In this Special Report, PaRR looks at the antitrust trends emerging across the world in 2013, with special attention paid to the European Union, United States, BRIC countries, Japan and Southeast Asia. Our investigative reporters have analyzed the fundamental antitrust trajectory in each of these regions with regard to:

- Progression of Antitrust Policy,
- Targeted Sectors and Cases, and
- Institutional Developments at the agency level.

Also, by considering some cases both recently resolved and ongoing, this report should facilitate preparations among corporations, legal professionals, institutional investors, and others for the world that awaits in 2013. The antitrust-proactive BRICs, growth-encouraging Europe, and resource-stricken United States lead the way.

For free trial please email sales@parr-global.com

For editorial feedback please email editorial@parr-global.com
POLICY PROGRESSION

Regulatory focus on healthcare could get another SCOTUS boost

With healthcare now accounting for roughly one-third of the nation’s annual gross domestic product, there is no doubt the government will leap on any opportunity to use competition to constrain price or boost quality results.

This is especially important now, as the healthcare system long championed by President Barack Obama and approved in large measure by the US Supreme Court (SCOTUS) last year will begin to go into effect.

Healthcare has been a major focus for both the Federal Trade Commission (FTC) and Department of Justice (DoJ) since at least 2004, when the agencies worked together to find ways antitrust law could help slow the ever-increasing cost of health care. Their joint report ultimately warned that without competition, prices would continue to escalate.

“When anticompetitive conduct increases prices, it makes it more difficult for many Americans to obtain needed care,” the report warned.

The FTC’s continued efforts in the healthcare segment could get a major boost this year from SCOTUS, which has taken up a number of the commission’s major causes in the segment.

A number of healthcare antitrust cases are set to come before SCOTUS this year, giving lawyers hope that some long-contested issues will be resolved. One of the most important cases could provide a loophole for some mergers to escape federal antitrust review. Another could help generic drugs get to market faster. But however the court rules, the fact is that the courts provide the best route for modifications to antitrust policy. And the FTC will be especially invested in these cases’ outcome, as a player in many of the cases coming before the court.

For instance, SCOTUS has finally taken up the FTC’s challenge to deals made between generic and brand-name pharmaceutical companies. FTC Chairman Jon Leibowitz has described the problem as “pay for delay”, in which brand-name companies allegedly pay their generic rivals in either cash or other deals to slow the process of bringing cheaper generic drugs to market. The legality of the practice will have a hearing sometime this spring.

SCOTUS has agreed to hear the FTC’s case against Watson Pharmaceuticals, which contests an agreement in which Solvay Pharmaceuticals paid generic drug makers Watson, Paddock Laboratories, and Par Pharmaceutical Companies to delay generic competition to Solvay’s branded testosterone-replacement drug Androgel, a prescription pharmaceutical with annual sales of more than USD 400m.

The critical issue in the case is whether an agreement such as this one - the result of a litigation settlement - can be appropriately assessed by an outside party. Thanks to legislation passed in 2003, the FTC is a repository for all such settlements, and if SCOTUS finds the brand-name companies cannot legally delay entry to the generic in question, any prior agreements are likely to be challenged by the FTC.

Another FTC healthcare case which will come before SCOTUS is a challenge to a hospital merger in Georgia. The transaction would potentially end a long-running antitrust feud between rival hospitals, and Georgia politicians have claimed that the federal

United States

Healthcare industry plays the foil to antitrust enforcement

• Unusually active year for SCOTUS to resolve long-held issues
• Noteworthy suits and merger reviews expected in healthcare
• Dearth of DoJ attorneys may hamper cartel enforcement
The government has no authority to step in and interfere with the merger, already approved under state law.

This case is potentially explosive, since it would give many merging companies an opportunity to skirt federal rules if they can find some state authority to sanction the deal. But a clear decision either way is somewhat unlikely: court watchers suggest that the case will be sent back to Georgia for further clarification, delaying final resolution.

**TARGETED SECTORS & CASES**

**Uptick in mergers apparent as healthcare remains a focus**

According to the FTC’s top competition enforcement official, Rich Feinstein, “There was a flurry of filings in the fourth quarter of last calendar year.” That uptick in mergers has remained fairly consistent into 2013, he said, giving the agencies plenty of deals to evaluate for competitive concerns at the start of the year.

“There are plenty of things we’re looking at,” Feinstein said.

Jan McDavid, head of the antitrust practice group at Hogan Lovells, said she expects this year to be busier for merger lawyers. “You’re going to have more mergers this year,” she predicted, adding that both the FTC and DoJ will be busy reviewing cases.

When it comes to merger review in the healthcare sector, the FTC has managed to get parties to simply walk away from transactions, as in the case of its challenge to Reading Health System’s proposed acquisition of Surgical Institute of Reading (SIR), which was announced in November.

That case marks an important change for the agency, as small and speciality hospitals had previously been generally excluded from merger challenges. But FTC lawyers found that SIR’s outpatient and 15-bed specialty hospital warranted a closer look, then moved to stop the deal. The case strengthens the government’s hand, because success in enforcement has a tendency to embolden regulators to uncover and challenge similar cases.

Yet another FTC case, ProMedica Health System’s proposed purchase of St. Luke’s Hospital in Lucas County, Ohio, could prove significant and actually make new law. In attempting to block the deal, the FTC is arguing that in hospital cases like this one, announced in 2010, a loss of competition in even one area could drive up prices.

The FTC argues the case is about a loss of competition generally, but it has focused on how the merger would eliminate local competition for prenatal care and delivery services. Previously, the law has looked at a “shopping basket” of a range of inpatient hospital services, including obstetrics, emergency services, and heart surgery.
From the perspective of the DoJ, illegal monopolization within the hospital industry has attracted attention. And the department’s Antitrust Division has forced at least one hospital to revise its contracts with payers, in Texas.

In the health insurance sector, the DoJ has filed suit against Blue Cross Blue Shield of Michigan, challenging some of its contracting. That case is currently pending, with both sides preparing for trial.

Outside of healthcare, both agencies have looked into high technology. On the merger front, the DoJ has scrutinized some of the largest patent pools ever sold and discussed the importance of companies complying with commitments to license patents essential to industry standards at “fair, reasonable and non-discriminatory” (FRAND) rates.

The FTC has looked at industry behavior in the non-merger context, most notably a nearly two-year-long analysis of Google’s business practices which recently resulted in a settlement. The FTC also “encouraged” Google to adhere to FRAND commitments.

The DoJ remains embroiled in the auto-parts cartel, which is believed to be the largest cartel investigated by the agency to date. Nine companies and 12 executives have already been indicted. As many as 80 separate automobile parts are estimated to have been subject to price-setting efforts by manufacturers.

Most of the data under review is being supplied by cartel participants trying to get leniency through the DoJ’s “amnesty plus” program.

INSTITUTIONAL DEVELOPMENTS

Leadership changes present unique challenges

Both the FTC and the DoJ’s Antitrust Division will face significant challenges this year, in addition to the usual business of regulating the way businesses grow and compete with each other.

In terms of the leadership challenges, newly confirmed Assistant Attorney General Bill Baer takes over the helm of a team in the DoJ that has been demoralized by budget cuts, office closings, and inter-office transfers. And after serving more than eight years at the FTC, including four as chairman, Jon Leibowitz has revealed his intention to soon resign his post.

Leibowitz’s plans to depart will leave the White House with the task of putting in place a strong chairman who can contend with a pair of closely allied Republican ideologues in the agency’s leadership. Republican Commissioners Maureen Ohlhausen, who has already written thoughtful and provocative statements about the need for caution when flexing governmental antitrust muscle, was recently joined at the commission by Josh Wright, a former colleague with extensive economics, teaching and communications skills.

In the DoJ headquarters two blocks down Pennsylvania Avenue, closer to the White House, Baer has his hands full, too.

Antitrust lawyers in Washington know Baer, either personally, or by reputation, and that bodes well for him, according to Bill Dillon, a former DoJ litigator who now has his own firm in Atlanta.

“Bill comes in with an amazing gift, in that everyone who works at the Antitrust Division wants him to be there. He’s a straight shooter and a brilliant lawyer,” Dillon said. But that does not mean he expects Baer to have an easy time at the head of the antitrust division.

That is because, as part of a cost-saving effort by the agency, Christine Varney, Baer’s predecessor, eliminated a large percentage of the cartel-fighting team, Dillon explained. “Varney cut the program in half and walked out the door.”

Dillon and his colleagues in Atlanta, Dallas, Cleveland, and Philadelphia were eliminated from the Antitrust Division, after most declined to uproot their families and move to Washington, or into different states.

“Most of the field office attorneys aren’t willing or able to move to different states,” said Hill Wellford, a partner at Bingham McCutchen who previously worked at the DoJ.

That could cause headaches for the anti-cartel program, Dillon warned, because the agency’s huge auto-parts case could include as many as 80 different cartels. And lawyers need to sort out all of the underlying issues, identify the correct parties, and indict the proper participants within five years of the end of the cartel activity. This paperwork processing problem is compounded by the fact that most relevant documents are in Japanese, Taiwanese, or Korean, and must be translated.

Baer will have his hands full trying to figure out how to address the problem of getting the work done while dealing with a shortage of attorneys, Dillon said. “He has got to find a way to bridge that gap, but he has zero resources to do it.”

by Cecile Kohrs Lindell in Washington DC
European Union

Almunia legacy to take shape with major cases wrapping up and important legislative initiatives imminent

- No softening of antitrust enforcement expected
- EC looks to wrap up Google and ‘patent war’ cases, probes into banks
- ‘Business-friendly’ merger control mulled by EC, national regulators consolidate

POLICY PROGRESSION
A crunch year for private enforcement

The record cartel fine handed down by the European Commission (EC) in late 2012 – a whopping EUR 1.47bn against seven cathode ray tube manufacturers – may well have set an appropriate tone for what to expect in 2013.

As the European Commissioner for Competition Joaquin Almunia approaches the second half of his time in office, in spite of the continuing economic crisis, practitioners expect no softening for antitrust enforcement at the European Union (EU) level.

The Spanish commissioner, who has hit the headlines by blocking NYSE Euronext’s takeover of Deutsche Boerse and by publicly sparring with Google, is into the last couple of years of his mandate. Next year, EU member states will start looking for a replacement.

And as Almunia enters the last years of his tenure, the commissioner’s legacy is starting to take shape, said Nicholas Levy, an antitrust partner in the Brussels and London offices of Cleary Gottlieb Steen & Hamilton.

“A general priority for 2013 is to preserve healthy competitive conditions in the single market against the growing temptation to respond to weak economic conditions with laxer competition rules and softer implementation,” Alexander Italianer, director general of the EC’s Directorate General for Competition (DG Comp), told PaRR.

The long-awaited initiative on damages actions, designed to stimulate the European culture of antitrust litigation, is also forthcoming. Although the first discussions on this initiative began in 2005, Almunia admitted to PaRR in September that the draft legislation would likely slip into 2013.

The proposal has been held back by the EC’s efforts to devise a pan-European collective redress scheme. Concerns over damages claimants’ access to confidential leniency documents on the EC’s case files also contributed to the delay.

A “legislative proposal is planned in the coming months to give more legal certainty on a number of issues at the interface between the public and private enforcement of EU competition law, in particular access to the evidence related to leniency requests,” said Italianer. “As to the issue of collective redress, the European Parliament stressed the need for a broad European initiative,” he added.

“The EC leniency programme has been one of the most significant developments in antitrust enforcement in the last 20 years,” said Nicholas Levy. He expected the EC to prioritise “providing guidance to national courts to avoid discoverability of leniency documents in follow-on damages actions”.

The EU courts are also expected to further clarify the limits of third-party access to leniency documents when ruling on several pending cases, including appeals of the EC decisions in the Heat Stabilisers, Air cargo and Carglass cartel cases as well as the EC’s appeal in the EnBW Energie Baden-Württemberg case before the EU’s highest court.

Although the European legislative landscape for antitrust follow-on claims remains ill-defined, cases are nonetheless being brought in courts across member states in increasing numbers.

The European Union

Almunia legacy to take shape with major cases wrapping up and important legislative initiatives imminent

- No softening of antitrust enforcement expected
- EC looks to wrap up Google and ‘patent war’ cases, probes into banks
- ‘Business-friendly’ merger control mulled by EC, national regulators consolidate

POLICY PROGRESSION
A crunch year for private enforcement

The record cartel fine handed down by the European Commission (EC) in late 2012 – a whopping EUR 1.47bn against seven cathode ray tube manufacturers – may well have set an appropriate tone for what to expect in 2013.

As the European Commissioner for Competition Joaquin Almunia approaches the second half of his time in office, in spite of the continuing economic crisis, practitioners expect no softening for antitrust enforcement at the European Union (EU) level.

The Spanish commissioner, who has hit the headlines by blocking NYSE Euronext’s takeover of Deutsche Boerse and by publicly sparring with Google, is into the last couple of years of his mandate. Next year, EU member states will start looking for a replacement.

And as Almunia enters the last years of his tenure, the commissioner’s legacy is starting to take shape, said Nicholas Levy, an antitrust partner in the Brussels and London offices of Cleary Gottlieb Steen & Hamilton.

“A general priority for 2013 is to preserve healthy competitive conditions in the single market against the growing temptation to respond to weak economic conditions with laxer competition rules and softer implementation,” Alexander Italianer, director general of the EC’s Directorate General for Competition (DG Comp), told PaRR.

The long-awaited initiative on damages actions, designed to stimulate the European culture of antitrust litigation, is also forthcoming. Although the first discussions on this initiative began in 2005, Almunia admitted to PaRR in September that the draft legislation would likely slip into 2013.

The proposal has been held back by the EC’s efforts to devise a pan-European collective redress scheme. Concerns over damages claimants’ access to confidential leniency documents on the EC’s case files also contributed to the delay.

A “legislative proposal is planned in the coming months to give more legal certainty on a number of issues at the interface between the public and private enforcement of EU competition law, in particular access to the evidence related to leniency requests,” said Italianer. “As to the issue of collective redress, the European Parliament stressed the need for a broad European initiative,” he added.

“The EC leniency programme has been one of the most significant developments in antitrust enforcement in the last 20 years,” said Nicholas Levy. He expected the EC to prioritise “providing guidance to national courts to avoid discoverability of leniency documents in follow-on damages actions”.

The EU courts are also expected to further clarify the limits of third-party access to leniency documents when ruling on several pending cases, including appeals of the EC decisions in the Heat Stabilisers, Air cargo and Carglass cartel cases as well as the EC’s appeal in the EnBW Energie Baden-Württemberg case before the EU’s highest court.

Although the European legislative landscape for antitrust follow-on claims remains ill-defined, cases are nonetheless being brought in courts across member states in increasing numbers.
In grouped claims, following on from the EC’s air cargo cartel decision, filed in the UK and the Netherlands, the plaintiffs are seeking compensation in excess of the EUR 799m fine already paid out by the airlines, as reported by PaRR in November.

Nor have member states been passive in anticipation of the EC’s overdue private enforcement initiative.

The French government has tabled reforms that would introduce a form of class actions into the country’s legal system. The reform will focus primarily on facilitating damages claims from groups of individual consumers, and possibly SMEs, giving a central role to consumer associations.

However, this reform should not lead to as extensive class actions litigation as in the US, noted Laurent Godfroid, partner at competition practice of Gide Loyrette Nouel. The exact scope of the reform will be clearer in March 2013 when the draft law is presented, he added.

The president of France’s Competition Authority, Bruno Lasserre, said recently that he expected companies to bring claims in Paris courts rather than in London or Amsterdam. The claimants have a vested interest in litigating under the rules, which they could contribute to, the president noted.

Meanwhile, the consultation on reforming the follow-on actions system in the UK is seen by lawyers as an attempt to consolidate London’s leading position as a forum for such claims, as reported by PaRR in July.

**SECTORS AND CASES**

EC and member states eye tech and healthcare

Several major cases remain on Almunia’s wishlist. “The commissioner will be keen to close those cases he has taken a personal interest in” before his mandate is over, predicted Levy.

The EC’s probe into Google online search services is finally nearing its end, several years after the first complaints were lodged, and the EC is also looking into allegations against *Samsung*.

Commissioner Almunia has taken a personal interest in the so-called “patent wars”, as his speeches have frequently addressed suspected abuses by standard-essential patent holders seeking injunctions against potential licensors.

The EC sent a statement of objections to Samsung before Christmas. Meanwhile, as reported by PaRR in October, the regulator is coordinating internally to ensure that a coherent policy on excessive pricing conduct is applied both in standard essential patent cases and in the investigation against Gazprom.

Practitioners are also waiting with bated breath to see the outcome of investigations into alleged anticompetitive practices related to credit default swaps (CDS) and the setting of benchmarks for interbank lending rates (Libor and Euribor). Indeed, Almunia has said, with some irony, that the potential fines imposed on banks found to have breached competition rules “will not be EUR 1”.

“Balancing competition and regulatory requirements in a way that does not discourage necessary investment in the energy and telecoms sectors will also be important this year,” David Broomhall, managing partner at Freshfields in Brussels, expected. A similar prediction was made by an EC official last November, as PaRR reported.

Energy companies will likely face antitrust scrutiny for information exchange about so-called “network codes”, as well as tougher enforcement by national competition authorities and more state aid investigations, the EC official said. He singled out the energy sector in Eastern Europe as likely to attract particular regulator attention.

“The commissioner is also keen to catch up after a year with virtually no cases settled,” said Broomhall. “We are likely to see more settlements of cartel cases this year,” he predicted.

At the national level, several sectors are expected to be on regulators’ radar.

France’s competition watchdog announced on 15 January that it would launch a sector inquiry into the country’s pharmaceuticals industry. This comes on top of at least three antitrust probes concerning generic drug makers’ access to the market.

The French regulator is also expected to keep a close eye on the “net giants” to ensure that consumers are not locked into new monopolies, noted Godfroid.
Healthcare and telecoms will be closely watched by the Dutch regulator, Chris Fonteijn, the chairman of the Netherlands Competition Authority, said in a recent interview.

In Germany, Carsten Grave, a partner at Linklaters’ Dusseldorf office, predicted the competition authority would focus on the food retail, energy and healthcare sectors. The Bundeskartellamt is also conducting inquiries or investigations into the postal services and banking as well as cable networks markets.

Andreas Mundt, the president of the German Bundeskartellamt, told PaRR that the Bundeskartellamt will “look more thoroughly into the subject of vertical restraints” in light of “numerous complaints in various sectors, often in relation to e-commerce”. The authority will, for example, assess the new distribution rules of Asics and Adidas, Mundt added.

“The EC is increasingly focusing on state aid and merger control, where if they do not act no one will, as well as EU-wide cartels and high-profile dominance cases,” observed Levy. “That leaves quite a significant part of competition policy that is largely being enforced at the national level, including joint ventures that do not meet the EU merger control criteria and vertical restraints.”

INSTITUTIONAL DEVELOPMENTS

Streamlining procedures and authorities

Commissioner Almunia is keen to see several legislative and procedural changes implemented under his watch. “To encourage growth in Europe we have decided to make our merger procedures more business-friendly,” Italianer told PaRR. “The streamlined system will allow the commission to focus on the cases that have a real impact on competition and require complex analyses.”

Almunia previously described streamlining the merger review process as a priority for 2013 in comments reported by PaRR in December. This reform is expected to increase the number of deals reviewed under the so-called “simplified procedure” by 10%.

The business and legal communities will welcome any easing of the burden on notifying companies, said Levy. These measures may help expedite approvals and reduce costs for notifying companies, and could well be taken up by other jurisdictions that have systems based closely on EU merger control, he added.

Italianer confirmed that the EC was planning a consultation on the streamlining of merger control. There will also be a consultation on the EC’s controversial plan to extend its EC merger control to transfers of non-controlling minority stakes.

Several member states with established antitrust enforcement traditions will be reforming their institutions and rules over the coming year.

The UK will merge its Office of Fair Trading (OFT) with its Competition Commission, while Spain and the Netherlands plan to concentrate various competition, sector and consumer authorities into overarching national super-regulators.

“We expect the top priority for Lord Currie, the designate chairman of the UK Competition and Markets Authority and his newly appointed CEO, Alex Chisholm, will be to ensure a smooth transition to the combined authority, in particular trying to avoid any drop-off in case output,” said Alastair Mordaunt, a partner at Clifford Chance’s competition practice in London.

“We could see the OFT wrapping up on some pending cases this year, as it carries out some ‘spring cleaning’ to ensure that it hands over a decent portfolio of cases to the new authority,” Mordaunt added.

A forthcoming regulatory merger is understood to have given rise to concerns within Spain’s Comisión Nacional de la Competencia (CNC). After a bumper year of activity and plentiful fines, the effects of the merger on the authority’s work are hard to predict, a source at the CNC told PaRR. The authority might extend the time limits applicable in antitrust investigations to smooth the transition, the source said.

Changes are also under way in Germany, where amendments to competition law have been meandering through the country’s legislative process. The changes will align German competition rules with EU law, introduce a “significant impediment on competition” (SIEC) test into national merger control rules, and will seal a legal gap over successor liability for cartels.

The draft law, originally scheduled to come into force on 1 January, is back with the German federal parliament, having been blocked by the country’s regional states. The opponents were particularly vocal against subjecting state-owned healthcare providers to competition scrutiny, as reported by PaRR.

The competition law reform “is stalling and might be postponed until elections are over in September”, predicted Grave.

Mundt did not expect the delay to cause significant problems. “On a case by case basis this could create some degree of uncertainty for companies,” he recognised. “It could make a difference whether a merger is assessed under the old rules or under the SIEC test, which will hopefully apply soon,” Mundt added.

by Nicholas Hirst, Francesca Micheletti and Martha Ivanovas in Brussels
BRICS - China

Competition issues increasingly on radar screen of companies, government

- Compliance programs a boon for competition attorneys
- Multinationals and SOEs increasingly scrutinized
- Regulators look to more sophisticated analysis practices

POLICY PROGRESSION

Antitrust compliance becoming crucial aspect for Chinese companies

China’s three antimonopoly enforcement bodies, the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration for Industry and Commerce (SAIC), are set to enhance their power by tapping into more high-profile antitrust cases, publishing more detailed implementation rules, and increasing enforcement efficiency in 2013, according to Chinese antitrust officials, experts, and local attorneys.

With more and more companies being investigated and penalized by antitrust enforcement bodies like NDRC and SAIC, companies in China, especially many large state-owned enterprises (SOEs), are realizing the importance of compliance with the Anti-Monopoly Law (AML) and have requested compliance help from law firms with regard to business operations, said Zhonglun Law Firm Partner Xue Yi at a recent Beijing antitrust summit. AML compliance advisory is emerging as a burgeoning business for Chinese law firms, Xue added.

As an increasing amount of companies seek legal advice, Chinese enforcement bodies will have increasing difficulty in identifying AML violations, which will also become more secretive in nature, said Huang. More advanced investigative methods will be introduced into antitrust enforcement this year, Huang added.

In MOFCOM’s merger review, the small but significant and non-transitory increase in price (SSNIP) model will be introduced as a method of determining a company’s relative market power. SSNIP will be used to analyze relevant market concentration, and economic analysis will also be utilized more in complicated M&A case reviews, Huang said.

The NDRC’s Xu Kunlin said his agency needs to improve the following areas of study: analysis of vertical monopoly; exemptions in monopolistic agreements; economic analysis of abuse of dominance; follow-up after investigation terminations; leniency program applications; and the calculation of illegal income.

NDRC set up an expert group last year to study exemptions in vertical monopoly agreements, according to a PaRR report. But the draft legislation is only expected for public comment for sometime later in 2013, as yet undefined.

In MOFCOM’s merger review, the small but significant and non-transitory increase in price (SSNIP) model will be introduced as a method of determining a company’s relative market power. SSNIP will be used to analyze relevant market concentration, and economic analysis will also be utilized more in complicated M&A case reviews, Huang said.
MOFCOM may also finalize more detailed rules in 2013, as it has already drafted the “Measures on Imposing Restrictive Conditions of Concentration” legislation and draft provisions on a fast-track mechanism. These two drafts have been discussed and revised over several rounds, but have not yet been put forward for public comment, a necessary step before formal release. PaRR has reported that MOFCOM is likely to publish the two provisions this year.

Beijing-based competition attorney Song Jie, of the Anjie law firm, said the provisions on remedies may come out before the fast-track provisions, which were proposed earlier, because there are fewer concerns over the former issue, while the latter has been bogged down by various disagreements and concerns.

PaRR has previously reported that MOFCOM is worried that its four years of merger review experience will not prove sufficient for the agency to provide internal definitions for safe harbor thresholds or restrictions for specific M&A transactions.

Meanwhile, even if the planned fast-track mechanism is released, it may not significantly shorten China’s merger review process, said Shang Ming, the director general of MOFCOM’s Anti-Monopoly Bureau. “Even by adopting the fast-track process, a substantial amount of cases need to go through the whole procedure, and need to be carefully checked,” Shang said at the first China Competition Policy Forum held in Beijing in early December 2012.

MOFCOM is therefore considering drafting guidelines to clarify “control” in mergers and joint ventures, according to Shang. Currently, MOFCOM does not have a clear definition of what constitutes an acquisition of a controlling stake. New legislation on merger control definition should help businesses and regulators determine their requirements for merger review purposes, thereby contributing to a reduction in the number of merger review cases notified, according to Shang. At the moment, all JVs need to be notified to MOFCOM if the parties meet the merger review notification threshold, no matter if the JV is a 10-90 percentage or 50-50, said Zhou Zhaofeng, a partner at Chance & Bridge. In the first half of 2012, MOFCOM received 83 merger notifications, of which 22 were JVs, and the agency concluded 78 cases in the same period.

Although MOFCOM is keen to establish definition guidelines for merger control, the enforcement body may not have sufficient legislation right now to publish the guidelines, according to Huang Yong, deputy director of the expert panel at the State Council’s Anti-Monopoly Committee (AMC). Only the State Council has jurisdiction to publish such guidelines and it is not something that MOFCOM can control, so it remains unclear when these guidelines will be published.

The SAIC encountered the same issue when the agency tried to supplement the AML. According to a PaRR report, SAIC has decided to forestall legislative work on the guidelines for antitrust enforcement of intellectual property (IP), due to coordination issues among the three antitrust regulators, who have been unable to reach agreement on which agency should lead the process. Instead, SAIC is seeking to publish ministry-level regulations, an easier and faster way of introducing the rules. So far, the first draft of the new IP-related regulations has been completed and is under discussion. The SAIC will solicit further opinions and release it in the first quarter of 2013, according to a PaRR report.
TARGETED SECTORS & CASES

Multinationals increasingly in regulatory crosshairs

With MOFCOM becoming an increasingly important and high-profile merger review jurisdiction, the NDRC is also making efforts to build up its authority in global antimonopoly enforcement.

In late 2012, NDRC already had its eyes on large multinationals. The agency carried out an investigation into Beijing Benz Automotive Co. over allegations that it had signed resale price maintenance agreements with its car dealers. The penalty could be as high as CNY 700m (USD 111.4m), according to a PaRR report. Although the investigation eventually ended up with an amicable settlement between Benz Automotive and its dealers, the NDRC has so far not formally announced the result of the case. Chinese automobile companies have already been put on warning by the case and have moved to review and correct their agreements with dealers.

Entering 2013, NDRC started the New Year by ordering six international LCD makers -- Samsung Electronics, LG Display, Innolux (previously known as Chimei Innolux), AU Optronics, Chungwa Picture Tubes and HannStar Display -- to pay a total of CNY 353m (USD 56.6m) in financial sanctions for alleged price fixing between 2001 and 2006. This is the first price fixing case ever closed by the NDRC and the fine represents the largest ever imposed in a Chinese antitrust case.

Half a month later, NDRC and the Guizhou Price Bureau conducted a resale price maintenance investigation on the famous Chinese white liquor maker Kweichow Moutai, as some of its previous distribution policies had violated the AML. Moutai immediately announced that it would abandon some of its resale price maintenance policies. NDRC then extended the investigation to other famous liquor brands, such as Wuliangye. The agency may also launch investigations into anticompetitive conduct in the pharmaceutical sector in 2013, according to a PaRR report.

“Going forward, NDRC aims to strengthen enforcement,” said Xu Kunlin, the director general of the NDRC’s Department of Price Supervision, said at a recent Beijing conference. “I told our staff, launching investigation cases are the real deal. No matter how much you tell people and educate them, it won’t be as effective as an issued penalty.”

Meanwhile, the SAIC plans to “diversify the types of cases investigated” and conduct probes not only involving monopolistic agreements, but also abuse of dominance and of administrative power, said Ren Ai-rong, the head of the SAIC’s Anti-monopoly and Anti-unfair Competition Enforcement Bureau.

MOFCOM, apart from merger reviews, is also expected to investigate cases that should have been notified to MOFCOM over the past four years but were not, according to Huang.

Last year, competition lawyers told PaRR that some of their SOE clients had received telephone enquiries from MOFCOM, inquiring as to whether they had filed antitrust notifications about their M&A deals. Xu Lefu, the division director at the MOFCOM’s Anti-Monopoly Bureau, speaking in Hong Kong in December 2012, pointed out that MOFCOM has not publicized any such investigation, but has undertaken some probes and will conclude and announce the outcome of these in 2013.

INSTITUTIONAL DEVELOPMENTS

Agencies look towards more sophisticated practices

To meet the increasing enforcement demands the NDRC and SAIC are likely to see in 2013, both bodies greatly expanded their antitrust teams throughout the previous year. NDRC added 20 people at the central level and 150 people at the local provincial level, while SAIC added 30 people at the central level. Going forward, MOFCOM, NDRC and SAIC will likely add only three or four people in 2013, but will conduct more training to enable the teams to learn and use more advanced methods of analysis.

The lagging legislative progress in supplementing the AML has made actual antitrust enforcement inconvenient and has also led to calls for reform of China’s antitrust system. The AMC’s Huang Yong suggested that the Chinese government should encourage a streamlining of the current antitrust regime and study whether to merge the three enforcement agencies into one single authority at the State Council level. Such a merger would greatly increase efficiency, Huang said at a Beijing conference in December.

The State Council oversees 16 key ministries. An enforcement body at the State Council level, or the current AMC, would raise the profile of antitrust enforcement in relation to other ministries of a similar level. Additionally, such a move would lubricate the legislative process as the regulations issued by the State Council are applicable to all ministries and the State Council has the right to interpret the AML.

by Lisha Zhou, Joy Shaw in Shanghai, and Eliot Gao in Beijing
Polici! Progression

Le
dency application overhaul ushers in
era of cartel enforcement

Cartel investigations are set to make headlines in Brazil in 2013 as regulators seek to remove a large backlog of cases after significantly improving the country’s merger review process in recent years, according to a senior official at the Administrative Council for Economic Defense (CADE).

“The work that has been done with great results in mergers will also be done in ... cartel enforcement,” CADE’s General Superintendent Carlos Ragazzo told PaRR in an exclusive interview giving an overview of the competition agency’s priorities for 2013.

After the Brazilian government reformed its competition law in 2011 and established the so-called “Super CADE”, the regulator surprised many commentators by quickly implementing a pre-merger review standard, as opposed to the previous system whereby mergers were approved “post-consummation”.

And the new system is showing tangible results. The average time to review a merger has now dropped to around 50 days -- from longer than 150 days in 2011 -- silencing the skeptics who insisted Brazil’s M&A market “would grind to a halt”, according to Barbara Rosenberg, partner at the Barbosa, Mussnich e Aragao law firm.

After processing more merger reviews last year than in 2011, CADE will seek to bolster its cartel and single-firm conduct investigations throughout 2013.

In a bid to encourage more voluntary disclosures, CADE sought public comments from companies and individuals on a variety of issues that will result in new settlement rules in price-fixing cases.

“One of the things we are trying to achieve in cartel investigations is...[expanding] our settlements policy,” Ragazzo said.

Brazil’s leniency program currently provides full immunity from administrative and criminal charges to the first company or individual that approaches CADE to report a violation. In 2012, CADE signed 10 such agreements.

But there are no rules benefitting so-called “second-ins” or “third-ins”, one reason why CADE has sought to amend the rules governing such settlements, which increasingly involve Brazilian companies.

“We have been receiving more and more leniency applications, some of which are from nationals, which is something new,” Ragazzo said.

Ragazzo said the range of penalty reductions would be 30%-50% for so-called “second-ins”, with a graded system applied to any other firms seeking leniency.

The new settlement rules may come into force in as little as a month. However, unlike leniency agreements, such settlements do not automatically grant immunity from criminal prosecution and this may discourage parties from reporting infringements, both Rosenberg and Bruna said.

Beyond cartel investigations, CADE is being urged to reform rules governing merger notifications involving investment vehicles such as private equity firms. Competition lawyers believe the new law...
has created “insecurity” and have criticized disclosure provisions for investors with holdings of 20% (or higher) in any investment. Several lawyers said CADE may propose changes to these rules sometime after February.

Another heated debate concerns the compulsory notification of commercial agreements, including distribution contracts, joint ventures, and technology licensing contracts to regulators.

Currently, the new competition law does not regulate such agreements and Jose Inacio Franceschini, a partner at Franceschini e Miranda, believes these agreements should be dealt with from a conduct perspective, without the obligation to notify regulators.

TARGETED SECTORS & CASES

Infrastructure projects create bid-rigging hotspot

“CADE has been telling everyone this is the ‘year of conduct’,” Rosenberg said.

There are nearly 400 conduct cases pending at CADE and as such, regulators will be kept busy for the next three years, according to Sergio Varella Bruna, a partner at Lobo e de Rizzo.

“We are more focused on solving the cases we already have -- we have a huge backlog of cartel investigations,” Ragazzo added.

Despite the backlog, Ragazzo said CADE would still pursue new cases.

Bid-rigging investigations relating to government procurement will likely be a priority, particularly as Brasilia prepares to spend heavily on infrastructure and energy projects in the coming years, including the 2014 World Cup and 2016 Summer Olympics.

Bruna also expects CADE to examine recommended retail pricing, an issue brought up at the regulator’s last tribunal session in 2012. Medical care, pharmaceuticals and the chemical industry are also expected to be investigated, according to Mauro Grinberg, a former CADE commissioner and partner at Grinberg Cordovil e Barros Associados.

However, Ragazzo cautioned against second guessing which sectors might be the subject of future scrutiny.

“We don’t have that much control on the kind of leniency applications that come to us,” Ragazzo said.

One way to predict CADE’s future behavior is by looking at investigations in other jurisdictions. As auto-parts cases arise in the EU and the US, similar investigations are likely to start in Brazil, Rosenberg said.

But one of the main hindrances to CADE’s international investigations stems from its difficulty in serving subpoenas to firms and their executives abroad, particularly in Taiwan, Japan and South Korea. Therefore, cartel investigations into certain Asian cathode ray tube and liquid crystal display manufacturers could take some time to complete.

2013 will also see two landmark rulings in an international air cargo cartel investigation and a domestic cement industry price fixing case. These two trials are being closely watched as CADE is expected to set new standards for calculating penalties even though both investigations started under the old competition law.

“Defining the fine to be levied by CADE in the transition cases will be one of the agency’s great challenges this year,” said Jose Alexandre Buaz Neto, a partner at Pinheiro Neto. CADE, however, may rely on other smaller cases to set the precedents, according to several competition attorneys.

INSTITUTIONAL DEVELOPMENTS

‘Super CADE’ begins to bulk up

Another issue that has provoked discussion is whether CADE has enough personnel to match its new ambitions. The 2011 reforms organized the agency into three bodies: a seven-member tribunal comprising the president and six commissioners; a General Superintendent’s (SG) office which conducts investigations; and an economic analysis department.

Though conduct investigation demands are staff-intensive, there is no consensus as to when CADE will be able to add the 200 new personnel authorized by the new law. Ragazzo said the agency plans to hire 50 staff this year. Currently, CADE has a staff of 240 but only 100 handle cases.

The new law also brought the merger review process more in line with mature economies, but the new system shifted a lot of the workload to the SG, according to Bruna.

“There is no consensus as to when CADE will be able to add the 200 new personnel authorized by the new law. Ragazzo said the agency plans to hire 50 staff this year. Currently, CADE has a staff of 240 but only 100 handle cases.”

The new law also brought the merger review process more in line with mature economies, but the new system shifted a lot of the workload to the SG, according to Bruna.

“The challenge for the SG is to continue processing the merger review filings while still being able to generate the new conduct cases for the commissioners to try at the tribunal,” Bruna said.

Currently, about 90% of merger review applications are being processed under a fast-track notification procedure conducted at the SG level.

by Ana Mano in Sao Paulo and Raymond Barrett in Washington DC
POLICY PROGRESSION

Legislative efforts smooth exemptions process, enable dawn raids

The Competition Commission of India (CCI) is set to get more teeth in 2013, if amendments to the Competition Act 2002 are passed and the National Competition Policy (NCP) rolled out. This would help the regulator in its cartel investigations and would do away with the conflicts it faces with sector regulators.

The Union Cabinet in October 2012 approved the proposal of the Ministry of Corporate Affairs to amend the Competition Act 2002. The effort was undertaken with the intent of fine-tuning the law to meet present-day requirements and was informed by the experiences gained by the CCI since its inception in 2009.

Notably, the amendment to the Competition Act will make consultation between the CCI and sector regulators mandatory in order to ward off conflicts and forum shopping. According to practitioners, the overhaul will help establish a more transparent legal environment and give the CCI jurisdiction over all market sectors and preclude any exemptions.

Various sector regulators, including the Telecom Regulatory Authority of India (TRAI), Central Electricity Regulatory Commission (CERC), and Indian Railways, have sought exemptions.

Yet, there remains some ambiguity as to whether the findings of the CCI are binding on the sector regulator, said Shashank Gautam and Payel Chatterjee, counsels with Nishith Desai Associates.

Meanwhile, the much awaited NCP seeks to harmonize all government policies, including those dealing with foreign direct investment (FDI), trade, industrial, disinvestment, fiscal, intellectual property rights (IPR), labor, and procurement, said CUTS International’s policy analyst, Natasha Nayak.

The NCP could spur the country’s growth rate and launch the second wave of economic reforms in the country since 1991, said M. Veerappa Moily, minister for the oil sector, and formerly the minister for corporate affairs.

The amendment to the Competition Act will facilitate the commission in investigating cartels, as it will enable the regulator to “strike and carry out dawn raids”, now that the CCI chairman will have the necessary powers to authorize such tactics.

The Competition Act currently allows for dawn raids but requires the CCI to seek authorization from courts after it has conclusive evidence of a violation of competition laws. So far, there have not been any dawn raids by the CCI, given the complicated procedure and the possibility of a leak due to the number of people involved, said Dhanendra Kumar, the former CCI chairman. Such leaks would allow concerned parties to destroy evidence, he added.

With the expected amendment coming into effect, the CCI investigative team is set to use dawn raids to put a stop to cartels in India, said a CCI official.
TARGETED SECTORS & CASES

Pharmaceutical thresholds threaten other, appropriate, industry consolidation

The CCI last year investigated alleged cartels in the fast-moving consumer goods (FMCG) space, including milk, onions, sugar and rice, as previously reported by PaRR. It has also investigated the cement, tire and auto-parts industry, among others.

The revitalized Competition Act, specifically the inclusion of Section 5A, will enable the Indian government and the CCI to set different thresholds for different industry segments.

Competition attorneys worry that this could hamper growth and affect M&A deals.

The key purpose of this section is to establish a low bar for M&A deals and ensure that a preponderance of transactions fall under the remit of the competition regulator. Initially, the insertion of Section 5A was triggered by the need for greater vigilance of the Indian pharmaceutical sector, but in-house legal counsel fear that such an amendment means that other industries will now fall under the shadow of CCI overreach.

Nowhere else in the world have competition commissions introduced industry specific review thresholds, said Bharat Vasani, general counsel at Tata Sons Limited, the holding company for the Tata Group. Uday Mehta, CUTS International associate director, shared Vasani’s somewhat skeptical view of the new system and pointed out that the shift marks a significant departure from the more established regulatory regimes in developed countries.

India’s legacy from the earlier license-quota-permit system has resulted in the existence of many small companies that, coupled with the macroeconomic atmosphere, has created industries ripe for consolidation, said Vasani. Most sectors are facing tough challenges and, should the industry-wise thresholds be introduced, they may hamper appropriate consolidation in many sectors, he explained.

CCI chairman Ashok Chawla agreed that Indian industry is generally fragmented and consolidation is needed to achieve economies of scale. Chawla maintained, however, that transactions still need to be guided by competition policy. The current merger threshold levels have been “consciously kept at the higher end”, he added.

Competition lawyers anticipate a rise in the number of appeals filed with the Competition Appellate Tribunal (COMPAT) in 2013, in response to numerous orders issued by the CCI which have not found favor with Indian companies.

Considering the huge monetary penalties imposed by the CCI, now is the right time for COMPAT to step in and address the large number of expected appeals, said Ravisekhar Nair, a recently appointed associate partner at Economic Laws Practice (ELP).

After being fined INR 60bn (USD 1.6bn), various cement companies have filed an appeal with COMPAT. Similarly, real estate major DLF Ltd filed an appeal against a CCI order that alleged the company had been abusing its dominance.

One of the cement companies’ chief financial officers did not rule out the possibility of the case going on for the next 10-15 years. “Should we lose at the COMPAT level, we will take it up to the Supreme Court,” he said.

DLF India has also reported its intentions to take up the issue with the Supreme Court, should COMPAT rule in favor of the CCI order and force it to modify a buyers’ agreement.
Practitioners said that, aside from the DLF and the cement case, which have received a lot of publicity, all eyes will be on CCI’s verdict in the Google matter. Various interested parties have expressed concern that the competition regulator may not possess the requisite degree of sophistication to appropriately address the matter.

In 2013, practitioners anticipate an increase in the number of Form II filings in India.

A Form II is filed when there are likely to be more complex competition concerns, as in the case of the first Form II filing following Gujarat State Petroleum Corporation’s (GSPC) acquisition of BG Group’s [BG:LN] 65.12% stake in Gujarat Gas Company (GGCL) [BSE:523477], and Diageo’s plans to acquire a stake of up to 53.4% in United Spirits through a three-stage transaction.

The majority of the merger control filings have “involved a change in ownership with very little horizontal overlap or vertical linkage”, CCI member Geeta Gouri told PaRR. Hence, many of the merger review cases filed have not posed any competitive concerns in the market, which explains why there have, to date, been no cases that have entered a Phase II investigation, she added.

However, Nair anticipates that with the economic situation worsening, Indian industry will see a greater degree of consolidation, which in turn would result in more detailed reviews by the CCI, and more cases entering Phase II investigation.

It is a misnomer that the degree of intensity of investigation will increase in a Form II filing, said a CCI official. Globally, 90% of transactions notified are cleared within Phase I, with just about 5% going into Phase II, and one or two out of 100 actually being stalled, Nair said. CCI’s Gouri anticipates a maximum of 2% of all M&A transactions filed with the regulator in a single year to be deemed complex.

INSTITUTIONAL DEVELOPMENTS

Capacity building required to handle rising number of cases

The CCI is on a major recruitment spree, having solicited applications to fill 33 vacancies within the first quarter of 2013. This spree includes an effort to fill the posts of director and joint director (economics); deputy director (law); deputy director (financial analyst), deputy director (economics), among others.

There is a shortage of good personnel with an economics background which is affecting the timeline of merger reviews, said a Mumbai-based lawyer involved in an ongoing merger case.

Another Delhi-based lawyer pointed out that, as members of CCI are on deputation from the Government of India, they do not necessarily have the “willingness” to go against government-linked companies. Such employees are always on short-term transfer and would not wish to affect their future government postings, he explained.

A CCI official involved in investigations told PaRR that the shortage of personnel and rising number of antitrust cases filed could affect the timeline for probes. While the goal is to try and resolve cases sent for investigation within six months, there are exceptions, and currently each of the investigative officers are handling four to five cases.

The CCI’s investigative arm has about 28 to 29 cases on hand to be investigated, of which it is confident of disposing 12 that are on the verge of completion, the official said.

By the end of the financial year, 31 March 2013, the CCI’s investigative arm expects to issue about 30 reports pertaining to antitrust investigations, having issued around 18 so far. The investigative arm has not as yet been asked to investigate merger reviews, but should there be a Phase II investigation, the director general and his team could be asked to investigate.

by Freny Patel in Mumbai
POLICY PROGRESSION
Focus on cartels may spur surge in leniency applications

Cartels are currently regarded as the worst violators of Russian competition law, according to local competition attorneys. In 2012, amendments to article 178 of the Criminal Code of the Russian Federation updated cartel-related legislation in the country. These amendments criminalised cartels and repeated abuse of dominance but have decriminalised “vertical” agreements. Before 2012, the wording of article 178 was so broad that it could be applied to any agreement or action limiting competition, including vertical agreements. Since the law was put into effect, the circle of competition-restricted agreements and actions has significantly narrowed, explained Nadia Goreslavkaya, an associate at Baker & McKenzie – CIS in Moscow.

The amendments to article 178, dated 6 December 2011, are technically known as No. 401-FZ on Amendment to the Federal Law On Protection of Competition and Certain Legislative Acts of the Russian Federation. They came into effect on 6 January 2012.

In 2013, the Federal Antimonopoly Service (FAS) is likely to start cooperating with the Ministry of Internal Affairs and the Russian Police Service to fulfil its newfound enforcement powers. During a telephone conference organised by the Antitrust Section of the American Bar Association (ABA), Andrey Tsyganov, the deputy head of FAS, noted that the agency saw itself as a “full scope” competition authority, able to detect and suppress cartels through its involvement at every stage of the law enforcement process, from evidence gathering to case handling to trial.

In 2013, high-profile cartel investigations, coupled with the increased severity in punishment, could lead to a soaring number of leniency applications. Speaking during the same teleconference, Vassily Rudomino, a partner at the ALRUD law firm in Moscow, said that leniency applications have increased substantially since 2009, primarily due to the more severe criminal and civil sanctions introduced at that point.

TARGETED SECTORS & CASES
Strategic sectors continue to be protected

FAS will initiate additional fisheries cartel investigations soon, Alexander Kinyev, the head of FAS’ cartel division, told PaRR in November 2012. FAS initiated proceedings into the Norwegian fish supply sector in October 2012 that involved the Russian Fish Company, a leading distributor. It also recently began investigating a suspected pollock fishing cartel, involving 53 fisheries and 46 fishing companies serving Asia.

Like cartel investigations, abuse of dominance cases will continue to be important for the FAS in 2013, Voznesenskiy predicted. The quantity and importance of such cases would not diminish, according to Voznesenskiy.

Nikolay Voznesenskiy, the head of the competition and antitrust practice at Goltsblat BLP, said that FAS is likely to continue initiating some cartel cases in the healthcare sphere because distribution of pharmaceuticals, particularly when related to state procurement tenders, is constantly within the FAS investigatory sphere.

2013 Global Antitrust Trends – PaRR Special Report
Abuse of dominance cases will continue to generate the highest fines and these have traditionally been initiated in the mineral extraction, transport and energy sectors, he added.

FAS is likely to conduct comparatively fewer investigations in the fast-moving consumer goods (FMCG) retail area because of some recent self-regulation in this sector, Voznesenskiy noted. However, the agency will continue to scrutinize the automobile sector, which has historically been an area of focus. FAS is likely to hone its attention on automobile producers in order to further reform the distribution of vehicles and spare parts. Alternatively, FAS could introduce some sector regulations, Voznesenskiy suggested.

Russia is expected to continue actively protecting its strategic sectors and companies in 2013.

This year, the European Commission’s (EC) investigation into alleged abuse of dominance in the Central and Eastern European (CEE) gas market by Gazprom is likely to be the highest profile Russia-related regulatory case, sector lawyers said. In response to that investigation, on 11 September 2012, Vladimir Putin, the president of the Russian Federation, signed a decree on “measures to protect the interests of the Russian Federation during engagement by Russian legal entities in foreign business”, which came into effect on the day of its official publication.

In response to that investigation, on 11 September 2012, Vladimir Putin, the president of the Russian Federation, signed a decree on “measures to protect the interests of the Russian Federation during engagement by Russian legal entities in foreign business”, which came into effect on the day of its official publication.

Back in September 2011, the EC conducted dawn raids at the premises of affiliates of Gazprom and the EC subsequently opened formal proceedings against Gazprom in September 2012. However, PaRR recently reported that the EC is unlikely to release a Statement of Objections (SO) in this investigation until late 2013. The view that the SO in the Gazprom investigation would not come until well into 2013 was shared by a second London-based energy antitrust lawyer.

The lawyer said the situation had been dragging on and the earliest the SO will come is by summer break. The lawyer also said that a link to oil prices in many of Gazprom’s long-term contracts with buyers was key to the current abuse of dominance case against the Russian group.

“Putin is rock solid behind Gazprom and it is very unlikely that there will be a negotiated settlement. If it can be proved that there is an economic effect from the link with oil prices, it would really have to be litigated,” said the lawyer.

The lawyer was quick to note that Gazprom currently supplies some 25% of the EU’s natural gas.

FAS last year also initiated a case against China-based Pacific Andes because of the conglomerate’s dominance in the Russian pollock market, which is regarded as strategic. In November 2012, Russia’s Foreign Investment Commission ordered the Chinese group to sell its fishing assets in Russia, as the assets had been acquired illegally. These cases illustrate the willingness of the Russian Government to protect its strategic assets not only through FAS, but also through new legislation and Russia’s Foreign Investment Commission.

**INSTITUTIONAL DEVELOPMENTS**

**WTO ascension, IP rights, and a move to pre-consummation review**

Russia’s newly minted membership in the World Trade Organisation (WTO) is expected to accelerate M&A deals in Russia.

“We’ve been expecting an uptick in M&A in Russia – and accession to the WTO should accelerate that,” Chris Weafer, chief strategist with Troika Dialog/Sberbank, said.
Andrey Goltsblat, managing partner of Goltsblat BLP, the Russian practice of London-based law firm Berwin Leighton Paisner LLP, meanwhile, suggested that “many foreign companies would be interested in M&A deals with Russian players to get some share of the Russian market. [PepsiCo’s] earlier deal with Wimm-Bill-Dann is an illustration that foreign investors are interested in the Russian food market.”

The Eurasian Economic Commission (EEC) is due to develop a model law on competition for the Single Economic Space of Russia, Kazakhstan and Belarus by July 2013, Andrey Slepnev, the minister for Trade of the EEC, told PaRR. Participation in the Customs Union would allow Russia to investigate cross-border issues in Russia, Kazakhstan and Belarus.

Slepnev told PaRR that in the first part of 2013, the EEC plans to present a report about various mutual trade barriers such as administrative hurdles, technical regulations, copyright regulations, customs declarations, tax administration and other issues, that still exist throughout the territory of the Customs Union. After the report is issued, the EEC along with national agencies and the business community, will seek out solutions to overcome such barriers, he said.

The EEC will work in tandem with the WTO. As the only WTO member within the existing Customs Union, Russia will make sure that the bodies coexist within their respective legal frameworks, Andrew Tochin, the director of the trade policy department at the EEC, told PaRR.

In 2013, Russia is expected to continue addressing such important regulatory issues as the development of intellectual property (IP) rights, the regulation of the energy and infrastructure sectors, and improvement of the investment climate.

According to a High Commercial Court of Russia spokesperson, a court devoted to IP rights, fully endowed as a legal entity, will be established by February 2013.

To become operational, the court needs at least 15 judges and final approval from the High Commercial Court. At present, 11 judges are appointed, the spokesperson told PaRR.

FAS is expected to actively participate in IP discussions, because the agency is aiming to supervise some IP cases that involve competition, said Voznesenskiy.

The regulatory framework of the Russian electricity network must also be fully overhauled prior to an extensive privatisation programme, Deputy Prime Minister Arkady Dvorkovich told a London conference in September. He added that a new regulatory framework was needed for the Russian rail network. A de facto state monopoly in the rail cargo transport sector is the key regulatory issue to be dealt with in this area.

As part of this agenda, FAS also recently initiated the reform of M&A-related legislation to get rid of post-merger notifications, said Voznesenskiy. This change is likely to come into force in May 2013, added Oleg Moskvitin of Muranov, Chernyakov & Partners.

Torsten Syrbe, a partner in the corporate practice at Clifford Chance in Moscow, said that the Russian parliament, the Duma, is currently considering the FAS draft bill.

Syrbe said that the post-consummation clearance regime has not been of much relevance to cross-border transactions, as such deals almost always require clearance before merging operations. The current process has in fact been a significant burden for small domestic deals, especially in real estate transactions, according to Syrbe.

In November 2012, FAS head Igor Artemyev met with President Putin to discuss proposed changes to Russia’s strategic investment legislation. The new legislation would exclude some companies from the list of strategic investments. Local lawyers told PaRR that they expect the process of amending the Strategic Investment Law to take up to another year.

In 2013, FAS is likely to undergo some internal changes designed to make the agency a more effective regulator. On 28 December 2012, the government introduced a road map to further the interests of competition within Russia, according to Syrbe.

FAS will introduce new assessment criteria for its employees to become more accountable for the kind of superfluous investigations that are ultimately quashed in courts, Voznesenskiy said. This policy is designed to decrease the quantity and improve the quality of FAS investigations, he explained.

However, Syrbe offered a note of caution regarding FAS’ reputation as one of the more competent and transparent agencies within the Russian Government.

FAS enjoys a high amount of esteem due to the progress it has made in these regards, but Syrbe said that much still depends on the individual case-handler assigned to a matter. “Foreign investors can find themselves in very frustrating situations, especially where a difficult case requires a substantive discussion between the company, its legal counsel and FAS. And this is very different from the EC, US and other sophisticated competition bodies.”

by Natalia Lapotko in Moscow and Oliver Adelman in London
POLICY PROGRESSION
Antimonopoly Act amendment bill on agenda

The hearing procedures for the Japan Fair Trade Commission (JFTC) will come under intense scrutiny in 2013, an official at the powerful Keidanren business lobby told PaRR.

New Prime Minister Shinzo Abe, and the new government under his Liberal Democratic Party (LDP), is set to face calls this year to resubmit a bill to amend the Antimonopoly Act (AMA) to the Japanese Diet, the official explained.

After requests from business leaders, led by Keidanren, the previous Democratic Party government submitted the bill in March 2010. It was never a priority for the Democrats, however, and was not debated in the Japanese Diet in the ensuing two years. The bill fell by the wayside after Japan’s 16 December 2012 parliamentary elections and the arrival of Abe and the LDP.

At the heart of the amendment debate are the JFTC’s hearing procedures on alleged antitrust violations. Under the existing AMA, the agency conducts investigations and issues cease-and-desist orders to parties accused of violating the AMA. Parties that choose to contest a JFTC order may request an administrative hearing before a tribunal that is roughly equivalent to the UK’s Competition Appeal Tribunal.

The AMA amendment bill, which antitrust lawyers expect the new government to present to the Diet as early as March, would abolish the JFTC hearing procedure altogether, but allow parties to challenge a JFTC order by filing a lawsuit directly with the Tokyo District Court. Many business groups have challenged the fairness of the hearing procedure currently in place, arguing that the JFTC serves as both prosecutor and judge.

“The JFTC’s hearing system must be abolished,” she added. “If the JFTC is aware that its cease-and-desist orders will ultimately be checked by the neutral Tokyo District Court, it would strive to exercise sound judgment.”

Keidanren’s view reflects the business group’s concern that JFTC cease-and-desist orders contested by parties accused of violating the AMA have rarely been overturned since the 2005 amendment, with one exception.

Antitrust leadership vacancy, hearing procedure emerge as hot topics

- Amendment to appeals procedure adds legitimacy to regulator
- Brief merger reviews expected as compliance cited as hastening factor
- Exit of well-regarded antitrust chief leaves big shoes to fill

“Such a self-conclusive system will always be distrusted with respect to the fairness of its hearing proceedings,” said Teruko Wada, a lawyer and manager in the Nippon Keidanren’s business infrastructure bureau.
In June 2012 the JFTC rescinded the cease-and-desist order against the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC), four years after an initial on-site inspection. The JFTC had issued a cease-and-desist order against JASRAC in February 2009, saying its comprehensive collection of royalties for musical works in the field of broadcasting violated the AMA.

Keidanren says the regulator’s existing appeal process falls far short of US/European rules by not fully ensuring standards of due process or the predictability of enforcement.

Shinya Watanabe, an antitrust lawyer at Jones Day, noted that approximately 40% of the cease-and-desist orders issued by the European Commission have been rescinded in court. But even if the JFTC’s hearing procedures were abolished, Watanabe added, the Tokyo regional court would still be unlikely to overturn orders since it would only examine a fraction of the data originally available to the regulator.

Critics of the proposed amendment point out that it comes with some negative repercussions. Akira Negishi, a professor at Konan University law school, has opposed the abolition of the hearing procedure, sharing concerns that the Tokyo regional court would not have the necessary expertise to judge antitrust violations.

Similarly, the National Liaison Committee of Consumers’ Organization, which filed a petition on behalf of consumers in March 2010, argues that the abolition of the JFTC hearing procedure would challenge the latter’s role as an independent administrative expert.

“The abolition of the hearing procedure would weaken JFTC’s independence, its enforcement power and ultimately be against the best interest of consumers,” a committee spokesperson said.

“The abolition would turn the JFTC into an ordinary administrative organization, putting antitrust enforcement into political hands,” Konan University’s Negishi argued.

**TARGETED SECTORS & CASES**

**Speedier merger reviews**

In 2012 the JFTC cleared the USD 8.8bn merger of Japan’s largest steel maker Nippon Steel and its third largest rival Sumitomo Metal Industries after a 10-month review that went to Phase II.

The deal was the Japanese steel industry’s first large merger in a decade, leading to the creation of the second-largest steel company
in the world. It was also the JFTC’s first major merger review following the amendment of its business combination regulations, which came into effect in July 2011.

Masanori Fukamachi, senior officer for mergers and acquisitions at the JFTC, said the merger was approved much faster than usual “because every participant communicated smoothly and cooperated in a speedy manner”.

The JFTC is spending much less time on reviews than it previously had, as further witnessed by its approval of subsequent deals such as the merger between the Osaka Securities Exchange and the Tokyo Stock Exchange.

The planned merger between Japan’s largest aluminum maker Furukawa-Sky Aluminum and its number-two rival Sumitomo Light Metal Industries has been undergoing a JFTC Phase II review since 28 September 2012. The deal has also been attracting attention as to whether the JFTC will make another speedy decision as it did on the Nippon Steel/Sumitomo Metal merger.

“We did not treat the earlier cases as an exception,” said a JFTC official. “It does not make sense to spend too much time on reviews and delay consolidation.”

If the JFTC uses the same timeline in the aluminum deal as it used for the steel, the competition authority should complete its Phase II review by March 2013.

INSTITUTIONAL DEVELOPMENTS

Reshuffle at the JFTC

Meanwhile, the ruling LDP government has yet to announce the names of candidates to fill the JFTC chairman seat, which has been vacant for more than three months since Kazuhiko Takeshima departed the post at the end of September 2012.

Tokyo-based antitrust lawyers and JFTC officials agreed that, in formulating policy, the new JFTC chairman will be expected to toe the line established by the previous incumbent.

Known in Japan as “the watchdog that barks”, Takeshima forged a stellar reputation during his 10-year tenure. Among his achievements, he lifted bid-rigging surcharges, radically reduced the number of bid-rigging cases, and introduced comprehensive new merger review guidelines.

Kazuyuki Sugimoto, a former vice finance minister and currently a director at Mizuho Research Institute, is rumored to be among the top candidates to fill the vacant seat, one antitrust lawyer said. His appointment would follow a pattern of retired vice ministers from Japan’s Ministry of Finance filling the role. Takeshima himself was a former commissioner within the ministry’s National Tax Administrative Agency.

Further potential changes within the JFTC, relating to the AMA amendment bill, will be contingent on political developments. When to resubmit the AMA amendment bill will be a combined decision of the ruling LDP and its coalition party Komeito. And some observers see Komeito as a possible opponent to the amendment, due to the party’s concerns about its implications for the Japanese consumer. However, Komeito’s representation in the coalition is small and lawyers told PaRR that it is unlikely to raise major objections.

Tetsuji Yokote, director of planning at the JFTC’s economic affairs bureau, said the government is in the middle of discussions on how to handle the amendment issue. The JFTC had already approved details of the amendment when the Democratic Party submitted the bill in 2010, he pointed out.

The ideas behind the amendment originated under the LDP, before the Democratic Party submitted the bill in 2010.

“This means both the ruling LDP and the opposition Democratic Party support the bill,” an antitrust lawyer said, adding that the JFTC has already reduced the number of staff in charge of its hearing procedure.

by Norie Hata and Yuzo Yamaguchi in Tokyo
Asia is expected to make antitrust waves in 2013, as competition laws could be introduced for the first time in many countries and get strengthened in others. The change has long been predicted, with much of the region openly striving to follow in the footsteps of the US and Europe.

There are some similarities in the way Asian countries have introduced their competition laws. For instance, merger control does not seem to be favoured in countries like Hong Kong and Malaysia, which have refrained from introducing merger review at the initial stage, contrary to standard practice around the world. Rather, many Asian countries are likely to focus on advocacy in 2013, as many regulators feel there is a vital need to educate companies on the need to change business practices that are perceived to be anticompetitive.

In Malaysia and Taiwan, regulators have proposed the formulation of clearer guidelines as competition law is still a new concept for nearly all domestic companies, which need to change the way they conduct their day-to-day business. Singapore amended its merger control regulations last year, and more changes are likely this year. Other Asian countries like the Philippines and Thailand are expected to start introducing the actual, practical implementation of competition law, in keeping with the 2015 deadline for the member states of the Association of Southeast Asian Nations (ASEAN). This 2015 deadline called for the introduction of competition law by member states as a prerequisite for the ASEAN member countries in fulfilling the goals of the 2007 ASEAN Economic Blueprint.

The president of the Philippines has been urged to certify his country’s antitrust bill and thereby create the Philippine Fair Competition Commission. The agency would regulate anticompetitive behavior and improve the business climate, which should in turn encourage greater foreign investment.

HONG KONG

New law recently unveiled, but no merger control yet

Hong Kong is the latest Asian nation to introduce a competition law. While there was initially some anxiety that the new law could affect the laissez-faire style of business in the region, most antitrust lawyers expect the law will not be enforced for at least 12 to 15 months.

Preparation is likely to take at least one year, as the Competition Commission needs to formulate regulatory guidelines, carry out consultations, and conduct public programs to promote understanding and awareness, said Gregory So Kam-leung, the secretary for the Commerce and Economic Development Bureau (CEDB) in Hong Kong. Details for the operation of the Competition Tribunal must also be worked out. Some provisions of the Competition Commission came into effect on 18 January, but the Tribunal will only be enacted on 1 August 2013.

The Hong Kong government has decided not to introduce merger control, except in the case of the telecommunications sector. “This does not come as a surprise, given the size of the marketplace and its preference to focus on behavior rather than distort the market,” said one China-based antitrust lawyer with experience in Hong Kong.

Though M&A deals will largely not require the approval of the new competition agency, Margaret Wang, counsel at Freshfields Bruckhaus Deringer, told PaRR that parties involved in the sale of a Hong Kong company with a substantial interest in China may have to assess the need to file for a merger control clearance with the Chinese authorities based on the revenue figures for the parties involved in the deal.

There is immense potential for the new commission if it decides to take action against abuse of dominance in the territory’s real estate, retail, transportation, and telecommunications sectors, said another
Hong Kong-based lawyer. Some conglomerates in Hong Kong have the ability to exert pressure and influence government policies, the lawyer noted. As such, there is concern regarding the agency's level of independence and transparency.

Yet, businesses have already started aligning their practices with the expected changes in the law by modifying agreements that could be perceived as being anticompetitive, Hong Kong-based lawyers said. Chinese-language newspapers, for instance, announced changes to their earlier pricing agreements, and some have decided to distribute their papers free of cost, said Marc Waha, a partner and antitrust attorney at Norton Rose in Hong Kong.

**INDONESIA**

Regulator seeks greater cooperation with sector peers

The Indonesian government is tightening rules on share ownership, and the country's competition regulator, Komisi Pengawas Persaingan Usaha (KPPU), is taking a tougher stand on merger notification, antitrust lawyers said.

Late last year, KPPU issued three new M&A regulations, most notably including penalty guidelines for delays in merger notification.

With changes being made in M&A laws governing the banking, oil and gas, and telecommunications sectors, KPPU is also seeking to overhaul the 1999 antimonopoly law, an Indonesian lawyer told PaRR. It is calling for a more integrated approach between sector regulators and the competition regulator to ensure good business practices and free competition.

**MALAYSIA**

Encouraging merger activity ahead of merger control

If Malaysia's longstanding ruling party, Barisan Nasional, loses the general election this year, merger control guidelines could possibly be drafted and made into law quite soon, said Muni bin Abdul Aziz, an equity partner with Baker & McKenzie.

However, the CEO of the Malaysia Competition Commission (MyCC), Shila Dorai Raj, said the introduction of merger review any time soon is unlikely. Her views were echoed by other antitrust lawyers, who said that Malaysia, as a developing nation, would like to instead encourage mergers.

The MyCC is still in a formational stage as an institution and, because merger reviews require a massive task force, instituting such a regime remains a daunting challenge, Raj told PaRR.

Nevertheless, Aziz hopes for a greater emphasis on competition law advocacy and education to take place this year. People need to be aware that, when they submit tenders or contracts or bid for projects, they should not be talking to other bidders in connection to their respective bids as is the case today, he explained.

Ultimately, it will be some time before real changes occur in the way Malaysian companies conduct business, he predicted.

MyCC is actively scrutinizing cartels and trade associations in order to identify whether there is any collusion and/or price fixing among them, said Aziz.

The regulator needs to formulate clearer guidelines for individuals to follow, Aziz noted, repeating that what is obvious to the West are still new concepts to this part of the world.

One of the many cases MyCC is currently investigating is that of the alleged violation of competition law in the domestic steel sector. The Melewar group, which controls Melewar Industrial Group (MIG) and Mycron Steel, filed a complaint with MyCC against Megasteel Sdn. Melewar’s subsidiaries produce cold rolled coil (CRC), the main raw material for which is hot rolled coils (HRC). Megasteel is the main producer of HRC and also a competitor in the manufacturing of CRC. Melewar reportedly alleged that Megasteel had adopted unfair pricing in the sale of its products.

**SINGAPORE**

Balancing business-friendly approach with increased merger notification

The Competition Commission of Singapore (CCS) is keen to minimize the regulatory burden on business, but mergers that are not filed with the commission will indeed attract investigation, said Adam Nakhoda, a deputy director at the Commission.

Singapore follows a voluntary merger notification regime, but Nakhoda said some parties have taken unnecessary risks by not notifying transactions. In 2012, the CCS received and cleared only a handful of merger cases in the steel, telecommunications, and hard disk drive manufacturing sectors, according to public records.

The CCS would like to retain its business-friendly approach but also its transparency. So from 1 July 2012, the agency revised guidelines for merger procedures, aiming to increase transparency, streamline the process, and minimize the notification burden.
The CCS stresses that it remains committed to applying a timely and transparent process. According to the regulator, it has completed 86% of merger reviews within 30 working days, though this statistic was generated from a period with relatively few merger filings, said one of the lawyers.

Merging parties may, under the revised guidelines, request that the CCS provide a confidential opinion on a merger, Gerald Singham, partner from Rodyk & Davidson LLP, told PaRR. Two other Singapore-based lawyers said the recent amendments in merger control could result in a greater number of merger filings.

In addition to keeping a watch on merger filings, the CCS is expected to finalize its infringement decision against ferry operators for unlawful exchange of price information in 2013, which Nakhoda said is the CCS’ first case involving price information exchange.

Since its inception in 2006 the CCS has made seven infringement decisions and has taken on cases involving multinational companies in international cartels, Nakhoda said.

In terms of cartel enforcement, Nakhoda said the CCS will continue to take robust action against hardcore cartel infringements, as well as price-fixing, bid-rigging, and abuse of dominance. The CCS can also intervene in a market without taking formal enforcement action, as well as head off anticompetitive practices by active surveillance and targeted outreach, he added.

As to leniency issues, Nakhoda said that criminalization is still not in the cards, but there will be a legislative and guidelines review in 2013. While the leniency program has already attracted multinational companies, local groups still shy away from it, he added.

### VIETNAM

**Agency strains to strengthen laws, further independence**

The Vietnam Competition Authority (VCA) has proposed a strategy to bring its laws in line with developed nations such as the US and Japan. However, antitrust lawyers feared that politics could prevent any meaningful change. VCA’s helplessness was recently demonstrated by a hike in prices by fuel companies operating in the same space, thereby violating Article 13 of the Competition Law. However, as one of the companies, Petrolimex, has a 60% market share and is governed by the Ministry of Industry and Trade, as is VCA, the regulator was constrained by its lack of independence.

Meanwhile, the VCA is also looking to revise the way it defines markets in order to make the regulator more open and flexible for applications that do not neatly fall into rigid categorization. Antitrust lawyers anticipate that more complaints will be lodged with the VCA when the regulator is allowed to modify Article 58 of the Competition Law, which today places the burden on the complainant to provide evidence of violation.

Similar to Taiwan’s competition regulator, the VCA has proposed to increase the processing time for merger review, given the complexity of some competition cases that require both analysis of legal provisions and economic analysis. Otherwise the accuracy of the decision of the council regarding an investigation case could be negatively impacted, the regulator said.

by Freny Patel in Mumbai, Eliot Gao in Beijing and Perris Lee in Taipei
Editorial Contacts

Hong Kong
Tom Cane
+852 2158 9715

São Paulo
Ana Mano
+ 55 11 3081 8272

Brussels
Evelina Kurgonaite
+32 2 548 9553, +32 4 798 30413

Tokyo
Yuzo Yamaguchi
+81 3 3597 2054

London
Oliver Adelman
+44 20 7010 6228

Mumbai
Freny Patel
+91 22 43686012

New York
Yanita Morris
+ 1 212 500 7542

Shanghai
Joy Shaw
+8621 688 63001

Sydney
Mike Ross
+ 61 2 9467 6654

Washington
Reuben Miller
+1 202 434 1070