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This is the sixth 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 issues divestiture remedies rules

On July 5, 2010, China's Ministry of Commerce ("MOFCOM") published (with immediate effect) the Provisional Rules on Divestitures of Assets or Businesses to Implement Concentrations Between Undertakings (the "Divestiture Rules").[1] The Divestiture Rules are the first rules specifically regulating divestiture remedies under the Chinese Anti-Monopoly Law (the "AML").

The Divestiture Rules appear to be modeled on the EU Commission's approach to merger remedies. Consistent with other MOFCOM rules and regulations, however, the Divestiture Rules are quite general and thus provide MOFCOM with more discretion than the Commission's rules. The Divestiture Rules do not address the procedure for submitting remedies, but this topic is addressed in MOFCOM's Rules on the Examination of Concentrations Between Undertakings (the "Examination Rules").

The Divestiture Rules distinguish between two phases in the divestiture process. During the first phase (the "self-divestiture period"), the merging parties have sole responsibility for finding a suitable purchaser for the divested business. If the merging parties are not successful during the self-divestiture period, a second phase begins, during which a divestiture trustee will be appointed (the "trustee divestiture period").[2] After a divestiture sales agreement is executed, consistent with the European Commission's rules, the Divestiture Rules give the parties three months to close the divestiture. This period may be extended based on the particular requirements of each case.

MOFCOM will be responsible for evaluating the monitoring and divestiture trustee candidates and potential divestiture buyers, as well as approving the agreement(s) with the trustees, the proposed divestiture sales agreement and any other related agreements.

The merging parties have a number of obligations designed to secure the value of the divested business, such as maintaining the independence of the business, refraining from any conduct that may have an adverse effect on the divested business and appointing a special manager to manage the divested business.

Although the Divestiture Rules are the first specific rules on divestiture remedies under the AML, the AML and the Examination Rules cover remedies in general. The AML allows MOFCOM to impose remedies to lessen the negative impact of a concentration on competition. The Examination Rules, which entered into force on January 1, 2010,[3] provide further detail regarding the submission of remedies under the AML.

In addition to the AML and the aforementioned rules, three conditional clearance decisions involving divestiture remedies (*Panasonic/Sanyo,*[4] *Pfizer/Wyeth*[5] *and Mitsubishi Rayon/Lucite*[6]) shed light on MOFCOM's approach to divestiture remedies.

In *Panasonic/Sanyo* and *Mitsubishi/Lucite*, MOFCOM allowed a divestiture period of six months beginning on the closing date of the notified merger, subject to a possible six-month extension at MOFCOM's discretion. If the merging parties were unable to find a buyer, the decision specified that MOFCOM would appoint a trustee to dispose of the divested business.

In *Pfizer/Wyeth*, the merging parties were also given six months to enter into a binding agreement with a buyer, but the six-month period began on the date of MOFCOM's approval, rather than the closing of the notified transaction. If a buyer was not found within the six-month

1 For a detailed review of the Divestiture Rules, please refer to our Alert Memorandum of July 26, 2010, which may be found at http://www.cgsh.com/chinas_mofcom_issues_provisional_rules_on_divestiture_remedies/.

2 The Divestiture Rules contemplate two types of trustees: a "monitoring trustee," which oversees the entire divestiture process, and a "divestiture trustee," which will be appointed in the event the divestiture enters a trustee divestiture period. Trustees must be independent third parties approved by MOFCOM.

3 For a detailed review of the Examination Rules, please refer to our Alert Memorandum of December 11, 2009, which may be found at http://www.cgsh.com/news/List.aspx?practice=2&geography=46.

4 MOFCOM Decision [2009] No. 82, October 30, 2009, available at http://fldj.mofcom.gov.cn/aarticle/zcfb/200910/20091006593175.html?3329889584=3474478533.

5 MOFCOM Decision [2009] No. 77, September 29, 2009, available at http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html?3514506400=3639222316.

6 MOFCOM Decision [2009] No. 28, April 24, 2009, available at http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html?528227488=3639222316.

time period, a trustee would be appointed to dispose of the divested business at "no minimum price." Pfizer was required to provide support, training, services and raw materials at the buyer's request.

On August 13, 2010, one month after the issuance of the Divestiture Rules, MOFCOM conditionally cleared *Novartis/Alcon*,[7] though it did not require any divestitures. Nonetheless, MOFCOM invoked its powers under the Divestiture Rules by requiring that Novartis appoint a monitoring trustee. Article 13 of the Divestiture Rules allows MOFCOM to apply the rules to remedies other than divestitures.

As in other areas, it will be essential to monitor MOFCOM's decisional practice for more detailed information on how MOFCOM applies its rules in individual cases.

MOFCOM clears Novartis/Alcon transaction with conditions

On August 13, 2010, MOFCOM approved, with conditions, the acquisition of Alcon, Inc. ("Alcon") by Novartis AG ("Novartis"). This is the sixth transaction subject to conditions imposed by MOFCOM. Notably, all six conditional approvals involved transactions between foreign multinational corporations, and the only published prohibition decision concerned an acquisition of a Chinese company by a foreign multinational (Coca-Cola/Huiyuan).

According to MOFCOM's decision, the parties filed the merger notification on April 20, 2010, and MOFCOM accepted the notification immediately thereafter. Contrast this with some of the previously reported cases, for which MOFCOM took months to accept the notification. This may be a sign of improved administrative efficiency.

Similar to MOFCOM's previously published decisions, the Novartis/Alcon decision provides little detailed legal analysis. MOFCOM did identify two relevant product markets: (i) ophthalmic anti-inflammatory/anti-infection compounds ("eye-care medication products") and (ii) contact lens care products. It is unclear what MOFCOM used as the relevant geographic market, if anything, as the decision discusses both global and China market shares.

In eye-care medication products, MOFCOM determined that the parties would have a combined market share of 55% worldwide and 60% in China. However, Novartis's share in China is less than 1%, and Novartis advised MOFCOM of its decision to withdraw from this product market globally.

In contact lens care products, MOFCOM determined that the parties would have a combined market share of 60% globally and 20% in China, which would make them the second largest company in China behind Haidron Contact Lens Co. Ltd. ("Haidron"). MOFCOM noted that Novartis's Chinese subsidiary had entered into a strategic partnership with Haidron, under which Haidron serves as the sole distributor for Novartis contact lens products in China. The decision expressed concern that the agreement might facilitate coordination between the combined company and Haidron with respect to price, output and/or sales territories.

MOFCOM and the merger parties agreed to the following conditions:

- by the end of 2010 and continuing for five years thereafter, Novartis shall stop selling its eye-care medication products in China; and
- Novartis shall terminate the agreement entered into by its Chinese subsidiary and Haidron within one year after the decision.

The remedies are unusual in a number of respects. First, it is interesting that MOFCOM imposed conditions in the eye-care medications product market as Novartis had only a 1% share and had expressed its intention to exit the market. In addition, even assuming that the antitrust concern is valid, the more typical remedy would have been the divestiture of Novartis's business, which would have kept the product on the market to the benfit of consumers. While the the condition imposed on the contact lens care products is understandable, the decision, unfortunately, does not provide any detailed analysis of the factors MOFCOM weighed regarding the likelihood and impact of the alleged coordination.

INDIA

Supreme Court of India delivers its first judgment under the Indian Competition Act

On September 9, 2010, the Supreme Court of India delivered its first judgment under the Indian Competition Act 2002 on an appeal brought by the Competition Commission of India ("CCI") against an Order of the Competition Appellate Tribunal of India (the "Tribunal"). The Supreme Court's judgment is an important and welcome development in the evolution of Indian competition law.

In October 2008, Jindal Steel, one of the largest steel manufacturers in India, complained to the CCI that its competitor, the Steel Authority of India ("SAIL"), had abused its dominant position by entering into a long-term exclusive supply agreement with an

7 MOFCOM Decision [2010] No. 53, August 13, 2010, available at http://fldj.mofcom.gov.cn/aarticle/ztxx/201008/20100807080639.html?3413841200=3474478533.

important customer, Indian Railways. The CCI found that there was a *prima facie* case and recommended that an investigation be initiated. SAIL requested an extension to comment on the CCI's findings, which the CCI refused.

SAIL appealed that refusal to the Tribunal and requested interim relief to stay the CCI's investigation pending resolution of the issue. The Tribunal granted SAIL's appeal and stayed the CCI's investigation. The Tribunal also held that the CCI could not be an interested party in any appeal before it and that the CCI was obliged to state the reasons why it recommended the initiation of an investigation. The CCI then appealed the Tribunal's decision, arguing *inter alia* that a decision to initiate an investigation was not an appealable decision under the Competition Act 2002 and that a direction precluding the CCI from being an interested party in appeal proceedings was inappropriate.

The Supreme Court Judgment addressed five principal questions of law:

- Appealable decisions. The judgment held that only CCI decisions under Section 53 of the Competition Act 2002 are appealable to the Tribunal. Section 53 of the Competition Act 2002 sets out a list of appealable decisions (*e.g.*, an infringement decision) but a decision to initiate an investigation is not part of that list.
- Right to be heard at an initial stage. The Supreme Court held that neither parties under investigation nor third parties have a right to be heard during the initial stages (*i.e.*, while the CCI is formulating its opinion).
- Tribunal proceedings. The Supreme Court held that the CCI ought to be a "necessary party" in Tribunal cases where the proceedings concern a CCI decision or in other appropriate cases.
- Interim relief. The Supreme Court confirmed that the CCI has the power to grant interim relief (*e.g.*, to issue an order temporarily restraining an undertaking from carrying out an act) but noted that these powers were to be used sparingly and under "exceptional and compelling circumstances."
- Reasoned decisions. The Supreme Court also held that it was incumbent on CCI to reason its decisions, regardless of whether they are appealable decisions or not. However, the Supreme Court did not require the CCI to produce substantiated and/or fully reasoned decisions at an interim stage.

INDONESIA

KPPU fines Pfizer for abuse of a dominant position

In late September, Indonesia's antitrust agency, the KPPU, fined Pfizer and Indonesia's PT Dexa Medica holding that the companies abused their dominant market positions in antihypertension products to overcharge consumers. The KPPU ordered Pfizer and its relevant subsidiaries to pay as much as 25 billion rupiah (~$2.8 million; €2 million) each. Dexa Medica was hit with a 20 billion rupiah fine (~$2.2 million; €1.6 million). The KPPU pointed out that the price of Pfizer's drug in Indonesia is 14.6 times higher than the price to the World Health Organization and stated that the fair price of the product is about 2.5 times the price to WHO. It is unclear how the fair price was determined. The commission also ordered Pfizer to lower the price of its drug by 65% and Dexa Medica to lower its price by 60%.

JAPAN

Japan's Fair Trade Commission ("JFTC") issues draft guidelines

The JFTC issued Draft Guidelines on the abuse of a superior bargaining position (the "Draft Guidelines"), as provided by the Anti-Monopoly Law ("AML"). One of the amendments to the AML (which was itself subject of a comprehensive revision in 2009) was to introduce surcharges of 1% of all sales between the parties for the period during which the abuse occurred (with a three year maximum).

Abuse of a superior bargaining position is a broader theory than traditional notions of illegal monopolization. A company need not have significant market power to violate these provisions – all that is required is that its market position be superior to its counterparty in a given transaction.

Neither the AML nor the Draft Guidelines provide an objective definition for what can constitute an abuse of a superior bargaining position. Each instance will be evaluated on a case-by-case basis. However, the AML provides some guidance on the factors that will be used to determine whether an abuse has taken place, namely cases where: (1) the stronger party requires the counterparty to acquire goods or services other than those covered by the regular transaction; (2) requiring the weaker party to provide money, goods or services in addition to the consideration given for the regular transaction; or (3) where the company in a stronger position refuses to receive or return goods, delays or reduces payment or otherwise changes the terms of the transaction to the disadvantage of the counterparty.

To assess whether a party has a superior bargaining position, the following (non-exhaustive) factors are provided by the Draft Guidelines: (1) the degree to which the weaker party depends on doing business with the other party; (2) the stronger party's position on the market; (3) whether other partners are available to the weaker party; and (4) other facts showing that the weaker party must do business with the stronger party.

The Draft Guidelines note that such conduct risks having a wider detrimental effect on competition. Companies doing business in Japan should be aware of this type of abuse when engaging in transactions in Japan; as noted above, surcharges for such conduct could result in fines of 1% of sales between the relevant parties.

SOUTH KOREA

Korea's Fair Trade Commission ("KFTC") initiates inquiry on patent abuse

On August 6, 2010, the KFTC initiated an industry-wide inquiry into patent abuse in the IT sector. This is the first such large-scale inquiry into patent rights. The KFTC decided to initiate the inquiry after it fined Qualcomm for imposing discriminatory patent license fees on mobile phone manufacturers in 2009. The inquiry will proceed in two stages. First, written questions will be sent to companies. The second step involves on-site investigations of non-cooperating companies or companies that submit misleading information.

The focus of the inquiry is the current status of patent disputes and patent licensing contract terms. The goal is to uncover possible legal violations and to determine whether the KFTC can deregulate certain reasonable contract practices. Any potential violations of law uncovered by the investigation will result in a further investigation and the possibility of sanctions. The inquiry will last six weeks (August 6 – September 17) for domestic IT firms and 8 weeks (August 6 – September 30) for foreign firms.

KFTC imposes sanctions on eBay-Gmarket's abuse of dominance

On July 14, 2010, the KFTC issued a corrective order and administrative fine of KRW 10 million (~$9,000; €6,400) to eBay-Gmarket, Co. Ltd. ("Gmarket") for its abuse of a dominant position in Internet Open Market management.[8] The KFTC also filed a criminal complaint with the Public Prosecutor's office. In addition, the KFTC imposed fines of KRW 200 million (~$180,000; €128,000) on Gmarket and KRW 50 million (~$45,000; €32,000) on an employee for obstruction of the KFTC's on-site investigation. Gmarket delayed the entry of KFTC officials onto Gmarket's premises and deleted computer files despite a KFTC request to preserve evidence.

The KFTC found that Gmarket has a market share of over 90% in Internet Open Market management. The abuse occurred when Gmarket notified sellers that it would exclude a seller from the Gmarket homepage if the seller also worked with its competitor, "11th Street". As a result of the notification, at least ten major sellers stopped working with 11th Street. The KFTC determined that Gmarket's actions significantly affected the business decisions of sellers and prevented them from doing business with its competitor. The KFTC calculated the fine based on the Gmarket sales fees imposed on the ten major sellers that stopped working with 11th Street due to Gmarket's actions.

The KFTC filed the criminal complaint because this action occurred less than three years after the KFTC sanctioned Gmarket for similar conduct.

8 Gmarket is a Korean online auction and shopping website. Anyone can offer goods and services for sale. Gmarket generates revenue by charging sellers a fee based on the opening and selling prices of each item sold and via advertising.

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