

China's Energetic Enforcement of Anti-Monopoly Law Cases and Lessons

An array of industries has been coming under the spotlight as China intensifies efforts to bring companies into compliance with a six-year-old anti-monopoly law, which refers to the law itself that implemented as of August 1, 2008, as well as post-law ancillary legislative and legal documents. Recently, US mobile chipmaker Qualcomm Inc. was hit with a record fine of nearly USD 1 billion in a Chinese antitrust probe, escalating tensions in companies to new highs to face increasingly aggressive regulators.

The short article discusses various actions taken in 2014 by regulators from different agencies, and shares some thoughts and considerations with our readers.

Enforcement from the National Development and Reform Commission

(1) Qualcomm: Abusing its dominance

Since November 2013, the National Development and Reform Commission (NDRC) has conducted antitrust investigation into Qualcomm for allegedly abusing its dominance by reaping the vast majority of licensing fees for the chip sets used by handsets in China. After a fourteen-month probe, the NDRC has concluded Qualcomm's monopolistic practice on February 10, 2015. Besides a record fine of CNY 6.088 billion (about USD 975 million) and a mandate to the company on lowering licensing fees, the NDRC also demanded Qualcomm abandon its so-called "reverse patent license"—a compulsory agreement that Qualcomm imposed on its clients to lift their patent fees to each other.

(2) Twelve Japanese Auto Parts and Bearing Manufacturers: Horizontal price fixing

Twelve Japanese companies including eight (8)

auto parts manufacturers (Hitachi, Denso, Aisan, Mitsubishi Electric, Mitsuba, Yazaki, Furukawa, Sumitomo) and four (4) bearing manufacturers (Nachi-fujikoshi, Seiko, Jtekt and NTN) have been investigated by the NDRC. In August 2014, the NDRC announced the completion of the investigations and imposed fines of total CNY 1.2354 billion for price-fixing and accordingly violating antitrust laws. The fines varied among the Japanese companies from zero, four to six percent of a company's revenues for the previous year, in view of respective cooperation with the agency.

Enforcement from the Chinese Ministry of Commerce

(3) Western Digital Corporation: Violating conditions for approval of acquisition

China's Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) has challenged Western Digital Corporation's acquisition of Viviti Technologies Ltd., formerly known as Hitachi Global Storage Technologies ("HGST"), which violated the MOFCOM's conditions for approval of acquisition. Western Digital Corporation acknowledged its wrongdoing, and was fined CNY 300,000 on December 2, 2014.

(4) A.P. Møller-Maersk A/S, MSC Mediterranean Shipping Company S.A., and CMA CGM S.A.: Planned P3 network denied

MOFCOM has denied an alliance named the P3 Network among A.P. Møller-Maersk A/S, MSC Mediterranean Shipping Company S.A., and CMA CGM S.A. MOFCOM has concluded, after a review under China's merger control rules, that the alliance would result in likely anticompetitive effects and thus announced a non-approval.

Enforcement from the State Administration of

Industry and Commerce

(5) Microsoft: Abusing its dominance

China's State Administration of Industry and Commerce (SAIC) initiated an antitrust probe into Microsoft since July 2014, alleging the company having broken anti-monopoly laws regarding compatibility, bundling and document authentication for its Windows operating system and Office suite of applications. The case is still on-going.

Enforcement from Provincial Price Bureaus¹

(6) Chrysler: Vertical price-fixing

In September 2014, Chrysler received fines of CNY 31.7 million from Shanghai Price Bureau for signing a distribution agreement with car dealers in which it required dealers to keep the "manufacturer's recommended prices." Three of its car dealerships in Shanghai also received antitrust tickets with a combined value of CNY 2.14 million. The fine to Chrysler equaled to three percent of the company's annual revenue for involved products of the previous year.

(7) FAW-Volkswagen: Vertical price-fixing

The antitrust investigation on FAW-Volkswagen costs the multinational automaker CNY 248 million in fines in September 2014. Hubei Bureau of Price Supervision investigated an Audi customer complaint, and found a monopolistic agreement among Audi dealers to set high maintenance prices in cars. The fine equaled to six percent of the company's luxury brand Audi's 2013 sales in Hubei province.

Lessons

It is important to note that while the Chinese anti-monopoly law borrows from foreign laws, in particular from Europe, it also contains some Chinese specific features such as requirements that

¹ Some provincial price bureaus are under the local NDRC and some others may be under the local SAIC.

enforcement agencies take into account industrial policy considerations. Further, China's legal and cultural environment quite differs from other jurisdictions. Specifically, the law does not limit the right to complain to competitors of an accused company, and rather, it allows anyone in China to file such a complaint. The law also permits the enforcement agencies to impose fines of between one percent and ten percent of a company's revenues for the previous year.

China's anti-monopoly law enforcement responsibility is divided among three agencies, *i.e.*, the NDRC (responsible for price-related non-merger conducts), MOFCOM (responsible for merger and acquisition control), and the SAIC (responsible for non-merger enforcement, in particular non-price-related conducts). As seen, the agencies have been acting energetically in 2014 and likely years beyond.²

Given the importance of the Chinese economy and the aggressiveness of Chinese regulators, the Chinese anti-monopoly law should rank high on companies' radar screens. Thus, companies with significant business activities in China should take into account the specific features of Chinese anti-monopoly law and in particular Chinese legal and cultural environment when assessing antitrust compliance in China. We recommend these companies establishing antitrust compliance policies and following necessary procedures in merger and acquisition process, and once antitrust investigations start, fully cooperating with the agencies.

² Moreover, antitrust litigation in China has gathered speed as well, in particular after the adoption in May 2012 of the Supreme People's Court's rules on civil litigation under the anti-monopoly law. *Qihoo vs. Tencent* has been reviewed and decided by the Supreme People's Court in 2014, where Tencent (a leading instant message software and internet social platform provider) was found to engage in anticompetitive conducts and was ordered to pay damages of CNY 150 million to Qihoo 360 Technology Co., Ltd. (a large computer safeguard software company).

The newsletter is not intended to constitute legal advice. Special legal advice should be taken before acting on any of the topics addressed here.

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