CLEARY GOTTLIEB

Asian Competition Report

JANUARY – MARCH 2010

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This is the fourth 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

Ministry of Commerce ("MOFCOM") issues interpretation of two rules

On January 12, 2010, MOFCOM issued an interpretation of its Rules on Notification of Concentrations between Undertakings (the "Notification Rules") and Rules on Examination of Concentrations between Undertakings (the "Examination Rules").[1] There are several points worth noting:

A notifying party may require the cooperation of the other undertakings to a transaction. For example, in the case of a hostile takeover of a listed company, the notifying party may not have certain required documents or information. The interpretation states that the target must cooperate with the notifying party and provide the necessary documents or information to MOFCOM.

If parties to a concentration seek to withdraw a notification because the concentration will be abandoned, they must file a notification of withdrawal setting forth the reasons for the withdrawal, but the withdrawal does not require MOFCOM approval. If the parties will continue with the concentration but wish to withdraw the notification because, for example, the concentration plan is changed so that the concentration no longer meets the pre-merger notification thresholds, the parties must submit an application for withdrawal that explains the rationale and then wait for MOFCOM approval.

Undertakings need not wait for the issuance of a statement of objections by MOFCOM before proposing restrictive conditions. Such conditions may be suggested at any point during MOFCOM's review.

Finally, MOFCOM reminds foreign law firms that they must engage local counsel in connection with any notification, as foreign law firms may not practice PRC law.

The first publicized cartel case under the Anti-Monopoly Law

On March 30, 2010, the National Development and Reform Commission ("NDRC"), which is the enforcement authority under the Chinese Anti-Monopoly Law (the "AML") responsible for price-related restrictive agreements and abusive conduct, published the result of its investigation, along with its local agencies, of a price cartel among rice noodle producers in Nanning and Liuzhou (both are cities in Guangxi province). This is the first official report of NDRC's enforcement of the AML, and the first officially publicized investigation of restrictive agreements under the AML, since it came into force on August 1, 2008.

NDRC, the Bureau of Commodity Prices of Guangxi Zhuang Autonomous Region, and relevant departments in the governments of Nanning and Liuzhou conducted the investigation. The agencies determined that in early 2010 producers jointly raised wholesale prices by up to 26%. After preliminarily confirming the facts, the Nanning and Liuzhou authorities instructed the concerned rice noodle producers to immediately bring their violations to an end, held meetings to call on producers to ensure normal supply, and established an emergency response plan in order to stabilize prices and guarantee supplies. Subsequently, prices in Nanning and Liuzhou dropped to levels in place prior to the collusion.

Authorities imposed administrative sanctions on thirty-three rice noodle producers. The three organizers of the cartel were fined RMB 100,000 (~$14,700 or €11,000). Eighteen other participants received fines ranging from RMB 30,000 (~$4,400 or €3,300) to RMB 80,000 (~$11,700 or €8,800) depending on the gravity of the offense. Another twelve producers that cooperated with the investigation, provided important leads, and took corrective measures on their own initiative were given only administrative warnings.

Applicable Legal Framework

Within the existing Chinese legal framework, both the AML and Price Law are applicable to price cartels. Both laws were invoked in this case, though, based on interviews with the authorities and other press reports, NDRC and its local agencies appear to have relied more heavily

1 The Notification Rules and Examination Rules were issued on November 21, 2009 and entered into force on January 1, 2010.

on the Price Law. The Price Law is not specifically aimed at anti-competitive behavior, but rather is designed to "regulate price behavior" and "stabilize the general price level in the market" in order to "protect the lawful rights and interests of consumers and business operators" and "promote the healthy development of the socialist market economy" (Article 1).

This approach is perhaps not surprising. NDRC's development of the relevant implementing rules under the AML has progressed slowly. At present, NDRC has published only one set of draft rules, the August 12, 2009 draft Rules on Anti-Pricing Monopoly. On the other hand, NDRC, together with its local agencies, has established a relatively comprehensive implementing framework for the Price Law and has extensive enforcement experience, though, admittedly not with respect to cartels.

While the expectation of some may have been that Chinese authorities would adopt the AML as the exclusive means to sanction anti-competitive conduct, clearly NDRC has not chosen this path. In fact, NDRC has stressed that the AML must be applied together with the Price Law, since they are not substitutes for one another.[2] While the scope of conduct prohibited does overlap in some respects, the laws differ with regards to the responsible authorities, investigative powers, administrative sanctions, availability for the reduction of fines, appeal process, *etc*.

While the authorities are more familiar with the Price Law, the AML could provide investigators with additional powers, including expansion of NDRC's jurisdiction to conduct that takes place outside China but leads to anti-competitive effects in China, additional investigative tools, the threat of heavier sanctions, and the possibility of a leniency program. It is possible that NDRC has and will employ the more familiar Price Law either exclusively or alongside the newer AML in an effort to more easily transition its enforcement efforts regarding cartels from the older law to the newer AML. In any event, clarification of the relationship between the AML and the Price Law (and its implementing measures) would be helpful to establish a consistent and coherent legal regime for price-related conduct.

Responsible Authority

According to the official press release, the authorities involved in the cartel investigation included NDRC (and its local agencies at the provincial and town levels), public security departments, quality supervision departments, grain administration departments, the State Administration for Industry & Commerce ("SAIC"), food and drug administration departments, and local MOFCOM agencies. It is unclear what role the departments, other than NDRC and its local agencies, played in the investigation and decision-making process.

Under the AML, NDRC is responsible for price-related conduct while SAIC handles non-price related conduct. MOFCOM, which primarily focuses on merger control review, may also have some involvement in cartels that involve international trade. There are substantial overlaps in the agencies' areas of responsibility, particularly NDRC and SAIC, as it can be difficult, if not impossible, to categorize a particular case as price- or non-price-related.

In addition, unlike SAIC, NDRC has not issued specific rules regarding the allocation of power between its national and local agencies. It is unclear from the official press release which agency of NDRC issued the decisions and imposed sanctions. Companies could benefit from some clarification of each authority's jurisdiction and the division of power between the national and local agencies.

Leniency

NDRC's press release mentions that producers that cooperated with the investigation, provided important leads, and took corrective measures on their own initiative were given immunity from monetary penalties. While encouraging, this general description of the application of a policy seemingly consistent with a leniency mechanism does not amount to a functional leniency program. Moreover, twelve producers appear to have received leniency. This is inconsistent with the AML leniency policy proposed by SAIC, which applies to at most three companies, with only the first reporter receiving complete immunity. Wide application of leniency reduces the incentives of any individual company quickly to approach antitrust authorities regarding potentially collusive behavior. Notably, NDRC has not yet proposed a leniency regime.

Conclusion

While publication by NDRC of the details of this investigation and the resulting sanction are welcome developments, the details of other investigations, if any, may not be made public. In addition, because of the special characteristics of the rice noodle cartel case, its precedential value for global companies is limited. Rice noodles are a daily breakfast staple for residents of Guangxi province and considered a basic necessity. In addition, the price increase occurred just before the Chinese New Year when authorities are watching price increases closely in an effort to maintain "public happiness". Moreover, with other important holidays shortly thereafter (such as the Qingming Festival and Labor Day) and a severe drought in the southwestern part of China (including Guangxi province), NDRC may

2 *See* http://www.ndrc.gov.cn/jggl/zhdt/t20080829_248411.htm.

have published this decision as a deterrent to other potential cartelists or businesses looking to increase prices.

More will be learned about NDRC's approach to price cartels with the release of final implementing rules and guidelines, the development of a leniency policy, and the publication (hopefully) of the first decision regarding a national or international cartel.

The establishment of a national security review regime is reportedly underway

Article 31 of the AML states that transactions involving the investment of foreign capital in domestic enterprises that impact national security shall be subject to a national security review in addition to the standard MOFCOM merger control process.

Recent media reports indicate that a new agency resembling an "inter-ministerial joint conference" is going to be set up, including representatives from NDRC, MOFCOM, SAIC, the Ministry of Industry and Information Technology, the Ministry of Science and Technology, the Bureau for Science, Technology and Industry for National Defense, the Ministry of Agriculture, the State-Owned Assets Supervision and Administration Commission, the China Banking Regulatory Commission, the State Administration of Taxation, and important industry associations.

Consistent with both the language of and some officials' past informal interpretation of Article 31, media reports indicate that the "national security review" would be independent of the merger control review. It remains to be seen how the two substantive reviews would interact and differ from each other, as experience shows that the current merger control review takes into account public policy concerns.

In addition, the relationship between the "national security review" and the "national economic security review" remains unclear. The latter is a review managed by MOFCOM in accordance with Article 12 of the Rules on Acquisition of Domestic Enterprises by Foreign Investors. Under Article 12, an additional filing is required if a proposed transaction results in foreign investors acquiring actual control over a domestic enterprise, and the transaction involves key industries, might impact national economic security, or leads to the transfer of actual control of a well-known trademark or a time-honored Chinese brand.

INDIA

Competition Commission of India ("CCI") challenges Competition Appellate Tribunal of India ("CAT") authority

After receiving complaints, the CCI opened an abuse of dominance investigation regarding a long-term exclusive supply agreement between Indian Railways and the government-owned Steel Authority of India ("SAIL"). When the CCI commenced its investigation, SAIL requested a stay from the CAT. The CAT ruled that it had the power to order a stay prior to a decision of the CCI being made (i.e., even where there has been no definitive finding of anti-competitive behavior). The CCI has asked the Indian Supreme Court to determine whether the CAT is so-empowered.

Mumbai High Court rejects Kingfisher Airlines' request for intervention

On April 1, 2010, the Mumbai High Court dismissed Kingfisher Airlines' request for intervention in relation to a CCI investigation into its cooperation agreement with Jet Airways. Kingfisher Airlines alleges that the CCI has no power to investigate because the CCI's predecessor (the MRTP Commission) investigated the agreement pursuant to the Monopoly and Restrictive Trade Practices Act (now repealed). The High Court ruled that the CCI had jurisdiction to investigate and that it was not the court's place to intervene. It also refused leave to appeal its decision to the Indian Supreme Court. The CCI's investigation was prompted by concerns that the Kingfisher/Jet alliance may provide monopoly power over certain routes in India.

JAPAN

Procedural reforms proposed by Japan's Cabinet designed to enhance due process rights

On March 12, 2010, three Cabinet members responsible for Japan's Fair Trade Commission ("JFTC") sent to the legislature proposed amendments to the antitrust laws that would reform certain procedural processes regarding the adoption and appeal of JFTC cease and desist orders.

First, the JFTC proposes to abolish its current hearing procedure. This proposal would improve defendant companies' due process rights by providing them with the opportunity to review and comment on the evidence that the JFTC intends to rely on prior to adopting a cease and desist order.

In addition, the proposed amendments will give the Tokyo District Court exclusive jurisdiction for the review of appeals of JFTC cease

and desist orders. Under the current rules, the JFTC hears such appeals. The JFTC proposes that a panel of 3 to 5 judges should hear the appeals in order to ensure a degree of expertise in the review of JFTC decisions. Rulings rendered by the Tokyo District Court would be subject to appeal to Japan's Supreme Court.

Finally, these amendments would eliminate the "substantial evidence" rule under which the courts are bound by the JFTC's findings of fact provided the findings are supported by substantial evidence.

In general, these amendments enhance defendant companies' due process rights. The Keidanren (Japan's business federation) has indicated its support for these reforms, noting in particular that the consultation process that defendant companies will benefit from prior to the JFTC's adoption of a final cease and desist order provides companies with an opportunity to submit evidence that rebuts the JFTC's preliminary accusations.

Should these reforms be adopted, they will come into force in the fall of 2011.

SOUTH KOREA

Korea Fair Trade Commission ("KFTC") publishes 2009 business combination report

During the first quarter of this year, the KFTC published a summary and analysis of the business combination reports filed with it during 2009. There are several points worth noting.

The KFTC saw a decline in the total number of reports filed and the number of reports made in connection with both the acquisition of a domestic enterprise by a foreign entity and foreign-to-foreign transactions. Perhaps this should not be surprising given the state of the global economy.

Type	Number Filed	
	2008	2009
Total	550	413
Domestic Acquired by Foreign	47	23
Foreign-to-Foreign	48	30

On the other hand, there was an increase in the number of reports filed regarding intra-group transactions.

In order to resolve anti-competitive issues presented by a number of transactions, the KFTC and the transaction parties agreed to certain remedies. Notably, the KFTC accepted behavioral remedies (as opposed to structural remedies such as the sale of a factory or licensing of intellectual property) in connection with a few high profile transactions, such as Lotte Chilsung Beverage's acquisition of a factory from Haitai and eBay's acquisition of Gmarket. In both cases, the parties agreed to take certain actions or to refrain from taking certain actions in order to alleviate the KFTC's concerns. While the competition authorities in the U.S. and Europe do accept behavioral remedies as well, both prefer structural remedies.

Qualcomm pays abuse of dominant position fine

As noted in our report for the third quarter of 2009, on July 23, 2009, the KFTC issued Qualcomm a fine of approximately KRW 260 billion (~$235 million or €173 million) for abusing its dominant position in the form of royalty discrimination, conditional rebates, and other terms. On March 5, 2010, Qualcomm paid this fine, the largest ever levied by the KFTC against a single company.

In addition to the fine, the KFTC's order prohibits Qualcomm from charging different royalties based on whether a mobile phone manufacturer uses Qualcomm's or a competitor's chipset, providing rebates conditioned on the purchase of Qualcomm chipsets at levels that exclude competitors, and unreasonably obligating continued payment of royalties after expiration or invalidation of patents. The order followed an investigation lasting approximately three years.

Qualcomm has made public its plans to continue to fight the order. If it prevails on appeal, the KFTC will refund the fine.

Amendment of Guidelines of Review against Unfair Exercise of IP Rights

On March 31, 2010, the KFTC issued amended Guidelines of Review against Unfair Exercise of IP Rights ("Guideline"). The Guideline entered into force on April 6, 2010. The main features of this amendment are the introduction of a legal basis for the regulation of foreign firms' abuse of IP rights and the expansion of the scope of the original Guideline to cover new issues regarding patent pools, technical standards, and frivolous patent disputes.

Previously, the KFTC applied the "Guidelines on Forms and Standards of Unfair Trade Practices in International Contracts" to the abuse of IP rights in international contracts. As this guideline expired in August 2009, KFTC was left with no applicable guidelines for the review of IP rights abuses by foreign firms.

The revised Guideline covers the following important abuses:

- Unfair agreements on contract conditions by patent pool participants;
- Joint exclusion of a new entrant by existing participants in a patent pool;
- Intentional non-disclosure of relevant patents by a participant in a technology standardization procedure;
- Imposition of unreasonably high license fees by patent holders participating in a technology standardization procedure;
- Bringing frivolous lawsuits for patent infringement and unreasonably delaying litigation in order to exclude a new market entrant; and
- Anti-competitive settlement of a patent dispute.

The Guideline also provides that KFTC will consider any pro-competitive effects of innovation created by the exercise of IP rights when reviewing the legality of the exercise of an IP right.

Through this Guideline, KFTC attempts to harmonize the relationship between IP law and competition law as well as to enhance the transparency and predictability of its enforcement of competition law. KFTC will also conduct sectoral inquiries in the IT and pharmaceutical industries where it expects that abuses of IP rights are more likely to occur.

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