CLEARY GOTTLIEB

Asian Competition Report

JULY – SEPTEMBER 2011

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This is the tenth edition of Cleary Gottlieb's Asian Competition Report, covering major antitrust developments in Asian jurisdictions. We hope you find this Report interesting and useful.

CHINA

Brussels partner meets with MOFCOM delegation

On July 7, Brussels partner Till Müller-Ibold gave a presentation titled "EU Competition Policy and Financial Institutions in the Financial Crisis" at the China mission to the EU. A group of Ministry of Commerce ("MOFCOM") officials, including Vice Minister Gao Hucheng, who currently leads MOFCOM's Anti-Monopoly Bureau, were present.

China's antitrust enforcement agencies sign MOU with US counterparts

On July 27, the National Development and Reform Commission ("NDRC"), MOFCOM, and the State Administration for Industry and Commerce ("SAIC") signed an Antirust Memorandum of Understanding ("MOU") with their US counterparts, the Federal Trade Commission and Department of Justice.

The MOU formalizes the existing cooperation among the agencies. It also lists several specific areas for cooperation, including:

- Keeping each other informed of significant competition policy and enforcement developments;
- Enhancing each agency's capabilities regarding competition policy and law;
- Exchanging competition law enforcement experience;
- Exchanging information and advice regarding matters of competition law enforcement and policy;
- Providing comments on proposed changes to competition rules;
- Exchanging views with respect to multilateral competition law and policy; and
- Sharing experience regarding raising awareness of competition policy and law.

The MOU also contains a confidentiality provision, which requires a recipient to maintain the confidentiality of any information communicated to it in confidence.

MOFCOM issues final national security review rules

On August 25, MOFCOM issued final rules regarding China's national security review scheme for transactions by foreign investors ("Circular 53"). Circular 53 became effective September 1, 2011, and replaced the Interim Provisions of the Ministry of Commerce on Matters Regarding the Implementation of the Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the "Interim Rules").[1] The national security review scheme was initially established by China's cabinet in February 2011 via the Notice on Establishing Security Review Mechanism for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.[2] Most of Circular 53's changes to the Interim Rules are minor. That said, however, foreign investors should be aware of certain changes to the Interim Rules.

For example, Article 9 of Circular 53 adds an anti-circumvention clause. This clause emphasizes that MOFCOM will look into the "substance and the actual impact" of a transaction when assessing whether the transaction is subject to national security review. Specifically, Article 9 states that foreign investors may not circumvent national security review by structuring a transaction using nominee holdings, trusts, multiple levels of re-investment, leases, loans, agreements granting contractual control, offshore transactions, or any other method. The anti-circumvention clause and its use of the term "contractual control" once again raises the legality of the variable-interest entity ("VIE") structure in China and likely provides MOFCOM with the legal basis to examine certain VIE structures.

For additional details regarding Circular 53, please refer to the firm's alert memo available at http://www.cgsh.com/mofcom_issues_final_national_security_review_rules/.

1 For additional details regarding the Interim Rules, please refer to the firm's alert memo available at http://www.cgsh.com/chinas_mofcom_issues_interim_rules_on_national_security_review_ of_foreign_acquisitions/.

2 For additional details regarding the Notice, please refer to the firm's alert memo available at http://www.cgsh.com/chinas_state_council_issues_notice_on_national_security_review_of_foreign_acquisitions/.

MOFCOM issues interim rules on the assessment of the impact of concentrations on competition

On September 5, China's "Interim Rules on the Assessment of the Impact of Concentrations on Competition" (the "Assessment Rules") took effect. The rules provide the first guidance from MOFCOM regarding its substantive assessment of transactions under the Anti-Monopoly Law (the "AML"). The AML lists five factors MOFCOM should consider when analyzing transactions, and the Assessment Rules expand on each of these factors.[3]

In addition to detailing the five AML factors, the Assessment Rules make clear that MOFCOM will analyze a transaction for three competitive effects. First, MOFCOM will consider whether the concentration will create or enhance a single firm's "ability, incentive and possibility" to independently eliminate or restrict competition ("unilateral effects"). Second, if only a few firms compete in the relevant market, MOFCOM will consider whether the concentration will create or enhance the ability, incentive and possibility of these undertakings to jointly eliminate or restrict competition ("coordinated effects"). Finally, when the transacting parties do not compete with each other on any relevant market, MOFCOM will determine whether there is any anti-competitive effect in upstream, downstream, or related markets ("vertical" or "conglomerate" effects). These theories are well established in antitrust law, though EU and (especially) U.S. authorities rarely pursue conglomerate effects theories of harm.

Given the lack of transparency surrounding MOFCOM's merger control process and the short, conclusory nature of the few available merger control precedents,[4] practitioners have been looking forward to the release of the Assessment Rules. While to a large extent the Assessment Rules reflect traditional approaches to antitrust, they are short and vague and leave many questions unanswered. This is particularly disappointing in areas where US and EU guidelines do not provide useful parallels, in particular the role in MOFCOM's assessment of a transaction's effect on competitors or the national economy.

For additional details regarding the Assessment Rules, please refer to the firm's alert memo available at http://www.cgsh.com/chinas_mofcom_issues_interim_rules_on_the_assessment_of_the_impact_of_concentrations_on_competition/.

MOFCOM announces merger review statistics

On September 21, Shang Ming, the Director General of MOFCOM's Anti-Monopoly Bureau, presented statistics regarding MOFCOM's review of transaction in 2008, 2009, 2010, and year to date 2011. In 2008, MOFCOM reviewed 17 transactions, one of which was cleared with conditions. In 2009, 80 transactions were reviewed, four were cleared with conditions, and one was blocked (Coca-Cola/Huiyuan). In 2010, 117 transactions were reviewed, one of which was cleared with conditions. As of August 2011, MOFCOM had received 142 filings, of which 118 had been accepted for review. By that date, one transaction had been cleared with conditions.

Brussels office hosts a meeting with MOFCOM delegation

On September 25, a team from Cleary's Brussels office hosted a meeting with a MOFCOM delegation. In response to the MOFCOM delegation's request we discussed two issues: the treatment of non-antitrust considerations in European merger review and the firm's impressions of Chinese merger review from the perspective of counsel to notifying parties. Cleary and MOFCOM had a lively discussion about these topics

INDIA

Committee drafts National Competition Policy

On July 28, a draft National Competition Policy ("NCP") was submitted to the Ministry of Corporate Affairs. The draft broadly defines the terms competition law and policy ("a proactive and positive effort to build a competition culture in an economy") and explains the need for a national competition policy. The objective of the NCP is to establish an overarching policy framework for infusing competition law principles into various statutes and regulations in order to make the Indian market more competitive and to "unlock fuller growth potential of Indian economy". The NCP lists seven principles: (i) a fair market process (regulations are rule bound, transparent, fair, and non-discriminatory); (ii) institutional separation between policy making, operations, and regulation; (iii) competitive neutrality (such as policies that level the playing field where state owned entities compete with the private sector); (iv) fair pricing and inclusionary behavior (particularly for public utilities and IP rights holders); (v) third party access to essential facilities; (vi) public policies and programs to work towards promotion of competition in the marketplace; and (vii) national, regional, and international cooperation.

3 The five factors are: (i) transacting parties' market share and market control; (ii) the degree of concentration in a relevant market; (iii) the impact on market entry and technology development; (iv) the impact on consumers and other undertakings; and (v) the impact on the development of the national economy.

4 MOFCOM is not required to publish unconditional clearance decisions.

CCI issues record fine for abuse of dominance

On August 12, the Competition Commission of India ("CCI") imposed a fine of Rs. 630 crore (~$127.5 million; €93 million) on the real estate company DLF Ltd. ("DLF") for abusing its dominant position in the residential real estate market. The fine is the largest yet issued by the CCI and amounts to 7% of the company's average turnover during the three preceding financial years. DLF has appealed to the Competition Appellate Tribunal.

CCI launches abuse of dominance investigation against Apple

The CCI received information from consumers that Apple was limiting the availability of its products, such as the iPhone and the iPad, in India by selling them through exclusive partnerships with two telephone service providers. After considering this information, on September 8, the CCI determined that there exists a *prima facie* case of abuse of dominance by Apple. As a result, the CCI has directed its investigative wing, the Office of the Director General, to conduct a detailed investigation.

CCI completes review of first four merger notifications

The CCI has completed its first four merger reviews since the merger control regime came into effect in India on June 1, 2011. Each of the transactions was notified to the CCI in the shorter form and was approved by the regulator within the 30 day time limit for stage-one clearance. The four transactions were:

- Reliance Industries' acquisition of Bharti group's 74% stake in each of two insurance joint ventures with AXA;
- Walt Disney (Southeast Asia) Pte. Limited's acquisition of UTV Software Communications Ltd.;
- G&K Baby Care Private Limited and Danone Asia Pacific Holding Pte Ltd's acquisition of Wockhardt Limited, Carol Info Services Limited, and Wockhard EU operations; and
- Acquisition of a laminates unit of Bombay Burmah Trading Corporation Ltd. by Japanese company Aica Kogyo Company Limited through its Indian subsidiary, Aica Laminates India Private Limited.

SOUTH KOREA

KFTC publishes revised guidelines for cartel leniency application

On July 22, the Korean Fair Trade Commission ("KFTC") published the revised "Notification on Exempting or Mitigating Corrective Measures under Leniency Program" (the "Amendment"). The Amendment aims to enhance the transparency and predictability of the KFTC's cartel leniency program. The major changes are as follows:

- The Amendment lists the reasons the KFTC may cancel a party's leniency status. These are: (i) failure to cooperate fully until the end of the investigation; (ii) providing false documents; (iii) failure to terminate involvement in the reported cartel; (iv) the leniency applicant coerced other members to participate in the cartel; or (v) the evidence submitted to KFTC does not prove the cartel at issue.
- The Amendment expands the scope of materials that may be submitted to support a leniency application such that the KFTC may accept evidence in any form as long as the materials help prove cartel behavior.
- The Amendment permits the KFTC to extend the 75-day period during which parties must provide supporting materials for their application.
- The Amendment provides the KFTC flexibility in calculating the fine reduction for parties that identify a second cartel (commonly known as "Amnesty Plus").

KFTC fines six pharmaceutical companies for illegal rebates

On September 5, KFTC imposed fines of KRW 11 billion (~$9.4 million; €6.9 million) against six pharmaceutical companies – CJ Cheiljedang Corp., Janssen Korea Ltd., Novartis Korea Ltd., Sanofi-Aventis Korea Ltd., Bayer Korea Ltd., and AstraZeneca Korea Ltd. – for offering illegal rebates to doctors, clinics, and hospitals in order to increase drug sales. The KFTC explained that the rebates inflated the cost of prescription medicine.

KFTC amends rules to punish bid-rigging in public procurement

On September 21, KFTC adopted the "Notification to guarantee fair bidding process in public procurement" (the "Notification"). The Notification prevents companies with records of repeated bid-rigging from bidding for public procurement process. Rigging bids for public procurement has been one of the most common breaches of South Korean competition law.

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Contacts

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www.clearygottlieb.com

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: 1 212 225 2000
F: 1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: 1 202 974 1500
F: 1 202 974 1999

PARIS
12, Rue de Tilsitt
75008 Paris, France
T: 33 1 40 74 68 00
F: 33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: 32 2 287 2000
F: 32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: 44 20 7614 2200
F: 44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow 115054, Russia
T: 7 495 660 8500
F: 7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: 49 69 97103 0
F: 49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50668 Cologne, Germany
T: 49 221 80040 0
F: 49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: 39 06 69 52 21
F: 39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: 39 02 72 60 81
F: 39 02 86 98 44 40

HONG KONG
Bank of China Tower
One Garden Road
Hong Kong
T: 852 2521 4122
F: 852 2845 9026

BEIJING
Cleary Gottlieb Steen & Hamilton LLP
Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022
T: 86 10 5920 1000
F: 86 10 5879 3902

BUENOS AIRES
CGSH International Legal
Services, LLP-Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
T: 54 11 5556 8900
F: 54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP 04511-060
T: 55 11 2196 7200
F: 55 11 2196 7299