CLEARY GOTTLIEB

Asian Competition Report

OCTOBER – DECEMBER 2009

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This is the third edition of Cleary Gottlieb's Asian Competition Report, covering major antitrust developments in Asian jurisdictions. As detailed below, during the fourth quarter of 2009, China continued to issue implementing rules under its Anti-Monopoly Law and saw resolution of early Anti-Monopoly Law litigation. South Korea continued its efforts to investigate and punish price fixing cartels. We have reported on recent developments with the circulation of two Alert Memoranda and the publication of articles in Competition Law360 and Bloomberg Law Reports (Asia-Pacific). We hope you find this Report interesting and useful.

CHINA

Resolution of first court cases under China's Anti-Monopoly Law ("AML")

During the fourth quarter of 2009, China's courts issued decisions or helped mediate settlement in four abuse-of-dominance cases.[1] The court ruled for defendants in each of the three decisions, finding that plaintiffs failed to meet their burden of showing that the defendants had a dominant position and explaining that the defendants' conduct was legitimate. These decisions illustrate the significant role played by private litigation in the development of Chinese antitrust law applicable to unilateral conduct. The Chinese antitrust enforcement agencies responsible for this area, the State Administration for Industry and Commerce and the National Development and Reform Commission, have not yet announced any decisions or publicly launched any investigations under the AML, although a number of complaints have been filed. The four cases are summarized below:

- On October 23, 2009, the Shanghai No. 1 Intermediate People's Court rejected an abuse-of-dominance case filed by Sursen Electronic Technology Co., Ltd. ("Sursen"), the operator of a website offering digital books, against Shanda Interactive Entertainment Ltd. ("Shanda") and Shanghai Xuanting Entertainment Co., Ltd. ("Xuanting").
- Also on October 23, 2009, China Mobile settled a private abuse-of-dominance lawsuit brought by Mr. Zhou Ze, a Beijing lawyer who is a subscriber to China Mobile's services. In the settlement, which was mediated by Beijing No. 2 Intermediate People's Court, China Mobile agreed to pay 1,000 renminbi (approx. $146) without admitting wrongdoing. China Mobile reportedly claimed that its payment was only an acknowledgement of its gratitude for Mr. Zhou's suggestion on improving their services.
- On December 18, 2009, the Beijing No. 1 Intermediate People's Court ruled for Baidu, a Chinese Internet search company, in a case brought by Tangshan Renren Information Services Co. ("Renren"), which operates a medical consulting services website. Renren claimed that Baidu used its dominant position to limit access to Renren's website in violation of the AML.
- On December 24, 2009, the Beijing No. 2 Intermediate People's Court reportedly ruled for China Netcom's Beijing Branch in a case brought by Mr. Li Fangping over China Netcom's alleged discriminatory treatment of customers who are not permanent Beijing residents.

Shanda

This case involved a book Sursen published online in 2008. Shanda had previously hired author Zhu Zhihong to write an online serial novel titled "Star Change," to which Shanda's partner Xuanting holds the copyright. "Star Change" was one of the most popular online novels in China in 2008. Two other authors subsequently wrote "Star Change – the Sequel" using similar pen names and the same characters, scenes, and other details. Beginning in May 2008, Sursen's website, du8.com, carried "Star Change – the Sequel," which also gained widespread popularity.

Shanda and Xuanting accused the sequel's authors and Sursen of violating Xuanting's copyright. The sequel's authors issued a public apology on January 1, 2009, and promised to cease writing the sequel.

Sursen, however, filed suit under the AML, alleging that Shanda had abused its dominant market position in the "Chinese online literature market" by stopping the two Chinese authors from publishing their sequel and by falsely claiming copyright infringement. This decision appears to be the first judgment applying the AML, specifically Article 17(4) of the AML, which prohibits an undertaking with a dominant market position from "limiting a counterparty to trading only

1 Our Alert Memoranda regarding these cases are available at http://www.cgsh.com/news/List.aspx?practice =2&geography=3.

with it or with an undertaking designated by it without any justification." The case went to trial on June 17, 2009.

On October 23, 2009, the Shanghai No. 1 Intermediate People's Court issued an opinion rejecting Sursen's abuse-of-dominance claims, for two primary reasons:

First, the court held that there was not sufficient evidence that Shanda had a dominant position in the market for Chinese online literature. Sursen did not provide sufficient evidence to count Shanda's position in online gaming (for which Shanda is better known) toward its position in online literature. In addition, while the court acknowledged that Shanda's official website claimed a market share of more than 80% in China's online literature market (higher than the 50% threshold for a presumption of single firm dominance under Article 19 of the AML), the court did not accept this as evidence of dominance. The court noted that: (i) the statement was likely made for marketing purposes and was not a properly calculated market share; and (ii) the plaintiff had previously claimed that its website was the largest website for electronic books.

Second, the court held that the plaintiff failed to establish that Shanda and Xuanting acted improperly in forcing the sequel's authors to cease publication. Instead, the court held that the defendants' actions were justified by the defendants' desire to protect their intellectual property rights.

The decision is notable for the court's willingness, at least on these facts, to treat the assertion and protection of intellectual property rights as a permissible justification for challenged action.

China Mobile

In this case, Mr. Zhou argued China Mobile held a dominant position, possessing a 70% share of the domestic mobile telecoms market, and that it abused its dominance by charging subscribers who do not participate in pay-as-you-go schemes a 50 renminbi (approx. $7) monthly rental fee. Mr. Zhou claimed China Mobile violated Article 17(5) and Article 17(6) of the AML, which prohibit an undertaking with a dominant market position from "conducting tie-in sales of commodities or imposing other unreasonable trading conditions to transactions without any justification" and from "applying differential prices or other transaction terms among their trading counterparties who are on an equal footing without any justification." Relevant provisions in China's Price Law and Consumer Protection Law were also invoked. Mr. Zhou asked the court to order China Mobile to stop charging him the monthly rental fee and to reimburse him for the rental fee charged in the past two years.

China Mobile denied that it holds a dominant position or that it imposed unreasonable trading conditions or engaged in discriminatory pricing. To support its arguments, China Mobile submitted to the court circulars and rules issued by the Ministry of Industry and Information Technology (and its predecessor) dated from 1994 to 2002.

After two trials, the court mediated a settlement and issued its decision on October 23, 2009 accepting Mr. Zhou's dismissal application.

Baidu

Beijing's No. 1 Intermediate People's Court accepted Renren's lawsuit against Baidu on January 6, 2009. Renren accused Baidu of using its dominant position to limit access to Renren's website in retaliation for Renren's reduced spending on Baidu's bid-for-ranking system. Bid-for-ranking is a for-profit model of ranking Internet search results adopted by Internet search engine providers, in which payments by website operators affect the rankings of those websites in search results. This contrasts with "natural rankings," in which the algorithms used to rank search results do not take such payments into account. Renren alleged that after it lowered its spending on Baidu's bid-for-ranking system, daily visits to its website decreased significantly and that searches on Baidu yielded far fewer hits than searches on Google. The company claimed that Baidu has a dominant position in the market for Chinese search services and that Baidu's actions violated Article 17(4) of the AML.

Baidu admitted that its search algorithm reduced the likelihood of Renren's website appearing in search results. Baidu argued that this result was unrelated to Renren's bid-for-ranking payments and was taken because Renren's website had a large number of "junk links." Baidu's "natural ranking" search algorithm gave higher rankings to websites with more links. In order to increase its "natural ranking," Renren deliberately included a large number of links that were irrelevant to its website's contents, *i.e.*, "junk links." Baidu's search engine detected these links and automatically reduced the search results of Renren's website in its "natural ranking" system. Baidu further argued that its rules regarding junk links were imposed to protect the integrity of Baidu's search results and that the penalties for breaching those rules were publicly available.

Baidu also argued that because it does not charge for its search services, these search services cannot constitute an antitrust market and that, even if search services were an antitrust market, the plaintiff failed to prove that Baidu had a dominant position under the AML.

The court rejected Baidu's market definition argument and held that there was a market for Chinese search engine services. The court noted that, although Baidu does not charge users for their searches, the free service is closely tied to other products or services for which Baidu does require payment. Baidu's overall business model is designed to generate profit, and it relies on attracting Internet users in order to capture actual or potential business value, such as advertising revenue. The court found that search engine services constitute a separate antitrust market from Internet news services, instant communication services, and other Internet services. The court also held that China represents a relevant geographic market, based in particular on Internet users' cultural background and language preferences.

On the question whether Baidu held a dominant position, however, the court held that there was insufficient evidence of Baidu's dominance. A presumption of dominance may arise in accordance with Article 19 of the AML when an undertaking's market share is 50% or more. Plaintiff has the burden of presenting sufficient evidence to establish the requisite market share. Renren submitted only two news reports (one is a report from the China Securities Journal and the other is from the "Company News" section of Baidu's website) to support its claim. The court held that these reports did not meet the plaintiff's burden, because it was unclear whether the shares referred to in the two articles were based on the same market definition as defined by the court, and the two articles did not provide underlying data or describe the methodology used to calculate the market shares. Therefore, the court held that the press reports were insufficient to show that the alleged market shares were objectively and scientifically calculated.

In addition, the court noted that merely having a monopoly is not a violation of the AML. As long as a defendant's acts are justified and do not harm competition, the court will not find an abuse of a dominant position. The court noted that Baidu's rules were clear and applied to all websites equally, Baidu acted reasonably to protect the integrity and reliability of its search results, and its actions were neither discriminatory nor coercive.

China Netcom

Mr. Li Fangping filed this case in the Chaoyang District People's Court on August 1, 2008, the day that the AML came into force. The case was transferred to the Beijing No. 2 Intermediate People's Court in October 2008.

China Netcom's Beijing branch required that Mr. Li, as a non-permanent resident of Beijing, either pay his fixed-line telephone phone service bills in advance or provide a guarantee. Mr. Li chose to pre-pay his telephone bills. As a pre-payment customer, Mr. Li was not entitled to enjoy certain discounts or preferential packages, which were offered by China Netcom only to pay-after-call customers. Mr. Li claimed that because China Netcom held a dominant market position in Beijing and abused its dominance by discriminating against pre-payment customers, it violated Article 17(6) of the AML.

China Netcom reportedly argued that its requirement that non-Beijing residents provide a guarantee or prepay for their calls does not discriminate against non-permanent Beijing residents but is intended to avoid debt collection problems. Permanent Beijing residents with a history of overdue payments were also required to join the pre-payment plan, and non-permanent Beijing residents are eligible for the pay-after-call payment scheme if they own real estate in Beijing.

The court reportedly held that: (i) the plaintiff failed to prove that China Netcom's Beijing branch held a dominant market position; (ii) the payment plans were not substantially different; and (iii) based on the claimed rationale, China Netcom has the right to limit the availability of the pay-after-call plan to certain customers. Mr. Li has indicated that he will appeal this decision.

Conclusions

In the Shanda, Baidu, and China Netcom cases, the court found that plaintiffs failed to present sufficient evidence of the defendants' dominance. While the plaintiffs in at least the Shanda and Baidu cases seem to have relied on flimsy evidence, it is unclear what evidence will be considered sufficient to show that a defendant holds a dominant position. It is also unclear how plaintiffs would be able to develop the necessary evidence in cases where reliable market share data are not publicly available, given the lack of discovery in Chinese litigation.

The Baidu decision is also notable for its comment regarding the legitimacy of Baidu's conduct, which suggests that, in at least some cases, actions by a dominant company will be evaluated under a "rule of reason" standard, and the defendant will not be found to have abused its dominant position if it can show that its actions were justified and, on balance, did not harm competition.

As noted, China's courts continue to remain in front of its administrative agencies in developing Chinese law regarding abuses of dominant positions under the AML. On the other hand, the fact that all Chinese courts that have adopted decisions in abuse-of-dominance cases have ruled for the defendants may suggest that the courts are taking a cautious approach until they receive some guidance from the enforcement agencies. In addition, as all decided cases involved Chinese defendants, it remains to be seen what approach will be followed with respect to cases involving foreign firms.

Ministry of Commerce ("MOFCOM") clears Panasonic/Sanyo transaction with conditions

On October 30, 2009, MOFCOM approved, with conditions, Panasonic Corporation's acquisition of Sanyo Electric Co., Ltd. Panasonic/Sanyo represents the fifth transaction that MOFCOM has cleared with conditions since the AML took effect on August 1, 2008. None of the five decisions has involved a domestic enterprise.

The parties filed the merger notification on January 21, 2009. MOFCOM did not formally accept the notification until May 4, 2009, after the submission of supplementary materials. The final decision came after expiration of both the 30-day initial review, and during an unusual 60-day extension of the 90-day second phase review. The parties requested the 60-day extension so they could complete remedies negotiations with MOFCOM.

MOFCOM continued its recent trend of providing greater detail in its published decisions. However, as usual, the decision provides little detail on MOFCOM's legal analysis or the facts supporting its conclusions. MOFCOM identified three relevant markets: (i) rechargeable coin-shape lithium batteries, in which the combined entity would have a market share of 61.6%; (ii) household nickel-metal hydride batteries, in which the combined entity would have a market share of 46.3%; and (iii) nickel-metal hydride batteries for vehicles, in which Panasonic EV Energy Co., Ltd. ("PEVE"), a joint venture between Panasonic and Toyota, has a 77% market share and the only other competitors are Panasonic and Sanyo.

MOFCOM imposed the following conditions, which were proposed by the parties:

- Divestiture by Sanyo of its rechargeable coin-shaped lithium battery business;
- Divestiture of either (a) Sanyo's nickel-metal hydride battery business in Japan and, with respect to certain battery sub-types, the provision of OEM services from its manufacturing facility in Suzhou; or (b) Panasonic's nickel-metal hydride battery business in China;
- Divestiture of Panasonic's HEV nickel-metal hydride battery business; and
- A reduction of Panasonic's ownership interest in PEVE from 40% to 19.5%, and waiver by Panasonic of (a) its right to appoint PEVE directors; (b) its right to vote at PEVE shareholder meetings; (c) its veto right under the joint venture agreement with respect to nickel-metal hydride batteries for vehicles; and (d) removal of "Panasonic" from the PEVE name.

For the first time, MOFCOM imposed conditions on a party's offshore assets. In addition, MOFCOM asserted extraterritorial authority to supervise the divestiture of the offshore assets.

MOFCOM finalizes Rules on the Notification of Concentrations between Undertakings (the "Notification Rules")

On November 27, 2009, MOFCOM finalized the Notification Rules, which were published for public comment in January and March 2009, and will come into force on January 1, 2010.[2]

Combined with the Guidelines on Notification of Concentrations between Undertakings (the "Notification Guidelines") and the Guidelines on Notification Documents and Materials, both adopted in January 2009, the Notification Rules set out the basic procedures for the notification of transactions under the merger control provisions of the AML.

The final version of the Notification Rules provides less detail than the first and second drafts, leaving many questions unanswered. This is consistent with other Chinese rules and guidelines, which, perhaps purposefully, are quite vague and leave significant discretion to the antitrust enforcement authorities. We understand that additional clarification may be provided by an upcoming revision to the Notification Guidelines.

Some of the major issues and outstanding questions are summarized below:

Definition of Control

Under the AML, a concentration arises when two or more undertakings merge or when an undertaking obtains "control" or "decisive influence" over another undertaking. In the January Alert,

2 Please see our Alert Memorandum on the draft provisional rules published in January 2009 (the "January Alert"), available at http://www.cgsh.com/proposed_merger_control_rules_under_the_chinese_anti_monopoly_ law/.

we noted that while the draft Notification Rules provided some additional information regarding the definition of "control", the definition remained vague, and we noted that the relation between the AML's conception of "control" and "decisive influence" was unclear. The final Notification Rules completely omit the draft's definitional language.

The deletion of the proposed clarification of the definition of "control" leaves MOFCOM with greater discretion and flexibility with respect to its jurisdiction over transactions other than straightforward acquisitions or mergers, such as joint ventures. In such cases, companies will continue to face uncertainty as to whether a particular transaction results in the acquisition of "control" or "decisive influence," and thus (when the notification thresholds are met) a filing obligation.

Joint Ventures

The final Notification Rules also omit somewhat confusing language from the drafts dealing with the treatment of joint ventures. The draft Notification Rules confirmed that the joint establishment of a new entity by two or more undertakings qualified as a concentration under Article 20 of the AML. The draft did not, however, clarify whether a joint venture is notifiable regardless of whether it is "full function" or whether one or more undertakings will have "control" over the venture.

The discussion of this issue has been dropped in the Notification Rules, again leaving companies with greater legal uncertainty than had been expected. We understand, however, that MOFCOM takes the view that notification of joint ventures is captured by the existing language in Article 20 of the AML, which states that a concentration includes "obtaining control of or the capability to exercise decisive influence over other undertakings by contract or other means." This language says nothing about joint control or whether a joint venture must be "full function" to qualify as a notifiable undertaking. Thus, a joint venture that would be considered "competitive" and not subject to merger control in the EU might require notification in China.

Calculation of Turnover

The Notification Rules confirm that, when a transaction involves an acquisition of control over part of an undertaking, only the turnover of the portion of the seller involved in the transaction, as opposed to the turnover of the seller's entire corporate group, should be taken into consideration when determining whether the transaction exceeds the turnover thresholds. While the draft Notification Rules also contained this language, MOFCOM officials have provided varying advice regarding this topic.

In addition, MOFCOM deleted language explicitly excluding from "Chinese turnover" revenue generated by sales in Hong Kong, Macau, and Taiwan. It should be noted, however, that this exclusion has been common practice since 2003, well before the language was included in the draft Notification Rules. Thus, the deletion of this language does not appear to represent a change in MOFCOM's position that Hong Kong, Macau, and Taiwanese revenue should not be included in applying the turnover thresholds.

As before, concentrations between the same companies or between companies belonging to the same groups that take place within a specified period of time are treated as one concentration for purposes of applying the mandatory notification thresholds. The Notification Rules increase the relevant time period from one year to two.

Documentary Submissions

The draft Notification Rules required the submission of extremely broad and ill-defined categories of documents "in support of the concentration agreement" (examples given in the draft included feasibility studies of the concentration, due diligence reports, research reports on industry development, reports on the concentration plan, and forward-looking reports on the development prospects after the transaction). This requirement is eliminated from the final Notification Rules. Instead, Article 11 makes the submission of these kinds of documents voluntary. On the other hand, Article 10 leaves room for MOFCOM to demand "other documents and materials required by the Ministry of Commerce." This change also results in an inconsistency between the Notification Rules and the Notification Guidelines adopted in January 2009.

Two Continuing Issues

Under the Notification Rules, MOFCOM retains complete discretion to determine whether a notification is complete and to refuse to accept the notification for an indefinite period of time until it is satisfied. This issue could prove especially significant given the lack of clarity in the Notification Rules about which documents and information will be required.

As expected, the final Notification Rules did not institute any kind of short form notification or simplified procedure for non-controversial cases.

Together, the uncertainty involved in preparing a notification that MOFCOM will consider complete, without including extensive information that may not be required, suggests that notifying parties may wish to engage in pre-notification discussion with MOFCOM at least in complicated cases.

MOFCOM finalizes Rules on the Examination of Concentrations between Undertakings (the "Examination Rules")

On November 27, 2009, MOFCOM also finalized the Examination Rules, which were published for public comment in January and March 2009, and will come into force on January 1, 2010. Together with the Guidelines on Merger Control Examination of Concentrations between Undertakings, adopted in January 2009, the Examination Rules provide an overview of MOFCOM's procedures for the investigation of notified transactions.

The Examination Rules are largely unchanged from the published drafts. The following issues and changes are worth noting:

Like the draft rules, the final Examination Rules do not contain detailed provisions on the methods by which MOFCOM may collect evidence. The Examination Rules allow the notifying parties to submit materials or make statements in defense of the transaction. MOFCOM may seek the opinions of other government agencies, industry associations, customers, and other undertakings.

MOFCOM may also convene hearings to which it may invite notifying parties, competitors, customers, suppliers, and experts, as well as representatives of other government agencies, industry associations, and consumers. Separate hearings may be held for confidentiality reasons. Unlike the draft rules, the final Examination Rules do not mention the creation of a written record of hearings.

If MOFCOM determines that a more in-depth investigation (a "Phase II" review) is required, pursuant to the Examination Rules it must inform the parties of its concerns and provide them with an opportunity to respond. Such a "Statement of Objections" was optional under the draft rules. Unlike in the EU and certain other jurisdictions, in China the opening of a Phase II review does not appear to trigger any special procedural requirements, and transactions can be cleared early in Phase II if MOFCOM determines that the transaction does not raise significant substantive issues.

During the review process, the undertakings concerned may propose remedies to eliminate or reduce any potential anti-competitive effects of the transaction. The draft rules gave MOFCOM the express power to propose remedies. Although this power is not contained in the final rules, MOFCOM will still likely be closely involved in formulating any proposed remedies. The undertakings concerned and MOFCOM may modify the proposed remedies or propose new ones during the review process.

Remedies may include structural remedies, behavioral remedies, and combinations thereof. Over the past year, we have seen MOFCOM adopt each of these categories of restrictive condition. As a general rule, MOFCOM appears to be more open to accepting behavioral remedies than the U.S. or EU competition authorities.

The draft rules and MOFCOM's decisions were inconsistent in stating whether proposed remedies had to completely remove anti-competitive effects or whether remedies alleviating such effects could suffice. The Examination Rules clarify that either may suffice.

INDIA

Termination of Monopolies and Restrictive Trade Practices Commission

In our last quarterly report, we stated that, as of September 1, 2009, the Monopolies and Restrictive Trade Practices Act of 1969 ("MRTP Act"), India's predecessor competition law, was repealed, and that for two years, the MRTP Commission would 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. Shortly thereafter, the President of India issued an ordinance, with effect from October 14, 2009, that terminated the MRTP Commission. The ordinance transferred all pending antitrust matters to the Competition Appellate Tribunal.

Continued uncertainty regarding implementation of Sections 5 and 6 of the 2002 Competition Act regarding merger control

As previously reported, sections 5 and 6 of the 2002 Competition Act of India, which concern merger control, have not yet come into force. Various unofficial sources and press reports indicate that this may occur in the early months of 2010. We will provide details as they become available.

JAPAN

Japan's Fair Trade Commission issues fines and cease-and-desist orders against cathode ray tubes manufacturers

In November 2007, Japan's Fair Trade Commission (the "JFTC") launched an investigation into the cathode ray tubes ("CRT") market. The JFTC's investigation was conducted almost simultaneously with investigations into possible antitrust infringements in this market undertaken by the U.S. and the European Union's antitrust authorities.

In its decision, the JFTC concluded that several CRT manufacturers had engaged in a cartel contrary to Article 3 of Japan's Anit-Monopoly Act (prohibiting unreasonable restraints of trade). The JFTC found that the companies (noted below) had substantially restrained competition by agreeing to set minimum price targets for CRT deliveries to Sanyo Electric Co., Sharp Corp., and other television manufacturers between May 2003 and March 2007.

On October 7, 2009, the JFTC fined five CRT makers a total of ¥3.32 billion (€25 million, $37 million). According to the news agency Kyodo News International, this was the first time the JFTC fined a foreign company for its involvement in an international cartel. Three units of Panasonic's subsidiary MT Picture Display Co. Ltd. were fined ¥1.8 billion (€13.5 million, $20 million), Samsung South Korea was fined ¥1.3 billion (€9.8 million, $14 million), and LG Philip Displays Korea was fined ¥150 million (€1.2 million, $1.7 million). In addition, the decision notes that the JFTC intends to address a fine to a Malaysian unit of Samsung.

The JFTC also issued cease-and-desist orders against (1) representatives of the Panasonic subsidiary MT Picture Display Co. Ltd, and (2) Samsung SDI Co. Ltd. This order requires the addressees to confirm that any meeting with competitors regarding the pricing for CRTs would be discontinued, as well as an undertaking that the companies would determine their prices separately for this product in the future.

MT Picture Display Co. and its overseas subsidiaries have filed for a hearing to challenge the surcharge payment and the cease-and-desist orders issued against them.

Japan's revised Anti-Monopoly Act

On June 3, 2009 the Japanese Diet approved a revised version of Japan's Anti-Monopoly Act (the "Revised AMA").[3] It was recently announced that the Revised AMA will come into force on January 1, 2010. The provisions regarding merger control contained in the Revised AMA will be applicable to transactions that close on or after January 31, 2010.

The aspects of the Revised AMA that merit special emphasis are:

- **Increase in range of conduct subject to penalties.** The Revised AMA expands the range of conduct subject to penalty. Previously, only cartels and "controlling" unilateral activity were subject to fines. The Revised AMA will, for the first time, allow for the imposition of fines for exclusionary unilateral conduct, as well as for certain types of unfair trade practices, such as the abuse of superior bargaining power, refusal to deal, and discriminatory pricing.
- **Increase in penalties for cartels and bid-rigging.** The Revised AMA provides for an increase in the penalties for cartels and instances of bid-rigging. A 50% increase in fines will now be imposed for companies found to have played a leadership role in a cartel. In addition, the maximum jail sentence for individuals who engage in cartel or bid-rigging activity is increased from three to five years.
- **Revision of Japan's leniency program.** The Revised AMA increases from three to five the number of companies eligible to qualify for leniency. In addition, the Revised AMA expands the scope of the leniency program by permitting joint applications for leniency by two or more corporate affiliates within the same corporate group.
- **Share acquisitions subject to mandatory notification.** The Revised AMA requires that share acquisitions meeting the filing thresholds be notified prior to closing and that the parties observe a mandatory thirty-day waiting period.
- **Notification thresholds revised.** The Revised AMA abolishes the prior system of notification thresholds, which tied the notifiability of a transaction to the existence of Japanese assets. The Revised AMA uses the concept of "aggregate domestic sales" as the test for notifiability. This test includes sales through offices located in Japan as well as sales into Japan through direct imports. In addition, the domestic sales of the entire corporate group will be taken into account when calculating whether thresholds are met under the Revised AMA. These amendments will subject a substantially lager number of foreign-to-foreign stock acquisitions to notification in Japan.

SOUTH KOREA

Korea Fair Trade Commission ("KFTC") issues its largest ever fine for price fixing

On December 2, 2009, KFTC imposed a combined fine of KRW 669 billion (€396 million, $565 million) on six companies for their alleged involvement in a liquefied petroleum gas ("LPG") price cartel. The fine, although less than the KRW 1.3 trillion previously hinted by commission officials, was the largest ever imposed by KFTC on a single industry. This is further proof of the KFTC's determination to crack down on price fixing schemes.

3 Please see our June 2009 Alert Memorandum on the Revised AMA, available at http://www.cgsh.com/japanese_ diet_approves_bill_to_amend_the_anti-monopoly_act/.

According to the KFTC, four oil refining companies, SK Energy, GS Caltex, S-Oil, and Hyundai Oilbank, and two LPG companies, E1 and SK Gas, were engaged in the price fixing scheme between 2003 and 2008, observing that LPG prices among them varied only by roughly KRW 0.79 (€0.0005, $0.0007) per gallon.

The individual fines were: SK Gas – KRW 198.7 billion (€117 million, $168 million); E1 – KRW 189.4 billion (€112 million, $160 million); SK Energy – KRW 160.2 billion (€95 million, $135 million); GS Caltex – KRW 55.8 billion (€33 million, $47 million); S-Oil – KRW 38.5 billion (€23 million, $33 million); and Hyundai Oilbank – KRW 26.3 billion (€16 million, $22 million).

KFTC reported that certain parties were going to benefit from its leniency program, but did not identify them. According to the Yonhap News, SK Energy, which was the first to report details of the cartel to the regulator, need not pay its fine, and SK Gas, the second company to cooperate in the investigation, received a 50% reduction.

KFTC announces 2010 business plan

On December 16, 2009, Ho-Yul Chung, KFTC Chairman, announced KFTC's key business plan for 2010 (the "KFTC 2010 Business Plan"). According to Mr. Chung, KFTC plans to focus on improving marketplace competitiveness, preventing the formation of cartels, protecting small- to medium-sized enterprises, and reinforcing consumer rights. The KFTC 2010 Business Plan is in line with its stricter enforcement of the fair-trade law in 2009, including cracking down on price-fixing and imposing record fines against companies that participated in such schemes. The following is a summary of certain key points outlined in the KFTC 2010 Business Plan:

- **Improving of marketplace competitiveness.** KFTC plans to reduce anti-competitive barriers to entry in key service industries including healthcare, finance, distribution, and energy and focus on preventing monopolies and oligopolies by carefully scrutinizing large-scale M&A transactions.
- **Supporting free competition and preventing the formation of cartels.** KFTC plans to monitor certain key industries that produce products that are important to the everyday lives of consumers in order to prevent the formation of cartels. In addition, in order to prevent bid-rigging, KFTC plans to require liquidated damages to be set forth in procurement agreements, which would become payable upon the discovery of a cartel. KFTC also announced stricter enforcement of the law, which prohibits unfair support practices among affiliates of large conglomerates, and its intention to investigate more vigorously related party transactions among such affiliates.
- **Educating companies about foreign competition law.** KFTC plans to institute educational programs for domestic companies to educate them about competition law in other jurisdictions.

TAIWAN

Taiwan Fair Trade Commission ("TFTC") issues fines for abuse of dominance

An October 28, 2009, TFTC decision imposed fines on Royal Dutch Philips Electronics Ltd., Sony Corporation, and Taiyo Yuden Co., Ltd. for abusing their dominant position in recordable compact disk ("CD-R") technology. In the 1990s, the three companies pooled their patents regarding CD-R technology. Taiwanese licensees complained to the TFTC. The current decision follows years of administrative proceedings and litigation. It confirms that the three companies had a monopoly on the CD-R technology market and abused that monopoly by charging excessive, non-negotiable royalties, prohibiting challenges to their patents, and failing to disclose important trading information (including the (to be) authorized patents' specific contents, scope, and periods of validity) during the negotiation of authorization agreements. TFTC imposed the following fines: Philips – NT$3,500,000 (€76,000, $108,000); Sony – NT$1,000,000 (€22,000, $31,000); and Taiyo Yuden – NT$500,000 (€11,000, $15,000).

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