

PRC Antitrust Update: Special Edition on ABA Antitrust China Conference

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This special memorandum summarizes the major topics and information discussed by China's three antitrust agencies during the "Antitrust in Asia: China" conference, co-sponsored by the ABA Section of Antitrust Law and the Expert Advisory Committee of the Anti-Monopoly Commission of the State Council of the PRC, on May 21-23, 2014 in Beijing.

Ministry of Commerce ("MOFCOM")

MOFCOM to Publish Remedy Rules in 1H 2014

According to Shang Ming, Director General of MOFCOM's Anti-Monopoly Bureau, MOFCOM is finalizing its draft rules on imposing merger remedies (the "Remedy Rules") and plans to publish the final Remedy Rules in the first half of 2014.

The draft Remedy Rules were published for public comment in April 2013 and is now in the final stage of the legislative process. The Remedy Rules will include detailed provisions on the process of submitting remedy proposals, consulting with MOFCOM, and resolving and disclosing merger remedies.

The Anti-Monopoly Law does not provide guidance on when particular remedies are appropriate. The remedies imposed by MOFCOM so far include structural, behavioral and hybrid remedies, according to Director General Shang.

Shang Ming Discussed Reasons For Imposing Hold Separate Remedies

According to Director General Shang, there are specific reasons that MOFCOM occasionally imposes hold separate remedies to address competition concerns:

- (1) In certain circumstances, it is impractical to impose structural remedies (e.g. no buyer for divested assets), although structural remedies would still be the most ideal solution. As such, MOFCOM is forced to use hold separate remedies to achieve similar effects as structural remedies.
- (2) In certain cases, the parties themselves propose hold separate remedies in order to address the competition concerns raised by MOFCOM, which proposal is then accepted by MOFCOM after evaluation.
- (3) The hold separate remedies do not contradict China's Anti-Monopoly Law and are also practical from an economic point of view.

So far, MOFCOM has imposed hold separate remedies in four conditional clearance cases.

Director General Shang further clarified that hold separate remedies are not a universal solution and should be adopted on a case-by-case basis, and that competition concerns generated by horizontal mergers should be resolved mainly through structural remedies. He added that he has been asked whether hold separates are practicable and he said that he cannot yet say because MOFCOM is still in the midst of monitoring, analyzing, and drawing conclusions based on their implementation.

One co-panelist and practitioner commented that hold separates raise a host of difficult issues, including corporate fiduciary implications. For example, the management of the held-separate entity may not be as responsive to the combined entity's board of directors because it is not supposed to do so under the hold separate order. The acquirer thus may face challenges in protecting its investment, if the management of

the held-separate entity takes the entity in a direction that is not in shareholder interests, or in making investment decisions, such as turning down the held-separate entity's corporate opportunity for rational business reasons.

Other commentators noted that, in addition to divestitures, hold separates, and FRAND obligations in the intellectual property context, MOFCOM has been creative with merger remedies, including: continuous supply of certain products to the Chinese market; FRAND obligations in supply of raw materials; price reduction for certain products; and limitation on use of "variable interest entity" structure, a common method for Internet companies to avoid foreign ownership restrictions.

Shang Ming Assures "Simple" Cases to Receive Faster Clearance

Director General Shang assured that the simplified merger review procedure will be faster than the normal review procedure. However, Shang added that the time it takes to review a "simple" case will also depend on whether applicants have correctly classified the transaction as "simple" and whether it attracts public comments and challenges. In such instances, applicants would have to re-file as a normal case, which would cause further delay.

MOFCOM published the simple case notification threshold in February 2014 and related procedural rules in April 2014, and Director General Shang noted that the simplified procedure was a response to the perception of MOFCOM's lengthy review process.

On May 22, 2014, MOFCOM published the first ever "simple case" on its website, since the implementation of the simplified process: Rolls-Royce Holding's proposed acquisition of the remaining 50% interest in Rolls-Royce Power Systems, a joint venture between Rolls-Royce Holding and Daimler. The case is classified as "simple" because the joint venture will be controlled post-merger by an existing controlling shareholder. The public comment period is from May 22 to May 31. Shang said that if there are no public objections, then the case will be reviewed under the simplified procedure.

Director General Shang also discussed MOFCOM's merger review practices and the main reason for the lengthy review process. MOFCOM typically raises competition concerns with parties during the second phase of a review, approximately 30-40 days into the process. The review period may be prolonged by the negotiation and discussion process between MOFCOM and the applicants, and the response speed of the applicants affects MOFCOM's review length. On occasion, the parties' statutory review period was about to expire but the applicants still had not submitted a satisfactory resolution and so they withdrew and re-filed. Shang indicated that MOFCOM "does not like" this practice of pulling and re-filing (leading to a new review period of up to 180 days) because the bureau has limited resources.

Separately, one Chinese practitioner and co-panelist noted that MOFCOM will do on-site visits and that this has been an efficient way for the agency to understand local operations.

Another practitioner estimated that there may have been over 10 cases in which MOFCOM has investigated a failure to notify a merger, and it generally imposed only relatively minor fines. MOFCOM has announced that starting from May 1, it will publish investigations on its website. The commentator added that the common understanding is that this move is intended to increase the degree of punishment for failure to notify, as such publicity may affect a public company more than the prospect of fines.

An academic commentator noted that the China Unicom/Netcom merger (two large state-owned enterprises ("SOEs")) was not notified to MOFCOM though it was subject to the Anti-Monopoly Law at the time. That merger was planned by the central government.

MOFCOM to Continue to Seek Industry Comments and Consider Industrial Policies

MOFCOM seeks comments from industrial regulators in its merger review practices and will continue to do so, said Director General Shang. Industrial regulators know their respective industries well and their comments often include information on industrial development trends, which helps MOFCOM identify

competition problems and solve competition concerns. He noted that the NDRC is an important source of information.

Director General Shang emphasized that China has a different system from other jurisdictions, which do not have industrial regulators or very few industrial regulators. He noted that in China, industrial policy has a strong start and foundation whereas competition policy is young. As a result, MOFCOM will continue to balance competition policies and industrial policies in its merger review, and Shang said he hopes competition policy will eventually be on equal footing with industrial policy. Shang added that foreign lawyers may not appreciate that MOFCOM can have such a close relationship with industry regulators, as he understood from foreign antitrust authorities that they do not consult industry regulators. Shang said MOFCOM does this to avoid creating confusion or resistance from industry regulators.

Practitioner panelists also commented that MOFCOM will pay particular attention to the impact of a transaction on the welfare of local customers in China, even if that is not a competition-related concern.

An Anti-Monopoly Commission expert adviser noted that the Anti-Monopoly Bureau is an internal division of MOFCOM and is not an independent agency like the DOJ, FTC, or UK's CMA.

One commentator noted that MOFCOM, NDRC and SAIC are agencies with different enforcement powers, and the ultimate competition authority in China is the State Council's Anti-Monopoly Commission.

National Development and Reform Commission (“NDRC”)

NDRC Investigations Arise Mostly from Complaints

According to Xu Kunlin, Director General of NDRC's Price Supervision and Anti-Monopoly Bureau, all but one of NDRC's antitrust investigations were launched as a result of submissions of complaints or whistleblowing. The only case initiated by NDRC itself was the investigation of two Chinese white liquor giants, Wuliangye and Kweichow Moutai, which resulted in the then record-high fines in 2013. Xu said in that case, he himself read on the Internet the companies' public announcements of their reprisals against dealers who breached minimum resale price maintenance (“RPM”) contracts. Xu also noted that the Wuliangye/Moutai case demonstrates NDRC's willingness to target all enterprises including SOEs.

According to Director General Xu, NDRC will independently verify the content of every complaint it receives. He said that, like U.S. agencies, NDRC will pursue only those complaints which are based on concrete evidence. For example, he noted that the bureau investigated the 2011 China Unicom/Telecom case (both large, central SOEs) for months and consulted with outside experts before it decided to launch a case.

Xu Kunlin Discussed RPM and Abuse of Dominance Analyses

In response to questions, Director General Xu noted that the Anti-Monopoly Law is different from U.S. law because it explicitly prohibits RPM. But as the law also allows for exemptions based on certain considerations, a company has the opportunity to persuade the NDRC that the RPM in question benefits consumers. Thus, as the law is enforced, there is no “per se” rule against RPM in China.

Director General Xu was asked to clarify the “abuse of dominance” analysis because a Guangdong court in *Qihoo v. Tencent* (2013) had stated that because the defendant did not have a dominant position, it did not need to reach the abuse question. Xu responded that the NDRC will first look at whether there is anticompetitive harm and then look at whether there is a dominant position.

Xu Kunlin Discussed Calculation of Penalties

Director General Xu said that it is complex to determine which basis to use in order to calculate penalties in antitrust investigations. The general principle followed by NDRC is that if the illegal conduct only affected consumers in the domestic PRC market, then the investigated target's China revenues will be

used to calculate penalties; if the conduct affected the global market, then global revenues may be used to calculate penalties. In NDRC's past investigations, including those regarding the LCD panel cartel and infant formula producers' RPM, the penalties imposed by NDRC were based on revenues generated in China.

Director General Xu further noted that, in the LCD panel price-fixing case, NDRC compared import figures as reported by the target companies themselves with those from customs. Where there was a discrepancy, NDRC pressed the relevant companies, which admitted that they had under-reported. Xu said that heavier penalties were imposed as a result.

NDRC's Biggest Challenge Is Its Staffing Shortage

Director General Xu stated that the biggest challenge for his bureau is the shortage of manpower. There are 46 officials at NDRC's Price Supervision and Anti-Monopoly Bureau, and he said that he would like 100 more people, which would allow the bureau to initiate more investigations on its own.

Director General Xu noted that NDRC delegates enforcement to provincial authorities. These authorities have experience with enforcement because the Price Law (which existed before the Anti-Monopoly Law came into effect) also addressed anti-monopoly issues. Delegating to provincial authorities is necessary because, given China's scale, not all cartels can be investigated by NDRC.

NDRC Is Drafting New Regulations on Administrative Penalties

NDRC is in the process of drafting new rules on discretionary powers in administrative penalties, according to Director General Xu. This new regulation will include detailed provisions on circumstances where heavier or lighter penalties may be imposed.

Based on news reports, NDRC has already prepared an initial draft of this new regulation and will first seek internal comments from provincial-level development-and-reform agencies. After that, NDRC will publish the draft for public consultation before formally adopting it this year.

Asked by practitioners about the desire for greater certainty for businesses, Director General Xu said that he is trying to release more regulations and guidelines, perhaps some on safe harbors.

NDRC Suspended Abuse of Dominance Investigation of U.S. Firm InterDigital

Director General Xu announced at the conference that NDRC had decided to suspend its abuse of market dominance investigation of InterDigital. InterDigital had co-operated with NDRC's investigation, reached settlement agreements with the relevant Chinese companies, and made satisfactory commitments to NDRC. These commitments include: (i) no discrimination against Chinese companies by levying unfair licensing fees; (ii) no bundling of standard-essential patents (SEPs) with non-SEPs when negotiating licensing agreements; (iii) no demand for cross-licensing; and (iv) no initiation of litigation in order to impose unreasonable terms. NDRC will monitor InterDigital's compliance.

Xu Kunlin Discussed Focus on Local Monopolies and International Cooperation

Director General Xu cited his focus on combatting potential local monopolies, which has entailed coordination with about ten other different government agencies. His bureau has identified cases where local toll booths charged out-of-area cars more, or where a local government would only procure from a local beer brewery.

He also noted that NDRC coordinates with sector regulators and industry associations, and participates in many meetings with the State Council. He noted that there are times when NDRC and other entities have differing opinions. He emphasized the importance of having one consistent standard of antitrust enforcement across the agencies.

Director General Xu noted that NDRC has had closest international exchange with Korea, Europe, and the U.S. He said that this year, a third dialogue with the U.S. will start in September in Washington, D.C., with NDRC leading and MOFCOM and SAIC participating. In response to questions, Xu said that there have been no investigations yet where NDRC coordinated with foreign agencies. He said that he has communicated with Korea and hopes to jointly conduct a cartel investigation with Korean antitrust authorities. He said that he would discuss this topic with the U.S. in the future.

State Administration for Industry and Commerce (“SAIC”)

SAIC Is Finalizing Intellectual Property Rights Rules

Ren Airong, Director General of SAIC’s Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau, noted that there will be one month of solicitation of public comment on the most recent draft of “Rules on the Prohibition of Abuse of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition.” If there are no objections, the draft will likely be the final version.

Director General Ren noted that the draft rules contain a compulsory licensing section or refusal to deal limitation. She noted that some, including certain U.S. companies, had objected and wanted this section to be removed. SAIC ultimately decided to keep it but limited compulsory licensing to those situations where a license is necessary for competition and whether there is unreasonable harm from a refusal to deal in the IPR context.

Various commentators expressed concern, posing the question of whether a company would need to license all its intellectual property. U.S. commentators emphasized the controversial nature of the essential facilities doctrine. Director General Ren noted that the essential facilities doctrine is embraced in the EU, and Chinese law is more similar to EU law than U.S. law.

Tetra Pak Investigation Ongoing

SAIC’s abuse of market dominance investigation of Tetra Pak, a multinational food packaging and processing company, is still ongoing, according to Director General Ren. Led by a team of more than 10 investigators, the bureau has been actively investigating this case for more than a year. Ren said that the case is complex and the investigators are facing a heavy volume of data for analysis. For now the bureau has requested additional information and is waiting for Tetra Pak to respond.

Ren Airong Discussed SAIC and NDRC Jurisdictions

SAIC’s Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau, which has 8 people on its staff, generally launches investigations based on complaints, such as from a sector regulator, according to Director General Ren. SAIC, which has jurisdiction over non-price conduct, and NDRC, which investigates price-related conduct, cooperate so that where cases involve both price and non-price conduct, the agency that discovers, investigates, or launches a case first, or that a complaining party or witness approaches first, leads the case.

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