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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Emerging Antitrust Regimes In Asia

Law360, New York (December 01, 2008) -- This summer's implementation of China's Anti-Monopoly Law (AML) may well stimulate the emergence and modernization of other antitrust regimes in Asia.

Of course, antitrust is not new to Asia. Japan and Korea have long established and well developed antitrust rules. The antitrust authorities of Japan, Korea, India, Indonesia, Taiwan and Thailand are all members of the International Competition Network (ICN).

The antitrust laws of all of these countries, as well as (more recently) Singapore, prohibit cartels, and several of them, notably Japan, Korea, Singapore and (soon) India, have formal leniency policies to encourage cartel whistleblowing.

As in the EU, Asian antitrust laws are primarily enforced through government action. While private antitrust actions are possible in some of these jurisdictions, they do not have opt out class actions, broad discovery rules and treble damages like those that characterize the U.S. system and accentuate the enforcement role of private antitrust actions there.

Viewed from the perspective of multinational companies faced with the growing possibility of antitrust scrutiny in multiple jurisdictions, not only in Asia but elsewhere across the globe, government enforcement of Japanese and Korean antitrust laws probably seems largely straightforward and relatively non-controversial.

In contrast, the enforcement policies and priorities of other Asian competition authorities are less clear to the outside world. That is, of course, all the more true in China under the AML, given its entry into force only four months ago.

Theoretically modeled mainly on EU competition law (the European Commission and the Chinese government have what the EC describes as a “structured dialogue” for sharing experience and views on competition law enforcement), the AML is still a long way from full implementation.

Only the merger control provisions have so far been applied in practice, following the State Council's adoption this summer of a regulation setting out turnover filing thresholds. There are still many open issues as to how these filing thresholds will be applied in practice.

For instance, the Ministry of Commerce (MOFCOM), the governmental body charged with applying the AML's merger control provisions, is said to consider that the seller's turnover should be taken into account; in the EU and in most other jurisdictions the seller's turnover is not usually taken into account (unless the seller retains a jointly controlling interest in the target).

A number of merger control filings are believed to have been made under the AML, although MOFCOM is said to have rejected a number of them as being incomplete.

Recently, MOFCOM issued a public notice announcing its first merger control decision under the AML, clearing Inbev's acquisition of Anheuser-Busch subject to commitments not to increase stakes or hold shares in certain Chinese breweries. Less than one page in length, the notice does not shed light on how MOFCOM conducted its substantive review and the criteria it applied. Hopefully, a reasoned decision will be published soon.

The AML also establishes a national security review, but there are as yet no detailed rules on its application. If uncertainties remain regarding the practice in merger control and national security reviews, how the authorities will apply the AML's "antitrust" provisions is completely unknown at this stage.

The power to apply them is divided between two distinct governmental bodies: the National Reform and Development Commission (NDRC), charged with enforcement against anti-competitive pricing conduct, and the State Administration of Industry and Commerce (SAIC), which will target non-price anti-competitive behavior. It remains to be seen how this distinction will work in practice and what these two agencies' enforcement policies and priorities will be.

Antitrust regimes in other parts of Asia have been around longer but are undergoing new development. In recent years Taiwan's Fair Trade Commission (TFTC) has been thoroughly re-examining what is said to be the first major amendment of its Fair Trade Act in over 15 years.

The proposed changes include a revision of filing thresholds under the mandatory merger control regime, an expansion of the TFTC's powers to investigate anti-competitive practices and the introduction of a cartel leniency program.

The TFTC has also actively issued and reviewed guidelines on a number of specific topics to clarify its current enforcement policies. To date, only four mergers have been blocked in Taiwan, three of which involved the cable television industry.

In May, the TFTC banned a merger between the two largest Taiwanese karaoke companies (Holiday Entertainment and Cashbox Partyworld) for the second time and seems to have provoked a fair amount of controversy with what some perceived to be a relatively narrow market definition.

Indonesia has had an antimonopoly law since 1999. Indonesia's merger control regime currently involves voluntary filings, but draft guidelines are understood to provide for mandatory notifications where certain turnover thresholds are exceeded.

On the antitrust side, Indonesia's Commission for the Supervision of Business Competition (KPPU) has focused primarily on bid-rigging in State procurement matters. Alleged price-fixing in other contexts has also been an enforcement target however.

Late last year Temasek, an investment company owned by the Singapore Government, was found to have violated the anti-monopoly law because its Indonesian subsidiaries held minority shareholdings in two of Indonesia's largest mobile telecommunications operators thereby creating alleged opportunities for pricing collusion.

The KPPU ordered the Temasek subsidiaries to divest the stake in one of the mobile operators, or reduce the stakes in both of them by half. After the KPPU's order was upheld earlier this year by a district court, Temasek's subsidiary ST Telemedia was reported to have sold its 42 percent stake in mobile operator Indosat.

The case raised concerns among foreign investors, as the Indonesian government had approved ST Telemedia's acquisition of that stake some four years earlier.

Alleged abuse of something akin to market dominance has also been an enforcement objective of the KPPU in several cases. For example, earlier this year the KPPU found that Carrefour had applied unfair terms and conditions in its allegedly dominant relationship with small and medium-sized Indonesian suppliers.

For its part Thailand has also had an antitrust law in place since 1999, but the Thai competition authority has taken some time to adopt implementing rules.

In early 2007, it issued guidelines defining the concept of dominance by reference to market share and turnover criteria. Thailand's antitrust law prohibits mergers and acquisitions leading to monopoly, but these provisions still await implementation. After undergoing public hearings, proposed implementing legislation is expected to be adopted in the course of 2009.

In 2006, the Singapore Competition Act introduced a comprehensive system of competition law in Singapore, regulating activities in sectors where no specific competition regulation had previously been implemented.

The Competition Commission of Singapore (CCS) subsequently published a number of guidelines, clarifying how it would apply substantive provisions such as market definition, leniency and filings for notification or guidance.

At the moment Singapore's merger review regime, which came into force in July 2007, is limited to voluntary notifications to the CCS. In fall 2007, the CCS approved the first transaction notified to it under the new merger control regime, i.e. Intel's joint venture with STMicroelectronics.

In the beginning of this year, the CCS took its first cartel decision, fining pest control companies for bid-rigging, thus sending the message that it would become active on the antitrust front.

Enforcement actions against cartels are expected to become a regular practice in Singapore. The CCS announced recently that it would review its leniency program, introducing a marker system for applicants and a system to encourage them to report involvement in other cartels.

As in China, India's economy is undergoing rapid development, and competition law is also coming to the forefront there. India's Competition Act of 2002 was amended in 2007, and enforcement is currently expected to begin next spring with the appointment of new Competition Commission members and staff. A number of the new act's provisions raise potential concerns for multinational companies.

In particular, the unusually long "suspensive" merger review period of 210 days and the absence of local nexus criteria could well lead to burdensome merger control notifications and unnecessary delays for foreign transactions with no actual effect on India's market.

The Competition Commission is attempting to address these and other concerns in implementing regulations, which have not yet been adopted. Like China's, India's new competition regime leaves plenty of room for uncertainties, and it remains to be seen how it will be applied in practice.

Vietnam has had a comprehensive competition law in force since 2005 but is understood to be still in the process of implementing it. The government of the Special Administrative Region of Hong Kong has a competition law under consideration, although few if any details are known at this point. Bangladesh, Nepal and Malaysia are also understood to be reviewing the possible adoption of competition laws.

In the Philippines, existing antitrust legislation is rather fragmentary, with no single law devoted specifically to competition. The Department of Trade and Industry is a member of the ICN, but its responsibilities focus more on issues such as trade defense than on antitrust, and the Philippines does not appear to have any other central agency overseeing the implementation of competition law.

All of that could change in the foreseeable future. The Philippines government has made commitments in the Asia Pacific Economic Cooperation (APEC) forum to review existing laws and enact a specific competition law, but no specific deadline appears to have been set.

Finally, one should not overlook Oceania, where Australia and New Zealand have long established antitrust and merger control regimes, and Papua New Guinea also has a competition law.

The proliferation of antitrust laws across the world, while aiming to ensure that consumers and businesses benefit from undistorted competition, also create significant costs and challenges for multinational companies engaged in global business.

Their mergers and acquisitions are subjected to possible pre-merger filing requirements in multiple jurisdictions. Moreover, the importance of investing in global compliance efforts grows daily with the mounting risks of high fines and other sanctions for anti-competitive conduct.

To date, these risks have been relatively muted in Asia outside a few countries like Japan and Korea. China's implementation of the AML, however, seems likely to encourage other Asian countries, including the ones noted above, to move forward with the adoption, implementation or modernization of their antitrust laws.

Multinational companies doing business in Asia would be well advised to stay tuned and pay close attention to unfolding developments.

--By William O. Fifield, Yang Chen and Yang Ing Loong, Sidley Austin LLP

William Fifield is a partner with Sidley Austin in the firm's Hong Kong office. Yang Chen is a partner with the firm in the Beijing office. Yang Ing Loong is a partner in the firm's Singapore office.