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This is the second edition of Cleary Gottlieb's Asian Competition Report, covering major antitrust developments in Asian jurisdictions. As detailed below, during the third quarter of 2009, China continued to issue implementing rules under its Anti-Monopoly Law and celebrated the Law's first anniversary. India also continued to issue regulations under its Competition Law. We have reported on recent developments with the circulation of two Alert Memoranda and the publication of an article in the July-August edition of the China Business Review. We hope you find this Report interesting and useful.

CHINA

Ministry of Commerce ("MOFCOM") reports merger review statistics

Through the end of June 2009, MOFCOM's Anti-Monopoly Bureau had received 58 merger notifications under the Anti-Monopoly Law ("AML") and completed its review of 46 transactions. Of these 46 transactions, 43 were unconditionally approved, two were approved with conditions (InBev/Anheuser-Busch and Mitsubishi Rayon/Lucite), and one was blocked (Coca-Cola/Huiyuan). MOFCOM published its InBev, Mitsubishi Rayon, and Coca-Cola decisions. As previously reported, while these decisions provide some insight into MOFCOM's application of the AML, their brevity, the apparent absence of substantiating evidence for the theories of harm advanced, and the unconventional remedies imposed in the InBev and Mitsubishi cases (from a U.S. or EU antitrust perspective) generated controversy and uncertainty concerning MOFCOM's exercise of its merger review powers.[1]

The Anti-Monopoly Commission of the State Council (the "AMC") issues final Guidelines for the Definition of Relevant Market

On May 24, 2009, the AMC adopted the final Guidelines for the Definition of Relevant Market (the "Market Definition Guidelines") under China's AML. The Market Definition Guidelines were released on July 8, 2009.[2] The final version follows the draft Guidelines for Definition of Relevant Market published on January 7, 2009.[3]

The Market Definition Guidelines detail the steps to be taken when defining relevant product and geographic markets. They also explain factors to be taken into consideration when defining relevant markets, including evidence of customer switching, customer preferences, and, if relevant, supply-side substitutability. While initially drafted by MOFCOM, the final Market Definition Guidelines were issued by the AMC and deal with market definition not only for merger control purposes, but also for the purpose of analyzing restrictive agreements and abuses of dominant positions.

The Market Definition Guidelines are largely consistent with EU and U.S. practice, although they do depart from international norms in certain respects. In particular, Article 7 of the Market Definition Guidelines restricts the use of the so-called "hypothetical monopolist test" to situations where the market definition is "less clear."[4] This is inconsistent with standard practice in the U.S. and EU, which use the test as the conceptual basis and starting point for the definition of relevant markets. On the other hand, changes to Article 7 from the January draft are significant and may reflect a greater willingness to accept economic analyses. First, the January draft restricted the use of the hypothetical monopolist test to "complex situations." The final Market Definition Guidelines do not include this limitation. Moreover, unlike the January draft, which encouraged the use of economic analysis only in those limited cases where the hypothetical monopolist test is employed, the final version of Article 7 encourages the definition of relevant markets in all cases "based on objective and authentic data" using "economic analysis." This is a positive development as the use of objective measures, rather than reliance only on subjective analyses of product characteristics and customer preferences, is consistent with international norms and provides more certainty to companies operating in China. On the other hand, there is some risk that the

1 For a more detailed review of these decisions, please refer to our Alert Memoranda of March 23, 2009, and September 16, 2009, available at: http://www.cgsh.com/news/List.aspx?practice=2&geography=3.

2 For a detailed review of the Market Definition Guidelines, please refer to our Alert Memorandum of July 27, 2009, which may be found at: http://www.cgsh.com/chinas_anti-monopoly_commission_of_the_state_council_ issues_final_ guidelines_for_the_definition_of_relevant_market/.

3 On January 30, 2009, Cleary Gottlieb circulated an Alert Memorandum regarding the draft guidelines as well as other draft rules issued by MOFCOM, which may be found at: http://www.cgsh.com/proposed_merger_control_ rules_under_the_chinese _anti_monopoly _law/.

4 The hypothetical monopolist test, as outlined in the Market Definition Guidelines, would examine whether a hypothetical monopolist could profitably increase its product price by a small amount (generally 5-10%) for a non-transitory period (generally a year).

reviewing agencies may narrowly define "objective and authentic data" and, thus, limit parties ability to employ economic analyses.

Like the January draft, the final version provides little detail in connection with references to "innovation" or "technology" markets, concepts that have been debated in the EU and the U.S. Both the draft and the final Market Definition Guidelines are also unclear on the definition of relevant markets when there is evidence of "price discrimination."

MOFCOM and other regulatory bodies jointly adopt rules for calculation of turnover in the financial industry

On August 3, 2008, China's State Council published its Regulation on Notification Thresholds for Concentrations of Undertakings. Pursuant to this Regulation, a concentration must be notified when either the worldwide turnover of all the undertakings concerned in the preceding year was more than RMB 10 billion ($1.46 billion) or the turnover in China of all the undertakings concerned in the preceding year was more than RMB 2 billion ($293 million), and, in either case, the turnover in China of at least two of the undertakings concerned was at least RMB 400 million ($58.6 million).

Special rules for applying these thresholds in transactions involving financial institutions were adopted jointly by MOFCOM and other regulatory bodies on July 15, 2009. These rules mainly deal with the calculation of turnover of financial institutions. Sums of money received and managed by financial institutions other than revenues, fees, and interest are not taken into account. In addition, the turnover of financial institutions is automatically multiplied by 10% in order to effectively increase the threshold for financial institutions.

MOFCOM revises M&A rules

On July 23, 2009, MOFCOM released a revised version of its Rules on Acquisition of Domestic Enterprises by Foreign Investors (the "M&A Rules"). The revised rules replace rules adopted in 2006, which, among other things, regulated merger control filings in China before the adoption of the AML. The main substantive change introduced by the revised M&A Rules is to replace the chapter dealing with merger control with a reference to merger control rules under the AML and Regulation on Notification Thresholds for Concentrations of Undertakings. However, the M&A Rules continue to require foreign investors to determine whether a proposed transaction involves "key industries and contains factors that would have an impact or potentially impact on national economic security or leads to the transfer of actual control of a well-known trademark or a time-honored Chinese brand from a domestic enterprise." If so, the parties must make an additional filing to MOFCOM. Additional guidance would be helpful regarding the factors that may trigger a "national economic security review," the substantive standards of the review, and the relation between the "national security review" under the AML[5] and the "national economic security review" under the M&A Rules.

China celebrates AML's first anniversary

The AML entered into force in August 2008. Since then, the AMC and Anti-Monopoly Enforcement Authorities ("AMEAs")[6] have made considerable progress in fleshing out China's antitrust regime, including by issuing a number of regulations, rules, and guidelines.[7] Four general observations of the AML's first year merit specific mention.

- Although a large number of regulations, rules, and guidelines have been published, the vast majority of the regulatory regime remains in draft form. Moreover, there are still significant ambiguities and a number of important holes in China's regulatory framework. Notably, although SAIC has proposed the outlines of a leniency program for non-price related antitrust violations, NDRC has so far not proposed a leniency program for price fixing and other price-related antitrust violations.
- The AMEAs have so far provided little guidance on the substantive application of the AML. MOFCOM has handled a large number of merger cases, but has published decisions in only five, and the first three decisions attracted criticism from an EU or U.S. perspective (see below for a discussion of the two more recent decisions). SAIC and the NDRC have not published any decisions regarding

5 Under Article 31 of the AML, a "national security review" is required when a transaction involving a foreign acquirer and a domestic target may impact national security. Importantly, it is unclear exactly what target activities trigger such a review, which authorities will conduct a national security review, and how they will do so.

6 In August 2008, the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of the State Administration for Industry and Commerce ("SAIC"), MOFCOM's Anti-Monopoly Bureau, and the Price Supervision Department of the National Development and Reform Commission (the "NDRC") were designated as AMEAs under the AML. The responsibility for enforcing the AML is allocated as follows:

- SAIC is responsible for scrutinizing non-price-related anti-competitive agreements, abuses of dominant positions, and abuses of administrative power;
- The NDRC is responsible for price-related anti-competitive agreements, abuses of dominant positions, and abuses of administrative power; and
- MOFCOM is mainly in charge of merger review, as well as investigating antitrust conduct in international trade.

7 A more detailed review of the AML's first year and a table summarizing these regulations, rules, and guidelines, whether in final or draft form, may be found in our Alert Memorandum of September 16, 2009, available at: http://www.cgsh.com/chinas_anti-monopoly_law_one_year_on/.

restrictive agreements or abuses of dominant positions. In fairness, regulators in other jurisdictions have developed their bodies of precedent over many years or decades.

- The unusual division of authority between SAIC and NDRC creates the potential for overlapping jurisdiction in many cases. Clear rules as to which agency will handle which cases will be needed, and care will be required to ensure that the two agencies' rules and regulations are consistent.
- A number of cases alleging abuses of dominant positions have been filed before the Chinese courts, suggesting that private litigation may play a larger role in the early development of Chinese antitrust law than many expected when the AML was adopted.

In the coming months, we anticipate that the AMEAs will release final versions of several of the outstanding drafts and publish a number of additional drafts, including, notably, SAIC's substantive rules on restrictive agreements and abuse of dominant positions and guidelines on the enforcement of the AML in the area of intellectual property rights. These rules should help clarify existing ambiguities and fill a number of holes, including a leniency regime for price-fixing.

Many U.S. and European observers have expressed concern that the AML will be used to further industrial policy goals or nationalist sentiments unrelated to antitrust law. At this stage, it is too early to tell if such fears are justified. On the one hand, the AML and the published rules and guidelines are largely consistent with international antitrust norms. On the other hand, the AML and the draft and final rules and guidelines are, perhaps purposefully, quite vague and leave significant discretion to the AMEAs. As noted, three of MOFCOM's five publicly available merger review decisions do little to allay the concerns, and the co-existence of requirements for a merger control filing, national security filing, and national economic security filing by foreign investors that acquire certain domestic enterprises raises more ambiguity.

The AMEAs have accomplished a great deal over the past year. The coming year should help to remove some of the existing uncertainty regarding the procedural framework and provide further guidance on the AMEAs' enforcement of the AML.

NDRC issues draft implementing rules regarding restrictive agreements

On August 12, 2009, NDRC published draft Rules on Anti-Pricing Monopoly (the "Draft Anti-Pricing Monopoly Rules"), which apply to price-related anti-competitive agreements and provide detail as to the types of behavior that will constitute such an anti-competitive agreement. Price-related anti-competitive agreements are defined as "any agreements, decisions, in writing or verbally, or other concerted actions between two or more undertakings that eliminate or restrict competition in price." The draft rules prohibit competitors from fixing prices or discounts, using a standard formula to calculate prices, agreeing not to modify prices, restricting output, dividing up markets, and similar conduct.

Surprisingly, the Draft Anti-Pricing Monopoly Rules suggest that NDRC has jurisdiction over agreements between competitors that restrict output or sales volume or divide markets if such agreements affect prices. This may suggest that NDRC has responsibility for any agreements that affect price, even indirectly. If so, substantial overlaps between NDRC's and SAIC's areas of responsibility are likely. Moreover, similar concepts receive differing treatment in the draft NDRC and SAIC rules. For example, the Draft Anti-Pricing Monopoly Rules define "anti-competitive agreement" and "coordinated practice" differently from the definition of "anti-competitive agreement" and "acts of collaboration" in SAIC's draft restrictive agreement rules. These differences could result in confusion and complicate companies' compliance efforts.

As with MOFCOM's and SAIC's draft rules, the Draft Anti-Pricing Monopoly Rules raise a number of concerns. For example, Article 5 indicates that "concerted action" can be evidenced by "consistent" pricing conduct and communications between businesses. It is unclear if both elements must be satisfied to find concerted action. It is also unclear what exactly constitutes "consistent" behavior, *e.g.*, whether parallel pricing – which is common in many highly competitive industries – is sufficient. In addition, the draft states that NDRC will consider whether the alleged consistent behavior has a legitimate justification. As written, however, it appears that consistent behavior may raise a presumption of illegality that must be rebutted by the parties. Inferring coordination based on consistent pricing may chill a company's ability to respond rationally and unilaterally to pricing competition from its rivals.

It is also unclear whether all of the price-related agreements referenced above are prohibited regardless of their impact on consumers. Experience in the U.S. and EU shows that *per se* prohibitions should be limited to price fixing, output restriction, and market/customer sharing. For the remaining cases, a rule-of-reason is a preferable approach. It would be useful for implementing measures to emphasize the need for the agencies to show likely anti-competitive effects, to apply economic analyses on a case-by-case basis, and to address the analysis of possible justifications. In particular, it would be helpful for NDRC's rules to stress the need to prove consumer harm before prohibiting allegedly restrictive agreements, particularly in the case of vertical agreements, which are normally pro-competitive.

In spite of the publication of the Draft Anti-Pricing Monopoly Rules, one of the main disappointments of the first year of the AML is the lack of guidance from NDRC regarding price-related anti-competitive agreements, in particular cartels. Cartels are generally viewed as the most serious violations that antitrust laws are intended to prevent. Similarly, it is noteworthy that NDRC has not proposed adopting a leniency regime comparable to that established by SAIC.

NDRC issues draft implementing rules regarding the abuse of a dominant market position

The Draft Anti-Pricing Monopoly Rules also provide further detail regarding the definition of a dominant position, the types of conduct that may constitute an abuse, and the circumstances in which a dominant firm may be able to justify its otherwise abusive behavior. Consistent with the AML, predatory pricing, refusals to deal, "unfairly high" or "unfairly low" pricing, and price discrimination are prohibited.

In Articles 12 and 13, the Draft Anti-Pricing Monopoly Rules elaborate on the AML's prohibitions against selling at unfairly high prices, purchasing at unfairly low prices, and predatory pricing. Article 12, regarding unfairly high or low prices, lists a variety of factors for NDRC to consider, including whether the price is "obviously" higher or lower than the cost of the product, whether an increase or decrease in price is beyond "normal" levels, whether a price increase or decrease is obviously inconsistent with a change in cost, and whether the price is obviously different from the price of similar products offered by other companies. While cost is a relevant benchmark in both Articles 12 and 13, neither article defines the term nor clarifies which measures of cost apply.

Notably, Article 13 lists several possible justifications for below-cost pricing, including selling perishable or seasonal products at a discount prior to expiration, bankruptcy or going-out-of-business sales, short-term promotions to attract customers, matching competitors' prices, and taking advantage of economies of scale to reduce costs resulting in benefits to consumers. The first two justifications are in line with relevant provisions of China's Anti-Unfair Competition Law regarding below-cost selling.

Articles 12 and 13 will likely be difficult to implement, as it is hard to determine whether prices are "normal" or "reasonable" or whether low prices are "predatory" based on objective factors, and the draft rules lack a requirement that NDRC make a finding that challenged pricing by a dominant company resulted in harm to consumers.

Article 14 expands on prohibited refusals to deal and states that, "[u]ndertakings with dominant market positions are prohibited from refusing in disguise to deal with a trading counterparty by setting unfairly high or low prices without any justifiable reasons." It goes on to define "unfairly high or low prices" to mean "the trading counterparty cannot attain normal profit after normal production and sale if the commodities are sold at such prices." First, it is surprising that a refusal to deal falls within NDRC's jurisdiction, as it is typically considered a non-price restraint that would normally fall under SAIC's jurisdiction. Second, basing the definition on the subjective notion of "normal profit" may well give rise to uncertainty and confusion. It will also likely prove extremely difficult for one party to predict another's profit margin, much less determine whether such profit is "normal." Moreover, if applied literally, this could be construed to suggest a greater duty to sell at low prices when dealing with particularly inefficient (high-cost) competitors.

As with SAIC's draft rules regarding abuse of a dominant position, the Draft Anti-Pricing Monopoly Rules do not clearly indicate that a finding of consumer harm is required to establish an abuse of dominance. Unlike cartel behavior, which is generally recognized to result in harm to consumers regardless of any alleged justification, an abuse of a dominant position is often accompanied by pro-competitive justifications and benefits. It is unclear if NDRC will balance pro-competitive benefits against perceived harms when investigating allegedly prohibited conduct.

MOFCOM issues fourth and fifth merger review decisions

On September 28, 2009, MOFCOM approved with conditions General Motors' acquisition of certain assets of parts supplier Delphi Corp. U.S. and EU authorities had already approved the deal. MOFCOM expressed concern about possible vertical effects, including an adverse impact on the stability, price, and quality of Delphi's supply of auto parts to GM's competitors. MOFCOM also sought to ensure that GM's competitors could switch to other suppliers if necessary and that Delphi would maintain the confidentiality of competitively sensitive and confidential information of other automobile manufacturers supplied by Delphi. In response to these concerns MOFCOM imposed four behavioral remedies. Press reports indicate that the companies proposed remedies and MOFCOM accepted. Approval of the concentration was conditioned on the following four behavioral commitments:

- Delphi and its controlled affiliates will continue to supply Chinese automobile manufacturers on non-discriminatory terms. As before the transaction, the timeliness and reliability of supply and product quality shall be ensured. With respect to price and quantity of supply, standard market practices and executed agreements shall be respected, and unreasonable conditions, which may directly or indirectly eliminate or restrict competition, may not be imposed;
- GM shall not unlawfully seek from Delphi any competitively sensitive, confidential information of domestic automobile manufacturers. Delphi shall not illegally disclose such information to GM. The companies shall not unlawfully exchange or communicate third parties' competitively sensitive, confidential information in a formal or informal way;
- Delphi and its controlled affiliates shall cooperate with clients that seek to switch suppliers. Delphi and its controlled affiliates shall not delay or impose restrictive conditions to increase automobile manufacturers' switching costs; and
- GM shall continue to employ a multi-source supply strategy and non-discriminatory terms (as long as GM's requirements are met) for all auto parts purchases. Unreasonable conditions specifically favorable to Delphi and to the disadvantage of other auto parts suppliers shall not be imposed.

On September 29, 2009, MOFCOM conditionally cleared the merger of pharmaceutical companies Pfizer and Wyeth. MOFCOM's investigation revealed overlapping animal health products. As a result, MOFCOM required the divestiture of Pfizer's Chinese swine mycoplasma pneumonia business. MOFCOM's review found that the companies' post-transaction market share of such vaccines would be 49.4%, which is far higher than the next closest competitor whose share is only 18.4%. Other players have market shares below 10%. MOFCOM also noted high barriers to entry due to costly and time-consuming R&D required to develop pharmaceuticals and the particularly sophisticated technical requirements to develop vaccines against swine mycoplasma pneumonia. MOFCOM concluded that the combined entity would be able to expand its market share, profitably raise prices, and restrict entry and innovation.

As discussed above, MOFCOM previously used its merger review power to prevent future conduct unrelated to the transaction or to impose remedies seemingly at odds with standard competition theory. Here, the remedies seem to follow the competitive concerns expressed in the decisions. In addition, both filings were accepted by MOFCOM without the extensive delays suffered in the three previously reported decisions. Once again, however, the decisions themselves are quite short and do not provide detailed insight into the rationale for MOFCOM's findings.

INDIA

Competition Commission implements regulation regarding leniency

On August 13, 2009, the Competition Commission of India ("CCI") released the Competition Commission of India (Lesser Penalty) Regulations. The regulations describe the CCI's policies for the reduction of penalties for participants in a cartel that assist in the investigation and prosecution of the cartel. As previously reported, Section 3 of the 2002 Competition Act of India prohibits agreements restricting the production, supply, distribution, acquisition, or control of goods or provision of services that may cause an appreciable adverse effect on competition within India. Participation in a cartel may lead to penalties of up to three times a participant's profit or 10% of its turnover for each year of the existence of such agreement, whichever is higher. Participants may also be liable for compensation to any third parties affected by the anti-competitive conduct. The CCI may investigate acts or agreements that occur outside India that have an appreciable adverse effect on competition within India.

A participant that makes a full, true, and "vital" disclosure about cartel behavior may qualify for lesser penalties. A vital disclosure is one that enables the CCI to form a prima facie opinion regarding the existence of a cartel, when it previously could not, or establishes a violation of the Act by providing new evidence. An applicant for leniency must also continue to cooperate throughout the period of investigation, cease its participation in the cartel, and refrain from concealing, destroying, or manipulating any evidence.

The first applicant to provide vital disclosure may receive a reduction in penalties of up to 100%. The second applicant may benefit from reductions up to 50% and the third from up to a 30% reduction. Each applicant's disclosure must provide significant added value to the evidence already in CCI's possession. Reductions in penalties are at the discretion of the CCI and will be determined based on the stage of the investigation when the applicant comes forward, the evidence already in CCI's possession, and the quality of the disclosure.

Repeal of the Monopolies and Restrictive Trade Practices Act of 1969

As of September 1, 2009, the Monopolies and Restrictive Trade Practices Act of 1969 ("MRTP Act"), India's predecessor competition law, is repealed. For two years, the MRTP Commission will continue in existence to hear cases and proceedings filed prior to September 1 as well as any new actions arising prior to September 1 under the MRTP Act. After two years, the MRTP Commission will be dissolved, and any remaining matters will be transferred to either the Competition Appellate Tribunal or the National Commission (unfair trade practices).

Unclear when Sections 5 and 6 of the 2002 Competition Act regarding merger control will come into force

As previously reported, on May 20, 2009, the 2002 Competition Act of India's Section 3 regarding anti-competitive agreements and Section 4 regarding abuse of a dominant position became effective. Sections 5 and 6, which concern merger control, have not yet come into force. Various unofficial sources and press reports indicate that this may occur by the end of 2009. We will provide details as they become available.

JAPAN

Japan's Fair Trade Commission ("JFTC") imposes record fine on steel cartel

On August 27, 2009, JFTC ordered three steelmakers to end an illegal cartel and imposed a fine of JPY 15.5 billion yen (~$170 million). The fine is the largest ever imposed by the JFTC in a price-fixing case. The order is addressed to Nippon Steel & Sumikin Coated Sheet Corp. (JPY 6.34 billion), Nisshin Steel Co. (JPY 5.49 billion), and Yodogawa Steel Works Ltd. (JPY 3.68 billion). A fourth company, JFE Galvanizing & Coating Co., was also a member of the alleged cartel, but was not fined because it voluntarily reported the cartel to the JFTC pursuant to Japan's leniency program. The JFTC alleged that the three companies agreed to fix the prices of zinc-coated steel sheet products.

JFTC issues cease-and-desist order to Qualcomm

On September 28, 2009, the JFTC issued a cease-and-desist order to Qualcomm concerning its use of licensing practices to abuse its dominant position. The order is based on Qualcomm's breach of its promise to a standard setting body to license its third generation mobile technology on fair, reasonable, and non-discriminatory ("FRAND") terms to Japanese cell phone handset makers. More specifically, the order states that Qualcomm breached its FRAND promise by using its dominant position in the CDMA and WCDMA cell phone technologies to coerce all handset makers into agreeing to cross-license their patents on a royalty-free basis without regard to the value of those patents and prevented the manufacturers from asserting their rights under those patents against Qualcomm's customers or licensees. Because of Qualcomm's dominant position in CDMA and WCDMA technology, every OEM employing that technology requires a Qualcomm license. Qualcomm's non-assert provision effectively prevented handset makers from asserting their patent rights against all other OEM's producing third generation mobile technology. The JFTC found that the non-assert provisions reduced the incentive of these companies to engage in R&D of their own technology and had the effect of further strengthening Qualcomm's dominant position in the market for CDMA technology. The order requires that Qualcomm eliminate cross licensing and non-assert provisions from its patent licensing agreements with Japanese cell phone handset manufacturers. Qualcomm opposes the findings of the order and has indicated that it will exercise its right to an evidentiary hearing before the JFTC and, if necessary, will appeal to the Japanese courts.

The JFTC initially launched its investigation in November 2006. On July 28, 2009, the JFTC issued a draft order to Qualcomm. Interestingly, the draft order was delivered to Qualcomm just days after South Korea imposed a record fine on Qualcomm for its Korean licensing practices (see below).

SOUTH KOREA

Agency appoints new Chairman

On June 28, 2009, Dr. Ho-Yul Chung was unofficially appointed Chairman of the Korea Fair Trade Commission ("KFTC"). Dr. Chung was formerly a professor at Sungkyunkwan University focused on antitrust law issues. He also served as head of the KFTC's Competition Policy Advisory Committee and the Korean Competition Law Association. He replaces the former Chairman, Dr. Yong-Ho Baek.

KFTC issues corrective orders and fine against Qualcomm

On July 23, 2009, the KFTC issued a decision to impose corrective orders and a fine of approximately KRW 260 billion (~$217 million) against Qualcomm for abusing its dominant position in the form of royalty discrimination, conditional rebates, and other terms. This is the largest fine ever levied by the KFTC against a single company. The KFTC found that Qualcomm has a 99.4% share of the CDMA (a cell phone technology) modem chipset market and that it used several strategies to exclude competition and maintain its dominant position. Qualcomm's illegal strategies included: (i) imposing higher royalties on mobile phone manufacturers that used chipsets produced by competing chipset manufacturers; (ii) providing rebates to mobile phone manufacturers on the condition that they fulfill most of their demand for the chipsets through Qualcomm; and (iii) using its dominant position to impose terms on mobile phone manufacturers that required the manufacturers to pay 50% of the agreed royalties even after expiration or invalidation of the relevant patents.

In addition to the fine, the 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 stated that it plans to appeal the order.

KFTC issues fine against beverage firms

On August 14, 2009, the KFTC issued a decision to impose a combined fine of approximately KRW 25.5 billion (~$20.6 million) on three soft drink manufacturers for allegedly fixing prices. The decision is addressed to Lotte Chilsung Beverage (KRW 21.7 billion), Haitai Beverage (KRW 2.3 billion), and Woongjin Foods (KRW 1.4 billion). Two other companies, Coca-Cola Korea and Donga-Otsuka, which were also allegedly involved in the price-rigging scheme, were not fined because they voluntarily reported their involvement in the scheme. According to the KFTC, Lotte Chilsung Beverage devised a price hike plan and the other beverage makers followed suit. The five beverage companies increased the prices of their beverages three times since February 2008, citing a weakening local currency and increased raw material costs. The KFTC stated that it intends to bring criminal charges against the chief executive officers of Lotte Chilsung Beverage and Haitai Beverage for their participation in the cartel.

Court rules against Microsoft in antitrust suit

On September 14, 2009, the Seoul Central District Court held that Microsoft had abused its dominant market position and violated South Korea's antitrust laws when it bundled software programs with its Windows operating system. At the same time, the Court rejected for lack of evidence software company Dideonet's demand for almost $81 million in damages allegedly suffered as a result of Microsoft's action. This is the second adverse decision handed down to Microsoft by this Court. In June, the Court similarly ruled that Microsoft had violated South Korea's antitrust laws by packaging software with its Windows operating system. Again, the Court rejected private damages claims, this time on the ground that the damages were not sufficiently linked to Microsoft's conduct.

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