

Antitrust in China and across the region  
Quarterly Update  
April to June 2016

**C L I F F O R D**  
**C H A N C E**

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# Antitrust in China and across the region

## Quarterly Update: April to June 2016

While the first half of 2016 has been relatively quiet, there is an indication that enforcement is picking up for both the National Development and Reform Commission (NDRC) and State Administration of Industry and Commerce (SAIC). NDRC will reportedly focus on five key areas: manufacturing, pharmaceuticals, medical devices, vehicle manufacturing and ocean shipping. Separately, SAIC has stepped up its enforcement at the provincial level in several cases and penalised companies in a range of sectors including accounting, provision of television services, gas distribution and water supply.

China's Ministry of Commerce (MOFCOM) has been active in enforcement against companies that fail to notify mergers to it in accordance with the Anti-Monopoly Law (AML), having imposed fines in 3 separate cases. Separately, MOFCOM announced that, during the 6<sup>th</sup> St. Petersburg International Legal Forum in May, Brazil, Russia, India, China and South Africa had signed an MOU on law and policy cooperation between their competition agencies.

It was also announced that antitrust litigation has also grown significantly in China in the last year. Recent statistics from China's Supreme People's Court indicate that private antitrust litigation in 2015 increased by 80% from the previous year, with 156 new first instance private antitrust lawsuits in 2015.

Across the Asia-Pacific region, there has been significant enforcement activity by regulators this quarter. Australia issued fines against companies for cartel conduct and other anti-competitive behavior in the laundry detergent and flyash sectors. Taiwan issued its first whistleblower reward after the establishment of its reward program last October for providing information on a cartel case involving container-handling services. Korea also imposed fines in a number of cases, including KRW 352 billion (USD 306 million) against 13 companies for allegedly rigging bids for LNG terminal construction projects.

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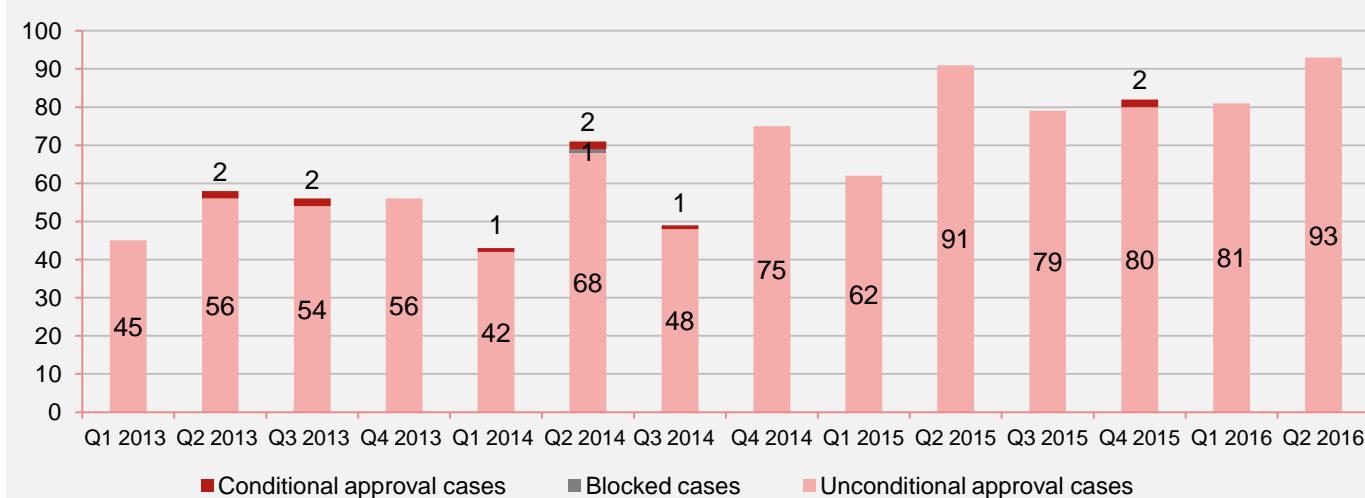
# Merger Control



## How many cases have there been?

China's Ministry of Commerce (MOFCOM) issued 93 merger decisions in the second quarter of 2016, an increase of 2% compared to the second quarter of 2015. More than 82% of these cases were notified under the simplified procedure. All 93 cases were unconditionally cleared.

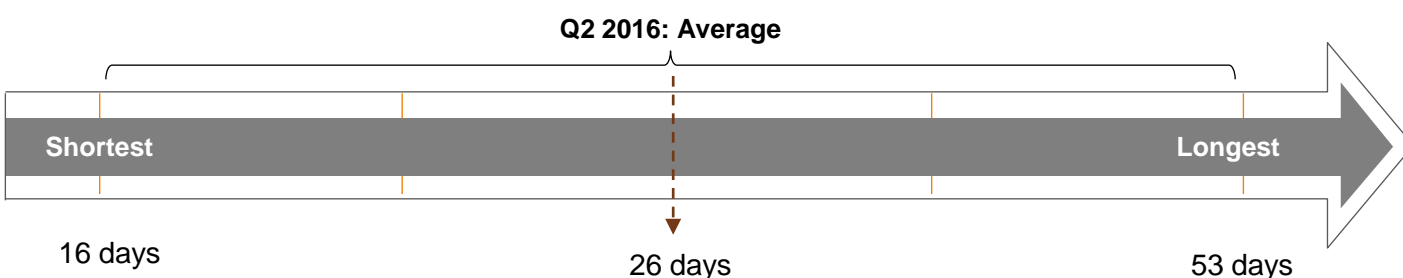
**Merger control trends – Q1 2013 – Q2 2016**



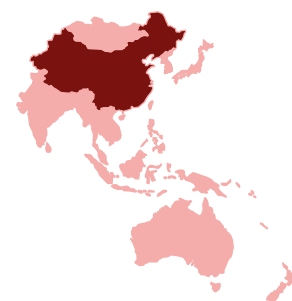
## Simplified procedure: How quick is the review period?

MOFCOM's simplified procedure was introduced in April 2014 and has a non-binding target review period of 30 days for qualifying cases.

Quarter	Average review period	Simplified procedure (%)	Cases exceeding 30 days
Q4 2014	28 days	58.7%	4
Q1 2015	29 days	69.4%	11
Q2 2015	33 days	76.9%	19
Q3 2015	29 days	76.0%	12
Q4 2015	27 days	81.7%	7
Q1 2016	27 days	74.1%	2
Q2 2016	26 days	82.8%	10

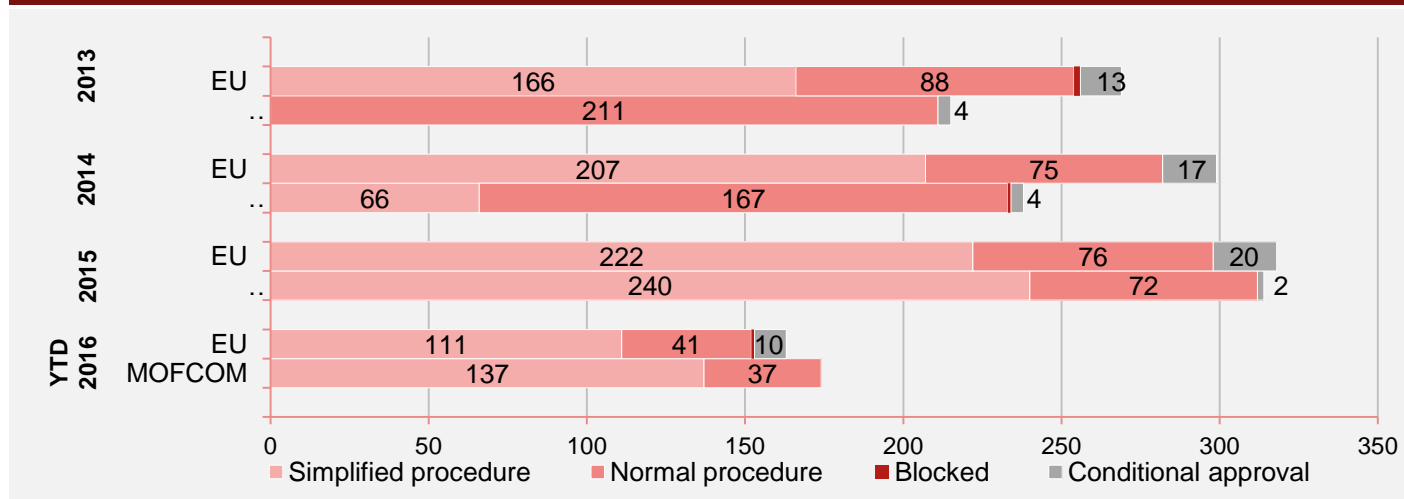


# Merger Control (continued)



## How does China compare internationally?

Comparison with EU – 2013 – 2016



## Other news

### China fines companies for failure to notify mergers

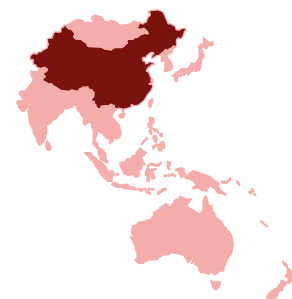
On 4 May 2016, MOFCOM published three decisions dated 21 April 2016 fining several companies involved in three separate transactions for failing to notify the transactions in accordance with the AML merger control rules. First, Dade Holdings was fined RMB 150,000 (USD 23,000) for its failure to notify its acquisition of a 50% shareholding in Jilin Sichang Pharmaceutical in 2011. Second, Beijing CNR Investment and Hitachi were fined RMB 150,000 (USD 23,000) each for failure to notify a joint venture between them in 2013. Thirdly, New United Group and Bombardier Transportation Sweden were fined respectively RMB 300,000 (USD 46,000) and RMB 400,000 (USD 61,000) each for failure to notify a joint venture in 2015. The publicised decisions from MOFCOM were notable in certain respects. The decisions provided further guidance on the point of implementation of a concentration where the relevant parties would be considered to have failed to notify the concentration in accordance with Article 21 of the AML. With respect to acquisition, (i.e. the decision against Dade Holdings), the parties should have notified before the completion of the registration of the share transfer at the Administration of Industry and Commerce (AIC). Concerning the two joint ventures discussed above, the point of implementation was when the joint ventures obtained their business licences. Additionally, it is worth noting that New United Group and Bombardier Transportation Sweden received heavier fines as it appeared that they deliberately decided not to notify and Bombardier had been previously fined for not notifying.

### MOFCOM lifts remedies imposed in Walmart Yihaodian deal in 2012

On 8 June 2016, MOFCOM announced its decision to remove the conditions imposed in relation to Walmart's acquisition in 2012 of a 33.6% shareholding in Niu Hai Holdings, which indirectly owned Yihaodian (a Chinese e-commerce company). MOFCOM imposed three conditions for approving the transaction: Niu Hai Holdings would confine merchandise sales to its existing network platform; Niu Hai Holdings would not provide network services to any other trading parties without gaining a business permit for value-added telecom services; and post-completion Walmart would not be permitted to use a variable interest entity (VIE) structure to provide value-added telecom services which were provided by Yihaodian. MOFCOM decided to remove the conditions after consideration of several factors, including that entry barriers to China's value added telecom service market had been reduced over time, and that government regulations had been implemented which opened the online data processing and transaction processing services businesses in China to wholly foreign owned businesses. Furthermore, MOFCOM found that during the period of implementation of the conditions, China's online retail sector had grown at a fast rate with increased competition. On the other hand, Yihaodian had no substantial growth during this period and its growth rate lagged behind its main competitors. In related news, it was announced on 20 June that JD.com, a Chinese e-commerce company, had closed its purchase of Yihaodian from Walmart in exchange for 5% of JD.com's shares. This transaction was not notified to MOFCOM.

# Antitrust Investigations

## The National Development and Reform Commission (NDRC)



The Jiangsu branch of the National Development and Reform Commission (JDRC) announced on 24 May 2016 that it had fined six companies (Lianyungang Zhicheng Chemical, Lianyungang Baierte Chemical, Guanyun Jin'an Chemical, Lianyungang Hengmao Chemical, Binhai Hongjia Chemical and Shanghai Focus Chemical Technology Company) a combined RMB 3,810,000 (USD 581,116) for price fixing. The NDRC found that six companies had colluded to raise the price of chlorophenol, a raw material used to manufacturer pesticide and pharmaceutical products. Each company was fined 1% of their 2014 revenue in the relevant market. The decision is also noteworthy in that both Shanghai Focus Chemical Technology Company, the sales company involved and its subsidiary, Lianyungang Zhicheng Chemical, a manufacturer of chlorophenols, were fined separately for their involvement in the cartel.

Case	Date announced	Issue	Total fine (RMB '000)	Minimum (RMB '000)	Maximum (RMB '000)	% of Turnover	Leniency/ Co-operation
<b>Automobile &amp; Auto parts</b> - Shanghai Hankook Tyre Co., Ltd <i>Shanghai Price Bureau</i>	April 2016	Resale Price Maintenance	2,175.2	NA	NA	1	Yes
<b>Automobiles inspection</b> - 31 providers of vehicle inspection services and the industry association <i>Shaanxi Price Bureau</i>	April 2016	Horizontal Price Fixing	5,769.6	NA	NA	3-8	Yes
<b>Chemicals</b> - 6 chemical companies in Lianyungang <i>Jiangsu Price Bureau</i>	May 2016	Horizontal Price Fixing	3,810	NA	NA	1	Yes

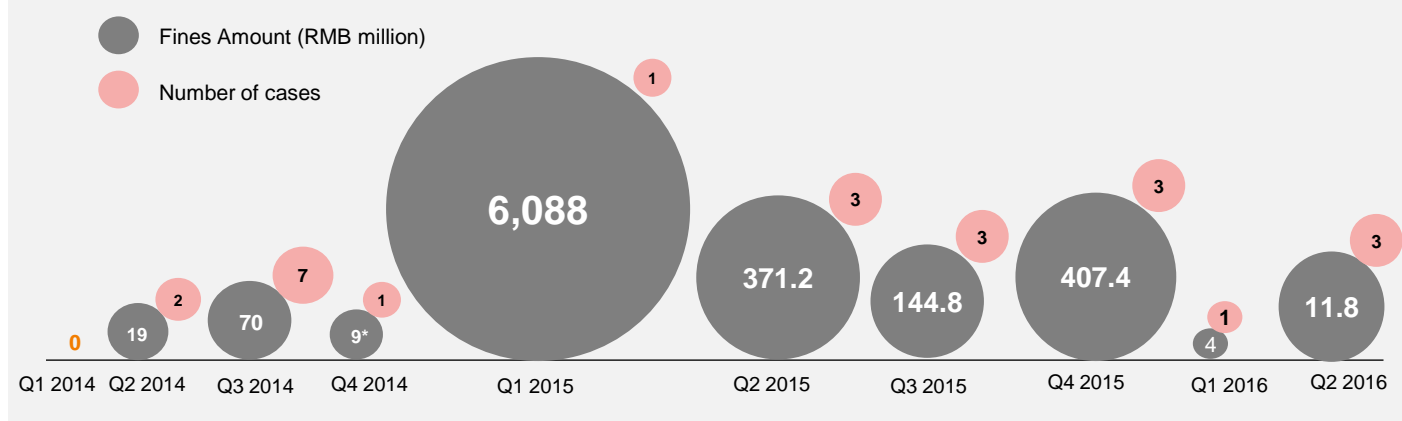
The NDRC is actively enforcing in five sectors this year. As reported in the news media, the five sectors that are under investigation are smart manufacturing, pharmaceuticals, medical devices, vehicle manufacturing and ocean shipping. In the vehicle manufacturing sector, a new round of antitrust investigations into vehicle makers has started. The NDRC has so far fined vehicle makers such as FAW-Volkswagen, Audi, Chrysler, Mercedes-Benz and Nissan, for antitrust violations. In the medical device sector, the NDRC is investigating major medical device manufacturers, and is mainly focused on the sales of high-end medical devices. Along with the medical device sector, the NDRC is investigating pharmaceutical conglomerates for possible antitrust violations including excessive pricing of brand name drugs, possible abuse of drug patents, price-related vertical restraints and abusive conduct in their supply and distribution chains. The NDRC is also conducting antitrust probes into the smart manufacturing technology sector, targeting potential patent abuse, such as those related to essential standard patents, by several foreign technology companies. In addition, the NDRC is now also conducting two separate investigations into the international ocean shipping sector liner conferences and possible cartel conduct specifically of a port in southern China.

# Antitrust Investigations (continued)

## The National Development and Reform Commission (NDRC)



### Enforcement trends – Q1 2014 to Q2 2016



## Other news

### China's NDRC consults on guidelines on exemptions for anti-competitive agreements

On 12 May 2016, the NDRC published draft guidelines on conditions and procedures for applications for exemption of anti-competitive agreements (Guidelines) for public comment. Under Article 15 of the AML, undertakings may not be considered to have entered into anti-competitive agreements where certain exceptional conditions are satisfied, such as for the purpose of technological improvement or product development. The Guidelines set out the detailed procedure and standards that must be met to benefit from the exemption. Undertakings and industry associations can file an exemption application by providing justifiable reasons and evidence, together with the details of competitors. When determining whether the exemption conditions are satisfied, NDRC will focus on three aspects: (i) whether the conditions under Article 15 of the AML are satisfied; (ii) whether market competition will be undermined; and (iii) whether customers can share the benefits of the agreement in question. Industry associations can also consult with the competent regulator in relation to the lawfulness of a proposed agreement.

### China's NDRC consults on draft antitrust guidelines for penalty determination

On 17 June 2016, the NDRC published draft guidelines for identifying illegal gains and determining penalties in antitrust cases. The draft guidelines aim to provide an analytical framework and some basic methodologies that antitrust law enforcement agencies can use to determine the amount of illicit gains and penalties when imposing sanctions relating to anti-competitive agreements and abuse of dominance. For the conclusion of anti-competitive agreements, the initial penalty rates proposed in the draft guidelines range from 1% to 3% of the entity's annual sales in the previous year, depending on the types of agreement. An initial 3% penalty is applicable to agreements to fix or change the price of goods, to restrict the production volume or sales volume of goods and to divide the sales market or procurement market for raw materials. For agreements to restrict the purchase of new technology or new equipment, or to restrict the development of new technology and new products, to collectively boycott transactions and other anti-competitive agreements as recognised by the Anti-Monopoly Enforcement Authority, an initial 2% penalty rate will apply. A 1% penalty rate will apply to vertical agreements where an undertaking enters into agreements with its trading partners to fix the resale price of goods to a third party, to restrict the minimum resale price of goods sold to a third party and that which is recognised as a monopoly agreement by the Anti-Monopoly Enforcement Authority. For abuse of market dominance, an initial penalty rate of 2-3% would apply, depending on how the undertaking obtained its dominant position. An initial 3% penalty rate will apply to undertakings which obtained their dominant position by means of law or administrative regulations. A lower initial penalty rate of 2% would apply to undertakings that have a dominant position by virtue of market competition. The initial penalty rate will be adjusted taking into consideration factors such as the duration and severity of the illegal acts, as well as the undertaking's role and intention. Thus the final penalty range would be from 1 – 10%.

# Antitrust Investigations (continued)

## The State Administration for Industry and Commerce (SAIC)



On 17 May 2016, the Administration of Industry and Commerce of Shandong Province imposed fines on 23 accounting firms in Linyi City, Shandong Province, for reaching and implementing monopoly agreements to divide the sales market by establishing a "Self-Discipline Committee of CPA Industry." Although 25 firms had been involved in the agreement to divide the sales market only 23 of those firms were fined. The fines ranged from 1% to 3% of the revenue of each company in 2013, with a total of RMB 1.98 million (USD 300,000 million). The announcement did not explain why only 23 firms, rather than all 25 firms were fined. However, in a separate publication concerning the case on the SAIC website, it was noted that prior to the Shandong AIC reaching its decision 2 of the 25 accounting firms being investigated deregistered with the AIC as enterprises. With respect to those 2 firms, the Shandong AIC did not punish the 2 firms and instead requested further guidance from the SAIC on the treatment of such situations.

Case	Date announced	Issue	Total fine (RMB '000)	Minimum (RMB '000)	Maximum (RMB '000)	% of Turnover	Leniency/ Co-operation
<b>Pipeline Gas Supply</b> <i>Shandong*</i>	May 2016	Abuse of market dominant position – Imposing unreasonable trading conditions	6,818.5	NA	NA	3	No
<b>Auditing &amp; Capital Verification</b> <i>Shandong*</i>	May 2016	Monopoly agreement – allocating sales market	1,982.7	11.3	304.9	1 – 3	Yes
<b>Water Supply</b> <i>Inner Mongolia*</i>	May 2016	Abuse of market dominant position – Imposing unreasonable trading conditions	451.6	NA	NA	2	Yes
<b>Television Network Services</b> <i>Inner Mongolia</i>	June 2016	Abuse of market dominant position – Imposing unreasonable trading conditions	98	NA	NA	1	Yes

\* All three decisions were issued in Q1 2016 and published in May 2016

### SAIC's Inner Mongolia bureau fines local TV-services provider for abuse of dominance

On 7 June 2016, the Inner Mongolia branch of SAIC fined the Xiliguole prefecture-level branch of Inner Mongolia Radio and Television Network Group RMB 98,000 (USD 15,000), or 1% of the company's revenue in 2015, for abuse of a dominant position. The company was found to have unfairly imposed extra charges in addition to the regular maintenance payment for TV services. The regulator also confiscated illegal gains amounting to RMB 91,600 (USD 14,020).

### SAIC's Inner Mongolia bureau fines city water supplier for abuse of dominance

On 22 April 2016, the Inner Mongolia bureau of SAIC fined the municipal water supply and drainage company in the city of Alxa Zuoqi RMB 451,600 (USD 69,000), or 2% of its revenue for the previous year, for abuses of market dominance. The company forced consumers to use water meters and installation services supplied by it or face termination of their water supply. The Inner Mongolia AIC found that the company had a dominant market position in the city of Alxa Zuoqi for the supply of water and the company had abused its position by forcing customers to purchase and install a specific water meter.

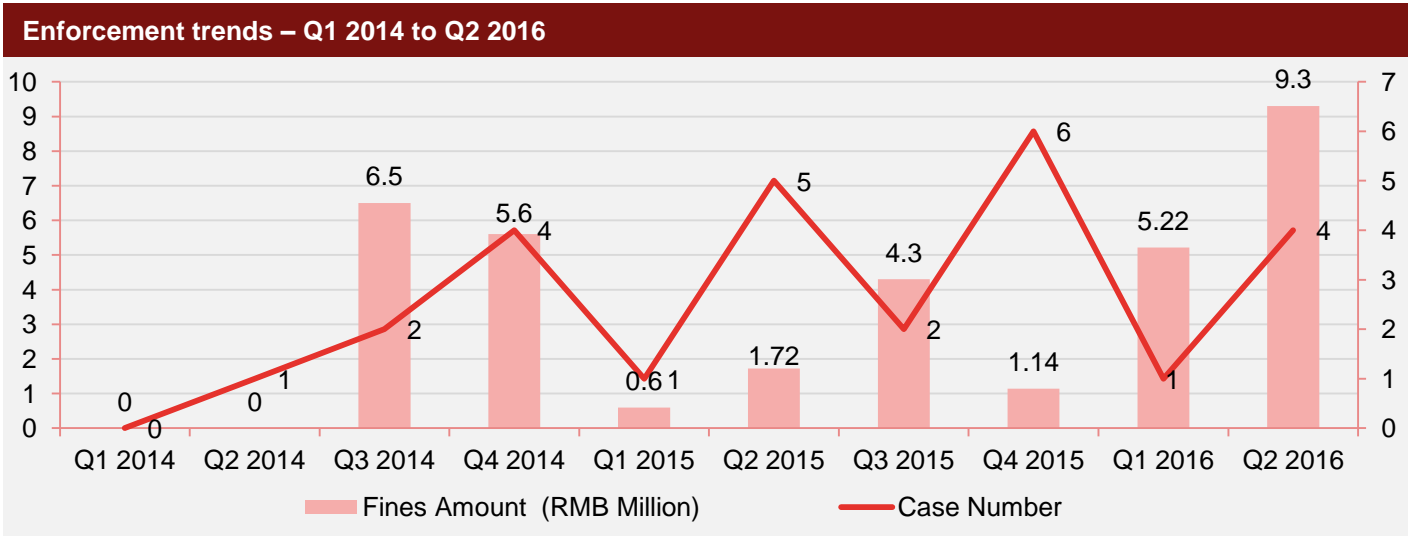


# Antitrust Investigations (continued)

## The State Administration for Industry and Commerce (SAIC)



On 21 March 2016, the Shandong provincial branch of SAIC fined Qingdao ENN Gas RMB 6,818,533.79 (USD 1.05 million) for imposing unfair conditions in its piped gas supply services, according to an official penalty order. The penalty equals 3% of the company's revenues generated in the relevant market in 2013. The Shandong AIC found that Qingdao ENN Gas abused its dominance in the relevant market and collected "prepaid gas fees" from gas consumers without any justification.



## Other news

### SAIC campaigns to regulate internet commerce

On 4 May 2016, the SAIC published a plan to launch a nationwide campaign targeting illegal practices in Internet commerce. The SAIC intends to crack down on anticompetitive agreements, abuses of market dominance and abuses of intellectual property rights; and cooperate with the relevant pricing monitoring and regulatory authorities by exchanging related findings, in order to strengthen antitrust enforcement in the internet sector.

# Other Asia Pacific news in brief

## India

The Competition Commission of India's (CCI) INR 50 million (USD 0.75 million) penalty imposed on 16 February 2016 on GE for failing to notify its acquisition of Alstom within the mandated timeframe. The Parties filed their notification on 24 November 2014 and re-filed on 14 January 2015 after the initial notification was deemed not in conformity. While the relevant transaction agreements had been signed on 4 November 2014, the CCI considered that two earlier public announcements dated 5 May 2014 were the trigger point for filing notifications. The penalty is 0.0001% of the combined value of worldwide assets of the companies. In determining the penalty, the CCI considered the "bona fide conduct of GE regarding the intent to file the notice, although after the expiry of statutory timelines" and noted the fact that the transaction was not completed without prior regulatory approval. The CCI approved the transaction in May 2015.

## Philippines

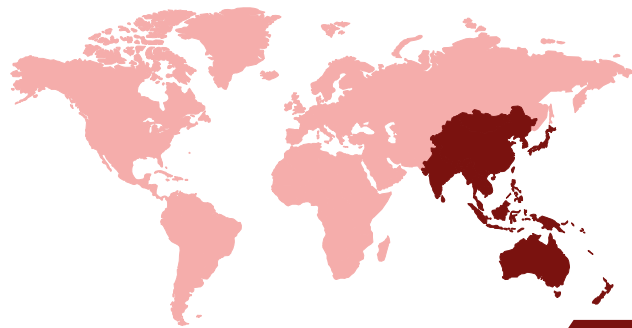
The recent proposed purchase of San Miguel Corporation's telecommunication business by Globe and PLDT illustrates the lack of clarity surrounding the implementation of the Philippines Competition Act. On 3 June 2016, the Philippine Competition Commission (PCC) released the implementing rules and regulations (IRR) for the Philippine Competition Act which set out the scope of anti-competitive agreements and abuse of dominant position; the review standard and notifying threshold for mergers and acquisitions; and the procedures for review and notification. The IRR took effect on 18 June 2016. According to an earlier 30 May 2016 PCC statement, the PCC will review the proposed acquisition. While the deal was signed a few days ahead of the release of the IRR, the PCC maintained it had the authority to review the transaction. However, the transitional clause in the Philippine Competition Act provides a transitory or grace period, and the PCC can only penalise anti-competitive conducts or practices which are not corrected by August 2017. If the PCC decides to issue a decision rejecting or amending the merger, Globe and PLDT can challenge the decision in the Court of Appeals of the Philippines.

## Indonesia

On 26 April 2016, the KPPU fined Korea's LG International IDR 8 billion (USD 0.6 million) for not reporting its takeover of PT Binsar Natorang Energy on time. The KPPU found that the electronics company had violated Law No. 5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition by reporting its takeover of Binsar Natorang Energy's shares 20 days late. The combined asset value (IDR 3.82 trillion) of the transaction exceeded the stipulated merger notification threshold. Under Indonesia's competition law, all mergers involving combined assets of IDR 2.5 trillion (USD 188 million) or a combined turnover of IDR 5 trillion (USD 377 million) have to be assessed by the KPPU and must be notified with 30 days after completion.

## Australia

The Australian Competition and Consumer Commission (ACCC) had a busy second quarter of 2016. First, on 28 April and 3 June 2016 respectively, the Australian Federal Court ordered Colgate-Palmolive to pay AUD 18 million (USD 13.7 million) and Woolworths to pay AUD 9 million (USD 6.52 million) in fines for cartel conduct and anti-competitive arrangements to limit the supply and control the price of laundry detergent. In December 2013 the ACCC had started proceedings against Colgate, PJ Cussons, Woolworths and Paul Ansell, a former Colgate sales director. Secondly, on 29 April 2016, the Australian Federal Court imposed penalties of AUD 18.6 million (USD 14.19 million) on Cement Australia for anticompetitive agreements to restrict the trade in flyash by preventing a competitor from getting direct access to a source of flyash in southeast Queensland, and thus entering the market. Thirdly, on 16 June 2016, the ACCC accepted a court-enforceable divestiture undertaking from Primary Health Care and Healthscope Limited requiring Primary to divest pathology assets it purchased from Healthscope, largely reversing the acquisition. Primary and Healthscope had completed the transaction without notifying the ACCC in advance, despite being aware of potential competition concerns. Australia applies a voluntary merger notification regime, although Section 50 of the Competition and Consumer Act of 2015 prohibit transactions which substantially lessen competition.



### South Korea

The KFTC fined 13 companies KRW 351.6 billion (USD 306 million) for allegedly bid-rigging for LNG terminal construction projects. For the KFTC, this is a significant amount of fines. These companies are reported to have rigged bids for tenders floated by Korea Gas Corp to construct LNG terminals in Korea between 2005 and 2012. Representatives of these companies met before submitting their bids to agree on the final winners and bid prices for each of the projects. The 13 companies are Keangnam Enterprises, Daelim Industrial, Daewoo E&C, DongAh Construction Industrial, Doosan Heavy Industries, Sambu Construction, Samsung C&T, SK E&C, GS E&C, Posco E&C, Hangyang, Hanwha E&C and Hyundai E&C.

### Japan

From 1 June 2016, for transparency purposes, the Japan Fair Trade Commission (JFTC) began releasing the names of companies afforded leniency in administrative investigations, as well as the percentages by which their fines were reduced. When the leniency system was first introduced in 2006, firms applying for immunity could decline to publicly disclose their identities and the percentages of their reduced fines.

### Hong Kong

On 24 May, the Hong Kong Competition Commission (HKCC) published its study into certain aspects of the residential building renovation and maintenance market. In its study, the HKCC analysed data provided by the Urban Renewal Authority and Hong Kong Housing Society on tender records from about 500 past projects relating to the appointment of consultants to plan and oversee renovation and maintenance projects and the appointment of contractors to perform the renovation works. The study found that for tenders that consultants participated in which included contractors with whom the consultants had a previous association, the consultants had a better chance of winning. Other cases indicated that maintenance consultants submitted bids of a value which did not correspond with the size or cost of a project. The HKCC's view was that in these cases the consultants would submit low bids to win the tender and the colluding contractor would then charge inflated fees on the project once won. Overall, the HKCC concluded that even though there was likely no contravention of the competition rules given that the study relates to activities taking place before the commencement of the Hong Kong Competition Ordinance, it would have investigated further had the data been from after its commencement.

### Taiwan

The Taiwan Fair Trade Commission (TFTC) issued its first whistleblower reward in April 2016 after the establishment of its reward program in October 2015. The whistleblower was rewarded NTD 500,000 (USD 15,000) for providing information on a cartel case involving container-handling services. The TFTC established an antitrust fund to facilitate antitrust investigations, part of which is used to reward whistleblowers. Any whistleblower providing useful information to TFTC could get a reward of 5% to 20% of the fine finally imposed, depending on the type and value of evidence provided. If an informant is involved in the reported cartel, the informant can apply for leniency. The identity and other personal information of the whistleblower is kept strictly confidential.

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