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## I. INTRODUCTION

Even though the Anti-Monopoly Law of the People's Republic of China ("AML")[2] has been in force for a relatively short span of time, antitrust law enforcement in China has attracted the attention of observers around the world. The main reason concerns curiosity regarding how the Chinese competition authorities review global M&A transactions. In the past few years, the Chinese Ministry of Commerce ("MOFCOM") has approved a series of global transactions—such as Google's acquisition of Motorola's mobile business or the two hard disk drive deals—subject to conditions though.

This article will first discuss the legislation on merger remedies in China. Then, it will provide background on some of the cases where remedies were imposed. Finally, the article will point to the problems encountered in the merger remedy area in China—both in the existing legislation and in MOFCOM's case practice—and I will put forward some personal suggestions on how these problems can be solved.

## II. LEGISLATION ON MERGER REMEDIES

In other jurisdictions, the terms "remedies" or "commitments" are used. In China, the term of art is "restrictive conditions." Article 29 of the AML states that "[i]f a concentration between business operators is not prohibited, [MOFCOM] may decide to attach restrictive conditions to reduce the negative impact which the concentration has on competition."

In November 2009, MOFCOM issued the *Measures on the Review of Concentrations between Business Operators* ("Review Measures").[3] According to Article 11 of the Review Measures, MOFCOM may propose three types of restrictive conditions: (1) structural conditions, (2) behavioral conditions, or (3) "hybrid conditions." Hybrid conditions are a combination of both structural and behavioral conditions. In addition, the Review Measures provide guidance on the general requirements, the modification and supervision of restrictive conditions, and the penalties for non-compliance.

The following year—in July 2010—MOFCOM enacted the *Interim Provisions on the Implementation of Divestiture of Assets or Businesses in Concentrations between Business Operators* ("Divestiture Provisions").[4] The Divestiture Provisions have 13 articles and—as their title implies—focus on a particular type of structural conditions: divestiture of a business or assets. The main content of the Divestiture Provisions includes the eligibility requirements for:

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[2] Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68 of August 30, 2007.

[3] Measures on the Review of Concentrations between Business Operators, [2009] MOFCOM Order No.12, November 24, 2009.

[4] Interim Provisions on the Implementation of Divestiture of Assets or Businesses in Concentrations between Business Operators, [2010] MOFCOM Order No.41, July 5, 2010.

- monitoring and divestiture trustees;
- purchasers of the business or assets to be divested; and
- hold-separate trustees.

The Divestiture Provisions also contain rules on the rights and obligations of monitoring and divestiture trustees, and regulate some details of how the business or assets to be divested are to be held separate from the merging parties during an interim period.

As mentioned, the Divestiture Provisions regulate the divestiture of business or assets. Interestingly, however, Article 13 of the Divestiture Provisions appears to expand their scope. That provision indicates, in the implementation of behavioral conditions or hybrid conditions, "reference may be taken from the relevant provisions herein."

MOFCOM is at present drafting a further measure implementing the AML's remedy provisions—*i.e.*, the *Regulation on the Imposition of Restrictive Conditions in Concentrations between Business Operator*s. In order to prepare this Regulation and seek feedback on a draft version of it, MOFCOM has held a series of seminars over the past two years. For example, in April 2012, an antitrust legislation seminar with Chinese and U.S. officials was held in Guiyang,[5] and in October 2012 the 4th China and EU competition policy week took place in Xi'an.[6] At these events, MOFCOM discussed its plans for impending merger remedy legislation with officials of the competition authorities in the United States and the European Union. These seminars indicate that MOFCOM attaches great importance on enhancing its normative efforts in the merger remedy area and that it is keen to seek input from many stakeholders.

The *Regulation on the Imposition of Restrictive Conditions in Concentrations between Business Operators* may be issued in the form of a departmental regulation. If so, the future regulation will be the highest-ranking norm regulating merger remedies in China (apart from the few principles contained in the AML).

## III. THE REMEDIES IN PRACTICE

### *A. General*

From the moment the AML came into effect in August 2008 until the Chinese New Year 2013, MOFCOM approved 16 transactions subject to conditions.

Over time, the information contained in the public decisions of these 16 merger cases where remedies were imposed has grown more detailed and more structured. From a substantive perspective, the decisions show that MOFCOM has become increasingly creative on how to devise remedies over time.

Of the 16 cases where remedies were imposed in China, in two cases MOFCOM clearance was granted in phase 1, while in six cases MOFCOM approved the transaction in phase 2. In

[5] Ministry of Commerce, *The Antitrust Legislation Seminar with Chinese and US officials Held in Guiyang*, April 25, 2012, *available at* http://fldj.mofcom.gov.cn/aarticle/xxfb/201204/20120408089241.html (last visited on January 21, 2013).

[6] Ministry of Commerce, *The China and EU Antitrust Legislation Seminar Held in Xi'an*, October 11, 2012, available http://fldj.mofcom.gov.cn/aarticle/xxfb/201210/20121008379338.html (last visited on January 21, 2013).

eight transactions, MOFCOM issues clearance only in the extended period of phase 2 (also known as "phase 3").

### B. Types of Remedies Imposed

An analysis of the 16 conditional merger cases reveals that MOFCOM has adopted various types of conditions. The remedies imposed include structural conditions, behavioral conditions, and hybrid conditions. For example, the case *Alpha V/Savio* was subject to pure structural conditions. In this case, MOFCOM found that the transaction was likely to restrict or exclude competition in the yarn clearer market. To eliminate the impact caused by these anticompetitive effects, MOFCOM imposed a structural condition on Alpha V—*i.e.*, Alpha V had to divest its minority stake in a subsidiary (which was active in the same relevant market as the target company) to an independent buyer within six months from MOFCOM's approval of the transaction.[7]

In turn, 10 transactions were approved subject to pure behavioral conditions: *InBev/Anheuser-Busch*, *General Motors/Delphi*, *Novartis/Alcon*, *Uralkali/Silvinit*, *General Electric/Shenhua*, *Seagate/Samsung Hard Disk Drive*, *Henkel/Tiande Chemicals, Google/Motorola Mobilit,Wal-Mart/Newheight Holdings,* and *ARM/Giesecke & Devrient/Gemalto*.

The behavioral conditions that were imposed by MOFCOM are of many different types, such as:

- Non-discrimination obligations were used in the *General Motors/Delphi*, *Henkel/Tiande Chemicals*, *Google/Motorola Mobility* and *ARM/Giesecke & Devrient/Gemalto* cases.
- The obligation to "firewall" a part of the business was imposed *in General Motors/Delphi* and *Seagate/Samsung*.
- In *Novartis/Alcon*, the acquirer had to commit to terminating an exclusive distribution agreement with a competitor.
- In *United Technologies/Goodrich*, the merging parties were requested to provide some transitional arrangements before the effective divestiture of a business.

The above-mentioned remedies are generally in line with those imposed by antitrust agencies outside China. In contrast, some behavioral conditions imposed by MOFCOM seem to be intended to provide a basis for intervention in the market, and are rarely adopted by enforcement agencies in other jurisdictions. A good example of this is the supply and service commitment in *Uralkali/Silvinit*. In order to eliminate the anticompetitive effects in the potassium chloride market, MOFCOM imposed remedies demanding the merging parties to follow existing sales practices, which included price negotiations for spot-market sales and sales with long-term contacts, taking into account historical and current trading situations with their Chinese customers. The remedies included an obligation upon the merging parties to continue supplying a broad range and sufficient volume of potassium chloride products. The parties also

[7] Ministry of Commerce, Public Announcement [2011], No.73 of 31 October 2011 (the Alpha V/Savio Decision).

had to appoint a monitoring trustee and report to MOFCOM on a six-monthly basis, or upon request.[8]

In another string of cases, MOFCOM even imposed obligations upon merging parties to limit their market expansion. For example, in *InBev/Anheuser-Busch*, the acquirer was prohibited from raising the 28.56 percent equity interest it held in Zhujiang Beer and the 27 percent equity interest held by Anheuser-Busch in Tsingdao Brewery. It was further prohibited from buying any shares in China Resources Snow Brewery or Beijing Yanjing Brewery, two competing beer companies.[9] In *Mitsubishi Rayon/Lucite International*, one of the remedies imposed was to prohibit the merged entity from acquiring manufacturers of a few particular chemical compounds or building new plants for those compounds in China.[10] In *Wal-Mart/Newheight Holdings*, MOFCOM's remedies put a strict limit onto Wal-Mart's market operations post-transaction. The remedies included an obligation upon Wal-Mart not to resort to a variable interest entity ("VIE") structure to engage in value-added telecommunications services that the target company performed.[11]

The remaining cases saw the imposition of hybrid conditions. In *Panasonic/Sanyo*, for example, MOFCOM ruled that the proposed transaction would adversely affect competition in three different battery markets. Accordingly, MOFCOM conditioned its clearance of the transaction upon the completion of the divestiture of certain businesses post-transaction. For each of the three markets, MOFCOM demanded that the merged entity transfer the business of either the acquirer or target to an independent third-party buyer.[12] The behavioral condition in *Panasonic/Sanyo* was that the merging parties had to grant access to intellectual property related to the production of one type of battery to the buyer of the business.

In *United Technologies/Goodrich*, MOFCOM considered that the transaction would likely have an anticompetitive effect in the aircraft AC power generation system market. Therefore, MOFCOM imposed both structural and behavioral conditions. The structural condition was the divestiture of Goodrich's electrical power system businesses and Goodrich's 60 percent share in Aerolec, a joint venture with Thales Avionics Electrical System. The behavioral conditions required the merged entity to provide reasonable technical support to the buyer of the divested business for one year after completion of the divesture (upon the buyer's request); to assist the buyer in the manufacturing, assembly, testing, maintenance/repair, and overhaul of the power system etc.; and to provide technical training and consulting services to the buyer.[13]

[8] Ministry of Commerce, Public Announcement [2011], No. 33 of 2 June 2011 (the Uralkali/Silvinit Decision).

[9] Ministry of Commerce, Public Announcement [2008], No.95 of 18 November 2008 (the InBev/Anheuser-Busch Decision).

[10] Ministry of Commerce, Public Announcement [2009], No.28 of 24 April 2009 (the Mitsubishi Rayon/Lucite International Decision).

[11] Ministry of Commerce, Public Announcement [2012], No.49 of 13 August 2012 (the Walmart/Newheight Holdings Decision).

[12] Ministry of Commerce, Public Announcement [2009], No. 82 of 30 October 2009 (the Panasonic/Sanyo Decision).

[13] Ministry of Commerce, Public Announcement [2012], No.35 of 15 June 2012 (the United Technologies corporation/Goodrich Decision).

An analysis of past cases shows that MOFCOM attached different kinds of remedies to transactions that were also subject to remedies in other jurisdictions. In the *Western Digital/Hitachi* case, for instance, MOFCOM imposed different conditions on the merging parties as compared with the competition authorities in United States and the European Union. The U.S. Federal Trade Commission required Western Digital to sell off assets used to manufacture desktop hard drives to a competitor, while the European Commission issued clearance subject to the condition that some business be divested to a buyer. In China, MOFCOM imposed a wide range of behavioral conducts. The regulator required that Western Digital:

- ensure that Hitachi products are independently manufactured, priced, and marketed;
- refrain from exercising its shareholder rights in Hitachi in an "anticompetitive" manner;
- maintain independence between the two entities' R&D teams; and
- establish firewalls to prevent the exchange of competitively sensitive information between the acquirer and the target entities.[14]

In *Google/Motorola Mobility*, the European Commission cleared the transaction without conditions,[15] while MOFCOM did impose conditions, including the obligation upon Google to continue licensing Android in a free and open manner and treat all OEMs in a non-discriminatory manner, etc.[16]

This indicates the degree to which MOFCOM acts independently, and may show its increasing confidence in handling complex merger cases.

### C. Implementation of Remedies

#### 1. Structural Remedies

For the implementation of structural remedies, MOFCOM's practice experienced various different approaches. At times, MOFCOM insisted on the appointment of trustees to divest a business (such as in *Pfizer/Wyeth*). In other circumstances, MOFCOM allowed the parties to drive the process of divesting the identified assets themselves. As such, in *Alpha V/Savio* and *Western Digital/Hitachi*, the merger parties were allowed to "self-divest" as MOFCOM did not appoint divestment trustees.

Still, MOFCOM has typically required that, in case divestiture is not completed within a certain period, it can appoint an independent trustee to finalize divestiture process (for example in *Mitsubishi Rayon/Lucite International*, Panasonic/Sanyo, and *United Technologies /Goodrich*).

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[14] Ministry of Commerce, Public Announcement [2012], No.9 of 2 March 2012 (the Western Digital/Hitachi Decision).

[15] *Google/Motorola Mobility*, Case COMP/M.6381 (2012), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf (last visited on January 31, 2013).

[16] Ministry of Commerce, Public Announcement [2012], No.25 of 19 May 2012 (the Google/Motorola Decision).

In addition to divestiture trustees, most MOFCOM decisions required independent monitoring trustees to be appointed. This was the case in *Alpha V/Savio*, *Western Digital/Hitachi,* and *United Technologies /Goodrich*. In contrast, in *Mitsubishi Rayon/Lucite International*, *Pfizer/Wyeth,* and *Panasonic/Sanyo*, no monitoring trustees were required.

In order to maintain the value of the assets, MOFCOM imposed a hold separate obligation in *Pfizer/Wyeth*, requiring the merging parties to appoint an interim manager to manage the business to be divested during the six-month divestment period. The manager was to be guided by the principles of maximizing the interests of the to-be-divested business; ensure that the business maintained its viability, marketability and competitiveness; and be independent from other businesses retained by the merging parties.[17] In *United Technologies /Goodrich*, the merging parties were requested to maintain the value of the assets to be divested before completion of the divestiture process.

In terms of timing, the merger parties are typically required to complete the entire divestiture process within six months. The benchmark for starting the clock varies. In *Mitsubishi Rayon/Lucite International* and *Panasonic/Sanyo*, the moment was the day of the closing of the transactions. In contrast, MOFCOM's own clearance decision was the benchmark in *Pfizer/Wyeth*, *Alpha V/Savio*, *Western Digital/Hitachi,* and *United Technologies /Goodrich*.

An entirely different relief proposal appears in *Mitsubishi Rayon/Lucite International*, where MOFCOM required the merging parties to "divest" 50 percent of Lucite China's annual MMA production capacity for five years to unaffiliated third party purchasers. According to the MOFCOM decision, if this "capacity divestiture" had not been completed within the specified time period, MOFCOM would have been able to appoint an independent trustee authorized to sell 100 percent of the shares in Lucite China to an independent third party.[18]

### 2. Behavioral Remedies

In *Novartis/Alcon*, *Uralkali/Silvinit*, *Western Digital/Hitachi*, *Henkel/Tiande Chemicals*, *Seagate/Samsung,* and *Google/Motorola Mobility*, the post-merger entities were required to appoint an independent monitoring trustee to supervise their compliance with the remedies. In contrast, in *InBev/Anheuser-Busch*, *General Motors/Delphi,* and *General Electric/Shenhua*, monitoring trustees were not required.

## IV. ISSUES TO BE ADDRESSED GOING FORWARD

Both the currently normative framework and MOFCOM's case practice show some insufficiencies that need to be addressed in the future. Below, I will highlight some of the problems, and propose ways to solve them.

[17] Ministry of Commerce, Public Announcement [2009], No.77 of 29 September 2009 (the Pfizer/Wyeth Decision).

[18] Mitsubishi Rayon/Lucite International Decision, *supra* note 10, at 4.

### *A. Problems with the Existing Legislative Framework*

#### 1. Important Gaps

The rules on merger remedies rules still have a few important gaps. For instance, there are no clear rules on how parties should submit a remedy proposal and on how MOFCOM evaluates that proposal. Similarly, the fix-it-first approach and the possibility for MOFCOM to request an "up-front buyer"—used in the United States and Europe—is not contained in the current legal framework in China. In addition, there is no mention of a fast-track dispute settlement mechanism during the remedy implementation phase in the Chinese rules.

Going forward, new rules governing remedies in China could draw upon experience in the United States and the European Union. As such, new figures such as fix-it-first, up-front buyers, and crown jewel mechanism should be featured in future regulations.

To address the issue caused by the absence of a fast dispute resolution mechanism, MOFCOM should set up an arbitration mechanism for behavioral remedies, in line with China's Arbitration Law[19] and other relevant laws and regulations. The practice in the United States and Europe in that regard could also be relevant. This would allow MOFCOM, in future cases, to resolve disputes between the merging parties and third parties on the basis of a market-oriented and fast dispute resolution mechanism.

#### 2. Not Enough Details

The current rules regulating merger remedies in China are often very high-level, and fail to provide the detailed guidance necessary for antitrust practitioners and, indeed, government officials. There is a clear need to provide more detailed content on the substance and procedure applicable to merger remedies. For example, little if any guidance is given as to the implementation of remedies—such as the appointment and the duties of divestiture and monitoring trustees, or the timing of the process.

Going forward, the new rules to be adopted should be more detailed. For example, the duties of divestment trustees should be clarified in future rules, and for monitoring trustees MOFCOM should consider establishing a model text for the trustee agreement.

#### 3. Higher Normative Authority Required

The AML itself was passed by the Standing Committee of the National People's Congress and, as such, enjoys very high authority. However, Article 29 of the law just sketches out some basic principles on merger remedies, but contains no details. However, the title of the Review Measures is only that of "measures"—not suggesting a high rank in the hierarchy of the Chinese legal system—*i.e.*, they have the level of a departmental regulation adopted by MOFCOM. But, as far as remedies are concerned, the rules in the Review Measures involve more high-level principles than detailed practical guidance. Finally, while the Divestiture Provisions do contain some specific rules on merger remedies, their normative value is not significant. In fact, the Divestiture Provisions are just an announcement issued by MOFCOM, with a low level in the legal hierarchy and insufficient authority.

[19] Arbitration Law of the People's Republic of China, [1994] Presidential Order No.31, August 30, 1994, as last amended on August 27, 2009.

Going forward, I believe that the basic system for merger remedies should be stipulated in a departmental regulation. This would confer a relatively high level of authority within the Chinese legal system. At the same time, the details of the substance and procedure related to remedies could be left for regulation in other, lower-ranked documents, such as model texts, flow charts, or FAQs.

### *B. Problems with MOFCOM's Past Decisions*

#### 1. Unclear Relationship Between Competition Concerns and Remedies

In some of the past MOFCOM cases, the relationship between the competition concerns identified by MOFCOM and the remedies imposed was not entirely clear. In particular, in some cases, the conditions imposed by MOFCOM did not seem to adequately address the anticompetitive effects identified by the authority. This circumstance has triggered speculation that MOFCOM's focus is on industrial policy and other non-competition factors. For instance, in *Mitsubishi Rayon/Lucite International*, the competition concerns identified by MOFCOM just focused on one relevant market—a chemical compound with the abbreviation "MMA"—where the merging parties had an overlap. However, among the remedies imposed by MOFCOM, there was a requirement that the post-merger entity not acquire competitors or open new manufacturing sites for three additional products—MMA monomer, PMMA polymer, and cast sheet products—for five years, absent MOFCOM's prior approval. Such requirements have been questioned by the public, as MOFCOM did not identify the other products as an area of its competition concerns.[20]

Going forward, MOFCOM should take care to ensure that the remedies imposed directly address the competition concerns identified, and do not go beyond.

A pre-condition for this is that MOFCOM communicate its competition concerns to the merging parties in a timely and clear fashion. I think that, in future legislation, MOFCOM could even publish a model text for competition concerns. If MOFCOM followed such an approach, the merging parties would be able to propose an appropriate remedy proposal tailored to address the specific concerns identified by MOFCOM.

Another important issue is to make sure that MOFCOM be more cautious in the application of behavioral remedies. To streamline the process for the imposition of behavioral remedies, MOFCOM should take into account the classifications of behavioral remedies put forward in the ICN's Merger Remedies Review Project.[21] Under that classification, behavioral remedies can fall into two groups: the aim of the first group of remedies would be to facilitate horizontal rivalry, while the second group would aim to directly control outcomes. As mentioned, MOFCOM should avoid using remedies that lead to the control of outcomes including price caps, service level agreements, and supply commitments.

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[20] YANG DONG & ZHOU XIN, MERGER REMEDIES IN CHINA, ISSUES SURROUNDING THE ENFORCEMENT OF THE ANTI-MONOPOLY LAW, p. 287 (2010).

[21] Merger remedies review project: report for the fourth ICN annual conference (2005), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf (last visited on January 21, 2013).

### 2. Insufficiently Detailed Description of Remedies

In general, MOFCOM's public decisions are increasing in length and detail. However, the descriptions of the specific restrictive conditions are high on principles, but low on detail. Hence, MOFCOM's decisions only provide limited guidance—both for the merging parties in the particular case and for other companies wishing to anticipate MOFCOM's reaction in future cases.

Going forward, it is thus imperative that MOFCOM disclose more information in its public decisions. The remedies—in particular behavioral remedies, whose duration often spreads over a lengthy period of time—should be as precise as possible. MOFCOM should avoid vague or ambiguous expressions in its decisions.

### 3. Priority for Structural Remedies

So far, the majority of conditions imposed in MOFCOM's past decisions have been behavioral conditions. However, it is widely recognized that it is more difficult and costly to supervise behavioral conditions (as compared to structural conditions).

Going forward, the basic principle for MOFCOM should be to give structural conditions preference, all things being equal. If, in certain circumstances, behavioral conditions were more appropriate, then MOFCOM would need to ensure that such conditions are effectively implemented and supervised. Some of MOFCOM's past decisions lack proper a monitoring mechanism, which undermines the effectiveness of the implementation of the conditions.

### 4. Mechanism for Change of Waiver of Remedies Required

In some of the past cases, MOFCOM included a review clause that allows the parties to request MOFCOM to re-evaluate whether there continues to be a need to have the remedies in place. Cases where MOFCOM included such a review clause are *Mitsubishi Rayon/Lucite International*, *Panasonic/Sanyo*, *United Technologies/Goodrich*, *Seagate/Samsung*, *Western Digital/Hitachi*, *Google/Motorola Mobility,* and *ARM, Giesecke & Devrient/Gemalto*. In this last case—concerning the establishment of a joint venture among three companies—the parties are entitled to apply for release of the remedies if the environment or the situation of the joint venture has undergone a significant change.[22] However, such a "sunset clause" was not present in all cases. For example, the public decisions in the *InBev/Anheuser-Busch*, *General Motors/Delphi,* and *Uralkali/Silvinit* cases did not provide for such mechanism. In my view, all MOFCOM decisions imposing remedies should have such a clause.

Going forward, the future legislation should set out in detail the procedure and mechanism for such review clauses. The legislation should both cover the substance and process regulating this type of clauses. This would allow the merging parties to know more clearly when they can request MOFCOM to waive or change the remedies, including the standard of assessment for MOFCOM's decision in that respect.

[22] Ministry of Commerce, Public Announcement [2012], No.87 of 06 December 2012 (ARM, Giesecke&Devrient/Gemalto Decision).

In future cases, MOFCOM should always include such a review clause in the decision, and give the merging parties the chance to terminate, modify, or replace the remedies in a given situation.

## V. CONCLUSION

The provisions on merger remedies in the AML are not very detailed, although MOFCOM has issued some implementing rules in recent years that provide some additional information. The existing legislation on remedies is still far from perfect. For example, there is no guidance on the fix-it-first approach, and the rules about rights and obligations of divestiture and monitoring trustees are still not specific enough.

MOFCOM has shown it has an open mind in devising remedies during the past four years since the AML is in effect. MOFCOM has often resorted to behavioral conditions, and in some cases the remedies contain a relatively high degree of market intervention.

What is more, the implementation of the remedies at times lacks effective mechanisms to protect the merging parties. Specifically, the content of the restrictive conditions is not detailed and clear enough, and does not always require MOFCOM to pay attention to any changes in the underlying market conditions.

Although the current rules on merger remedies in China have some shortcomings, we should also acknowledge the increasing know-how and sophistication of the antitrust enforcement agencies in China including—of course—MOFCOM. Their activities—both in terms of legislative efforts and case enforcement—are becoming increasingly international.

With the further improvements in legislation and the rich enforcement experience gathered by antitrust officials, Chinese antitrust enforcement will become more influential globally. I believe that, going forward, there is no doubt that China will become one of the most important antitrust jurisdictions alongside the United States and the European Union.