

CHINA

MOFCOM conditionally approves Google/Motorola Mobility and UTC/Goodrich

On May 19, China's Ministry of Commerce ("MOFCOM") conditionally cleared Google's acquisition of Motorola Mobility Holdings, Inc. ("Motorola Mobility"). MOFCOM's approval was the final antitrust clearance needed for the transaction. To obtain MOFCOM's approval, Google agreed to (i) keep its Android operating system free and open-sourced, consistent with its current practice, (ii) treat all handset OEMs in a non-discriminatory manner with regard to the Android platform, and (iii) honor Motorola's pre-existing commitment to license its patents on "fair, reasonable and non-discriminatory" ("FRAND") terms. MOFCOM was the only antitrust authority to place conditions on its approval. As with past conditional decisions, MOFCOM provided little support for some of its conclusions. For example, the remedies suggest that MOFCOM was concerned that post-transaction, Google would use its alleged dominant position to disadvantage Motorola Mobility's competitors. However, MOFCOM did not explain why it thought Google would have the incentive and ability to favor Motorola Mobility following the transaction.

On June 15, MOFCOM approved United Technologies Corporation's acquisition of Goodrich Corporation ("Goodrich") subject to the parties divestiture of Goodrich's power system business, including businesses and assets located in the U.S. and the U.K. MOFCOM found that the companies were the top two global suppliers in the market for electric power systems used in aircraft, with a combined 84% share. Unlike the Google/Motorola Mobility case, MOFCOM issued its clearance decision before the authorities in the U.S. and Europe. In addition, in a break from many of its prior conditional decisions, MOFCOM required a divestiture rather than imposing a behavioral remedy.

The Supreme People's Court finalizes Judicial Interpretation on antitrust civil litigation

On June 1, the judicial interpretation (the "Judicial Interpretation") of China's Supreme People's Court (the "SPC") regarding private civil litigation under China's Anti-Monopoly Law (the "AML") took effect. This is the first SPC judicial interpretation addressing the AML.

The Judicial Interpretation provides important guidance on antitrust civil litigation and is expected to improve the procedural consistency of the Chinese courts' application of the AML. However, the Judicial Interpretation leaves significant ambiguity on a number of issues, including indirect purchaser standing, plaintiffs' discovery rights, the interaction between court and AML Enforcement Authority ("AMEA") proceedings (particularly whether a court may or should stay its proceeding pending an AMEA's investigation), plaintiffs' access to leniency application documents, and how to calculate damages.

Particularly important is the Judicial Interpretation's guidance regarding burden of proof. The Judicial Interpretation deleted the general provision in the 2011 draft interpretation that the plaintiff bears the burden of proving the existence of the alleged monopolistic conduct, loss, and causal link between the infringement and the damages complained of. Instead, Articles 7-9 of the Judicial Interpretation detail the allocation of the burden of proof for horizontal agreements and abuse of dominance. While similar to the 2011 draft, the Judicial Interpretation may slightly increase plaintiffs' burden of proof.

For example, in most abuse-of-dominance cases, the plaintiff must prove that the defendant has a dominant position in the relevant market and that the defendant abused that dominance (Article 8). If this is established, the defendant bears the burden of proving that it acted pursuant to an acceptable justification.

The Judicial Interpretation retains the 2011 draft's rebuttable presumption of dominance when the defendant is a public utility enterprise or holds an exclusive position according to law. However, the Judicial Interpretation requires that this presumption be established based on "specific facts of the relevant market's structure and its competition landscape."

For more detailed information of the Judicial Interpretation, please refer to our alert memorandum, which is available at http://www.cgsh.com/chinas_supreme_peoples_court_finalizes_judicial_interpretation_on_antitrust_civil_litigation/.

MOFCOM publishes new merger notification form

On June 6, 2012, MOFCOM published the new Notification Form of Concentration of Undertakings (the “New Form”), which took effect on July 7, 2012. The New Form is quite similar to the original form, though it adds additional obligations. For example, parties must list all concentrations in the past three years in the relevant market, provide additional information regarding customers and suppliers, and, if the transaction involves the formation of a joint venture, the parties must list activities of the JV and the resources allocated to the JV by the parents. In addition, although some sections of the New Form are noted as “optional”, such as the production of internal documents, it is unclear whether parties must defend the decision not to provide the optional information, and, if so, what arguments would be deemed satisfactory.

HONG KONG

LegCo passes Competition Ordinance

On June 14, Hong Kong’s Legislative Council (“LegCo”) passed the Special Administrative Region’s long-awaited Competition Ordinance (the “Ordinance”). The Ordinance introduces Hong Kong’s first cross-sector competition regime.

The Ordinance establishes two primary “Conduct Rules” designed to prohibit anti-competitive agreements (the “First Conduct Rule”) and abuse of a substantial degree of market power (“Second Conduct Rule”). Both Conduct Rules have extraterritorial effect. In order to implement the legislation, the Ordinance also creates a new Competition Commission and Competition Tribunal. The Competition Commission is an independent body charged with investigating anti-competitive conduct and bringing proceedings before the Tribunal. The Competition Tribunal is a special judicial body created to adjudicate disputes under the Ordinance and issue financial penalties.

Full enforcement of the Ordinance is not expected for some time, pending further clarification and promulgation of rules by the Competition Commission.

First Conduct Rule

The First Conduct Rule prohibits anti-competitive agreements and other practices that have the object or effect of preventing, restricting, or distorting competition in Hong Kong. In response to amendments proposed in late 2011, the final version of the Ordinance distinguishes between “hardcore” violations of the First Conduct Rule, which include price fixing, market allocation, output control, and bid-rigging, and other, “non-hardcore” violations. It is

unclear whether “hardcore” conduct is limited to arrangements among competitors or whether it also applies to vertical arrangements between suppliers and customers, such as agreements to price a product above a certain minimum or below a certain maximum price.

In cases involving “hardcore” conduct, the Commission need not provide any warning before prosecuting an infringing party. However, it may issue infringement notices (a kind of warning allowing a company to confess and enter into commitments) and accept commitments from undertakings to take or refrain from taking action in exchange for the Commission’s agreement not to commence an investigation or bring proceedings before the Tribunal.

In the case of “non-hardcore” market violations, the Competition Commission must first issue a “warning notice” to the responsible parties, requiring them to cease and not repeat the contravening conduct during a specified “warning period”. If the contravening activity continues after the expiration of the warning period, the Commission can then initiate enforcement proceedings in the Competition Tribunal. In response to criticism from small to medium sized enterprises (“SMEs”), the final Ordinance contains a *de minimis* exception for “non-hardcore” arrangements between undertakings whose combined annual worldwide turnover does not exceed HK\$ 200 million. Exemptions also are provided for agreements that enhance economic efficiency and categories of agreements in respect of which the Competition Commission has granted block order exemptions.

Second Conduct Rule

The Second Conduct Rule is designed to prohibit undertakings with a substantial degree of market power from abusing that power by engaging in conduct that has as its object or effect the prevention, restriction, or distortion of competition in Hong Kong. Interestingly, the law applies to an undertaking with “a substantial degree of market power” rather than a “dominant” undertaking. It is unclear, but the threshold for “dominance” may be higher. The Ordinance defines such abuse of power to include predatory behavior towards competitors and limiting production, markets, or technical development to the prejudice of customers. There is also a *de minimis* exemption to the Second Conduct Rule, but it is limited to conduct by an undertaking whose turnover does not exceed HK\$ 40 million.

Limited Merger Rule

The Ordinance also contains a Merger Rule that prohibits certain mergers between licensed carriers in the telecommunications sector. In response to criticism raised during the public consultation phase, particularly from businesses that feared that the broad wording of the Conduct Rules could be used to challenge mergers and acquisitions in non-telecom sectors, the Ordinance contains an express provision excluding merger activity from the First and Second Conduct Rules. While Hong Kong may consider a cross-sector merger control regime in the future, the Ordinance in its current form raises issues only for M&A activity among holders of telecom carrier licenses.

Penalties

The Ordinance sets the maximum penalty for a violation at 10% of the undertaking's turnover obtained in Hong Kong for each year of the infringement, up to a maximum of three years. In addition to monetary penalties, the Tribunal may also award damages to aggrieved parties, order an undertaking to unwind a transaction, issue interim injunctions, and issue director disqualification orders.

Private Right of Action

Earlier iterations of the Ordinance had granted private parties the right to bring either a "follow-on" action, following a determination by the Tribunal or higher courts that a Conduct Rule had been violated, or a "stand-alone" action. In response to criticism from SMEs, who argued that the private right of action could be abused by larger competitors seeking to raise unwarranted and expensive litigation, the final version of the Ordinance preserves "follow-on" private actions, but removes the right to pursue "stand-alone" private actions.

Additional Guidance Expected

Although the final version of the Ordinance has been passed, important processes and procedures will need to be clarified before the Ordinance takes full effect. Most importantly, the Competition Commission will need to draft guidelines that provide clarification regarding the scope of the Conduct Rules.

INDIA

Recent bid-rigging decisions

In April, the Competition Commission of India ("CCI") issued three bid-rigging decisions regarding public procurement cases (*A Foundation for Common Cause & People Awareness vs. PES Installations Pvt. Ltd. & Ors.*, *Coal India Limited vs. GOCL Hyderabad & Ors.*, and *Suo-Moto Case no. 02/2011*). The fine imposed in each of these decisions was significant and presumably reflected, in the CCI's opinion, the importance of competitive tenders for state entities (which constitute ~30% of India's GDP).

It is noteworthy that in all three cases the CCI was unable to produce any direct evidence of a cartel arrangement and relied on circumstantial evidence to infer bid rigging. For instance, in *Suo-Moto Case no. 02/2011*, the CCI used the fact that three competitors entered the premises of the Food Corporation of India together to submit their bids as sufficient proof of collusion. Similarly, in *Coal India Limited vs. GOCL Hyderabad & Ors.*, identical letters sent by two competitors explaining their reasons for not attending an auction were used as proof of a "meeting of minds". These decisions provide useful insight into how the CCI intends to consider cases under Section 3 of the Competition Act (anti-competitive agreements), in particular as regards the standard of proof (in the *Suo-Moto Case no. 02/2011*, the CCI set the standard of proof as the "preponderance of probability").

CCI imposes fine on 11 cement companies for cartel activity

On June 20, the CCI fined 11 cement companies and the Cement Manufacturers Association ("CMA") more than INR 60 billion (~\$1.1 billion; €836 million) for engaging in alleged cartel activity. This fine set multiple records. It is the largest fine issued by the CCI to date. In addition, the INR 11.5 billion (~\$208 million; €169 million) fine on one cement company, ACC, is the largest fine on a single company ever issued by the CCI.

The CCI held that the 11 cement companies contravened Sections 3(3) (a) and (b) of the Competition Act 2002 by fixing prices and limiting and controlling the production and supplies in the market. In the absence of direct evidence, the CCI used circumstantial evidence to infer cartelization between the parties, centering on economic evidence and evidence of communications. The CCI found that the CMA collected and distributed both retail and wholesale prices of cement companies and used this evidence to infer coordination on price between the parties. The CCI disregarded the argument by the

CMA and 11 cement companies that they were ordered to share this information by the Government's Department of Industrial Policy and Promotion. In terms of economic evidence, the CCI inferred collusion from alleged price, production, and dispatch parallelism as well as alleged "super-normal" profits earned by the companies.

The CCI's decision raises a number of important questions, in particular as regards the standard of evidence required for a finding of infringement under Section 3 of the Act and the methodology for calculating the fine. There are also important questions raised in relation to due process / rights of defense (*e.g.*, the CCI's decision is based heavily on economic factors but the underlying data and calculations are not provided), the ability of the CCI to take into account evidence existing prior to the adoption of the relevant provisions of the Act, and the identification of alleged participants (*i.e.*, whether this should be determined by reference to a complaint received by the CCI or more generally by the CCI's investigation). These questions will presumably be answered by the appellate courts in the context of the likely appeals.

JAPAN

JFTC files criminal accusation related to price-fixing investigation

On June 14, the Japan Fair Trade Commission ("JFTC") filed a criminal accusation with the Public Prosecutor-General alleging that three companies engaged in the sale of industrial machinery bearings and/or automotive bearings, NTN Corp., Nachi-Fujikoshi Corp., and NSK Ltd., and seven individuals working for those companies met and agreed to fix the prices of those products. Another company, JTEKT, was exempted from prosecution as a result of the JFTC's leniency program. This is the first criminal charge brought by the JFTC since 2008.

SINGAPORE

CCS issues revised Merger Guidelines

On June 22, the Competition Commission of Singapore (the "CCS") published its revised Guidelines on Merger Procedures 2012 (the "Merger Guidelines"). The Merger Guidelines took effect on July 1. Singapore's Competition Act prohibits transactions that have resulted, or may be expected to result, in a substantial lessening of competition. Parties to a transaction may voluntarily notify the CCS of pending transactions. The Merger Guidelines introduce a new service whereby parties may confidentially consult with the CCS in order to obtain an indication from CCS on whether the transaction may infringe the Competition Act. The Merger Guidelines also

introduce new turnover thresholds below which CCS is unlikely to investigate a transaction, which should help SMEs, and clarify the information required when parties prepare a merger notification form.

SOUTH KOREA

KFTC amends notification on imposition of administrative fines

In an effort to offer greater incentives for voluntary corrections of violations and to increase the deterrent effect of the law, on March 28, the Korea Fair Trade Commission (the "KFTC") announced that the Notification on Detailed Criteria for Imposition of Administrative Fines (the "Notification") would be amended (the "Amendments"), effective as of April 1, 2012. The Amendments (i) allow reduction of administrative fines by up to 50% in certain cases if a party voluntarily takes action to correct a violation, (ii) raise the limit on the basic rate of fines for a violation to the maximum limit legally permitted, (iii) increase fines for obstruction of a KFTC investigation, and (iv) increase fines by up to 20% for habitual violators that repeat the same type of violation in a three-year period.

Introduction of procedural rules for consent decree system

On April 1, the Rules on Management of and Procedures for the Consent Decree System came into effect in accordance with a November 2011 amendment to the Monopoly Regulation and Fair Trade Law, which introduced a consent decree system. The consent decree system may be utilized to resolve cases for which the KFTC has initiated an investigation but for which there is not a clear violation of the law. A respondent wishing to utilize this system may propose a corrective measure, such as providing remedies to consumers and compensation for damages, which will be reviewed by the KFTC. The KFTC will determine whether to accept the remedy and close its investigation. The system may not be utilized in cartel cases.

South Korea and China sign competition MOU

On May 29, the competition authorities of Korea and China signed a Memorandum of Understanding ("MOU") strengthening bilateral cooperation. The MOU permits mutual investigative assistance between the countries. In addition, various personnel exchange programs have been established to further cooperation.

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