s competitors may have reduced access to innovative nickel-metal hydride batteries.

MOFCOM approved the transaction with the following conditions:

- JVCo shall sell its battery products on fair, reasonable, and non-discriminatory terms to third parties; and

- Assuming there is demand, JVCo shall begin selling its products to third parties within three years of production.

Microsoft under investigation for abuse of dominance

Based on complaints about tied sales involving media players and browsers and Microsoft’s refusal to disclose certain information regarding the Windows operating system and Office software that led to interoperability problems, the State Administration for Industry & Commerce (“SAIC”) has launched an investigation under the Anti-Monopoly Law (“AML”).

On July 28, nearly 100 officers simultaneously raided Microsoft’s offices in Beijing, Shanghai, Guangzhou, and Chengdu. Lawyers retained by Microsoft observed the search. The dawn raids follow an initial investigation by SAIC involving interviews of Microsoft executives and the submission of relevant materials by Microsoft and other parties.

On August 6, SAIC inspected Microsoft offices in Beijing, Liaoning, Fujian, and Hubei and the Dalian office of Accenture, which does some financial work for Microsoft in China.

In addition to the dawn raids, SAIC met with Microsoft executives, including the General Counsel and CEO, to discuss its antitrust concerns, and SAIC has requested various submissions from the company.

The investigation is ongoing.

In addition, executives from Qualcomm continue to engage with the National Development and Reform Commission (“NDRC”) regarding the agency’s investigation of abuse of dominance / discriminatory licensing fees. It has been reported that Qualcomm executives have met with NDRC officials four times this year.¹

¹ For more information, please refer to Cleary Gottlieb’s Asian Competition Quarterly Report for the First Quarter of 2014, available at <http://www.cgsh.com/news/List.aspx?geography=46>.

Reports also indicate that SAIC and Tetra Pak are discussing the agency's final judgment and that the agency's decision will become available soon.²

NDRC fines auto parts and bearings suppliers for fixing prices

On August 20, NDRC announced total fines of RMB 1.24 billion (~\$200 million; €150 million) following an investigation of alleged price fixing and bid rigging. In its announcement, NDRC said that since 2000, eight auto parts suppliers held frequent talks regarding sales and pricing in China. According to the NDRC, the collusion impacted the pricing of 13 auto parts, including wire harnesses, starters, alternators, and throttle controls, used in more than 20 car models produced by Toyota, Honda, Nissan, Suzuki, and Ford. NDRC also found that four bearings manufacturers colluded regarding prices for bearings sold in China.

The eight auto parts companies – Hitachi, Denso, Aisan, Mitsubishi Electric, Mitsuba, Yazaki, Furukawa, and Sumitomo – were collectively fined RMB 832 million (~\$135 million; €100 million). Hitachi was not fined as it was the first company to provide information to NDRC, and it provided further cooperation with NDRC pursuant to the agency's leniency program. The other companies received fines from 4-8% of relevant revenues in China in the previous year. The AML permits fines up to 10% of relevant China revenue in the previous year. Sumitomo received the largest penalty, RMB 290.4 million (~\$45 million; €35 million), which is the biggest antitrust fine levied in China to date. The previous record was the RMB 247 million (~\$40 million; €30 million) fine received by Kweichow Moutai in February 2013 for engaging in resale price maintenance of its white spirits. Moreover, the collective RMB 832 million fine levied on all of the auto parts suppliers is the largest industry-wide fine issued to date. The previous record was the RMB 669 million (~\$110

million; €80 million) fine assessed to milk powder producers for resale price maintenance.

The relevant bearings manufacturers – Nachi-Fujikoshi, NSK, JTEKT, and NTN – were fined a total of RMB 403 million (~\$65 million; €50 million).

It is notable that for each investigation only the first company to report its behavior received immunity from fines. In prior investigations, such as NDRC's resale price maintenance investigation into the optical lens industry, multiple companies were exempted from fines. This may be the result of NDRC's view of the severity of this particular violation.³

NDRC's investigation of automobile companies likely to conclude soon

Since 2011, NDRC has been investigating possible horizontal and vertical anticompetitive practices in automobile spare parts sales and distribution and service, including resale price maintenance and requiring the use of specific factory-made parts. This summer, the investigation of auto manufacturers' pricing practices has intensified. A number of manufacturers have announced price cuts for cars (Jaguar Land Rover, Chrysler) and/or spare parts (Audi, Mercedes-Benz, Chrysler, Toyota, Honda, BMW), likely as a result of pressure received from NDRC. In addition, investigations into the spare parts pricing and distribution practices of Mercedes-Benz (NDRC and its Jiangsu bureau announced that they raided several Mercedes-Benz facilities), Audi, BMW, and Chrysler were confirmed. GM also announced that it was contacted by NDRC.

On August 13, the Hubei bureau of NDRC imposed fines of RMB 1.6 million (~\$260,000; €210,000) on four BMW dealers in Wuhan for fixing prices by agreeing to charge customers a pre-delivery inspection fee.

² For more information, please refer to Cleary Gottlieb's Asian Competition Quarterly Report for the Third Quarter of 2013, available at <http://www.cgsh.com/news/List.aspx?geography=46>.

³ For more information, please refer to Cleary Gottlieb's Alert Memorandum, available at <http://www.cgsh.com/chinas-ndrc-fines-auto-parts-and-bearings-companies/>.

On August 17, an official from NDRC's Jiangsu bureau confirmed that Mercedes-Benz had imposed vertical restraints on its dealers controlling the prices of auto parts and maintenance in the after-sales market.

On September 11, the Shanghai bureau of the NDRC fined Chrysler (China) Automotive Sales RMB 31.68 million (~\$5.2 million; €4.1 million), 3% of its sales in the previous year, for engaging in resale price maintenance and three of its Shanghai dealers RMB 2.14 million (~\$350,000; €280,000) for fixing the prices of car maintenance and repair fees.

On the same day, the Hubei bureau of the NDRC fined FAW-Volkswagen RMB 248.58 million (\$40 million; €30 million), 6% of its sales in the previous year, and eight of its Hubei Audi dealers RMB 29.96 million (~\$4.9 million; €3.9 million) because FAW-Volkswagen's Audi sales division organized meetings with ten Hubei-area dealers to agree on pricing for automobiles and service. One dealer was exempted from fines as a result of its cooperation and another received no fines due to its relatively insignificant involvement and speedy rectification.

Finally, it has been reported that on September 16, NDRC questioned Toyota executives regarding pricing for replacement and spare parts for its Lexus division.

Concern that antitrust regulators unfairly targeting foreign businesses

The recent NDRC decisions against milk powder, auto parts, bearings, and automobile producers, the ongoing investigations of Tetra Pak, Qualcomm, and Microsoft (see adjacent reports), and the presence of at least one foreign company in all but one prohibition or conditional decision issued by MOFCOM have resulted in criticism from American and European businesses, business groups, and certain government officials suggesting that China's antitrust enforcement agencies are unfairly targeting foreign companies. In September, both the U.S. Chamber of Commerce and the U.S.-China Business Council issued reports that included criticisms of China's antitrust enforcement.

On September 11, China's three antitrust regulators held a joint press conference to respond to these allegations. The Director General of SAIC stated that since the implementation of the AML in 2008, only 2 of SAIC's 39 investigations targeted foreign companies (Microsoft and Tetra Pak). Likewise, NDRC stated that only 33 of the 335 companies it has investigated were foreign companies.

While the numbers suggest that the criticisms are unwarranted, the perception remains that foreign companies are targeted in the highest profile investigations involving the largest fines.

While many high profile investigations by SAIC and NDRC involve foreign companies, local companies also face large fines for AML violations. For example, until it was eclipsed by Sumitomo, the largest fine issued by NDRC was the RMB 247 million (~\$40 million; €30 million) fine received by Kweichow Moutai in February 2013 for engaging in resale price maintenance of its white spirits. In addition, as reported below, both cement companies and auto insurers recently received significant fines from NDRC.

NDRC fines property insurers for price fixing

On September 2, NDRC fined 22 insurance companies and a trade association for agreeing to certain discounts and handling fees for commercial auto insurance. NDRC alleged that the trade association organized meetings during which the discounts and fees were discussed. Except for China Life Property & Casualty, which received a 90% discount for being the second company to provide cooperation, the insurers were fined 1% of their auto insurance premium earnings for the previous year, which amounted to a combined RMB 110.19 million (~\$20 million; €15 million). The trade association received the maximum fine of RMB 500,000 (~\$80,000; €65,000). PICC was exempted from fines, as it was the first to report the conspiracy to NDRC, and it provided active cooperation during the investigation.

Interestingly, NDRC chose to publish the entirety of each decision on its website. This is the first time NDRC has

published such decisions, and we understand that NDRC intends to continue publishing such decisions in the future.

NDRC terminated its investigations of nine additional insurance company after finding that the companies did not participate in the conspiracy.

NDRC fines cement makers for price fixing

On September 9, the Jilin bureau of the NDRC fined three cement producers RMB 114.39 million (~\$20 million; €15 million) for fixing the price of cement to be sold outside Jilin province and agreeing to a minimum price for cement sold inside the province. Two of the firms did not actively cooperate and received fines equal to 2% of their 2012 sales, while the third producer received a reduced fine of 1% of 2012 sales due to its active cooperation. NDRC announced that the sector has been under investigation since March 2013.

HONG KONG

Commission appoints CEO

On September 3, Stanley Wong joined the Hong Kong Competition Commission as the Chief Executive Officer. Wong was a member of the competition authority in Ireland for five years, and he also led a European Commission project providing technical assistance to Chinese and Indian antitrust regulators. Mr. Wong will be responsible for overseeing the Competition Commission's day-to-day work.

INDIA

CCI fines 14 automobile manufacturers for abuse of dominance

On August 25, the Competition Commission of India (the "CCI") imposed on 14 leading vehicle manufacturers a cumulative monetary penalty of INR 25.45 billion (~\$415 million; €330 million) as well as mandatory orders to change their behavior. The penalty was imposed pursuant to a ruling that each of the manufacturers abused its dominant position and imposed anti-competitive vertical

restraints in the market for its own spare parts and repair and maintenance services.

Each manufacturer was found to be dominant in a relevant market comprising the secondary market for spare parts and repair and maintenance services in respect of each manufacturer's vehicles. The CCI disagreed with the manufacturers' contention that the primary market for vehicles and the secondary market for spare parts and repair and maintenance services should be viewed as one unified "systems market" (and therefore that a manufacturer was not dominant in the market if sufficient competition existed at the point of sale of the primary product, *i.e.*, the vehicle). The CCI rejected the argument on the grounds that Indian consumers do not, when buying a car, take into account subsequent expenditure required for spare parts and servicing, and therefore do not engage in the "whole life costing" that characterises systems markets.

The CCI found that the vehicle manufacturers had abused their dominant position and had also imposed anti-competitive vertical restraints in the relevant markets by preventing independent retailers from accessing the market using a combination of: limitations on the supply of spare parts, technical manuals, and diagnostic tools; excessive or unfair pricing of spare parts; and restrictive warranty policies that limited consumers' choice of outlets for vehicle maintenance and repair.

The CCI rejected the manufacturers' arguments that vertical restraints on suppliers and dealers were permitted under Section 3(5) of the Competition Act 2002 as being necessary for the protection of their intellectual property, since it considered that provision to apply only to intellectual property protected under Indian, and not overseas, IP laws.

The monetary penalty imposed represents 2% of each company's annual turnover averaged over the past three years. Indian vehicle manufacturer Tata Motors received the highest penalty (INR 13.5 billion rupees (~\$220 million; €175 million)). The CCI also issued various mandatory

orders requiring: removal of restrictions on suppliers and distributors prohibiting the supply of spare parts to the secondary market (manufacturers are, however, able to charge a royalty where spare parts are manufactured using their intellectual property); and removal of warranty restrictions requiring customers to have their vehicles serviced only at particular outlets.

The order affected both global (BMW, Fiat, Ford, General Motors, Honda, Maruti Suzuki, Mercedes Benz, Nissan, Skoda, Toyota, and Volkswagen) and Indian (Hindustan Motors, Mahindra & Mahindra, and Tata Motors) vehicle manufacturers. Mahindra & Mahindra and Tata Motors have announced an intention to appeal the decision. Other manufacturers are expected to follow.

First dawn raid carried out by CCI

On September 23, the Office of the Director General, the investigative arm of the CCI, carried out its first dawn raid. Surprise inspections were made by 15 CCI officials and 10 support staff over a period of 14 hours at the offices of JCB's Indian subsidiary, JCB India, in New Delhi and Faridabad. The raid was conducted in connection with allegations that JCB abused its dominant position by filing sham litigation in the Indian courts to prevent a competitor, Bull Machines, from entering the market for backhoe loaders. The CCI considered that JCB was not cooperating sufficiently with its investigation.

JCB subsequently filed a complaint in the New Delhi High Court alleging that the raid should not have been conducted as the court had previously ordered a partial stay (and has since ordered a full stay) on the CCI's investigation while litigation is still pending. The court has identified the dawn raid as a potential breach of the partial stay order. It has demanded an explanation from the CCI and ordered that all hardware seized in the raid be sealed and kept in safe custody.

INDONESIA

Parliament approves increased fines and dawn raids

In September, Indonesia's parliament approved increased fines for cartel offences and granted the Commission for the Supervision of Business Competition ("KPPU"), Indonesia's antitrust regulator, the power to conduct surprise inspections (sometimes referred to as dawn raids). The cap for cartel penalties was increased from IDR 25 billion (~\$2.1 million; €1.6 million) to IDR 500 billion (~\$40 million; €35 million). The amendments are subject to approval by the new administration of President Joko Widodo.

JAPAN

JFTC fines Tsubaki Nakashima for price fixing

On September 9, the Japan Fair Trade Commission ("JFTC") fined Tsubaki Nakashima JPY 1.32 billion (~\$12 million; €9 million) for agreeing with Amatsuji Steel Ball Mfg. Co. to prevent declines in steel ball prices. The steel balls are most commonly used in bearings. The JFTC alleged that the companies exchanged pricing and discounting information and agreed to fix revised sales prices.

MALAYSIA

Block Exemption Order (BEO) for liner shipping agreements

On July 8, the Malaysia Competition Commission ("MyCC") published a Block Exemption Order ("BEO") for cooperative agreements in the liner shipping industry. Consequently, Vessel Sharing Agreements ("VSAs") and Voluntary Discussion Agreements ("VDAs") among ocean liner shipping companies will be exempted from certain prohibitions set forth against anticompetitive horizontal agreements, such as those involving market allocation. The BEO does not exempt entities from illegal, monopolistic conduct. In addition, this BEO applies only to sea transport services and does not cover inland freight services. The BEO will remain in force for three years.

MyCC will review its effects after two years. The MyCC's decision follows consultation with relevant stakeholders, including the public. The BEO is the first granted under the Malaysia Competition Act of 2010.

PHILIPPINES

Agreement to set up effective merger control regime

On July 4, the Philippines' Department of Justice ("DoJ") together with the Securities and Exchange Commission ("SEC") signed a Memorandum of Agreement ("MoA") that foresees setting up an effective merger control regime in the Philippines. The MoA, which entered into force in August, sets out the division of work between the DoJ and the SEC – merger control filings are to be submitted to the SEC, which will immediately notify the DoJ. DoJ's Office for Competition shall review the impact of the proposed concentration and report its findings and recommendation to the SEC. The DoJ is currently drafting guidelines setting out more detail relating to the process, requirements, and standards that it will apply when assessing merger control filings. The MoA is part of the Philippines' efforts to comply with the requirement that all ASEAN member states introduce a competition policy by 2015.

SOUTH KOREA

Supreme Court rules on information exchanges

On July 24, Korea's Supreme Court upheld a lower court judgment overturning the Korea Fair Trade Commission's ("KFTC") KRW 363 billion fine (~\$335 million; €270 million) against 16 life insurance companies for price fixing. The fines were issued in 2011 after the KFTC found that the companies colluded on interest rates for insurance premiums. The primary evidence against the insurers was information exchanges regarding interest rates and the timing of rate adjustments.

The KFTC determined that a price fixing agreement could be inferred because the information exchange occurred in an oligopolistic market and (i) involved sensitive and confidential information; (ii) occurred before the relevant

rates were set; and (iii) occurred between individuals with relevant pricing responsibility.

The Supreme Court explained that the exchange of information plus the "appearance" of unlawful collusion are insufficient to infer an agreement. Instead, the Supreme Court stated that, when determining whether information exchanges may be evidence of collusion, the KFTC must consider the factors it cited as well as (a) the purpose of the exchange; (b) each company's actions following the exchange; (c) the degree of parallelism in those actions; and (d) the impact of the exchange on the relevant market.

The Supreme Court found that there was no clear parallelism with respect to the relevant rates and that each insurer may have independently determined its rates in an effort to maximize profits. As a result, the Supreme Court held that the KFTC failed to prove that a price fixing agreement could be inferred from the exchanges.

KFTC fines construction firms for bid rigging

On July 30, the KFTC fined 28 construction firms a combined KRW 435.5 billion (~\$400 million; €320 million) for rigging bids associated with the Honam high-speed railway construction project. It is the largest KFTC fine for bid rigging on a construction project and the second largest KFTC fine for a violation of Korea's antitrust law (the largest was KRW 669 billion (~\$615 million; €495 million) fine levied on six liquefied petroleum gas producers in December 2009 for price fixing). The rigged contracts were worth KRW 3.59 trillion (~\$3.3 billion; €2.7 billion). The companies involved pre-arranged bidding prices and helped each other win contracts. Fifteen of the companies and seven individuals have been referred to the prosecutor's office.

KFTC amends guidelines regarding the referral of individuals to the public prosecutor

On August 20, the KFTC issued amendments to its criminal referral guidelines in an effort to increase the number of individuals that face prosecution for violating Korea's antitrust law. Under the amended guidelines, individuals

directly responsible for a violation as a result of having ordered, approved, or carried out the illegal conduct or who physically obstruct an investigation may be referred for prosecution. Cooperation with an investigation will reduce the likelihood of a criminal referral.

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