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This is the eleventh 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

MOFCOM conditionally approves GE/Shenhua JV, Alpha V/Savio, and Seagate/Samsung

On October 31, China's Ministry of Commerce ("MOFCOM") cleared Alpha Private Equity Fund V's ("Alpha V's") acquisition of Savio Macchine Tessili S.p.A. ("Savio"), subject to the condition that Alpha V divest its 27.9% interest in a Swiss competitor of Savio, Uster Technologies AG ("Uster"). According to MOFCOM, Uster and Savio (through its wholly owned subsidiary, Loepfe Brothers Ltd.) are the only two producers in the world of electronic yarn clearers for automatic winding. The Alpha V/Savio case is notable because although MOFCOM required Alpha V to divest its interest in Uster, MOFCOM did not explicitly determine that Alpha V's 27.9% interest gave it control over Uster. This decision is particularly relevant for private equity groups that may hold a large number of significant but non-controlling portfolio company interests.

On November 10, MOFCOM conditionally approved the establishment of a joint venture ("JV") between General Electric (China) Co., Ltd. ("GE China") and China Shenhua Coal to Liquid and Chemical Co., Ltd. ("Shenhua"). As a condition to MOFCOM's approval, the JV agreed that it would not restrict the supply of feedstock to potential coal-water slurry gasification technology licensees in order to force potential licensees to use the JV's technology or to raise potential licensees' costs to use other technologies. According to MOFCOM, GE China has the highest market share among only three main players in the Chinese market for technology licensing for coal-water slurry gasification, while Shenhua's parent company, Shenhua Group, was the largest supplier of feedstock for coal-water slurry gasification in China in 2010. The GE China/Shenhua JV decision is MOFCOM's first conditional joint venture clearance since the implementation of the Anti-Monopoly Law (the "AML") in August 2008, and is notable for imposing behavioral remedies to address vertical concerns in a technology licensing market.

For a more detailed analysis of the Alpha V/Savio and GE/Shenhua decisions, 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/.

On December 12, MOFCOM conditionally cleared Seagate's purchase of Samsung's hard disk drive ("HDD") business. Both the European Commission and the United States Federal Trade Commission cleared the transaction without conditions. To obtain approval, Seagate agreed to (i) segregate the Samsung business and maintain it as an independent subsidiary making its own pricing, marketing, and strategic decisions, and (ii) expand Samsung's production capacity within six months and, thereafter, reasonably determine Samsung's production capacity and volume. After 12 months, Seagate may apply to MOFCOM for termination of these conditions. This clause was likely inserted to allow MOFCOM to reconsider its remedy after it concludes its review of the transaction between Seagate's competitors Western Digital and Hitachi Global Storage. MOFCOM also required that Seagate (iii) refrain from significantly altering its current business operations, (iv) refrain from requiring that TDK (China) Investment Co., Ltd. supply HDD magnetic heads exclusively to Seagate or its controlled entities or restrict the supply of TDK's HDD magnetic heads to other HDD manufacturers, and (v) for three years after the clearance decision, invest a minimum of $800 million per year in research and development.

MOFCOM approves Yum/Little Sheep and Nestlé/Hsu Fu Chi

MOFCOM approved without condition Yum Brand Inc.'s purchase of Little Sheep Group Ltd. (on November 7) and Nestlé SA's purchase of a 60% interest in Hsu Fu Chi International Limited (on December 7). After MOFCOM blocked Coca-Cola's purchase of Huiyuan in 2009, some observers doubted that the government would allow a foreign takeover of a major Chinese brand. These approvals dampen those criticisms. Little Sheep operates Mongolian hot-pot restaurants, and Hsu Fu Chi is China's second largest confectionary producer. Nestlé's purchase is one of the largest foreign takeovers of a Chinese company.

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NDRC fines pharmaceutical companies for anti-competitive conduct

In November, China's National Development and Reform Commission ("NDRC") sanctioned two pharmaceutical companies for an anti-competitive distribution agreement. The companies, Weifang Shuntong Pharmaceuticals ("Shuntong") and Weifang Huaxin Pharmaceuticals ("Huaxin"), received a cease and desist order and face a fine of approximately RMB 7 million (~$1.1 million; €845,000) along with the confiscation of illegal gains. This is NDRC's first significant fine since China's AML took effect.

NDRC stated that the companies, in violation of Article 17(3) of the AML, abused their dominant position by, without valid reason, refusing to deal with a third party. NDRC found that, in June 2011, Shuntong and Huaxin signed an exclusive distribution agreement with the only two Chinese manufacturers of promethazine hydrochloride, a raw material used to produce Reserpine, a blood pressure drug on China's list of "essential" medicines. The agreement prevented the manufacturers from selling the raw material to any third party in China without Shuntong's and Huaxin's permission.

NDRC investigates China Telecom and China Unicom

On December 2, both China Telecom and China Unicom confirmed that they had applied to NDRC to suspend its investigation of their pricing practices. NDRC has been investigating both companies' alleged discriminatory pricing of network access fees. Both companies undertook internal evaluations and submitted plans to address the problems found during those investigations. Both agreed to improve the quality of interconnections with other network operators, increase broadband speed, standardize network access fees and reduce the fee to "a proper level", and reduce end user broadband access fees for public Internet access. On December 13, NDRC requested more detail from the parties. The matter has received significant attention as it is NDRC's first major, public antitrust investigation and it involves two big, state-owned enterprises, which many commentators assumed were largely exempt from AML enforcement.

MOFCOM provides enforcement overview

On December 27, the Director General of MOFCOM's Anti-Monopoly Bureau, Shang Ming, held a press conference to discuss MOFCOM's merger control enforcement. He indicated that during 2011, MOFCOM received 194 filings (up 43% from 2010), accepted 179 of these, and concluded its review of 160 transactions. Of the 160 completed reviews, 151 (94%) were unconditionally approved, four were approved with conditions (Uralkali/Silvinet, the GE/Shenhua JV, Alpha V/Savio, and Seagate/Samsung), and five notifications were withdrawn. He noted that a higher percentage of MOFCOM's reviews were extended to the second review phase and that MOFCOM would undertake to improve review efficiency. Finally, he stated that during 2012, MOFCOM planned to revise the standard notification form based on its experience and comments received and would issue new rules regarding the imposition of conditions on transactions under review, sanctions for failure to file a notifiable transaction, and the investigation of a transaction failing to meet the filing thresholds but suspected of being anti-competitive.

China's MIIT issues final internet rules

On December 31, China's Ministry of Industry and Information Technology ("MIIT") published final rules regarding competition between providers of Internet information services ("PIIS"), users' rights, and the protection of online personal data (the "Internet Rules"). An interpretation of the Internet Rules was published on the same day. The Internet Rules will come into effect on March 15, 2012.

The Internet Rules reflect a mixture of antitrust, unfair trade law, and consumer protection principles and overlap to a certain extent with each of the AML, Anti-Unfair Competition Law, and the Consumer Protection Law.

The Internet Rules likely will have a significant impact for many providers of information technology and telecommunications products and services in China, as well as companies in other sectors that provide goods or services in China over the Internet. The scope of the rules is very broad, covering activities that in other contexts may be the subject of antitrust or unfair competition rules. The Chinese regulatory environment was already complicated, with MOFCOM, NDRC, and the State Administration for Industry & Commerce frequently having overlapping jurisdiction. MIIT's involvement as the regulator of IIS adds further regulatory complexity.

For more detailed information of the Internet Rules, please refer to our alert memorandum, which is available at http://www.cgsh.com/chinas_miit_issues_final_internet_rules/.

NDRC expanding its enforcement team

In December, NDRC disclosed that it would more than double (from 20 to 46) the number of officials in its Price Supervision, Inspection, and Anti-Monopoly Bureau. The spokesperson also stated that NDRC provincial agencies would recruit another 150 officials. This may signal increased antitrust enforcement in the next year or two.

HONG KONG

Draft Competition Bill revised

On October 25, the Commerce and Economic Development Bureau announced proposed changes to the Competition Bill (the "Bill"). The amendments are generally viewed as concessions made by the government to the business community. The primary amendments include the following:

- Under the first conduct rule regarding anti-competitive agreements, a distinction is made between hardcore and non-hardcore anti-competitive conduct. Hardcore anti-competitive conduct includes price fixing, bid rigging, market/customer allocation, and output restriction. Only hardcore violations will be subject to infringement notices.[1] However, infringement notices may no longer require that a business operator pay a certain amount to the Competition Commission (up to HK$ 10 million (~$1.3 million; €980,000)). Companies accused of non-hardcore anti-competitive conduct will receive a warning notice and be given a chance to comply before enforcement proceedings are begun.
- A series of *de minimis* exceptions are proposed, including (i) non-hardcore violations of the first conduct rule conducted by companies with a combined annual turnover of less than HK$ 100 million (~$12.9 million; €9.8 million) and (ii) violation of the second conduct rule (abuse of a substantial degree of market power) by a company with an annual turnover of less than HK$ 11 million (~$1.4 million; €1.1 million).
- The available monetary penalties are capped at 10% of the local (as opposed to "global") turnover for each year of infringement, up to a maximum of three years. The relevant turnover includes sales of all products, not just those related to the infringement. If an infringement lasts more than three years, the three years of infringement during which the company had the highest turnover will be chosen.
- The right to bring stand-alone private actions is abandoned. Private enforcement will have to follow an infringement decision.
- The first and second conduct rules will not be applicable to mergers. The result is that mergers outside the telecommunication sector will not be governed by Hong Kong competition law.

The revised bill continues to face opposition from many business groups. It remains to be seen whether the Bill can pass before the end of the current legislative session and this year's Chief Executive elections.

INDIA

National Committee on Competition Policy recommends enhanced powers for the CCI

According to news reports, the Indian National Committee on Competition Policy[2] has recommended a number of fundamental changes to the Indian Competition Act 2002. Proposed changes include affording the Competition Commission of India ("CCI") greater powers to conduct dawn raids, widening the ambit of cartels to include joint buying, and granting the CCI formal jurisdiction to review joint venture transactions. Proposed changes also include an amendment to the test for identifying "decisive influence" and amending other jurisdictional thresholds.

CCI finds that SAIL is not abusing its dominant position

In October 2009, Jindal Steel and Power Limited approached the CCI alleging that the Steel Authority of India Limited ("SAIL") was abusing its dominant position by entering into a Memorandum of Understanding with Indian Railways pursuant to which it was agreed that SAIL would be the exclusive supplier for rails to Indian Railways. Jindal complained that it was foreclosed from access to a key customer. The CCI directed its investigative wing, the office of the Director General ("DG"), to conduct a detailed investigation. The DG found that SAIL was dominant in the manufacturing of rails and that the agreement with Indian Railways foreclosed access to this market. Following review of the DG's Report, the CCI held, on December 20, 2011, that SAIL had a monopoly position in the supply of rails and that Indian Railways was a monopsonist (a dominant buyer). Nonetheless, the CCI found that an agreement between bilateral monopolists is not inherently exclusionary, and, therefore, it must review the rationale for the agreement, its conditions, and whether it, in fact, forecloses competition. The CCI ultimately held that the agreement was rational and an efficient outcome and, therefore,

1 When it has reasonable cause to suspect a violation, the Bill empowers the Competition Commission to issue an infringement notice that describes the conduct at issue, the evidence, and proposed settlement terms. An entity that receives such a notice can ignore it, in which case the Commission is likely to bring an enforcement action before the Competition Tribunal, or begin settlement negotiations.

2 A Committee formed of competition law experts including former CCI chairman Dhanendra Kumar, Amitabh Kumar, senior adviser (regulatory, competition, and tax) at J Sagar Associates; Supreme Court lawyer Anand Pathak; Pallavi S. Shroff, senior partner at Amarchand Mangaldas; G.R. Bhatia, partner at Luthra and Luthra Law Offices; and Manas Kumar Chaudhuri, partner at law firm Khaitan and Co.

could not be anti-competitive. The case strongly suggests that the CCI is sympathetic to and conversant with the economic principles applicable to competition law.

PHILIPPINES

DOJ challenges its first cartel

In November, following a complaint filed by the chairman of the Federation of Philippine Industries, the Filipino Department of Justice ("DOJ") recommended the filing of charges against the former president of the LPG Marketers Association and eight other individuals. These individuals allegedly fixed oil prices in violation of the Downstream Oil Industry Deregulation Act of 1998 and the Revised Penal Code. This apparently represents the DOJ's first challenge to a price fixing cartel. The defendants claim that the DOJ lacks jurisdiction and argue that their pricing decisions were made independently.

SOUTH KOREA

KFTC fines drug makers for collusion

In October, the Korean Fair Trade Commission (the "KFTC") found that GlaxoSmithKline ("GSK") and its South Korean rival, Dong-A Pharmaceutical ("Dong-A"), had concluded an anti-competitive agreement and fined the parties KRW 3 billion (~$2.7 million; €2 million) and KRW 2.1 billion (~$1.9 million; €1.4 million), respectively. The KFTC decision states that in 2000, GSK offered Dong-A the exclusive right to sell in South Korea the anti-nausea drug Zofran and anti-viral medication Valtrex in return for Dong-A's promise not to sell its cheaper, generic version of Zofran and not to produce or sell any other drugs that compete against Zofran and Valtrex. GSK denies any wrongdoing.

KFTC fines makers of LCD screens and CRT glass

On October 28, the KFTC imposed fines totaling KRW 194 billion (~$174 million; €131 million) against six makers of liquid crystal display ("LCD") screens – Samsung Electronics Co., LG Display Co., AU Optronics Corp., Chimei Innolux Corp., Chunghwa Picture Tubes, and HannStar Display Corp. – for participating in a price-fixing cartel from September 2001 to December 2006. The KFTC explained that these companies met more than 200 times during that period to agree on prices for, and to reduce the production of, flat panels used for computers, notebook personal computers, and televisions. This is the largest fine that the KFTC has imposed in an international cartel case.

On December 12, the KFTC imposed a KRW 54.5 billion (~$49 million; €37 million) fine on four cathode ray tube ("CRT") glass manufacturers – Samsung Corning Precision Materials Co., Ltd., Hankuk Electric Glass Co., Ltd., Nippon Electric Glass Co., Ltd., and Nippon Electric Glass (Malaysia) Sdn. Bhd. – for agreeing to fix prices and reduce output of CRT glass for almost eight years (March 1999 to January 2007).

KFTC announces business plan for 2012

On December 15, the KFTC announced the key elements of its 2012 business plan, which include:

- Heightened monitoring of the IT, pharmaceuticals, machinery, and chemical industries, with a particular focus on potentially monopolistic practices;
- Increased review of potential cartel behavior in sectors connected to the daily life of consumers, such as finance and general services, and intermediate products, products with larger price differences in domestic and overseas markets, and products with significant profits; and
- Making the review of business combinations more efficient by completing its review of transactions that present no antitrust risk within 20 days and concentrating its resources on anti-competitive business combinations and ordering structural remedies when necessary.

KFTC amends merger control guidelines

On December 22, the KFTC announced amendments to the Business Combination Review Guidelines (the "Amendment"). The Amendment aims to simplify the procedures for review of transactions unlikely to cause anti-competitive effects and to supplement the existing criteria for the assessment of competitive effects to more closely match international standards. The amendments are effective as of December 28, 2011. More specifically:

- Transactions between two companies whose businesses are non-complementary and non-substitutable are eligible for the simplified review process, which, in principle, means that the KFTC will complete its review within 14 days from the submission of the merger notification;
- The definition of control is expanded to include the ability to appoint board members and indicia of negative control, such as veto rights over the appointment of executives or major business decisions;

- In evaluating competitive effects, the KFTC will (i) review whether a transaction increases the risk of collective action by fundamentally reducing competitors' incentives to compete; and (ii) take into account whether a transaction leads to vertical anti-competitive effects by increasing the combined entity's buyer power in the raw material purchasing market thus restricting the supply of end products to consumers; and
- The Amendments make clear that the list of factors that may mitigate a transaction's anti-competitive effect apply to both horizontal mergers as well as vertical and conglomerate mergers.

KFTC amends monopoly regulation to extend scope of pre-merger notification

On December 27, the KFTC announced its plan to amend the Enforcement Decree of the Monopoly Regulation and Fair Trade Law to require a pre-closing business combination filing for share acquisitions when the assets or the annual turnover of either the acquirer or the target company, including all affiliated companies, exceeds KRW 2 trillion (~$1.8 billion; €1.4 billion). The amendments are effective as of January 1, 2012. An acquisition of newly issued shares will continue to be subject to a post-closing filing if the timing or transaction amount is uncertain due to the nature of the transaction (such as a competitive tender offer in a securities market) or where the filing party cannot be certain about the changes in ownership interest in the target. Previously business combinations through the acquisition of newly issued shares were subject to post-closing filing obligation regardless of the size of assets or annual turnover of the parties, subject to limited exceptions.

TAIWAN

Leniency program adopted and antitrust fines increased

On November 23, amendments to Taiwan's Fair Trade Law were adopted that introduce a leniency program for cartel investigations and increase maximum fines for violations of the law.

Under the new leniency program, the Taiwan Fair Trade Commission ("TFTC") may reduce the fine for a company that either:

- Reports detailed information about the violation along with supporting evidence before the TFTC is aware of or initiates an investigation against the suspected concerted action; OR
- During the TFTC's's investigation, reveals specific information and supporting evidence that assists the TFTC's investigation.

More detailed rules regarding the leniency program are expected in 2012.

The amendments also sharply increase the maximum fines that may be imposed for serious violations of the law's provisions regarding monopolies and concerted action. Under the revised law, companies face a fine of up to the greater of 10% of the last financial year's turnover in Taiwan or NT$ 25 million (~$850,000; €640,000). Previously, fines were capped at NT$ 25 million.

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