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2014 China Anti-Monopoly Annual Report

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I. Merger Control

Legislation

- There is no new legislation with respect to the field of merger control in China during the year 2013, however at the beginning of 2014, the MOFCOM published the “Interim Provisions on Standards Applicable to Simple Cases Regarding Concentration of Business Operators” on February 11, 2014.

- To further clarify the notification of simple cases, the MOFCOM shortly afterwards unveiled the “Guidelines for Declaring A Simple Case Regarding the Concentration of Business Operators (for Trial Implementation)” on April 18, 2014.

- The MOFCOM released the amended “Guiding Opinions on Notification of Concentration of Undertakings” on June 6, 2014. Compared with the previous version, the amendment expands the content to areas such as definition of control, calculation of turnover, status of joint venture in identifying concentration and pre-notification consultation, etc.

- On December 4, 2014, the MOFCOM promulgated the “Provisions of the Ministry of Commerce on Imposing Additional Restrictive Conditions on the Concentration of Business Operators (for Trial Implementation)”. The new rule was aimed to replace the old “Interim Provisions of the Ministry of Commerce on Implementing Assets or Business Divestiture Related to Concentration of Business Operators”. The new rule further clarifies the requirements of the remedy scheme, the scope of the divestiture, the requirements of the purchaser of the to be divested business, divestiture procedures, the obligations and responsibilities of the relevant parties, the change and termination of the imposed conditions, and the legal liabilities of the parties.

MOFCOM’s Simple Case Review

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2. The original Chinese rule published by MOFCOM is available http://www.mofcom.gov.cn/article/b/c/201412/20141200835207.shtml
On May 22, 2014, the MOFCOM published the first notice of concentration under simple merger case review "Rolls-Royce Holding/ Rolls-Royce Power Systems" on the website for public comment⁴, the MOFCOM took only nine days to review before it was cleared on 9 June, 2014.

On January 12, 2015, the MOFCOM listed 75 deals cleared unconditionally in Q4 2014⁵, 48 of which were the results of the simple case review.

Shang Ming, Director General of the Anti-Monopoly Bureau of the MOFCOM said the simplified merger review procedure had averagely shortened its review length by 30 days compared with that of the previous year.

The timeline for simple cases review is significantly shorter compared to that for cases under standard review, in particular when (i) the concentrated undertakings are establishing a joint venture outside China and the joint venture has no business in China; (ii) or when a party of the concentrated undertakings acquires equity shares of a foreign enterprise and the foreign enterprise has no business in China.

Enforcement Tendency Highlight

MOFCOM decided to disclose its administrative penalty decision on the unnotified concentrations, which officially started to be investigated after 1 May 2014, on the MOFCOM website. More importantly, the MOFCOM published a hot-line to facilitate public complaints.

On May 22, 2014, the MOFCOM published the first simple merger case "Rolls Royce Holding/Rolls Royce Power Systems" on its website for public comment.

MOFCOM attached increased importance to the role of economic analysis in its merger review procedure in 2013. With respect to some cases, the MOFCOM hired the economists itself to perform analysis for the concentration filings.

The timeline of MOFCOM’s review on concentration cases in 2014 is shorter compared to that of 2013.

Significant Cases

Glencore’s Acquisition of Xstrata⁶

- It is the largest merger in mining industry
- It took more than one year to obtain the final decision from the MOFCOM

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³The original Chinese notice published by MOFCOM is available at http://fldj.mofcom.gov.cn/article/jyzjyjyjgs/201405/20140500597172.shtml
⁴The complete list is available in Chinese at http://fldj.mofcom.gov.cn/article/zcfb/201501/20150100863949.shtml
⁵The original Chinese notice published by MOFCOM is available at http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400091222.shtml
after the filing was officially accepted. The parties withdrew the filing near the end of phase III and refiled with the MOFCOM shortly after

- MOFCOM imposed both structural and behavioral remedies on this deal

Facts

On April 16, 2013, the MOFCOM posted the first clearance with remedies of the year 2013, finally giving the green light to the Glencore/Xstrata deal. According to the notice, Glencore and Xstrata have horizontal overlaps and vertical relations in several relevant markets. MOFCOM’s competitive concerns mainly rested on three relevant markets, including the copper concentrate, zinc concentrate and lead concentrate markets.

In the copper concentrate market, the MOFCOM was concerned that the concentration may strengthen Glencore’s market power, hence enable Glencore to conduct anticompetitive behaviors which may harm consumer interests. As for the zinc concentrate and lead concentrate markets, the MOFCOM held that the concentration would not only increase Glencore’s market power in the zinc concentrate or lead concentrate markets, but would also strengthen Glencore’s integration of the zinc and lead supply chain.

Remedies

With several rounds of negotiation, the final consensus reached by two sides is a clearance with the remedies summarized as following:

- Glencore shall divest all the interest in the Las Bambas copper mine project in Peru before the date specified by MOFCOM, otherwise, one of alternative copper mines, including the Tampakan, Frieda River, El Pachón and Alumbrera mines will be designated by the MOFCOM to be auctioned without reserve.

- Glencore shall supply Chinese customers with a long-term contract offer of no less than the minimum quantity of the copper concentrate from the years 2013 to 2020. In 2013, the minimum quantity was 900,000 metric tonnes of copper concentrate.

- Glencore shall continue to provide Chinese customers with an offer which provides long-term contracts and spot contracts of zinc concentrate and lead concentrate at fair and reasonable rates, and also keep the offer in line with prevailing international market terms by taking into account the product quality, the number of cross-deliveries, payment terms, buyer credit and other relevant factors.
Marubeni’s Acquisition of Gavilon

- The parties withdrew the filing near the end of phase III and refiled with MOFCOM shortly after
- MOFCOM imposed both structural and behavioral remedies on this deal

Facts

For the second conditional clearance of the year 2013, the MOFCOM announced its conditional approval of Marubeni Corporation (“Marubeni”)’s acquisition of Gavilon Holdings (“Gavilon”) on April 22, 2013. According to MOFCOM, the proposed concentration was likely to eliminate and restrict competition in the Chinese soybean import market.

By considering multiple factors, such as the existing comprehensive advantage of Marubeni in China’s soybean import market (e.g. well-established distribution network and client resources), the influence of Gavilon in the North American soybean market and the chance that Marubeni is able to further expand its supply of soybeans based on Gavilon’s capacities in North America, the MOFCOM believed that the deal would strengthen Marubeni’s market power in the Chinese soybean import market.

MOFCOM also stressed that the concentration would make market entrance more difficult, given that access to sourcing channels, marketing networks, and economy of scale are necessary conditions to compete effectively in the market. Additionally, the MOFCOM also noted that the deal might further weaken the bargaining power of Chinese soybean crushers who have low concentration and are small scale.

Remedies

After rounds of negotiations between the notifying parties and the MOFCOM, the agency eventually confirmed that the remedy proposals submitted by Marubeni on April 17, 2013 could address MOFCOM’s competitive concerns. Final conditions imposed by MOFCOM are as below:

- Within 6 months of the merger clearance date, Marubeni shall set up two separate and independent legal entities and operations teams that are charged with the exporting and selling of soybeans to China. The “separation” and “independence” refer but are not limited to personnel decisions, procurement, marketing, sales and pricing.

- Marubeni’s subsidiaries shall not purchase soybeans from Gavilon’s U.S. assets unless such a transaction is on fair terms.

Marubeni’s and Gavilon’s soybean subsidiaries shall not exchange information related to the competition in nature.

Marubeni shall appoint an independent trustee to oversee the fulfillment of the above-mentioned duties.

Baxter’s Acquisition of Gambro

- MOFCOM imposed both structural and behavioral remedies on this deal.
- The structural remedy imposed by MOFCOM is identical with that under EU’s conditional clearance, while the behavioral remedy is an addition.
- MOFCOM employed the approach of the “HHI Index” in its competitive assessment.
- Although the relevant geographic market is defined as worldwide, MOFCOM also carefully examined the effects that this deal may have on the Chinese market.

Facts

On August 8, 2013, the MOFCOM published the third conditional clearance decision of the year 2013, which is on the proposed acquisition of Swedish dialysis equipment manufacturer Gambro AB (“Gambro”) by its U.S. rival healthcare company Baxter (“Baxter”). It is also the 19th conditional approval since the implementation of the AML in August 2008.

In the MOFCOM decision, the markets for continuous renal placement therapy (CRRT) products and haemodialysis (HD) products are defined as relevant product markets, and the geographic market is defined as the global market. Meanwhile, the impact on the Chinese market was also carefully examined by MOFCOM.

After thorough assessment, the MOFCOM probed potential anti-competitive effects that this deal may produce. First, high concentration (high HHI ex ante/ex post the concentration) created by this deal implicated potential damages to the competition landscape of the relevant market. Second, by reviewing the parties’ market shares, the MOFCOM concluded that Baxter would gain a dominant market position for CRRT products after the merger since the transaction would eliminate a main competitor of Baxter. Third, the MOFCOM maintained that the continued existence of OEM agreements would facilitate potential coordination between Baxter and Niplo. Fourth, the transaction poses great difficulties for the new entry of enterprises into relevant markets.

7The original Chinese notice published by MOFCOM is available at http://fldj.mofcom.gov.cn/article/ztxx/201308/20130800244176.shtml
Remedies

After several rounds of consultations, the MOFCOM accepted the notifying parties’ remedy proposal and decided to approve the transaction on the following conditions:

- Baxter shall divest its worldwide CRRT business, including the tangible and intangible assets necessary to ensure the survival and the ability to compete of the divested business.
- Baxter shall terminate the agreement of OEM production with Niproas long as it is relevant to the Chinese market.

MediaTek’s Acquisition of MStar

- The parties withdrew the filing near the end of phase III and refiled with MOFCOM shortly.
- The parties were required to submit a detailed operation plan within three months after a clear decision is made and the transaction can only be closed after the detailed operation plan is approved by MOFCOM.
- Based on MOFCOM’s rules, the parties provided a detailed operation plan within three months and the plan was eventually approved by MOFCOM.

Facts

On August 27, 2013, the MOFCOM announced the fourth conditional clearance of the year 2013, which is on MediaTek Inc’s (“MediaTek”) acquisition of MStar Semiconductor Inc (“MStar”). In this case, the MOFCOM defined the market for LCD TV control chips as the relevant product market. The MOFCOM considered the LCD TV control chip market as having global characteristics while also recognizing the uniqueness of the Chinese market. Therefore, the Chinese market is the emphasis of MOFCOM’s analysis and assessment in this case.

After careful assessment, the MOFCOM had competitive concerns in the following four aspects. First, the transaction would materially change the market structure by lifting the HHI of the Chinese LCD TV control chips market from 4533 to 6500, with an increment of 1962. Second, the notifying parties were the top two competitors in the relevant market and they constrained each other in terms of price, service quality and innovation ex ante the transaction. After the concentration, these constraints will not exist anymore. Third, the notifying parties would have a total market share as high as 61% and 80% in the global and Chinese markets respectively.

The original Chinese notice published by MOFCOM is available at http://fldj.mofcom.gov.cn/article/ztxx/201308/20130800269821.shtml
hence other competitors can’t effectively compete with MediaTekex post after the transaction. Fourth, the entry barrier would be raised to a further degree.

While pointing out the factors that might lead to the post-merger anti-competitive effects, the MOFCOM also recognized that the characteristics of the LCD TV control chip sector and the fluctuation of the supply and demand thereof will, to some degree, alleviate the negative impact of the proposed transaction.

Firstly, the market structure of the LCD TV control chip sector is not stable. LCD TV control chips usually have brief life cycle and the product lines between TV chips, handset chips and computer chips are getting blurring. The chip designing firms with comprehensive R&D capacities are able to compete in the relevant market in the foreseeable future.

Secondly, the proposed transaction is likely to make other chip makers to have the opportunity to compete in the market. A regular practice of the six biggest Mainland China TV set makers is that they purchase chips from two or more suppliers. To maintain the rule of thumb, after the clearance of the deal, the TV makers might look to other chip producers for supply, which can be expected to bring more opportunities to the small competitors of the filing parties.

Despite the promising pre-competitive effects that the transaction may lead to, the MOFCOM still concluded that the concentration would have the overall effect of restricting or eliminating competition on the relevant markets in the short term.

**Remedies**

The following conditions were imposed on this deal by MOFCOM:

- MStar’s Taiwan subsidiary (“MStar Taiwan”) should take over MStar’s LCD TV control chips business, and MStar Taiwan should continue staying in the market as an independent entity.
- MediaTek’s shareholder rights should be limited to dividends, financial report consolidation and the conditional appointment of board members. The exercise of other rights is subject to prior approval by MOFCOM.
- MediaTek and MStar Taiwan should not conduct business cooperation without the prior approval of MOFCOM, and should set forth measures to avoid information exchange on both employee and management level. MediaTek and MStar Taiwan should maintain their pre-transaction practices on supply, after-sale services and open code, etc. as before.
- MediaTek and MStar Taiwan shall not acquire any competitor in the LCD TV control chip market in the absence of MOFCOM’s prior approval.
The initial period of the remedies is three years. Within this period, MediaTek and MStar Taiwan shall submit a written report to MOFCOM on the fulfillment of the above-mentioned obligations every three months. After the three-year period, MediaTek and MStar Taiwan may apply for the removal of the hold-separate obligations.

**Themo Fisher’s Acquisition of Life Technologies**

- MOFCOM engaged third party economic consultants to assist with its economic analysis.
- MOFCOM employed the approaches of “HHI Index” and “indicative price increase tests” in its economic analysis.
- MOFCOM imposed both structural and behavioral remedies on this deal

**Facts**

On January 14, 2014, the MOFCOM conditionally approved Thermo Fisher Scientific Inc.’s (“Thermo Fisher”) acquisition of Life Technologies Corporation (“Life Technologies”), after reaching the conclusion that the proposed deal may have the effect of eliminating and restricting competition in markets for cell culture products, SSP kits, SDS-PAGE protein standards and siRNA reagents.

In market definition, the MOFCOM identified 59 relevant product markets based on demand and supply substitutability analysis. With regard to the relevant geographic market, MOFCOM believed that for two of the product markets, Australian/New Zealand HyClone and siRNA reagent, the markets are global and for the other 57 product markets, the relevant geographic market was China market.

MOFCOM conducted spot visits and engaged a third party economic consultancy to assist with its economic analysis, on top of consultations with relevant governmental agencies, industry associations and relevant third parties as before. Through comprehensive analysis, the MOFCOM focused on market concentration levels and post-merger estimates of potential price increases, and identified competition concerns in four markets: the markets for cell culture products, SSP kits, SDS-PAGE protein standards, and siRNA reagents.

**Remedies**

MOFCOM cleared the concentration subject to the following conditions:

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9The original Chinese notice published by MOFCOM is available at http://fldj.mofcom.gov.cn/article/ztxx/201401/20140100461603.shtml
Thermo Fisher shall divest its global cell culture business, including tangible and intangible assets required to maintain the viability, marketability and competitiveness of the business.

Thermo Fisher shall sell its 51% interest in Lanzhou Minhai Bioengineering Co., Ltd. in China.

Thermo Fisher shall divest its global gene modulation business, including tangible and intangible assets required to maintain the viability, marketability and competitiveness of the business.

Thermo Fisher shall reduce the catalogue prices for SSP kits and SDS-PAGE protein standards by 1% every year for the next 10 years, and shall not reduce the discounts offered to Chinese distributors.

Thermo Fisher shall supply SSP kits and SDS-PAGE protein standards to third parties on an OEM basis or based on a perpetual and non-exclusive license for the next 10 years.

**Microsoft’s Acquisition of Nokia**

- The U.S. Department of Justice (“DOJ”) and European Commission (“the Commission”) cleared this deal without any conditions.
- MOFCOM speculated on the likely post-merger licensing conduct of the merging parties, the DOJ and the EU Commission did not.
- FRAND obligations were imposed by the MOFCOM as conditions.

**Facts**

On April 8, 2014, the MOFCOM approved Microsoft Corporation’s (“Microsoft”) acquisition of the bulk of device and service business of the Nokia Corporation of Finland (“Nokia”) which was subject to conditions that involved an intellectual property issue.

Based on thorough analysis, the MOFCOM found that Microsoft’s acquisition of Nokia’s device and service business had the effect of eliminating or restricting competition in China’s smartphone market.

Whereas neither the DOJ nor the EU Commission had predictions about the likely post-merger licensing conduct of the merging parties, the MOFCOM suspected that Microsoft could exclude and impede competition. According to the MOFCOM, for

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one thing, Microsoft “could” exclude and impede competition in China’s smartphone market based on its patents for Android: “Microsoft has the motive to raise royalty fees”; for another, Nokia “could abuse its reserve of patent licenses” (“the acquisition enhances Nokia’s motive to rely on profits from patent licensing”).

Remedies

After rounds of negotiations, the MOFCOM cleared this deal with remedies. Please refer to the full text of remedies in the following link:


Merck’s Acquisition of AZ Electronics

- MOFCOM’s review process took only around two months from the time that the case was officially accepted.
- MOFCOM itself engaged an independent third party consulting firm to provide economic analysis.
- Neither horizontal overlap nor vertical overlap existed in this deal.

Facts

Following the antitrust authorities in Germany, Japan, Taiwan area and the United States, the MOFCOM conditionally cleared Merck KGaA’s (“Merck”) acquisition of AZ Electronic Materials S.A. (“AZ Electronics”) on April 30, 2014. According to the notice, the relevant product markets for this concentration were defined as two markets, i.e. the crystal liquid market and the photoresist market, and the relevant geographic market is the global market.

The MOFCOM undertook a thorough assessment of various factors including market share, market power and market entry. The authority also consulted the economic analysis provided by an independent consulting firm and the industry surveys. Drawing upon the foregoing information, the MOFCOM reached the conclusion that Merck’s acquisition of AZ Electronics is likely to enable Merck to tie the sales of crystal liquid and photoresist together, or to conduct cross-subsidy between the two products, to the detriment of market competition.

Remedies

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11The original Chinese notice published by MOFCOM is available at http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400569060.shtml
After rounds of negotiations, Merck’s commitment offered on April 25, 2014 was considered sufficient to remove MOFCOM’s competition concerns. MOFCOM cleared the deal by imposing several conditions as below:

- Merck shall not conduct tying sales of any form to either directly or indirectly force Chinese clients to purchase Merck’s crystal liquid and AZ Electronics’ photoresist at the same time, this includes not conducting cross-subsidy of any form between Merck’s crystal liquid and AZ Electronics’ photoresists;

- Merck’s licensing of crystal liquid patents shall be based on non-exclusive and non-sublicense principles. The licensing terms should also comply with commercially reasonable and non-discriminatory principles;

- Merck shall report the fulfillment of the above-mentioned obligations to MOFCOM every half-year. Anytime Merck plans to conclude any licensing agreement related to crystal liquid patents in China, it shall notify MOFCOM in advance;

- The period for the said obligations is three years, from the announcement date of the decision until April 30, 2017.

P3 Network shipping alliance

- MOFCOM’s second disapproves of a concentration since the implementation of the AML.
- P3 Alliance has been unconditionally cleared by European Commission and by U.S. Federal Maritime Commission in EU and U.S. respectively.
- MOFCOM focused its competition analysis on P3 Alliance’s impact on the Asia-Europe route in the container shipping line market.

Facts

Following the first blocked case, proposed acquisition of Huiyuan Juice by Coca-Cola in March 2009, the MOFCOM unexpectedly blocked the proposed shipping alliance among the world’s three largest liner shipping operators, namely, Maersk Line (“Maersk”), Mediterranean Shipping Co and CMA CGM (“P3 Alliance”) on June 17, 2014. The MOFCOM concluded that the P3 Alliance was actually a “close joint operation” and it would have restrictive and anti-competitive effects on the Asia-Europe container shipping market.

12 The original Chinese notice published by MOFCOM is available at http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml
Based on a thorough examination, the MOFCOM concluded that the relevant product market was the global container shipping service market and defined the relevant geographic market as Asia-Europe routes, transatlantic and transpacific routes. Given that the Transatlantic route does not cover Chinese ports and the Transpacific route is highly competitive, the MOFCOM focused its competition analysis on the Asia-Europe routes.

MOFCOM assessed key factors such as the market share and controlling power, level of the concentration, market entry and impact on other undertakings in competition analysis. The conclusions were as follows:

a. The arrangement would create a tight joint operation that would be different from traditional, loose-knit shipping alliances;
b. The arrangement would significantly enhance the parties’ market power;
c. The arrangement would significantly enhance market concentration;
d. The arrangement would raise entry barriers to the relevant market;
e. The anticompetitive impact of the arrangement on other relevant undertakings

The MOFCOM believed the parties in the proposed network would form a tight joint operation that could have the effect of eliminating or restricting competition in the Asia-Europe container line transportation market. The parties concerned could not demonstrate that the arrangement's positive effects would outweigh its negative impact on competition, neither could they prove that the proposed arrangement would be in accordance with the public interest. MOFCOM therefore decided to block the concentration.

Joint venture by Hunan Corun, Toyota China, PEVE, XinZhong Yuan and ToyotaTsusho

- MOFCOM used re-filing in reviewing this deal
- MOFCOM defined the vehicle-use nickel-metal hydride battery market and hybrid power vehicle market as the relevant markets, and the relevant geographical market is the global market for vehicle-use nickel-metal hydride batteries and the Chinese market for hybrid power vehicles
- MOFCOM imposed behavioral remedies on this deal.

Facts

13 The original Chinese notice published by MOFCOM is available at http://fldj.mofcom.gov.cn/article/ztxx/201407/2014070648291.shtml
On July 2, 2014, the MOFCOM issued its decision to conditionally clear the proposed joint venture by Hunan Corun New Energy, Toyota Motor (China) Investment (“Toyota China”), Primearth EV Energy (“PEVE”), ChangshuXinZhong Yuan VC (“XinZhong Yuan”) and Toyota Tsusho Corp (“Toyota Tsusho”), concluding that the deal would reduce competition in the vehicle-use nickel-metal hydride battery market and also hinder downstream hybrid power vehicle players’ ability to obtain batteries, and was therefore likely to exclude or restrict competition in two markets.

In the competition analysis, the MOFCOM specifically considered the vehicle-use nickel-metal hydride battery a highly concentrated market and believed the deal would lead to diminish competition. Supply of vehicle-use nickel-metal hydride batteries in the global market are almost monopolized by PEVE, Panasonic, Corun and Johnson Controls, with their collective four-firm concentration ratio (CR4) as high as 97%. Besides, as Panasonic holds a 19.5% stake in PEVE, the proposed deal featured a common interest among PEVE, Panasonic and Corun. That means the deal would reduce the three parties’ willingness to compete and therefore result in a restriction of competition.

**Remedies**

MOFCOM held several discussions with the applicants to address the aforementioned issues. On June 25, the applicants submitted their final proposal. After review, the MOFCOM believed that that latest version provided solutions to help reduce any negative impact arising from the deal. MOFCOM requested that the parties involved in the deal and the new JV commit to the following obligations:

- The new JV should sell its products to third parties based on fair, reasonable and non-discriminatory (FRAND) principles;
- With the existence of market demand, the new JV should start selling products to third parties three years after production commences;
- The new JV should report annually to MOFCOM on its fulfillment of the above two duties;
- The new JV should formulate a proposal to carry out those duties and implement it upon MOFCOM's approval.
Western Digital fined for non-compliance with merger remedies regarding the acquisition of Hitachi\(^{14}\)

- MOFCOM’s first fining decisions against the failure to comply with merger remedies
- MOFCOM fined Western Digital with CNY 600,000 in total

Facts

On December 8, 2014, the MOFCOM issued two separate penalty decisions against Western Digital for its failure to comply with the hold-separate remedies MOFCOM imposed in the company’s March 2012 acquisition with Hitachi in accordance with the AML. The remedy required Western Digital to keep Viviti a separate legal entity after the merger and maintain independent business operations.

MOFCOM found that on March 8, 2012, Viviti’s U.S. unit, HGST, was consolidated into Western Digital, becoming a fully owned entity. And further found that in January 2013, Western Digital had eliminated the development division of Viviti/HGST without prior approval and transferred all employees to Western Digital. MOFCOM imposed a CNY 300,000 fine for each violation.

Tsinghua Unigroup fined for failure to notify its acquisition of RDA Microelectronics\(^{15}\)

- MOFCOM’s first publication of penalty decision against the non-filer
- MOFCOM evaluated the competitive impact of the deal and believed the transaction would not eliminate or restrict competition
- MOFCOM fined Unigroup with CNY 300,000

Facts

On December 8, 2014, the MOFCOM announced the penalty decision against Unigroup for its failure to notify its acquisition of RDA Microelectronics in accordance with the AML.


\(^{15}\) The original Chinese decision published by MOFCOM is available at http://tfs.mofcom.gov.cn/article/ckts/ckzcfg/201412/20141200824277.shtml
MOFCOM formally initiated an investigation into Unigroup’s possible violation on the RDA acquisition on 12 August. MOFCOM found Unigroup had signed an acquisition agreement with RDA on November 11, 2013 to acquire all of the latter's shares for USD 907m. On July 18, 2014, Unigroup completed the transaction. MOFCOM further found the combined Unigroup’s global revenue with RDA’s global revenues in 2013 met the merger filing notification threshold. However, Unigroup did not notify the transaction to the MOFCOM before completion. MOFCOM evaluated the competitive impact of the deal and believed the transaction would not eliminate or restrict competition. Therefore, the MOFCOM decided to fine Unigroup CNY 300,000.

Outlook

The first day of August 2014 marked the sixth anniversary of the implementation of the AML. The past six years have witnessed that China’s merger control regime is growing mature and that the MOFCOM is playing a more active and indispensable role in maintaining the market order.

The cooperation between the MOFCOM and anti-trust agencies in other jurisdictions has become wider in scope and more frequent. An all-front collaboration model has been established, covering education, research and exchange of information and experience.

It can be anticipated that MOFCOM will continue to make implementing rules in 2015 and that the review process would become more transparent and efficient. We also expect that the MOFCOM’s investigation upon unnotified concentrations that shall be subject to merger review and the breach of imposed remedies will be further strengthened.

II. Monopolistic Agreements

➢ Legislation


The year of 2014 has seen the continued efforts of the price regulator the NDRC
to make implementing rules.

The NDRC’s Several Provisions on the Standardization of the Power to Impose Price-related Administrative Penalty ("Several Provisions"), which are aimed at institutionalizing the administrative power of penalty of the price authorities and improving the transparency of the factors that the regulators may consider before imposing a penalty, came into force on July 1, 2014. The Several Provisions clarify when to impose administrative penalties on price violations, what kind of penalties shall be imposed, and the extent of the agency’s discretion. The new rule also make clear that the penalties shall be related and proportionate to the factual findings and the characteristics, the severity and the harm to the society of the violation. The outcomes of the administrative penalties may include impunity, lighter or mitigated punishment, regular punishment and heavier punishment.

The second rule that the NDRC promulgated in 2014 is the Rules on the Hearing and Review of Price-Related Administrative Punishment Cases ("Rules on the Hearing and Review") which became effective on January 1, 2014. The hearing of a case refers to the process whereby the price supervision and inspection agency examines the factual and legal issues and makes decisions on the basis of the investigation report of the case upon the finalization of an investigation. The review of a case refers to the process whereby after the hearing of the Case, the official in charge of a competent price department reviews the investigation report of the case, the hearing process, the statements and defense made by the parties concerned, the public hearings conducted, etc., and makes relevant decisions in accordance with the Provisions on Price-Related Administrative Punishment Procedures. Thus, the adoption of this new rule can be anticipated to enhance the transparency of the internal decision-making process of the price regulators and promote the parties’ monitoring of the law enforcement actions.

➢ Horizontal agreements

**Enforcement by the SAIC**

In the P.R.C., monopolistic agreements fall within the jurisdictions of the SAIC and the NDRC. Specifically, the SAIC is responsible for the enforcement against non-price related monopolistic agreements, while NDRC takes charge of combating price-related monopolistic agreements.

On July 29, 2013, the SAIC launched an antitrust case platform, and published all 13 anti-monopoly administrative penalty decisions handed down by the SAIC’s local branches since the AML came into effect. Twelve out of thirteen of the published cases involved horizontal monopolistic agreements. Three of the agreements were reached directly between undertakings, and nine were concluded

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indirectly through industry associations.

The 12 cases cover a wide variety of industries, including construction, building materials, petroleum gas, second-hand cars, insurance and tourism. The said industries are all related to people’s livelihoods. However, none of the punished companies and industry associations are considered to be influential or large enterprises.

The SAIC’s cases feature smaller amounts of fines and significantly lighter penalties. Penalties for the industry associations ranged from 200,000 RMB to 500,000 RMB, and the companies were fined between 60,000 RMB to 3 million RMB.

Enforcement by the NDRC

LCD case

In relation to the SAIC, the NDRC took a harder line in terms of the amount of penalties and the influence of the investigated companies. On January 4, 2013, the NDRC announced penalties on six foreign LCD panel makers, Samsung, LG, AU Optronics, Chushotwo Picture Tubes, ChimeiInnoLux, and HannStar, for colluding to manipulate the pricing of LCD panels in China between 2001 and 2006. The LCD case marks the first case in which the Chinese competition authority applies extraterritorially.

The LCD case is also the first case in which the authority flexed antitrust muscles. The NDRC imposed pecuniary sanctions totaling 353 million RMB, including: payment of 172 million RMB (approximately USD 27.3 million) in restitution of Chinese TV manufacturers for the past overcharges; disgorgement of 36.75 million RMB (approximately USD 5.8 million) in illegal profits; and administrative fines of 144 million RMB (approximately USD 22.9 million). Penalties for individual companies ranged from 240,000 RMB (approximately USD 38,158, 0.07% of the total) for HannStar up to 118 million RMB (approximately USD 18.8 million, 33.4% of the total) for LG.

It is notable that the penalties were imposed in accordance with the Price Law of the P.R.C. adopted in 1997, rather than the AML, which came into effect in 2008. The NDRC Price Supervision and Anti-Monopoly Bureau have the authority to enforce both laws, which contain overlapping rules against collusion. The Price Law establishes a broad framework for the regulation of prices by the NDRC, and it prohibits “aberrant” pricing practices such as collusion and price manipulation. The AML, drafted as a comprehensive competition statute largely modelled on the EU and the U.S. antitrust regimes, prohibits cartels as anticompetitive “monopoly agreements.”

The official press release characterizes the LCD manufacturers’ conduct both as “price monopoly” (using the language of the AML) and as “colluding…to manipulate the market price” (using the language of the Price Law). However, the NDRC relied on the Price Law to impose penalties because the underlying conduct occurred in 2001 to 2006, before the AML took effect.

**Shanghai Gold Jewellers case** 18

In July 2013, the NDRC launched a probe into Shanghai gold jewellers and the Shanghai Gold and Jewellery Industry Association, alleging that price manipulation of gold jewellery had been committed by its major members. Thirteen members of the association are under investigation, including gold companies Lao Feng Xiang, Lao Miao Jewellery, Shanghai Yuyuan, Hong Kong-based Chow Tai Fook (the world’s largest jewellery retailer) and Chow Sang Sang.

The investigation found that the association and some of its member jewelers fixed the prices of gold and platinum products through the implementation of association rules (the Implementing Rules of the Shanghai Gold and Jewellery Industry for Gold and Platinum Jewellery Price Discipline). The aim was to regulate pricing activities among association members by setting an ‘intermediate price’ from which members could not deviate by more than 3 per cent. The price discipline rules also stipulated a range for price changes and a standard formula for calculating prices. As a result of the implementation of the rules, the market prices of gold and platinum products in Shanghai remained at a level higher than the international bullion price. Price-fixing agreements, in particular, agreements arranged by industry associations, are strictly prohibited by the AML. According to Article 7 of the NDRC’s Anti-Price Monopolistic Provisions, “price fixing” includes various direct and indirect means of eliminating or impeding price competition, such as fixing or altering the range of price changes; fixing or altering the discount rate or surcharges; and adopting standard formulas for calculating prices. The relevant articles of the Shanghai Gold and Jewellery Industry Association’s price discipline rules were directly in violation of the NDRC provisions.

According to the penalty announcement released by the NDRC in August 2013, five gold jewellers were confirmed to have engaged in the manipulation of the price of gold and had their actual pricing practices fall into the range matching the association’s price discipline. Each was fined at one percent of its relevant turnover in the preceding year, totalling 10 million RMB. The agency also imposed a fine of 500,000 RMB on the Shanghai Gold and Jewellery Industry Association for playing a leading role in organizing the cartel. This is the maximum fine that can possibly be imposed on an industry association under the AML.

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18 The original Chinese notice published by the NDRC is available at http://jjs.ndrc.gov.cn/gzdt/201308/t20130813_553441.html.
It is notable that eight out of 13 companies under the investigation were dropped from the final penalty list. In particular, one of the companies first investigated, Chow Tai Fook, which denied the involvement in the alleged price manipulation, was actually found not guilty. Due to the lack of sufficient information in the NDRC’s announcement, it is unclear which factors led to the NDRC’s conclusion as to the innocence of these exempted companies.

Japanese auto part price-fixing case

On 20th August 2014, the NDRC announced on its website a decision to impose fines totaling RMB 831.96 million on eight auto parts companies and RMB 403.44 million on four bearings manufacturers, all based in Japan, for price-fixing in relation to auto parts and bearings, respectively. The total fines imposed in this case reached RMB1.235 billion, the highest antitrust fines imposed in a single case in 2014.

China follows the U.S., the EU and Japan in punishing auto parts makers. In fact, this is not the first time that the NDRC conducted the follow-on investigation. In 2013, the NDRC conducted investigation on six foreign LCD panel makers after the punishment handed down by the EU Commission under Article 101 TFEU. Therefore, it is important to be alerted about antitrust investigation conducted in the jurisdictions other than China.

It is also notable that Hitachi and Nachi-Fujikoshi, the auto parts and bearing maker, were exempted from penalties respectively as they were the first leniency applicants to the NDRC and provided important evidence.

Volkswagen AG, Chrysler and Audi and their distributors price-fixing case

In September 2014, the Shanghai Price Bureau announced its punishment of foreign carmakers for price-fixing, fining the Chinese sales unit of Chrysler and three of its distributors respectively RMB 31.68 million and RMB 2.14 million. The price regulator in Hubei province fined the sales unit of Volkswagen FAW-Volkswagen Automobile Co Ltd and eight of of its distributors respectively RMB 249 million and RMB 29.96 million for fixing prices.

The penalties have raised the risks of similar fines being levied against other global players, which are being probed for possible anti-competitive behavior.

The Japanese auto part price-fixing case and this case suggest that the auto sector may have been put under particular scrutiny under the AML in 2014.

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19 This case also contains vertical monopoly known as resale price maintenance. Please refer to “vertical agreement” section in this report for more details.
Zhejiang Insurance Association price-fixing case

On September 2014, the NDRC made public 23 administrative penalty decisions against the Insurance Association of Zhejiang Province (“Association”) and 22 insurance companies doing business in the same province, for a total of more than RMB 110 million. The decisions were actually made in 2013.

The NDRC’s investigation revealed that since 2009, the Association had arranged for 23 property insurance companies within Zhejiang province to reach and implement agreements on fixing commercial auto insurance premium rates and fixing and altering commercial auto insurance agency commissions, both of which violated the AML.

It is notable that this is not the first time that the insurance industry is fined by the Chinese antitrust authorities. Insurance associations seem to be one of the focuses under the spotlight of the antitrust authorities. We understand that the insurance industry has unique characteristics which may justify the exchange of competitively sensitive information such as cost or even premium rate. However, it is important to reconcile the industry specifics and the antitrust compliance, and have active communications with the antitrust agency.

- Vertical agreements

Vertical agreements have incurred substantial interest of NDRC in 2013, and the authority’s enforcement in 2014 has not suggested less of an appetite for resale price maintenance (“RPM”).

Luxury liquor case

On February 22, 2013, Guizhou Provincial Price Bureau (“Guizhou Price Bureau”) announced the decision to impose a penalty of 247 million RMB (approximately USD 39.8 million) on Kweichow Moutai, the most famous Chinese state-owned producer of premium liquor, for administering RPM. On the same day, Sichuan Provincial Development and Reform Commission (“SDRC”) released its decision to penalize Wuliangye, another well-known, state-owned premium liquor maker, in an amount of 202 million RMB (approximately USD 32.6 million) for the same charge. Both agencies are local branches of NDRC.

The luxury liquor case records the first administrative penalty against a vertical monopoly agreement, or more precisely, against RPM. It also clears earlier doubt that China’s AML enforcement agencies may treat state-owned companies more leniently.

A couple of issues are noteworthy:

Firstly, although the analysis is quite simple and straightforward, the SDRC’s statement suggests a “per se rule” approach as it merely addresses the
anti-competitive effects of Wuliangye’s RPM behaviors. In addition, the statement also repeatedly mentions Wuliangye’s strong market position although there was no indication that there is any market share threshold for RPM to be held illegal. The same rational also appears in the Guizhou Price Bureau’s decision.

Nevertheless, it seems that the literal interpretation of the AML suggests that the law shall employ the “rule of reason” approach to agreements, in that Article 15 of the AML applies to all types of monopoly agreements with no exception to the vertical ones.

Secondly, the SDRC’s statement also mentions that Wuliangye banned cross-regional sales and cross-channel sales in addition to restricting the minimum resale price. However, market allocation is not explicitly found to be illegal, and instead appears to be considered as a measure used by Wuliangye to restrict the resale price.

The AML only provides for two types of vertical monopoly agreements, namely fixing resale price and restricting the minimum resale price. The SAIC, who is responsible for non-price related violations, has not promulgated any rules on non-price-related vertical agreements. Given the absence of the specific provisions, it seems that the NDRC has taken a cautious approach with respect to non-price-related vertical agreements, such as vertical territorial allocation.

In the *Moutai & Wuliangye* case, the fines on both enterprises reached a record high. However, that record was soon broken by the *Baby Formula* case.

**Baby Formula case**

In June 2013, the NDRC conducted antitrust probes over several major baby formula companies (both foreign and domestic), including Mead Johnson, Dumex, Wyeth, Abbotts, Friesland Campina, Fonterra, Meiji, Biostime and Beingmate, for price monopolistic behaviour. In response to the NDRC investigation, the baby formula manufacturers, one after another, took rectification steps, such as directly or indirectly cutting formula prices. In August 2013, the NDRC concluded its investigation into the manufacturers and rendered fines totalling 668 million RMB, which were higher than the fines imposed in the *Moutai & Wuliangye* and *LCD* cases, and set a new record in the history of the NDRC’s antitrust enforcement.

The investigation found that all of the involved baby formula manufacturers had illegally limited their distributors’ resale prices by stipulating restrictive terms in contracts and by fining and reducing or terminating supplies of non-complying companies. The NDRC concluded that such behaviour constitutes a violation of Article 14 of the AML, and disrupted the market by restraining and eliminating

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intra-brand competition and weakening inter-brand competition. Following 
*Moutai* & *Wuliangye*, this is the second administrative penalty concerning a vertical 
Monopolistic agreement.

According to the NDRC press release, Wyeth, Beingmate and Meiji obtained full exemptions for voluntarily reporting the relevant facts related to the signing of the Monopolistic agreement, providing important evidence to the NDRC and implementing rectification measures. In contrast, fines equivalent to 3 to 6 percent of their annual sales were imposed on the other six undertakings. Among them, firms that actively cooperated (Dumex, Abbotts, Friesland Campina and Fonterra) had lower fines, equivalent to 3 percent of their turnovers of the preceding year, imposed upon them. Due to their non-cooperation during the antitrust probe, Mead Johnson and Biostime were penalised with fines equivalent to, respectively, 4 percent and 6 percent of their annual turnovers. Another factor contributing to the NDRC’s determination of the amount of penalties were the rectification measures taken by the firms, such as the undertakings’ price-cutting measures, the timing of the price cutting, the specific price dynamics and the firms’ commitment to a no-price-increase.

**Glasses Case**

On May 29, 2014, the NDRC fined five spectacle makers over 19 million RMB (approximately USD 3.04 million) for monopolizing retail prices. The investigated companies included the Shanghai branch of the French company Essilor, the Beijing branch of Japan’s Nikon Corp and the Guangzhou branch of German optical company, Zeiss, the Beijing branch of U.S.-based contact lense producers Bausch & Lomb and the Shanghai branch of Johnson & Johnson.

The NDRC launched the investigations in August 2013. Some of the companies have so far cut their prices before the NDRC statement. Essilor, Hoya, Bausch & Lomb, Nikon and Zeiss have already cut the prices of some of their products by 10 percent to 30 percent after the NDRC probe.

A fine of 2 percent of previous year’s turnover was levied on Essilor and Nikon reaching respectively 8.8 million RMB and 1.68 million RMB. The fine was reduced to 1 percent of the previous year’s turnover for Zeiss, Bausch & Lomb, and Johnson & Johnson, which respectively reached 1.77 million RMB, 3.69 million RMB, and 3.64 million RMB thanks to their active cooperation and proactive corrective measures. Hoya Corp. and Shanghai Weicon Optics Co. were exempt from punishment because they had voluntarily reported monopolistic practices and had rectified the issue.

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21 The original Chinese notice published by NDRC is available at [http://zys.ndrc.gov.cn/xwfb/201405/t20140529_613553.html](http://zys.ndrc.gov.cn/xwfb/201405/t20140529_613553.html).
Trends and Strategies

In 2014, both the NDRC and the SAIC concentrated their enforcement actionson the fields closely related to people’s livelihoods. This preference is likely to keep up in the near future, when China’s antitrust regime at its early stage and need to establish people’s support and confidence. In addition, the 2014 enforcement records suggest that it is important to pay attention to China’s antitrust investigations following the U.S. and the EU actions.

In respect of the NDRC, following the Zhe Jiang Insurance Association case\textsuperscript{22} and Chrysler and Audi case,\textsuperscript{23} the Japanese auto parts case\textsuperscript{24} suggests that the antitrust regulators are determined to strengthen antitrust enforcement against horizontal monopolistic agreements, and that the voluntarily report and effective cooperation with agencies are worthwhile.\textsuperscript{25}

The SAIC’s published penalty cases show that monopolistic agreements organized mainly through industry associations could have significant negative impacts on the market and harm the public interest. Both the industry association and the participating enterprises must be held accountable for their breaches of the AML. Companies shall be very cautions when joining an industry association and participating in meetings organized by an industry association with topics about prices or other sensitive issues.

Outlook

We expect the AML’s enforcement on monopolistic agreements will continue in the future, and will directly benefit customers by focusing on fields that have a significant impact on their daily life.

It is encouraging that the antitrust regulators are enhancing the transparency of their enforcement actions. Following the SAIC’s launching of the antitrust case publishing platform, the NDRC revealed the official decisions on the Japanese Auto parts case and the 2013 insurance cartel case. We expect the NDRC will keep releasing the full text of its administrative penalty decisions in the future.

Moreover, we have noticed that the NDRC applied leniency program frequently in cartel cases in 2014. For example, in the Japanese Auto parts case, the NDRC fully exempted Hitachi and NACHI, because they were the first report respectively among the autopart manufacturer and the bearing manufacturer.

\textsuperscript{25} Please refer to the content in the section of “Significant Cases” of this report for details.
However, some commentators suspect that the foreign companies are more likely to be targeted by the Chinese antitrust authorities and the competition policy is significantly driven by industrial policies. Such concerns may be relieved by increasing transparency of the authorities’ enforcement activities. To this end, more transparency may be required to explain the reasoning underlying the antitrust authorities’ decisions.

III. Abuse of Market Dominance

Legislation

➢ There is no new legislation in relation to the abuse of dominance from 2013 to date.

➢ Ms Ren Airong, Director General of Antitrust and Anti-Unfair-Competition Enforcement Bureau under the SAIC, announced that the SAIC is planning to publish the final draft of the guideline regarding Intellectual Property (IP) rights’ abuse under the AML in July 2014.

Enforcement Tendency summarization

➢ The year of 2014 has seen a decent increase of abuse of market dominance cases, in particular at the local level. oftentimes, the NDRC and the SAIC generally find it difficult to pursue investigations against abuse of market dominance cases. Two main reasons are often cited to explain this standoff: first, it is hard for the authorities to define the relevant markets and prove the undertaking(s)’ dominant market position through economic approaches; second, it is hard to collect evidence regarding abusive practices.

➢ Transparency of abuse cases dealt with by the SAIC has improved because the SAIC has established an on-line platform to publish these decisions.

➢ The number of IP rights abusive cases is significantly increasing, particularly in the high-tech and IT markets.

➢ In all the five abuse of market dominance cases finished in 2014, the antitrust regulators provided a detailed statement in relation to the relevant market, the assessment of the dominant market position, the abusive practices, the examination of the justifiable reasons, and the collected evidences. The decisions illustrate at least two noteworthy issues: first, transparency is steadily improved as the central and local agencies disclosed its reasoning in every decision; second, the SAIC and its local branches are gaining capacities to handle complicated abuse-of-dominance cases.

Significant Cases
Cases pursued by the NDRC

Qualcomm Case

The NDRC fined Qualcomm CNY6.08 billion (approximately USD975 million) for abusive patent licensing practices, a record pecuniary penalty ever since the AML came into force in 2008.

The Qualcomm case is closely related to IP rights abuse in the field of high-tech (the chipset of smartphones) market.

Facts

Qualcomm Inc. (“Qualcomm”) is a multinational semiconductor company that designs, manufactures and markets digital wireless telecommunication products and services and owns a spate of standard essential patents (‘SEP’) in the telecommunication sector. On November 25, 2013, this company disclosed that it was confronted with an antitrust investigation launched by China’s NDRC, and Qualcomm was not aware of any charge by the NDRC that the company had violated of the AML.27

In February 2014, the Mobile China Alliance (“MCA”) of the China Communications Industry Association (“CCIA”) submitted a report to the NDRC complaining about the significant harms that the Qualcomm’s business model has threatened to China’s handset industry. In this report, the MCA accused Qualcomm of collecting excessive patent royalties from, tying, and discriminating against the Chinese handset makers, which is in violation of FRAND principles.28

Mr. Xu Kunlin, the Director General of Price supervision and Antimonopoly Bureau under the NDRC disclosed that NDRC’s investigation towards Qualcomm has made significant progress on May 22, 2014.

On February 10, 2015, the NDRC released the decision on the Qualcomm case, fining the high-tech giant CNY6.08 billion and approving the rectification measures proposed by the company. The punished abusive practices include excessive pricing, bundling the SEPs with the non-SEPs, and imposing unfair trade terms in the form of

29 This finding consists of several claims: 1) Qualcomm charged consumers for patents that had already expired. 2) Qualcomm forced customers to grant Qualcomm free licenses for their own patents whilst refusing to lower the royalties it imposed in consideration of the value of the patents licensed to it. 3) the royalty rate was set on the basis of the wholesale price of the mobile devices concerned.
forcing customers to accept non-challenge clauses regarding the validity of
Qualcomm’s patents. The approved rectification measures consist of: 1) unbundling
SEPs with non-essential patents; 2) refraining from imposing royalty-free grant-back
clauses on Chinese licensees and from charging royalties for expired patents; 3)
removing non-challenge clauses or other unfair clauses in licensing agreements with
Chinese customers; 4) calculating royalty rates on the basis of 65% instead of 100%
of the wholesale price of handsets sold for use in China.

Analysis

Qualcomm, the world's biggest maker of cellphone chips, sees China as a key
market as growth in smartphones shifts away from the United States and towards
developing countries. China Mobile has been preparing to upgrade to high-speed
networks using technology developed by Qualcomm.

Some analysts speculate China's antitrust investigation may be an attempt to gain
leverage in royalty negotiations with Qualcomm ahead of the expected rollout date of
the new 4G wireless infrastructure in 2014. Analysts also theorized that Beijing may
be moving towards supporting local suppliers trying to compete with Qualcomm, the
global leader in 4G technology, also known as Long-Term Evolution (“LTE”).
However, the NDRC emphasized that the investigation is solely based on competition
concern.

Investigation against InterDigital(Suspended)30

- The NDRC has decided to suspend the abuse of market dominance investigation
  of InterDigital(“IDC”) on May 22, 2014 in accordance with Article 45 of the
  AML.

- The investigation is suspended because the IDC has cooperated with the NDRC,
  submitted satisfactory commitments and reached settlement agreements with
  relevant Chinese companies. However, the NDRC said it reserves the right to
  restart investigation if lapses are discovered.

- The IDC case is another case related to IP rights abuse and high-tech(i.e.
  telecommunication) markets.

Facts

On 19 January 2014, Mr. XuKunlin confirmed that IDC, an American wireless
research and development company, possessing a large number of telecommunication
SEPs, is under the NDRC’s antitrust scrutiny. Triggered by whistle-blowing, the

investigation commenced in June 2013 in response to the claims that IDC was suspected of excessive pricing and discriminatory licensing in China. It's alleged that the licensing fees collected from the Chinese handset makers are dozens of, or even one hundred times higher than that collected from foreign leading handset makers.

On January 3, 2014, an IDC executive accompanied by local and U.S. external counsel, met with NDRC officials to respond to NDRC’s investigation, to explain the company’s recent settlement agreements with the Chinese companies on this matter and to discuss the way forward for resolving NDRC’s investigation of IDC’s licensing conduct.

The IDC submitted a letter of commitment to the NDRC to seek suspension of the authority’s investigation under a procedure provided for under the AML, and, on May 22, 2014, the NDRC accepted the commitment and decided to suspend the investigation.

According to the NDRC, the commitments made by the IDC include but are not limited to:

a. IDC will not charge Chinese companies discriminative high royalty fees;

b. IDC will not bind its SEPs with non-SEPs when licensing;

c. IDC will not require Chinese companies to license IDC reversely for free.

d. IDC will not force Chinese companies to accept its unreasonable licensing conditions by directly filing patent lawsuits before court.

Analysis

This is another antitrust investigation related to the SEP and telecommunication market, which suggests the antitrust regulator’s great interest in this field. Moreover, violations of FRAND principle may constitute abuse of dominance position at the same time. Although the SAIC confirmed that holding a SEP does not necessarily mean the holder has dominant position in the technology market, violating the FRAND principle is still risky. Finally, the commitments made by IDC are generally consistent with those in the judgment of Huawei vs IDC.31

Cases pursued by the SAIC

Investigation against Tetra Pak (pending)

Facts

In August 2013, the SAIC launched an investigation against Tetra Pak, a Swedish food processing and packaging company, for abuse of market dominance.\(^{32}\)

It claimed that by using its advantages in liquid beverage packaging equipment and maintenance services, Tetra Pak tied the sale of packaging materials to that of its equipment and imposed differential treatment among business counterparties.

Responding to a misleading news report saying that the probe on the packaging giant had ceased, the spokesman of the SAIC stated that the investigation is still on-going\(^{33}\).

Analysis

As the world’s largest producer of aseptic carton packaging for liquid food, it is unsurprising to see antitrust investigation towards Tetra Pak. Due to lack of information in relation to the details of the SAIC investigation we are currently unable to comment on the case. We anticipate the SAIC will disclose more information about its investigation process and not only the decisions.

Investigation against Microsoft

Facts

According to SAIC’s official press release, in June 2013, the SAIC received some companies’ complaints against Microsoft about bundling, compatibility issues and other concerns caused by uncomplete disclosure of relevant information of Windows System and Office softwares. The whistleblowers claimed that Microsoft’s conducts violated the AML.\(^{34}\)

On July 28, 2014, the SAIC dawn raided four offices of Microsoft in Beijing, Shanghai, Guangzhou, Chengdu at the same time, with the cooperation of nearly 100 enforcement officers from SAIC’s branches in 9 cities such as Beijing, Shanghai, Guangdong, Sichuan, etc.

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In August 2014, the SAIC published a short announcement and warned Microsoft to comply with Chinese laws and not to disturb the investigation in any method. Microsoft promised to fully cooperate with SAIC’s investigation.35

On August 6, 2014, the SAIC raided Microsoft’s office in Beijing for the second time. Besides, the Accenture Information Technology (Dalian) Ltd., Co. which is responsible for Microsoft’s financial outsourcing was also visited without prior notice. 36

On September 1, 2014, the SAIC interviewed the vice president of Microsoft, Chenshi, and requested Microsoft to submit a written report about the compatibility and other issues related to the incomplete disclosure of information within 20 days.37

On September 25, 2014, Microsoft’s CEO SatyaNadella visited the SAIC, and promised to abide by Chinese laws and regulations, and to fully cooperate with the investigation. Currently, there is no further development about the case.

Analysis

At the current stage, the SAIC has publicized limited details of the case. After Qualcomm, Microsoft is yet another IT giant investigated by China’s antitrust agencies. As mentioned above, the SAIC released the Rules on Prohibiting the Exclusion or Restriction of Competition through Abusing Intellectual Property Rights (Exposure Draft) in 2014. With the increasing attention of China’s agencies to abusing IP rights and high technology area, in the future, it is not surprising to see more similar investigations and litigations.

Yiyuan Purified Water Case

Facts

On December 16, 2013, Guangdong Administration for Industry and Commerce (“GDAIC”) issued a decision to penalize Yiyuan Purified Water Company (“Yiyuan”), an urban public water supply firm, for abuse of dominance through bundled sales.38

In this case, after elaborating on the other two sources of water supply and their characteristics, the GDAIC defined the relevant product market as the urban public water supply service. The geographic market was defined as the west district and the areas under two sub-district offices of Dayawan district of Huizhou city.

The GDAIC believed that Yiyuan has a dominant market position, after examining the following factors:

a. high market share of Yiyuan in the relevant market;

b. heavy reliance of other business operators on Yiyuan;

c. difficult market entry.

The abusive practices of Yiyuan included:

a. requiring local real estate development companies to sign agreements that contain, not only terms for temporary water supply service to construction sites, but also terms requiring the complainants to engage Yiyuan to work on the residential water meter projects;

b. signing water supply engineering agreements without terms regarding residential water meter projects, but requiring development companies to sign a letter promising to reach agreements with Yiyuan for residential water meter projects in the future, and acknowledging Yiyuan’s right to cut the water supply in case of a breach of the promised letter; and

c. requiring the local real estate development companies to sign tie-in agreements with a designated third party when Yiyuan is not qualified to sign such agreements

Moreover, the GDAIC determined that Yiyuan’s bundled sales were not reasonably justified because:

a. they are not a common business practice;

b. they were against the counterparties’ will;

c. they ran afoul of local administrative rules; and

d. there is no legal or policy basis for Yiyuan’s claim that the bundled sales were intended to enhance water safety.

Analysis

It is noteworthy that although handled by a local authority supervised by the SAIC, the Yiyuan case marked the very first case in which the antitrust agency detailed the relevant market definition, the assessment of the dominant market position, the abusive practices, and the scrutiny of the justifiable reasons.

Although the definition of the relevant market and the reasoning of the GDAIC and the SAIC are subject to criticism, it is still applauding to see that the antitrust regulators have realized the importance of the application of rule of reason in an
abuse case. In addition, through it’s a published decision, practitioners may observe the regulators’ reasoning and thus transparency and legal certainty have been generated.

**Beijing Shengkai Sports Developmeng Case**

**Facts**

On June 3 2014, the SAIC publicized the decision on suspension of the investigation against Beijing Shengkai Sports Developmeng Ltd., Co. (“Shengkai”).

The SAIC concluded that Shengkai, as the exclusive agency of 2014 Brazil FIFA World Cup tickets, abused its dominant position by bundling hotel rooms, tourist attractions tickets and other tourism products with the sales of games tickets.

In May 2014, Shengkai submitted the application for suspending the investigation and made the following commitments:

- *a.* promoting the sale policy of 2014 FIFA World Cup tickets and purchase channel in order that the customers could fully understand relevant information;

- *b.* contacting the customers by phone calls or emails, and refunding the customers the payment for unwanted hotel rooms, transportation, travel or other service;

- *c.* providing two types of products for choice; and

- *d.* regularly conducting legal training to the company staffs.

On January 12, 2015, the SAIC decided to terminate the investigation and close the case considering that Shengkai actively cooperated with the investigation and the committed remedies actually eliminated the effect of the abusive behaviors on the market.

**Analysis**

At present, there are limited regulations relating to details of suspension application, and this case could serve as a ready reference.

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Firework Producers in Chifeng City Case

Facts

On May 27, 2014, Inner Mongolia Administration for Industry and Commerce (“IMAIC”) issued a decision to penalize six firework producers in Chifeng for unlawful market division and abuse of dominance through setting additional unreasonable conditions under the AML.41

According to the decision, four of the six producers were authorized by local safety apartment to organize production security training and to apply for licenses on the behalf of the retailers. The IMAIC concluded the four producers illegally took advantage of the authorization and requested the retailers to prepay a sum of money for orders. For these retailers did not pay the specified amount, the producers either refused to provide the license, or reduce the supply in the sales season.

The IMAIC found such conducts violated the AML. The four producers imposing unreasonable trade conditions on retailers were fined 8% percent of their annual revenues for 2013.

Analysis

Recent cases simply that the SAIC’s investigation for abuse of dominance has not just been focused on large-scale enterprises. Investigations targeting SMEs which hold dominant position in district markets could become the norm.

Chifeng Subsidiary of the Inner Mongolia Tobacco Company Case

Facts

On July 4, 2014, the IMAIC issued a decision to penalize Chifeng subsidiary of the Inner Mongolia Tobacco Company (“Chifeng Tobacco Company”) for abuse of dominance through bundling sales of less popular cigarette products under the AML.42

In the present case, the IMAIC defined the cigarette products wholesale market in Chifeng as the relevant market. According to the Law on Tobacco Monopoly, the company which engages in the wholesale trade of tobacco products shall be subject to the approval of the department of tobacco monopoly administration, and acquire a license. The IMAIC found Chifeng Tobacco Company was the exclusive wholesaler in Chifeng and concluded that the company had a dominant position in the said market.

41 See the decision at http://www.saic.gov.cn/zwgk/gggs/jzzf/201501/t20150112_151220.html, last visited on February 18, 2015.
The IMAIC believed that Chifeng Tobacco Company made use of the dominance and formulated the sales policy which forced the retailers to purchase less popular cigarette products without justified reasons. The following anticompetitive effects could be caused by the company’s abusive behaviours.

First, the abusement disturbed the competition between tobacco producers and lowered the producers’ motions to improve the quality of products. The Chifeng Tabacco Company compelled the retailers to purchase less popular products by virtue of its advantage in the relevant market. Such behaviors objectively made the retailers and consumers have to share the costs generated from the out-dated technologies of tobacco.

Second, the retailers benefits were badly harmed. The overstock of less popular cigarettes tied up a large amount of cash flow.

Third, the abusive conducts hurted the consumers’ interests by depriving their opportunities to acquire more high-quality products.

The IMAIC fined the company RMB 5.96 million which is equivalent to 1% of annual sales for 2013.

**Analysis**

Compared with the NDRC, the SAIC has conducted most of the investigations at the provincial level via local AIC branches. Consequently, the SAIC has received less media attention than the NDRC, as the investigated companies usually have limited influence over the country. The tendency might be more marked in the future.

**Pizhou Subsidiary of Xuzhou Tobacco Company Case**

**Facts**

On September 29, 2014, Jiangsu Administration for Industry and Commerce (“JSAIC”) issued a decision to penalize Pizhou Subsidiary of Xuzhou Tobacco Company (“Pizhou Tobacco Company”) for abuse of dominance through making discriminatory treatment under the AML.  

Similar to the last case investigated by IMAIC, the JSAIC defined the cigarette wholesale market in Pizhou as the relevant market and determined Pizhou Tobacco Company owned a dominant position due to the exclusive administrative license for the wholesales of cigarette products in specified district.

The JSAIC found that Pizhou Tobacco Company imposed differential treatments on similarly situated retailers. More specifically, the company provided more frequent

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deliveries and greater supplies of popular cigarettes to one retailer and its subsidiaries compared to other retailers. Such discriminatory treatment was found to have been made without justifiable reasons.

In JSAIC’s opinion, the differential treatment hindered fair competition and violated the AML. In consideration of the company’s cooperation attitude and corrective measures, the JSAIC fined 1% of the annual sales for popular cigarette products for 2012, approximately RMB 172 million.

Analysis

This is the SAIC’s first case on discriminatory treatment and second case relating to abusement in tobacco industry. In the second half of 2014, the SAIC released several decisions relating to abuse of dominance in certain monopolistic areas, which implies the current main focus of SAIC’s enforcement.

Another noteworthy issue is that the JSAIC calculated the amount of fines based on the annual sales in 2012, which is different from the NDRC’s approach. According to Article 47 of the AML, for the undertakings abusing dominant market position, a fine of 1% to 10% of the sales amount of the preceding year shall be imposed. Obviously, for different understanding of preceding year, the JSAIC and the NDRC took different approaches. It seems that the JSAIC counted from the year when the investigation was launched. However, the NDRC counts from the year when the final decision is made.

Chongqing Gas Group Co. Case

Facts

On April 28, 2014, the Chongqing Administration for Industry and Commerce (“CAIC”), a local anti-monopoly regulator in southwestern China, fined Chongqing Gas Group Co. (“Chongqing Gas”) CNY1.79 million (approx. USD 289,288) for abusing its dominant market position by imposing unfair trade terms on the non-civil gas users.

Chongqing Gas is a state-owned public utility carrier providing natural gas to civil and non-civil users. According to the CAIC decision, the relevant market is defined as the natural gas supply market in seven districts of Chongqing city. In consideration of the market share, the reliance of users on the company, and the entry barrier which is chiefly caused by rigid regulation, the watchdog believed that Chongqing Gas possessed a dominant market position in antitrust terms.

It is stated in the CAIC decision that from 2008 to 2010, Chongqing Gas and its non-civil gas users signed supply agreements on the basis of the standard form of contract prepared by the supplier. According to the standard supply contracts, the gas charge was not purely based on the gas meter, but rather a multiplier was applied. This
term, the CAIC concluded, was unfair in nature.

Analysis

Following the 2013 Yiyuan Purified Water Case, the Chongqing Gas case sees another hit of the SAIC through regional branches to abusive practices of local public utilities under the AML. Among others, the following aspects of the case are noteworthy:

(1) Continued delegation and supervision mode in regional cases.

Article 3 of the Provisions on the Procedures for the Administrative Organs for Industry and Commerce to Investigate Cases Concerning Monopoly Agreements and Abuses of Dominant Market Positions ("SAIC’s Provisions on the Procedures") provides that the administrations for industry and commerce at the provincial-level may be authorized to investigate monopoly conducts that occur in its administrative region. However, the authorization shall be made on a case-by-case basis. Any authorized administrations for industry and commerce at the provincial-level shall not further authorize the inferior administration for industry and commerce.

The delegated enforcement is a natural response to the vast area of China. Meanwhile, the case-by-case authorization is aimed at ensuring enforcement consistency.

(2) Prolonged internal process before officially launching the investigation

The Chongqing Gas case was first revealed in May 2010, when the CAIC officials conducted regular inspection on public utilities, including water, gas, electricity, telecommunication, and broadcasting. The local regulator reported the findings to the SAIC in July 2010, and the central government agency officially authorized the investigation in June 2011. The seemingly belated launching of the investigation suggests the paucity of manpower, the heavy caseload, and the communication cost between central and local regulators.

(3) Fine calculation base not the previous year’s turnover of the decision

According to the CAIC decision, the pecuniary penalty’s calculation base is not the 2013 turnover of the Chongqing Gas, i.e., the previous year’s turnover of the decision which was handed down in 2014. Rather, the fine was calculated on the basis of the 2010 turnover of the company. It is probably because the gas company almost immediately removed the inappropriate multiplier for the gas charge and undertook a series of rectification measures, which seemed very satisfactory to the antitrust agency.

Outlook

Abuse of market dominance is a prickly area for antitrust enforcement due to the
difficulties in defining the relevant markets and proving market dominance. However, we may still get the following clues from the past enforcement actions.

First, both the SAIC and the NDRC expressed their willingness to strengthen the enforcement of the AML. Particularly, the NDRC stated that it would keep a close eye on the abuse of dominant position. It is thus fair to predict that the enforcement leaning towards the abuse of the dominant position will be more active in the foreseeable future.

Second, as suggested by the Qualcomm case and IDC case, the authorities have attached more importance to the high-tech industries, involving complex intellectual property rights issues. Given that the SAIC is preparing the guideline with regard to IP rights abuse under the AML, it seems the topic of IP rights abuse and antitrust will be put in the spotlight in the future.

In addition, the Yiyuan purified water case indicated that the SAIC and its provincial branches had improved their capacities to deal with intricate abuse of market dominance cases.

These facts together suggest that the abuse of the dominant position may be the next focus of the AML. Meanwhile, we anticipate the SAIC and the NDRC will issue detailed guidelines with regard to the calculation of the amount of illegal gains and fines. Moreover, transparency is expected to be further improved upon in future by publishing the decisions regularly.

IV. Antitrust Litigation

Legislation

- Compared with the public enforcement of the AML, the supplemental legislation for private and administrative antitrust litigations are much fewer, and there is no new legislation in this field in 2014.

Enforcement Tendency Highlight

- The year of 2014 has seen more and more private antitrust litigations triggered by end consumers.
- Traditional monopoly enterprises frequently have become the target of private antitrust litigations.

Administrative antitrust litigations, or actions against antitrust enforcement agencies have burst on the scene.

Courts seems very cautious and careful about defining the market dominance in the Internet industry.

**Significant cases**

**Huawei v.IDC**

- It is China’s first private antitrust case concerning the issue of Standard Essential Patents (“SEPs”).
- In this case, Chinese court applied the principle of FRAND (Fair, Reasonable and Non-discrimination) and calculated a licensing rate for the first time.
- The final decision has aroused great attention worldwide.

**Facts**

Huawei Technologies Co., Ltd. ("Huawei") is one of the largest telecommunications equipment makers in China and the world. InterDigital Communication Inc. ("IDC") is a non-practicing entity (NPE) holding certain numbers of 2G, 3G and 4G SEPs. In September 2009, IDC joined in the European Telecommunications Standards Institute ("ETSI") and committed to license its SEPs on FRAND terms.

In December 2011, Huawei filed the complaint against IDC and its subsidiaries before the Shenzhen Intermediate People’s Court ("Shenzhen Court"). Huawei accused IDC of abusing its market dominant position, requesting discriminatory royalty rates, and tying the licensing of SEPs with non-SEPs. Besides, Huawei requested the court to determine an appropriate royalty rate under FRAND terms, and sought damages of 20 million RMB from IDC.

The Shenzhen Court found that IDC had abused its dominant market position by: (1) tying SEPs with non-SEPs during licensing negotiations; (2) initiating investigations and proceedings in the United States with the aim of hindering Huawei from using the SEPs.

Moreover, the Shenzhen Court held that IDC failed to comply with its FRAND commitments in connection with its SEPs by: (1) requiring Huawei to pay royalties that were more than 100 times higher than those paid by Apple and other foreign handset makers; and (2) requiring Huawei to license all of its own patents obtained

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Following the decision of the Shenzhen Court, IDC filed an appeal to the Guangdong High People’s Court (“Guangdong Court”). In October 2013, the Guangdong Court upheld the previous decision made by the Shenzhen Court. It ordered IDC to pay Huawei a compensation of 20 million Yuan for the abuse of market dominance in relation to the licensing of SEPs for 3G wireless communications.

However, the Guangdong Court found that the bundling of SEPs and non-SEPs could be justified on the grounds of efficiency, and therefore IDC’s tying practice did not violate the AML. Regarding the judgment of the Guangdong Court, IDC applied a retrial to the Supreme People’s Court. The attitude of the Supreme People’s Court remains to be waited.

**Key Issues of the Case**

- **Definition of Relevant Market**

  The Guangdong Court confirmed Huawei’s definition of relevant market, that is every licensing market of each SEP constitutes an independent relevant product market, and each country of the relevant product market constitutes an independent relevant geographical market. The Guangdong Court made such conclusion based on the theory that every single SEP is unique and non-substitutable, and could not be replaced by other technologies.

- **IDC’s Dominant Market Position**

  In accordance with the final written judgment, the court is of the view that the uniqueness and non-substitutability implies IDC, as the only supplier, holding 100% market share in every SEP licensing market. IDC owns the ability to block or affect other undertakings entering into relevant markets. Furthermore, since IDC just licenses its patents and does not engage in any substantial production, Huawei could not restrict IDC through cross-licensing SEPs. Hence, the court affirmed that IDC had a dominant market position in the relevant market.

- **Abuse of Market Dominance by IDC**

  Regarding whether IDC’s behaviors constituted abuse of market dominance, the court’s analysis is as follows.

  Firstly, compared with other licensees such as Apple, Samsung, RIM and HTC, Huawei was charged obviously higher licensing fees of SEPs involved in the case by IDC.

  Secondly, it is lack of reasonability for IDC to charge obviously higher licensing fees to Huawei. The unreasonable licensing fees caused Huawei to either to give up
the relevant end market or to accept the unfair price terms, which directly restricts its competition ability.

Thirdly, IDC compelled Huawei to license all of its patents freely. However, both the number and the value of Huawei’s patents are much more and higher than IDC’s patents, which further exacerbates an unfairly high price. Moreover, IDC failed to meet its FRAND commitment, ignored Huawei’s good faith during the negotiation process, and applied for injunctions with the U.S. court. IDC attempted to force Huawei to accept the unreasonable licensing terms through making use of injunction. Therefore, there is no legitimacy for IDC to implement such behaviors.

Analysis

At present, one of the hotspots under the AML is how to calculate the licensing rate on FRAND terms and it has become a tough problem worldwide. In this case, the Guangdong Court took a comparative approach by comparing terms and conditions of the license contracts between IDC and other licensees. This approach was made two months earlier than and is similar to the calculation method that the U.S. court adopted in the Microsoft v. Motorola case. Although this case has great significance in the area of antitrust private litigation, there still are some problems in the final judgment, for example, the court didn’t take the value of patents to products into account and attached less importance to certain different conditions between the comparative license and the license in this case. Besides, it is worth discussing whether every licensing market of each SEP constitutes an independent relevant product market.

Qihoo360 v. Tencent

- It is the first antitrust case concerning the Internet industry which attracted significant attention from different sectors.
- It is the first private antitrust lawsuit decided by the Supreme People’s Court.
- It is also the milestone precedent which will be an important reference for the future interpretation and application of the AML.

Facts

Qihoo 360 Technology Co., Ltd. (“Qihoo 360”) is one of China’s largest anti-virus software companies. Tencent (Shenzhen) Co., Ltd. (“Tencent”) offers China’s most famous online instant communication platform.

On September 26, 2010, Tencent required QQ (“QQ”, a instant messaging tool

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developed by Tencent) users to install the QQ computer housekeeper software. On September 27, Qihoo360 issued a “Privacy Protector” tool, which was directly aimed at QQ. Qihoo360 declared that the tool could monitor and expose QQ’s behaviors in real time and reminded users that “a chat software” was spying on their personal documents and data without the users’ permission.

In November 2011, Qihoo360 filed a lawsuit with the Guangdong High Court under the AML against Tencent, and accused Tencent of tying the sale of QQ software to the purchase of anti-virus software and restricting QQ customers from using Qihoo’s services. Qihoo claimed damages of 150 million RMB.

In March 2013, the court ruled against Qihoo, finding that it had failed to define a relevant market and could not provide sufficient evidence to show the abuse of a dominant position by Tencent.

Qihoo appealed to the Supreme People’s Court, and the court upheld the judgment of the first instance court in the end on October 8th, 2014.

**Key Issues of the Case**

- **A Clear Definition of Relevant Market is not Necessary for Every Abuse Case**

  With respect to the relevant market, Qihoo 360 and Tencent held different viewpoints. Qihoo360 considered the relevant product market to be the market for instant messaging software and the related services (“IM services”). Tencent argued that the market definition proposed by Qihoo360 was too narrow and thus incorrect. It argued that the relevant product market should include IM services and other real-time communications tools, such as emails, microblog, etc.

  However, due to the complexity of internet products, the Supreme People’s Court did not give a clear conclusion on the boundary of the relevant market. The Supreme People’s Court offers a powerful perspective instead, which reads “in the abuse case, defining a clear relevant market is merely a tool, rather than the end, to evaluate the market power and the anti-competitive effects. Even though the relevant market has not been clearly defined, some direct evidences showing the anti-competitive effects could be enough to evaluate the alleged undertaking’s market position and the anti-competitive impact of the alleged conduct.”

- **Market Share Could be Rough and Misleading When Establishing Dominance**

  In the decision, the Supreme People’s Court, firstly, acknowledged the fact that Tencent’s market shares exceed 80 percent of both the PC and mobile IM market. What worth noting is, the court then stated another significant point, namely, it must be based on the specific circumstances to decide the position and function of market share for assessing the market dominant position. A high market share
doesn’t necessarily mean the market dominance, especially in the IM service field in which competition has dynamic characteristics.”

The Supreme People’s Court then evaluated the other relevant influential factors stipulated in Article 18 of the AML, such as the current competition in relevant market, the undertaking’s ability to control the price and quantity and other trading conditions, financial power and technology conditions of the undertaking, and entry barriers in the market, etc. After a comprehensive assessment, the court concluded that current evidence failed to support the Qihoo 360’s claim that Tencent possesses a dominant market position.

Analysis

Some critics argue that the decision may create a de facto antitrust exemption for internet companies, given that the court found Tencent with a huge market share of 80 percent does not possess a dominant position. It should be recognized that China’s internet industry is currently experiencing its “golden years”. An antitrust ruling, especially those on the abuse cases, may significantly influence commercial practices and/or competitions in this industry. Generally speaking, the court took a relatively cautious approach to examine this case which could be observed as court’s unwillingness of artificial over-interference in the internet industry and the intention to let the market to discipline the players.

Rainbow v. J&J

- It is the first private antitrust litigation concerning vertical agreements under the minimum resale price maintenance (“RPM”) clause of the AML.

Facts

Rainbow Yonghe Technology and Trade Co., Ltd (“Rainbow”) is one of the distributors of Johnson & Johnson Medical (Shanghai) Ltd., and Johnson & Johnson Medical (China) Ltd. (collectively “J&J”), and have kept a cooperative relationship with J&J for 15 years. Every year, the two parties sign a medical suture distribution contract. In January 2008, Rainbow and J&J entered into the “Distribution Contract in 2008” which stipulated that Rainbow should sell and market the suture in the designated area without lowering the price below the price set by J&J.

In March 2008, Rainbow offered a price below the level specified in a distribution contract in a bid. In July, J&J revoked the Rainbow’s distributorship and deducted the performance securities on the grounds that Rainbow reduced the resale price without permission and grabbed the distributorship outside of the designated area, which damaged the price & territory management system set by J&J.
In April 2010, Rainbow filed the lawsuit against J&J with the Shanghai No.1 Intermediate People’s Court, accusing J&J of developing monopoly agreements, and sought 14 million RMB in damage.

In May 2012, the first instance court dismissed Rainbow, finding that the plaintiff had failed to prove an anticompetitive effect of the contract. Rainbow was dissatisfied with the decision and lodged an appeal with Shanghai High People’s Court (“Shanghai High Court”).

In August 2013, Shanghai High Court overturned the first decision, and ordered J&J to compensate the loss with the amount of 530,000 RMB.

**Key Issues of the Case**

- **“Per Se Rule” or “Rule of Reason”**

  Rainbow alleged that J&J had engaged in RPM in violation of Article 14 of the AML and that it was not necessary to prove the anti-competitive effects. The Shanghai High Court held that in order to establish a claim under Article 14, it should be proved that the RPM clause has the effect of eliminating or restricting competition. In another word, a RPM clause is not per se a violation of the AML. The legality of the RPM clause is to be judged in accordance with the “rule of reason”.

- **How to Allocate the Burden of Proof?**

  Rainbow claimed that according to the judicial interpretation issued by the Supreme Court, the defendant should bear the burden of proof in proving that the horizontal agreements do not have the effect of eliminating or restricting competition, which should be applicable to vertical agreements as well. The Shanghai High Court held the view that the plaintiff should bear the burden of proof proving the antitrust effects of the vertical agreements.

- **Whether the RPM Clauses Constitute Monopoly Agreement?**

  In the appeal trial, the Shanghai High People’s Court found that the following considerations are the most important in analyzing the nature of minimum RPM, and could be treated as a fundamental approach in assessing such conducts: (1) Whether competition in the relevant market is adequate; (2) Whether the defendant has a strong market position; (3) What’s the motivation of the defendant for fixing the minimum resale prices; (4) Competitive effect of fixing minimum resale prices. Among the aforesaid considerations, the first one is the most fundamental inquiry and only when the answer is no, should any further analysis be required. After a relevantly comprehensive analysis from multiple angles (including market share, pricing power, brand influence, and control over distributors), and comparing the anti-competitive with pro-competitive effects, the Shanghai High Court reached the decision that the RPM clause involved in this case constituted the monopoly agreement.
Analysis

As we all know, the decision related to RPM publicized by the government agency is simple. In this situation, this case is helpful to mitigate the lack of transparency of how government bodies are dealing with vertical monopoly agreements. Furthermore, the courts paid more attention to economic analysis in this antitrust litigation, which redounds to enhancing the quality and the professionalism of private antitrust litigation to a significant degree.

eMiage v. Qihoo 360

- Another antitrust lawsuit regarding abuse of market dominance in the sector of internet.
- The court dismissed the case on the ground that the plaintiff failed to prove existence of market dominance of the defendant.
- eMiage appealed to the Beijing High People’s Court and the case is pending now.

Facts

In October of 2014, eMiage, a new internet company based in Beijing, sued Chinese security software giant Qihoo 360 for abuse of dominant market position and unfair competition at the Beijing No. 2 Intermediate People’s Court.

Qihoo 360’s 360 Mobile Safe is a mobile security and management software. It has allegedly been jamming MiChat and eMiPian, two smartphone apps launched by eMiage in 2012. MiChat is an internet instant messaging app and eMiPian manages mobile business cards and social networking.

According to eMiage, 360 Mobile Safe blocked or trashed scanned messages without MiChat and eMiPian users’ knowledge. On top of that, eMiage alleged that 360 Mobile Safe has a dominant position in the relevant market and it scans and monitors all apps installed on users’ smartphones, which has constitute the abuse of market dominance under the Anti-Monopoly Law of P.R.C.

On the last day of 2014 (December 31), the Beijing No. 2 Intermediate People's Court dismissed eMiage's antitrust lawsuit against Qihoo 360, finding eMiage failed to prove that Qihoo 360 possesses the market dominance.

Key Issues of the Case

- Market Share

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47 The story of this case is available at http://www.cnbeta.com/articles/358765.htm, last visited on February 18, 2015.
The court disagreed with eMiage's argument that Qihoo 360 has a market share of more than 50%. The judge in this case explained that while eMiage calculated the market share by referring to "market penetration rate" and thereby considering Qihoo 360 has market dominance, "the court maintains that argument is lack of factual bases.

Besides, the judge in this case explained that eMiage did not provide sufficient proof that Qihoo 360 has the ability to control prices, quantity and other trading conditions in the mobile security software market.

➢ Market Entry

eMiage alleged that Qihoo 360 hindered the ability of other companies to enter the market, while the court believed that the alleged behaviors were closely related to restriction of trading conditions and tie-in sales under the AML. However, the violations only occur on the condition of the Qihoo 360 holding the market dominance.

Even if Qihoo 360 possessed a market dominance position, it is not believed that the alleged behaviors by Qihoo 360 constitute an abuse by the court. According to the court, another necessary condition for abuse of dominant position under the AML is the defendant has no justifiable reasons for alleged behavior.

Analysis

It seems that this ruling of the Beijing No. 2 Intermediate People’s Court has followed the logic of the Supreme People’s Court’s ruling on Qihoo 360 v Tencent case. It once more released the signal that proving the market dominance of the defendant operated in the internet industry is not a easy job for the plaintiff.

Yunnan Yingding v. Sinopec48

● It is the first anti-monopoly lawsuit filed against an state-owned oil company in China.

Facts

Yunnan Yingding Bio-energy Co., Ltd. (“Yingding”), a bio-energy manufacturer claimed that Sinopec and the Yunnan branch of Sinopec's trading company had abused their market dominant position by refusing to incorporate the biodiesel they produced from waste cooking oil into Sinopec's distribution system, without justifiable reasons. The lawsuit was filed with Kunming

48 The story of this case is available at http://cnews.chinadaily.com.cn/2014-12/19/content_19129117.htm, last visited on February 18, 2015.
Intermediate People’s Court (“Kunming Court”) in China’s Yunnan province in January of 2014.

Sinopec argued that the reason why they rejected Yingding’s biodiesel was that Yingding had failed to provide complete trading terms and to prove the biodiesel complying with relevant national standard and had passed relevant national road and engine safety test. Besides, Sinopec denied it possesses market dominance given that there were more than 100 oil distributors in Yunnan province.

After hearing, the Kunming Court ruled against Sinopec by ordering Sinopec to incorporate the biodiesel manufactured by Yingding within 30 days of the ruling dated December 8, 2014 in accordance with the Renewable Energy Law and the AML. Both Yingding and Sinopec have appealed to the High People’s Court of Yunnan province, and the case is pending now.

Key Issues of the Case

- Relevant Product Market

It is reported that the relevant product market was defined as the sales market for petroleum products in the first instance. Nevertheless, whether the distribution channels for biodiesel are 100 percent the same with that for petroleum products is worth of more consideration. On top of that, whether oil distributors are the sole channel that biodiesel manufacturers could resort to. If the answers are not, whether the relevant product market in this case should be defined as the sales market for petroleum products remains arguable.

- What is Refusal to Deal under the AML?

Sinopec was found to have abused its dominance by refusing to deal with Yingding in the judgement of the first instance court. However, it should be recognized that the behavior could be determined as refusal to deal in the sense of antitrust law only when the purpose of the refusing party is to eliminate or restrict competition, according to antitrust theories. Specifically in Yingding v. Sinopec case, Sinopec itself does not produce biodiesel, therefore is not Yingding’s competitor. In this connection, it is hard to say Sinopec’s purpose of refusing to purchase Yingding’s biodiesel is elimination or restriction of competition.

Analysis

A lot of issues have not been clearly answered in the first instance, such as the definition of the relevant market, whether justifiable reasons existed or not, whether all conditions for refusal to deal under the AML are met. Both Sinopec and Yunnan Yingding have appealed to Yunnan High People’s Court, the above-mentioned issues are expected to be resoved in the second instance.
Shenzhen Sware Technology v. Guangdong’s Department of Education\(^4\) (pending)

- It is the first private antitrust litigation against a government agency in China.
- The plaintiff also complained to antitrust enforcement agency in the same time.

**Facts**

The Chinese software company Shenzhen Sware Technology accused the education authority of Guangdong province before Guangzhou Intermediate People’s Court, by the ground of abuse of the administrative powers. Shenzhen Sware Technology alleged that the provincial education department selected its rival, Glodon Software Co, as the sole software provider at an annual national vocational school examination after an opaque “solicitation process”. According to the plaintiff, the education department’s conduct had a tremendous negative impact on its businesses. Once the decision was made by the education department, their market share kept falling.

The lawsuit was filed on April 26, 2014 by the plaintiff, and the Guangzhou Intermediate People’s Court held a hearing on 26 June. So far the court has not issued a judgment of first instance yet. It is commented that the case could be the first private antitrust law suit against a government agency in China.

**Concrete Producers V. Jiangsu Price Bureau**\(^5\)

- It is the first time companies challenged a decision issued by Chinese antitrust enforcement agency in court.
- The court dismissed the lawsuit on the ground of expiration of statute limit, and merits of the administrative lawsuits had not been heard by the court.
- Nanjing DadiWanhong withdrew complaint before ruling.

**Facts**

Nanjing Construction Group, Nanjing Jiasheng Concrete and Nanjing DadiWanhong Concrete (collectively the “plaintiffs”) had brought the administrative lawsuit against Jiangsu Price Bureau with the the Nanjing Intermediate People’s Court on April 28, 2014. The plaintiffs alleged that Jiangsu Price Bureau imposed a too-high fine on them in a recently concluded concrete cartel investigation. This appears to be

\(^4\) The story of this case is available at [http://www.chinacourt.org/article/detail/2014/12/id/1496874.shtml](http://www.chinacourt.org/article/detail/2014/12/id/1496874.shtml), last visited on February 18, 2015.

the first time that the investigated challenged the decision issued by the antitrust authority in Chinese court.

According to the Administrative Procedural Law of P.R.C, administrative lawsuits against an administrative punishment must be filed with a court within three months of a punishment decision being received. In accordance with this rule, the court dismissed the lawsuit in September of 2014 on the grounds that the case were filed beyond statute limit of 3 months. Nanjing DadiWanhong withdrew its complaint before the ruling.

**Outlook**

In addition to the above-mentioned cases, the number of private antitrust litigations triggered by consumers have also a sharp rise in 2014.

For instance, a user of Tencent’s popular instant messaging and social networking app WeChat named Wang Xiao, had accused Tencent unfairly tied the WeChat account to its mobile payment service, Weixin Payment. The Shenzhen Intermediate People’s Court held a full-day hearing on December 2, 2014, and the case is pending now. A student at the China University of Mining and Technology has brought an antitrust lawsuit at the Nanjing Intermediate People's Court against China Telecom, alleging China Telecom abused its market dominant position. The court had convened a hearing on January 20, 2015.

It has been seen the tendency of a scaled case amount for private antitrust litigations before Chinese courts. In the meantime, the investigation target undertakings began to sue the anti-trust agencies due to the alleged unfair penalty. According to statistics, Chinese courts have closed 172 of 188 officially accepted cases as of May 2014. In the single year of 2013, 71 cases were accepted, which accounts for almost half of the aggregate and represented an increase of 40 cases compared to 2012. It is expected a continuous increased amount of private antitrust litigations in 2015.

With the leap-forward of China’s public antitrust enforcement, more follow-on privatelawsuits after administrative antitrust punishments by NDRC or SAIC are anticipated in 2015.

It should be recognized that Chinese courts’ experience in dealing with complicated antitrust actions is accumulating. However, currently there are still problems that urgently need solutions. For example, how to properly balance the burden of proof, how to deal with the relationship between private litigations and an administrative investigation, how to establish an efficient expert witness system to conduct comprehensive analysis, how to handle the litigations with both AML base and non-AML base, etc. In the long term, private enforcement is expected to be more active given the increase of business litigation and scarcity of public enforcement
V. General Conclusion

- The antitrust enforcement in China has gradually surpassed the infant phase and is developing towards a deeper level and more diverse areas. The enforcement against cartels, abuse of dominant position and ex ante control on concentrations are all involved.

- The international tendency co-exists with the Chinese characteristics in the antitrust regime of China. On one hand, the antitrust enforcement in China is increasingly in line with international practice, for example, the antitrust enforcement agencies of China sometimes commence follow-up investigations on cases that have been investigated in other jurisdictions. On the other hand, the antitrust enforcement agencies are independent of their counterparts in other jurisdictions. The fact that MOFCOM’s decisions on specific cases are often different from those in other jurisdictions is good evidence.

- The technicality feature inherent in antitrust enforcement becomes highlighted, e.g. expert witnesses’ appearance in private antitrust litigations, economists’ active role in the antitrust enforcement of not only MOFCOM, but also the NDRC and the SAIC.

- Transparency has enhanced further in the antitrust enforcement of China. MOFCOM’s decision to publish the penalty on unnotified concentrations and the live telecast on the Qihoo case in the Supreme Court are both good examples.

- The central government attached increased importance to the antitrust regime of China, which can be mirrored in the high appearance rate of the word “anti-monopoly” in the working report of the new government and communist party.

- State-owned enterprises, especially those regulated by the central government, exhibit lack of consciousness of the antitrust compliance. Meanwhile, the antitrust enforcement agencies’ touches on enterprises regulated by the central government are also scanty.

- The competition policies often interweave with the industry policy, diplomatic policy and national security policy, which restrict the independency of antitrust enforcement agencies of China to some extent.

- In the coming days, the combination of the public enforcement and the private litigation would be an unique scenery for China AML, especially with respect to an asian country which is lack of competition culture.
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