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**C H A N C E**



**ANTITRUST IN CHINA AND  
ACROSS THE REGION**

**QUARTERLY UPDATE**

October to December 2017

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# ANTITRUST IN CHINA AND ACROSS THE REGION

## QUARTERLY UPDATE: OCTOBER TO DECEMBER 2017

The final quarter of 2017 saw a spike in merger enforcement in China, with MOFCOM imposing remedies in five cases – more than in the previous two years combined. Of these, one case was settled with divestment remedies (CR Bard/Becton); three with behavioural remedies (HP/Samsung, Maersk/Hamburg Süd and SPIL/ASE); and one with a mix of divestment and behavioural remedies (Agrim/Potash). In four of these cases, the formal six month review timetable was not long enough to enable MOFCOM to complete its review and so the parties pulled and re-filed the transaction to extend the review period.

Enforcement in China continued to be domestically-focused, with NDRC issuing 27 decisions relating to abuse of administrative power in connection with the introduction of the Fair Competition Review System (designed to ensure local regulations maintain a level playing field) and SAIC focused on the implementation of new consumer protection legislation (Anti-Unfair Competition Law). One interesting case note – the Hainan Higher People's court clarified that whilst civil claims alleging resale price maintenance (RPM) need to demonstrate anti-competitive effect, the enforcement authorities (NDRC and its local affiliates) do not need to establish anti-competitive effect when establishing RPM, nor when determining the level of penalty.

Outside China, Singapore had an active quarter, despatching two mergers for phase II review; wrapping up its studies into car parts distribution (with measures taken to remove restrictive warranty terms) and retail petrol sales (with recommendations on price transparency and consumer awareness); and consulting on changes to the Competition Act. In addition, a new competition law came into effect in Thailand; new rules came into effect in Korea streamlining the merger process for extraterritorial joint ventures; and in the Philippines, the rule requiring mergers to be filed prior to signing was replaced by a requirement to file within 30 days of signing. Finally, Qualcomm's antitrust woes continued with the imposition by the Taiwanese Fair Trade Commission of a fine of TWD 23.4 billion (approx. USD 773 million) for abuse of a dominant position.

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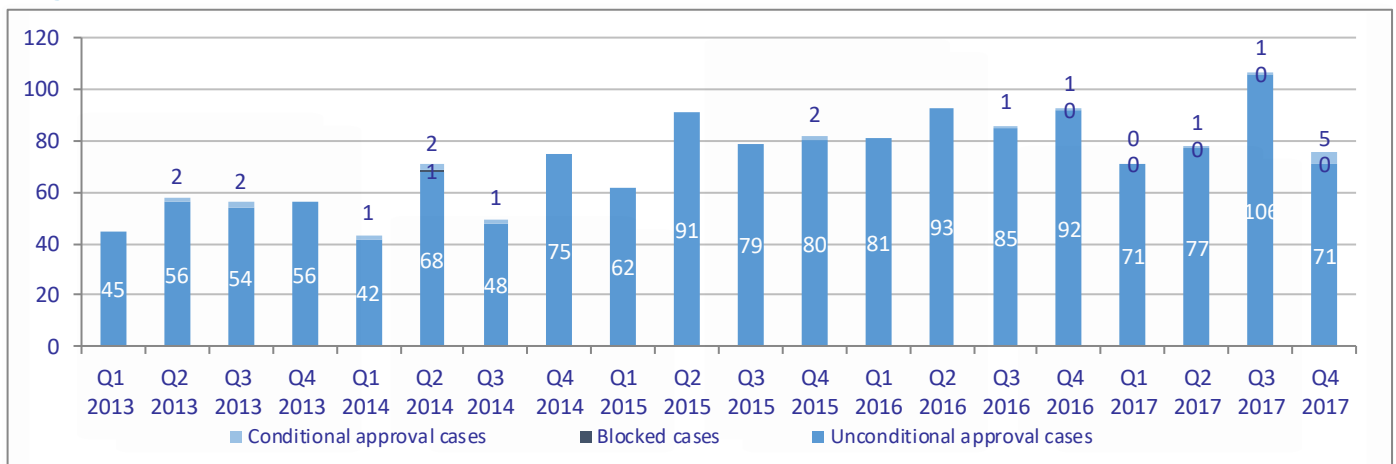


THE MINISTRY OF COMMERCE (MOFCOM)

How many cases have there been?

China’s Ministry of Commerce (MOFCOM) issued 76 merger decisions in the fourth quarter of 2017, a decrease of 17% compared to the fourth quarter of 2016. Around 58 of these cases were notified under the simplified procedure. 71 cases were unconditionally cleared, while 5 case were conditionally approved.

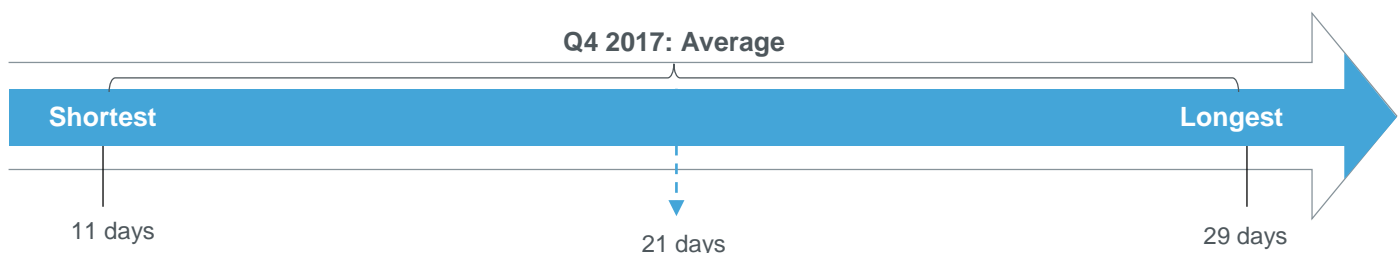
Merger control trends – Q1 2013 – Q4 2017



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
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
Q3 2017	20 days	82.2%	1
Q4 2017	21 days	76.3%	0

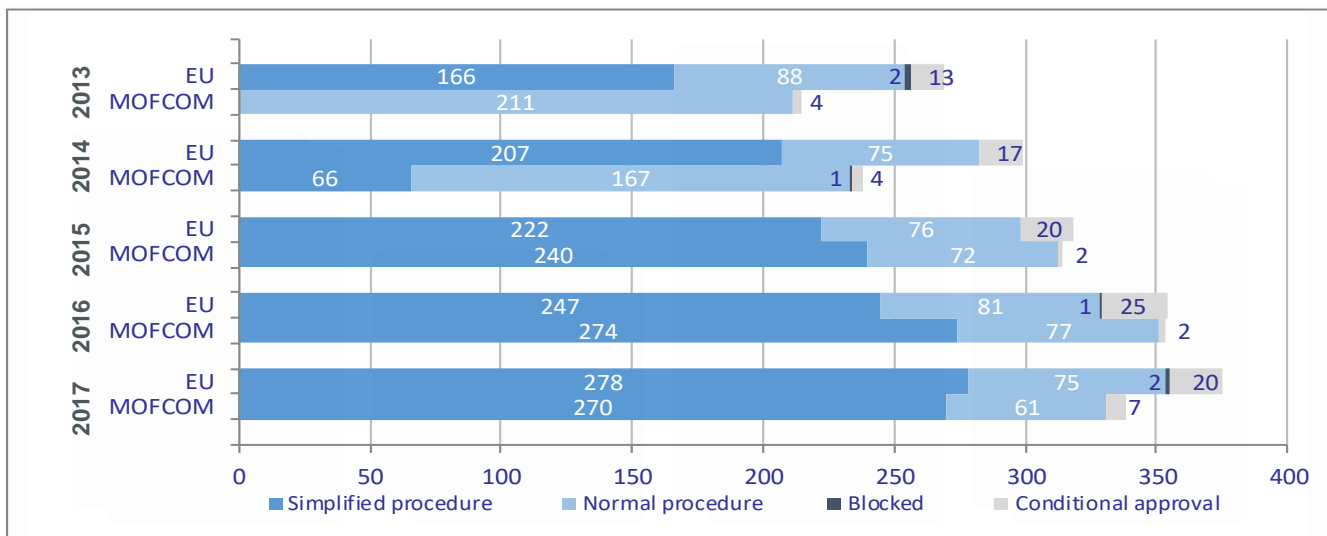




## THE MINISTRY OF COMMERCE (MOFCOM)

How does China compare internationally?

Comparison with EU – 2013 – 2017



### MOFCOM conditionally approves HP's acquisition of Samsung's certain printing business

On 5 October 2017, MOFCOM conditionally approved the acquisition of certain businesses of Samsung Electronics Co ("**Samsung**") by HP Inc. ("**HP**"), which was notified on 16 November 2016 with formal review commencing on 23 December 2016. The relevant product markets were defined as (i) A3 format laser printers, (ii) A4 format laser printers and (iii) printing consumables. The relevant geographical market for each of the above product markets is China-wide. In its competitive assessment, MOFCOM was concerned about: (i) the concentration level of China A4 format laser printer market; (ii) HP's ability and incentive to implement tie-in sales; and (iii) high barriers of market entry which makes it unlikely for effective competitors to emerge in the short term. To alleviate the competition concerns, MOFCOM imposed conditions, including: (i) HP must continue to sell A4 laser printers on fair and reasonable terms, and submit such price information to MOFCOM every six months; (ii) HP must not acquire any A4 laser printer business (including minority stake) from other printer manufacturers in China; (iii) in respect of Samsung's A4 laser printers and original consumables sold in China, HP must not implement any technical measures, firmware or upgrading which may affect compatibility of third parties' consumables; (iv) in respect of HP A4 laser printers and HP A4 printer consumables sold in China, HP must not implement any technical measures, firmware or upgrading which may affect compatibility of third parties' consumables using HP's original chips; and (v) HP must not engage in false advertising, tie-in sales or other unreasonable commercial conduct.

### MOFCOM conditionally approves the merger between Agrium and Potash

On 6 November 2017, MOFCOM conditionally approved the merger between Agrium Inc. ("**Agrium**") and Potash Corporation of Saskatchewan Inc. ("**Potash**"), which was notified on 8 November 2016 with formal review commencing on 5 December 2016. The relevant product market was defined as the potassium chloride market. The relevant geographic market is worldwide. In its competitive assessment, MOFCOM was concerned that (i) the transaction would be likely to strengthen the parties' control of the global potassium chloride market; (ii) the transaction would weaken buyers' bargaining power in the China potassium chloride market; and (iii) high entry barriers to the potassium chloride market would prevent effective competitors from emerging in the short term. To alleviate the competition concerns, MOFCOM required the merged entity to: (i) transfer the equity interest held by Potash in three major players in the global potassium market to third parties; (ii) not purchase any equity interest in competing players within the next five years; (iii) limit the interest held by Potash in a Chinese company; and (iv) ensure that Canpotex (through which Agrium and Potash supply potassium chloride to China) remains a stable and reliable potassium fertilizer exporter to China and maintains its current distribution practice and procedure.

### MOFCOM conditionally approves Maersk's acquisition of Hamburg Süd

On 8 November 2017, MOFCOM conditionally approved the acquisition of Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG ("**Hamburg**") by Maersk Line A/S ("**Maersk**"), which was notified on 29 March 2017 with formal review commencing on 27 April 2017. The relevant product markets were defined as (i) one way routes for general container liner shipping services and reefer container liner shipping services (in total 11 routes affected), (ii) the global market for oil tanker shipping services, (iii) the global market for containers, and (iv) the China-wide market marine freight forwarding agency services. Among the above four product markets, only two routes (i.e. the Far East-west coast of South America route (FE-WCSA) and Far East-east coast of South America route (FE-ECSA)) were identified by MOFCOM as the markets where the transaction would give rise to competition concerns. In its competitive assessment, MOFCOM expressed the following concerns: (i) on the FE-WCSA and FE-ECSA routes, post-transaction, Maersk would be able to restrict competition in both general and reefer container liner shipping markets through vessel sharing agreements to which Hamburg currently is a party; (ii) on the FE-WCSA route, Maersk would also be able to raise prices or take other measures unilaterally to restrict competition in the reefer container liner shipping market; (iii) high barriers to entry would prevent effective competitors from emerging in the short term. To alleviate the competition concerns, MOFCOM imposed conditions including the following: (i) Hamburg shall cease to be a party to the vessel sharing agreements on FE-WCSA and FE-ECSA routes; (ii) neither Maersk nor Hamburg shall enter into new vessel sharing agreements or shipping alliances with major competitors on either FE-WCSA or FE-ECSA route; (iii) Maersk shall reduce its capacity in respect of reefer container shipping on the FE-WCSA route and maintain its market share within a certain range for three years following completion of this transaction.

### MOFCOM conditionally approves ASE's acquisition of SPIL

On 24 November 2017, MOFCOM conditionally approved the acquisition of the equity interests in Siliconware Precision Industries Co., Ltd. ("**SPIL**") by Advanced Semiconductor Engineering, Inc. ("**ASE**"), which was notified on 25 August 2016 with formal review commencing on 14 December 2016. The relevant product market was defined as semiconductor assembly and test ("**SAT**") services for original equipment manufacturer ("**OEM**"). The relevant geographic market is worldwide. In its competitive assessment, MOFCOM was concerned that the transaction would: (i) increase ASE's high market share in the relevant product market both in China and globally; (ii) restrict customers' ability to choose service providers; (iii) eliminate the close competition between ASE and SPIL and thus increase their ability to price in a discriminatory way; (iv) enable ASE to increase prices unilaterally; and (v) prevent effective competitors from emerging in the short term due to high entry barriers. MOFCOM also considered the characteristics of the industry and found that rapid development and service providers' dependence on customers' production capacity would lessen the adverse effects arising from the transaction to some extent. To alleviate the competition concerns, MOFCOM imposed the following conditions for a restrictive period of 24 months: (i) ASE and SPIL shall operate independently of each other; (ii) the holding company of the merged ASE shall exercise limited shareholder rights; (iii) ASE and SPIL shall provide services to customers without discrimination and on reasonable terms; and (iv) ASE and SPIL shall not prevent customers from switching service providers.

### MOFCOM conditionally approves the merger between Becton and Bard

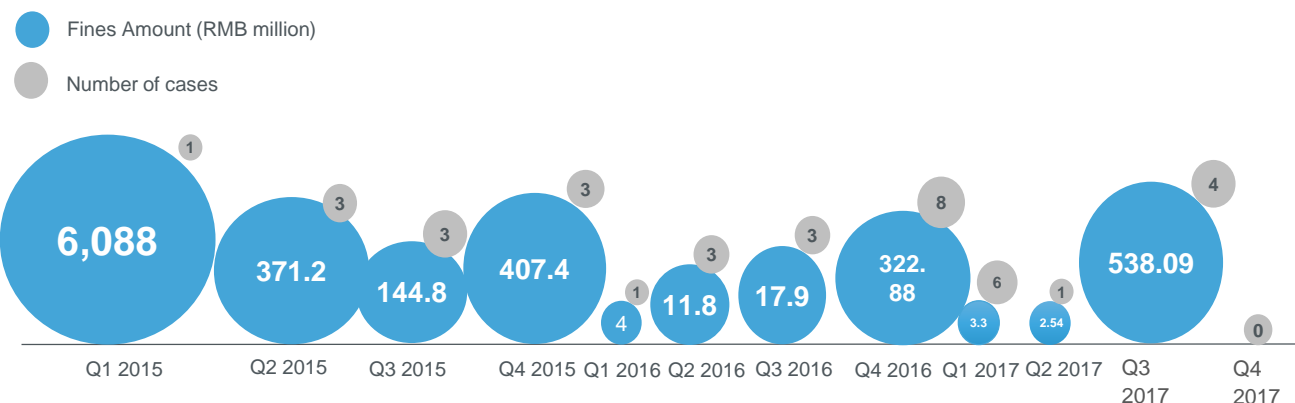
On 27 December 2017, MOFCOM conditionally approved the merger between Becton, Dickinson and Company ("**Becton**") and C. R. Bard, Inc. ("**Bard**"), which was notified on 20 June 2017 with formal review commencing on 12 July 2017. The relevant product market was defined as the market for core needle biopsy devices, and the relevant geographic market as China. In its competitive assessment, MOFCOM found that the parties controlled the relevant product market in China, that the merger would limit the technological development of the relevant market and that barriers to entry were high. In light of the above concerns, MOFCOM imposed the following conditions on the parties and merged entity: divesting Becton's existing and pipeline global product lines for core needle biopsy devices and; ensuring that the divested businesses remain competitive pending their transfer to qualified buyers within three months of the date of the decision.



## THE NATIONAL DEVELOPMENT AND REFORM COMMISSION (NDRC)

NDRC has been quiet in terms of enforcement in the fourth quarter of 2017. With the detailed rules on implementing the Fair Competition Review System ("**FCRS**") being putting into place, there has been a focus on ensuring compliance at the local governmental authorities' level. As a result, to date NDRC has reported 27 cases which involve the abuse of administrative powers at the local level. Furthermore, the past quarter has seen NDRC finish its probe into Chinese ports, which have committed to ceasing anti-competitive conduct and expect to operate more cost-effectively across the whole sector. In addition, with respect to the pharmaceutical sector, NDRC released a price guidance on APIs and DPTS, with the aim of reining in any potential anti-competitive conduct in relation to this particular segment.

### Enforcement trends – Q1 2015 to Q4 2017



### China's first court decision clarifying the different approaches to RPM between civil lawsuits and administrative enforcement

Hainan Price Bureau recently won an appeal case, in which Hainan Higher People's Court (the "**Higher Court**") overturned the first instance court's ruling and upheld the Hainan Price Bureau's RMB 200,000 (approx. USD 30,618) fine imposed upon Yutai Scientific Feed ("**Yutai**") for RPM. The Higher Court in its decision has confirmed the different approaches to RPM between civil lawsuits and administrative enforcement. In civil cases, a claimant is obliged to prove both the anti-competitive effects (Article 13 paragraph 2, AML) of the alleged RPM (Article 14, AML) and the actual losses in order to claim civil compensation. However, enforcement authorities (such as NDRC and its local counterparts) are not required to prove anti-competitive effect or any actual losses when determining whether conduct constitutes an unlawful RPM and levying penalties. On this basis, the Higher Court dismissed the first instance court's decision, which ruled in favor of the claimant Yutai by finding that Yutai's conduct did not eliminate or restrict competition.

The Higher Court's decision is considered to be landmark in China as this is the first time a court explicitly clarifies the differences in determining a vertical monopoly agreement between civil lawsuits and administrative enforcements. Previously, a couple of RPM civil cases, e.g. Ruibang/Johnson & Johnson and GREE, have confirmed that anti-competitive effect is a pre-requisite to determine the existence of a vertical monopoly agreement pursuant to Article 13 paragraph 2, AML. By contrast, in the Medtronic case, NDRC found Medtronic to have infringed the AML simply by entering into and implementing agreements with an RPM element without considering the anti-competitive effects.

### Detailed rules on implementing Fair Competition Review System launch, followed by 27 administrative monopoly cases published by NDRC

On 26 October 2017, five central government authorities – NDRC, Ministry of Finance, MOFCOM, SAIC, and the Legislative Affairs Office of the State Council – jointly published *the Detailed Rules for the Implementation of the Fair Competition Review System ("Rules")*. Serving the purpose of supplementing *the Opinion of the State Council on Establishing Fair Competition Review System In the Course of Building Up the Market System*, the Rules provide details on review mechanisms and procedures, review standards, exceptions, social supervision and accountability system. The Rules aim to prohibit local governments from conferring preferential treatment to certain undertakings to the detriment of other undertakings' interest. Local undertakings now are entitled to sue local governments for any infringing conduct and report it to anti-monopoly agencies.

As of 26 October 2017, there are 31 provinces that have laid out detailed implementation plans and 19 of them have expressly stated that the Fair Competition Review System has formed part of their respective performance evaluation systems. Meanwhile, NDRC in December published 27 cases involving abuse of administrative power by local governmental agencies. These cases cover more than 10 provinces and a wide spectrum of sectors, including agricultural machines, accounting services, consulting services, financial services municipal construction, environment supervision, gas, housing, insurance, and health, etc.

### Chinese ports commit to rectification measures following NDRC probe

On 15 November 2017, NDRC released a statement summarizing the result of its probe into a number of Chinese ports. NDRC found the following conduct of the investigated ports to be anti-competitive: (i) obliging logistics firms to use the tugboat, tally and shipping agency services of the ports' subsidiaries; (ii) charging excessive fees for international transshipment container handling services; (iii) imposing unfair terms, including terms on mandatory unpacking tally, non-competition and loyalty clauses. To respond to the issues identified by NDRC's probe, the affected ports have put forward measures to (i) fully open the tugboat, tally and shipping agency services markets, (ii) reduce import and export container handling fees and (iii) remove all unfair trade terms and ensure fair competition. According to NDRC, logistics costs in this industry should be significantly reduced as a result - savings in terms of the handling fees alone should be RMB 3.5 billion (approx. USD 528 million).

### NDRC releases price guidance on APIs and drugs prone to shortages

On 16 November 2017, NDRC published *the Price Behaviour Guidelines on Operators of Active Pharmaceutical Ingredients and Drugs Prone to Shortages* (the "**Guidelines**"). The Guidelines provide (i) the definitions of active pharmaceutical ingredients ("**API**") and drugs prone to shortages ("**DPTS**"), (ii) the factors to be taken into account when defining relevant markets and determining whether an undertaking has a dominant position, (iii) the forms of anti-competitive conduct concerning APIs and DPTS and possible exemptions, and (iv) prohibited conduct by dominant players.

The Guidelines are put in place to implement *Several Opinions of the Central Committee of the Communist Party of China and the State Council on Promoting the Price Mechanism Reform*. NDRC expects to continue to survey and assess the overall competition landscape in API and DPTS markets. In addition, NDRC will strengthen enforcement, identify common issues, respond to social concerns, and promptly adapt the Guidelines based on enforcement experience.



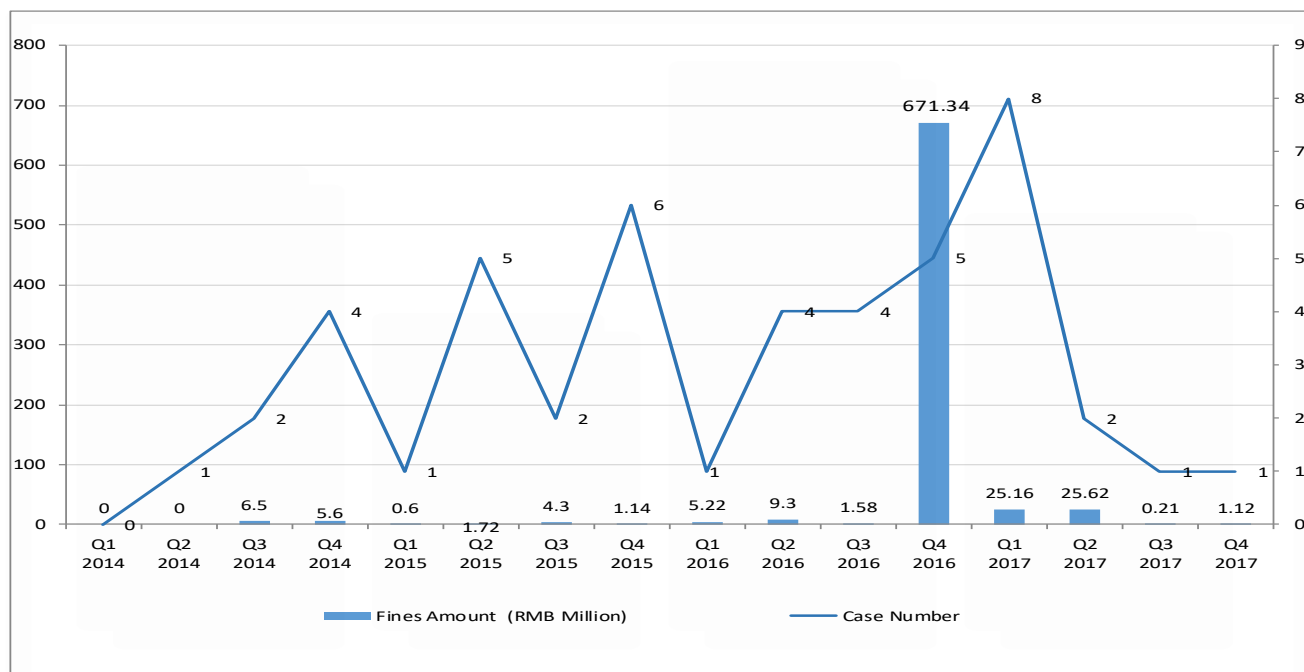


## THE STATE ADMINISTRATION FOR INDUSTRY AND COMMERCE (SAIC)

### Hunan AIC fines two companies over monopoly agreement

On 11 December 2017, SAIC announced that Hunan AIC, authorized by SAIC, had fined Baiwang Jinfu RMB 748,771.4 (approx. USD 113,171), amounting to 2% of its sales in 2016 in Changsha, and Hunan Aisino RMB 374,850.93 (approx. USD 57,165), amounting to 1% of its sales in 2016 in Changsha for entering into a market sharing agreement. Hunan AIC commenced an informal investigation prompted by third parties' complaints on 20 February 2017, followed by a formal investigation authorized by SAIC on 13 March 2017. The agency found that (i) the two companies were competitors in the market for VAT invoice systems and technological services in Changsha; (ii) the two companies met on four separate occasions and entered into an agreement to divide up the sales and service markets; (iii) the anti-competitive conduct enabled them to become exclusive service providers in certain areas and as a result eliminated tax payers' ability to select service providers. Notably, in its penalty decision Hunan AIC confirmed that it would be impossible to calculate the unlawful gains resulting from the anti-competitive conduct in this case and thus the parties were not required to pay an additional amount by way of confiscation of illegal gains.

### Enforcement trends – Q1 2014 to Q4 2017



Case	Date announced	Issue	Total fine (RMB '000)	Minimum (RMB '000)	Maximum (RMB '000)	% of Turnover	Leniency/ Co-operation
Value-added tax invoice systems Hunan AIC	11 December 2017	Monopoly agreement – sales market partitioning	1123.6	748.8	374.9	2%	NA



## ● Thailand

### Thailand's new competition act takes effect in October

On 5 October 2017, the new Trade Competition Act ("**TCA**") took effect, replacing the first competition law issued in 1999 ("**1999 Act**"). Two notable changes brought about by the TCA are: (i) the establishment of an enforcement body, namely the Trade Competition Commission (the "**TCC**"), which is independent of the government and has its own budget; and (ii) state-owned enterprises, which were fully exempted under the 1999 Act, are now exempted under only limited circumstances, e.g. carrying out activities pursuant to a law or cabinet resolution as required for national security or public interest.

## ● India

### CCI fines Monsanto for not cooperating in a probe

On 14 November 2017, CCI imposed a total fine of INR 20 million (approx. USD 309,597) on Monsanto and three of its affiliates for not cooperating in an ongoing investigation. CCI commenced the investigation following complaints that Monsanto had abused its dominance in the market for genetically modified seeds. In its investigation, CCI required Monsanto to submit certain documents and data, which were claimed by Monsanto to be "historic", "voluminous" and therefore time-consuming to collect and submit. CCI considered the above reaction of Monsanto as non-cooperative and imposed a fine as punishment.

## ● Singapore

### CCS consults on proposed amendments to the Competition Act

The Competition Commission of Singapore ("**CCS**") has launched a public consultation on proposed changes to the Competition Act (the Act). Amongst other things, the key proposed amendments to the Act (i) empower the CCS to accept binding and enforceable commitments for cases involving the section 34 and section 47 prohibitions; (ii) empower the CCS to conduct general interviews during inspections and searches under section 64 and section 65 (the scope of CCS' questioning will still be limited to the subject matter or purpose of the investigation); and (iii) allow the CCS to provide confidential advice on anticipated mergers as a statutory process. Comments on the consultation paper are due by 11 January 2018.

### CCS releases market inquiry reports on car parts and retail petrol prices in Singapore

In December 2017, the CCS finalised two market studies. The first of these related to the supply of car parts and the second related to retail petrol prices. In relation to car parts, the CCS found that terms in dealer warranties allowing authorised dealers to reject warranty claims if a car had been serviced by an independent workshop were anti-competitive and the CCS has worked with dealers to remove such terms. In relation to retail petrol, the CCS found that the widespread use of discounts and rebates made price comparison difficult and as such recommended greater price transparency through the development of a price comparison portal or app. The CCS also recommended greater consumer awareness about octane levels as many consumers purchase a higher grade (and more expensive) fuel than is required.

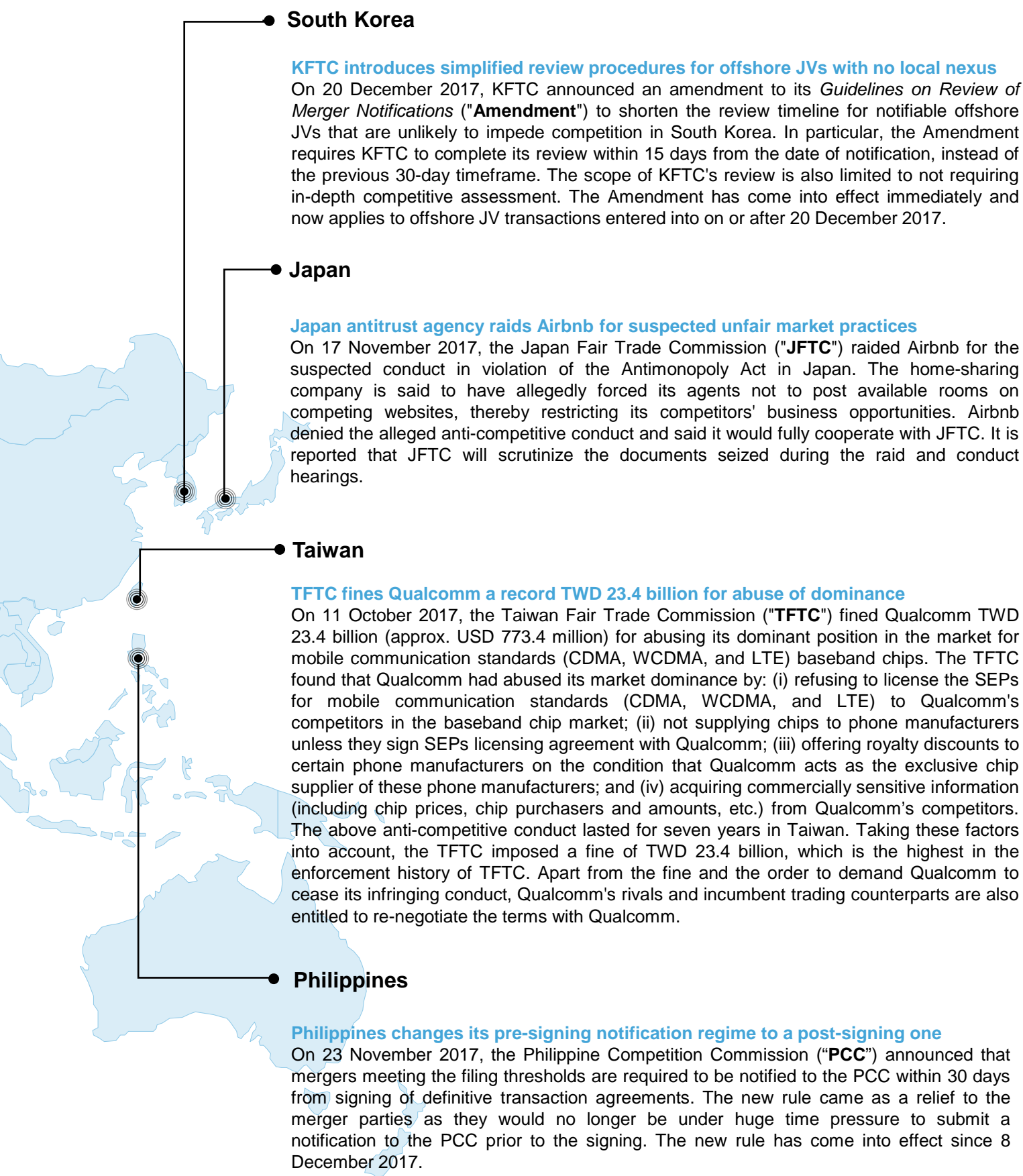
### CCS launches two Phase II merger reviews

In the fourth quarter of 2017, CCS launched two Phase II reviews, which are the only two Phase II reviews by CCS in the past two years (2016-2017). One of the cases concerns Wilhelmsen Maritime Services' acquisition of Drew Marine's businesses. CCS found that post transaction, the remaining competitors would be unlikely to place effective competition constraints on the merged entity. The other case concerns the merger between Essilor International and Luxottica Group. CCS found that it may lead to customers facing higher prices and anti-competitive foreclosure.

## ● Australia

### Australian Parliament introduces a new amendment to competition law

On 18 October 2017, the Australian Parliament passed a legislative amendment to the antitrust law, complementing the earlier amendment approved in August 2017. The key reforms in the two amendments include: (i) replacing the never-used price signalling provisions with a general prohibition on concerted practice that substantially lessens competition; (ii) requiring mergers to be heard first by the Australian Competition and Consumer Commission ("**ACCC**") and reviewed by the Australian Competition Tribunal; and (iii) introducing class exemptions for conduct that the ACCC determines as not raising competition concerns. The amendments were put in place in response to the 2015 Harper Competition Policy Review.



● **South Korea**

**KFTC introduces simplified review procedures for offshore JVs with no local nexus**

On 20 December 2017, KFTC announced an amendment to its *Guidelines on Review of Merger Notifications* ("**Amendment**") to shorten the review timeline for notifiable offshore JVs that are unlikely to impede competition in South Korea. In particular, the Amendment requires KFTC to complete its review within 15 days from the date of notification, instead of the previous 30-day timeframe. The scope of KFTC's review is also limited to not requiring in-depth competitive assessment. The Amendment has come into effect immediately and now applies to offshore JV transactions entered into on or after 20 December 2017.

● **Japan**

**Japan antitrust agency raids Airbnb for suspected unfair market practices**

On 17 November 2017, the Japan Fair Trade Commission ("**JFTC**") raided Airbnb for the suspected conduct in violation of the Antimonopoly Act in Japan. The home-sharing company is said to have allegedly forced its agents not to post available rooms on competing websites, thereby restricting its competitors' business opportunities. Airbnb denied the alleged anti-competitive conduct and said it would fully cooperate with JFTC. It is reported that JFTC will scrutinize the documents seized during the raid and conduct hearings.

● **Taiwan**

**TFTC fines Qualcomm a record TWD 23.4 billion for abuse of dominance**

On 11 October 2017, the Taiwan Fair Trade Commission ("**TFTC**") fined Qualcomm TWD 23.4 billion (approx. USD 773.4 million) for abusing its dominant position in the market for mobile communication standards (CDMA, WCDMA, and LTE) baseband chips. The TFTC found that Qualcomm had abused its market dominance by: (i) refusing to license the SEPs for mobile communication standards (CDMA, WCDMA, and LTE) to Qualcomm's competitors in the baseband chip market; (ii) not supplying chips to phone manufacturers unless they sign SEPs licensing agreement with Qualcomm; (iii) offering royalty discounts to certain phone manufacturers on the condition that Qualcomm acts as the exclusive chip supplier of these phone manufacturers; and (iv) acquiring commercially sensitive information (including chip prices, chip purchasers and amounts, etc.) from Qualcomm's competitors. The above anti-competitive conduct lasted for seven years in Taiwan. Taking these factors into account, the TFTC imposed a fine of TWD 23.4 billion, which is the highest in the enforcement history of TFTC. Apart from the fine and the order to demand Qualcomm to cease its infringing conduct, Qualcomm's rivals and incumbent trading counterparts are also entitled to re-negotiate the terms with Qualcomm.

● **Philippines**

**Philippines changes its pre-signing notification regime to a post-signing one**

On 23 November 2017, the Philippine Competition Commission ("**PCC**") announced that mergers meeting the filing thresholds are required to be notified to the PCC within 30 days from signing of definitive transaction agreements. The new rule came as a relief to the merger parties as they would no longer be under huge time pressure to submit a notification to the PCC prior to the signing. The new rule has come into effect since 8 December 2017.

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