How Chinese Antitrust Law Has Affected the Business Operations in China: Perspective of Life Science Industry

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Introduction

China's life science industry is growing at a rate of more than 20 percent annually, and is expected to continue at that pace for the next decade. By 2020, the market will be worth an approximated USD 900 billion, up from USD 108 billion in 2005.With the forthcoming surge of the aging population in China, a new round of urbanization, better availability of healthcare, and the increased expenditure on healthcare by the government, the continuous boom of the life science sector will be positively expected to grow rapidly. Such rapid growth is a magnet for global life science enterprises. A number of multinational companies have made expansions within China in the last few years, whether by mergers and acquisitions or by the establishment of a joint venture. For example, in early 2013, Catalent Pharma Solutions announced two joint ventures in China for its Softgel Technologies and Clinical Supply Solutions businesses. Further, in the midst of 2012, Johnson and Johnson acquired Guangzhou Bioseal Biotechnology Co., Ltd. for the purpose of business expansion in China.

Though the market of life science is experiencing rapid growth and is sufficiently attractive, the significant legal challenges do exist at the same time. In addition to the traditional attention given to legal risks pertaining to anti-commercial bribery, antitrust legal issues have become more and more important for life science companies, an effect that has had great impact on their business operations such as distribution agreements and joint research and development with competitors. Just recently, the National Development and Reform Commission ("**NDRC**"), one of the enforcement authorities under the PRC Anti-monopoly Law ("**AML**") has indicated that the industry of pharmaceuticals has fallen into its scope of top targeted sectors. In addition, the Ministry of Commerce in China ("**MOFCOM**"), in charge of merger control under the AML, conditionally cleared the acquisition of Gambro by Baxter, which demonstrated that the merger review had essential effects on the cross-border M&A transaction, whether on timeframe or on the outcome. As such, in order to share with the growing market of life science while to avoid running afoul of the AML, one should pay special attention to the active enforcement of the AML in China, thus ensuring the business activities compliant with the AML and incorporating such legal requirement into its commercial arrangement.

To address the antitrust concerns currently surrounding the business operations of life science companies in China, this article will focus on the following aspects: (1) merger control; (2) price monopoly; (3) non-price monopolistic conduct; (4) private antitrust litigation; and (5) abuse of administrative powers to restrict or eliminate competition.

Merger Control

Understanding MOFCOM

In China, MOFCOM is the sole agency responsible for conducting the antitrust review of concentration of undertakings. Within MOFCOM, the Anti-Monopoly Bureau ("AMB") enforces the provisions of merger control under the AML; currently there are seven divisions, namely Division of Office, Division of Competition Policy, Division of

Consultation, Division of Law, Division of Economy, Division of Supervision & Enforcement, and Division of Coordination for the Anti-monopoly Commission.[1]With slightly more than 30 personnel in total as opposed to its burdensome workload of reviewing hundreds of cases each year, MOFCOM is quite limited in its working staff. Such insufficiency of human resources has continuously been a significant barrier to working more effectively on the merger review process.

Jurisdiction

Generally, according to AML and practices by MOFCOM so far, whether a specific transaction is subject to notification before MOFCOM will depend on whether the two conditions are satisfied: (1) the transaction falls into the scope of "concentration of undertakings" under AML; and (2) the turnover of the undertakings concerned to the transaction meet threshold trigger.

(1) Categories of Concentration of Undertakings

Pursuant to AML and the current practice MOFCOM, normally the M&A transaction (whether share deal or asset deal) is qualified as a concentration of undertakings. In addition, acquisition of control or the ability to exert decisive influence over another undertaking by contract or other means will fall into the scope as well. In practice, MOFCOM will determine whether a transaction is qualified concentration of undertaking will focus on whether there is change of control of undertaking on a lasting basis, which is similar the approach in the EU. MOFCOM largely refers to the notion of change of control adhering to the international competition practices, mainly concentrating on the elements of the influence over management and operation decision making of an undertaking. As such, even a minority investment in an undertaking while having influence on the commercial strategic decision whether through the level of board of director or other means, will be regarded as concentration of undertakings, For example, the acquisition of not more than a 30 percent stake in Hong Kong Lijun International Co., Ltd. by Sichuan Kelun Pharmaceutical Co., Ltd. fell into the scope of undertaking of concentration and was notified before MOFCOM.

Further, although there is no explicit provision involving the establishment of a JV by two (or even more) undertakings under the AML, it is generally attributed by MOFCOM to the

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[1]Under AML, there is special agency called Anti-monopoly Commission (the "AMC"), which is be responsible for organizing, coordinating and guiding anti-monopoly work and exercises certain powers, including without limitation researching and drafting relevant competition policies, and arranging for the investigation and assessment of the overall status of competition in the market and issuing assessment reports. Currently, the AMC is headed by Wang Yang, one of China's vice premiers, who is in charge of trade and investment policies. The deputies of the AMC are officials from MOFCOM, NDRC, and SAIC. The AMC is overseeing the three enforcement authorities and is operating from a separate working office which is located within MOFCOM and headed by a vice minister of MOFCOM.

regime of merger control in practice. Until December 10, 2013, MOFCOM has issued a total of three conditional clearance decisions pertain to the JV establishment, despite none in life science sector. But it has been reported that most of the JV transactions involving the multinational companies in this industry have secured antitrust clearance from MOFCOM. For illustration, the establishment of a joint venture between and by Pfizer and Zhejiang Hisun Pharmaceuticals was notified before MOFCOM and eventually was approved unconditionally. Moreover, it should be noted that currently MOFCOM does not distinguish the concept of a full-functional JV, which is the only kind of JV subject to notification in EU.

(2) Threshold

AML and *the Provisions of the State Council on Notification Standards of Concentration of Undertakings* ("**Threshold Provisions**") set out the notification turnover criteria.[2]Under that threshold, most of the transactions involving multinational companies will be required to conduct the process of merger review and to secure the antitrust clearance before closing.

Timeframe

Under the AML, notification is required prior the implementation of the transaction. Until MOFCOM grants its approval, parties to the transaction should be very careful to avoid taking certain steps for the implementation of the transaction, which may be considered gun-jumping. Similar to the competition practice in EU or the US, there is also a pre-notification consultation mechanism in China. Undertakings can contact with MOFCOM on specific issues prior to notification.

In accordance with AML, the review process of a concentration of undertakings includes two phases: (a) phase I: preliminary review, when MOFCOM has an initial period of 30 calendar days to undertake a first-stage review upon the official acceptance of the transaction; (b) phase II: further review, which lasts 90 calendar days and can be extended if the review is not completed yet. MOFCOM has the authority to extend this stage for the maximum of 60 calendar days upon the application by parties to the concentration or at its own discretion. It is noteworthy that China also differs from practices of the EU in that the start-up of further review in China does not necessarily imply serious competition concerns on the concentration.

[2]A concentration of undertakingsshall be subject to notification upon satisfying one of the following thresholds:(a) the combined global turnover of all undertakings concerned in the last fiscal year exceeding RMB 10 billion (about USD 1.6 billion), and the China-wide turnover of at least two undertakings respectively exceeding RMB 400 million(about USD 65 million) during the last fiscal year; or (b) the combined China-wide turnover of all undertakings concerned in the last fiscal year exceeding RMB 2 billion (about USD 327 million), and the China-wide turnover of at least two undertakings respectively exceeding RMB 400 million (about USD 65 million)during the last fiscal year.

At present, MOFCOM officially accepts the notification only where it regards the materials complete, which might make the preparation and supplemental of the materials last for a number of several months. In Baxter's acquisition of Gambro, notification materials were officially accepted on March 12, 2013, more than two month after they were submitted to MOFCOM on December 31, 2012.

In addition, a few recent conditional clearance decisions issued by MOFCOM indicate that MOFCOM may require parties to withdraw notification and make a new notification to further extend the time limitation of review. This trend makes the duration of review even more unpredictable. So far, a new notification prolongs review by a range of 3 to 6 months respectively in these cases. This will definitely have great impact the timeframe for M&A transactions, in particular the cross-border deals.

Further, as mentioned above, the lack of sufficient staff plays a negative role in such prolonged review process. Finally, according to the AML, during the procedure of merger review MOFCOM is required to consult on the opinions from other competent ministries (such as the NDRC and Ministry of Industry and Information Technology, as the case may be), which also consumes sometime of the process.

In short, though the capacity building of MOFCOM is positively expected and its experience is increasing, the time required to secure the antitrust clearance is still comparatively time-consuming, which will continuously have an essential impact on M&A transactions.

Substantive Test

According to the AML, when appraising whether a transaction has the effect of eliminating or restricting competition MOFCOM is authorized to consider a wide range of factors, among which market share of the undertakings concerned, HHI index and market entry of the relevant market are primary factors that MOFCOM will weigh most. MOFCOM has also issued *the Interim Provisions on Assessment of the Impact of Concentration of Undertakings on Competition*, which became effective on September 6, 2011 to offer guidance in this regard.

Based on conditional clearance decisions issued by MOFCOM so far, it is noticed that some analysis methods similar to other antitrust jurisdictions are frequently adopted, including "unilateral effect," "coordinated effect," "foreclosure effect" and "leveraging effect," For instance, In Baxter's acquisition of Gambro, MOFCOM reasoned that the proposed transaction would give the merged entity high market share in the relevant market, to raise unilateral effect consequently. After the transaction, the coordinated effect would also be compounded since Baxter and another company Nipro, two major competitors in a relevant market, had executed OEM agreement sharing competitive sensitive information such as costs and quantities.

For another illustration, in Novartis' acquisition of Alcon, MOFCOM distinguished two concerning relevant markets: ophthalmic anti-inflammatory and anti-infective combination products ("**infectoflam**"), and lens care products. In the infectoflam market, despite

Novartis' promise to exit China's market provided in its notification materials, MOFCOM still showed competition concerns of unilateral effect. In the lens care products market, MOFCOM noted that one of Novartis' subsidiaries has in place a distribution agreement with Haichang Contact Lens Co., Ltd ("**Haichang**"), currently the largest manufacturer and supplier of lens care products in China. Therefore the parties would be able to collude on pricing and other issues with Haichang.

In addition, specific features of the life science sector are also taken into account by MOFCOM in its competition assessments. In Baxter's acquisition of Gambro, both CRRT and HD products were deemed markets with entry barriers to a certain extent, due to required intellectual properties and great investment needed to conduct R&D and to establish a distribution system. Similarly, in Pfizer's acquisition of Wyeth, MOFCOM considered that pharmaceutical R&D is characterized by high cost and a long cycle, leading to difficult entry.

Further, with the increasingly sophisticated experience in merger review, MOFCOM may also clear a transaction without conditions while other oversea competition authorities grant conditional clearance. For instance, in Johnson's acquisition of Synthes, though the US agency conditionally cleared this transaction, MOFCOM approved it unconditionally.
In summary, MOFCOM is learning more and more to determine whether the specific concentration of undertakings will raise competition concerns by adopting the international converged practice, such as the application of coordinated effect and unilateral effect. Such practice will guide life science companies to make self-assessments from the AML dimension at an early stage of deal structuring, thus ensuring the proposed transaction will not trigger competition concerns in the Chinese jurisdiction, and if such concerns exist, to prepare the negotiation of restrictive conditions with MOFCOM (discussion below).

Restrictive Conditions (Remedies)

According to AML and *Measures for the Review of Concentration of Undertakings*, MOFCOM may impose three types of restrictive conditions on a transaction: (a) structural remedies, *i.e.* requirements that the parties divest specific assets or businesses; (b) behavioral remedies, *i.e*. requirement that parties provide the use of the network or essential facilities to other parties, or license key technologies (including patent, know-how and other intellectual properties), or terminate exclusive agreement; (c) combinations of structural and behavioral remedies.

In the life science sector, divesture is often adopted, as the cases of Baxter's acquisition of Gambro and Pfizer's acquisition of Wyeth. In Baxter's acquisition of Gambro, MOFCOM further determined that Baxter must completely terminate its OEM production agreement with Nipro regarding HD products within Chinese territory by March 31, 2016, a supplemental behavioral remedy. Novartis was also ordered to terminate its distribution agreement with Haichang within 12 months after closing the transaction in its acquisition of Alcon. It can be concluded that behavioral remedies are more likely to be imposed when

coordinated-effect concern is raised in the parties' cooperation with other major competitors in the relevant market.

In short, similar to other competition and antitrust enforcement agencies, MOFCOM will not outright ban a concentration of undertaking, though it raises serious competition concerns. This practice by MOFCOM allows life science companies to bargain for favorable or acceptable conditions for the green light on specific transaction from MOFCOM.

Pricing Monopoly

Understanding the NDRC

The NDRC is in charge of pricing monopoly and has established the functional department of Price Supervision and Anti-Monopoly Bureau. The Bureau consists of three divisions for enforcing AML, namely the Division I of Price-related Anti-Monopoly Investigation, Division II of Price-related Anti-Monopoly Investigation, and Division of Competition Policy and International Cooperation. It has reported about 40 people currently within the NDRC for enforcement of AML. In addition, it is noteworthy that at present the local counterparts of the NDRC at the provincial level are authorized to enforce AML within their respective jurisdiction. A number of provinces have established their own bureaus for enforcing AML, such as Jiangsu Province[3] and Guangzhou Province.[4] Such structure of enforcement institution arrangement has empowered NRDC to investigate the pricing monopolistic conducts very broadly within mainland China.

Moreover, on November 4, 2013, the NDRC announced that it will accelerate the establishment of the price complaint platform of "12358." Such a national platform also demonstrates that the NDRC intends to integrate regional resources into a unified, potent enforcement force.

Considering that most of the life science companies conduct business not only in first-tier cities, but also covering the remaining part of mainland China, the rapid growth of capacity building and its enforcement structure do place increasing regulatory challenges on this industry.

Monopoly Agreement

(1) Horizontal Monopoly Agreement

Under AML and the relevant regulation,[5]in terms of horizontal monopoly agreements in relation to price, NDRC enforces the anticompetitive conduct of price-fixing, which is a

[3]In July 2013, the Jiangsu Price Bureau established its sub-bureau of anti-monopoly, which performs well.
[4]In November 2012, the Guangdong Price Bureau established its sub-bureau of anti-monopoly, which has investigated a few pricing monopoly cases so far.
[5]*The Regulations on Anti-Price Monopolies*, promulgated by NDRC on December 29, 2010, became effective on February 1, 2011.

hardcore restriction in China. Similar to other matured competition and antitrust jurisdictions, the form of such conducts can vary from the direct price-fixing to agreed formula to calculate the price. For instance, in the case of price-fixing in the gold industry, the Shanghai Gold &Jewelry Trade Association and five gold retailers were imposed a fine of RMB 10.1 million (approximately USD 1.63 million). Such undertakings reached the self-implementing rule on the price of gold and platinum in Shanghai, which had fixed the calculation method and calculation formula of the retail price, and fixed price range.
In the meantime, to date, some trade associations are absent of knowledge of the AML and continue the tradition of an operation model, which includes discussion on the price and output in China. Therefore, the NCRC tends to investigate the trade association and thus police the cartel. In that sense, life science companies shall be very cautious in attending any kind of meetings organized by trade association, such as keeping the representative attendants aware of AML knowledge and implications.

(2) Vertical Monopoly Agreement

In terms of a vertical monopoly agreement, NDRC regulates two aspects: (a) fixing resale price, and (b) fixing the minimum resale price ("Minimum RPM"). Particularly, the enforcement of Minimum RPM has been active and even aggressive by the NDRC since the beginning of 2013. Earlier last year, the local counterparts of NDRC fined two well-known PRC domestic alcohol companies, Wuliangye and Moutai, for entering illegal vertical agreements and implementing Minimum RPM, respectively. The total amount of such fines has reached RMB 449 million (about USD 72 million). Further, last August, the NDRC issued a decision to impose fines on a number of baby infant formula manufacturers for conducting Minimum RPM. The total penalties imposed on all companies added up to RMB 670 million (about USD 110 million). In these two cases, the NDRC shed some light on how to determine whether the application of Minimum RPM will amount to contravention of AML, namely focusing on the following aspects: (a) Whether Minimum RPM will eliminate competition between distributors of the same brand (intra-brand competition), (b) whether Minimum RPM will remove inter-brand competition because of its negative effect within the industry, and (c) whether the usage of Minimum RPM will harm the interests of consumers. Though such guidance by the NRDC arguably lacks detailed analyses and remains ambiguous, it at least provides a preliminary analytical framework.

In practice, quite a number of life science companies have contained the Minimum RRM provision in distribution agreement (such as the Johnson case to be discussed below). Such arrangements are facing potential antitrust legal risk in China in light of the continuously active enforcement of Minimum RPM by NRDC. Just recently, it was reported that the NDRC has initiated antitrust investigation against one of well-known global life science company for Minimum RPM.

Abuse of Market Dominant Position

As for abuse of market dominant position pertain to price, NDRC enforces the following:(a) selling products at unfairly high prices or buying products at unfairly low prices, (b) selling products at prices below cost without valid justification, and (c) other abusive conducts in

relation price, such refusal to deal, exclusive dealing and discriminatory treatment.[6] The NDRC stipulates the details on such abusive conducts in *The Regulations on Anti-Price Monopolies*.

Actually, concerning the abuse of market dominance in the sector of life science, NDRC's took its first enforcement action against two PRC domestic companies. In that case, Shandong Weifang Shuntong Pharmaceutical Co., Ltd. ("**Shuntong**") and Weifang Huaxin Medicine Trade Co., Ltd. ("**Huaxin**") were accused of unlawfully controlling the raw material of compound reserpine tablets and increasing its sales price to boost profits. At that time, there were only two domestic producers of promethazine hydrochloride, the major raw material used to make compound reserpine tablets, a high blood pressure medication that is widely used in China. According to the NDRC's statement, Shuntong and Huaxin entered into contracts in June 2011 with the only two producers, prohibiting the producers from selling the compound to third parties without the approval of Shuntong and Huaxin. After gaining control over the source of the raw material, the two companies then increased its sales price from less than RMB 200 per kilogram to as much as RMB 300 to 1,350 per kilogram. Many reserpine manufacturers were forced to halt production and could only supply medical institutions from their remaining inventories. Given the two companies' malicious monopolistic conduct, NDRC has ordered them to stop illegal acts immediately and imposed a fine of RMB 6,877,000 (about USD 1 million, including confiscated gains of RMB 377,000 and a penalty of RMB 6,500,000) on Shuntong, and a fine of RMB 152,600 (about USD 25 thousand, including confiscated gains of RMB 52,600 and a penalty of RMB 100,000) on Huaxin.

It is understood that some life science companies might hold a significant part of the market share in a niche market. In that circumstance, such undertakings shall be very careful on reviewing its current commercial arrangements, including, without limitation, price aspects of distribution agreement, rebate policy and discriminatory price, since such business operations will be likely to fall afoul of AML with respect to abuse of market dominant position.

Non-Pricing Monopolistic Conducts

Understanding SAIC

State Administration for Industry & Commerce ("**SAIC**") is responsible for non- price-related monopolistic conducts in China, with its functional unit of Anti-monopoly and Anti-unfair Competition Enforcement Bureau. SAIC has been devoted to accelerating enforcement lately. On July 29, 2013, the online platform for antitrust cases handled by SAIC was put into operation, issuing all 12 cases with their detailed decisions that have been investigated and closed by SAIC since the effectiveness of AML. During the past five years, SAIC authorized counterparties in many provinces to handle a total of 23 antitrust

[6]Article 13, 14, 15 and 16 of *The Regulations on Anti-Price Monopolies.*

cases. In contrast with the NDRC, the SAIC takes the form of specific authorization, that is, to authorize provincial counterparties on a case-by-case basis.

The spotlight on SAIC also derives from its draft *Provisions on Prohibiting Abusing Intellectual Property Rights to Exclude or Restrict Competition* under deliberation. Now the draft rule is updated with the 7th version, which distinguishes notable changes compared with the 6th. Its promulgation is highly expected to make up for the overlap field of antitrust and intellectual property, a sheer blank in China so far.

Monopoly Agreement

In addition to pricing horizontal monopoly agreements regulated by the NDRC, other kinds of anticompetitive practices fall into the authority of the SAIC, such as market allocation and joint boycott. In *the Regulations of the Industry and Commerce Administration Authorities on the Prohibition of Monopoly Agreement Behaviors* promulgated by the SAIC, every type is detailed specifically. From the SAIC enforcement precedents released on its website, it can be readily concluded that market allocation is a primary concern and many horizontal monopoly agreements are reached via industrial association.

Regarding vertical monopoly agreements, so far neither any specific guidance nor enforcement decision was released by the SAIC. Such a situation does create the uncertainty for life science companies since there are quite a lot of commercial arrangements in distribution agreement that will be likely fall into the radar of the AML, including but not limited to territorial allocation, customer allocation, exclusive dealing or supply, non-compete clause and more. The best practice for managing such potential legal risk is to make the self-assessment on a case-by-case basis in accordance with the AML jointly by reference to the best practice in other jurisdictions.

Abuse of Market Dominant Position

Non-pricing abusive conducts under AML include: refusal to deal, exclusive dealing, tying, imposing unreasonable terms and discriminatory dealing, all with the precondition that no justification can be acceptable. Likewise, *the Regulations of the Industry and Commerce Administration Authorities on the Prohibition of Abuse of Dominant Market Positions* by SAIC as well details every prohibition and provides for available justifications. So far, no case released has been enforced by SAIC in life science sector.

Private Antitrust Litigation

Similar to the US, in China, more and more undertakings have begun to use the AML to resolve the commercial disputes, thus bargaining for favorable compensation or protecting commercial interests. Such a trend has been accelerated by the effectiveness of *Provisions on Issues Concerning the Application of Law in relation to Trials of Monopoly Civil Dispute Cases*(the "**Judicial Interpretation**") on June 1, 2011. The private enforcement of AML by Chinese people's courts is expected to active in the coming years.

Minimum RPM: Rainbow vs. Johnson & Johnson: The first private antitrust action, *Rainbow vs. Johnson & Johnson* ("**J&J Case**"), in the sector of life science is in relation to the Minimum RPM. This case also arose from the dispute between supplier and distributor. In 2010 the plaintiff Rainbow sued J&J for imposing a Minimum RPM in their distribution agreement and sought for reimbursement. The allegations were dismissed by Shanghai First Intermediate People's Court because Rainbow couldn't sufficiently prove that the Minimum RPM practice in agreements had caused a restrictive or eliminative effect on competition. This decision entailed the adoption of rule of reason. As opposed to per se illegal doctrine which dooms Minimum RPM itself illicit, rule of reason means to determine whether a case concerning RPM is illegal on the basis of analyzing its impact on competitiveness.

Affirmation on applying rule of reason to Minimum RPM: Although Shanghai Higher People's Court (the "**Court**") gave the reverse decision, it reconfirmed applying rule of reason to Minimum RPM. It reasoned that, according to the wording of AML, it is indispensable for horizontal monopoly agreements to have eliminative or restrictive impact on competition. Since vertical monopoly agreement harms competition less than horizontal one, it is reasonable to define its violation more strictly. Thus eliminative or restrictive impact on competition is also a necessary prerequisite of vertical monopoly agreement. From this perspective, rule of reason was affirmed herein.

Burden of Proof: The Court still advocated that the burden of proof concerning RPM lies in the plaintiff. The Judicial Interpretation does say that in horizontal monopoly agreement disputes, the defendant is burdened to prove that horizontal monopoly agreement does not eliminate or restrict competition. However, the reversal of burden of proof concerning horizontal monopoly agreement cannot be extended to vertical monopoly agreement.

Laying out Analytical Framework: Furthermore, unlike the view from NDRC focusing on the effect of intra-brand and inter-brand competition, and the harm on consumers' interests, and the Court has provided four key factors in evaluating competitive effects of Minimum RPM, including: (a) whether the relevant market is fully competitive; (b) whether the defendant has a strong market position; (c) the motivation of the defendant conducting Minimum RPM; and (d) the actual effects on competition of Minimum RPM.

This case typically sheds light on Chinese courts' attitudes towards Minimum RPM, that is, the rule of reason. It is not yet expressly settled whether the adoption will be generalized to other types of vertical monopoly agreements by courts. For life science companies, it is useful to make reference to this case to decide whether Minimum RPM can be retained at the distribution agreement without contravening AML.

Huawei vs. InterDigital Group: Another latest private antitrust case is also noteworthy to address, though it is not relating to the life science sector. On October 28, 2013, Guangdong Higher People's Court (Higher Court) gave the final adjudication, favoring the claims of Huawei Technologies Co., Ltd. (Huawei) against InterDigital Group (IDC), who is the holder of the 3G essential patent. It is the first case in China where an essential patent is involved. IDC was affirmed to have abused its market dominant position and shall compensate

Huawei RMB 20,000,000.[7] Huawei initiated the lawsuit as a defense against patent infringement litigation brought by IDC in the US, and seemed to succeed in at least a partial counterattack.

Since some of foreign life science companies have entered into or will conclude transactions on patent licensing with certain commercial terms (such as the exclusive licensing and comparative high royalty in China), such arrangements might face antitrust risk in light of the AML, in particular where there is any dispute arising from the performance of such an agreement. Antitrust review and assessment of such transactions become essential in China.

Abuse of Administrative Powers to Restrict or Eliminate Competition

Traditionally, where foreign companies enter into the Chinese market, they bargain or secure the attractive commitments (preferential exclusive granting of access or conclusion of long-term services agreement) from local governments. Such commitments make foreign investors more comfortable or confident during the process of the subsequent business operation locally, even sometime by the form of letter of covenant. With the enactment of the AML, such support from local government shall be dealt with and treated very carefully by foreign life science companies.

Under the AML, there is a special chapter prohibiting the abuse of administrative powers to restrict or eliminate competition in the relevant market, including but not limited to restricting or excluding the external enterprises from entering into local market by setting out threshold. Currently, there is typical case in this field. In 2011,a local government of China's Guangdong province issued an order requiring the use of GPS services of a private company to monitor the transportation of all hazardous goods in that city. The Guangdong Provincial Administration for Industry and Commerce ("**Guangdong AIC**") investigated after receiving complaints from competitors, and concluded that the specific administrative order constituted an abuse of administrative power under AML. The Guangdong AIC sought the guidance of the SAIC, then made a recommendation to Guangdong's provincial government to correct the abuse. On June 12, 2011 Guangdong's provincial government ruled that the order violated Articles 8 and 32 of the AML (namely, abuse of administrative power to eliminate or restrict competition).

Therefore, in view of the aforesaid case, life science companies are advised to pay careful attention to the commitment or promise from local governments for the purpose of attracting investment. Otherwise, such granting might be invalid or declared revoked due to the contravention of AML.

Conclusion and the Look Ahead

[7]See Ye Ruosi, Zhu Jianjun & Chen Wenquan, "Determination of Whether Abuse of Dominance by SEP Owners Constitutes Monopoly: Comments on the Antitrust Lawsuit *Huawei v. InterDigital*," Electronics Intellectual Property, vol.3, 2013

Precedents in life science sector are far from enough to provide a clear-cut framework of antitrust enforcement in China. But clues are gaining so that companies can approach cautiously under certain guidance. It is necessary to further stress the instability where antitrust enforcement is directed in China. Therefore, any high-profile case deserves close attention, and additional regulations are very crucial including some pending legislation due to the vague nature of the AML. The only certainty is that antitrust has been, and will be affecting companies' business in China, perhaps to an extent beyond our expectation.

For Chinese enterprises, it is a hard transition period when they need to adapt themselves to the underdeveloped field of antitrust compliance. China and its domestic companies, including state-owned enterprises and private enterprises, have been long under planned economy time without the concept of monopoly, particularly in the life science sector whose development depends mostly on government funding but hardly on market competition. But things are different now. Antitrust enforcement is speeding up in recent years and referring to other matured jurisdictions increasingly. And domestic enterprises are also expanding globally, in the face of intense competition and rigid compliance requirements from other countries.

For foreign companies, situations might be even more unpredictable. Sometimes, it appears that Chinese authorities might take special attitude than their counterparties in other jurisdictions. For example, some transactions subject to merger control are cleared unconditionally in other jurisdictions, while MOFCOM imposes remedies. Under other cases, Chinese authorities seem to adopt a milder attitude, for example towards RPM. Thus foreign companies will have to conduct at least as cautiously as they do in other jurisdictions. In addition, since there are few general principles in China, most cases need to be analyzed on a case-by-case basis. Therefore it's better for multinational companies to adopt China-specific antitrust guidance and employ local consultancy when having branches in China. And despite the declared non-discriminatory enforcement between domestic and foreign companies, it is still sensible for foreign companies to adopt a more prudent code than their domestic peers.

To look forward, life science will be definitely one of antitrust hotspots in China. And with the expected introduction of more special implementing rules (IP and antitrust) and guidance (vertical restraints), life science companies will have more knowledge and understanding of ensuring compliancy with the AML in China. We should pay special attention to the rapid development of private antitrust litigation in China, and the new types of actions that will be likely occur in the coming years, such as litigation concerning reverse payments. In short, enforcement authorities and market subjects are both exploring the path ahead. Conflicts may be inevitable during this period, so interactions and communications make a lot of sense. But what we can finally reap is optimistic. Growing competition will bring China a boom in life science sector, a sector full of innovation and welfare.