China Antitrust Review 2013

January 27, 2014

The year 2013 marked the fifth anniversary of the implementation of China's Anti-Monopoly Law ("AML") and included a number of significant developments in each of the three antitrust authorities within the Chinese government. On merger enforcement, the Ministry of Commerce ("MOFCOM") has continued its ongoing efforts to make its review of transactions quicker and more transparent—though, in practice, review time remains lengthy. In addition, MOFCOM continues to impose remedies that in some cases diverge from the types of remedies imposed by other antitrust authorities, particularly with regard to requiring merging parties to "hold separate" their respective businesses rather than integrating them postmerger. Beyond merger enforcement, the two other Chinese antitrust authorities, the National Development and Reform Commission ("NDRC") and the State Administration for Industry and Commerce ("SAIC"), continue to set record-level fines and appear to be focusing their enforcement upon certain types of conduct, including resale price maintenance, market allocation, and tying claims. Multinational companies are increasingly subject to penalties for such conduct in China.

We consider each of these key developments below.

I. Overview of AML Enforcement Framework

China has three separate government ministries that have authority to enforce the AML: (i) MOFCOM is responsible for reviewing merger control cases; (ii) NDRC is responsible for price-related violations of the AML; and (iii) SAIC is responsible for violations not relating to price. In contrast, there are two federal antitrust enforcement agencies in the United States (the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission). In Europe, there is only one enforcement agency at the European Union level (the European Commission), but there are a multitude of national enforcement authorities among the member states, as well.

In addition, China has an Anti-Monopoly Commission ("AMC") organized under the State Council, which is composed of the heads of several ministries and departments of the State Council, and which establishes general policy guidelines for and coordinates activities among MOFCOM, NDRC, and SAIC.

II. Merger Control

A. Developments in Merger Control Regime

In the first half of 2013, MOFCOM released two long-awaited draft regulations for public comments—one aimed at simplifying the merger process, and the other at addressing the kinds of remedies that MOFCOM seeks from transactions it challenges. The public comment period for both regulations has now expired, and both regulations are expected to be implemented during the first half of 2014.

Draft Regulation on Simple Cases.[1] Commentators have long noted that merger review in China can be a longer process than parties typically experience in the U.S. or the EU due to MOFCOM's resource constraints (about 30 staff members, including administrative staff)[2] and the involvement of other Chinese

[1] *See* Ministry of Commerce, *Interim Regulations (Draft for Public Comments) on Application Standards for Simple Cases on Concentration of Undertakings*, *available at* **http://fldj.mofcom.gov.cn/article/zcfb/201304/20130400076870.shtml** (Chinese language).

[2] Fei Deng and Cunzhen Huang, *A Five Year Review of Merger Enforcement in China*, The Antitrust Source (Oct. 2013), at 6.

agencies in the review.[3] The draft regulation released in 2013 is aimed at streamlining the review in simple cases that MOFCOM views as unlikely to give rise to competitive concerns. Such simple cases could include, for example, transactions involving parties with low market shares post-merger (15% combined share in horizontal mergers and 25% in vertical mergers or mergers without a vertical relationship between the parties), or transactions involving joint ventures formed outside of China or the acquisition of non-Chinese entities, where the parties do not "engage in economic activities" within China. Nonetheless, notwithstanding a transaction qualifying for "simple" classification, MOFCOM retains broad discretion to perform in-depth merger review, such as where it is difficult to define the relevant market, where consumers or "other relevant business operators" might be harmed, or where the merger might harm Chinese "national economic development."[4]

In addition to MOFCOM retaining broad discretion to perform in-depth review of otherwise "simple" transactions, there also remain a number of undefined terms and expressions in the draft regulation that could create further ambiguities for merging parties. For example, it is, as yet, unclear what MOFCOM intends by "engaging in economic activities" or harm to Chinese "national economic development," or how to determine whether a relevant market is difficult to define or a transaction will have adverse effects on consumers.

It remains to be seen what practical effect the regulation will have upon the speed of merger review in China, because the regulation remains in draft form and has yet to be implemented. Nonetheless, news reports indicate that it has been approved internally at MOFCOM and it is expected to become final relatively soon in 2014.

Draft Regulation on Imposing Merger Remedies.[5] MOFCOM also released a draft regulation aimed at clarifying the agency's authority to impose restrictive conditions on merger approval. The draft regulation gives MOFCOM the authority to impose three kinds of remedies: (i) structural remedies (such as divestitures of tangible assets, intellectual property, or other interests), (ii) behavioral remedies (such as requiring third-party access to the merged parties' infrastructure, licenses of key technologies, or termination of exclusivity agreements), and (iii) hybrid remedies, which are combinations of structural remedies and behavioral remedies. As described below, MOFCOM is employing behavioral remedies far differently than they are utilized in the U.S. or the EU.

While the draft regulation describes the kinds of remedies that MOFCOM has imposed in recent years, it is nonetheless silent respecting the conditions that would justify imposition of a particular type of remedy. This draft regulation provides that if the filing parties fail to submit remedy proposals within the time period prescribed by MOFCOM, or if the proposed remedy proposals are not adequate to reduce the adverse effects of concentration on competition, the transaction will be prohibited. MOFCOM has put these principles into practice in several recent mergers, including *Western Digital/Hitachi* (2012), *Glencore/Xstrata* (2013), *Marubeni/Gavilon* (2013), and *MediaTek/MStar* (2013). In each of these transactions, the parties were unable to come to consensus with MOFCOM on remedial measures during the statutory review period provided by the AML (180 days), and thus, to avoid having their deals blocked, the parties withdrew their filings and refiled their transactions to reinitiate the review process.

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[3] *See, e.g.*, D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law* (Jan. 27, 2013), at 13-14, *available at* **http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207690**.

[4] *See* Davis Polk client alert, **Chinese Antitrust Authority Releases Draft Regulations on "Simple" Mergers, Merger Remedies**.

[5] *See* Ministry of Commerce, *Regulations (Draft for Public Comments) on Imposing Restrictive Conditions on Concentration of Undertakings*, *available at* **http://tfs.mofcom.gov.cn/article/as/201303/20130300068492.shtml** (Chinese language)

B. Merger Control Decisions

For the first ten months of 2013 (that is, the period for which MOFCOM has released statistics to date), MOFCOM received 185 merger notifications (an increase of 13.5% from 2012) and accepted 175 cases (an increase of 25% from 2012).[6] The number of cases closed between January and October 2013 reached 161; 21 cases (13%) were closed during phase I review, 130 cases (80.7%) were closed during phase II review, and 10 cases (6.2%) were closed during the extended review period.[7] Compared with 2012, the average review time in 2013 was ten days shorter than the prior year.

MOFCOM did not permanently block any mergers in 2013. Among the 175 cases accepted for review during the period in which statistics are available, MOFCOM imposed conditions on four transactions, compared to six cases for which conditions were imposed in 2012. Below, we review the four transactions in which MOFCOM imposed remedies.

Glencore/Xstrata. In April 2013, more than a year after the parties originally notified the transaction to MOFCOM in April 2012, MOFCOM conditionally approved the acquisition of Xstrata plc ("Xstrata"), a multinational mining company, by Glencore International plc ("Glencore"), one of the world's leading integrated producers and marketers of commodities. MOFCOM permitted the merger subject to significant structural and behavioral remedies.

MOFCOM raised concerns about the effect of the transaction on various mineral markets—copper concentrate, zinc concentrate, and lead concentrate—and alleged that the transaction could bolster Glencore's market power, allow the firm to change contract terms to the detriment of certain copper concentrate customers, raise entry barriers to potential competitors in copper concentrate, and undermine the bargaining power of copper concentrate customers. MOFCOM made these allegations despite the fact that the parties' combined market shares in the relevant markets were quite low. On a worldwide basis, the combined copper concentrate market share of the parties was 7.6% in production and 9.3% in supply, and only 12.1% in supply to China. In zinc concentrate, on a worldwide basis, the combined market share was 11.2% in production and 17.9% in supply, and 9% in supply in China (with the 9% Chinese supply attributable solely to Glencore, as Xstrata had no Chinese sales); and in lead concentrate, on a worldwide basis, the combined share was 6.8% in production and 7.6% in supply, and 9% in supply in China (with the 9% Chinese supply attributable solely to Glencore, as Xstrata had no Chinese sales). These are market shares that the U.S. antitrust authorities deem "unlikely to have adverse competitive effects and ordinarily require no further analysis."[8] These shares are also well below the 25% combined share under which an absence of anticompetitive harm is presumed by the European Commission.[9]

After making two rounds of submissions of proposed remedies, both of which MOFCOM rejected, the parties withdrew their merger application and refiled with MOFCOM in November 2012. Ultimately, MOFCOM imposed a structural remedy (divestiture of an interest in Las Bambas, a key copper project being developed by Xstrata in Peru) as well as behavioral remedies (a long-term contract supply of copper concentrate to Chinese customers, with a certain minimum volume per year at specified

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[6] *See* Ministry of Commerce, *Business Review 2013 (III): Making Efforts to Well Develop Anti-Monopoly Review of Concentration of Undertakings to Maintain the Fair Competition Order* (Dec. 5, 2013), *available at* **http://english.mofcom.gov.cn/article/newsrelease/significantnews/201312/20131200425951.shtml.**

[7] The 180-day statutory merger review period is comprised of three phases: (i) phase I is 30 calendar days; (ii) phase II is 90 calendar days; and (iii) phase III (extended review period) is 60 calendar days.

[8] U.S. Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines, at Section 5.3.

[9] European Comm'n, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, at Section III, ¶ 18.

benchmark prices and maintenance of long-term contract and spot contract supply of zinc concentrate and lead concentrate until 2020). If Glencore fails to complete its divestiture in a timely manner, it will be required to sell its interest in another copper project, to be determined by MOFCOM, through an auction process.

Some commentators have suggested that China's overall dependence upon foreign sources of copper, zinc, and lead, rather than the likely anticompetitive effects of this particular transaction, is what drove MOFCOM's decision. Those commentators have characterized the decision as one best understood as implementing China's trade policies through its antitrust laws.

The *Glencore/Xstrata* remedies also are notable for a second reason, in that they mark the first time that MOFCOM has published the full copy of the parties' commitments to MOFCOM—another step that MOFCOM has taken to provide greater transparency and visibility into its merger control.

Marubeni/Gavilon. In April 2013, MOFCOM also required remedies to approve the acquisition of Gavilon Holdings, LLC ("Gavilon") by Marubeni Corporation ("Marubeni"), two global commodity trading companies with overlapping agricultural businesses, and specifically overlapping soybean businesses. These remedies, which are in place for at least two years, include a hold separate remedy, which can have the practical effect of preventing the parties from integrating and extracting efficiencies from their deal.

MOFCOM raised a number of concerns about competitive effects in the soybean market. China is the world's largest importer of soybeans; indeed, as MOFCOM stated in its decision, 80% of soybean supply in China came from imports during 2012. In 2012, Marubeni was the largest soybean exporter to China, with 99% of its business in China, and MOFCOM deemed Gavilon to have considerable abilities to procure, store, and manage logistics for soybean businesses in North America. The parties are believed to have quite low market shares in soybeans,[10] and MOFCOM did not identify the market shares of the parties giving rise to the agency's concerns in its decision. Nevertheless, MOFCOM alleged that Marubeni could use Gavilon's capabilities to source soybeans from North America post-merger, in a market that MOFCOM viewed as having barriers to entry to potential entrants, who must develop access to soybean resources and sales networks while laying out large capital investments. Therefore, MOFCOM took the position that the transaction would reduce competition and weaken the bargaining power of Chinese customers for soybeans.

As was the case in *Glencore/Xstrata*, the parties withdrew their original merger filing and refiled with MOFCOM after initially failing to agree on conditions for clearance. Subsequently, MOFCOM imposed a hold separate remedy to require the parties' Chinese businesses for soybean export and sales to be held separately and independently, with a firewall set up to prevent the exchange of competitive information that would permit the parties to coordinate their operations post-merger. Such a remedy would appear to make it difficult for the parties to realize any efficiencies from the transaction. In addition, Marubeni and Gavilon may not transact with one another except on fair market terms. The parties may seek release of the hold separate obligation after two years.

In contrast, both the U.S. and the EU antitrust authorities cleared the *Marubeni/Gavilon* transaction without conditions. As in *Glencore/Xstrata*, some have suggested that trade policy considerations played an important role in MOFCOM's decision and its imposition of remedies.

Baxter/Gambro. In August 2013, MOFCOM cleared an acquisition by Baxter International Inc. ("Baxter") of Gambro AB ("Gambro"), subject to both structural and behavioral remedies.

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[10] Javier Blas, *China clears Marubeni-Gavilon deal*, Financial Times (Apr. 23, 2013).

The *Baxter/Gambro* transaction involved a horizontal overlap with respect to products used to treat kidney diseases—specifically, products for hemodialysis and for continuous renal replacement therapy ("CRRT"), such as monitors, dialyzers, and blood tubes. MOFCOM determined that the post-merger shares of the parties would be high, both worldwide and in China. (The parties had a combined share in CRRT monitors of 64% globally and 57% in China; a combined share in CRRT blood tubes of 59% globally and 84% in China; and a combined share in CRRT dialyzers of 62% globally and 79% in China.) As to hemodialysis, MOFCOM found that the merged entity would become one of two main competitors post-merger, with a market share of 48%. In addition, Baxter and that other main competitor (Nipro Medical Corporation) also had a manufacturing agreement that would permit them to exchange competitively sensitive information, such as production costs and quantities, thereby creating a risk of coordination and exclusion. Responding to these concerns, MOFCOM ordered the parties to divest Baxter's global CRRT business and terminate the manufacturing agreement in hemodialysis before the end of Q1 2016.

MOFCOM's divestiture remedy in this case was identical to the remedy imposed by the EU in the same case. *Baxter/Gambro* thus represents an example of a merger in which MOFCOM's remedies aligned with those of another jurisdiction's antitrust authority. As it did in *Glencore/Xstrata*, MOFCOM also published the parties' commitments in this case.

MediaTek/MStar. Also in August, MOFCOM approved the horizontal merger of MediaTek Inc. ("MediaTek") with MStar Semiconductor, Inc. ("MStar"), subject to a hold separate remedy. The *MediaTek/MStar* transaction is also notable in that it had the longest review period among all 20 mergers in which MOFCOM has imposed remedies since 2008: 13 months between the initial filing in July 2012 and ultimate approval (subject to conditions) in August 2013.

Both MediaTek and MStar engage in the design and manufacture of integrated circuits, focusing on chip products for multimedia displays and wireless communication devices. MOFCOM found significant anticompetitive effects in the relevant market (which it defined as the worldwide LCD TV control chip market, with a focus on China) based in part on concentration levels that would have rendered the transaction presumptively anticompetitive under the Horizontal Merger Guidelines used by the U.S. antitrust authorities. (The pre-merger Herfindahl-Hirschman Index calculation or "HHI" was 4,533, which is already highly concentrated, and the post-merger HHI was 6,500, with a delta of 1,962.) MOFCOM found that the merger would eliminate the primary competition in the market, result in the merged firm having a dominant position (61% market share globally and 80% market share in China), restrict customers' choices of chip suppliers, and maintain high entry barriers.

MOFCOM imposed a fairly detailed hold separate remedy that required MStar's operating entity, Morningstar Taiwan, to remain an independent competitor in the marketplace, with MediaTek permitted to exercise only severely restricted shareholders' rights (such as receipt of dividends and collection of data to prepare financial statements). MediaTek could appoint directors, but only subject to MOFCOM's approval—a requirement which enabled MOFCOM to continue to supervise the merging firms in a manner that is not consistent with typical U.S. and EU antitrust enforcement norms. The hold separate obligations also prohibit Morningstar Taiwan and MediaTek from cooperating with one another on any business matter without MOFCOM's prior approval, and they also prohibit either company from acquiring any competitor in the relevant market without MOFCOM's prior approval. Moreover, in another departure from U.S. and EU norms, MOFCOM required the parties to follow pre-transaction practices regarding price reductions in the relevant market. Finally, the parties were prohibited from closing the transaction unless and until MOFCOM approves an implementation plan for these remedies. In addition to seeking antitrust approval in China, the parties also sought approval from South Korea, which approved the deal, subject to a three-year monitoring period for chip prices.[11]

General Observations.

Lengthy Process. MOFCOM's review process, which is already viewed as lengthier than U.S. or EU review by many practitioners and theorists, has remained long, and sometimes even in excess of the review period provided under the AML. Among the four deals subjected to remedies in 2013, review ranged from 8 months to 13 months. In three of those deals, the parties withdrew and re-filed their applications to merge because MOFCOM had hit the maximum 180 days provided for review under the AML.

Trade Policy Considerations. The AML requires MOFCOM, in performing merger review, to consider a merger's impact on national economic development in addition to competition factors. MOFCOM's enforcement actions in the *Glencore/Xstrata* and *Marubeni/Gavilon* mergers suggest that MOFCOM may have been influenced by China's dependence upon foreign imports of the overlap products. Indeed, the *Glencore/Xstrata* merger appears to indicate that, even where the combined market shares of the parties are quite low, MOFCOM may subject the merger to detailed investigation and far-reaching remedies where it involves areas essential to the development of the Chinese economy (such as raw materials, agriculture, and energy).

Hold Separate Remedy. The hold separate remedies imposed in two 2013 deals, the *Marubeni/Gavilon* and *MediaTek/MStar* transactions, follow two previous deals, *Seagate/Samsung* (2011) and *Western Digital/Hitachi* (2012), in which MOFCOM imposed a similar remedy. The obligation to hold separate lasts for one to several years, after which the parties can apply for relief to integrate. By contrast, hold separate remedies are generally only used in the U.S. as an interim short-term measure pending a complete *divestiture* of the overlapping business.

To date, the parties to only one merger subjected to a hold separate have become eligible to seek relief from the remedy—that is, the parties in *Seagate/Samsung*—and yet the hold separate in that transaction appears to have remained in place.[12] Considerations of modifying this hold separate may be ongoing, as MOFCOM met with Seagate's CEO in February 2013 to discuss the conditions imposed on the merger. Nonetheless, MOFCOM does not appear to have lifted the hold-separate requirements it has imposed.

MOFCOM's use of the hold separate remedy can preclude parties from achieving the value-enhancing efficiencies that frequently underlie transactions. It is unclear why MOFCOM uses the hold separate remedy rather than refusing outright to approve transactions that can only be remedied by maintaining the merging parties as separate competitors. MOFCOM has the authority to block transactions it deems violative of the AML, and it did so in 2009 when it reviewed the *Coca-Cola/Huiyuan* transaction.

III. Enforcement Actions

As noted, NDRC has jurisdiction over price-related conduct, and SAIC has jurisdiction over non-price conduct. Both of those agencies brought significant enforcement actions in 2013.

A. NDRC

In late 2012 and early 2013, NDRC levied what were then record-high penalties against LCD panel manufacturers for engaging in a price-fixing cartel (RMB 353 million, which is currently USD 58.4 million).

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[11] Lorraine Luk, *MediaTek-Mstar Merger to Boost Chip-Design Business*, WSJ Digits (Aug. 28, 2013), *available at* **http://blogs.wsj.com/digits/2013/08/28/mediatek-mstar-merger-to-boost-chip-design-business/**.

[12] Seagate Technology Public Limited Company, Form 10-K (Aug. 8, 2013), at 36.

Later in 2013, NDRC imposed further record-high fines in two other cases, both involving resale price maintenance ("RPM") practices, and made international headlines for allegations that it coerced admissions of antitrust violations from non-Chinese companies.

Resale Price Maintenance. One of the two RPM cases involved two leading high-end liquor companies in China, Wuliangye and Kweichou Moutai, for entering into agreements with distributors to restrict and maintain minimum resale prices to third parties. NDRC fined Wuliangye RMB 202 million (USD 33.4 million), calculated as 1% of the company's turnover for the year 2012,[13] and it fined Kweichou Moutai RMB 247 million (USD 40.8 million). This was the first case in which domestic industry giants were fined for violating the AML.

The other RPM suit, brought in August 2013, concerned six international infant formula producers. NDRC fined these companies, in the aggregate, RMB 668.73 million (USD 110.6 million), with higher penalties for two companies in particular—Biostime, which was fined RMB 162.9 million (USD 27 million, approximately 6% of its turnover in 2012), and Mead Johnson, which was fined RMB 203.76 million (USD 33.7 million, approximately 4% of its turnover in 2012)—due to NDRC's view that they had failed to cooperate with the investigation and promptly rectify their conduct. By contrast, three other infant formula producers were also investigated but exempted from penalties after actively cooperating with Chinese authorities and voluntarily implementing remedial measures.

News reports in China now suggest that, going forward, NDRC will focus investigation and enforcement efforts on six industries: (i) aviation, (ii) household chemicals, (iii) automobiles, (iv) telecommunications, (v) pharmaceuticals, and (vi) home appliances. Reports indicate that consumers may have raised complaints or concerns in these industries, and NDRC may be collecting evidence of potential violations from ongoing investigations in these areas.

Confessions. This summer, news outlets reported that NDRC allegedly sought confessions from about thirty non-Chinese firms, including General Electric, Microsoft, Intel, and Qualcomm, for "any antitrust violations" that they may have committed, with warnings against using outside counsel to defend themselves. NDRC has since stated that outside counsel are "welcome" to participate in NDRC probes.[14]

B. SAIC

In July 2013, SAIC listed the cases that it had investigated and closed between 2010 and 2013 and published its enforcement decisions on its website.[15] SAIC is expected to publish enforcement decisions on a going-forward basis, continuing efforts at transparency and disclosure in Chinese antitrust enforcement. The decisions released by SAIC all involve horizontal agreements among domestic Chinese companies relating to market allocation (that is, agreements to divide sales markets or raw materials purchasing markets). SAIC has generally sought two financial remedies for such violations: disgorgement of unlawful gains and/or fines.

SAIC is also currently investigating Tetra Pak, a multinational food packaging and processing company, for alleged abuse of market dominance, including alleged tying of the sale of packaging materials to the

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[13] Under Article 46 of the AML, the fines can range between 1% to 10% of the infringing party's turnover in the preceding year. The fine against Wuliangye fell into the low end of this range due to Wuliangye's full cooperation with the investigation and immediate rectification of its conduct.

[14] *See, e.g.*, Michael Martina, *Exclusive: Tough-Talking China Pricing Regulator Sought Confessions from Foreign Firms*, REUTERS (Aug. 21, 2013), **http://uk.reuters.com/article/2013/08/21/ukchina-antitrust-idUKBRE97K05220130821**; *China: NDRC refutes bias against foreign firms, external lawyers*, COMPETITION POL'Y INT'L (Sept. 17, 2013), **https://www.competitionpolicyinternational.com/china-ndrc-refutesbias-against-foreign-firms-external-lawyers**.

[15] *See* SAIC, Competition Law Enforcement Bulletin, **http://www.saic.gov.cn/zwgk/gggs/jzzf/** (Chinese language).

purchase of packaging equipment, and alleged price discrimination in favor of top-tier dairy companies. This investigation is significant, in part, because it involves more than 20 provincial and municipal authorities within SAIC and is the first high-profile antitrust enforcement investigation brought by SAIC against an international entity.

IV. Private Litigation

2013 also saw two notable developments in antitrust private litigation in China. These cases may provide important precedents for the future interpretation of the AML.

Ruibang v. Johnson & Johnson. Ruibang Yonghe Technology and Trade Co., Ltd. ("Ruibang") has sued Johnson & Johnson in the first private action involving RPM practices in China. A lower court, the Shanghai No.1 Intermediate People's Court, had previously ruled in favor of the defendant, finding that Ruibang had failed to establish an anticompetitive effect from such agreement. In August 2013, the Shanghai Higher People's Court overturned the trial court's decision, ordering Johnson & Johnson to compensate Ruibang in the amount of RMB 530,000 (USD 87,600). Reflecting a standard recently articulated by the U.S. Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (2007),[16] the higher court stated that RPM agreements and conduct are not *per se* illegal and that plaintiffs must demonstrate that the activity has resulted in eliminating or restricting competition in the relevant product or service. The People's Court held that factors to be considered in this analysis include the adequacy of competition in the relevant market, the motives of the defendant in exercising RPM practice, and the competitive effects of the practice at issue.

The appellate decision in *Ruibang* appears to be broadly consistent with NDRC's agency enforcement of RPM agreements. However, based upon NDRC's published decisions on RPM, it is not yet clear whether NDRC agrees that a demonstration of anticompetitive effect is required.

Qihoo v. Tencent. 2013 also marked the defeat of a plaintiff and a subsequent appeal in another private action concerning various allegations of single-firm conduct regarding QQ, a popular online instant communication platform in China. The lawsuit, originally filed in November 2011, was brought by Qihoo 360 Technology Co., Ltd. ("Qihoo"), a large anti-virus software company, against Tencent, Inc., one of China's largest Internet service portals and operator of QQ. Qihoo alleged in the Guangdong Higher People's Court that Tencent had, among other things, tied the sale of QQ software to the purchase of anti-virus software and restricted QQ customers from using Qihoo's services. Qihoo sought RMB 150 million (USD 24.8 million) in damages.

In March 2013, the trial court ruled against the plaintiff, finding that it had failed to define a relevant market and could not provide sufficient evidence to show that Tencent held a dominant position sufficient to harm competition. The plaintiff appealed to the Supreme People's Court, which held a hearing in late November 2013 to consider a number of different issues of law and fact, including how to define the relevant market for messaging services, whether the defendant has market power in that market sufficient to establish plaintiff's claim, and whether the conduct at issue qualifies as abuse of market dominance (and, if so, what damages are appropriate).

The appellate court has not yet issued a final ruling in this case, which is the first private antitrust lawsuit to be decided by the Supreme Court.

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[16] 551 U.S. 877 (2007) (stating that resale price agreements should be assessed using a rule of reason, rather than *per se* illegality, standard).

V. Conclusion

Despite MOFCOM's efforts to streamline its review process and clarify its thinking on remedies, merger reviews remain quite lengthy and, at times, conclude with remedies that differ substantially from the kinds of remedies imposed by U.S. and EU authorities (sometimes even as to the same merger). This is most true with regard to the "hold separate" remedy, which MOFCOM has now imposed four times (including twice in 2013). This remedy effectively prevents parties to a merger from being able to integrate post-closing the business segments subjected to the hold separate without an eventual agreement from MOFCOM to terminate the remedy. While MOFCOM has drafted new regulations to address the speed of its review and the remedies it imposes, it remains to be seen whether those regulations will have a practical effect on merger review speed and disposition.

In terms of non-merger enforcement, the Chinese enforcement agencies continue to set record-level fines for antitrust violations. Both the Chinese agencies and private plaintiffs focused in 2013 on certain types of antitrust claims, such as RPM agreements, market allocations, and tying allegations. It is an open question whether court rulings in these matters will be consistent with U.S. and EU precedents or whether companies will be subject to different substantive antitrust standards for claims in China.

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