Competition Law Association
British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

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SUMMARY NOTE

Competition Law Association
Evening Meeting at Freshfields Bruckhaus Deringer LLP on 24 October 2011 at 6.00 pm

International Cooperation in Competition Law- What assistance can (and should) established competition authorities provide newer authorities (with particular reference to China or India)?

Speakers: Ed Smith, a Director of International at the Office of Fair Trading; Alex Potter, a Partner at Freshfields Bruckhaus Deringer LLP; Karen Ip, a Partner at Herbert Smith LLP, based in its Beijing office; and Shweta Schroff Chopra, Principal Associate at Amarchand Mangaldas in New Delhi.

Chairman: James Flynn QC

Ed Smith "International Assistance in Competition Law"

The first speaker was Ed Smith who discussed why it was necessary for national competition bodies to cooperate with each other and what the Office of Fair Trading does to engage with other competition authorities and in particular with the Chinese and Indian competition authorities.

He explained the rapid spread of antitrust laws over the late 20th and 21st centuries. In the 1980s, the main countries with established antitrust authorities were the United States of America, countries in Western Europe and India to some extent. Today, the ICN has 140 members. He explained that this growth was not just a question of numbers, but also a question of depth as economic and competition policy is becoming more central to national government agendas so they are beginning to focus more attention and resources on competition law.

He posed the question about how to manage this significant growth in national antitrust laws. He explained that global governance of these national authorities is disparate. There have been historical attempts at overarching competition laws such as the Havana Principles in 1951 but these attempts have never really worked. Therefore, international cooperation in competition law involves a patchwork of multilateral, regional and bilateral organisations and relationships.

The main aims of international cooperation in competition law can be seen to be coherence, consistency, convergence, development and coordination. Ed Smith explained that the main tools used by the Office of Fair Trading to promote these aims are softer tools such as thought leadership and sharing best practices through round table discussions and training. Promoting the use of advocacy by national competition authorities so that they talk to their own governments about the importance of competition law is also important as there is a need to address national government restrictive practices as well as private company restrictive practices. The Office of Fair Trading does a lot of its advocacy work through the ICN.

Ed Smith explained that cooperation by various competition authorities is increasingly done on a bilateral level. In particular, he mentioned that China is less inclined to engage in multilateral processes and is not a member of the OECD or ICN. China is more inclined to build bilateral relationships and is developing its relationships with the European Union and the BRICs for example.

The Office of Fair Trading is sponsoring a China Anti-Monopoly Forum and is running a training project with the central theme of transparency. The Office of Fair Trading is also doing case study training with MOFCOM so the relationship between the Office of Fair Trading and the Chinese competition authorities is developing. The relationship between the Office of Fair Trading and the Indian competition authorities is more nascent but Ed Smith explained that the Office of Fair Trading is hoping to offer secondments and training in the near future.

A final key point was that established competition authorities such as the Office of Fair Trading had to avoid preaching to newer competition authorities and that these newer authorities will be keen to point out the flaws in the established regimes. Both parties can learn from each other and a two way dialogue is vital.

Alex Potter "Merger Control in China"

Alex Potter explained the legislative framework for antitrust laws in China with a focus on merger control. The key law is the Anti-Monopoly Law, Chapter IV which deals with merger control. This law came into force on 1 August 2008, but it did not contain any provisions on relevant turnover thresholds, so provisions relating to turnover thresholds were prepared in a second legislative act that only came into force on 3 August 2008. The Ministry of Commerce or MOFCOM deals with the review of mergers in China.

Alex Potter also noted the importance of the Provisions of the Ministry of Commerce on the Implementation of the Mechanism for the National Security Review of Mergers and Acquisitions of Domestic Enterprises by Foreign Investors which came into force in 2011. These provisions highlight the importance of national economic security for China and lay down a procedure for the purchase of domestic companies to be reviewed. The scope of the industries that qualify for review under these new provisions has not been fully defined. However, it is clear from past and ongoing practice under the Anti-Monopoly Law merger control rules that the Chinese authorities interpret national security broadly, going beyond the defence industry and incorporating national economic security, including protection of famous and important Chinese brands. There is therefore significant scope for industrial and political concerns to play a formal role in merger control in China.

In relation to the enforcement of merger decisions, there are only draft provisions on merger remedies at the moment. So far, there have only been seven decisions by MOFCOM where remedies have been required from the parties before the merger was cleared. In a substantial number of the decisions, the required remedies were behavioural in nature, rather than the structural remedies preferred in other parts of the world.

Also, it is important to note that MOFCOM has a residual discretion under the Anti-Monopoly Law to review mergers that do not meet the turnover thresholds for a merger filing, but are nevertheless suspected of giving rise to concerns.

Finally, Alex Potter explained that Chinese competition authorities are interested in learning from other competition authorities' experiences and the number of bilateral agreements between China and other countries is proliferating. However, they are looking for a Chinese solution to competition problems and will challenge established authorities' ways of doing things.

Karen Ip "Behavioural Competition Law in China"

Karen Ip looked at the anti-competitive behaviour aspects of antitrust law in China and explained that this was much less developed than merger control law.

Apart from MOFCOM, there are two other enforcement agencies in China, the NDRC and the SAIC. The NDRC deals with price-related enforcement issues and the SAIC deals with non-price related enforcement issues. The relevant regulations in relation to these agencies only came into force in February 2011 and there is a lack of clarity about how to interpret many of the provisions in these regulations. Foreign investors are therefore concerned by the infancy of the regime and the lack of precedents and guidance. Karen Ip provided the example of the difficulty of interpreting the meaning of exchange of information under the regulations as no definition has been provided. This lack of clarity means it is difficult for both foreign companies and Chinese companies to predict the outcome of investigations by these agencies. Furthermore, the NDRC and the SAIC are not willing to provide general guidance. These agencies will simply request that you provide them with all relevant information and then the matter can be discussed.

Karen Ip explained that it is not clear how the NDRC and SAIC interact and it is not always easy to distinguish between price related and non-price related matters, so companies may end up with a choice about which agency they choose to go to. This choice may be significant as the rules of these two agencies are inconsistent. If it is a question for a company making a leniency application or if your client is the second or third applicant for leniency, it is preferable to go to the NDRC as the rules provide a greater deal of certainty about the leniency procedure and any relevant fines. In comparison, the SAIC rules do not provide a clear position on these issues.

Shweta Schroff Chopra "Introduction to Competition Law in India"

The Competition Act in India only came into force in 2009 and has come into force in a piecemeal manner. One of the first cases under the new Competition Act involved Hindi movies and was a dispute between film producers and multiplex cinemas over profit-sharing. The filing of this case with the competition authorities (the CCI) brought the parties to the negotiating table; however, once the case had been filed it could not be withdrawn under Indian competition law even though the parties no longer wished to pursue the case.

In relation to anti-competitive agreements, the test in India is whether an agreement is "likely to cause an appreciable adverse effect on competition in India." If it does, the agreement will be void. Shweta Schroff Chopra explained that it is not clear what this test means in practice and the CCI and lawyers are still figuring it out. She also explained that fines in relation to anti-competitive agreements have been relatively low.

In comparison, fines in abuse of dominance cases have been quite significant. For example, DLF, a large real estate company, was recently fined 7% of its worldwide turnover, which amounted to approximately $126 million, in relation to its use of unfair contract terms prejudicing the position of existing buyers of land in a suburb of Delhi. This was a significant decision that has provoked a lot of discussion and commentary about the real estate market in India. This decision has now been appealed to the Competition Appellate Tribunal.

In relation to merger control, new regulations have been in force since 1 June 2011. Initially, it had been envisaged that notification of mergers would be voluntary, but it was decided that the merger control regime should be mandatory and suspensory. The CCI has reviewed five or six merger cases so far and has published four decisions. All of these four cases were cleared unconditionally and the CCI has managed to clear these four cases within thirty days. This is encouraging as the merger control regime in India allows the CCI up to 210 days to review mergers. Shweta Schroff Chopra said she expects that the CCI will start to take longer to review mergers as the workload increases. The review period is also likely to increase as there is a lack of trained personnel in the CCI and there are currently only eleven officers in the merger control department.