Antitrust Enforcement in China Becomes “New Normal”.

In the past year, the enforcement of China’s Anti-Monopoly Law (“AML”) was characterised by continued activism and improvements in both substance and procedure.

> The Chinese competition enforcement agencies have launched a number of legislative initiatives, seeking to provider further substantive guidance and improve procedural transparency.

> The National Development and Reform Commission (“NDRC”) and the State Administration for Industry and Commerce (“SAIC”) have intensified and expanded their enforcement activities to cover new frontiers.

> On the merger control front, the Ministry of Commerce (“MOFCOM”) continued to fine-tune the simplified review procedure to deal with an increased number of notified transactions, and intensified enforcement against non-compliance with filing obligations.

Legislative initiatives

New draft antitrust guidelines

The past year has been a milestone as far as proactive legislative activities by the authorities are concerned. Mostly notably, the State Council’s Anti-Monopoly Commission has decided to draft six sets of antitrust guidelines, and NDRC was selected to take the lead in drafting of these guidelines except for the intellectual property (“IP”) guidelines which are being prepared through joint efforts by all three antitrust agencies. Some of the guidelines will provide more clarity on key procedural aspects of enforcement, including leniency applications, infringement exemptions, commitments leading to suspensions of investigations and the calculation of fines and illegal gains. Other guidelines will provide more clarity on the application of the AML to certain areas, such as the IP and automotive sector.

As of the end of March 2016, four consultation drafts have already been published for public comments and the remaining two drafts (on exemption procedure and calculation of fines, respectively) are yet to be made publicly available.
available. It is expected that the relevant ministries will submit the draft guidelines to the Anti-Monopoly Commission in June this year, with the Anti-Monopoly Commission aiming to enact at least some of the guidelines before the end of 2016.

The draft guidelines, on the one hand, seek to develop the standards of antitrust enforcement in China by referring to ideas from the more matured antitrust jurisdictions such as the EU and the US. For example, both the draft IP and automotive guidelines introduce the long-awaited market share thresholds for exemptions, which presume the exercise of IP rights or a vertical agreement between the car manufacturer and the dealer does not infringe the AML if the IP owner or the car manufacturer, respectively, has relatively modest market shares. In addition, the draft leniency guidelines introduce a marker system similar to the EU rules which enable the applicant to reserve its first place in the queue by submitting initial documentary evidence, with additional evidence to follow at a later stage.

On the other hand, the draft guidelines retain some of the distinctive Chinese features. For instance, whilst resale price maintenance (“RPM”) is generally considered to be a per se infringement under the AML as in many other jurisdictions, the draft auto guidelines contain certain exceptions, such as in situations where a supplier and an end-user have agreed on prices and a distributor is appointed only to provide certain support such as in relation to delivery, payment and invoicing (effectively a “middleman”). The draft auto guidelines also contain other exemptions to the RPM prohibition, for example during the promotion period of new energy vehicles and in the context of government procurement and on-line sales.

Amendments to the AUCL

In parallel with drafting of new antitrust guidelines, earlier this year the Legal Affairs Office of the State Council launched a public consultation on the proposed revisions to the Anti-Unfair Competition Law (“AUCL”).

The proposed amendments seek to remove certain provisions that overlap with the AML, including restrictive conduct by publicly-owned enterprises, tying and bundling, below-cost sales and abuse of administrative powers. This essentially raises the bar for challenging tying/bundling and below-cost sales practices. In the future, one can only seek to establish unlawful tying/bundling and below-cost sales practices in violation of the AML (which requires proof of a dominant market position) and there is no longer a separate path where one could argue the same practices also infringe the AUCL (which arguably only requires proof of market power which falls short of market dominance). The draft also introduces some new forms of infringements such as an imposition of unfair trading conditions on the counterparty by using a “relatively superior position”. However, such new concepts have sparked controversy and it remains to be seen whether they will be included in the final version of the new AUCL.

We have been closely involved in the legislative process and will continue to brief you on the progress and implications for the market participants.
Conduct enforcement

Continued activism in enforcement

Building on several years of active enforcement, the investigations by NDRC and SAIC have gained additional momentum with even more proactive enforcement activities in the past year. This echoes the 2015 public statement by Director General of the antitrust enforcement department of NDRC that the Chinese antitrust enforcement would be increasingly in a regular, extensive and in-depth manner in the future.

Sector-wise, pharmaceuticals, medical devices, shipping, automotive and parts, telecoms and financial services have remained high-risk areas and the authorities have explicitly expressed their commitment to continue to actively target these sectors in the coming year.

Widening enforcement scope

Whilst the enforcement of horizontal cartel agreements traditionally focused on local violations by domestic private companies, enforcement in this area is becoming increasingly active in targeting multinational and state-owned companies as well.

Continuing the trend of global cartels enforcement, NDRC joined the US and Japan in targeting the ocean-shipping sector. The agency found that eight multinational roll-on, roll-off shipping companies based in Japan, Korea, Norway and Chile had colluded over at least four years on major shipping routes involving China and fined them a total of RMB 407 million yuan (approximately EUR 56 million). Notably, Nippon Yusen KK was granted full immunity as the first to report the cartel to NDRC.

In addition, the authorities have been continuing to cooperate with enforcement authorities from other jurisdictions on several other active cartel investigations. For example, NDRC has reportedly been cooperating with its counterparts in other jurisdictions on investigations into manufacturers of electric capacitors in relation to their alleged cartel activities. In the broader context, the Chinese authorities have concluded memoranda of understanding on cooperation with foreign counterparts and held meetings with a number of other cartel enforcers worldwide.

Furthermore, in addition to traditional hard-core violations such as price fixing, market allocation and RPM, the authorities have also investigated certain new types of infringements (e.g. joint boycotting), as well as explored novel theories of harms involving IP abuse, excessive pricing, tying/bundling, and refusal to deal. In the first published refusal to supply case, SAIC fined Chongqing Qingyang Pharmaceutical, a manufacturer of both allopurinol ingredients and preparations, for refusing to supply allopurinol ingredients to its distributors and other customers (including other competing manufacturers of allopurinol preparations) and foreclose them from the downstream market.

Unique investigative features
The enforcement activities in the past year demonstrate that investigations originate from various sources at both the provincial and national levels, including complaints (e.g. the Liaoning tobacco case), media coverage (e.g. the China mobile case), leniency applications (e.g. the Japanese car parts cartel case) and leads from other Chinese administrative agencies or foreign antitrust authorities.

The authorities have also conducted broader sector inquiries. For example, following inquiries into a wide range of pharmaceutical companies in 2014, the authorities reportedly investigated several multinational medical device companies in the past year. In such cases, the agencies first send a standard questionnaire to a number of market players and subsequently target certain companies with follow-up inquiries or even formal investigations.

The pace of the investigations can vary dramatically – some cases had final decisions announced only a few months from the launch of the formal investigation (e.g. the allopurinol preparations cartel case), whilst other cases have reportedly lasted several years (e.g. the ongoing probes into Microsoft and Tetra Pak). In the meantime, both NDRC and SAIC have taken various measures to further improve procedural transparency, including publishing the full text of all decisions and providing detailed facts and reasoning in the decisions.

Importantly, both NDRC and SAIC can have jurisdiction over the same alleged anticompetitive practice. In the allopurinol case mentioned above, SAIC’s sanctions on Chongqing Qingyang Pharmaceutical were followed by NDRC’s fines on five manufacturers (including Chongqing Qingyang Pharmaceutical) in the downstream allopurinol preparations market. The dual investigations and penalties reaffirm the message that even after one authority has closed its case, the other authority can still pursue the investigation on different grounds. Similarly, a bribery investigation at the beginning may prompt a follow-on antitrust probe, and vice versa. Further details about the Chinese investigation procedure can be accessed here.

Merger control

Shortened process and improved efficiency

2015 was the busiest year for MOFCOM since the AML became effective, with the regulator accepting 338 filings for review (up 37% from 246 in 2014) and completed its review of 332 cases (a year-on-year increase of 36%). The number of the cases and their high profile further reinforced China’s position as one of the prominent merger control regimes alongside the EU and the US.

Over the past year, MOFCOM continued to refine its simplified review procedure (introduced in 2014) in order to deal with the increased workload. The introduction of the simplified review procedure proved effective in reducing delays, with 74% of all cases reviewed by MOFCOM in 2015 cleared within Phase I (i.e. 30 calendar days).

From September 2015 onwards, MOFCOM has also been carrying out a
series of organisational reforms, including encouraging parties’ self-assessment regarding reportability of transactions, adding additional resources to case teams, tightening formality requirements of notification documents and reducing the number of information requests to notifying parties.

In addition, MOFCOM amended its implementing regulations to clarify certain jurisdictional issues, such as the analysis of control, the identification of undertakings concerned and the calculation of turnover, in order to assist companies and legal practitioners with assessing whether transactions are notifiable in China.

Continued risk of intervention in complex transactions

In contrast to the increasing number of notified cases, in 2015 MOFCOM appeared to be less interventionist: it did not block any cases and only imposed remedies on two transactions as a condition for clearance: Nokia’s proposed acquisition of Alcatel-Lucent and NXP’s plan to acquire Freescale.

These two remedy cases highlight the broader regulatory policy considerations (e.g. ensuring that domestic companies operating at the downstream level have access to input or intellectual property rights on reasonable terms) which are normally taken into account during MOFCOM’s merger review process.

Increased sanctions for failure to notify

MOFCOM continued to toughen its stance on the failure to notify cases and imposed fines in nine cases in 2015, out of the total fifteen occasions to date. It also continued its “name and shame” approach, such as announcing fines on four companies for prematurely implementing their respective transactions (including both acquisitions and joint ventures). Importantly, two of the cases related to an acquisition of a minority stake (35% in both cases). Linklaters’ previous client alert which covered these cases in more detail can be accessed here.

Implications for businesses in China

Following on from an active year of enforcement, the Chinese antitrust authorities have expanded their reach to cover a more diverse range of antitrust conduct. In addition, the guidelines, once enacted, will provide an additional analytical framework for assessment. It therefore remains important for companies operating in (and with) China to ensure that their compliance programmes keep pace with the law in such a dynamic environment.
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