Antitrust Developments in the PRC in 2014

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Introduction

In 2014, China's Anti-Monopoly Law ("**AML**") entered its seventh year. After a number of years building up the enforcement agencies and gaining experience, the direction of China's competition regime is becoming clearer. In particular, 2014 saw an increase in the number of high profile antitrust investigations being launched as well as the introduction of a new simplified merger review procedure. While there is still room for improvement in terms of transparency of investigations and due process, more legal rules have been recently published, especially in respect of procedural rules.

This article provides a summary of the key legislative and enforcement developments under the AML over the past 12 months and examines the likely consequences these changes will have for companies doing business in China.

China's antitrust agencies and their enforcement record in 2014

Before delving deeper into the Chinese antitrust authorities' activities in 2014, it is useful to provide a brief introduction to the various authorities and their competences. Unlike other jurisdictions, China does not have an independent and unified antitrust enforcement agency. There are three regulatory authorities that enforce the AML at the national level: the National Development and Reform Commission ("**NDRC**"), the State Administration of Industry and Commerce ("**SAIC**") and the Ministry of Commerce ("**MOFCOM**").[2]

The NDRC is mainly in charge of investigations involving price-related antitrust infringements (including both anti-competitive cartel or vertical agreements and abusive conduct). According to the NDRC's press release on February 13, 2015,[3] it stepped up price supervision and antitrust work in 2014, and imposed total fines of RMB 1.8 billion (USD $287m) in major price monopoly cases (i.e., cartels and resale price maintenance). The industries investigated by the NDRC in 2014 included automotive and auto parts (3 cases), cement (1 case), insurance (1 case) and eyeglasses (1 case).

The SAIC is responsible for the enforcement against non-price related antitrust infringements. The SAIC has launched 47 antitrust investigations nationwide to date, of which 21 have been concluded as of March 2015.[4] In 2014, the SAIC initiated 15 new antitrust cases nationwide which covered various industries such as tobacco, salt, telecommunications, fuel gas and insurance.[5]

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2 Above these three agencies is a higher authority, the Anti-Monopoly Commission of the State Council. The Commission's role is mainly competition policy making and high level coordination, rather than daily regulatory work or specific enforcement activities.

3 See http://www.ndrc.gov.cn/gzdt/201502/t20150213_664556.html.

4 See http://news.xinhuanet.com/politics/2015-03/09/c_127560575.html.

5 See http://www.saic.gov.cn/jgzf/fldyfbzljz/201501/t20150128_151703.html.

The Anti-monopoly bureau of MOFCOM is the agency responsible for merger review. In 2014, MOFCOM received 262 merger filings and concluded 245, with 17 cases still ongoing.[6] According to MOFCOM, this represents a 17% increase in the number of filings since 2013.[7] Of those 245 cases cleared; 240 were cleared without conditions, 4 were cleared with conditions and 1 was blocked.

The enforcement teams of the NDRC and SAIC have expanded over the past year and the agencies are benefiting from the increase in resources. More specialised staff are being hired by the agencies and their local counterparts. Similarly, MOFCOM's Antimonopoly Bureau has grown to approximately 30 staff. While the increase in resources is to be welcomed, the enforcement teams still remain understaffed considering the size of China, and this is particularly obvious when compared with their counterparts in other major jurisdictions. However, the steady increase in resources indicates that the recent escalation of enforcement in China is a trend likely to continue.

Anti-competitive conduct

Over the past year China's antitrust authorities have come to the fore on the global antitrust stage with some notable decisions and investigations in the non-merger antitrust area. Since 2013, the investigations and fines imposed by the NDRC and the SAIC spanned a number of sectors and industries, for example, multi-nationals such as Qualcomm, Tetra Pak, Mead Johnson and Abbott have all been investigated and/or fined by the NDRC and the SAIC. In 2014, the list of companies under investigation has been extended to include other well-known multinational companies such as Microsoft, FAW-Volkswagen's Audi and Chrysler.

Even though the recent enforcement activity against foreign companies has been much publicised, investigations into foreign companies still only accounts for a small percentage of the agencies' overall enforcement actions. Data from the NDRC's official website shows that only 10 percent of enforcement actions by the NDRC involve foreign companies and the number for the SAIC is only 5 percent.[8]

Cartels

Horizontal agreements have been a priority for both the NDRC and SAIC in recent years. While the Chinese authorities have previously investigated local companies for cartel behavior, this year saw investigations into high profile international cartels which were previously the subject of antitrust investigations in other jurisdictions.

In August 2014, the NDRC announced that it had fined ten Japanese auto parts manufacturers a total of RMB1.24 billion (USD $201.6 million) for colluding to

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6 See http://www.mofcom.gov.cn/article/ae/ai/201501/20150100882509.shtml.

7 See http://www.mofcom.gov.cn/article/ae/ai/201501/20150100882509.shtml.

8 See http://www.saic.gov.cn/gsld/llyj/xxb/201410/t20141015_149027.html. The number of enforcement actions taken by the NDRC which involved foreign companies was 33 out of a total 335 cases, and the number for the SAIC was only 2 out of 39 cases.

set the prices of vehicles, auto parts, and bearings. The fines imposed ranged between 4 and 8 percent of the companies' sales in the previous year in China. Two other companies which were initially investigated – Hitachi and Nachi-Fujikoshi Corporation – were exempted from fines as they qualified for leniency and cooperated with the NDRC. Some of the bearings producers which were fined by Chinese authorities this year, JTEKT, NSK and NTN, were fined by the European Commission in March 2014 for their participation in the same international cartel.

The Japanese auto parts case is also notable as it showed the Chinese antitrust agencies are willing to re-consider a decision and reduce a fine on hearing valid arguments from the parties. A penalty decision of RMB 342.72 million (USD $55 million) was imposed on Sumitomo Electric Industries Ltd., one of 12 Japanese car parts makers found to have engaged in price fixing. Subsequently, Sumitomo argued that the calculation of the fine should have been based only on its stake in its China joint venture rather than total sales of the joint venture for the previous year. The NDRC accepted Sumitomo's argument and reduced the fine by RMB 53.32 million (USD $8.5 million).[9]

Several other cartels have been investigated and penalised by the NDRC and SAIC in 2014. The NDRC initiated an investigation in the electronic capacitor market which was triggered by a leniency application filed by a Japanese company.[10]The investigation is still ongoing and is reported to focus on a number of leading capacitor manufacturers including Panasonic, Nichicon, Nippon Chemi-con, Rubycon and Nec Tokin.[11] Similar investigations in the capacitor market are underway in other jurisdictions such as the US and South Korea. Interestingly, an NDRC official has indicated that this could be a case in which the Chinese authorities cooperate with their counterparts in those other jurisdictions.[12]

In terms of cartel enforcement against domestic companies, three cement companies were fined for their participation in a cartel to fix the ex-factory price of clinker cement. The companies, Jilin Yatai group, Jidong Cement's (Jilin branch) and North Cement, were fined between 1-2% of their previous year's sales for their participation in the cartel by the NDRC and its Jilin provincial bureau. The Chongqing Wuxi AIC investigated and fined four quarry mine operators over alleged bid rigging concerning supplies of quarry products to contractors working on a local highway. The operators had allegedly orally agreed to divide their supplies to builders of certain sections of the highway. The Chongqing Wuxi AIC ruled that the oral agreement amounted to a monopoly agreement because it served to exclude and limit competition. The four quarry operators were fined between RMB 40,000 (USD $6,000) to RMB 200,000 (USD $33,000).[13]

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9 China News, "China's NDRC cuts antitrust fine after Sumitomo fights its corner", 21 August 2014.

10 The NDRC stated the company would receive 100% leniency from fines but has not revealed the name of the company.

11 See http://app.parr-global.com/intelligence/view/1179040.

12 Comments made by Xu Kunlin, the NDRC's antitrust chief, at the American Bar Association Asia Antitrust conference in Beijing on 22 May 2014.

13 The individual operators fined and fines imposed: Zhang Xiaobo (RMB 40,000/USD

The cartel decisions in 2014 are notable for a number of reasons, in particular the level of fines imposed and the focus on international cartels. During the early years of the AML, the fines were relatively modest in most cases (less than USD $200,000). Recently, we have seen fines totaling over USD $200 million imposed in the auto parts and bearings cartel cases. The focus on international cartels is also an interesting development. Some of the recent investigations launched by Chinese authorities echo those in other jurisdictions. Given the global nature of many cartels, it is not surprising the Chinese authorities have focused on the same industries or companies which other jurisdictions have also investigated for their involvement in international cartels.

Vertical Agreements

In 2014, there was also an increased level of enforcement against vertical agreements, particularly with regard to Resale Price Maintenance (RPM).

The NDRC announced that it had launched separate enforcement proceedings in the auto industry for alleged RPM infringements against foreign car manufacturers such as Chrysler, Audi and Mercedes-Benz. In September, Shanghai DRC announced an RMB 31.68 million (USD $5.2 million) penalty against Chrysler, and Hubei DRC announced an RMB248 million (USD $40.3 million) penalty against Audi under the authorisation of the NDRC.[14]

According to the published decision on the Shanghai DRC's website, from 2012 to 2014, Chrysler signed dealership agreements containing resale price maintenance terms and conducted business practices which maintained a certain retail price. The Hubei DRC investigated Audi sales division, FAW-Volkswagen, and found that FAW-Volkswagen organised multiple meetings with 10 Hubei dealers to reach and implement car and service price agreements. FAW-Volkswagen was fined RMB 248.58m (USD $40.52 million), 6% of its annual sales in the previous year, for playing a leading role in organising the price agreements between dealers. While the level of fines was made public by the agencies, the final decisions were not published.

In May, seven manufacturers of eyeglasses and contact lenses including Johnson & Johnson, Essilor Optical and Nikon were investigated and fined by the NDRC for setting minimum resale prices. The NDRC fined five of the manufacturers a total of more than RMB19 million (USD $3.1 million). The remaining two companies were exempted from fines due to their cooperation with the NDRC.

While there appears to be a number of enforcement actions taken for RPM and vertical restraints this year, it is still very much a grey area in China and there is no uniform analytical framework that applies to the assessment of vertical restraints. For example, unlike the EU, there is no 'safe-harbour' regarding market shares in vertical agreements and it is not clear how the exemption criteria in Article 15 of the AML are applied. This is one area in particular where

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$6,000), Wen Aiyuan (RMB 70,000/ USD $11,000), Wen Xianxue (RMB 200,000/USD $33,000), Wu Gongzheng (RMB 90,000/USD $15,000).

[14] Both Shanghai DRC and Hubei DRC are regional offices of the NDRC.

agency guidelines or further publications of enforcement decisions this year would be particularly welcomed.

Dominance

Over the past year we have seen a number of dominance investigations in the information and technology sector. In July 2014, the SAIC announced that it had conducted dawn raids at the offices of Microsoft and launched an investigation concerning Microsoft's alleged abuse of market dominance. The investigation is still ongoing.

In February 2015 the NDRC imposed its highest fine to date on Qualcomm. The fine of RMB6.088 billion (approximately USD $975 million, 8% of Qualcomm's 2013 revenue in the Chinese market) was levied on Qualcomm for infringements relating to its licensing of standard essential patents ("**SEPs**"). The NDRC's investigation covered the wireless SEPs licensing market and the baseband chip market, in both of which Qualcomm held a dominant position. The abusive activities conducted by Qualcomm included: 1) charging unfairly high patent licensing fees, 2) the bundled licensing of essential and non-essential patents, and 3) providing unreasonable conditions in the sale of baseband chips. In addition to the fine, Qualcomm also agreed to a rectification plan relating to its licencing of Chinese SEPs. Under the terms of the rectification plan, Qualcomm agreed to:

i. Stop the bundling of essential and non-essential patents in Qualcomm's licensing practice;

ii. Use a royalty base of 65% of the net selling price with royalty rates set at 5% for 3G devices (including multi-mode 3G/4G devices) and 3.5% for 4G devices (including 3-mode LTE-TDD devices) that do not implement CDMA or WCDMA;

iii. Allow existing licensees to elect whether to take the new terms for sales of the branded devices for use in China since January 1, 2015; and

iv. Stop conditioning the baseband chips sale on signing a licensing agreement with terms found to be unreasonable by NDRC, and permit the chip customers to change the terms of the licensing agreement.

The most significant section of the rectification plan is the condition agreed upon by both the NDRC and Qualcomm to use 65% of the net selling price of the end device as the royalty base. However, the rationale for the 65% royalty base is unclear at the moment and is not elaborated on further in the published decision. This landmark fine and rectification plan will likely have a long lasting impact on the licensing practice of telecommunication SEPs for both domestic and foreign parties in China.

Qualcomm has previously faced antitrust probes in other major jurisdictions, including Japan, South Korea and the EU. In addition, it was recently reported

that the FTC, the US antitrust enforcement agency, are also investigating Qualcomm.[15]

In May 2014, InterDigital announced that the NDRC had suspended its antitrust investigation based on the commitments given by the company. Under the commitments provision in the AML, an investigation can be suspended if the company makes commitments to take specific measures to eliminate the anti-competitive effects of its conduct within a certain time frame.

InterDigital was investigated for abusing its dominant position by charging discriminatively high patent license fees to China's communications equipment manufacturers, and for bundling the licenses for non-standard essential patents with standard essential patents. InterDigital's commitments included, among others, that;

- InterDigital will abide by the FRAND (fair, reasonable and non-discriminatory) principles when negotiating and entering into licensing agreements with Chinese manufacturers;

- InterDigital will not bundle the licensing of its 2G, 3G and 4G wireless SEPs, nor will it require that a Chinese manufacturer agree to a royalty-free or reciprocal cross-license of the Chinese manufacturer's SEPs; and

- prior to commencing any action against a Chinese manufacturer in which InterDigital may seek exclusionary or injunctive relief for the infringement of any of its wireless SEPs, InterDigital will offer the Chinese manufacturer the option to enter into expedited binding arbitration under fair and reasonable procedures to resolve the royalty rate and other terms of a worldwide license under InterDigital's wireless SEPs, and under certain conditions, will refrain from seeking exclusionary or injunctive relief against the company.

The SAIC's investigation into Tetra Pak continued in 2014. The investigation concerns alleged abuse of dominance by the Swedish food and beverage packing company in the food processing and packaging market. According to recent reports, a decision is expected in the coming months.[16] In March, the SAIC launched an investigation into Shankai Sports International, the authorised vendor and exclusive agent for package tours to the 2014 FIFA World Cup in Brazil for China, Hong Kong and Macao. Shankai was accused of bundling various products and services, such as game tickets, accommodation, food and beverages, and requiring customers to purchase set bundles. The SAIC suspended the investigation in June after Shankai proposed a number of commitments. The investigation was formally closed in January 2015 as Shankai had fulfilled the commitments it had previously given.

The stepping-up of antitrust enforcement in 2014 was not only evidenced by the increasing number of investigations and fines but also by the enforcement approach of the Chinese authorities. It was relatively rare for companies to be dawn raided in the past, however this year the Chinese authorities raided large

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15 See https://sg.finance.yahoo.com/news/us-stocks-flat-qualcomm-sinks-153243892.html.

16 See http://app.parr-global.com/intelligence/view/1204517.

multinational companies such as Daimler and Microsoft. Foreign companies doing business in China should ensure that their global compliance programs include China and the possibility of dawn raids by the Chinese antitrust agencies.

Merger control

2014 has seen some interesting developments for China's merger control regime with the introduction of a simplified merger regime and the first public decisions imposing fines on companies for failing to notify a transaction.

On June 17, 2014, MOFCOM blocked the proposed P3 Network shipping alliance between Maersk, Mediterranean Shipping Company (MSC) and CMA CGM. This decision was notable for two reasons, firstly it is only the second transaction which MOFCOM has prohibited since the AML came into force six years ago,[17] and secondly, the alliance was cleared by antitrust and sector regulators in Europe and the USA.

Under the proposed alliance, Maersk, MSC and CMA CGM, the three largest container shipping liners in the world, would establish a long term operational alliance known as P3. The Transaction was notified to MOFCOM on 18 September 2013 and blocked in April 2014 after a 9 month extended Phase II review. In its decision, MOFCOM considered the P3 proposal would result in a tighter and more integrated form of cooperation than previous liner agreements; in particular members could consolidate certain trade routes including Asia–Europe, the Transpacific and Transatlantic routes. MOFCOM also considered market concentration would increase as members would have a combined market share of 46.7% and customers (shippers) would be worse off given they had little buyer power to constrain the alliance.

MOFCOM's review of Microsoft's acquisition of most of Nokia's devices & services business concluded in April. Although the parties had relatively small market shares in China, MOFCOM raised concerns that a refusal by Microsoft to licence its android patents could restrict new entrants entering the android smartphones market. To alleviate these concerns, MOFCOM imposed a number of patent licencing commitments on the acquisition; Microsoft were required to continue to offer licences on a FRAND basis, and to refrain from seeking injunctions against infringers of Microsoft's SEPs that manufacture smartphones in China.

MOFCOM's conditional clearance of Thermo Fisher's $13.6 billion acquisition of Life Technologies Corporation (Life Technologies) illustrated an increased sophistication in MOFCOM's market analysis. MOFCOM identified considerable overlaps between the two companies' businesses, with 59 relevant product markets in total. The agency's investigation focused on the product markets which would be highly concentrated post-merger. In order to address MOFCOM's concerns in those relevant markets, certain conditions were imposed on the acquisition, for example Thermo Fisher would divest its global cell culture business, sell its 51 percent stake in a Chinese bioengineering subsidiary, and undertake to reduce prices of certain products

[17] The first transaction to be prohibited was Coca-Cola/Huiyuan in 2009.

in markets where MOFCOM had concerns about the level of concentration post-acquisition.

Both the decision in the P3 case and Microsoft/Nokia illustrate that MOFCOM is not afraid to take decisions which run counter to those of its European and US counterparts. Furthermore, the decision in Microsoft shows that MOFCOM will scrutinise any deals which could adversely affect domestic Chinese manufacturers, in particular those cases where intellectual property rights and SEPs are at issue.

Civil litigation

2014 saw the Chinese courts take a more open and active approach to antitrust litigation. In particular, we have seen the courts expand the scope of civil and administrative antimonopoly litigation to include cases such as civil suits against cartel organisers, administrative suits against government agencies' abuse of administrative power and challenges against competition authorities' penalty decisions at a court of law. Some of the more high-profile cases are summarised below.

In April and July, Chinese telecommunications company ZTE and Taiwan-based technology company Arima filed abuse of market dominance complaints against InterDigital in Shenzhen and Nanjing courts, respectively. These lawsuits are based on similar grounds to *Huawei v InterDigital*, namely alleging that InterDigital had abused its dominant market position by engaging in excessively high pricing and tying arrangements in SEP licensing. In addition, like in the Huawei case, ZTE also requests the court to determine a FRAND royalties rate for InterDigital's patents.

A customer of the popular mobile phone voice and messaging service, WeChat, filed an abuse of dominance claim against WeChat owner, Tencent. The plaintiff, claimed that Tencent's requirement that users wishing to sign up for a WeChat 'friends group' had to first provide their bank details and link their account to Weixin Payment, Tencent's mobile payment system, amounted to illegal tying. A hearing took place in December and the case is ongoing.

In October, Tencent was successful in defending a private antitrust claim initiated by Qihoo Technologies at the Supreme People's Court. Qihoo provides computer security software and alleged that Tencent had been abusing its dominant market position by forcing its users to choose between Tencent's QQ and Qihoo's 360 products, and by tying its QQ Apps Manager with QQ instant messenger. The court of first instance ruled in favor of the defendant Tencent and found no abuse of dominance in the instant messaging services market. The case was appealed to the Supreme People's Court, the first antitrust private damages case taken before the Supreme People's court.

In its landmark decision, the Supreme Court affirmed the first instance ruling and provided detailed insights on a number of issues relevant to the abuse of market dominance analysis. Regarding the issue of market definition, the Supreme Court noted that delineation of the relevant market is an important means to evaluate the defendant's market power and the influence of the alleged abusive activities on market competition, but it is not the end itself.

Thus, it is not necessary to clearly and explicitly define the scope of the relevant market in every abuse of dominance case as long as the desired goal can be achieved. On the issue of dominance, the Supreme Court held that all relevant factors in Article 18 of the Anti-Monopoly Law need to be considered in evaluating whether a defendant has market dominance.

While the Supreme Court acknowledged that Tencent's share in the relevant market for its popular instant messaging service exceeded 80%, it nonetheless found that Tencent did not have market dominance due to the low entry barriers in the market, the large number of competitors, Tencent's inability to control trading conditions such as the price and quantity of the products, and the ease in which consumers can switch to competing products. On the issue of abuse, the Supreme Court held that Tencent's actions in forcing its users to choose between its popular instant messaging service and Qihoo's security software was not abusive, largely because other competitors gained notable market share at the expense of Tencent as a result, indicating its insignificant negative impact on consumers and market competition. In addition, with regard to whether Tencent committed illegal tie-in sales by bundling its popular instant messaging service with its own security software, the Supreme Court concluded that it was permissible under the Anti-Monopoly Law because of Tencent's proffered justifications, its lack of impact on the market competition, and the availability of the option for consumers to delete the tied product from their systems after the product is installed.

In December a trial court ruled against Sinopec, the state owned oil company, in an abuse of dominance claim taken by Yingding, a bioenergy company. Yingding alleged that Sinopec had abused its dominance by refusing to purchase and distribute biodiesel made by Yingding without justifiable causes. The Court ordered Sinopec to stop refusing to purchase and distribute biodiesel made by Yingding, and to accept Yinding's products into its distribution channels. Sinopec has appealed the decision to a higher court and that appeal is pending.

2014 also saw the first court appeal of an AML enforcement decision in *Nanjing Construction v Jiangsu Price Bureau*. Unfortunately, the case was dismissed on procedural grounds so the court did not decide on the merits of the appeal. The initial acceptance of the case by the court indicates that an appeal of an enforcement agencies decision is possible, however such appeals of administrative decisions in China are still quite rare and it remains to be seen whether appeals will succeed on the merits.

New legislation and other developments

Introduction of simplified merger notification procedure

MOFCOM issued the long-awaited *Interim Provisions on the Standards Applicable to Simple Cases of Concentration of Undertakings* in February 2014.[18] The adoption of the simplified merger procedure brings MOFCOM in

[18] The official enactment of the simple case filing regime started on April 18, 2014, when MOFCOM issued the Interim Guidelines for the Notification of Simple Cases of Concentrations of Undertakings ("Simple Case Procedures").

line with other international antitrust agencies which have similar simplified merger review procedures for transactions which are unlikely to raise competition concerns.

Under the simplified procedure, once notifying parties have concluded that the transaction triggers the notification thresholds under the AML,[19] they can then assess whether the transaction falls within any of the simplified procedure thresholds.[20] Since its introduction, MOFCOM has quickly gained a proven track record in handling such cases in a quick and efficient manner: as of November 2014, the average review time was 24 days from the official acceptance of the case to final clearance.

While the introduction of the simplified procedure has been largely positive, there are still some uncertainties which notifying parties should bear in mind. Firstly, there is no publicly available data regarding the length of the pre-acceptance period of simplified case filings. Secondly, MOFCOM has not made any announcement on cases which were rejected from the procedure or why those cases were rejected from qualifying. Thirdly, if a transaction needs to remain confidential before closing, the simplified procedure is not appropriate given MOFCOM's public announcement and public consultation of the simplified filing.

Overall, experience to date suggests the simplified procedure is working well which is good news for businesses involved in global transactions which have little or no effect on competition in China.

Reforms to MOFCOM's Remedy Rule

On December 4, 2014, MOFCOM issued its new merger remedy rule and guidance which entered into effect on January 5, 2015.[21] The Remedy Rule covers both substantive and procedural rules in relation to formulation and implementation of remedies as well as possible modification of remedies. In particular, the legislation and guidance outlines the criteria for divestitures and upfront buyers of such divestitures in problematic merger cases.

Although restrictive conditions/remedies have rarely been imposed by MOFCOM over the past six years (24 cases out of more than 900 filings), the

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19 For any merger or acquisition that is considered as a 'concentration of undertakings', a pre-merger notification must be filed with MOFCOM if the relevant parties' turnover exceeds any of the following thresholds, as set out in the Notification Thresholds Rules: (i) the total worldwide turnover of all parties to the transaction in the previous financial year exceeded RMB 10 billion and the PRC turnover of each of at least two parties to the transaction in the previous financial year exceeded RMB 400 million; or (ii) the combined PRC turnover of all parties to the transaction in the previous financial year exceeded RMB 2 billion and the PRC turnover of each of at least two of the parties to the transaction in the previous financial year exceeded RMB 400 million.

20 The Interim Guidelines outline the procedural rules governing the simplified review procedure, including the pre-filing consultation, the materials to be submitted, the public announcement requirement, and the possibility that a simple case filing could be revoked.

21 *Provisions on Imposing Restrictive Conditions on Concentration of Undertakings (for Trial Implementatio*n) (the "Remedy Rule") The Remedy Rule will replace MOFCOM's *Provisional Measures on the Implementation of Divestiture of Assets or Businesses Imposed on Concentration of Undertakings* (the "Divestiture Measures").

Remedy Rule is likely to provide useful guidance for parties involved in transactions that have anti-competitive effects which could be resolved through remedies. The new mechanisms introduced such as 'up-front buyer' may be challenging to the merging parties but indicate MOFCOM's willingness to adopt well-recognised practices in other jurisdictions.

Penalties for failure to comply with PRC merger rules

On December 8, 2014, MOFCOM published three administrative penalty decisions for non-compliant behavior relating to PRC merger control rules.[22] Since the AML came into effect on 1 August 2008, MOFCOM has investigated dozens of cases and imposed fines for non-compliance in accordance with the provisions of the AML; however, this marks the first time such penalty decisions for non-compliance with the merger control rules have been published.

- *Failure to notify an acquisition:* MOFCOM imposed a fine of RMB 0.3 million (USD $48,000) on Tsinghua Unigroup ("Unigroup") for its failure to notify its acquisition of RDA Microelectronics ("RDA"). RDA is a leading domestic chip maker and Unigroup is a technology company and an operating subsidiary of Tsinghua Holdings Co., Ltd. which is a state-owned company in China.[23] MOFCOM concluded that the acquisition should have been notified to MOFCOM before implementation since the turnover of both the acquirer and the target met the turnover thresholds under the China merger control regime.

- *Non-compliance with MOFCOM's conditional clearance:* In December 2014, two penalty decisions were both levied on Western Digital. The fines related to the failure to comply with the "hold separate" remedy imposed by MOFCOM in its conditional clearance of Western Digital's acquisition of Hitachi's hard disc drive business.[24] MOFCOM found that Western Digital broke the condition twice in 2012 and 2013 and imposed fines of RMB 0.3 million on Western Digital for each. According to the decisions, Western Digital admitted the non-compliance and has undertaken to correct the actions taken.

While the level of fines imposed in these recent non-compliance cases is relatively low, these decisions show that MOFCOM is being proactive in dealing with issues of non-compliance. Therefore, it is important that the business community be alert and weigh-up the risk of non-compliance before making business decisions which could be reviewed and sanctioned by MOFCOM in future.

Revised Guidance on Notification of Undertakings

The penalty decisions are available on MOFCOM's official website: http://tfs.mofcom.gov.cn/article/ckts/.

[23] According to MOFCOM's penalty decision, Unigroup had signed an acquisition agreement with RDA on 11 November 2013 to acquire all of RDA's shares for USD $907 million. The acquisition was completed on 18 July 2014.

[24] Under the "hold separate" condition, Hitachi's hard disc drive business (named Viviti Technology) should continue to operate as an independent competitor in the relevant market for two years after the closing of the transaction.

In June 2014, MOFCOM issued revised guidance on the notification of undertakings. The revised guidance includes updates on the timing for notifications, how to calculate revenues, pre-notification consultations, and factors considered for determining shareholder control. As regards timing of notifications, the guidance states companies should file a notification after a merger agreement is signed but before the deal is implemented. Detailed methodology on how to calculate the revenues of the merging parties is also provided. Furthermore, parties can now apply to MOFCOM for a pre-notification consultation and MOFCOM will provide guidance on issues of concern based on the information provided by the parties.

Conclusion

The Chinese antitrust agencies have made great strides over the past number of years. The agencies are still learning and are benefiting greatly from increased cooperation with other antitrust agencies around the world. Chinese authorities now frequently interact with competition authorities in other jurisdictions. The NDRC and the SAIC have both signed memoranda of understanding with the DOJ and FTC in the United States, as well as the Fair Trade Commission of South Korea, amongst others. This list was extended in 2014 with China entering cooperation agreements with Russia, Australia and Kenya.[25] While great strides have been made, there is room for improvement in 2015.

More focus on transparency and due process by the Chinese authorities is needed throughout the investigation process, for example, there are no 'state of play' meetings between the parties under investigation and parties have no access to the authorities' case files at any stage of the investigation. Publishing decisions would also greatly improve transparency and provide useful guidance. The recent decision by the NDRC to publish some of its decisions is a welcome move but more is needed, the decisions that have been published are very brief and lack the detailed antitrust analysis when compared with the decisions of the European Commission.

The increased enforcement by the Chinese antitrust agencies looks set to continue in 2015. As Professor Huang Yong, a leading Chinese antitrust academic and the deputy chairman of the advisory board to the Anti-monopoly Commission pointed out, "antitrust enforcement by Chinese authorities will become the new norm".[26] Foreign companies doing business in China will have to adjust themselves to the changing regulatory environment and focus more on antitrust compliance to mitigate their exposure.

25 See http://www.mofcom.gov.cn/article/ae/ai/201501/20150100882509.shtml.
26 See http://www.ce.cn/xwzx/gnsz/gdxw/201409/24/t20140924_3586600.shtml.