China Antitrust Review 2014

January 28, 2015

This year marked the sixth anniversary of China's Anti-Monopoly Law ("AML") and a year of significant developments for antitrust enforcement in China.

China has three separate antitrust regulators: (i) the Ministry of Commerce ("MOFCOM") is responsible for reviewing merger control cases; (ii) the National Development and Reform Commission ("NDRC") is responsible for price-related conduct; and (iii) the State Administration for Industry and Commerce ("SAIC") is responsible for non-price related conduct.

In 2014, MOFCOM took enforcement action against five proposed transactions, including one which it prohibited (the P3 shipping joint venture), marking only the second time in the AML's history that MOFCOM has barred a transaction outright.

Beyond merger enforcement, the two other state authorities, the National Development and Reform Commission ("NDRC") and the State Administration for Industry and Commerce ("SAIC"), intensified their enforcement efforts in 2014. Some of these initiatives have been criticized at the highest levels of the U.S. government.

Also in 2014, China's Supreme Court ruled on its first antitrust case since the inception of the AML, affirming the dismissal of a tying case.

These developments, described below, should be considered carefully by companies doing business in China or contemplating transactions that require clearance pursuant to the AML.

I. Merger Control

A. Developments in the Merger Control Process

Regulations and Guidelines for "Simple" Cases. Since the AML went into effect on August 1, 2008, commentators have noted that merger review can take substantially longer in China than in the U.S., the EU and elsewhere, due to MOFCOM's resource constraints and the involvement of other Chinese agencies in the merger review process.[1]

In 2014, MOFCOM implemented final regulations designed to speed antitrust review for merger cases that raise no substantive antitrust issues. These regulations specify the circumstances under which transactions qualify for "simple" treatment. For example, transactions may qualify if all parties are in the same relevant market and their combined market share is less than 15% or if the parties have a vertical relationship and their combined share in their respective markets is less than 25%.

In May 2014, MOFCOM published its first simple case — Rolls-Royce Holding's proposed acquisition of the remaining interest in its joint venture with Daimler — and approved the transaction in 19 days. Since then, MOFCOM has published notices of approximately 80 simple cases for 2014. Many of these transactions appear to have been cleared within 30 days after expiration of the public comment period.

[1] *See, e.g.*, D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law,* 10 N.Y.U. J. L. & Bus. 1, 13–14 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207690.

One recent report stated that practitioners had seen transactions that had previously taken five to eight months to clear are now being resolved within three to five months.[2]

Even though a transaction has been qualified as "simple," MOFCOM retains broad discretion to perform an in-depth merger review if it concludes that it is difficult to define the relevant market or where there are complaints of harm to consumers or Chinese "national economic development." Accordingly, before parties elect to file as a "simple" case, they should have a high degree of confidence that MOFCOM will in fact accept that designation. If MOFCOM were to reject the "simple" classification, the matter would have to be refiled as a regular case and the clock for review would be reset in terms of time for review. Thus, advance consultation with MOFCOM is certainly advisable.

Regulation on Merger Remedies. MOFCOM's final regulations on merger remedies (effective in January 2015) confirm its authority to impose: (i) structural remedies (such as divestitures of assets), (ii) behavioral remedies (such as licensing of key technologies, pricing requirements or termination of exclusivity agreements), and (iii) hybrid remedies, which are combinations of structural and behavioral remedies. MOFCOM retains broad discretion in considering remedy proposals and deciding upon appropriate solutions.

Penalties for Violations of Reporting and Remedial Requirements. In 2014, there were two important developments relating to parties that fail to adhere to MOFCOM's review procedures.

Failure to Notify Transactions. Since 2012, MOFCOM's regulations have authorized the imposition of penalties when parties fail to notify reportable transactions. Fines can be as much as RMB 500,000 (about $80,000) and MOFCOM can also require the parties to unwind the unreported transaction. In March 2014, MOFCOM announced that it would begin to publish administrative penalty decisions. In December 2014, MOFCOM published a penalty decision against Unigroup, which was fined RMB 300,000 ($48,000) for failing to notify its $907 million acquisition of RDA Microelectronics.

Failure to Adhere to Remedy Commitments. This year, MOFCOM also began publishing penalties imposed against parties that violate remedy commitments. MOFCOM published two penalty decisions, each against Western Digital Corporation and each for RMB 300,000 ($48,000) for breaching the "hold separate" condition MOFCOM imposed in connection with Western Digital's 2012 acquisition of Hitachi GST.[3]

These disclosures reflect MOFCOM's effort to incentivize cooperation with its review process. U.S. and EU authorities take a similar approach to publicizing fines for parties that breach their notification obligations or remedy commitments.

B. Merger Control Decisions

In 2014, MOFCOM took enforcement action to address competitive effects arising from five transactions, up from four such actions in 2013. MOFCOM permanently blocked one transaction—the P3 shipping joint venture—and imposed remedies upon four others. As we explore below, these decisions have deepened concerns that MOFCOM takes longer to review significant mergers than US and EU authorities and that the conclusions reached and remedies imposed often depart from other jurisdictions especially where Chinese competitors and national economic policy goals are significantly affected.

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[2] *Shorter wait: China's M&A watchdog halves time taken to approve deals*, Reuters (Oct. 20, 2014), **http://www.reuters.com/article/2014/10/21/us-china-regulator-m-a-idUSKCN0I92AD20141021.**

[3] *See* Davis Polk & Wardwell LLP, *Chinese Antitrust Authorities Approve Western Digital/Hitachi GST Deal with Significant Conditions* (Mar. 9, 2012), **http://www.davispolk.com/sites/default/files/files/Publication/02ebb877-46da-4ecd-bdaf-15b4120c8c2d/Preview/PublicationAttachment/f7c56be9-b90c-48c0-bb6c-17b6e5e4302a/030912_PRCUpdate.pdf**.

Horizontal Transactions

P3 Alliance. The operational joint venture among three large global shipping companies, to be known as "P3" and announced in June of 2013, called for Denmark's A.P. Moller-Maersk, Swiss firm Mediterranean Shipping Company and France's CMA CGM, to pool approximately 250 ships with the objective of utilizing their combined capacity more efficiently in order to reduce costs. The parties took care to adopt safeguards that preserved existing sales and marketing competition between the joint venture participants. Nonetheless, in June 2014, following a nine-month review and multiple rounds of unsuccessful negotiations on remedies, MOFCOM prohibited the transaction outright.

MOFCOM's prohibition is striking because it analyzed this joint venture as if it were a complete merger without discussion of the precautions taken by the participants to preserve downstream competition. In the U.S. and the EU, the Federal Maritime Commission and the European Commission, respectively, cleared the venture largely because the parties had erected firewalls separating sales and marketing personnel from the joint venture collaboration involving capacity utilization. Competitive decision-making involving prices, sales, and marketing were left to the individual shipping companies rather than to the joint venture. MOFCOM did not explain why the separation of pricing, sales, and marketing functions from the joint venture was inadequate to address any concerns about anticompetitive harms. MOFCOM also did not explain why the significant cost savings and other procompetitive synergies which would have been achieved did not outweigh the perceived anticompetitive harms. Commentators have expressed the view that MOFCOM may have been concerned that the more efficient P3 network would have disadvantaged Chinese shipping competitors.[4]

The P3 ruling marks only the second time that MOFCOM has blocked a merger. In 2009, MOFCOM prohibited The Coca-Cola Co. from acquiring the Chinese juice manufacturer China Huiyuan Juice Group Limited.

Thermo Fisher/Life. On January 15, 2014, MOFCOM announced its conditional clearance of the acquisition by Thermo Fisher Scientific, Inc. ("Thermo Fisher") of Life Technologies Corporation ("Life Technologies"). MOFCOM concluded that the transaction would reduce competition involving various cell culture and gene modulation technologies.

The U.S., the EU and MOFCOM concurred that high market shares in these technologies required divestitures as a condition for approving the overall transaction. MOFCOM required Thermo Fisher to divest its global cell culture and gene modulation businesses and to divest a 51% equity interest in a bioengineering company in China. The U.S. and the EU also imposed structural remedies, resulting in the January 2014 sale of Thermo Fisher's cell culture, gene modulation, and magnetic beads business to GE Healthcare for USD 1.06 billion.

Although the U.S. and the EU required only divestitures to address their competitive concerns, MOFCOM went further by imposing behavioral remedies. Specifically, for a period of ten years, MOFCOM required Thermo Fisher to decrease the catalog prices of certain products selling in the Chinese market by 1% annually, without reducing the discount for Chinese distributors, and to supply such products to third parties (or else to grant a perpetual non-exclusive technology license to third parties).

U.S. and European agencies do not favor behavioral remedies in horizontal transactions. In particular, if structural remedies do not suffice to restore the competitive status quo ante, U.S. and EU authorities prefer to challenge the transaction outright rather than act as price regulators.

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[4] *See* Davis Polk & Wardwell LLP, *MOFCOM Blocks "P3" Shipping Joint Venture* (June 19, 2014), **http://www.davispolk.com/sites/default/files/06.19.14.MOFCOM.Blocks.P3.Shipping.Joint_.Venture.pdf**.

Non-Horizontal Transactions

Microsoft/Nokia. In April 2014, MOFCOM considered the acquisition of Nokia's smartphones business by Microsoft. By this time, the transaction had been cleared without conditions in the U.S. and the EU. The EU stated that concerns relating to post-acquisition refusals to license were beyond the scope of the EU Merger Regulation and would be dealt with when and if anticompetitive licensing practices occurred.[5] The practice is similar in the U.S.[6] In contrast, MOFCOM chose to deal with these issues by imposing conditions on the clearance of the transaction not only on the business Microsoft was acquiring but also on the intellectual property assets being retained by Nokia.

MOFCOM focused on the vertical relationships between Microsoft and Nokia in smartphones, mobile operating systems, and patent licensing for smart mobile terminals in China. MOFCOM determined that Microsoft owned certain standard essential patents ("SEPs") and non-SEPs, which were fundamental to the functionality of smartphones utilizing the Android operating system. The Android operating system was installed on 80% of the smartphones in China. In addition, Nokia owned thousands of mobile telecommunications SEPs, which are essential to smartphone manufacturing.

MOFCOM stated that, in its view, the transaction gave the combined entity the incentive and the ability to restrict competition in the downstream smartphone market by withholding or raising the prices of licenses for its upstream patents. MOFCOM also concluded that, because Nokia was exiting the downstream smartphones market, it would have reduced incentives to maintain lower patent royalty fees for the mobile industry. MOFCOM found that most Chinese smartphone manufacturers would lack the bargaining power to constrain licensing fees, and the increase in such fees would endanger the ability of Chinese smartphone manufacturers to compete.

MOFCOM imposed a number of behavioral remedies as a condition to clearing the transaction. With regard to SEPs, MOFCOM required the combined entity, *inter alia*, to continue licensing its SEPs on fair, reasonable and non-discriminatory ("FRAND") terms and also required Nokia to refrain from conditioning SEP licenses to its retained patents on the licensee's acceptance of non-FRAND terms. With regard to non-essential patents, MOFCOM imposed additional constraints on Microsoft's sales practices, requiring the company to continue to offer nonexclusive licenses to smartphone manufacturers within China on fixed rates and terms substantially similar to those offered by Microsoft prior to the acquisition.[7]

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[5] "The Commission considers that any possible competition concerns, which might arise from the conduct of Nokia, following the transaction, in the licensing of the patent portfolio for smart mobile devices which it has retained falls outside the scope of the EU Merger Regulation. The Commission cannot take account of such concerns in the assessment of the current transaction. Indeed, Nokia is the seller whereas the Commission's investigation relates to the merged entity. However, the Commission will remain vigilant and closely monitor Nokia's post-merger licensing practices under EU antitrust rules, in particular Article 102 of the Treaty on the Functioning of the European Union (TFEC) that prohibits the abuse of a dominant market position." Press Release, European Commission, *Mergers: Commission clears acquisition of Nokia's mobile device business by Microsoft* (Dec. 4, 2013), **http://europa.eu/rapid/press-release_IP-13-1210_en.htm**.

[6] While the Department of Justice did not issue a statement similar to the European Commission's in connection with its clearance of the Microsoft/Nokia transaction, it had expressed a similar view in its earlier clearance of Google's acquisition of Motorola Mobility. "In light of the importance of this industry to consumers and the complex issues raised by the intersection of the intellectual property rights and antitrust law at issue here, as well as uncertainty as to the exercise of the acquired rights, the division continues to monitor the use of SEPs in the wireless device industry, particularly in the smartphone and computer tablet markets. The division will not hesitate to take appropriate enforcement action to stop any anticompetitive use of SEP rights." Press Release, U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. . . .* (Feb. 13, 2012), **http://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations**.

[7] Criticisms voiced by U.S. antitrust officials, discussed *infra* p. 6, may have been directed in part to the remedies imposed in this matter.

Merck/AZ Electronic. Early termination of merger control waiting periods respecting this transaction were granted in the U.S., Germany and Taiwan by February of 2014.[8] However, in April 2014, MOFCOM imposed behavioral remedies as a condition of clearance of the acquisition of AZ Electronic Materials S.A. ("AZ Electronic") by Merck KGaA ("Merck").

Although Merck and AZ Electronic were not head-to-head competitors, MOFCOM noted that the parties compete in "adjacent" markets in the manufacture of flat panel display manufacturing, and that by virtue of the transaction the parties could jointly bundle their products and thereby impede competition. Merck produces liquid crystal displays for screens used for televisions, smartphones, and tablets, with 60% share globally and over 70% share in China. AZ Electronic produces photoresist, or the raw material for electronic circuits in flat panel display backplanes, with 35% share globally and more than a 50% share in China. MOFCOM noted that liquid crystal and photoresist are "complementary products" used in flat panel display manufacturing and that after the transaction Merck would be the largest supplier of both products. MOFCOM concluded that the merged entity had the ability to bundle the sales of liquid crystal and photoresist to the detriment of competitors in each area, thereby restricting competition from other suppliers.

MOFCOM imposed behavioral remedies for a term of three years. First, MOFCOM required the parties not to engage in any kind of tying, including by conditioning the sale of one product on the other, or by cross-subsidizing between the liquid crystal and photoresist products. Second, MOFCOM required the parties to license Merck's liquid crystal intellectual property on a FRAND basis. And third, MOFCOM required the parties to report to MOFCOM regarding implementation of its remedies, with prior notice to MOFCOM of any liquid crystal patent licensing agreement.

The theory that MOFCOM appears to have employed here — sometimes referred to as "portfolio effects"— turns on the notion that bundled discounts might benefit customers in the short term, but because competitors unable to offer comparable bundled discounts would suffer, customers in the long run would be harmed. This largely discredited theory is rarely employed today in either the U.S. or the EU.

Auto Battery Joint Venture. MOFCOM conditionally cleared a proposed Chinese joint venture among Hunan Corun New Energy Co., Ltd ("Corun"), Toyota Motor (China) Investment Co., Ltd ("Toyota China"), Primearth EV Energy Co., Ltd ("PEVE"), Changshu Xinzhongyuan Investment Co., Ltd. ("Xinzhongyuan"), and Toyota Tsusho Corporation ("Toyota Tsusho"). The purpose of the venture is to produce nickel metal-hydride ("NiMH") battery packs for another Toyota joint venture in hybrid cars.

This transaction presented both horizontal and vertical issues. MOFCOM noted that Toyota China had 80.3% of the market for Chinese hybrid vehicles and together with three other firms including its joint venture partner PEVE, controlled 97% of the NiMH battery market. MOFCOM expressed concern that the increase in concentration might lead to coordinated effects. From a vertical foreclosure perspective, MOFCOM noted that PEVE held 66.4% of the market for NiMH batteries. MOFCOM concluded that Toyota might have the incentive to prevent third-party hybrid car manufacturers from accessing the NIMH joint venture's production.

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[8] Press Release, Merck KGaA, *Merck KGaA announces increased acceptances and extends offer period for AZ ElEUtronic Materials* (Feb. 6, 2014), **http://news.emdgroup.com/EMD/CC/EMDNewsRelease.nsf/d6db9bdc0c08af7EU1257243005130ee/35e8bcbd35e28cf1c1257c760074ae6e/$FILE/RNSFeb6EMD.pdf**; Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules, 79 Fed. Reg. 2173 (Jan. 13, 2014), **http://www.ftc.gov/sites/default/files/documents/federal_register_notices/2014/01/140113earlytermfrn.pdf**.

Accordingly, MOFCOM required the NiMH joint venture, *inter alia*, to make its products available to third parties on commercially reasonable and nondiscriminatory terms.

II. SAIC and NRDC: The intersection between the AML and intellectual property rights

As noted, NDRC has jurisdiction over price-related conduct, and SAIC has jurisdiction over non-price conduct.

During the summer of 2014, SAIC issued the latest in a series of proposed rules of conduct which would govern the application of antitrust law to the exercise of intellectual property rights.[9] While prior drafts represented non-binding Guidelines for applying the AML to intellectual property, the most recent drafts (those since June 2012) contemplate the adoption of specific administrative rules that will have the force of law. One controversial provision of the draft regulations extends the "essential facilities" doctrine to a refusal to license intellectual property where there are no reasonable substitutes to the intellectual property in question and a license is "necessary" for the economic activities of the putative licensee.

The draft has its defenders who characterize it as "a relatively cautious attempt to bridge the gap to related pre-existing laws in China, while at the same time attempting to follow international practices in the antitrust/IPR space – namely, European Union (EU) and US rules – to the extent possible."[10]

On the other hand, top level officials at both the FTC and DOJ have raised concerns about the direction in which the Chinese enforcement agencies appear to be headed. FTC Commissioner Maureen Olhausen recently criticized the SAIC draft as an attempt at "rebalancing the value of intellectual property to favor short term efficiency gains over longer term dynamic efficiency gains that come from strong protection of those rights" and "a departure from "international norms." She is particularly critical of the apparent effort to apply the "essential facilities" doctrine to certain patents that are not Standard Essential Patents.[11] It remains to be seen whether the final regulation is modified in response to such criticisms, and then how the regulation is enforced.

FTC Chairwoman Edith Ramirez noted that the FTC and the EU have adopted similar approaches in applying antitrust law to allegations that the owner of a SEP has failed to adhere to its commitment to license on FRAND terms. In her view, while the two agencies have brought enforcement actions based on a patent holder's alleged breach of a voluntary license agreement by seeking injunctions against licensees purportedly willing to pay fair reasonable and nondiscriminatory license fees, the agencies have not pursued enforcement actions based on particular royalty terms and they have not precluded the availability of injunctive relief where a licensee is unwilling to accept a license on FRAND terms.

Chairwoman Ramirez went on to express concern that China seemed willing to impose liability based solely on what it perceives to be unfair royalty terms on SEP patents as well as on royalty demands for licenses for patents that might not be subject to a FRAND commitment. She expressed "serious concern" that China's approach suggests "an enforcement policy focused on reducing royalty payments for local implementers as a matter of industrial policy, rather than protecting competition and long-run consumer

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[9] State Administration for Indus. & Commerce, Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights (Consultation Draft), **http://www.saic.gov.cn/gzhd/zqyj/201406/t20140610_145803.html**.

[10] Adrian Emch & Liyang Hou, *Antitrust Regulation of IPRS: China's First Proposal,* Competition Policy Int'l (August 2014), **https://www.competitionpolicyinternational.com/antitrust-regulation-of-iprs-chinas-first-proposal/**.

[11] Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Remarks at Second Annual GCR Live Conference: Antitrust Enforcement in China: What Next? (Sept. 16, 2014), **http://www.ftc.gov/system/files/documents/public_statements/582501/140915gcrlive.pdf**.

welfare."[12] The Assistant Attorney General for the Antitrust Division, William Baer, has stated that he shares these concerns.[13]

A. NDRC Enforcement Actions

Qualcomm Investigation: NRDC's pending investigation of Qualcomm appears to raise the concerns expressed by top U.S. antitrust officials. According to Qualcomm, this investigation involves "the Company's licensing business and certain interactions between the Company's licensing business and its chipset business, including how royalties are calculated in the Company's patent licenses, the value exchanged for cross-licenses to patents of the Company's licensees, whether the Company will offer license agreements limited to patents essential to certain standards, whether royalties are sought for the Company's expired patents, the Company's policy of selling chipsets only to the Company's patent licensees, the alleged refusal of the Company to grant patent licenses to chipset manufacturers, and certain other terms and conditions in the Company's patent license and chipset sale agreements."[14]

The investigation has been criticized in strident terms by the United States Chamber of Commerce as "designed to bias license negotiations in favor of would-be Chinese licensees" and an "inappropriate use of a competition law authority to investigate" which is "inconsistent with international competition enforcement norms."[15]

Indeed, similar concerns have now been raised at the highest levels of the U.S. government. In September of 2014, Treasury Secretary Jack Lew is reported to have written a letter to his counterpart in the Chinese government stating that numerous antimonopoly investigations against U.S. companies could have serious implications for relations between the two countries.[16] And in December of 2014, President Obama raised these concerns directly with Chinese President Xi. White House National Security Council spokesman Patrick Ventrell explained, "The United States government is concerned that China is using numerous mechanisms, including anti-monopoly law, to lower the value of foreign-owned patents and benefit Chinese firms employing foreign technology".[17]

Discussions between NRDC and Qualcomm are continuing and the investigation remains pending.[18]

AutoParts Investigation: Less controversially, and mirroring investigations that have taken place worldwide, NDRC imposed penalties on twelve Japanese auto parts and bearings makers alleged to have engaged in price-fixing. The penalty involved fines in an aggregate amount of RMB 1.24 billion (USD 200

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[12] Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Remarks at 8th Annual Global Antitrust Enforcement Symposium: Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective (September 10, 2014), **http://www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf**.

[13] William Baer, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the 41st Annual Conference on International Antitrust Law and Policy: International Antitrust Enforcement: Progress Made; Work to be Done (Sep. 12, 2014), **http://www.justice.gov/atr/public/speeches/308592.pdf**

[14] Qualcomm Inc., U.S. SEC. & Exch. Comm'n Form 10-Q, at 12–13 (filed July 23, 2014), **http://investor.qualcomm.com/secfiling.cfm?filingID=1234452-14-238&CIK=804328**.

[15] U.S. Chamber of Commerce, *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy*, (Sept. 9, 2014), **https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf**.

[16] *U.S. Treasury Warns China Over Antimonopoly Efforts*, **http://www.wsj.com/articles/u-s-treasury-warns-china-over-antimonopoly-efforts-1410687635**

[17] *As Qualcomm decision looms, U.S. presses China on antitrust policy* **http://newsdaily.com/2014/12/as-qualcomm-dEUision-looms-u-s-presses-china-on-antitrust-policy**.

[18] Qualcomm Inc., Form 10-Q, *supra* note 13, at 13.

million), the largest fines imposed since the implementation of the AML in 2008. The fines imposed on each company varied from 4% to 8% of the company's 2013 revenues.

B. SAIC Enforcement Actions

Microsoft and Tetra Pak Investigations:

In late July 2014, SAIC raided Microsoft's four China offices as part of its investigation of suspected antitrust violations related to the Windows operating system and Office software. According to news reports, the investigation is focused on whether Microsoft violated the AML by effectively requiring Chinese consumers to use more Microsoft products than they might otherwise choose. Nearly 100 personnel from SAIC offices in nine municipalities and provinces conducted raids, during which they questioned Microsoft executives and collected large amounts of data and documents.

In addition, SAIC is continuing its investigation into a potential abuse of market dominance by Tetra Pak, a multinational food packaging and processing company. That investigation, which involves a team of more than 10 investigators, has been pending for over a year.

III. Private Litigation

Qihoo v. Tencent. Finally, 2014 marked an important development in private antitrust litigation in China. when the Supreme People's Court of China (the "SPC") issued its first ruling on the AML in late 2014. The suit was brought by Qihoo 360 Technology Co., Ltd. ("Qihoo"), a large anti-virus software company, against Tencent, Inc. ("Tencent") one of China's largest Internet service providers and the operator of instant messaging software QQ. In 2011, Qihoo alleged in the Guangdong Higher People's Court that Tencent had, among other things, bundled its anti-virus software with its QQ software and restricted QQ customers from using Qihoo's services. Qihoo claimed damages of RMB 150 million (USD 24.8 million) as a result of Tencent's allegedly unlawful conduct. The trial court ruled against the plaintiff and the case was appealed to the SPC. In October 2014, the SPC issued its final decision, sustaining the rulings of the trial court and setting a landmark judgment.

The decision by the SPC is notable for several reasons. First, the SPC appears to take a careful analytical approach. Second, the case suggests the significance of economic analysis to the SPC's interpretation of the AML. Both Qihoo and Tencent retained economists and introduced economic evidence, which the SPC analyzed extensively in its decision.

IV. Conclusion

Both in the merger and conduct areas, 2014 was notable for several decisions and policy initiatives that have been criticized as placing China outside the mainstream of international antitrust enforcement. Companies contemplating transactions that require filings with MOFCOM must weigh the potential impact of those precedents on contemplated transactions. And in the non-merger area, particularly where licensing of intellectual property is involved, companies doing business in China should proceed with caution.

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