

Antitrust Enforcement: China Ups the Ante

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Introduction

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. Many of these investigations, involving large multinational companies (MNCs), have invoked criticism from some in the international business community with allegations of discrimination against foreign companies. While MNCs at the centre of recent antitrust probes may feel aggrieved, as many companies do when faced with an antitrust investigation, there may be more substance to these investigations than simply discriminating against foreign companies. In this article we will elaborate on this further and provide some possible alternative explanations as to why foreign MNCs have been investigated of late. We will also compare the recent enforcement actions with other enforcement actions taken by the Chinese antitrust authorities against domestic companies - cases which have not grasped international headlines in the same way as investigations against MNCs in China.

While the Chinese authorities have shown that competition law compliance is now a real consideration for global companies doing business in China and have made great strides in terms of improving enforcement, there is still room for improvement in the authorities' practices and procedures. In particular, the law needs to be clearer in certain areas, and transparency of the authorities' investigation process needs to be improved so businesses can have more certainty on when their activities may breach Chinese competition law.

Background on the Chinese antitrust agencies

Before delving deeper into the Chinese antitrust authorities' recent investigations, it is useful to provide a brief introduction to the Chinese authorities and their various competences. The *PRC Anti-Monopoly Law* ("AML") was introduced in 2007, therefore the enforcement of competition law in China is still quite new. This is worth noting when comparing China with other major jurisdictions such as the US and EU which have built up a vast body of case-law and best practices over decades of competition law enforcement.

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 for Industry and Commerce ("SAIC") and the Ministry of Commerce ("MOFCOM").² This article will focus on the non-merger enforcement activities of the NDRC and the SAIC. The NDRC is mainly in charge of investigations involving price-related antitrust infringements (including both anticompetitive cartel or vertical agreements and abusive conduct) while the SAIC is responsible for the enforcement against non-price

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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.**

related antitrust infringements.³ It is worth noting that these three ministries responsible for the enforcement of the AML each have numerous other responsibilities, not just competition enforcement. As well as the resource burden this places on the agencies, which already have limited resources,⁴ the different mandates can lead to potential conflicts of interests which may not be the case with antitrust enforcement agencies in other jurisdictions.

Summary of high profile cases involving MNCs

The investigations and fines imposed by the NDRC and the SAIC on MNCs have spanned a number of sectors and industries. MNCs such as Qualcomm, Tetra Pak, Danone (Dumex), Mead Johnson and Abbott have been investigated and/or fined by the NDRC and the SAIC since 2013. This year the list of companies under investigation has been extended to include other well-known brands such as Microsoft, FAW-Volkswagen's Audi and Chrysler.

The authorities' investigations to date against MNCs have focused on price fixing agreements, Resale Price Maintenance (RPM), and abuse of dominance;

- **Cartels:** Companies subject to cartel investigations include major Japanese auto parts and bearing producers such as Sumitomo Electric Industries Ltd. and Mitsubishi Electric Corporation,⁵ and major suppliers of liquid crystal displays (LCD) from Korea and Taiwan including Samsung Electronics and LG Display.
- **RPM:** Automobile companies such as FAW-Volkswagen, Chrysler, and Daimler, and infant formula producers such as Danone (Dumex), Mead Johnson and Abbott have been investigated by the NDRC.
- **Abuse of dominance:** Companies such as Qualcomm, IDC and Tetra Pak have been investigated this year.

The stepping-up of antitrust enforcement by the Chinese authorities this year was not only evidenced by the increasing number of investigations but also by the enforcement approach and unprecedented fines levied by the authorities. For example, while it was relatively rare for companies to be dawn raided in the past, the Chinese authorities recently raided companies like Daimler and Microsoft. Similarly the level of fines has increased over the past number of years. During the early years of the AML, the fines were relatively modest in most cases (less than US \$200,000). Recently, we have seen fines of over US \$200 million imposed in the auto parts and bearings cartel cases. With the Chinese antitrust authorities gaining expertise and confidence in initiating and conducting investigations, it looks like this trend is set to continue.

³ MOFCOM is the agency responsible for merger review.

⁴ According to press reports, the NDRC has an enforcement team of about 20 people. It is said that the SAIC has a smaller team, but no verified number is available. Although there is no clear data regarding the size of enforcement teams, it is evident that relevant authorities are short of manpower considering the size of China, and this is particularly obvious when compared with their counterparts in other major jurisdictions.

⁵ Other Japanese producers at the centre of the auto parts and bearings cartel investigations include; Hitachi Automotive Systems Ltd., Nachi-Fujikoshi Corp., Denso Corporation Nsk Ltd., Yazaki Corporation, NTN Corporation, TEKT Corporation, Mitsuba Corporation, Furukawa Electric Co., Ltd and Asian Industry Co., Ltd.

Discrimination against foreign companies?

The increased enforcement by the Chinese authorities has provoked criticism from some commentators claiming the recent investigations are politically motivated and are being used as a way to protect Chinese domestic companies at the expense of foreign competitors. AmCham China, the US business trade group in China, recently referred to foreign companies as being “singled out” in the Chinese investigations.⁶ But there may be more to the story than the Chinese authorities simply singling out foreign MNCs. When one considers the industries in question, the previous antitrust investigations which some of those companies have faced in other jurisdictions, as well as the fact that many domestic firms have been investigated and fined by the authorities, the Chinese investigations may not seem so strange or one-sided. We will discuss each of those points in turn.

“Selective” in the industries investigated

Being young antitrust agencies, the Chinese antitrust authorities have seemed to focus on industries which have major impacts on everyday lives of consumers so as to increase their profile as serious enforcers to consumers. This explains why we are seeing an increasing number of investigations involving products such as auto vehicles, infant formula, optical lens and gold jewelry. Unfortunately, in some of these sectors (such as auto vehicles and infant formula) many of the big players are foreign companies.

Target Companies

The Chinese antitrust authorities have attracted criticism for being selective in the companies they investigate since many of the investigations concern MNCs. However, data from the NDRC’s official website shows that only 10 percent of enforcement actions by the NDRC involves foreign companies and the number for SAIC is only 5 percent.⁷ The impression that Chinese authorities are selectively pursuing MNCs may come from the fine levels imposed on these companies, which are themselves the focus of headlines. Given that the MNCs are global companies, these factors make the investigations involving MNCs more high-profile which catches a lot of attention from home and abroad. For example, in the Infant Formula case there were a total number of nine domestic and foreign infant formula companies investigated for alleged RPM and altogether fined approximately RMB 668 million (US \$109 million). Biostime, a domestic infant formula producer was levied with the highest percentage fine amounting to RMB 163 million (US \$26.54 million), 6 percent of its previous year’s turnover,⁸ while Wyeth and Meiji, two foreign producers, received full immunity for cooperation with the NDRC. Nevertheless the press seemed to focus only on

⁶ See <http://www.amchamchina.org/article/13239>

⁷ See http://www.saic.gov.cn/gslld/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.

⁸ Under the AML, the Chinese antitrust agencies may impose a fine up to 10 percent of the undertaking’s previous year’s turnover. Mead Johnson received the largest fine of RMB 203.76 million (USD 33.19 million), although the percentage of Mead Johnson’s fine was 4 percent of its previous year’s turnover.

the investigation of foreign producers; the fact that a domestic company attracted the highest percentage fine got little media attention.⁹

Therefore, while the investigations into foreign companies have grabbed the headlines, it should be noted that the Chinese authorities have been actively pursuing domestic companies in recent years. For example, the SAIC in one of its first few cases in 2011, investigated and fined domestic concrete companies and an industry association in Lianyungang, a city in the coastal Jiangsu Province.¹⁰ Similarly, the NDRC fined a number of rice noodle producers in Nanning and Liuzhou (southern China's Guangxi Autonomous Region) for a price fixing cartel in March 2010.¹¹ Even state-owned companies have not escaped antitrust scrutiny in China; China Telecom and China Unicom were previously subject to antitrust probes for alleged abuse of dominance in the broadband access and inter-network settlement sector.¹²

During the same period (from the beginning of 2013 to now) when the NDRC seemed to increase its enforcement efforts against MNCs, there has also been quite a number of investigations against domestic Chinese firms by the Chinese authorities. In February 2013, state-owned distillers Kweichou Moutai and Wuliangye Yibin were fined 449 million RMB (US \$72.5 million) for alleged RPM practices; in September 2014 the NDRC published 23 administrative penalty decisions made against the Insurance Association of Zhejiang Province (a trade association) and 22 insurance companies doing business in the same province, for a total of more than 110 million RMB (US\$18 million).

In addition, it appears that most of the recent investigations have been initiated on the basis of whistleblowing rather than by the authorities' targeting specific companies. According to press reports, the Qualcomm and IDC investigations were both triggered by whistleblowers.¹³ Therefore, both domestic and foreign companies face anti-trust risk equally since any company may be reported by a whistleblower.

Why a sudden peak of enforcement against foreign companies?

During the earlier years of the implementation of the AML, enforcement focused mainly on domestic companies. Prior to 2013, foreign companies' names rarely appeared on the Chinese antitrust authorities' lists of reported investigations. However, for each type of anticompetitive conduct for which MNCs were recently investigated, the authorities first started with investigations into domestic companies. For example, the authorities had investigated numerous local cartels in various foodstuffs sectors before the NDRC initiated the first international cartel investigation - the LCD panels case in 2013. This indicates the Chinese authorities initially took a relatively cautious approach in terms of taking

⁹ See <http://shipin.people.com.cn/n/2013/0808/c85914-22485692.html>.

¹⁰ See <http://finance.ifeng.com/roll/20110303/3553748.shtml>

¹¹ See <http://www.chinanews.com/cj/cj-gncj/news/2010/03-30/2198963.shtml>

¹² The investigation was initiated in 2011. In February 2014, the NDRC claimed that it is still reviewing applications from both companies for a termination of the investigation based on commitments.

¹³ See the press report from Sina.com:

<http://finance.sina.com.cn/chanjing/gsnews/20140220/032018272422.shtml>.

enforcement actions against MNCs. Why are we now seeing a sudden peak of enforcement against foreign companies? Rather than simply explaining this phenomenon as the selective and discriminatory enforcement against MNCs, an alternative explanation—at least plausible explanation—is that after a few years accumulating enforcement experience from investigations of small and local domestic companies, and internal training of their staff, the authorities are now becoming more confident in launching investigations against MNCs. If this is the case, it would be a big mistake for foreign companies to assume the lack of enforcement against them in the early years would stay forever. MNCs will have to adapt themselves to such a change in the enforcement climate in China.

Similar antitrust investigations in other jurisdictions

Large MNCs being the targets of antitrust investigations is not unique to China. These companies are often targets of competition authorities around the world. One of the purposes of antitrust law is to prohibit collusion or abuse of market power and maintain dynamic market competition; therefore, authorities are likely to pay more attention to the behaviour of companies with strong market positions.

Some of the recent investigations launched by Chinese authorities echo those in other jurisdictions. For example, some of the LCD panel producers fined by Chinese authorities had been previously fined by the EU in 2010, e.g., Samsung Electronics, LG Display and AU Optronics, amongst others. Also, Japanese auto parts and bearings producers which were fined by Chinese authorities this year, JTEKT, NSK and NTN, were fined by EU in March 2014 for their participation in the same international cartel. Qualcomm was previously investigated in other major jurisdictions, including Japan, South Korea and the EU for abuse of dominance and it was recently reported that the FTC, the US antitrust enforcement agency, has opened an investigation into Qualcomm.¹⁴

Taking these factors into account, the recent investigations may not seem so strange. China is not alone in conducting investigations in these sectors or investigating large MNCs for possible anticompetitive behaviour. Given the global nature of many cartels, it is not surprising the Chinese authorities have focused on the same MNCs which other jurisdictions have also investigated for their involvement in international cartels.

However, while the enforcement activity has increased over the past year, the Chinese authorities still have improvements to make in terms of transparency and due process in investigations and providing greater clarity on how certain types of behavior are viewed by the authorities in China. Some of the issues in connection with transparency and due process may reinforce the perception of discriminatory enforcement against MNCs.

¹⁴ See <https://sg.finance.yahoo.com/news/us-stocks-flat-qualcomm-sinks-153243892.html>

Room for improvement

More focus on transparency and due process in investigations

Under AML and relevant regulations, Chinese antitrust authorities are not obliged to publish every decision they make, which means disclosure is discretionary, rather than an obligation required by law.¹⁵ Recently the NDRC has started to publish full texts of some of its decisions which is a welcome move.¹⁶ While these developments are likely in response to criticisms on the lack of transparency of its actions, more is needed. For example, the decisions that have been published are very brief and lack the detailed antitrust analysis when compared with the decisions of the European Commission.

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 the parties have no access to the authorities' case files at any stage of the investigation. This is quite different to the procedures in other jurisdictions where due process is adhered to in antitrust investigations. For example, in EU cartel investigations, the European Commission will issue a statement of objections to the parties which outlines the objections raised against them. At this stage the companies can examine the documents on the Commission's investigation file, reply in writing and request an oral hearing to present their comments on the case before representatives of the Commission.

Another area for improvement is to ensure companies being investigated (both foreign and domestic companies) can have adequate legal representation to protect their legitimate rights throughout the investigation. Recently, there had been so much speculation and concern about companies' outside counsels being excluded from defending them in investigations that a senior NDRC official had to clarify at an international conference organized by the ABA in China that the agencies would "welcome all companies efforts to defend themselves" in their investigations.¹⁷ Interestingly, in the recent SAIC investigation of Microsoft, the SAIC made it clear in its public announcement that Microsoft's PRC counsels "witnessed the whole process of the dawn raid"¹⁸ This suggests the authorities have been making conscious efforts to ensure a company's right to legal representation is respected. Nevertheless, unlike in western countries, legal representation in Chinese government investigation proceedings is still a relatively new concept. In practice, some

¹⁵ See Article 44 of AML, Article 12 of the NDRC Procedural Provisions and Article 25 of AIC Procedural Provisions.

¹⁶ From July 2013 to October 2014, the SAIC disclosed 18 penalty decisions in total on its official website: <http://www.saic.gov.cn/zwgk/gggs/jzzf/>
The NDRC disclosed 12 decisions relating to Japanese auto parts and bearing producers on 18 September 2014 and 23 decisions on domestic insurance companies on 2 September and 3 September 2014. http://jjs.ndrc.gov.cn/fjgd/index_1.html

¹⁷ PaRR report, "China's NDRC 'welcomes' companies to defend themselves in investigations" - ABA Antitrust in Asia, 26 May 2014.

¹⁸ See SAIC's public announcement at: http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729_147122.html.

officials may be under the wrong impression that the involvement of outside counsels means companies are choosing to be uncooperative and confrontational. Therefore, they may be hostile to outside counsels assisting their clients in an investigation. It will take time to get such officials to appreciate the role of outside counsels and change their misperceptions.

More guidance on provisions of the AML

Some legal rules need to be elaborated on, such as those with regard to the leniency policy. Although both the SAIC and the NDRC provide several provisions regarding exemption and reduction of the penalties, these provisions are still very general. It is not explicitly stated how companies can put down a marker, how much and what kind of evidence would help to get leniency, and the likelihood of getting leniency once the threshold for leniency is met. The implementation of the leniency mechanism largely depends on the discretion of enforcement authorities.

Greater clarity on how the authorities view certain agreements or behaviour would also be useful. RPM is subject to the rule of reason analysis in the US which requires balancing the benefit and harm of the relevant conduct, whilst it is presumably anti-competitive under TFEU Article 101(1) in EU. In China, although Article 15 of AML provides some justifications for RPM which is otherwise prohibited under Article 14 of AML, it had not been clear until recently what position the Chinese agencies would be taking in terms of enforcement against RPM.¹⁹ Without familiarity with practices in China, investigated companies might unreasonably count on economic analysis for mitigated punishment or even exemption.

Time frame for investigations

Unlike antitrust investigations in other jurisdictions, the time frame for investigations in China is very short. This is largely to do with the constrained resources of the authorities who prefer to wrap up investigations quickly. For example, the investigation into the Japanese auto parts cartel lasted less than a year in China, whereas it lasted over a year in the US and more than two years in the EU. Similarly the investigation into Qualcomm which was announced in early 2014 is expected to be completed soon,²⁰ whereas the investigation into Qualcomm in the EU and Japan took more than two years. With such short time periods for investigations, the companies, their relevant employees and outside counsels are all under huge pressure which might restrict their abilities to effectively respond to inquiries by the authorities. Such quick time frames also raise due process concerns given that antitrust investigations are usually complex involving review of voluminous documentation and detailed market investigations.

¹⁹ Recently the NDRC took a series of enforcement actions against RPM, making it clear that in practice RPM almost always amounts to *per se* violation which can rarely be justified.

²⁰ See <http://tech.sina.com.cn/t/2014-11-14/doc-icczmvm9860121.shtml>

These factors combined could explain in part why MNCs have felt they have been discriminated against by the Chinese authorities. During antitrust investigations in other jurisdictions, such as the EU or US, the MNCs would have had a different experience in terms of due process, transparency and treatment of their legal representation. Foreign companies and their advisors should understand that the rules and procedures in China are different from those in other parts of the world and the Chinese authorities apply these rules, however strange they may seem from a western point of view, to domestic and foreign companies alike.

Improved Enforcement Actions

While there is room for improvement, much progress has been made in legislation and procedures. More legal rules have been promulgated and draft rules published, especially in respect of procedural rules, e.g., *the Several Provisions on Regulating the Price-Related Administrative Penalty Power* promulgated by the NDRC. Furthermore, the enforcement teams of the relevant authorities are expanding steadily. More qualified staff are being hired by the NDRC and its local counterparts. Increasing resources again indicates that in the future enforcement actions will not diminish.

Despite shortcomings in relation to due process during the investigation, the Chinese antitrust agencies have recently shown a willingness to re-consider a decision and reduce a fine on hearing valid arguments from the parties. In August the NDRC sent a penalty decision of RMB 342.72 million (US \$55 million) to Sumitomo Electric Industries Ltd., one of 12 Japanese car parts makers found to have engaged in price fixing under Chinese antitrust law. Subsequently, Sumitomo argued that the calculation of the fine should have been based on its stake in its China joint venture rather than the 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 (US \$8.5 million).²¹

The agencies have also made use of the commitments provision in the AML under which an investigation will be suspended if the company makes commitments to take specific measures to eliminate the effects of its conducts within a certain time frame. If the company fulfills its commitments, the agency may terminate the investigation, otherwise it may decide to restart the investigation.²² Recently the NDRC investigation of IDC was closed using this procedure.

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

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

²² See Article 45 of Anti-Monopoly Law, Articles 16, 17 and 18 of the NDRC Procedural Provisions and Articles 17, 18 and 19 of AIC Procedural Provisions.

memoranda of understanding with the DOJ and FTC in the United States, as well as the Fair Trade Commission of South Korea, and they often hold seminars with their U.S. and EU counterparts. International best practices on transparency in investigations should be an area where the Chinese antitrust authorities can learn from their peers. The Chinese antitrust agencies have recently started to publish some decisions, which is a good start.

However, foreign companies and their advisors should understand that the rules and procedures in China are different from those in other parts of the world. This not only relates to different interpretations of certain types of behaviour, for example RPM, but also to the way investigations are carried out. By improving transparency in the investigations, companies will be better informed on how to comply with the AML. Greater transparency on the investigation process will also give investigated companies reassurance that they are being treated fairly.

In the early years of enforcing the AML, the NDRC and the SAIC focused their attention on domestic companies. Now, as the agencies gain confidence and learn from other jurisdictions, they are also tackling large MNCs doing business in China. 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. The increased enforcement by the Chinese antitrust agencies against both foreign and domestic companies looks set to continue. 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".²³ Foreign businesses will have to adjust themselves to the change of the regulatory environment in China and focus more on antitrust compliance to mitigate their exposure.

²³ See http://www.ce.cn/xwzx/gnsz/gdxw/201409/24/t20140924_3586600.shtml.