Cleary Gottlieb

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This is the seventh 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

China's courts have accepted 11 antitrust cases

On October 30, 2010, it was publicly reported that China's courts accepted 11 antitrust cases from August 1, 2008, when the Anti-Monopoly Law (the "AML") entered into force, to June 2010.[1]

The AML provides a basis for both civil and administrative litigation. Pursuant to Article 50, private parties that suffer damages may sue other private entities engaged in the anti-competitive conduct. Article 53 allows private parties to sue the administrative authorities responsible for enforcing the AML regarding decisions issued by them under the AML. Ten of the eleven cases are civil cases and one is an administrative action.

Thus far, none of the plaintiffs have been successful. He Zhonglin, a Supreme Court judge, stated that plaintiffs usually find it difficult to present adequate evidence regarding market definition, the existence of a defendant's dominant position, and/or that the conduct engaged in by the defendant amounted to an abuse of a dominant position.

The Supreme Court is in the process of formulating judicial interpretations of the AML in order to clarify plaintiffs' burden of proof.

NDRC publicizes Hubei Province Price Bureau's investigation on tying

On November 15, 2010, the National Development and Reform Commission ("NDRC") publicized that the Price Bureau of Hubei Province penalized the Wuchang Branch of Hubei Salt Group Co., Ltd. ("Wuchang Salt") for engaging in anti-competitive tying. According to reports, on July 9, 2010 and August 3, 2010, Wuchang Salt, a state-owned supplier of salt products, sold salt to local distributors contingent on the distributors' purchase of washing detergent powder, another of Wuchang Salt's products.

The Hubei Province Price Bureau ("HPPB") commenced an investigation on August 12, 2010. The HPPB found that Wuchang Salt had violated Articles 7 and 17(5) of the AML. Article 17(5) prohibits undertakings from abusing their dominant positions by bundling the sale of commodities without a valid reason or imposing unreasonable terms on a transaction. The HPPB determined that Wuchang Salt held a dominant position as the sole company authorized to sell salt in the region. Article 7 of the AML prohibits undertakings in industries pertinent to the national economy and national security (e.g., the salt industry) from using their market power to harm the interests of consumers. Some have argued that Article 7 may exempt at least some state-owned enterprises from application of the AML. Here, that certainly does not seem to be the case.

Subsequently, Wuchang Salt committed to the HPPB that it would cease its tying conduct. In accordance with Article 45 of the AML, the HPPB decided to suspend the investigation and to send a "reminder of caution".

In connection with the above investigation, NDRC revealed that several provincial pricing authorities had conducted investigations into cartels operated in the following industries: tableware disinfection products, explosives, badminton, insurance, internet bars, teas, and milk products.

Director Shang Ming speaks on MOFCOM's merger control enforcement

On December 18, 2010, Shang Ming, Director of the Antimonopoly Bureau of the Ministry of Commerce ("MOFCOM"), gave a presentation regarding MOFCOM's merger control review at the "International Symposium on the Enforcement of China's Anti-Monopoly Law under the New Economy" held at Renmin University of China.

According to Shang Ming, in 2010, MOFCOM accepted over 110 merger filings and issued one conditional clearance decision (Novatis/Alcon). Interestingly, Shang Ming revealed that in 2011 MOFCOM expects to publish implementation rules regarding Article 4 of the State Council Regulation on Notification Thresholds of Concentrations between Undertakings. Article 4 deals with transactions that do not meet the turnover thresholds but would nevertheless restrict or eliminate competition in the relevant market.

1 See http://www.cb.com.cn/1634427/20101030/161151.html.

Beijing court issued a ruling on Baidu's "anti-unfair competition" suit

Plaintiffs, Baidu Netcom Science Technology Co., Ltd. and Baidu.com Times Network Technology (Beijing) Co., Ltd. (jointly, "Baidu"), alleged that defendants, Qizhi Software (Beijing) Ltd. (owner of the 360 security software line) and Beijing San Ji Wu Xian Internet Technology Ltd. (operator of www.360.cn) (jointly, "360"), engaged in unfair competitive behavior. According to news reports, on December 20, 2010, the Beijing Second Intermediary People's Court ordered 360 to pay Baidu RMB 385,000 (~$58,000; €44,000).

Baidu alleged that in March 2010, 360 claimed that two types of Baidu software were "malicious plug-ins" that might cause harm to computers and that users should delete the software. In July 2010, Baidu further learned that 360 added an anti-virus program designed to remove the Baidu software. Users may uninstall the Baidu software simply by using 360's default anti-virus settings.

It was reported that the court found that 360's conduct constituted "unfair competition." The news articles do not disclose which laws were invoked.

From the frequent use of the language "unfair competition" in the news articles, it is likely that the court relied on the Anti-Unfair Competition Law. Indeed Article 14 of the Anti-Unfair Competition Law prohibits entities from fabricating or spreading false information to harm a *competitors*' business reputation. It was reported that 360 claimed that it should not be considered a competitor to Baidu. However, in a 2007 ruling, a court decided that Baidu and 360 were both network service providers and thus competitors.

MOFCOM to combine three tasks to "ensure the security of domestic industries"

On December 22, 2010, the Minister of Commerce, Chen Deming, stated in his annual working report that MOFCOM intends to combine (i) the foreign investment administration (approval for foreign investments in China); (ii) merger control review; and (iii) national security review to "ensure the security of domestic industries" in accordance with the laws. It is unclear how MOFCOM will combine these three areas and to what extent the measure will impact foreign companies. The stated objective – protecting domestic industries – may give pause to foreign companies considering acquisitions of high-profile Chinese companies, particularly companies in key industries (defense, oil and gas, telecoms, coal, aviation, steel and iron ore, information technology, etc.) or with prominent local brands.

HONG KONG

Update on Hong Kong's Competition Bill

As we noted in the Asian Competition Report for the second quarter of 2010, on July 2, Hong Kong's Legislative Council published the Competition Bill. Since October 8, the bill has been under review by a Bills Committee, which is accepting comments and questions regarding the bill. The committee may propose amendments as it sees fit. After this step, further debate will follow in the Legislative Council. Public reports indicate that passage is expected in 2012.

INDIA

Competition Commission of India ("CCI") rules in several important cases brought by private parties

The CCI issued decisions in several cases this quarter. These decisions give some indication of the CCI's approach to the following issues:

- **Definition of a horizontal agreement.** In *Neeraj Malhotra v. Deustche Post Bank Home Finance*, the complainant alleged that Deutsche Post Bank had abused its dominant position (through the implementation of unfair pre-payment policies) and engaged in price fixing through collusion with fifteen other banks. The Director General for Banking held in 2009 that there had been no abuse of dominance, but that anti-competitive agreements had been entered into by the banks, which were in contravention of the Competition Act 2002. The CCI overturned this decision. The case largely hinged on whether the word "agreement," as stipulated in Section 3 of the Competition Act, implied a formal "meeting of minds" or merely an informal verbal contract. The majority view held that there had to be sufficient evidence to suggest that a formalized price-fixing arrangement had been entered into by the parties.

- **To prove abuse of a dominant position, complainant must establish that appointment of exclusive distributor will have an appreciable adverse effect on competition.** In *Manish Singh v. Roger Williams & Ors*, the complainant had previously been one of the main distributors for Pharmacopecia (a "not for profit" pharmaceutical standard setting organization) in India. In the previous year, Pharmacopecia had terminated all distributorship contracts in India and appointed a single company, LGC Promochem, as its exclusive authorized distributor. The complainant alleged that the exclusivity agreement between Pharmacopecia and LGC Promochem gave rise to an abuse of dominance. The CCI ruled that such a claim could not be substantiated, as the fact that Pharmacopecia has appointed LGC

Promochem as its exclusive distributor does not necessarily indicate that the organization is abusing its position, nor can it be concluded that the appointment of the distributor will have an appreciable adverse effect on competition in the market.

- **Complainant's burden of proof.** In *Travel Agents Association of India v. British Airways*, the complainant, a trade association of travel agents in India, alleged that British Airways' refusal of ticketing authority to the association's members had the effect of diluting market competition. British Airways' refusal to deal with accredited agents and its exclusive agreements with larger travel agents was, according to the complainant, an anti-competitive agreement. The allegations were rejected by the CCI because the complainant provided nether details of exclusionary agreements entered into by British Airways nor any data or particulars that might reflect the adverse impact on competition in India.

CCI fine for failure to cooperate with an investigation upheld by Competition Appellate Tribunal

CCI issued a fine of INR 10 million (~$221,000; €167,000) to Kingfisher Airlines for failing to supply information in connection with CCI's ongoing investigation into the company's alliance with Jet Airways. The strategic alliance between Jet and Kingfisher includes code-sharing on domestic and international flights as well as a joint fuel management agreement. Section 44(b) of the Competition Act 2002 stipulates that if any party to a combination "omits to state any material particular knowing it to be material, such person shall be liable to a penalty which shall not be less than rupees fifty lakhs (~$110,000; €83,000) but which may extend to rupees one crore (~$221,000; €167,000), as may be determined by the Commission." Following an appeal by Kingfisher airlines, on December 13, this decision was upheld by the Competition Appellate Tribunal.

JAPAN

Japan Fair Trade Commission ("JFTC") continues strict enforcement against unreasonable restraints of trade

In three cases decided during the final quarter of 2010, the JFTC continued its strict enforcement of Article 3 of the Antimonopoly Act ("AMA"), which prohibits unreasonable restraints of trade. Of note is the JFTC's focus on illegal bid-rigging of tenders organized by public bodies.

In a case decided on November 9, 2010, the JFTC issued cease and desist orders against 31 companies, and fines for 27 of those 31 companies, for violating Article 3 of the AMA. The JFTC found that the 31 companies had agreed to rig bids for offshore works organized by the Kagoshima Prefecture. According to the JFTC, in order to prevent price competition, the implicated companies collectively decided the winner of certain bids and ensured that the designated winner would be awarded the tender. The total amount of fines issued by the JFTC was over ¥1.4 billion (~$17.5 million; €13 million).

On November 18, 2010, the JFTC announced that it had fined manufacturers and distributors of electric wires a total of approximately ¥10.8 million (~$130,000; €97,000) for using common price lists, copper price fluctuation indexes, and discounts.

Finally, on December 20, 2010, the JFTC fined 30 companies for bid-rigging contrary to Article 3 of the AMA. The JFTC found that these companies had colluded to designate successful bidders for certain construction works organized by the Iwate Prefecture. The JFTC imposed a total fine of over ¥362.5 million (~$4.4 million; €3.3 million) for this violation of the AMA.

SOUTH KOREA

Korea Fair Trade Commission ("KFTC") appoints new chairman and vice-chairman

Dong-Su Kim, the Chairman of the Export-Import Bank of Korea, has been appointed the new Chairman of the KFTC. He succeeds Ho-Yul Chung. Dong-Su Kim spent most of his professional career at the Ministry of Strategy and Finance, where he held a Vice-Minister position before moving to the Korea Exim Bank. The KFTC also appointed current standing Commissioner Jae-Chan Jung as the new Vice-Chairman of the KFTC. Jae-Chan Jung has spent much of his career with the KFTC.

Supreme Court holds that minimum resale price maintenance ("RPM") may be justified in some cases

On November 25, 2010, the Korean Supreme Court issued an interesting judgment allowing a party accused of minimum RPM to present arguments justifying its conduct. This seemingly conflicts with the language of the relevant statute, the Monopoly Regulation and Fair Trade Act ("MRFTA"), which, in Article 29, paragraph 1, provides that minimum RPM is prohibited per se.

In the case at issue, a pharmaceutical company entered into an agreement with distributors that set the price paid by insurance companies as the minimum resale price. If a distributor charged less than the minimum, the manufacturer reserved the right to stop selling to them and to seek damages. The manufacturer in fact imposed sanctions against distributors that did not abide by the agreement. The KFTC investigated and imposed a fine for violation of the MRFTA. The company appealed.

The Korean Supreme Court held that minimum RPM, even if it restricts intra-brand competition, may be justified in exceptional circumstances. Valid justifications may include promotion of inter-brand competition, which in turn promotes consumer welfare. The Court further explained that it would consider all of the relevant factors, which may include: (1) the degree of inter-brand competition; (2) whether the RPM promotes non-price competition among distributors; (3) whether the RPM diversifies consumer choice; (4) whether new entry is encouraged. The Court held that the defendant has the burden of proof. In this particular case, the Court found that the company could not justify its minimum RPM.

At this point it is unclear how, if at all, the KFTC will change its approach to minimum RPM. Moreover, the Court's ruling seems to require an amendment to the MRFTA.

KFTC's abuse of dominance investigation ends as it accepts Qualcomm remedies

In 2009, the KFTC fined Qualcomm Inc. KRW 260 billion (~$231 million; €176 million) for its abusive licensing practices and its abuse of its dominance in the cell phone chipset market. At the time, the KFTC noted that it would continue a separate investigation of Qualcomm's potentially exclusionary conduct in the market for certain multimedia functionality (and in particular, video software) on its chipsets. The KFTC's review was launched following complaints from two Korean software companies.

On December 13, 2010, KFTC concluded its investigation and accepted voluntary commitments from Qualcomm. In a press release last October, Qualcomm committed to licensing parts of its proprietary code to permit third parties, including software developers in Korea and worldwide, to in essence develop video software programs that would be competitive with some of the core Qualcomm video software programs that operate on its applications processors chipsets. The KFTC's press release indicated that the licenses would be issued (and the source code disclosed) within 2 to 10 months, depending upon the nature of the information and Qualcomm's preparation. Qualcomm is subject to quarterly reporting obligations. The KFTC says it expects the remedy would "encourage entry of small start-up companies, which will lead to protection of SMEs and encouragement of employment."

There are clear questions about the promptness and effectiveness of the KFTC's investigation in the present case. Qualcomm's dominant video software that it protected from competition was used to power its FLO TV offering. Qualcomm has announced that it intends to cease offering FLO TV in March 2011, and in December 2010 it sold the spectrum over which it broadcast FLO TV in the United States to AT&T for $1.9 billion. In essence, Qualcomm has decided to exit the market. It is therefore not clear what role the KFTC's investigation had, if any, in discouraging Qualcomm's allegedly abusive conduct.

KFTC releases 2011 business plan

On December 15, the KFTC announced its business plan for 2011, which focuses on four policy objectives: (1) improving business relationships between large companies and small to medium sized enterprises ("SMEs") to promote mutual growth; (2) stimulating competition in an effort to stabilize the livelihood of ordinary people; (3) Enhancing fair trade by empowering consumers; and (4) spreading a business culture of voluntary compliance with competition law.

In connection with the first policy, the KFTC explained that it will increase efforts to correct abuses of intellectual property rights ("IPRs"), such as exclusionary cross-licensing or the imposition of unfair conditions for licensing IPR, which were identified as issues in an investigation of the IT and pharmaceutical industries. The investigation of the IT and pharmaceutical industries will be expanded to target the machinery, chemical, and other industries prone to IPR abuse. The KFTC will also monitor practices related to SMEs' ability to fairly compete online.

In support of the second policy, the KFTC plans to expand enforcement against cartels in consumer goods markets and to actively pursue prosecution of bid-rigging. The KFTC will also investigate and introduce programs designed to open monopolistic/oligopolistic markets and to lower entry barriers in the healthcare, broadcasting, communications, education, and energy industries. Finally, the KFTC will carefully review transactions between large distribution companies as well as cross-border deals.

The fourth policy will be supported by KFTC plans to encourage SMEs to introduce antitrust compliance programs and continuation of the KFTC's efforts to educate Korean companies operating in domestic and overseas markets about antitrust laws.

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