Cleary Gottlieb

# Asian Competition Report

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This is the eighth 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

### China's NDRC announces price cartel decision

On January 4, 2011, the same date that China's National Development and Reform Commission ("NDRC") published two new sets of rules under the Chinese Anti-Monopoly Law (the "AML"), the agency announced the results of its investigation into a price cartel organized by a paper manufacturing trade association in Fuyang, a city in Zhejiang Province. The agency found that, in 2010, the trade association organized five meetings at which more than 20 members discussed and agreed on price increases and coordinated output. Based on those findings, NDRC held that the association violated the Price Law and the AML and imposed a fine of RMB 500,000 (~$77,000; €52,000), the maximum fine for trade associations under the AML and the Regulations on Administrative Sanctions for Price-Related Illegal Conduct.

This is NDRC's second decision referencing the AML. NDRC and the provincial pricing authorities previously conducted an investigation into a price cartel among rice noodle producers in Guangxi province.[1] In the rice noodle case, although both the AML and the Price Law were invoked, some interviews and press reports suggest that NDRC and its local agencies relied more heavily on the Price Law. Since the new rules have been issued (see below), NDRC may feel more comfortable applying the AML.

### China's NDRC issues new rules

Also on January 4, 2011, NDRC published the Anti-Pricing Monopoly Rules (the "NDRC Pricing Rules") and the Procedural Rules on the Administrative Enforcement of Anti-Pricing Monopoly (the "NDRC Procedural Rules"), both of which took effect on February 1, 2011. The announcement of the new rules and the enforcement action on the same day may indicate that NDRC is going to step up its enforcement efforts.

According to the NDRC Pricing Rules, the following three types of conduct are considered price-related anti-competitive conduct:

- Reaching restrictive agreements related to pricing;
- Abusing a dominant market position by using price-related measures to eliminate or restrict competition; and
- Abuse of power by administrative organizations using price-related measures to eliminate or restrict competition.

The NDRC Pricing Rules prohibit competitors from fixing prices or discounts, using a standard formula to calculate prices, agreeing not to modify prices and similar conduct. Likewise, transaction counterparties may not fix resale prices or set minimum resale prices. Trade associations may not facilitate such conduct. As noted in Article 15 of the AML, these prohibitions do not apply to certain categories of agreements that have pro-competitive purposes and will not materially limit competition, such as those that improve product quality, reduce costs, and enhance efficiency or upgrade technology.

The NDRC Procedural Rules allow a company that engages in price-related restrictive agreements to seek an exemption or reduction in penalties in exchange for providing NDRC with important evidence that plays a key role in proving a violation. NDRC has discretion in reducing penalties or providing immunity to companies. In particular, the first leniency applicant to provide such evidence can get immunity from sanction, the second applicant can receive not less than a 50% reduction, and subsequent applicants can receive no more than a 50% reduction.

With regard to abuse of dominance, the NDRC Pricing Rules prohibit, without valid justification, predatory pricing, refusals to deal, exclusive dealing, and price discrimination. The rules also prohibit "unfairly high" or "unfairly low" pricing and the imposition of unreasonable fees in addition to sales price. While the AML and the NDRC Pricing Rules do not require that the enforcement authorities prove that the alleged abuse harmed consumers, they do provide that a dominant company can defend its allegedly abusive conduct by providing a "reasonable justification." The AML does not define what constitutes a "reasonable

1 In addition, certain provincial pricing authorities conducted investigations into cartels operated in the following industries: tableware disinfection products, explosive products, badminton, insurance, internet bars, teas and milk products. For a more detailed discussion of the rice noodle and tableware disinfection product cartel investigations, please refer to our alert memorandum, available at: http://www.cgsh.com/de/first_price_cartel_cases_ under_the_ chinese_aml/.

justification," but the NDRC Pricing Rules provide further guidance on the reasonable justifications available for each type of abuse. The NDRC Pricing Rules also offer guidance in respect of (1) NDRC's definition of a "dominant market position"; (2) how NDRC determines whether an undertaking holds a dominant market position; and (3) conduct that NDRC views as abusing a dominant market position.

Article 4 of the NDRC Pricing Rules repeats the AML's confusing statement that "the state shall protect the legitimate business activities of state-owned undertakings operating in industries implicating the national economic lifeline or state security," or "having exclusive rights to operate in some specified industries according to relevant laws and regulations." Such undertakings must operate within the law, should follow "the principle of self-discipline," and "shall not impair consumers' interests by exploiting a dominant position." This language was not included in the 2009 draft of the rules. It is unclear if this article exempts certain companies from the AML or, perhaps, removes enforcement jurisdiction from NDRC.

The NDRC Pricing Rules and the Procedural Rules have provided important guidance on the application of the AML. However, they still leave many questions unanswered. Certain key concepts that were defined or clarified in the prior draft of the NDRC Pricing Rules have been removed, leaving NDRC with greater discretion in the implementation of the rules. In addition, while the NDRC Procedural Rules set out a framework for a leniency program, considerable work is still required to ensure procedural transparency and legal certainty. Furthermore, inconsistencies between NDRC's leniency rules and those of its sister agency, the State Administration for Industry & Commerce ("SAIC"), may discourage parties from seeking leniency and thus undermine the benefits of a leniency program. Despite these limitations, NDRC's new rules constitute a relatively complete body of implementing rules and should enable the agency to move forward with its AML enforcement activity.

For additional details regarding the new NDRC rules, please refer to the firm's alert memo, available at http://www.cgsh.com/chinas_ndrc_issues_new_rules_and_announces_a_new_price_ cartel_investigation_under_aml/.

## China's MIIT solicits comments on draft Internet Rules

On January 14, 2011, China's Ministry of Industry and Information Technology ("MIIT") unveiled draft rules to regulate competition between providers of internet information services ("PIIS")[2] and to protect users' rights and online personal data. The draft rules, entitled "Provisional Regulations for Maintaining the Social Order of the Internet Information Service Market" (the "Draft Internet Rules") appear to have been prompted by a recent dispute between two top Chinese Internet companies, Tencent and Qihoo.

The Draft Internet Rules are very broad and relate to a wide range of conduct by PIIS, addressing issues that commonly arise in the antitrust, unfair trade and consumer protection contexts. They also overlap to a certain extent with the Chinese Anti-Unfair Competition Law[3] and the Consumer Protection Law. If adopted, the Draft Internet Rules would have far-reaching implications for companies offering Internet-related products and services in China. The rules could also influence the development of Chinese antitrust law by SAIC, the agency responsible for enforcing the AML with regard to non-price-related anti-competitive conduct.

Interestingly, the Draft Internet Rules' development reflects the fluid nature of Chinese rules on competition. The Tencent-Qihoo dispute provoked a complaint to SAIC under the AML and a lawsuit under the Chinese Anti-Unfair Competition Law. But it was MIIT that intervened to resolve the dispute, using its powers to regulate the Chinese telecommunications sector, and MIIT now proposes broad new rules that will have major implications for Internet-related products and services.

For additional details regarding the Draft Internet Rules, please refer to the firm's alert memo, available at http://www.cgsh.com/chinas_miit_solicits_comments_on_draft_internet_rules/.

2 The draft Internet Rules do not define the term "providers of Internet information services." According to Article 2 of the "Administrative Measures for Internet Information Services" promulgated by the State Council in 2000 (the "Administrative Measures"), the term "Internet information service" means the provision of information services through the Internet to online subscribers. Article 7 of the Administrative Measures requires providers of commercial Internet information services to obtain an operating permit, commonly known as an "ICP license." Thus, it seems the term "providers of Internet information services" mainly refers to Internet content providers ("ICPs"). The Draft Internet Rules may be intended to apply to all activities of ICPs, regardless of whether those activities are directly related to the provision of online information.

3 As SAIC is the primary regulator of the Anti-Unfair Competition Law, it is unclear how SAIC and MIIT would handle their concurrent jurisdiction.

### Hudong's antitrust complaint against Baidu

On February 18, 2011, Hudong, the operator of China's largest encyclopedia website, filed a complaint with SAIC, which alleges, among other things, that Baidu has abused its dominant position in the search engine service market by downgrading and blocking Hudong's natural search results in favor of Baidu's own encyclopedia service, Baidu Baike.[4] Hudong requested that SAIC impose a fine of RMB 790 million (~$121 million; €83 million). SAIC has moved the matter to its Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau, which indicates that SAIC may have accepted the case. Subsequently, Hudong sued Baidu in a Beijing court for unfair competitive conduct.[5] Hudong has also called for the break up of Baidu so that its search engine business becomes an independent operation.

### China's State Council issues Notice on National Security Review of Foreign Acquisitions and MOFCOM issues Interim Rules on National Security Review of Foreign Acquisitions

On March 5, 2011, a new national security regime regulating foreign acquisitions of Chinese enterprises entered into force. This regime was created by a Notice on Establishing Security Review Mechanism regarding Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the "Notice") issued by the General Office of China's State Council on February 3, 2011. As with many Chinese rules, however, the Notice is opaque and discretionary and seems likely to result in uncertainty. On the same day, rules issued by China's Ministry of Commerce ("MOFCOM") implementing the new Chinese security review mechanism (the "Interim Rules") entered into force. The Interim Rules were issued on March 4, 2011 and will remain in force until August 31, 2011.

The Notice defines the scope of the new national security review system, provides for the creation of a new reviewing body, sets out the applicable procedure and defines the remedies that may be imposed.

It covers two categories of target companies:

- Military industry enterprises and supporting firms, enterprises located near major and sensitive military facilities and other entities related to national defense or security.
- Enterprises in security-related sectors, such as "essential" agricultural products, "essential" energy and resources, "essential" infrastructure, "essential" transportation, "key" technology and "major" equipment manufacture. These terms are undefined, raising difficulties for a foreign investor's assessment of whether a transaction should be notified for national security review.

Investments in target companies engaged in "security-related sectors" will trigger a national security review only if they may result in foreign investors acquiring "actual control" of the relevant Chinese enterprise.

Four types of investment will be caught by the new regime: (i) purchases or subscriptions of shares of a non-foreign invested enterprise (FIE) that transforms the enterprise into an FIE; (ii) acquisitions of shares of an existing FIE from a Chinese shareholder or subscriptions for capital increases of existing FIEs; (iii) establishment of an FIE to purchase and operate assets or to purchase shares from a Chinese enterprise; and (iv) to purchase assets directly from a Chinese enterprise and establish an FIE to hold and operate such assets.

The Notice does not apply to foreign acquisitions that involve changes of ownership in State-owned property or to acquisitions of Chinese financial institutions. Notably, the Notice treats investors from Hong Kong, Macao and Taiwan as foreign investors.

An inter-ministerial joint committee (the "Committee") will be established to conduct national security reviews. The Committee will be led by NDRC and MOFCOM and overseen by the State Council. The Committee may engage other authorities in its review process.

The Committee will assess whether a foreign acquisition will impact (i) domestic production capacity or equipment and facilities required for national defense; (ii) the stability of the national economy; (iii) social order; or (iv) the capacity to research and develop key technologies. However, the criteria on which the Committee will base its assessment are vague.

Notification forms will be submitted to MOFCOM. Once a notification is submitted, there is no limit on the amount of time that MOFCOM may review it before confirming that the notification is complete. After MOFCOM determines that the notification forms are complete, MOFCOM has 15 working days to determine whether the transaction falls within the scope of the security review regime. If MOFCOM determines that the transaction is not in scope, the parties may proceed to implement the transaction, provided that other necessary approvals have been received. If MOFCOM decides that the transaction is in scope, within five working days it will refer the matter to the Committee. The Committee then determines whether

4 *See* http://w.hudong.com/606d49959e084d468499a02a0f32e38f.html.

5 *See* http://w.hudong.com/10840a9a7ef449938cce64d86776b25b.html.

the transaction will affect national security. Generally, the Committee's review can last up to 30 working days, but if the Committee determines that a transaction will trigger a national security concern, the review will enter a special review process that can last up to 60 working days. When the Committee does adopt its decision, MOFCOM will inform the applicant(s) within five working days. If the Committee decides that the transaction will have no impact on national security, the parties may proceed to apply for other approvals necessary for foreign investment.

If the Committee considers that a transaction may impact national security, the Committee may require a transaction to be unwound or take other measures, such as transferring shares or assets to eliminate that impact. The parties may not implement the transaction until they adjust the transaction, file a new application, and receive approval. In addition, a transaction that has not been notified may be unwound if the Committee finds that it "has significantly impacted or may significantly impact national security."

Unlike merger review decisions, decisions imposing remedies in the national security review are not required to be published.

The introduction of the new national security review mechanism fills one of the remaining gaps in the implementation of the AML. While the Notice and Interim Rules detail the procedure for such reviews, they are ambiguous with respect to a number of important concepts. The ambiguity in the determination of which targets will trigger a national security review, combined with the possibility for a transaction to be unwound after closing if a notification is not made, may lead foreign investors to err on the side of caution and to make national security notifications in case of doubt.

The relationship between national security review and merger control review under the AML may also give rise to questions, since the same transaction may be subject to both. Although the two review procedures will presumably be conducted in parallel, this is not clear from the Notice and Interim Rules.

As has been the case in other jurisdictions, the application of the new national security review in particular cases is likely to be influenced by political sensitivities. The practical implications of China's new national security review process will only become clear in the coming years, when a body of practice has developed.

For a detailed review of the Notice and the Interim Rules, please refer to our alert memoranda, which are available at http://www.cgsh.com/chinas_state_council_issues_notice_on_national_ security_review_of_foreign_acquisitions/ and http://www.cgsh.com/chinas_mofcom_issues_interim_rules_on_national_security_review_of_foreign_acquisitions/.

## SAIC's first cartel case and final rules

SAIC recently announced its first cartel decision[6] and adopted final implementation rules under the AML, including creation of a new leniency regime.[7] These developments suggest that SAIC is now ready to step up its enforcement activities under the AML.

### Concrete cartel decision

SAIC's cartel decision concerned a non-price cartel organized by a construction material and machinery trade association among concrete producers in Jiangsu Province. SAIC's decision sanctioning the concrete cartel is SAIC's first published cartel enforcement decision.[9] The cartel resulted in sixteen concrete producers reaching an agreement with the association to divide concrete sales markets. Thereafter, the agreement was actively enforced. For example, the association requested participants to register their sales contracts and fined companies for failing to comply with the agreement.

SAIC found that the association and the sixteen companies violated Article 13 of the AML (prohibiting restrictive agreements among horizontal competitors). Consequently, the association was fined RMB 200,000 (~$30,000; €22,000), reflecting a discount for the association's cooperation with the investigation. Eleven of the sixteen participating companies received immunity from fines as a result of their cooperation with the investigation. The remaining companies were fined, but the amount of the fines was not specified in the decision.

Interestingly, SAIC's decision seems inconsistent with its own leniency program. SAIC's leniency program provides for immunity only for the undertaking that first reports the violation, while subsequent reporters may receive only reduced penalties. Here, eleven companies received immunity. As the decision pre-dated the new rules, SAIC may have believed that they were not bound by the new leniency rules. On the other hand, as the new rules do not

6 *See* http://www.saic.gov.cn/ywdt/gsyw/dfdt/xxb/201101/t20110126_103772.html.

7 The final rules adopted by SAIC follow its May 2010 release of draft rules (the "2010 Draft Rules"). For a detailed review of the 2010 Draft Rules, please refer to the firm's alert memo of June 24, 2010, available at http://www.cgsh.com/saic_issues_new_draft_rules_under_the_chinese_anti-monopoly_law/.

8 SAIC officials have indicated informally that the agency has investigated several cases, including one involving a multi-national company.

specify how to determine the "first applicant," SAIC may have applied the term to a group of applicants providing important evidence simultaneously or within a short period of time. Such a broad application of immunity could reduce the leniency program's effectiveness, since potential leniency applicants may be more likely to wait to see what other cartel members will do before filing an application if they think that they may still receive full immunity.

**SAIC Final Rules**

SAIC's implementing rules include (i) the Rules of the Administrative Authority for Industry and Commerce on the Prohibition of Restrictive Agreements (the "Restrictive Agreements Rules"); (ii) the Rules of the Administrative Authority for Industry and Commerce on the Prohibition of Abuse of Dominant Market Positions (the "Dominance Rules"); and (iii) the 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"; together, the "SAIC Final Rules").

Article 2 of the Restrictive Agreements Rules prohibits any horizontal agreements, decisions, or other concerted actions that eliminate or restrict competition by restricting output or sales, dividing sales or raw material markets, restricting the purchase or development of new technologies or equipment/products, and engaging in group boycotts. Article 9 prohibits trade associations from organizing restrictive agreements among their members. As noted in Article 15 of the AML, these prohibitions do not apply to certain categories of agreements that have pro-competitive purposes and will not materially limit competition. Notably, the rules do not refer to vertical agreements.

Article 11 provides details regarding SAIC's leniency program. Its provisions are largely unchanged from the 2010 Draft Rules and provide that (i) penalties shall be waived for the undertaking that first reports the violation, produces "essential evidence" and cooperates fully and voluntarily and (ii) penalties may be reduced for other undertakings that voluntarily report the violation and produce essential evidence. The final rules clarify that reductions apply to administrative fines but not illegal gains.

Consistent with the AML, the Dominance Rules prohibit a dominant company from engaging, without valid justification, in refusals to deal, exclusive dealing, tying, and discrimination. While the AML and the Dominance Rules do not require that antitrust authorities prove that the alleged abuse harmed consumers, they do provide that a dominant company can defend its allegedly abusive conduct by providing a "reasonable justification." The AML does not define what constitutes a "reasonable justification," but the Dominance Rules provide some general guidance.

The SAIC Final Rules, while useful, raise many interpretive questions. The Restrictive Agreements Rules do not adequately distinguish between conduct that should be *per se* prohibited and conduct that should be analyzed based on rule of reason. Moreover, while SAIC's leniency program is intended to increase enforcement activity, the program's effectiveness may be compromised by questions such as whether multiple entities may be considered together as a "first applicant" eligible for immunity and how much of a reduction the second and subsequent applicants may receive.

In addition, under its new rules, SAIC does not have to show that a restrictive agreement is in fact or likely to be anticompetitive; the undertakings concerned have the burden to show that their conduct is pro-competitive. Similarly, there are no specific requirements under the Dominance Rules that SAIC show that allegedly abusive conduct has an anticompetitive effect. The rules, instead, appear to place the burden on an undertaking to justify its allegedly abusive conduct. Compounding the problem, the categories of prohibited conduct are broadly defined.

Like the NDRC's rules, the SAIC Final Rules do not deal with questions of concurrent jurisdiction. In addition, the differences in the two agencies' rules regarding similar conduct will make companies' compliance efforts more difficult. As noted, however, Chinese agencies have indicated that they will be working closely with each other and they have experimented with a case coordination mechanism.

For additional details regarding the new SAIC rules and the cartel enforcement action, please refer to the firm's alert memo, available at http://www.cgsh.com/saics_first_cartel_case_and_final_rules_under_the_chinese_aml/.

# INDIA

**India launches merger control regime**

On March 4, 2011, India announced that the provisions of the Competition Act 2002 relating to merger control (Sections 5 and 6) will come into force on June 1, 2011. The announcement was preceded by the Indian Competition Commission's ("CCI") issuance, on March 2, 2011, of draft procedural regulations. As explained below, although the draft regulations make a number of important and welcome clarifications, many fundamental matters remain to be clarified.

The Act applies to both mergers, amalgamations, and acquisitions of control that are "*put in to effect*" after June 1, 2011. Neither the Competition Act nor the Draft Regulations provide guidance, however, as to whether "put in to effect" refers to signing or closing. Accordingly, there is uncertainty as to whether these provisions of the Competition Act 2002 apply only to concentrations that are agreed or announced after that date (or, in addition, apply to concentrations that have been announced, but have not yet closed).

Notification is mandatory for transactions meeting the relevant thresholds, and closing without clearance will be prohibited. The merger control rules of the Competition Act 2002 apply to the "*acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises*" but there is no clear guidance on the level of control required for qualification as a combination. Under the Act and draft regulations, transactions satisfying any one of the following thresholds must be notified in India:

The first two thresholds apply only to the undertakings directly involved in a reportable transaction:

- **Transactions Involving Companies That Derive Turnover in India Only**. Transactions must be notified if: (1) the value of the assets of the enterprises involved in the transaction exceeds Rs. 1,500 Crores (~$333 million; €232 million), or (2) the turnover of the enterprises involved in the transaction exceeds Rs. 4,500 Crores (~$ 999 million; €697 million).
- **Transactions Involving Companies That Derive Turnover in India and Elsewhere**. Transactions must be notified if: (1) the value of the assets of the enterprises involved in the transaction exceeds $750 million (~€524 million), including at least Rs. 750 Crores (~$166 million; €115 million) in India, or (2) the turnover of the enterprises involved in the transaction exceeds $2,250 million (~€1,583 million), including at least Rs. 2,250 Crores (~$499 million; €348 million) in India.

The third and fourth thresholds apply to the corporate groups to which the undertakings (or merged entity) directly involved in a reportable transaction belong:

- **Transactions Involving Corporate Groups That Derive Turnover in India Only**. Transactions must be notified if: (1) the value of the assets of the "group" to which the acquired enterprise will belong post-acquisition exceeds Rs. 6,000 Crores (~$1,332 million; €929 million), or (2) the turnover of the group to which the acquired enterprise will belong post-acquisition exceeds Rs.18,000 Crores (~$3,995 million; €2,789 million).
- **Transactions Involving Corporate Groups That Derive Turnover in India and Elsewhere**. Transactions must be notified if: (1) the value of the assets of the "group" to which the acquired enterprise will belong post-acquisition exceeds $3 billion (~€2,100 million), including at least Rs. 750 Crores (~$166 million; €116 million) in India, or (2) the turnover of the group to which the acquired enterprise will belong post-acquisition exceeds $9 billion (~€6.3 billion), including at least Rs. 2,250 Crores (~$499 million; €348 million) in India.

The thresholds provide for the following *de minimis* exception: a transaction need not be notified where the value of one party's assets does not exceed Rs. 250 Crores (~$55 million; €38.4 million) or where its turnover does not exceed Rs. 750 Crores (~$160 million; €111 million). The draft regulations do not say, however, whether this *de minimis* threshold applies only to Indian assets/turnover or also to non-Indian assets/turnover.

In addition, the draft regulations take an extremely broad view of what constitutes a combination and include several types of transactions that are not typically viewed as notifiable transactions in the vast majority of jurisdictions; for example (1) acquisitions of minority interests, (2) acquisitions of stock or raw materials, and (3) intra-group transactions.

The scope of the regime will therefore likely lead to a flood of notifications, some (perhaps the majority) of which will no impact on Indian trade. Pursuant to the draft regulations, each such notification will require a great deal of information, meaning that notifying parties will need to dedicate significant time and resources. This is true also for the "short form" notifications.

Transactions that are notifiable under the Competition Act 2002 cannot be closed under they have been approved. Although the statutory timetable is 210 days, the draft regulations provide that the CCI will adopt a *prima facie* view within 30 days (it is uncertain whether this refers to calendar or business days). The implication seems to be that a notified transaction may close (and the merger review will cease) if the CCI reaches a *prima facie* view that it will not have appreciable adverse effects in India. If a *prima facie* view has not been reached by Day 30, the CCI will revert to a full review, which, as explained above, has a review period of 210 days. However, it bears mention that for certain applications (*i.e.*, typically those without remedies or those with straightforward remedies), the CCI will endeavour to render its decision within 180 days.

In practice, the majority of unproblematic mergers should qualify for a *prima facie* decision on Day 30. However, even this deadline does not offer companies deal certainty on timetable, as the CCI "stops the clock" while requests are pending. This affords the CCI a great deal of scope to continually delay transactions until it has time and the resources to review.

The draft regulations introduce a sliding scale for filing fees depending on the value of the transaction. For acquisitions, these fees range from 10 lakhs rupees (~$22,000; €15,000) to 40 lakhs rupees (~$88,000; €60,000). Mergers and amalgamations attract a fee of 40 lakhs rupees (~$88,000; €66,000).

As may be seen from the above, a number of aspects of the Indian merger control regime require clarification, and, in its current form, the regime has extraordinary reach. In addition, notification in India seems likely to require a significant amount of time and resources and the scope for delay is significant. Revised (and likely final) guidelines are expected in May and they may address some of these concerns.

For additional details regarding India's merger control regime, please refer to the firm's alert memo, available at http://www.cgsh.com/the_adoption_of_merger_control_in_india/.

### CCI rules in several cases brought by private parties

The CCI issued a number of rulings in competition cases filed by private parties. In *Lodestar Slotted Angles Ltd. Vs Rockline Construction Company & Ors*., the CCI considered a fundamental issue, namely application of the Act to activity occurring before the Act entered into force. The complainant alleged that Rockline rigged bids at a property auction. CCI agreed that there was clear evidence of bid rigging. However, CCI found that the bid rigging occurred before the Act came into force on May 20, 2009, and that it was not a continuing offense. Therefore, the CCI held that the Act was not applicable to the conduct and closed the proceedings.

## JAPAN

### JFTC announces draft amendments to merger control guidelines

On March 4, 2011, the Japan Fair Trade Commission ("JFTC") announced draft amendments to certain parts of its merger control rules and requested public comments.

Japan's current merger control rules have been the subject of some criticism, with the pre-notification consultation procedure coming under particular scrutiny. It has been suggested that the current system has an adverse impact on the timing of acquisitions as the procedures are not transparent and, as a result, the process is often unnecessarily complex and time consuming. Under the reformed procedure, the JFTC will abolish its guidelines on prior consultation and reach decisions as part of the formal merger filing process.

The key amendments include: (1) a stated desire by the JFTC for improved communications with notifying companies; (2) shorter waiting periods for transactions that do not raise any substantive issues; (3) the clarification of reportability thresholds regarding share acquisitions; (4) clarification as to the fact that the notifying party is free to submit documents it wishes the JFTC to review during the review process; and (5) the provision of reasoned opinions by the JFTC for its requests of documents or other types of evidence from the parties.

The proposed amendments also offer further clarification regarding the JFTC's method for defining geographic markets, including the possibility that markets may be defined on a worldwide basis. JFTC also proposes to consider potential competition (from neighboring or foreign markets) in its appraisal of a reportable transaction.

This is a welcome development for merger control in Japan and will hopefully serve to increase transparency and accelerate the merger review process. The public consultation procedure ended on April 4, 2011, and the implementation of the revised system is expected in July 2011.

## SOUTH KOREA

### KFTC's report on 2010 M&A trends

On January 26, 2011, the Korean Fair Trade Commission ("KFTC") published a statistical report regarding 2010 M&A activity. The key findings were as follows:

- The number of reported M&A transactions increased by 21% over 2009 (413 → 419).
- The total value of reported transactions was KRW 215 trillion (~$186 billion; €140 billion), up 43% from 2009. In particular, the value of foreign-to-foreign transactions increased 51% over 2009 to KRW 184 trillion (~$159 billion; €120 billion).

- KFTC found that conglomerate transactions accounted for 49% (245 cases) of the total, followed by horizontal transactions at 34.5% (172 cases) and vertical transactions at 16.5% (82 cases).

### KFTC imposes fines on international color display tube cartel

On January 27, 2011, KFTC announced the imposition of fines of approximately KRW 26.3 billion (~$23.5 million; €16.8 million) on five color display tube (hereinafter "CDT") manufacturers. The KFTC found that the five CDT manufacturers (Samsung SDI Co. Ltd., LG Philips Display Korea Co., Ltd., Chunghwa Picture Tubes, Ltd., Chunghwa Picture Tubes (Malaysia) Sdn. Bhd., and CPTF Optronics Co., Ltd.) agreed to fix prices, control output of CDTs, and exchange confidential information. The parties implemented the agreement from November 1996 to March 2006. The KFTC granted exemption from fines to LG Philips Display Korea Co., Ltd. due to its inability to pay, as it closed in June 2009 after transferring its entire business, including the CDT sector, to another company.

The KFTC cooperated closely with the U.S. Department of Justice and the European Commission.

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