CLEARY GOTTLIEB

Asian Competition Report

JANUARY – MARCH 2012

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Below is Cleary Gottlieb's Asian Competition Report, covering major antitrust developments in Asian jurisdictions during the first quarter of 2012. We hope you find this Report interesting and useful.

CHINA

MOFCOM issues rules regarding failure to notify

On December 30, 2011, the Ministry of Commerce ("MOFCOM") issued Interim Measures of Investigating and Handling Failure to Duly Notify Concentrations between Undertakings (the "Measures"). The Measures address MOFCOM's powers to investigate and punish parties that fail to notify MOFCOM regarding transactions that meet China's merger control notification thresholds. The Measures took effect on February 1, 2012. Pursuant to the Measures, MOFCOM shall open a case and notify in writing the concerned party or parties if there is *prima facie* evidence that they failed to file a notifiable transaction. Such evidence may be provided by anyone, including a customer or competitor. After being informed that it is under investigation, the party or parties have 30 days to explain why the transaction was not filed (*i.e.* it is not a "concentration" under the AML or does not meet the merger control thresholds) and whether it has been consummated. MOFCOM then has 60 days to decide whether a notification should have been filed. If so, MOFCOM will inform the parties, and the parties must suspend the transaction and, within 30 days, must submit a standard merger control notification. MOFCOM will then conduct a substantive examination of the transaction pursuant to the normal timeline (anywhere from 30 to 180 days). As a result, the parties may be required to suspend their transaction for over 200 days. MOFCOM may impose the following sanctions for failure to notify: a fine of up to RMB 500,000 (~$80,000; €60,000), an order to cease the implementation of the transaction, an order to unwind the transaction, and an order to take any other necessary measures to restore the pre-transaction status quo. When imposing its penalty for failure to notify, MOFCOM will consider the parties' rationale and the length of time elapsed, as well as the impact on competition. This may mean that where a transaction does not raise substantive antitrust concerns, MOFCOM will not require that the transaction be unwound. However, MOFCOM has complete discretion regarding the applicable penalty.

MOFCOM conditionally approves Henkel Hong Kong/Tiande Chemical JV

On February 9, MOFCOM conditionally cleared the establishment of a joint venture ("JV") between Henkel Hong Kong Holdings Co., Ltd. ("Henkel HK") and Tiande Chemical Holdings Co., Ltd. ("Tiande"). This decision is MOFCOM's second conditional joint venture clearance since the implementation of the Anti-Monopoly Law. The first was its conditional clearance of the GE China/Shenhua JV.[1] According to MOFCOM, Tiande is one of only two suppliers of ethyl cyanoacetate, a key input for the production of cyanoacrylate monomer. To address input foreclosure concerns in the cyanoacrylate monomer market where both Henkel HK and the JV will be active, MOFCOM imposed behavioral remedies on Tiande. Tiande shall, on fair, reasonable, and non-discriminatory terms, supply ethyl cyanoacetate to all downstream customers. In addition, Tiande shall not offer Weifang Degao (a subsidiary of the JV) preferential supply terms and shall not share competitively sensitive information with Henkel Holding (the parent company of Henkel HK) or Weifang Degao.

MOFCOM conditionally clears Western Digital's acquisition of Viviti

On March 2, MOFCOM conditionally cleared the purchase of Viviti (a holding company of Hitachi Global Storage Technologies Holdings Ltd.) by Western Digital ("WD"). To obtain approval, WD agreed that, (i) Viviti will be maintained as an independent legal person and an independent competitor in the hard disk drive ("HDD") market, making its own decisions regarding pricing, production, marketing, aftermarket services, procurement, R&D, administration, financing, investment, personnel appointment, *etc.*, and (ii) it would work with Viviti to reasonably determine production capacity and volume. After 24 months, WD may apply to MOFCOM for termination of these obligations. The obligation to maintain Viviti as a separate competitor is similar to the remedy MOFCOM applied in the Seagate/Samsung

1 For a more detailed analysis of the GE/Shenhua JV decision, please refer to our alert memorandum, which is available at http://www.cgsh.com/chinese_merger_control_developments_ge_shenhua_jv_and_alpha_v_savio_conditional_approvals/.

HDD transaction. MOFCOM also required that (iii) WD and Viviti maintain their current business models and refrain from forcing clients to select them as an exclusive supplier of HDD, (iv) WD and Viviti continue their recent level of R&D spend, and (v) WD promise to divest major 3.5" HDD assets of Viviti to a third party within six months from the announcement of the decision. These remedies differ from those imposed by the U.S. Federal Trade Commission and the European Commission, which required that WD sell Viviti's desktop HDD unit to Toshiba. Interestingly, it also marks another case in which MOFCOM applied largely behavioral remedies to a horizontal transaction. The U.S. agencies and the European Commission tend to favor structural fixes, such as a divestiture, to remedy anti-competitive harm from horizontal transactions.

INDIA

Revisions to the Merger Control Regulations

On February 23, 2012, the Competition Commission of India ("CCI") issued amendments to the Competition Commission of India (Procedure in regard to the transaction of business relating tocombinations) Regulations, 2011 (the "Regulations"). The changes were designed to address areas of uncertainty and doubt that had arisen since the merger control regime became operational. The principal changes made were as follows:

- **Intra-Group Transactions**. The version of the Regulations that came into force on June 1, 2011 contained a provision which specified that an "acquisition of control or shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group" need not normally be notified (Section 8). The CCI's practice since that date was to regard only "acquisitions" within the same group as falling under the exemption to notify (*i.e.*, they did not apply the exemption to mergers). On February 23, 2012, the Regulations were amended to exclude from the filing obligation also a "merger or amalgamation involving a holding company and its subsidiary wholly owned by enterprises belonging to the same group and/or mergers or amalgamations involving subsidiaries wholly owned by enterprises belonging to the same group." Given the differences in terminology between the two exemptions, the prevailing view appears to be that intra-group mergers or acquisitions where one party is not wholly owned by the other are reportable to the CCI. To that end, there have been a number of intra-group transactions reported (*e.g.,* the *DLF Construction Limited/DLF Hotels and Apartments Limited/DLF Projects Limited* merger and the *TVS Sundaram* case).
- **Filing Forms**. The CCI has made clear that "Form II" (which requests a signficant amount of information on the merging parties) should be used where (a) the parties to the combination are engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or provision of similar or identical or substitutable services, and the combined market share of the parties to the combination after such combination is more than 15% in the relevant market; or (b) the parties to the combination are engaged at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or trade in goods or provision of services, and their individual or combined market share is more than 25% in the relevant market. Where parties choose to make a "Form I" notification (which requires signifcantly less information than a Form II filing) and the CCI subsequently determines that a Form II filing is required, the statutory timetables will run from the date on which the Form II filing is accepted.
- **Creeping mergers**. Section 5(9) of the Regulations has introduced a provision which states that "*[w]here, in a series of steps or individual transactions that are related to each other, assets are being transferred to an enterprise for the purpose of such enterprise entering into an agreement relating to an acquisition or merger or amalgamation with another person or enterprise, for the purpose of section 5 of the Act, the value of assets and turnover of the enterprise whose assets are being transferred shall also be attributed to the value of assets and turnover of the enterprise to which the assets are being transferred.*" The provision was ostensibly designed to ensure that transactions do not escape review if they are structured in a series of steps designed to benefit from the "small targets exemption."
- **Filing fees**. Filing fees have been increased significantly. They now stand at INR 1,000,000 (~$20,000; €15,000) for Form I and INR 4,000,000 (~$80,000; €60,000) for Form II.
- **Exemptions**. The Regulations also introduce or modify exemptions to the notification requirement. These include (1) acquisitions made solely as an investment or in the ordinary course of business insofar as the total shares or voting rights held by the acquirer, directly or indirectly, does not entitle the acquirer to hold 25% or more of the total shares, and (2) acquisition of shares or voting rights pursuant to a buy back of shares.

CCI penalties for delayed notification

Section 43A Competition Act 2002 provides that "*[i]f any person or enterprise who fails to give notice to the Commission under subsection (2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent. of the total turnover or the assets, whichever is higher, of such a combination.*" Interestingly, the CCI's recent practice indicates a willingness to impose such fines on transactions (including intra-group transactions) not reported within the 30 day time limit (*e.g., Grabal Alox Impex/Alok Industries* and *Siemens Engineering/Siemens Power Engineering*).

Uncertainty regarding reportability of transactions by financial institutions

Section 6 of the Competition Act 2002 provides that acquisitions by "*a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan or investment agreement, shall be filed without any fee in Form III, along with a certified copy of the loan agreement or investment agreement referred to in sub-section (5) of section 6 of the Act.*" This requirement had previously been understood to mean that transactions involving financial institutions did not need to be pre-notified to the CCI and that approval was not needed to implement the transaction. However, the CCI's recent decisional practice suggests that this is not the case. For example, it has recently accepted notifications from each of KKR and Goldman Sachs under Form I (*i.e.*, a notification with suspensory effect). Accordingly, there is currently a great deal of uncertainty as to the reportability of transactions made by financial institutions (especially where the definitive agreements are not pursuant to a "loan agreement" or "investment agreement").

CCI imposes penalty on Schott Glass India Private Limited for abuse of dominance

On March 29, 2012, the CCI adopted an order holding that Schott Glass India Pvt. Limited, a subsidiary of Schott AG, had abused a dominant position in relation to the market for specialty glass (*i.e.*, glass used in the manufacture of ampoules and vials) by applying dissimilar discounts to different categories of customers in the downstream borosilicate glass tubes market. The CCI noted in particular that, as a dominant company, Schott was under "a special onus to ensure fair competition" and failed to comply with that onus *inter alia* by offering prefential rates to its vertically integrated downsteam subsidiary, such that other downstream suppliers have been "impacted adversely and their margins have also declined." The CCI imposed a penalty of INR 5.66 crores (~$1.1 million; €800,000).

MALAYSIA

MyCC begins first competition probe

The Malaysian Competition Commission ("MyCC") has requested information from Malaysia Airlines and AirAsia regarding their share swap agreement. MyCC is concerned that the agreement, which included an agreement to cooperate on ground handling, training, and engineering as well as a commitment by Malaysia Airlines to reduce investment in its budget carrier and Air Asia's biggest domestic competitor, Firefly, would reduce competition for domestic routes.

SOUTH KOREA

KFTC amends cartel leniency program

The Korea Fair Trade Commission (the "KFTC") amended its official notification establishing guidelines for its leniency program, effective as of January 3, 2012. The amendment clarifies the definition of repeat offenders in cartel cases under the recently amended Enforcement Decree of the Monopoly Regulation and Fair Trade Law (the "Enforcement Decree"). As detailed in the Asian Competition Report for the fourth quarter of 2011, the Enforcement Decree was amended to define the situations, such as a leniency application by a repeat offender, in which cartel participants would become ineligible for the benefits of leniency.

KFTC fines Samsung Electronics and LG Electronics for price-fixing

On January 12, 2012, the KFTC fined Samsung Electronics Co. Ltd. and LG Electronics Inc. KRW 44.647 billion (~$40 million; €30 million) for conspiring to raise prices on their washing machines, flat-panel televisions, and laptop computers from mid-2008 to 2009.

Price-fixing cases surged in 2011

On March 11, 2012, the KFTC released data showing a surge in price-fixing cases detected by the KFTC in 2011. The KFTC attributes the increase to its tightened surveillance on cartels. A total of 96 cases of price-fixing were found in 2011, a 41% increase from the 68 cases in 2010. KFTC imposed fines in 57 cases in 2011, up 73% from 2010. The combined fines amounted to KRW 569.3 billion (~$505 million; €382 million).

KFTC announces proposed amendments to Enforcement Decree

On March 14, 2012, the KFTC announced draft amendments, expected to become effective in mid-June, to the Enforcement Decree. The KFTC proposed eliminating the ability of the second company seeking leniency in a two-member cartel to obtain any fine reduction. In addition, where there are more than two participants in a cartel, the second company will not enjoy the benefits of leniency if it applies for leniency more than two years after the first applicant. The KFTC also suggested increasing the base penalties for violating merger notification rules. For example, the new base fine for violations related to pre-closing filings would be raised from KRW 7.5 million – KRW 20 million to KRW 15 million (~$13,000; €10,000) – KRW 40 million (~$35,000; €27,000). Under the Monopoly Regulation and Fair Trade Law, the base fine may be increased by a maximum of 150% depending on the length of the violation. Therefore, the new maximum fine is KRW 100 million (~$89,000; €67,000).

KFTC fines Samsung Electronics for obstruction of investigation

On March 18, 2012, the KFTC fined Samsung Electronics Co. Ltd. KRW 400 million (~$350,000; €270,000) for intentionally and frequently interfering with its investigation into mobile phone pricing. This is the largest fine ever levied by the KFTC for obstruction of an investigation. According to the KFTC, top-level Samsung Electronics executives blocked and delayed the KFTC's investigation team from entering the company's operations and an executive in the wireless department ordered employees to discard related data and replace computers holding vital information. The KFTC says that another executive purposely avoided being interviewed and deleted or manipulated the files on his computer to hinder the investigation.

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