CLEARY GOTTLIEB

Asian Competition Report

APRIL – JUNE 2009

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This is the inaugural edition of the Asia Competition Report, which will cover major antitrust developments in Asian jurisdictions. This Report follows the recent relocation of Matthew Bachrack, a senior antitrust lawyer, to the firm's Hong Kong office. As announced in May, Matt will assist in developing an Asian-based antitrust practice to complement our preeminent antitrust practices in Europe and the U.S. This Report is intended to focus on the evolving competition regimes in the region and to keep clients informed about relevant developments. We hope you find it interesting and useful.

CHINA

Ministry of Commerce ("MOFCOM") clears Mitsubishi/Lucite transaction with conditions

On April 24, 2009, MOFCOM approved, with conditions, Mitsubishi Rayon Co., Ltd.'s acquisition of Lucite International Group Ltd. The publicly available decision provided significantly more detail than the prior InBev/Anheuser-Busch and Coca-Cola/Huiyuan decisions, although all three published decisions are short, and MOFCOM's description of its analysis is less complete than comparable decisions under the EC Merger Regulation and U.S. regulations.[1]

MOFCOM determined that the companies are horizontal competitors in China for methyl methacrylate ("MMA") and would have had a combined market share of 64% after the transaction. In addition, since Mitsubishi competes in two downstream markets, MOFCOM found that the combined company would have been able to restrict its downstream competitors' access to MMA. As a result, MOFCOM concluded that the concentration would eliminate or restrict competition and adversely affect competition in the Chinese MMA market and its downstream market.

The parties proposed remedies to MOFCOM, and the two sides agreed on the following:

- A divestiture to a third party of the right to purchase 50% of Lucite (China)'s annual MMA production for five years at cost;
- An interim "hold separate" arrangement pending the divestiture, providing that Lucite (China) shall operate independently from the MMA monomer business operations of Mitsubishi Rayon in China, with an independent management and board of directors membership between the closing of the proposed transaction and the completion of the divestment; and
- For five years after the transaction closes, Mitsubishi Rayon may not, without the prior approval of MOFCOM, acquire any producer of, or establish any new plant for MMA, PMMA polymer, or cast sheet in China.

The decision does not resolve the open question from prior decisions and the implementing rules of the Anti-Monopoly Law ("AML") as to whether remedies must "eliminate" or merely "reduce" the negative effects on competition. Indeed, the decision states that MOFCOM and the parties negotiated remedies to "reduce" the negative effects of the transaction but then notes that the agreed-upon remedies "fully eliminate" the adverse impact of the concentration.

The prohibition against adding Chinese MMA capacity is unusual. It is unclear how future additions of capacity could result in harm to consumers.

The outcome, as with the Coca-Cola and InBev decisions, demonstrates MOFCOM's willingness to use the merger-control process to address the possibility of future, non-merger-specific harm. Although the government would have the power to review the future behavior, such as a future acquisition by Mitsubishi Rayon or the construction of a new plant, if and when the need arose, MOFCOM preferred to prohibit the activity now.

MOFCOM's willingness to impose restrictive conditions on InBev/Anheuser-Busch and Mitsubishi/Lucite and to prohibit Coca-Cola/Huiyuan shows that MOFCOM is prepared to play an active enforcement role under the AML.

The State Administration for Industry and Commerce ("SAIC") issues draft implementing rules regarding the abuse of a dominant market position and restrictive agreements

On April 27, 2009, the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau ("AACEB") of SAIC, which is responsible for

1 While the U.S. does not typically publish details regarding clearance decisions, the agencies do provide details regarding decisions to block a transaction or, in the case of some high-profile transactions, to clear it with conditions.

enforcing the AML with regards to non-price-related conduct, published two draft substantive rules regarding the application of the AML to the abuse of a dominant market position and restrictive agreements. The draft rules are:

- Draft Rules on Prohibition of Abuse of Dominant Market Positions (the "Dominance Rules"); and
- Draft Rules on Prohibition of Restrictive Agreements (the "Restrictive Agreements Rules").

The draft rules take a broad approach to certain categories of abusive conduct (particularly refusals to deal, tying and bundling, and discriminatory treatment), as well as to the types of agreement that may be considered "restrictive" under the AML. The rules also outline the first leniency program to be proposed by the Chinese antitrust authorities.

While the Anti-Monopoly Bureau of MOFCOM has published a number of guidelines and implementing rules in draft or final form and has actively exercised its jurisdiction over mergers and acquisitions, SAIC's issuance of the draft rules marks the first time SAIC has used its rule-making authority to flesh out relevant AML provisions.[2] According to press reports, SAIC has received a large number of complaints under the AML but has so far not adopted any decisions, or even launched formal investigations. SAIC's issuance of the rules described in this memorandum may indicate that SAIC is now prepared to play a more active role in enforcing the AML.

These rules leave many questions unanswered. Concerns that have been raised include the following:

- The draft rules do not adequately distinguish between non-price-related antitrust conduct that should be prohibited *per se* (such as agreements among competitors involving output restrictions, territorial and customer allocation, and bid-rigging), and conduct that should be analyzed under a *rule of reason* approach that considers not only the potential anti-competitive effects, but also any pro-competitive justifications for the alleged conduct.
- The draft rules do not sufficiently stress the need to show actual or likely anti-competitive effects – harm to consumers by way of a reduction in the number of competitors, amount of innovation, foreclosure of reasonably efficient competitors, *etc*. – of abusive practices or restrictive agreements.
- Although the draft Dominance Rules and Restrictive Agreement Rules provide that a dominant company may defend conduct that would otherwise violate the AML based on "justifiable reasons" for its conduct, the rules apparently place the burden of proof on the dominant company while offering no guidance on what justifications SAIC will consider in different scenarios and the nature of the evidence that dominant companies will be required to provide.
- The draft and final rules apply only to anti-competitive conduct under the jurisdiction of SAIC. The NDRC has yet to issue similar guidance regarding price-related conduct, although we expect such rules shortly. Moreover, the rules do not provide any additional detail regarding the split in jurisdiction between SAIC and NDRC. It is reported that during the drafting process, SAIC consulted and reached consensus with the NDRC regarding topics such as the contents of complaints/reports, the commitment mechanism, the leniency program, and the obligation of the company/individuals under investigation to provide relevant information, to ensure transparency, clarity, and consistency. Coordination and consistency between SAIC and the NDRC will be particularly important as the agencies develop and implement their respective leniency programs, since cartel violations often involve both price- and non-price-related conduct.

For additional details regarding the proposed rules, the firm's alert memo may be found at http://www.cgsh.com/saic_issues_rules_under_the_chinese_anti-monopoly_law/.

SAIC issues two final procedural rules on the investigation of abuses of dominant positions, restrictive agreements, and abuses of administrative power that restrict competition

These final rules detail SAIC procedures for the enforcement of the non-price-related provisions of the AML, including the jurisdiction of provincial authorities, and set out (generally toothless) procedures for SAIC to follow in respect of administrative abuses, such as

2 In August 2008, the AACEB of SAIC, MOFCOM, and the Price Supervision Department of the National Development and Reform Commission (the "NDRC") were designated as Anti-Monopoly Enforcement Authorities under the AML. The responsibility for enforcing the AML is allocated as follows:

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

government bodies compelling companies to engage in conduct that violates the AML. The two rules adopted by SAIC on June 5, 2009, are the following:

- Procedural Rules on Investigating and Handling Cases of Restrictive Agreements and Abuse of Market Dominance by the Administrative Authority of Industry and Commerce (the "Investigation Rules"); and
- Procedural Rules on Prohibiting of Acts of Abuse of Administrative Power to Eliminate or Restrict Competition by the Administrative Authority of Industry and Commerce (the "Administrative Power Rules").

The rules take effect as of July 1, 2009, and are the first implementing rules finalized by the three Chinese enforcement agencies.

The Investigation Rules provide more detail on the conduct of investigations of alleged restrictive agreements or abuses of dominant market positions and the allocation of jurisdiction between SAIC and its provincial authorities.

Chapter Five (Articles 32-37) of the AML prohibits the abuse of administrative power to eliminate or restrict competition, such as an instruction by a government body requiring a company to engage in anticompetitive conduct. Under Article 51, however, when such an abuse occurs, it is up to the superior authority of the body accused of the violation to correct the situation; anti-monopoly authorities may only propose the action to be taken.

Given SAIC's limited authority in this area, the Administrative Power Rules not surprisingly are short and do not provide SAIC with much power. As per the AML, SAIC may only make recommendations to the appropriate superior administrative authorities for action. It is expected that a separate set of substantive rules will be issued concerning the handing of abuse of administrative power cases.

Importantly, the Administrative Power Rules note that it is not an acceptable defense for a business to argue that it was compelled, instructed, or authorized to engage in anti-competitive conduct by an administrative authority or organization. No distinction is made between anti-competitive actions that were "compelled" or "instructed", on the one hand, and anti-competitive conduct that was "authorized," on the other hand. It remains to be seen how SAIC will balance the Administrative Power Rules and Chapter 5 of the AML (prohibiting the abuse of administrative power to eliminate or restrict competition).

For additional details regarding the rules, please refer to the firm's alert memo at http://www.cgsh.com/saic_issues_rules_under_the_chinese_anti-monopoly_law/.

Baidu private antitrust trial

On April 22, 2009, the Beijing No. 1 Intermediate People's Court heard one of the first cases based on a private action alleging abuse of a dominant position under the AML. Tangshan Renren Information Services alleges that Baidu Network Technology Co. ("Baidu"), the most frequently used search engine in China, abused its dominant position in web search by deliberately lowering Tangshan's ranking on searches to negotiate a higher payment from it. Baidu argued that it is not dominant and that it has not engaged in any abuse. Tangshan also filed complaints against Baidu with SAIC as early as October 2008.

The plaintiff has the burden of proof and must show both that Baidu is dominant and that it abused that position. News reports state that the plaintiff submitted analyst reports to prove that Baidu held a dominant market share. Baidu questioned these reports and noted that the relevant services were provided for free to users, and, therefore, may not result in an antitrust market.

No decision has been publicly issued. It will be interesting to see how the court reacts to plaintiffs' evidence and defines the relevant antitrust market, whether Baidu is found to have a dominant position in the antitrust market, whether it finds the conduct at issue to be an abuse of the alleged dominant position, and whether the court takes any action to protect a champion of China's developing technology sector.

Interestingly, just two days before the trial opened, it was reported that the Supreme People's Court would try to issue by the end of the year a judicial interpretation regarding potential issues that could arise in relation to civil suits under the AML.

Travel Sky price fixing investigation

Reports indicate that NDRC has begun a price fixing investigation regarding the pricing practices of the Civil Aviation Administration of China's ticketing website, TravelSky. NDRC received tips accusing TravelSky of fixing the prices of airline tickets by manipulating its discounting policies. TravelSky is a state-owned business that, among other things, issues tickets for the major airlines. Its major shareholders are state-owned airline companies. If NDRC finds that TravelSky violated the AML, it could require payment of a fine up to 10% of TravelSky's turnover in the previous year.

INDIA

Competition Commission operational

On May 20, 2009, the 2002 Competition Act of India's Section 3 regarding anti-competitive agreements and Section 4 regarding abuse of a dominant position became effective. The provisions relating to the notification and review of mergers and acquisitions have not yet entered into force. Enforcement of the 2002 act had been delayed due to political issues and a Supreme Court challenge.

Section 3 prohibits agreements restricting the production, supply, distribution, acquisition, or control of goods or provision of services, which may cause an appreciable adverse effect on competition within India. A party found to violate this section may be liable for penalties of up to 10% of the average turnover for the last three years with sanctions relating to cartels potentially even higher (an enterprise can be fined up to three times its profit or 10% of its turnover for each year of the existence of such agreement, whichever is higher). Section 4 of the Act prohibits the abuse of a dominant position. Applicable sanctions include financial penalties (10% of the dominant firm's average turnover for the three proceeding years) and structural remedies. It is not yet clear what turnover figures (*i.e.*, India-only or global) the Competition Commission of India ("CCI") will use in calculating the fine.

In addition, the government made the CCI fully functional. The CCI may investigate acts or agreements that occur outside India that have an appreciable adverse effect on competition within India. The government has appointed five members to the CCI, including the Chairman, Mr. Dhanendra Kumar, a former World Bank executive. Parties may appeal decisions of the CCI to the Competition Appellate Tribunal, which is also in place.

JAPAN

Japanese Diet approves bill to amend the Anti-Monopoly Act

On June 3, 2009, the Japanese Diet approved amendments to the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (the "Amended Act"). The amendments modify the leniency program for cartel behavior, expand the range of conduct subject to penalty under the Anti-Monopoly Act and increase some of those penalties, and both update and expand the pre-merger notification regime. It was the government's intention to expand the deterrent effect of the law by increasing penalties and expanding its reach. The amendments will likely also result in the filing of a greater number of pre-merger notifications. A filing analysis now requires that parties evaluate the sales in Japan, including import sales, by an entire corporate group. Foreign companies will no longer be able to rely on the their lack of assets in Japan or the lack of sales by a Japanese subsidiary. In addition, share transfers will be subject to pre-transaction clearance, which requires that parties must observe a mandatory thirty-day waiting period prior to closing.

The Amended Act is scheduled to enter into force on a day provided by the Japanese Cabinet within one year of June 10. The Japan Fair Trade Commission is also expected to issue guidelines further clarifying the amendments.

For additional details regarding the amendments, please refer to the firm's alert memo at http://www.cgsh.com/japanese_diet_approves_bill_to_amend_the_anti-monopoly_act/.

SOUTH KOREA

Court recognizes "pass-on" defense for first time

On May 27, 2009, a Seoul District Court recognized the so-called "pass-on" defense for defendants accused of price fixing. While the court noted that plaintiffs purchasing product directly from defendants incurred damages at the time they made the purchase at the illegally inflated price, it held that plaintiffs' damages must be reduced by the amount of the unlawful increase that plaintiffs were able to pass on to downstream customers. The court explained that it sought to avoid a windfall for direct purchaser plaintiffs.

Korea and European Commission sign antitrust cooperation agreement

On May 28, 2009, the Korea Fair Trade Commission ("KFTC") and the European Commission entered into the Agreement between the Government of the Republic of Korea and European Community concerning Cooperation on Anti-competitive Activities. The goal of the agreement is increased cooperation on competition policy and enforcement. It is the first such cooperation agreement entered into by the South Korean government. The agreement allows for cooperation with respect to, among other things, notification of enforcement activity if it is suspected that the activity may impact the other jurisdiction, assistance in enforcement activity via the sharing of information, coordination of enforcement activity, and the maintenance of confidential information.

Enforcement activities

The KFTC, on May 19, 2009, imposed a corrective order and a KRW 557 million (US$448,000) fine on five marine hose manufacturers. The KFTC claims that Bridgestone Corp., Dunlop Oil & Marine Ltd., Trelleborg Industrie S.A., Parker ITR, and Manuli Rubber Industries S.p.A. rigged bids, fixed prices, and allocated market shares for marine hoses sold in South Korea from at least 1999 through 2006. Yokohama Rubber was also found to have participated but was not fined because it disclosed the cartel to the KFTC under Korea's cartel leniency program. The marine hose cartel was allegedly global, and the companies also face investigations, fines, and criminal sanction in other jurisdictions, including the U.S. and Europe.

In mid-June, the KFTC charged Qualcomm Inc. with setting unreasonable and discriminatory terms for the license of its patents. The patents relate to mobile phone handset chipsets subject to international standards. When Qualcomm's patents were included in the standard, the company agreed to license the patents on fair, reasonable, and non-discriminatory (FRAND) terms. The charges allege that Qualcomm violated these terms. Hearings are ongoing and a decision is expected in July. If it is found to have violated the antitrust law, Qualcomm could face hefty fines and be required to change its business practices.

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