



The American Antitrust Institute

Asia—A Progress Report

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Traditionally, Asia has not been the focal point of antitrust enforcement. Recent years have seen an increased level of enforcement and some important changes to the jurisprudential landscape throughout Asia. Of the three countries invited to talk on this panel, China has probably the shortest history of antitrust enforcement. Shortly after its long-awaited entrance last August, the Anti-Monopoly Law of China has proved its immediate applicability by blocking a large proposed acquisition by Coca-Colaⁱ. The result, however, begs more questions than answers, inspiring scholarly discussions and predictions on the future implementation of the law. Korea and Japan, the other two countries on the panel, boast of their reasonably well developed antitrust jurisprudence and experiences of handling complex antitrust issues. KFTC, Korea's antitrust regulator, made headlines worldwide in 2005 by fining Microsoft for tying practicesⁱⁱ, and again in 2008 by imposing similarly hefty fines on Intelⁱⁱⁱ. The antitrust enforcement, especially against cartels, will be strengthened in Japan. The Japanese Diet has recently passed amendments on its Anti-Monopoly Act, imposing larger surcharges on cartels and increased prison sentences for individuals participating in cartels^{iv}. New developments are also seen in other Asian countries. For example, India passed its Competition Act in 2002 and its amendments in 2007. The competition dynamics in Asia are changing and moving closer to the prevailing western enforcement models.

China: New Kid in Town

Professor Wu prefaced his presentation by graciously admitting China's lack of experience in dealing with antitrust law enforcement. As a new kid in town, China has lessons to learn from its more seasoned neighbors, such as Korea and Japan, and from the better developed US and EU models.

Professor Wu summarized China's competition policy development in terms of three chronological phases^v. Before the adoption of the reform and opening-up policy in 1978, China practiced a planned economy, and market competition was something either unknown or abhorred^{vi}. Following the economic reform in 1978, the government gradually loosened control over industries that did not implicate national welfare and security; but it was not until the 14th National People's Congress in 1992 that a socialist market economy that allows competition in its ordinary sense was truly established^{vii}. Quasi-legislative efforts, however, were introduced as early as 1980, when the State Council issued the first administrative regulation concerning the protection of market competition in China^{viii}. A series of legislation were adopted in the next two decades, of which the Anti-Unfair Competition Law of 1993 was the initial attempt at antitrust enforcement on a comprehensive level^{ix}. Finally, after over ten years of drafting, The Anti-Monopoly Law of China (hereinafter

“AML”) was adopted in 2007 and became effective last August, ushering China into the modern worldwide arena of antitrust enforcement^x.

After introducing a brief history of China’s competition policy development, Professor Wu went on to address the controversial decision of Coca-Cola/Huiyuan merger case, the first antitrust case under the new law. On March 18, 2009, China’s Ministry of Commerce (hereinafter “MOFCOM”) announced its decision to block Coca-Cola’s proposed acquisition of Chinese Huiyuan Juice Group, Ltd., under Article 28 of AML^{xi}.

Renmin University Law School, one of China’s most prestigious legal education institutions, held a seminar shortly after the decision was announced, discussing the legal and economic implications underlying the Coca-Cola/Huiyuan merger case. Practitioners and academics at the seminar were of three different opinions. Some wholeheartedly endorsed MOFCOM’s decision and argued that the prohibition was based on the assessment of the deal’s impact on competition in the Chinese juice-beverage market, and that proper economic analytic tools were employed to that end so that the results were reliable and legally enforceable under AML. Some affirmed the results, but expressed doubts about its assessment process. MOFCOM’s decision only cites broad language regarding the proposed acquisition’s anticompetitive effects, but fails to articulate any substantive reasoning, in particular whether the nature of its concern was a standard horizontal merger analysis, as Coca-Cola has its own juice brand, Minute Maid, or a leverage-style analysis focusing on the potential ability of Coca-Cola to use its market power in carbonated soft drinks to increase its share and power in fruit juices^{xii}. Other experts either expressed skepticism over Coca-Cola’s ability to leverage market power from carbonated soft drinks into fruit juices, or expressed concerns over the protectionist undertone of the prohibition.

Professor Wu applauded this decision and accepted its apparent rationale. He rejected the view that the prohibition was motivated by nationalistic concerns. Admittedly, AML has a socialist heritage, and enforcers may take account of national economic security and protection of local brands, but in this case there is no evidence tending to show the link between the blockage and any ulterior motives. The stated purpose of AML is to protect competition and consumers^{xiii}. There are other laws in the field of national economic security, and the antitrust enforcement department of MOFCOM is seemingly not empowered to act in the name of security concerns.

Professor Wu next outlined the multi-regulator regime under AML. Of the three enforcing authorities, MOFCOM is responsible for merger regulations; the National Development and Reform Commission (hereinafter “NDRC”) deals with price-related issues, such as price cartels; and the State Administration for Industry and Commerce (hereinafter “SAIC”) handles non-price-related issues, such as abuse of dominance^{xiv}. An anti-monopoly commission (hereinafter “AMC”) was established under AML as a coordinating agency^{xv}. AMC is under the direct of the State Council, and has the power to coordinate the three enforcing authorities and provide generic guidelines^{xvi}.

While MOFCOM remains relatively independent from the other enforcing authorities, NDRC and SAIC may find themselves in entanglement when it comes to complex antitrust cases involving both price-related and non-price-related issues. SAIC released two sets of procedural provisions on June 5, 2009, and some commentators speculate that they might conflict with rules to be later published by NDRC^{xvii}. Professor Wu opined that the reading of NDRC draft rules and SAIC rules reflects concerted efforts to coordinate and implement the law in a consistent fashion. In fact, NDRC has invited experts from SAIC to provide advice on its draft rules in an attempt to avoid stark

inconsistency. Also, AMC possesses the ultimate power to resolve conflicts between any enforcing authorities. Chaired by Mr. Vice-Premier, Wang Qishan, AMC seems to be superior in this dual-enforcement system, and may push its power to the very limits in a bureaucratic society.

Korea: An Active Regulator

Korea has a relatively long history of antitrust enforcement. KFTC, Korea's antitrust regulator, was established in 1980, and has been active in recent years in cases involving Microsoft, Intel, and eBay. Mr. Kim gave the audience a flashback of these decisions, interspersed with his observations.

In 2005, KFTC ordered Microsoft to produce a version of its Windows operating system without bundling its media player and instant messenger for the Korean market and imposed a \$31 million fine^{xxiii}. Microsoft vowed to appeal to the Seoul High Court, but later withdrew its request. In 2009, KFTC's ruling was confirmed by a Korean court in a private enforcement case, though the accompanying damages claim was denied^{xix}. Initially, there were speculations over the political undertone of this ruling, which to a large extent motivated Microsoft's determination to appeal. As a former KFTC Commissioner, Mr. Kim affirmed that the decision had an unbiased legal basis. In rendering its ruling, KFTC obtained evidence and business data gathered from both domestic and foreign markets, and received assistance from US and EU competition authorities. The fact that, in 2006, the European Commission also ordered Microsoft to offer a Windows version without bundling its media player attests to the objectivity of KFTC's decision^{xx}.

The same can be said of the Intel case in 2008, where KFTC fined Intel \$25.4 million for offering rebates in exchange of promises not to purchase from its rival, AMD^{xxi}. This case involves principally foreign companies in Korea, so its disposition is less likely to be politically motivated. In 2009, European Commission fined Intel a record \$1.45 billion for the same anticompetitive conduct^{xxii}. In Mr. Kim's view, KFTC has spearheaded the effort to regulate dominant companies' behavior in the technology market.

Unlike the Microsoft and Intel cases where KFTC ruled against dominant foreign companies, KFTC approved eBay's acquisition of Gmarket in Korea in 2008^{xxiii}. As the leading online auction and shopping service in Korea, Gmarket had a domestic market share of over 85%. The acquisition would undoubtedly result in an even more powerful player in this field; KFTC nevertheless gave green light to the deal. Despite its impact on Korea's open market, KFTC based its approval on the rationale that there is no entry barrier to internet-based markets and new competition grows fast. This decision, again, affirms the fact that KFTC does not let nationalistic concerns color its judgment.

Another highlight of Korean antitrust development Mr. Kim went on to address is KFTC's latest effort to enhance fairness and transparency in antitrust investigations. Amendments to KFTC's operation procedure have recently passed, adopting the so-called "Miranda Rule" to companies under investigation^{xxiv}. Under this rule, KFTC must inform a subject company of its rights before the commencement of investigation^{xxv}. KFTC has also introduced other measures to enhance the subject company's defending rights, such as the right to resume a hearing or request additional hearings^{xxvi}. These changes can expedite the investigation process and facilitate cooperation between subject companies and the investigators.

Japan: Continued Development

On June 3, 2009, the amendments to Japanese Anti-Monopoly Act were passed, which seek to strengthen cartel enforcement in Japan. The amendments impose larger surcharges on cartels and increased prison sentences for individual cartel members^{xxvii}. Mr. Miyakawa gave the audience a fairly detailed account of this new development.

The increased prison sentences from three to five years are of significant deterrent effects to potential cartel members because the courts cannot apply probations, as was the case in the past, to prison sentences exceeding three years^{xxviii}. The amendments also increase the potential number of leniency recipients to five, encouraging cartel participants to desist from anticompetitive behavior and cooperate with antitrust investigators^{xxix}. The statute of limitations has accordingly increased from three to five years, as cartel investigations often takes years to complete, and a shorter statute of limitations would exonerate some cartels if they terminate the violation three years before the investigations could be completed^{xxx}. The amendments also subject additional types of unilateral conduct to fines, and prescribe new notification requirements for certain merger-review cases^{xxxi}. Last but not least, the amendments aim at increased international cooperation and facilitate private actions by codifying rules on review of JFTC (Japan's antitrust regulator) files and sharpening discovery tools^{xxxii}. These changes will take effect in 2010, granting JFTC greater power in investigating and prosecuting antitrust violations.

Mr. Miyakawa sang the praises of this jurisprudential development, especially the strengthened regulation of cartels. He commented that because cartels function to the detriment of consumers and competition, and are not subject to the rule of reason, stricter enforcement is of absolute necessity. The amendments offer a fine balance of carrot and stick. While the new leniency program reaches more individuals participating in the same cartel, reduces their fines, and grants them immunity from criminal sanctions, the increased prison sentences for those who are eventually convicted mean that probations over actual serving in jail will no longer be a luxurious alternative.

ⁱ See MOFCOM's *Decision Regarding the Anti-monopoly Investigation of Coca-Cola's Proposed Acquisition of Huiyuan*, Ministry of Commerce of People's Republic of China Newsletter (Mar. 18, 2009), <http://www.mofcom.gov.cn/aarticle/ae/ai/200903/20090306108388.html>.

ⁱⁱ See *The Findings of the Microsoft Case*, Korea Fair Trade Commission (Dec. 7, 2005), http://ftc.go.kr/data/hwp/micorsoft_case.pdf.

ⁱⁱⁱ See *Corrective Measures against Intel's Abuse of Market Dominance*, Korea Fair Trade Commission (June 4, 2008), http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=18.

^{iv} See *Summary of the Amendment to the Antimonopoly Act*, Japan Fair Trade Commission (June 2009), <http://www.jftc.go.jp/e-page/pressreleases/2009/June/090603-2.pdf>.

^v See Hanhong Wu, *The Competition Policy in China: Past, Present and Future* (forthcoming 2009) (on file with AAI).

^{vi} See *id.*

^{vii} See *id.*

^{viii} See *id.*

^{ix} See Anti-Unfair Competition Law of the People's Republic of China, 1993 Standing Comm. Nat'l People's Cong. Gaz. (P.R.C.), translations available at <http://www.lawinfochina.com/law/display.asp?id=648>.

^x See Anti-Monopoly Law of the People's Republic of China, 2007 Standing Comm. Nat'l People's Cong. Gaz. (P.R.C.), translations available at http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm.

^{xi} See MOFCOM's *Decision*, <http://www.mofcom.gov.cn/aarticle/ae/ai/200903/20090306108388.html>.

^{xii} See *id.*

^{xiii} See Anti-Monopoly Law art. 1.

^{xiv} See Anti-Monopoly Law art. 10.

^{xv} See Anti-Monopoly Law art. 9.

xvi *See id.*

xvii *See* State Administration for Industry and Commerce of the People's Republic of China Order No. 41 & 42 (P.R.C.), http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/200906/t20090605_61125.html & http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/200906/t20090605_61123.html.

xviii *See The Findings*, http://ftc.go.kr/data/hwp/micorsoft_case.pdf.

xix *See Microsoft Found Guilty in Antitrust Case*, The Korean Times, http://www.koreatimes.co.kr/www/news/biz/2009/06/123_46642.html (last visited July 9, 2009)

xx *See Microsoft v. Commission of the European Communities*, T-201/04 (2007), available at <http://ec.europa.eu/competition/antitrust/cases/decisions/37792/en.pdf>.

xxi *See Corrective Measures*, http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=18.

xxii *See* Press Release, European Commission (May 13, 2009), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/745&format=HTML&aged=0&language=EN&guiLanguage=en>.

xxiii *See* Korea Fair Trade Commission Newsletter (Nov. 24, 2008), http://eng.ftc.go.kr/files/bbs/2008/KFTC_Newsletter9.pdf

xxiv *See* Amendment of Regulation on Case Handling Procedure, Korea Fair Trade Commission Newsletter (July 4, 2008), http://eng.ftc.go.kr/files/bbs/2008/KFTC_Newsletter_8.pdf.

xxv *See id.*

xxvi *See id.*

xxvii *See Summary*, <http://www.jftc.go.jp/e-page/pressreleases/2009/June/090603-2.pdf>.

xxviii *See id.*

xxix *See id.*

xxx *See id.*

xxxi *See id.*

xxxii *See id.*