

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



**ANTITRUST IN CHINA AND
ACROSS THE REGION**

QUARTERLY UPDATE

April to June 2017

CONTENTS

Introduction	3
Merger Control	4
Antitrust Investigations	6
Other Asia Pacific news in brief	9
Regional contacts	12



ANTITRUST IN CHINA AND ACROSS THE REGION

QUARTERLY UPDATE: APRIL TO JUNE 2017

In the last quarter, MOFCOM cleared 78 deals, all but one (Dow/DuPont) unconditionally and issued a further six penalties for failure to file. One of the cases cleared unconditionally was Reckitt Benckiser's (RB) acquisition of Mead Johnson. This had initially been filed under the simple procedure on the basis that RB was not active on any of the same markets as Mead Johnson nor did it have it a 25% share of any upstream, downstream or related market. However, the filing was subsequently pulled and re-filed as a normal case – reportedly because of comments raised during the 10 day consultation period that the market for RB's durex product (where RB's market share is in excess of 25%) was related to the market for Mead Johnson's infant formula products. This case sheds some light on the notion of related markets and is a timely reminder of the perils of the public consultation process, particularly for those in visible sectors such as consumer goods.

On the enforcement side, a relatively quiet quarter in China saw two more administrative monopoly decisions against public authorities and three decisions imposing modest fines in the property management, insurance and gas supply sectors.

Outside China, there have been a number of notable developments – India dropped its requirement for qualifying mergers to be notified within 30 days, so allowing greater flexibility when coordinating multiple merger filings; South Korea announced a modest increase in its filing thresholds (from KRW 200/20 billion to KRW 300/30 billion) and the prospect of imprisonment for the obstruction of an investigation; Indonesia approved a bill introducing a leniency regime; Vietnam issued a revised draft Competition Bill, proposing a single competition regulator, new filing thresholds and a leniency regime; and Australia announced a review of the financial services sector. In Japan, the JFTC has concluded that some LNG destination clauses restrict competition and in Hong Kong, the Competition Commission announced the appointment of its new CEO, Brent Snyder who had previously worked in the US Department of Justice and who will take up his post in September.

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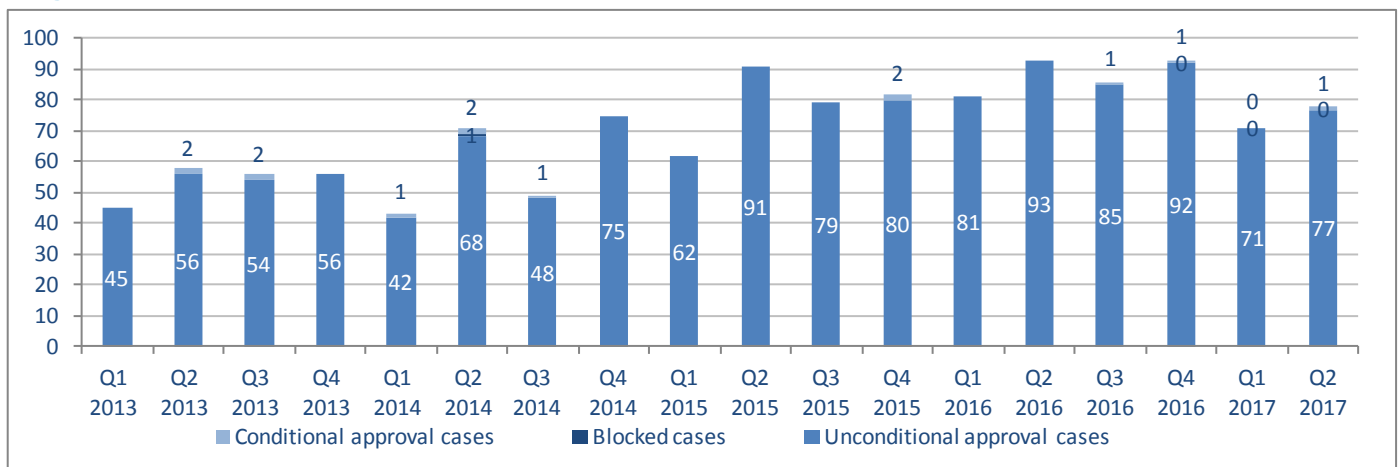


THE MINISTRY OF COMMERCE (MOFCOM)

How many cases have there been?

China’s Ministry of Commerce (MOFCOM) issued 78 merger decisions in the second quarter of 2017, a decrease of 16% compared to the second quarter of 2016. Around 67% of these cases were notified under the simplified procedure. 77 cases were unconditionally cleared, while one case was conditionally approved.

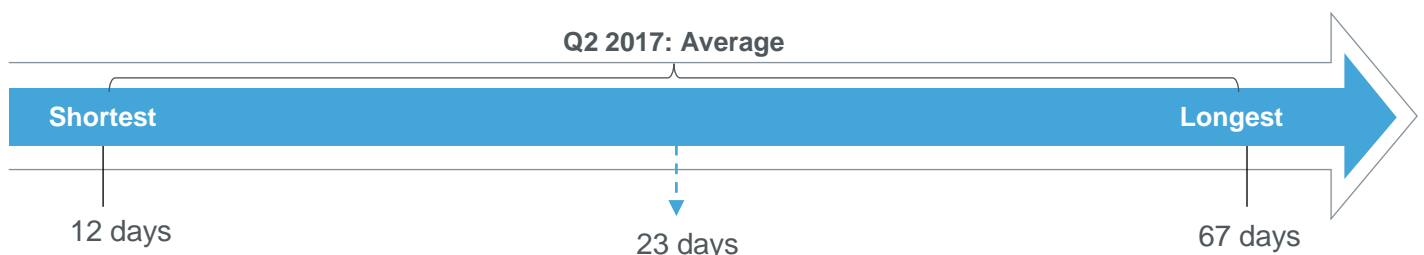
Merger control trends – Q1 2013 – Q2 2017



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
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
Q3 2016	25 days	75.6%	0
Q4 2016	25 days	77.4%	4
Q1 2017	25 days	81.7%	5
Q2 2017	23 days	66.7%	2

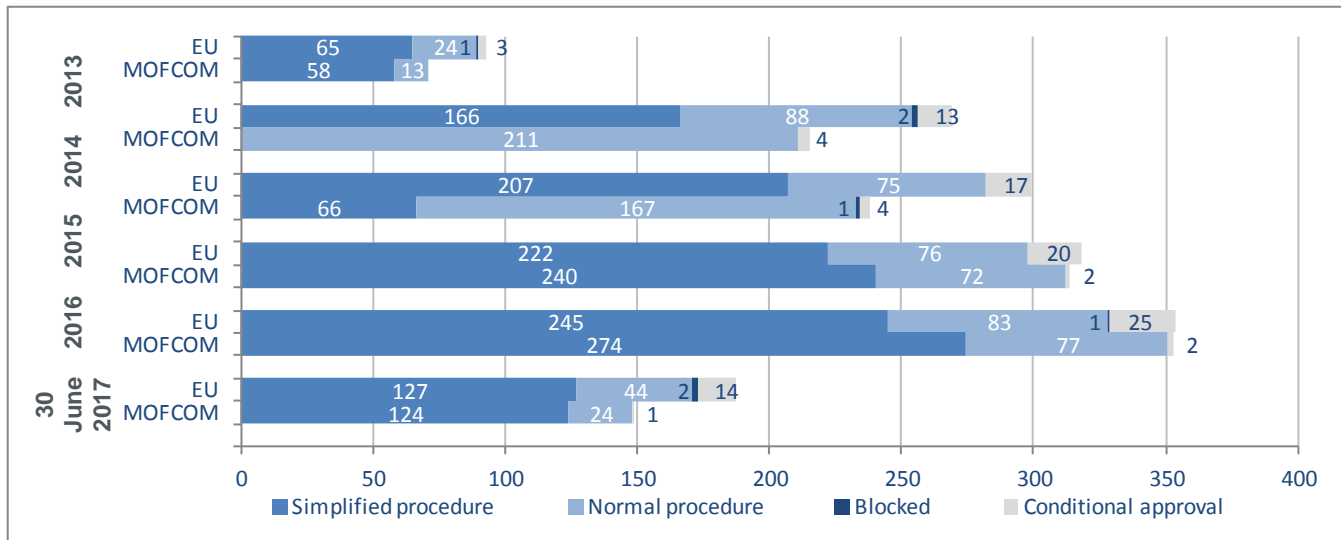




THE MINISTRY OF COMMERCE (MOFCOM)

How does China compare internationally?

Comparison with EU – 2013 – 2017



MOFCOM conditionally approves the proposed merger of Dow and DuPont

On 2 May 2017, MOFCOM announced that it had conditionally approved the proposed merger of Dow and DuPont, which was filed with MOFCOM on 21 March 2016. MOFCOM concluded that the proposed merger would have the effect of eliminating or restricting competition in the following markets: (i) the Chinese rice selective herbicide market; (ii) the Chinese rice pesticides market; (iii) the worldwide acid copolymers market; and (iv) the worldwide ionomers market. MOFCOM's primary concern was that the parties' high combined market shares would strengthen their control in the relevant markets and bar entry by effective competitors.

The conditions imposed by MOFCOM are a mixed package of both structural and behavioural remedies. Other than the divestment of relevant assets by DuPont and Dow, which reflect the remedy package accepted by the European Commission on 27 March 2017, MOFCOM has also required the parties to sell specific products in their crop protection portfolio at reasonable prices to Chinese consumers and not to engage in exclusive dealing for the next five years.

MOFCOM publishes six new fines on failure-to-file and plans to raise its penalty level

Since director general Wu Zhenguo took office in September 2016, MOFCOM has ramped up its enforcement against companies for failure to file notifiable mergers. In the last quarter, MOFCOM imposed six new fines on undertakings that had failed to file with MOFCOM, which is more than the total number of such decisions made by MOFCOM in 2016. Moreover, MOFCOM reportedly intends to propose an amendment to the AML (under the supervision of the Anti-monopoly Commission) with the aim of increasing the statutory limit for fines that may be imposed in failure-to-file cases from RMB 500,000 fine, which is deemed too low to have any deterrent effect. The proposed amendment reportedly would either increase the maximum fine or adopt a new approach (such as the revenue-based regime of the European Commission).

RB / Mead Johnson and the relevance of neighbouring markets

Reckitt Benckiser's USD 16.6 billion acquisition of Mead Johnson was notified to MOFCOM as a simple case on 30 March 2017 on the basis that there was no horizontal or vertical overlap between the parties and that neither party had a share of 25% or more on any market "relevant to the concentration". During the 10 day public consultation period which applies to all simple cases, MOFCOM apparently received comments to the effect that RB's durex brand had a market share of over 25% and that this market was "relevant to the concentration", presumably on the basis it was a related or neighbouring market to the infant formula market on which Mead Johnson was active. As such, the case would not qualify for the simple process and was therefore withdrawn and refiled under the normal procedure, eventually being cleared on 12 June. This case is of interest because it sheds some light on MOFCOM's approach to determining which markets might be "relevant to the concentration" (markets where there are common buyers or distribution channels) and also demonstrates some of the potential risks in filing under the simple procedure, particularly for mergers involving consumer facing businesses.

Other news

MOFCOM is reportedly considering publishing unconditional clearance decisions on the same day as approvals take place instead of the current practice of making them publicly available on a quarterly basis.



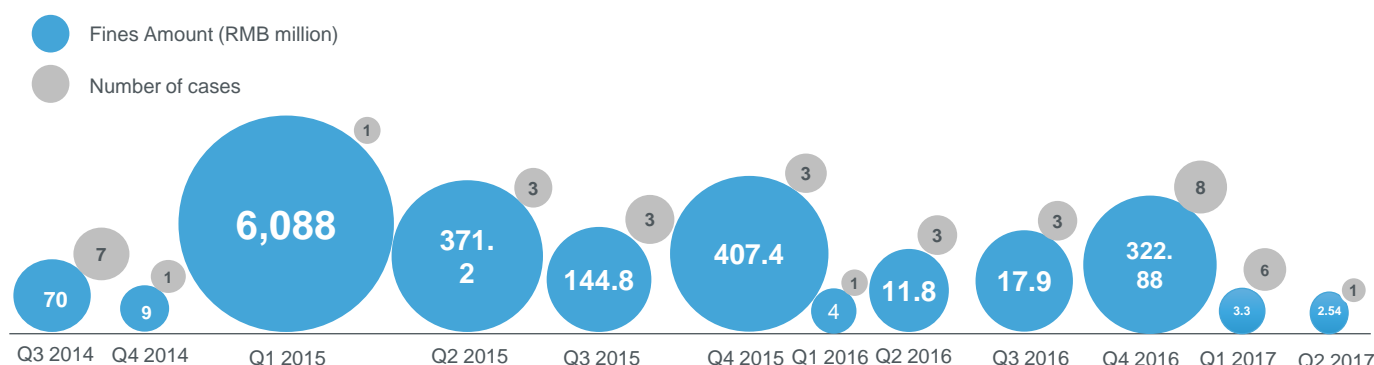
THE NATIONAL DEVELOPMENT AND REFORM COMMISSION (NDRC)

NDRC plans to fine 51 Shanxi power companies

The second quarter of 2017 has been fairly quiet, with only one decision published in which Beijing DRC imposed a fine of RMB 2.54 million on 49 property management firms for entering into a horizontal pricing agreement. One other development of note was a report that NDRC is proposing to issue a fine on 51 Shanxi power generators and the Shanxi Electrical Power Association for horizontal price-fixing. This arose out of an agreement between the parties to implement a series of measures including setting a minimum direct supply price. A number of the parties involved have sought to enlist the provincial government's support. They have argued that this conduct is common practice since China started to deregulate its power markets and that it falls within Article 11 of China's Anti-Monopoly Law which stipulates that trade associations "shall strengthen self discipline". This is a timely case as NDRC recently closed its consultation on draft guidelines on the application of competition rules to trade associations. As at the date of this briefing, no decision has been officially published.

Case	Date announced	Issue	Total fine (RMB '000)	Minimum (RMB '000)	Maximum (RMB '000)	% of Turnover	Leniency/ Co-operation
Property Management Beijing DRC	3 June 2017	Reaching and implementing monopoly agreement	2,540	N/A	N/A	3,5,7	N/A

Enforcement trends – Q3 2014 to Q2 2017





THE NATIONAL DEVELOPMENT AND REFORM COMMISSION (NDRC)

Other news

NDRC convenes its first official meeting on the Fair Competition Review Policy

On 5 May 2017, NDRC held the first official meeting to promote the Fair Competition Review Policy (FCRP). In this meeting, NDRC reviewed its progress with regard to the implementation of the FCRP. Since NDRC announced FCRP in 2016, 30 provincial governments have officially started to implement the FCRP. During the meeting, the NDRC also reviewed and approved three documents: (i) detailed interim rules for the implementation of the FCRP; (ii) a work plan on abolishing existing anti-competitive policies from 2017 to 2018; and (iii) work prioritisation for 2017.

NDRC orders Shenzhen Health Agency to rectify its abuse of administrative power

On 7 April 2017, NDRC announced that Shenzhen Health and Family Planning Commission (Shenzhen HFPC) had abused its administrative power and thereby infringed Article 8 and Article 32 of the AML. Specifically, NDRC found that Shenzhen HFPC had engaged in the following conduct: (i) implementing exclusive supply of collective procurement services by designating only one qualified supplier, Quanyaowang Pharma; (ii) forcing public hospitals and pharmaceutical manufacturers to purchase listed drugs only from Quanyaowang Pharma; and (iii) authorising Quanyaowang Pharma as the only firm that can designate drug delivery service providers. Following NDRC's investigation, Shenzhen HFPC has proposed to rectify its conduct by ensuring that public hospitals and pharmaceutical manufacturers are free to choose service providers for collective procurement and drug delivery.

Also in the pharmaceutical sector, it has been reported that NDRC is drafting new rules to regulate prices in the pharmaceutical sector to address concerns about anti-competitive practices. The new rules were proposed by NDRC in the context of the drug price reform launched by the Chinese government in May 2015.

Other news

International cooperation - On 23 June 2017, NDRC announced that it had signed a Memorandum of Understanding with its counterpart in Brazil, aiming to enhance their cooperation in antitrust enforcement.



THE STATE ADMINISTRATION FOR INDUSTRY AND COMMERCE (SAIC)

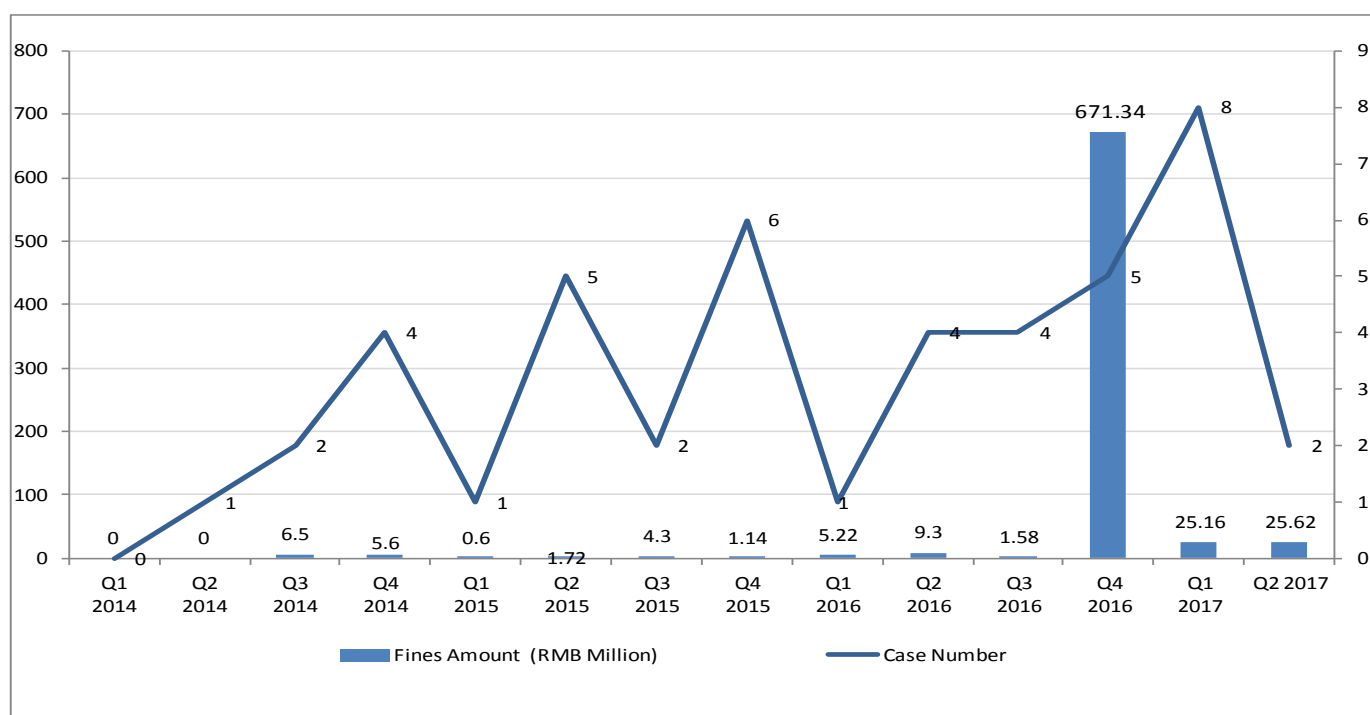
Shandong AIC orders Guan County Health Agency to rectify abuse of administrative power

On 17 April 2017, Shandong AIC sent an administrative letter to the local government of Guan County, requiring the Health and Family Planning Commission of Guan County (Guan County HFPC) to rectify its abuse of administrative power. The investigation was launched by Shandong AIC following a complaint. Shandong AIC found that Guan County HFPC had entered into framework strategic partnership agreements with two local distributors, thereby designating these companies as the only two drug delivery service providers. Moreover, Guan County HFPC further allocated the delivery territories for the two distributors. The above conduct is considered by Shandong AIC to be an abuse of administrative power, thus infringing the AML. In response to the recommendation letter, Guan County government has urged the HFPC to rectify its infringing conduct and to update Shandong AIC about the rectification measures taken.

SAIC is coordinating a six-month nationwide campaign against illegal online conduct

On 26 May 2017, SAIC announced that it would make collaborative efforts with MOFCOM, NDRC and seven other central governmental departments and agencies to launch a six-month nationwide campaign against illegal online activities. The targeted illegal activities include, among others, anti-competitive practices, false advertising and fake online reviews.

Enforcement trends – Q1 2014 to Q2 2017



Case	Date announced	Issue	Total fine (RMB '000)	Minimum (RMB '000)	Maximum (RMB '000)	% of Turnover	Leniency/ Co-operation
Insurance Guangxi AIC	7 April 2017	Monopoly Agreement - Sales market partitioning	565	3.5	172	5	N/A
Natural Gas Supply Jiangsu AIC	7 April 2017	Abuse of Dominance – Exclusive dealing	25,050	N/A	N/A	5	N/A

OTHER ASIA PACIFIC NEWS IN BRIEF

Hong Kong

HKCC appoints former US antitrust official Brent Snyder as the next CEO

On 19 June 2017, the Hong Kong Competition Commission (HKCC) announced the appointment of Brent Snyder as its next CEO. Snyder is to succeed Rose Webb, commencing office on 4 September 2017 for a term of 3 years. The new CEO served in the antitrust division of the US Department of Justice (DoJ) from 2003 until June 2017.

Hong Kong formally launches milk formula code after addressing competition concerns

On 13 June 2017, the Hong Kong Government officially launched its proposed code on the marketing and pricing of infant milk formula having addressed potential competition concerns. The previous version had included provisions that could distort competition in the market. The competition concerns came to light when an industry association consulted the HKCC regarding the code's compliance with the Competition Ordinance. Specifically, Article 5 had provided that powdered milk and related products for children under three-years of age could not be promoted through campaigns, discounts, coupons or special offers. Although voluntary, the code infringed the Competition Ordinance by potentially causing companies to coordinate prices. The new code was drafted jointly by the Food and Health Bureau and the Commerce and Economic Development Bureau, before being consulted on by the HKCC and submitted to the Legislative Council.

India

CCI's first RPM penalty imposed on Hyundai Motor India Limited

On 14 June 2017, the Competition Commission of India (CCI) fined Hyundai Motor India Limited (HMIL) INR 87 crore (USD 13.54 million) for engaging in resale price maintenance (RPM) and tying arrangements. This is the first CCI order penalising the practice of RPM. Whilst affirming that exclusivity arrangements are not illegal *per se*, the CCI confirmed that fixing a maximum retail price and limiting the maximum discount that could be given to consumers effectively constituted setting a minimum resale price. In its assessment of the tying arrangements, the CCI took a commercially flexible approach, holding that HMIL had a legitimate interest in cancelling warranties for the use of non-designated car parts and recommending that the dealers suggest designated insurance companies to consumers. Notably, this is the first time that the CCI has applied the concept of "relevant turnover" in determining the amount of the fine. The INR 87 crore fine imposed on HMIL only relates to its average turnover accrued from the sale of motor vehicles in the past three years.

CCI removes its 30-day merger filing deadline

On 29 June 2017, the Ministry of Corporate Affairs of the Government of India published notification S.O. 2039(E) (Trigger Exemption), pursuant to which the parties to a notifiable transaction are no longer required to file a notification with the CCI within 30 days of (i) its board approval for a merger; or (ii) the execution of transaction documents for an acquisition. The Trigger Exemption will be valid for a period of five years from the date of publication. Notifiable transactions will still require approval from the CCI prior to closing and remain subject to penalties for gun-jumping. This amendment is designed to bring the CCI's rules in line with the global practice.

Singapore

CCS issues an infringement decision against five capacitor manufacturers

On 6 April 2017, the Competition Commission of Singapore (CCS) issued a proposed infringement decision (PID) against five capacitor manufacturers, Panasonic, Rubycon, Singapore Chemi-con, Nichicon and ELNA Electronics (the Parties) for price-fixing and exchanging commercially sensitive information. The CCS's investigation was prompted by an application for immunity under the CCS's leniency programme. The CCS found that the Parties held regular meetings in Singapore, where they: (i) exchanged confidential and commercially sensitive business information, such as customer quotations, sales volumes, production capacities, business plans and pricing strategies; (ii) discussed and agreed on sales prices, including various price increases; and (iii) agreed to collectively reject customers' requests for a reduction in prices of Aluminium Electrolytic Capacitors (AECs) in the ASEAN region. The Parties had six weeks from receipt of the PID to make their representations before the CCS adopts its final decision. A similar cartel among capacitor manufacturers was subject to fines in Taiwan in 2015, followed by a fine imposed in Japan and two ongoing investigations in China and South Korea.

Competition authorities of Singapore and Japan sign cross-border memorandum of cooperation

On 22 June 2017, a memorandum of cooperation (MoC) was signed by Toh Han Li, chief executive of the CCS, and Kazuyuki Sugimoto, chairperson of the JFTC in Tokyo to increase cross border enforcement cooperation between Singapore and Japan. This is the first time Singapore has signed a cooperation agreement with a foreign competition authority.

OTHER ASIA PACIFIC NEWS IN BRIEF

Taiwan

[TFTC extends merger review decision deadline](#)

On 5 April 2017, the Taiwan Fair Trade Commission (TFTC) announced that it had agreed to extend its merger review decision deadline from 30 days to 30 working days. The extended review period has been proposed to give the TFTC more time to conduct thorough market research and avoid making rushed decisions, especially in the context of hostile takeovers. Although it was noted by Huang Mei-ying, the chairperson of TFTC, that hostile takeovers are not frequent, the agency still needs time to deal with small target companies who do not have sufficient access to the relevant market information.

[TFTC fines Sinphar Pharmaceutical for enforcing RPM](#)

On 7 April 2017, the TFTC announced its decision to fine Sinphar Pharmaceutical (Sinphar Pharm) for RPM. The TFTC found that Sinphar Pharm had forced Sinphar Counter to implement the retail prices recommended by Sinphar Pharm. Although bearing a similar name, Sinphar Counter was deemed to be independent of Sinphar Pharm. Sinphar Pharm threatened to terminate the contract, halt drug supply and cancel rebates if Sinphar Counter failed to adhere to the recommended prices. Moreover, Sinphar Pharm also sent its sales staff to Sinphar Counter's stores to remind and persuade them to comply with recommended prices. Sinphar Pharm claimed that the conduct was necessary to protect brand reputation, an argument dismissed by the TFTC. Sinphar Pharm was consequently fined TWD 2.5 million (USD 81,713) for the infringement.

Vietnam

[Vietnam's Ministry of Industry and Trade issues the second Draft Law on Competition](#)

On 5 April 2017, the Vietnamese Ministry of Industry and Trade issued the second Draft Law on Competition (Draft Law). The key changes to the current law include: (i) the introduction of a leniency programme; (ii) revisions to how dominance and market power are assessed; (iii) new merger notification thresholds; and (iv) consolidation of the Competition Council and the Competition Authority to form one single body, the National Competition Commission.

Indonesia

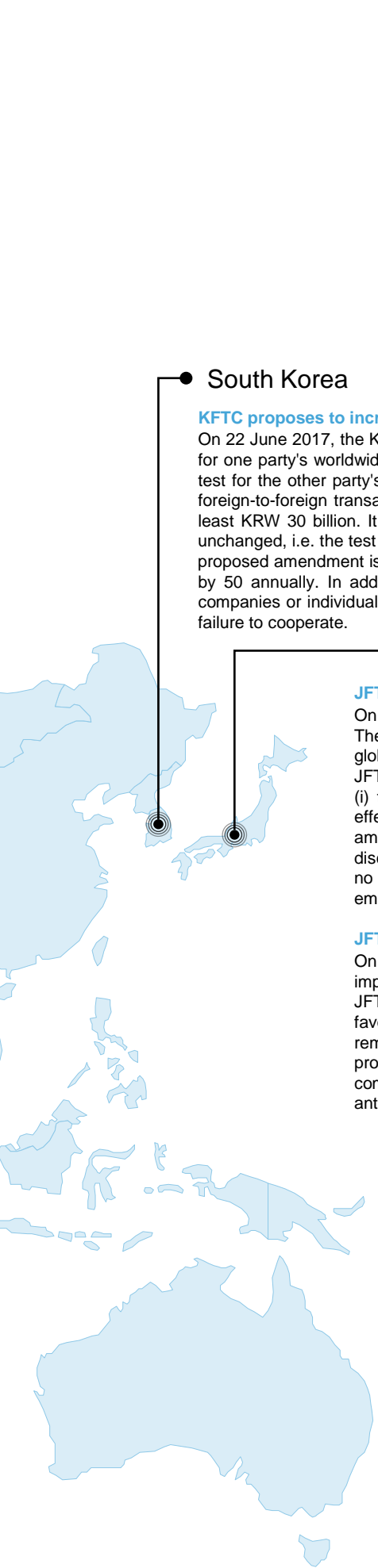
[KPPU may grant immunity to the first two leniency applicants](#)

On 28 April 2017, a bill was approved in the Indonesian parliament to provide for a leniency program in the country's competition law regime. Once the bill comes into force, the Commission for the Supervision of Business Competition (KPPU) will be able to grant immunity to the first two leniency applicants. Full immunity will be given to the first successful leniency applicant, while a partial amnesty, in which 50% of penalties will be waived, will be granted to the second company eligible for leniency. To successfully obtain leniency, applicants must provide the KPPU with written evidence proving the existence of anticompetitive agreements and inform the KPPU about anticompetitive conduct of which it was not already aware.

Australia

[Australia announces major reforms to overhaul the financial sector](#)

On 9 May 2017, the Turnbull Government announced an overhaul of the financial sector by introducing a comprehensive package of reforms to strengthen accountability and competition. The main theme in the announced reforms, which is pertinent to competition, is to welcome entry of new banks and new financial products and services. The Government has tasked the Productivity Commission (PC) to commence a review on the state of competition in the industry from 1 July 2017. To complement this review, the Australian Competition and Consumer Commission (ACCC) will receive AUD 13.2 million over four years to establish a dedicated unit to undertake regular in-depth inquiries into specific competition issues in the sector, in particular the pricing of residential mortgage products by the major domestic banks which will be liable for the new major bank levy. As the ACCC inquiry is required to have regard to the Government's view that banks need to fully and transparently account for their decisions and how the interests of different stakeholders are balanced, the major banks will need to carefully consider how the major bank levy is passed on in residential mortgage costs, if at all.



● South Korea

KFTC proposes to increase its merger notification thresholds and penalties for failure to cooperate with investigations

On 22 June 2017, the KFTC announced its proposal to increase the Korean merger notification thresholds. Specifically, the test for one party's worldwide turnover/assets will be raised from at least KRW 200 billion to at least KRW 300 billion, whereas the test for the other party's turnover/assets will be raised from at least KRW 20 billion to at least KRW 30 billion. With respect to foreign-to-foreign transactions, the threshold for each party's Korean turnover will be raised from at least KRW 20 billion to at least KRW 30 billion. It is worth noting that the threshold set to differentiate pre-closing and post-closing notification remains unchanged, i.e. the test for determining a large-scale company remains worldwide assets/turnover of at least KRW 2 trillion. The proposed amendment is scheduled to take effect from 19 October 2017, which is expected to reduce the number of notifications by 50 annually. In addition, the KFTC is also proposing the introduction of a two-year prison sentence and daily fines for companies or individuals that obstruct an investigation. Under the current rules, the KFTC may only impose fines for negligent failure to cooperate.

● Japan

JFTC publishes revised guidelines on distribution systems and business practices

On 16 June 2017, the JFTC published revised guidelines on distribution systems and business practices. The proposed revisions aim to reflect the rapidly changing business practices in the context of increasing globalisation of economic activities. A significant majority (953 out of 1,428) of the queries received by the JFTC in 2016 were regarding distribution systems and business practices. The revisions mainly concern: (i) the deletion of guidelines that are not based on case precedents; and (ii) the provision of a more effective analytical framework for assessing compliance on vertical issues. One particularly significant amendment worth highlighting is the reference to "agreements with platforms". This stems from academic discussion on parity clauses that was a topic for debate between Japanese scholars in 2016. There are no explicit references to "price parity" or "most favoured nation (MFN)" clauses and the revised guidelines emphasise that online business models are no different from their bricks-and-mortar counterparts.

JFTC ceases probe into Amazon

On 1 June 2017, the JFTC announced that it would close its investigation into Amazon once the company implements the commitments offered to remedy the competition concerns raised by the authority. The JFTC had been investigating price parity clauses requiring suppliers to provide Amazon with terms no less favourable than those applied in other channels. In its proposed remedies, Amazon has committed to: (i) remove the parity clauses; (ii) keep its employees notified; and (iii) report on the implementation of the proposed measures to the JFTC. The commitments will be binding upon Amazon for three years from the commencement of their implementation. The JFTC has reportedly set up an "IT Taskforce" to probe anticompetitive conduct and to promote fair competition in the digital sector.

JFTC publishes its report on LNG trading terms

On 28 June 2017, the JFTC published a report regarding liquefied natural gas (LNG) trades. According to the report, destination clauses, profit share clauses and 'take or pay' clauses can potentially restrict competition in the LNG market and, as a result, infringe the Anti-Monopoly Act of Japan (AMA). The JFTC analysed the necessity and reasonableness of each concerned conduct based on specific trading terms, e.g. FOB and DES terms. The primary focus of the report is destination clauses under fixed-term contracts. This type of clause imposes restrictions on purchasers' ability to freely designate and divert the destination of deliveries under the contract. The JFTC's view is that destination clauses under a fixed-term FOB contract are not necessary or reasonable. Moreover, the restrictions on diversion on top of destination clauses are highly likely to be in violation of the AMA. By contrast, the JFTC's view is that destination clauses in a fixed-term DES contract in order to define a delivery point is not in itself problematic under the AMA.

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