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CHINA

NDRC fines six LCD panel makers for price-fixing

On January 17, the National Development and Reform Commission ("NDRC") announced that it fined six LCD panel manufacturers for colluding to fix prices on LCD panels. The manufacturers are Samsung, LG, Chi Mei, AU Optronics, Chunghwa Picture Tubes, and Hann Star. This finding follows similar announcements regarding an LCD panel price-fixing cartel by the United States Department of Justice and the European Commission and marks the first time that China's antitrust agencies have fined companies for participation in an international price-fixing cartel.

NDRC found that during meetings held in Taiwan and South Korea from 2001 to 2006, the six LCD panel makers exchanged market information and fixed prices, including for LCD panels sold in mainland China.

The total monetary penalties were RMB 353 million (~$57 million; €44 million) and include restitution (RMB 172 million) to domestic manufacturers of LCD televisions, disgorgement (RMB 36.8 million) of illegal gains, and a fine (RMB 144 million). The meetings took place before China's Anti-Monopoly Law (the "AML") took effect. Therefore, NDRC applied the Price Law, which also prohibits price-fixing cartels. Hence, the fine was calculated using the six LCD panel manufacturers' "illegal gain" instead of their "sales".

NDRC announced that because the manufacturers self-reported their illegal activity, they received some reduction to the fine.

The six LCD panel manufacturers also promised: (i) to strictly abide by Chinese law; (ii) to use their best efforts to fairly supply Chinese television manufacturers and to provide all customers with the opportunity to purchase high-end and innovative products; and (iii) to extend from 18 months to 36 months, at no charge, the warranty on LCD panels included in televisions sold by Chinese manufacturers.

Interestingly, according to China's Administrative Sanction Law, no administrative sanctions may be imposed unless illegal conduct is discovered within two years of the illegal act ending. Here, according to MOFCOM's announcement, the collusion appears to have ended in 2006. It is not clear whether NDRC began investigating the conduct in 2008 or earlier, therefore "discovering" it with the limitations period, or whether the time limit was tolled in some other manner.

Local agencies of NDRC fine Maotai and Wuliangye for resale price maintenance

On February 22, local agencies of NDRC in Guizhou and Sichuan fined Kweichow Maotai RMB 247 million (~$40 million; €31 million) and Wuliangye RMB 202 million (~$33 million; €25 million) for engaging in resale price maintenance ("RPM"). These are the largest fines ever imposed by NDRC (and its agencies) under the AML.

In January, the companies independently announced that they were punishing distributors that priced their respective products below the minimum resale price set by Maotai and Wuliangye. Maotai also punished distributors that sold outside of their assigned territory. Just a few days later, after inspection by NDRC, both companies withdrew these punishments.

The publicly available NDRC decisions are short and do not make clear whether the agencies view RPM as *per se* illegal (in other words, the conduct is illegal regardless of its impact on competition/consumers). The decisions, particularly the Maotai decision, suggest that the agencies may have taken this strict approach. On the other hand, in *Rainbow v. Johnson & Johnson*, the Shanghai No.1 Intermediate People's Court recently applied a *rule of reason* standard to analyze RPM. The court explained that Article 13 of the AML defines a monopoly agreement as one that "eliminates or restricts competition", and, therefore, a plaintiff must establish that the RPM restricted competition. The case is currently pending appeal.

MOFCOM solicits comments on draft remedies rules

On March 27, China's Ministry of Commerce ("MOFCOM") published for public comment "Rules on Attaching Restrictive Conditions to Concentrations between Undertakings (Draft for Comment)" (the "Draft Rules"). The Draft Rules are intended to provide a comprehensive framework and general guidance for the design and implementation of remedies. These rules reflect the input of experienced practitioners and scholars and other antitrust authorities, including during closed-door seminars in April and August 2012. The Draft Rules largely echo those of the United States and the EU. They also try to incorporate the lessons learned from MOFCOM's existing 16 conditional clearances.

As the first comprehensive guidance on merger remedies under the AML, the Draft Rules address a wide range of issues, including the design, implementation, monitoring, modification, and waiver of merger remedies, as well as liability for breach. The rules provide welcome clarity on a number of issues. For example, the Draft Rules provide that MOFCOM must inform notifying parties about the nature of its antitrust concerns, and they include new details on the timetables for proposing and implementing merger remedies, in particular divestitures.

On the other hand, a number of issues are not addressed in the Draft Rules or need further clarification. For example, there is no specific timetable for MOFCOM to communicate its concerns, without which it would be very difficult for notifying parties to propose remedies. In the past, MOFCOM has sometimes identified its concerns at a late stage of its review, leaving little time for MOFCOM and the notifying parties to discuss how best to address these concerns.

In addition, the Draft Rules provide no guidance on the form of remedy MOFCOM prefers for particular transaction types or when presented with a particular theory of competitive harm. While it is not surprising that MOFCOM would want to avoid being bound by a statement of such preferences, the Draft Rules provide no reassurance to notifying parties concerned about MOFCOM's past tendency to apply merger remedies that are not generally accepted in international practice or that may even have been viewed as anti-competitive.

Moreover, a surprising and worrying aspect of the Draft Rules is MOFCOM's ability to impose stricter remedies on the merged entity than those agreed to by the notifying parties, apparently without limit in time and with no clear procedural protections for the merged entity.

It is hoped that MOFCOM's final rules will address the shortcomings in the Draft Rules. In past consultations, however, MOFCOM has tended to respond to criticism by deleting or shortening controversial provisions rather than by making significant substantive revisions. It seems likely, therefore, that the final rules will continue to leave significant questions unresolved.

INDIA

Exemptions from merger filing granted

On January 8, the Ministry of Corporate Affairs issued a notification under Section 54(a) of the Competition Act 2002, exempting certain mergers and acquisitions undertaken in the banking sector from the requirement to file notice of a merger with the Competition Commission of India ("CCI") under Sections 5 and 6 of the Competition Act.

The notice exempts the amalgamation of two banking institutions listed in a separate notification issued by the Government of India under Section 45 of the Banking Regulation Act 1949. The notification, which thus confers a limited exception to the filing requirement under the Competition Act on the banking sector in India, will be in place for five years from the date of issue (*i.e.*, until January 7, 2018).

CCI finds NIMPA engaged in anti-competitive conduct

On January 10, the CCI found that the Northern India Motion Pictures Association ("NIMPA"), an association of film distributors, had infringed Section 3(3) of the Competition Act 2002 by engaging in anti-competitive practices. The CCI held that NIMPA required distributors to register as members, and to register their films with it, as a condition precedent to release and exhibition. Although the complainant in this case contended that NIMPA operated in much the same way as a cartel by imposing undue pressure and restrictions on non-members within the industry, and by issuing circulars and instructions to members requiring them to interfere with the release and exploitation of films that had not been registered with NIMPA, the application of Indian competition rules in this case is relatively novel.

Section 3(3) of the Competition Act presumes that that such acts, since they were done by an association of enterprises engaged in the trade of goods ‘similar or identical’ in nature, have an appreciable adverse effect on the market for those goods in India. The CCI noted in its judgement that the presumption is rebuttable and that the activities of an association of the type caught by Section 3(3) may not be anti-competitive where it can be shown, for instance, that they encourage and enforce codes of ethics among the association’s members or have the effect of bringing about technological advancements in the industry through cooperation and conversation between members.

NIMPA was unable to rebut the presumption. In reaching this conclusion, the CCI dismissed as misconceived NIMPA’s submission that, in pressuring applicant distributors to settle monetary disputes with its members, it was acting merely as an arbitral forum in which disputes between members could be resolved. CCI explained that NIMPA acted in the interests of its registered members to the exclusion of all competing enterprises and found that there was no aggregate benefit to the industry.

NIMPA was ordered to cease and desist from carrying on such anti-competitive practices and was prohibited from imposing undue pressure on film distributors to settle monetary disputes with certain of the its members in order to obtain permission to release a film. The CCI reiterated in its order the requirement that NIMPA must modify its Articles of Association so that compulsory registration with the body is no longer a condition precedent for release, which it had imposed on the association in a previous order (No. 25 of 2010) in relation to similar conduct exhibited by the body. The CCI did not impose a penalty in this case.

CCI dismisses complaint against Apple, Vodafone, and Airtel

On March 19, the CCI dismissed a complaint against Apple Inc., Vodafone, and Airtel. The allegations against the three parties were delineated into two categories:

- First, breach of Section 3 of the Competition Act, which concerns anticompetitive agreements, through the grant of exclusive selling rights in respect of a particular variant of one of its products, the iPhone 3G/3GS, together with tie-in arrangements so that the iPhones were sold “locked”; and
- Second, violation of Section 4 through abuse of a dominant market position by each of the three parties in attaching unfair conditions to the purchase of iPhones.

In respect of the alleged breaches of Section 3, the CCI found that there had been no anti-competitive behavior. The grant of sole distribution rights by Apple to Vodafone and Airtel was found not to have been exclusionary in character. Apple had approached a number of other companies in order to set up similar distribution agreements, the agreements between Apple and each of Vodafone and Airtel were not for an undisclosed or unduly long period, and on termination those agreements were not simply renewed on a rolling basis.

Moreover, although the arrangements whereby iPhones distributed by Vodafone and Airtel were “locked” to those networks were of a type caught by Section 3(4), which states that a tie-in arrangement between vertically-related enterprises will be found to have been anti-competitive if it causes or is likely to cause an appreciable adverse effect on competition in India, the CCI found that on the facts no such effect could be established. In reaching this conclusion, the CCI noted that when assessing retail arrangements whereby the conditions of sale stipulate that multiple items are to be bought together, it is important to distinguish between product tying, which may violate Section 3(4), and product bundling, which will not. According to the CCI, product bundling involves offering generally available products for sale as a package for a single fixed price. Product tying involves making a product available for purchase only where it is bought together with another, generally available product. The CCI further observed, however, that a tie-in arrangement is not anti-competitive *per se* since there are compelling pro-competitive economic rationales for product tying. A tie-in arrangement will only be found to have caused an appreciable adverse effect on the market under Section 3(4) where the seller has sufficient market power to disable competition so that a consumer may only obtain the desired product through purchase of the tied product (here the network service), and where the tying-in arrangement affects a “not insubstantial” portion of the market.

The CCI concluded that in this case the requisite elements of dominant market power and a substantial effect on the market were not satisfied: first, neither Vodafone nor Airtel had sufficient market power to compel purchase of the product through purchase of their network services, since there was competition between them in marketing iPhones, and other varieties of smartphone are more generally available; and second, the proportion of the market that may have been affected was extremely small, as Apple's share in the market for smartphones was approximately 6%.

The allegations of abuse of a dominant market position on the part of the three companies were likewise rejected. The CCI concluded that the relevant market for the purposes of Section 4 was the "retail of smartphones operating on the GSM system." It rejected the contention of the complainant that the relevant market should be limited to retail sales of iPhones, finding that iPhones are not so different from other smartphones (in relation to price, capabilities, and characteristics) that consumers cannot see them as interchangeable with other smartphones. Since Apple's share in the Indian smartphone market stands at merely 6%, it was found not to be in a position of dominance capable of abuse under Section 4 of the Competition Act, and the claims against it were dismissed.

JAPAN

JFTC imposes new auto parts fines

On March 22 and March 29, the Japan Fair Trade Commission (the "JFTC") issued cease and desist orders and imposed fines in two additional investigations involving auto parts manufacturers. The March 22 decision concerns automotive lamp suppliers. The JFTC found that Koito Manufacturing, Ichikoh Industries, and Stanley Electric conspired to rig bids opened by automakers for headlamps and rear combination lamps. The fines totalled approximately JPY 4.7 billion (~$48 million; €36 million). The March 29 decision concerns bearing manufacturers NTN Corp., NSK, Nachi-Fujikoshi, and JTEKT. The JFTC found that the suppliers had conspired in relation to sales of industrial machinery bearings and automotive bearings. The fines totalled approximately JPY 13.4 billion (~$136 million; €104 million).

SOUTH KOREA

KFTC fined Fissler Korea for price-fixing and resale price maintenance

After an investigation found price-fixing and resale price maintenance, on January 21, the Korea Fair Trade Commission (the "KFTC") issued a cease and desist order to and fined Fissler Korea Ltd., an affiliate of Fissler GmbH. The fine was approximately KRW 170 million (~$153,000; €117,000). The KFTC found that from May 2007 to June 2011, Fissler fixed the retail price of its cookware products in the Korean market and required that its franchise stores price the cookware products above a certain minimum resale price. The cease and desist order, among other things, ordered Fissler to amend its contract with the franchisees.

TAIWAN

TFTC issues its largest fine for price-fixing cartel

On March 13, Taiwan's Fair Trade Commission (the "TFTC") held that nine independent power producers that supply electricity to state-owned Taiwan Power Company ("Taipower") had engaged in price-fixing. The TFTC found that the companies conspired during 27 meetings spanning four years to devise a common strategy to oppose Taipower's price adjustment requests. The fines total NT$6.32 billion (~$213 million; €163 million), going far beyond the previous record – NT$54 million imposed in September 2012 against optical disk drive manufacturers. Four companies reportedly received fine reductions due to their cooperation with the investigation.

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