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This is the fifth 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

National Development & Reform Commission ("NDRC") announces action on second price cartel[1]

On April 30, 2010, NDRC published the results of its local agency's investigation of a price cartel organized by an industry association among tableware disinfection product producers in Xiamen, a city of Fujian province. According to NDRC, the Xiamen Bureau of Commodity Prices (which is NDRC's local agency at the city level), and some media reports, on April 19, 2010, the Xiamen Office of the Fujian Tableware Industry Association organized a cartel among 28 tableware disinfection enterprises. The association and its members decided that as of May 1, 2010, their distribution price would be increased by RMB 0.10 per 5-piece set. A "Meeting Minute Regarding Price Increase on Tableware Disinfection Products in Xiamen" was signed by the participating enterprises, which were asked not to reduce their prices or compete for customers for three months and to make a deposit of RMB 5,000 to ensure their compliance.

The Xiamen Bureau of Commodity Prices conducted the investigation and held a "reminder of caution" meeting on April 27.[2] At the meeting, the Xiamen Bureau pointed out the illegality of the cartel and requested the industry association and enterprises to immediately bring the violation to an end, take corrective measures (including returning the deposits), and eliminate the ill effects. The Xiamen Office of the Fujian Tableware Industry Association and participating enterprises committed to do so. The Xiamen Bureau of Commodity Prices will monitor their compliance.

Compared to the State Administration for Industry & Commerce ("SAIC") and the Ministry of Commerce ("MOFCOM"), NDRC has been slow to develop rules and guidelines implementing the Anti-Monopoly Law (the "AML") within its field of jurisdiction. NDRC has also been slow to take action, at least publicly, in respect of price cartels. The announcement of two price-fixing investigations in the space of a month may herald a shift in NDRC's enforcement practice. On closer examination, however, NDRC's announcements raise as many questions as they answer.

First, do NDRC's announcements represent a more aggressive approach to cartel enforcement or simply a decision to publicize its enforcement actions? It is notable that the illegal conduct was identified and action taken very quickly, and that the case involved price fixing on a local level. NDRC may have detected and taken action against other such cartels since the AML entered into force, but chosen not to publicize them.

Second, what is the relationship between the AML and other Chinese laws? Although NDRC published the investigation under the "anti-monopoly enforcement" tab on its website, the Xiamen Bureau of Commodity Prices only cited China's Price Law. While the AML entered into force in 2008, NDRC continues to apply the Price Law alongside (or even in preference to) the AML. NDRC may feel more comfortable with the Price Law, which has more fully developed implementing rules and a substantial enforcement history.

Third, how is enforcement authority divided between NDRC and other government agencies? The AML and the Price Law confer jurisdiction for price-related violations on NDRC (and its local agencies). According to Article 10 of the AML, an Anti-Monopoly Enforcement Agency (like NDRC) may only delegate its enforcement authority under the AML to its local agency at the provincial level. Therefore, the Xiamen Bureau of Commodity Prices, a city level price supervisory agency, is not authorized to enforce the AML.

Fourth, what is NDRC's policy on fixing fines and other penalties? Unlike Western antitrust authorities, NDRC and its agencies seem to rely on informal measures such as "reminder of caution" letters and meetings quickly to put an end to cartel violations.

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1 For a detailed review of the first two cartel cases, please refer to our alert memo of May 21, 2010, which may be found at http://www.cgsh.com/first_price_cartel_cases_under_the_chinese_aml/

2 A "reminder of caution" is not an administrative sanction. According to NDRC's Measures Regarding Reminders of Caution in Price Supervision and Inspection issued on October 24, 2007, a "reminder of caution" only applies when (i) illegal price conduct has not yet occurred or (ii) the illegal price conduct is minor and the authority chooses not to impose administrative sanctions.

Although NDRC's announcement raises many questions, it is a welcome indication that NDRC is actively enforcing Chinese legal prohibitions against price fixing. As NDRC develops its implementing rules and enforcement experience in this area, it can be expected that the AML will evolve into the principal tool for enforcement of price-related antitrust violations, as anticipated when the AML entered into force almost two years ago.

SAIC issues new draft rules

On May 25, 2010, SAIC, which is responsible for enforcing the AML with regard to non-price-related conduct, issued three draft substantive rules for public comment. These drafts deal with the application of the AML to restrictive agreements, abuses of dominant market positions, and abuses of administrative power. The draft rules SAIC published regarding restrictive agreements and abuses of dominant market positions are revised versions of the draft rules published for comment in April 2009.[3] Unfortunately, in a number of areas SAIC apparently responded to comments regarding specific provisions in the prior draft rules by deleting the offending provisions, leaving SAIC with greater flexibility. As a result, it seems likely that the final rules will provide less guidance than multinational companies operating in China might have hoped and expected. Clarification will likely have to wait for further interpretations or enforcement actions applying the rules. The draft substantive rules regarding abuses of administrative power is the first draft of these rules published for comment.

The three draft rules published by SAIC are the following:

- Draft Rules of the Administrative Authority for Industry and Commerce on the Prohibition of Restrictive Agreements (the "Restrictive Agreements Rules");
- Draft Rules of the Administrative Authority for Industry and Commerce on the Prohibition of Abuse of Dominant Market Positions (the "Dominance Rules"); and
- Draft Rules of the Administrative Authority for Industry and Commerce on the Prohibition of Acts of Abuse of Administrative Power to Eliminate or Restrict Competition (the "Administrative Power Rules").

These draft rules are discussed below.

The Restrictive Agreements Rules

The Restrictive Agreements Rules reflect substantive changes from the 2009 drafts in the following areas: (1) SAIC's proposed leniency program; (2) the definition of "concerted practice"; (3) types of prohibited restrictive agreements; and (4) possible sanctions.

SAIC's proposed leniency program. The Restrictive Agreements Rules substantially revise the leniency program proposed in the 2009 draft, deleting some of the most important elements of the program. In particular, leniency may be extended to an unlimited number of applicants, instead of only three, as provided in the 2009 draft. In addition, the Restrictive Agreements Rules leave SAIC discretion in reducing penalties for the second and subsequent applicants, based on the time sequence of reporting, the importance of the information provided, relevant circumstances regarding the formation and implementation of the restrictive agreement and the level of cooperation provided (Article 13). By contrast, the 2009 draft provided for 50% and 30% reductions in penalties applicable to the second and third applicants. SAIC appears to have done exactly the opposite of what many commentators recommended following publication of the 2009 drafts, which was to provide more detail on the operation of the leniency program. The revised program will likely be significantly less attractive to potential leniency applicants, both because the benefits of reporting a violation early will be less certain and because a violator can still hope to earn a reduction by cooperating even if it is not among the first three violators to report the violation.

On the other hand, the 2009 draft referred to reductions in "penalties" without specifying what types of penalties would be subject to the program. The Restrictive Agreements Rules specify that the benefits of the leniency program apply only to monetary sanctions (Article 13) — *i.e.*, confiscation of illegal gains and fines — and thus not to a private action for damages or injunctive relief.

The definition of "concerted practice". The Restrictive Agreements Rules provide that "restrictive agreements" include concerted practices. Compared to the 2009 draft, the Restrictive Agreement Rules add two new factors for SAIC to consider when determining whether practices are in fact concerted. The new factors are "whether there has been communication of intent or an exchange of information among undertakings" and "the competitive landscape of the relevant market" (Article 3). The 2009 draft only contemplated the consistency in the behavior of the relevant companies, the existence (or not) of legitimate reasons for consistent behavior, the structure of the relevant market, and market changes. Although the additional detail is welcome, the definition of concerted practices

3 For a detailed review of the first drafts, please refer to our alert memo of June 18, 2009, which may be found at http://www.cgsh.com/saic_issues_rules_under_the_chinese_anti-monopoly_law/.

remains vague and could capture parallel conduct that does not result from any agreement.

Types of prohibited restrictive agreements. With regard to prohibited horizontal restrictive agreements, the Restrictive Agreements Rules provide some additional detail regarding output restrictions (Article 4), market partition (Article 5) and restrictions on technology/equipment purchasing and development (Article 6). The provisions regarding group boycotts (Article 7) are substantially unchanged, while provisions regarding bid rigging and conspiracies between auctioneers and bidders have been deleted.

With respect to vertical agreements, the 2009 draft listed a number of different types of non-price related agreements that could be caught by the AML: agreements between auctioneers and bidders, vertical territorial restraints and vertical exclusive dealing. Perhaps in response to criticism of the 2009 draft, references to these categories of vertical agreements have been deleted. The Restrictive Agreements Rules (Article 8) now state that vertical restrictive agreements that harm consumers' interests, as well as "other" restrictive agreements as determined by the enforcement authorities, are prohibited. The Restrictive Agreements Rules thus leave SAIC greater flexibility to determine what vertical agreements might violate the AML and offer little guidance on SAIC's enforcement policy.

The rules regarding industry associations are largely unchanged, except that the Restrictive Agreements Rules explicitly prohibit industry associations from formulating or promulgating "standards" that eliminate or restrict competition (Article 10). The 2009 draft did not expressly reference industry standards.

Possible sanctions. The AML provides that if a restrictive agreement has not been "implemented," violators may be fined not more than RMB 500,000. The Restrictive Agreements Rules add a provision that if a restrictive agreement has not been "reached," SAIC shall prohibit such conduct, but violators will apparently not be subject to any other sanctions (Article 11).

The Dominance Rules

The Dominance Rules revise the 2009 draft in the following areas: (1) SAIC's definition of a "dominant market position"; (2) SAIC's definition of "reasonable justification" for otherwise abusive conduct; and (3) provisions regarding specific abuses of dominant market positions.

Definition of a Dominant Market Position. The AML defines a "dominant market position" as a "market position in which an undertaking has the ability in the relevant market to control the price or quantity of products, or other transactional terms regarding products, or to impede or affect other undertakings' ability to enter the relevant market." The Dominance Rules alter the 2009 draft's definition of the "ability to impede or affect other undertakings' ability to enter the relevant market" and make it easier for SAIC to find a company dominant.

In addition, the AML (Article 19) establishes a rebuttable, market-share-based presumption of dominance (*i.e.*, one company having a 50% share, two companies together having a 66% share and three companies together having a 75% share (except for any company having an individual share of less than 10%)). In the 2009 draft, companies presumed to be dominant under these criteria could provide two types of evidence to rebut the presumption: (i) evidence that other companies can easily enter the relevant market; and (ii) evidence that there is a reasonable degree of competition in the relevant market. In the case of presumed joint dominance, the companies in question would have been required to show substantial competition between them and that no individual company possesses a "prominent market position" compared to the others. The Dominance Rules remove these specific provisions, which may indicate more flexibility in the type of evidence presumptively dominant companies may use to rebut the presumption.

Justified reasons for otherwise abusive conduct. The AML and the Dominance Rules provide that a dominant company can defend conduct that might otherwise be characterized as abusive by providing a "reasonable justification." Neither the AML nor the 2009 draft define or give examples of a "reasonable justification."

The Dominance Rules offer general guidance in this regard (Article 8). SAIC will consider: (i) whether the behavior in question is conducted based on business customs, normal business operation and normal benefits; (ii) whether the behavior in question will result in eliminating or restricting competition and harming consumers' interests; and (iii) the behavior's impact on economic efficiency, social and public interests and economic development. Importantly, the Dominance Rules do not define any "hard core" or *per se* prohibited categories of abusive conduct.

Abusive conduct. The Dominance Rules revise provisions regarding practices prohibited by the AML as abuses of dominant market positions:

- Refusals to deal

The Dominance Rules drop language from the 2009 draft stating that "refusing, reducing, restricting or terminating transactions with counterparties under the same trading conditions may be deemed to be without reasonable justification." This provision effectively made "discrimination" by a dominant company a *per se* offence. The change in the Dominance Rules thus subjects discrimination claims against a dominant company to a rule-of-reason test.

On the other hand, the Dominance Rules appear to make it easier for a non-dominant company to bring a claim under the "essential facilities" doctrine. Under the new draft, a dominant company may not deny other companies the use of necessary facilities on reasonable terms (Article 4). In assessing the reasonability of a refusal, SAIC should consider (i) the feasibility of investing in or developing the construction of alternative facilities; (ii) the reliance of the counterparty on the facility for the effective operation of its business; (iii) the possibility of providing access to the essential facility by the owner; and (iv) the impact on the owner's production and operation of providing access to the essential facility. Showing a violation under the new rules would seem to be easier than under the 2009 draft, under which a company refused access would need to prove that it "*cannot* conduct business operations without [access]" (*emphasis added*).

- Tying and bundling

The Dominance Rules largely replace the 2009 draft's definition and prohibition of "bundled sales" with the introduction of four situations in which products may be considered to be "bundled" (Article 6): (a) Compulsory bundling or combining of different commodities contrary to transaction customs, consumption habits, or disregarding the functions of the commodities; (b) Attaching unreasonable limits to the contract terms, payment method, transportation and delivery method of commodities or the service provision method; (c) Attaching unreasonable limits to sales territories, sales targets and after-sale services; and (d) Attaching conditions irrelevant to the object of the transaction.

- Discriminatory terms

According to the 2009 draft, a dominant company would be prohibited, without justifiable reasons, from engaging in discriminatory treatment of counterparties in equivalent transactions with respect to transaction terms, such as the quantity and quality of goods or services, payment conditions, delivery methods and after-sale services. The current draft provides slightly more detail on transaction terms that can be considered discriminatory, adding "discounts on quantity or other preferential terms" as an example (Article 7).

On the other hand, the Dominance Rules delete the 2009 draft's definition of, and therefore provide less guidance on, the meaning of "equivalent transactions."

The Administrative Power Rules

The Administrative Power Rules are SAIC's first draft substantive rules dealing with abuses of administrative power. The relevant procedural rules, Procedural Rules of Administrative Authority for Industry and Commerce on Prohibition of Acts of Abuse of Administrative Power to Eliminate or Restrict Competition ("Administrative Power Procedural Rules"), took effect on July 1, 2009.

The AML prohibits the abuse of administrative power to eliminate or restrict competition. When such an abuse occurs, however, it is up to the superior authority of the authority accused of the violation to correct the situation. The anti-monopoly authorities may propose remedial actions but cannot impose them.

As briefly touched upon in the Administrative Power Procedural Rules, the Administrative Power Rules (Article 5) restate that it is not an acceptable defense for an undertaking to argue that administrative authorities "compelled" or "disguisedly compelled" (*i.e.,* informally pressured) it to engage in anti-competitive conduct.

The Administrative Power Rules (Article 7) empower SAIC to "stop" anti-competitive behavior even if it is based on administrative "decisions," without explicitly mentioning other sanctions. If the undertakings in question continue their behavior after the governmental compulsion ends, then the sanctions imposed under the Restrictive Agreements Rules and the Dominance Rules will be towards the high end of the sanction range.

Conclusion

The Restrictive Agreements Rules and the Dominance Rules continue to reflect a form-based approach that attracted criticism when SAIC published its first draft substantive rules in 2009. Neither of the two Rules sufficiently stresses the need to show actual or likely anti-competitive effects of restrictive agreements or abusive practices to find an AML violation.

Similarly, the Restrictive Agreements Rules still do not adequately distinguish between non-price-related antitrust conduct that should be prohibited *per se* (such as output restrictions and territorial and customer allocation), and conduct that should be analyzed under a rule of reason approach (such as restrictions on technology/equipment purchase and development). SAIC's revised leniency program does not specify the types of agreements to which leniency will apply or clearly explain the requirements to qualify for leniency. The reduced level of legal certainty is likely to impair the leniency program's effectiveness in motivating companies to apply for leniency.

The Dominance Rules improve on the prior draft by clarifying that allegedly abusive conduct will be examined under a rule of reason standard. On the other hand, the Dominance Rules seem to broaden the definition of a dominant position, as well as the "essential facility" doctrine. The Chinese version of the doctrine is broader than that applied in either the U.S. or Europe, where a dominant company generally is not required to provide access to an "essential facility" unless such access is necessary for the competitor to provide a new product or service, not merely "to effectively operate."

Despite their limitations, the three draft substantive rules, together with the two procedural rules already in effect, will when finalized constitute a relatively complete body of implementing rules for SAIC and should enable SAIC to move forward with its enforcement activity.

Joint notice regarding agricultural pricing

On May 26, 2010, NDRC, SAIC and MOFCOM jointly issued "The Urgent Notice on Strengthening the Regulation of Agricultural Product Market to Maintain Normal Market Order" (the "Notice") requiring all levels of government to monitor and strengthen enforcement of illegal pricing of agricultural products. A little over a month later, on July 2, 2010, the three agencies announced enforcement actions taken in several provinces against a wide range of agricultural pricing practices, including both price fixing and price-related abusive conduct. The press release cited the Notice, which in turn cited the Price Law and the Regulation on Administrative Sanctions for Price-related Illegal Conduct as its source of authority. Neither the Notice nor the later press release cited the AML.

Once again, the antitrust enforcement agencies turned to the Price Law rather than the AML. As noted above, this may result from greater familiarity with the Price Law and its more extensive set of regulatory guidance. In addition, the Price Law allows more flexibility regarding the agencies authorized to take enforcement action. Note also that the three antitrust enforcement agencies jointly issued the Notice and jointly conducted the investigation in an area, price-reated conduct, in which NDRC nominally has exclusive jurisdiction, both under the AML and the Price Law.

NDRC accepts complaint alleging price-related abusive conduct by the state-operated railway

According to media reports, NDRC formally accepted a complaint filed by four Beijing lawyers alleging abusive practices by the state-operated railway. The complaint was filed on March 12, 2010 with both NDRC and SAIC. SAIC has not indicated whether it will accept the complaint.

The complaint alleges that the state-operated railway has abused its dominant position by charging excessively high prices and unreasonably limiting supply on its high-speed line between Beijing and Tianjin. Since the Ministry of Railways, a central government agency, sets the ticket price, the complaint also names the Ministry.

While there have been a number of abuse of dominance cases brought before China's courts, acceptance of the complaint by NDRC marks the first public indication of an abuse of dominance investigation by the AML's enforcement authorities. The administrative agencies have more resources than the courts for obtaining evidence for abusive conducts. Furthermore, this particular case is notable because the complaint names a state-operated entity and a government agency.

HONG KONG

Hong Kong publishes Competition Bill

On July 2, 2010, Hong Kong's Legislative Council published the Competition Bill. The bill applies to abuses of a substantial degree of market power in a market that have the object or effect of preventing, restricting or distorting competition in Hong Kong. Unlike China's AML, the bill does not contain any presumptive market share thresholds for dominance. The bill would create a Competition Commission to investigate complaints and bring enforcement actions and a Competition Tribunal within Hong Kong's judiciary to hear and adjudicate competition cases brought by the Commission or private actions and to review decisions of the Commission. The bill also anticipates that the Commission will develop detailed guidelines further explaining the substantive and procedural aspects of the bill. The bill now moves to the Legislative Council for debate.

INDIA

Competition Commission of India ("CCI") orders abuse of dominance investigation

On April 8, 2010, the CCI ordered the Director General to commence an abuse of dominance investigation into the activities of the National Stock Exchange of India ("NSE"). The recommendation comes as a result of a complaint by rival stock exchange MCX and relates to NSE's behavior in relation to the currency futures market (i.e., the act of waiving the transaction fee for trading in the derivatives). The CCI announcement stated as follows:

> After taking into consideration all facts and circumstances, the commission at this stage is of the view that there exists a prima facie case for referring the matter to the director general for conducting an investigation into the matter...therefore, the

commission directs the director general to cause an investigation to be made into the matter and submit report within 45 days from the date of receipts of commission's order.

There are numerous matters being investigated by the CCI, but it has yet to issue any decisions.

JAPAN

Japan's Fair Trade Commission ("JFTC") fines shutter manufacturers cartel

On June 9, 2010, the JFTC imposed fines totaling $62.8 million on four manufacturers of specified shutters for bid rigging and price-fixing, in violation of the Antimonopoly Act. Of particular interest is the fact that the JFTC reportedly rejected Bunka Shutter Co. Ltd.'s leniency application on the grounds that the documents it submitted in the context of its leniency application contained false information. This is the first case where the JFTC has rejected a leniency application due to the provision of false information. This case emphasizes the JFTC's increasingly stringent approach to price-fixing cartels and especially bid rigging, as it is the seventh time that the JFTC has fined companies for bid rigging this year.

MALAYSIA

Enacts first comprehensive antitrust law

On April 21, 2010, Malaysia's parliament passed two bills, the Competition Commission Bill 2010 and the Competition Bill 2010. The bills prohibit anti-competitive agreements and abuses of dominant positions. The laws make no provision for a merger control regime. A Competition Commission will investigate and enforce the laws, while a Competition Appeals Tribunal will hear appeals of Commission decisions. Implementation is expected at the beginning of 2012.

SOUTH KOREA

Korea's Fair Trade Commission ("KFTC") fines 19 airlines for fuel surcharge price-fixing

The KFTC imposed a total fine of 119,544 million won (~$103 million or €79 million) on 19 airlines for an agreement to introduce and then continuously raise fuel surcharges for air cargo to and from Korea between 1999 and 2007. The Commission's investigation began with a dawn raid in February 2006, prompted by a leniency application.

There were 21 airlines involved with the cartel. However, two of the airlines were not subject to fine, as the KFTC issued only warnings to Air India and SAS, and the KFTC granted immunity to Korean Airlines and Lufthansa as part of its leniency program. It is unusual for two companies to be granted immunity. Normally, only the "first to report" is granted immunity.

KFTC imposes behavioral remedies for cable TV merger

On May 26, 2010, KFTC approved the acquisition of OnMedia Co., Ltd. by CJ O Shopping Co., Ltd., subject to behavioral remedies designed to clear KFTC's competition concerns within the broadcasting Program Provider ("PP") market.

CJ O Shopping has the largest share of the PP market, while OnMedia holds the second biggest market share. Importantly, KFTC found that the merger would create a monopoly in the distribution of movies, animation, and content focused on women, three of the most popular forms of cable content.

As a result, the remedies were as follows:

- The merged entity should provide equal access to equivalent content to cable TV competitors and other payment-based broadcasting operators.
- Absent a compelling reason, the merged entity should provide its content based on the existing agreements with its customers.

As a result of potential new entry after the Korea-US Free Trade Agreement enters into force, the duration of the remedy was limited to 3.5 years.

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