CLEARY GOTTLIEB

Asian Competition Report

JULY – SEPTEMBER 2012

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CHINA

SAIC discloses information about AML enforcement

At a conference in August, a State Administration for Industry and Commerce ("SAIC") official told participants that SAIC had authorized several of its provincial agencies to investigate 16 antitrust cases (four of the investigations have been completed), one of which involves suspected abuse of market dominance and the rest involving anti-competitive agreements. In addition, the official reported that SAIC would improve its public disclosure regarding antitrust cases and that SAIC was developing a framework to guide the publishing of SAIC's antitrust enforcement decisions.

MOFCOM conditionally approves Walmart/Yihaodian

On August 13, the Ministry of Commerce ("MOFCOM") conditionally cleared the acquisition by Walmart of an additional 33.6% of Niuhai Holdings ("Niuhai") (the "Transaction"), which increased Walmart's interest in Niuhai to 51.3%. According to MOFCOM, the Transaction gave Walmart control over Niuhai's subsidiary, Niuhai Shanghai, and Shanghai Yishiduo E-commerce Co., Ltd. ("Yishiduo"), a variable interest entity ("VIE") controlled by Niuhai Shanghai.[1] Yishiduo operates "Yihaodian", an online shopping platform whose business consists of both online direct sales and a value-added telecommunications business ("VATB"). The VATB provides online trading platform services to third parties.

VATB is subject to foreign investment restrictions in China. Pursuant to China's *Provisions for the Administration of Foreign-invested Telecommunications Enterprises*, foreign investors cannot hold more than a 50% equity interest in a Chinese telecommunications enterprise that provides value-added telecommunications services. The VATB of Yishiduo is a value-added telecommunications service and, therefore, its operator must hold an internet content provider ("ICP") license from the Chinese telecommunications regulator.

MOFCOM determined that the relevant market is the Chinese business-to-consumer online retail market. It explained that Walmart is a key competitor in the global and Chinese supermarket sectors and that Yihaodian is the largest online supermarket in China. It held that post-transaction, Walmart may be able to rely on the combined competitive advantages of its existing brick-and-mortar supermarket business and the online retail business to restrict competition in the VATB in China.

MOFCOM imposed three conditions on the Transaction: (i) the scope of the Transaction was limited to Yihaodian's online direct sales business, which, in practice, meant that Niuhai Shanghai had to segregate Yishiduo's VATB (Niuhai Shanghai and Yishiduo have reportedly transferred the VATB to a new entity while Yishiduo continues to operate the online direct sales business); (ii) Niuhai Shanghai was prohibited from providing online trading platform services to third parties without first obtaining an ICP license; and (iii) upon completion of the Transaction, Walmart was prohibited from engaging in the current VATB of Yishiduo through a VIE structure (employing contracts to give Walmart *de facto* control over the ICP license without directly holding any equity interest in the Chinese entity (i.e., the VIE) that actually owns the ICP license).

While the decision does not articulate a clear theory of harm that would justify the imposition of remedies, the decision's reference to leveraging of Walmart's strength in other markets suggests that MOFCOM applied a conglomerate effects theory as it did in its 2009 *Coca Cola/Huiyuan* prohibition decision. As we noted then, this theory of competitive harm was abandoned years ago in the United States and is applied by the European Commission only rarely and where there is compelling evidence of harm. It is also interesting that MOFCOM chose to use the antitrust merger control process to reinforce its existing authority over foreign investment policy (which would allow it to regulate investment in a restricted or prohibited sector). As MOFCOM's approach to the VIE structure continues to be a hot topic, parties currently employing VIEs or considering their use to facilitate inbound M&A should continue to closely monitor MOFCOM's views on this subject.

1 It appears that Niuhai Shanghai controls Yishiduo through a series of agreements rather than by owning its equity. MOFCOM did not disclose the details of this arrangement in its decision.

INDIA

CCI declares merger notice invalid due to early filing

Section 6(2) of the Competition Act 2002 (the "Act") provides that "any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission ... within thirty days of – (a) approval of the proposal relating to the merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation as the case may be; (b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section".

On July 16, Aditya Birla Nuvo Limited, Peter England Fashions and Retail Limited, Indigold Trade and Services Limited, Pantaloon Retail (India) Limited, and Future Valley Fashion Retail Limited (collectively, the "Parties") filed a notice for a proposed transaction under the Act pursuant to a Memorandum of Understanding ("MOU") dated June 14, 2012. It was stated in the notice that the transaction was yet to be approved by the Board of Directors of the Parties and that the Parties had yet to finalize the exact scope of the assets to be acquired and the share entitlement ratio.

On August 14, the Competition Commission of India ("CCI") declared that it did not accept the contention of the Parties that the signing of the MOU and Subscription and Investor Rights Agreement (the "Agreement") triggered Section 6(2) of the Act because the signing of the MOU and Agreement were only steps towards negotiations between the parties regarding finalization of the scheme, valuation, exact scope of the assets to be acquired, share entitlement ratio, and approval of the same by the Board of Directors of the Parties. The CCI also observed that under the terms and conditions of the MOU, it will terminate immediately upon execution of the implementation agreement or if the scheme is not approved by the Board of Directors of the Parties, and as such is an interim arrangement. The CCI notes that under Regulation 31 of the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations 2011 (the "Combination Regulations"), the notice in Section 6(2) of the Act has to be filed only in regard to proposals approved by the Board of Directors on or after June 1, 2011 and that the approval of the Board of Directors refers to the final decision of the Board of Directors. As the final decision of the Board of Directors regarding the scheme of the proposed merger and demerger was yet to be taken, the notice filed was not in accordance with Section 6(2) of the Act and Regulation 31 of the Combination Regulations.

Cement company fined for bid rigging

On July 30, the CCI passed an order against 11 cement companies, including Shree Cement Limited ("Shree"), and their trade association, the Cement Manufacturers Association, finding cartel activity. In the order, the CCI imposed a penalty on Shree of 0.5 times net profit for 2009-2010 and 2010-2011. This equaled INR 4 billion (~$75 million; €58 million). The CCI did not fine the other cement companies, which were already penalized in the CCI's June 2012 decision.[2]

Indian competition authorities sign MOU with FTC and DOJ

On September 27, the CCI and the Government of India Ministry of Corporate Affairs signed a Memorandum of Understanding ("MOU") with the U.S. Federal Trade Commission and the Department of Justice to promote increased cooperation and communication between competition agencies in both countries. The scope of the MOU includes technical cooperation activities related to competition law enforcement and policy. In addition, subject to reasonably available resources, they may jointly engage in appropriate activities in furtherance of that interest, such as, *inter alia*: (a) participating in training courses on competition law and policy organized or sponsored by one another; and (b) providing assistance, where appropriate, in promoting understanding of sound competition policy among important supporting institutions, government agencies, the business community, bar associations, academic institutions, *etc*. The MOU concerns cooperation in *"competition law enforcement"* but the precise parameters will be detailed in a workplan that is yet to be adopted. The MOU states that "it is understood that the U.S. and Indian competition authorities do not intend to communicate information to the other if such communication is prohibited by the laws governing the agency possessing the information or would be incompatible with that agency's interest."

CCI investigates behavior in cable landing station market

In September 2012, the CCI reportedly initiated an investigation, *suo moto*, into allegations that telecom companies were "taking advantage of control over cable landing stations and charging a high landing fee." Submarine cable systems surface and transfer signals to the domestic network at cable landing stations, 85% of which are owned by Tata Communications Limited ("TCL") and Bharti Airtel Limited ("BAL"). Landing station owners are required to give access to the submarine cable systems without discrimination but they are permitted to fix fees for doing so. Foreign telecom companies

2 *See* Cleary Gottlieb's Asian Competition Report for the Second Quarter of 2012.

(including AT&T, Verizon, and Cable and Wireless) have alleged that TCL and BAL are abusing their dominant positions in the market by charging a fee much higher than that charged in other countries. It is also alleged that TCL and BAL are holding back consumption of bandwith in India by setting the tariff at this higher level. TCL and BAL defend their fees on grounds of costs.

SINGAPORE

CCS fines ferry operators for information exchange

In July, the Competition Commission of Singapore ("CCS") fined two ferry companies for exchanging information. This is the first time CCS has found companies in breach of the competition law solely for the exchange of competitive information.

CCS says the companies exchanged emails containing ticket prices and company quotations. The two companies, Batam and Penguin, were fined S$173,000 (~$140,000; €110,000) and S$114,000 (~$93,000; €73,000), respectively. According to CCS, because it is the first case regarding information exchange, it has "set the financial penalty at a relatively lower level".

SOUTH KOREA

KFTC issues fine for unfair support of affiliates by Korean conglomerates

In July, the Korea Fair Trade Commission ("KFTC") for the first time in its history fined two Korean conglomerates for unfairly supporting their affiliates. Seven affiliates of the SK Group, including SK Telecom, collectively were fined approximately KRW 35 billion (~$32 million; €25 million) for having provided business to an affiliate, SK C&C, under extremely favorable terms. Likewise, Lotte PS Net Co., Ltd., one of Lotte Group's companies, was fined KRW 649 million (~$596,000; €468,000) for purchasing automated teller machines ("ATMs") indirectly through its affiliate, Lotte Aluminum Co., Ltd., providing unfair intermediary sales margins to the affiliate without creating any economic efficiency, when such purchase could have been directly made from an ATM maker.

KFTC amends market dominance review guidelines and cartel review guidelines

On August 13, the KFTC amended its guidelines for the review of abuse of market dominant position, effective as of August 21, 2012, to add a new section describing the standards for determining anticompetitive effect. This new section lists the following five illustrative factors to be considered when analyzing the potential for anticompetitive effects in market dominance cases: (i) any increase in price or restriction in output; (ii) restrictions on the diversity of products or services available or the number of viable competitors; (iii) harm to innovation; (iv) foreclosure / increased barriers to competitors' market entry or expansion; and (v) increase in competitors' or potential competitors' costs.

On August 20, the KFTC adopted new amendments to its cartel review guidelines (the "Amendments"), also effective as of August 21, 2012. The Amendments provide that, among other things, (i) an agreement made by only some of the participants in a transaction or bid may be found illegal; (ii) multiple collaborative acts with a common intent and purpose that were performed continuously may be viewed as a single cartel; (iii) the existence of compliance monitoring system and imposition of sanctions on violators may result in a presumption of anticompetitive effect; and (iv) a general market analysis is required even in hardcore cartel cases.

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