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This is the ninth 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

Supreme People's Court solicits comments on Draft Judicial Interpretation on private antitrust litigation

On April 25, 2011, China's Supreme People's Court (the "SPC") unveiled a draft judicial interpretation regarding private litigation (the "Draft Interpretation") under the Anti-Monopoly Law (the "AML").[1] As the first detailed guidance on civil suits under the AML, the Draft Interpretation addresses a wide range of procedural issues, including jurisdiction, standing, consolidated proceedings, burden of proof, discovery, the relationship with administrative proceedings, damages and the statute of limitations.

Private enforcement actions are permitted under Article 50 of the AML, which provides that "operators who implement monopolistic conduct and cause loss to others shall bear civil liability according to law." Since the AML went into effect in 2008, 43 cases have reportedly been filed and 20 have been concluded.[2]

On February 4, 2008, the SPC published a notice on causes of action in civil cases and granted jurisdiction over AML cases to the Chinese courts' intellectual property tribunals.[3] On July 28, 2008, the SPC issued a Circular on Carefully Studying and Implementing the Anti-Monopoly Law (the "Circular"). The Circular did not specify procedural rules for private litigation, but this fact has apparently not discouraged private lawsuits under the AML.

The Draft Interpretation provides important guidance to the Chinese judiciary and the general public on a wide range of procedural issues relating to civil antitrust litigation. It addresses many of the practical difficulties plaintiffs face in private enforcement actions. In particular, the Draft Interpretation alleviates plaintiffs' burden of proof in certain cases and, for the first time, gives plaintiffs the right to make discovery requests in civil AML cases. These provisions, if adopted, should greatly enhance private antitrust enforcement in China.

Plaintiff victory in unfair competition case

On April 26, 2011, the Beijing Chaoyang District Court ruled against Qihoo, the provider of 360 (a widely used antivirus software), and two other defendants in a case brought by Tencent, the operator of "QQ," a popular instant-messaging tool in China. This is one of the few recent cases involving competitive conduct in which a Chinese court has ruled in favour of the plaintiff.

In addition to filing the complaint with the court, Tencent also asked its users to uninstall 360, alleging that the software would disrupt certain features of QQ and undermine its information security. In response to these actions, a Beijing lawyer filed a complaint with the State Administration of Industry and Commerce ("SAIC"), alleging that Tencent had abused its dominant position in the instant messaging software market by forcing its users to uninstall 360 without a valid reason. The dispute between Qihoo and Tencent has received considerable attention in China, prompting the Ministry of Industry and Information Technology ("MIIT") to propose far-reaching rules to regulate competition between Internet companies in China.[4] The regulatory response from MIIT and the court judgment reflect the rapid evolution of Chinese law in this sector and highlight that differing bodies of Chinese law may apply to and different authorities may regulate the same competitive conduct.

The court found that Qihoo's 360 Privacy Guard software showed a misleading warning – "likely to affect your privacy" – when scanning QQ's executable files. The court also found that Qihoo made a number of negative comments about QQ on its 360 website.

1 For additional details, please refer to the firm's alert memo, available at http://www.cgsh.com/chinas_supreme_peoples_court_solicits_comments_on_draft_judicial_interpretation_on_private_antitrust_litigation/.

2 *See* the Response of the Representative from the Intellectual Property Tribunal of the Supreme People's Court to the Press Regarding the Judicial Interpretation of the Anti-Monopoly Law (hereinafter the "Response"), available at: http://www.rmfyb.com.cn/paper/html/2011-04/26/content_26384.htm.

3 The notice went into effect on April 1, 2008, see http://www.chinacourt.org/flwk/show.php?file_id=125019.

4 *See* our previous alert memorandum on this case, available at: http://www.cgsh.com/de/chinas_miit_solicits_comments_on_draft_internet_rules/.

The court held that 360 Privacy Guard's misleading warning and the negative statements about QQ on Qihoo's 360 website were false allegations that harmed the commercial reputation of Tencent. Accordingly, Qihoo's conduct constituted commercial disparagement. The court ordered Qihoo and two other defendants to: (i) halt distribution of the 360 Privacy Protector; (ii) delete the false allegations against QQ from the 360 website; (iii) publicize an apology on the 360 website and the Legal Daily for 30 days; and (iv) pay Tencent RMB 400,000 (~$61,600; €41,600) in damages.

NDRC fined Unilever for making advanced price increase announcements

On May 6, 2011, China's National Development and Reform Commission ("NDRC"), the agency responsible for enforcement of the Price Law and price-related conduct under the AML, announced that Unilever had violated the Price Law by publicly announcing its intention to increase prices by approximately 10% from early April 2011 due to the rising cost of raw materials. According to NDRC, the announcement of Unilever's price increase induced panic among Chinese consumers, leading to the hoarding of consumer goods in several Chinese cities. NDRC determined that Unilever's conduct seriously distorted market order and violated the Price Law, which prohibits businesses from engaging in unfair pricing by fabricating and spreading information about price increases, excessively increasing prices or causing commodity prices to increase excessively. NDRC fined Unilever RMB 2 million (~$308,000, €212,000), the largest fine ever imposed by NDRC for a violation of the Price Law.

NDRC stressed that Unilever's spokesperson, in several interviews with Chinese newspapers, mentioned that because the Chinese market for household and personal care goods is highly competitive and Chinese consumers are very price sensitive, prices must be increased gradually so competitors' responses could be monitored. As a result of these statements, NDRC determined that Unilever attempted to coordinate prices among its competitors in an effort to collectively increase prices. NDRC further noted that such price signaling can induce price increases by competitors.

Interestingly, though NDRC found that Unilever had attempted to coordinate prices with competitors, it did not invoke the AML. It is possible that the agency relied on the Price Law to avoid the AML's higher burden of proof to establish the existence of "concerted practices."[5] In addition, since Unilever and other companies cancelled their price increases, the maximum fine under the AML would have been RMB 500,000, much less than the RMB 2 million fine NDRC imposed under the Price Law.

Notably, NDRC took no action against three other companies (Proctor & Gamble, Liby and Nice) that announced price increases, perhaps because Unilever gave greater prominence to its announcement by means of press interviews.

Separately, in response to recent increases in commodity prices, NDRC held talks with 17 industry associations and asked delegates to comply with the government's request to keep prices stable. On May 6, 2011, NDRC called in representatives from six foreign dairy producers for talks about their pricing and production after they reportedly raised prices by an average of 20%.

NDRC's response to recent price increases illustrates the continuing tension between China's application of antitrust principles in a free market economy and more traditional State control of the economy. In particular, NDRC is willing to use its powers under the Price Law to encourage or even force domestic and multinational companies to maintain price "discipline" in ways that appear inconsistent with antitrust principles.

Potential investigations in China's Internet industry

In May 2011, during the thirteenth Anti-Monopoly Law Summit Forum organised by the Renmin University of China, Mr. Jiang Tianbo, the Deputy Director General of the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of SAIC, stated that the Internet industry has become an active area where a number of antitrust complaints were lodged. In particular, he pointed out that the majority of complaints allege the joint boycott of transactions, tying, disparaging a competitor's reputation and predatory pricing. It was mentioned that SAIC has determined to improve its enforcement of the AML and the Anti-Unfair Competition Law in this industry.

MOFCOM conditionally approves potash merger

On June 2, 2011, China's Ministry of Commerce ("MOFCOM") cleared the merger of OAO Uralkali ("Uralkali") and OAO Silvinit ("Silvinet"), subject to conditions. This is MOFCOM's first published merger decision in 2011. Since the AML entered into force, MOFCOM has imposed conditions on six deals and blocked one (Coca-Cola's purchase of Huiyuan).

The notified transaction involved the combination of two Russian potash producers, Uralkali and Silvinit (the "Parties"). MOFCOM's 30-day, Phase I review period began on March 14, 2011, and MOFCOM initiated an in-depth, Phase II review on April 12, 2011.

5 See our previous alert memorandum on the Anti-Pricing Monopoly Rules, available at: http://www.cgsh.com/chinas_ndrc_issues_new_rules_and_announces_a_new_price_cartel_investigation_under_aml/.

MOFCOM defined the relevant product market as potassium chloride (potash). The decision does not specify how MOFCOM defined the relevant geographic market, but it analyzed the effect of the transaction on worldwide and Chinese potassium chloride sales and on China's potassium chloride imports, both by land and sea.

In its competitive assessment, MOFCOM found that the merged firm likely would have the ability unilaterally to increase prices and that the transaction increased the likelihood of coordinated interaction between the merged firm and its rivals.

To eliminate the anti-competitive effects of the merger, MOFCOM accepted the following conditions proposed by the Parties:

- The merged entity shall continue to trade potassium chloride directly with China and will use its best efforts to maintain a "steady" supply of potassium chloride products to China by rail and sea transportation.
- The merged entity shall supply "various and sufficient" potassium chloride products to China, including (white and pink) products containing 60% and 62% potassium oxide. In addition, as before, the merged entity shall provide sufficient products to Chinese customers to satisfy a variety of end uses (agriculture, industry, special industry, etc).
- The merged entity shall maintain regular negotiating procedures, including the negotiation of spot sales (by individual sale or monthly) and contractual sales (semi-annually or annually). Price negotiations should consider both past and current deals with Chinese customers as well as the "distinctiveness of the Chinese market".
- Twice a year or upon the request of MOFCOM, the merged company shall report to MOFCOM regarding the performance of its commitments. The merged entity shall appoint a supervisory trustee to supervise the performance of its obligations. MOFCOM shall have the right to penalize any action that breaches the conditions.

Interestingly, MOFCOM's approach to remedies in this case is not based on MOFCOM's recently adopted rules on merger remedies, the Provisional Rules on Divestitures of Assets or Businesses to Implement Concentrations between Undertakings,[6] which mainly address structural remedies. According to MOFCOM officials, new rules on remedies will be issued soon.

MOFCOM's decision is unclear regarding which theory of harm required the imposition of conditions, unilateral or coordinated effects. The 33% combined share cited by MOFCOM would likely not raise concerns about unilateral effects in many jurisdictions. Although the Parties' combined share of Chinese potash imports was over 50%, it would be unusual to define a relevant product market consisting solely of imports. In any case, the remedies imposed seem to reflect industrial policy concerns as much or more than competition concerns. For one thing, they specify potash types and end uses that do not correspond to the relevant product market definition. For another, they are very vague and, combined with the ongoing reporting and meeting requirements, will give MOFCOM considerable influence over the commercial behavior of the combined entity in China.

MOFCOM reveals latest figures on merger control

On June 3, 2011, during the 7th International Symposium on Competition Law and Policy at the Chinese Academy of Social Sciences, MOFCOM revealed that from August 2008 to May 2011, more than 240 mergers were cleared, of which 233 were cleared without remedies, one transaction was prohibited and 6 were approved with conditions. Of these, 119 were cleared during the 30-day Phase I review period, and 117 were cleared during the 90-day Phase II review period.

Official launch of Anti-Monopoly Commission Office within MOFCOM

While the Anti-Monopoly Commission Office (the "AMC Office") was established with the enactment of the AML in 2008, in mid-June 2011, MOFCOM confirmed that the State Council approved the "formal" establishment of the AMC Office within MOFCOM.

MOFCOM publishes draft rules regarding the failure to notify a notifiable transaction

On June 13, 2011, MOFCOM published for comment the draft Provisional Rules on Investigating and Penalizing Violation of Notification Obligations for Concentrations between Undertakings (the "Draft Non-Filing Rules") which outline the investigation procedures if companies fail to notify to MOFCOM a notifiable transaction.

The Draft Non-Filing Rules provide that if undertakings have implemented a notifiable concentration without notifying MOFCOM, MOFCOM may, by its own initiative, investigate the transaction. Third parties may also report a suspected violation of the notification obligation.

Companies will be notified in writing upon the commencement of an investigation into their transaction. They will have 15 days to submit

6 See our alert memorandum, available at http://www.cgsh.com/ chinas_mofcom_issues_ provisional_ rules_ on_divestiture_remedies/.

materials relevant to the investigation. Within 60 days of the receipt of such materials, MOFCOM will determine whether the transaction should have been notified. If so, the parties will be notified in writing and will have 30 days to submit a notification to MOFCOM, and, if the transaction is not yet fully implemented, they must terminate implementation of the transaction.

In connection with its investigation, MOFCOM shall also determine whether an undeclarared transaction has or may have the effect of eliminating or restricting competition pursuant to the relevant provision of the AML.

If parties to a notifiable transaction implement it without filing a notification, MOFCOM shall order the parties to (i) cease implementing the concentration; and (ii) within a specified period of time to dispose of their shares or assets, transfer their business, or to otherwise reinstate the market situation existing before the concentration. MOFCOM may also impose a fine of not more than RMB 500,000 (~$74,000; €55,700).

To date, MOFCOM has not publicly investigated, sanctioned, or fined any company for failure to notify a notifiable transaction.

INDIA

Indian merger control regime becomes effective

India's merger control regime became effective on June 1, 2011. Finalized regulations (the "Regulations") were adopted by the Competition Commission of India (the "CCI") on May 11, 2011 and new Notices were issued by the Indian Ministry for Corporate Affairs on May 30, 2011. As explained below, the Regulations and Notices depart materially from the CCI's draft regulations, which were issued on March 1, 2011.[7] The most significant departures are welcome and address concerns raised during the CCI's consultation process by industry, the legal community and regulators in other jurisdictions. The Regulations clarify various areas of uncertainty in an effort to make the Indian merger control regime more proportionate and predictable.

The most significant comments and suggestions received during the consultation process recommended:

- The creation of a stronger nexus test (one interpretation of the original thresholds was that they would require notification of transactions with no nexus to India).
- The exclusion of certain types of transactions, which are not usually reportable to competition authorities (*e.g.*, acquisitions of raw materials, acquisitions of minority interests, and acquisitions in circumstances where the acquirer already has sole control).
- Clarification of the transitional provisions, and, in particular, applying the merger control regime only to transactions signed after June 1, 2011.
- Simplification of the template notification forms that were appended to the draft regulations.

As noted below, all of these comments were addressed in the Regulations.

Nexus Test. The Regulations confirm that transactions that *"take place entirely outside India with insignificant local nexus and effect on markets in India … need not normally be filed"* with the CCI. For large multinationals, the impact of this provision and the Government-imposed de minimis nexus test seems to be that the thresholds function as follows:

Question 1
Does one party to the transaction have assets exceeding Rs. 250 Crores (~$55 million or €38.5 million) in India or turnover exceeding Rs. 750 Crores (~$160 million or €112 million) in India? If not, there is no need to notify.

Question 2
Does the transaction have any nexus to markets in India (*i.e.*, will there be any effects on Indian markets or will the transaction only affect markets outside India)? If not, no need (ordinarily) to notify. While this exemption leaves significant scope for interpretation, where the parties are confident that a transaction does not have the potential to cause an appreciable adverse effect on competition in India, this exemption may apply. This may be the case, for example, where there is no overlap between the parties' activities in India and the risk of other potential antitrust concerns (*e.g.*, vertical or conglomerate effects) can be reasonably ruled out due to the transaction's focus on jurisdictions other than India (note, however, that the CCI can open an investigation into a transaction that has not been notified up to one year after its conclusion).

7 For a more detailed discussion of the draft regulations, please refer to our alert memorandum dated March 16, 2011 and available at http://www.cgsh.com/the_adoption_of_merger_control_in_india/.

Question 3

If the above two Questions are answered affirmatively, the transaction must be notified if: (i) the value of the assets of the "group" to which the acquired enterprise will belong post-acquisition exceeds Rs. 6,000 Crores (~$1,332 million; €930 million); or (ii) the turnover of the "group" to which the acquired enterprise will belong post-acquisition exceeds Rs.18,000 Crores (~$3,995 million; €2,795 million).[8]

Exclusion of Certain Types of Transactions. The Regulations confirm that certain categories of transactions that are not typically reportable to competition authorities do not normally need to be notified to the CCI (*e.g.*, acquisitions of assets solely as an investment, acquisitions of stock in trade, raw materials, stores and spares, and acquisitions of minority shareholdings, *i.e.*, <15% of the voting rights, are not normally notifiable to the CCI).

Transitional Effect. The Regulations confirm that the Indian merger control regime will apply only to transactions effected after June 1, 2011. Under the Indian Competition Act 2002, a qualifying acquisition must be notified within 30 calendar days of execution of any agreement or other document for acquisition. For mergers and amalgamations, the relevant date is the date of the board resolution. For acquisitions, the relevant date is the date a definitive agreement is signed.

Notification Forms and Fees*.* The Regulations significantly simplify the template notification forms. The template for Form I (used in basic cases) is similar to the Short Form CO used in EU Merger Regulation cases. The template for Form II (used for more complex cases) has, however, more exacting information and data requirements and demands more than the standard Form CO used in EU Merger Regulation cases (*e.g.*, Form II requests more information on the seller). The fees are INR 50,000 (~$1,100; €770) for Form I and INR 1 million (~$22,000; €15,400) for Form II.

Prima Facie View. The Regulations confirm that the CCI will adopt a *prima facie* view within 30 calendar days of notification (although the CCI has wide reaching "stop the clock" powers). While the Regulations are not clear, the implication seems to be that a notified transaction may close (and the merger review will cease) if the CCI reaches a *prima facie* view that the transaction will not have appreciable adverse effects on markets in India.

The Regulations contain a number of welcome clarifications and confirm the value in participating actively in the consultation process. It is to be hoped that the CCI's pragmatism and readiness to consult are maintained going forward.

CCI imposes first fine for abuse of a dominant position

On June 23, 2011, the CCI held that the National Stock Exchange of India (the "NSE") had abused its dominant position in the currency derivatives market by engaging in predatory pricing. It imposed a fine of Rs. 55.5 Crores (~$12.4 million; €8.7 million), which amounted to 5% of NSE's average turnover for the last three years. The CCI held that the NSE's practice of not charging fees for credit derivative transactions, which was enabled by cross-subsidization from other exchange transactions, had the effect of foreclosing rivals (notably MCX) *inter alia* by impeding a rival's ability to generate a viable business. The fine issued in this case is the CCI's first fine for abuse of dominance (Section 4 of the Competition Act 2002) and the largest fine that the CCI has imposed since the Competition Act 2002 became effective (in May 2009). The NSE has stated publicly that it intends to appeal the decision to the first phase appellate court (the Competition Appellate Tribunal), and one of NSE's rivals (MCX) has already stated publicly that it intends to pursue the NSE for damages.

JAPAN

JFTC issues large fine on industrial gas cartel

During the second quarter of 2011, the Japan Fair Trade Commission ("JFTC") continued to pursue its policy of levying significant penalties on companies found to have engaged in cartels.

The JFTC fined four industrial gas producers ¥14.1 billion (~$184 million; €127 million) for engaging in a cartel. The four companies – Taiyo Nippon Sanso Corporation, Air Liquide Japan Ltd., Air Water Inc., and Iwatani Corporation – allegedly agreed to increase prices for oxygen, nitrogen, and argon gases (so-called "air separation gases"). The conduct in question took place in late January 2008, and the prices agreed upon became effective later that year (April 2008). As is customary, the JFTC also issued orders requiring the companies to end any anti-competitive arrangements, and required them to, in the future, determine all air separation gas prices independently.

Interestingly, the JFTC further required the companies to distribute guidelines on compliance with Japan's Anti-Monopoly Act, establish regular training programs for their sales staff, and ensure that their legal departments conduct regular audits to ensure that their air separation gas sales operations comply with competition law.

8 An undertaking is part of a Group where it is directly controlled as to >50% of its voting rights by another undertaking. Alternative thresholds apply (in particular for companies that are not part of a corporate group) and these may be found in our previous alert memorandum. http://www.cgsh.com/the_adoption_of_merger_control_in_india/.

SOUTH KOREA

KFTC imposes sanction against oil refiners for market allocation

On May 26, 2011, the Korea Fair Trade Commission ("KFTC") found that four refiners (SK Co., GS Caltex Corp., Hyundai Oilbank Corp. and S-Oil Corp.) allocated the market for the wholesale distribution of gasoline and imposed a fine of KRW 434.8 billion (~$405 million; €280 million). The KFTC also filed criminal complaints against three of the refiners (SK Co., GS Caltex Corp. and Hyundai Oilbank Corp.).

Beginning in 2000, the refiners agreed not to compete to supply gasoline to each other's distributors. The refiners also agreed not to contract with a retailer whose contract with a competitor had expired. As a result of this market sharing arrangement, the refiners stabilized market shares and avoided price competition for the services of the distributors, which ultimately harmed consumers by elevating gasoline prices.

KFTC publishes merger remedies guidelines

On June 15, 2011, the KFTC adopted the "Standard for Imposing Merger Remedies", which sets forth the criteria for imposing remedies against anticompetitive mergers. The standard makes clear that, as in other jurisdictions, structural remedies are preferred over behavioral remedies. It also treats intellectual property related actions separately and indicates that the disposal or licensing of IPR will be considered to remedy anticompetitive transactions. In addition, the standard establishes general principles for crafting remedies and identifies criteria for imposing various types of remedies. The purpose of the standard is to enhance clarity and predictability in the imposition of merger remedies.

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