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I. INTRODUCTION

Several months have now passed since the second anniversary of the enactment of China's Anti-Monopoly Law (“AML”). As compared with 2009, when antitrust news was often headlined in the press, the pace of antitrust enforcement this year seems, at least on its face, to be slowing down. This is partly the result of the lack of high-profile new merger review decisions like the Coca-Cola/Huiyuan decision, and the result of slowly evolving conduct rules legislation (i.e., those referring to prohibitions of monopoly agreements and abuse of market dominate positions).

However, a careful observer could find that the enforcement authorities are actually beefing up their enforcement and composing themselves for more active applications of the AML in the future. For one, the Ministry of Commerce (“MOFCOM”) has continued to further strengthen its merger control framework. Meanwhile, the National Development and Reform Commission (“NDRC”) has begun to apply the AML, in addition to pre-existing laws (such as the 1997 Price Law), to price-related cartels. The State Administration for Industry and Commerce (“SAIC”) also published the second draft of its three implementing regulations for public consultation. On the private action side, Chinese courts have resolved several antitrust cases and are in the process of trying several others, though not great in number.²

This article summarizes the developments in each field mentioned above and further discusses their implications for the business community. Sections II, III, and IV will examine the developments in several aspects according to the regulatory roles of the three enforcement agencies.

II. MOFCOM AND MERGER CONTROL

Despite seemingly less public visibility, MOFCOM's enforcement of the AML remains vigorous. Some evidence is that MOFCOM has reviewed more cases in the second year than the first year after the AML came into effect.³ As the sole regulator for merger control, MOFCOM has been relatively active in AML enforcement as compared with NDRC, SAIC, or the courts.

In 2010, there were two notable antitrust developments with respect to MOFCOM: the enactment of the Interim Regulation on the Implementations of Asset or Business Divestiture in Concentrations between Undertakings (“Interim Measures”) and the conditional clearance of the Novartis/Alcon transaction.

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² See http://www.legaldaily.com.cn/index_article/content/201008/30/content_2264422.htm?node=5955 (last visited on November 5, 2010) and http://www.legaldaily.com.cn/index_article/content/2010-11/03/content_2337657.htm?node=5955 (last visited on November 5, 2010).

³ MOFCOM had accepted more than 140 cases as of the end of June 2010 and 58 cases as of the end of June 2009, which means that the amount of accepted cases for the second year is more than that for the first year. See <http://bgt.mofcom.gov.cn/aarticle/c/d/201008/20100807078063.html> (last visited on November 5, 2010) and <http://fldj.mofcom.gov.cn/aarticle/zcfb/200907/20090706409831.html> (last visited on November 5, 2010).

A. Interim Measures

On July 8, 2010, MOFCOM released a new implementation regulation, the Interim Measures, which became effective upon issuance. The new regulation largely formalizes MOFCOM's earlier practice in imposing and implementing remedies, particularly in the Pfizer/Wyeth case, in which MOFCOM ordered Pfizer to divest parts of its business relating to the production and sale of several types of animal health vaccines, pharmaceuticals, and medicinal feed additives as a condition of approval for Pfizer's U.S.\$68 billion acquisition of Wyeth.⁴ The required divestment was carried out in June this year and China's Harbin Pharmaceutical Group was chosen as the purchaser.⁵

Under the Interim Regulation, companies subject to divestiture under the AML merger regime are required to follow strict timelines. For example, transfers must ordinarily occur within 3 months from the execution of the relevant sales agreement. In addition, to ensure that required divestiture remedies are effectively implemented, MOFCOM may appoint trustees—monitoring trustees and divestiture trustees to oversee the divestiture process—as the antitrust authorities in other jurisdictions. Subject to MOFCOM's approval, the merging parties are allowed to select the trustees, which can be entities or individuals.

Notably, unlike MOFCOM's other implementation regulations and guidelines, public comments on the draft were not sought before the Interim Measures were finalized. This may indicate that MOFCOM's belief that the Interim Measures would not lead to many controversies among the public.

B. Novartis/Alcon Decision

On August 13, 2010, MOFCOM approved the proposed acquisition by Swiss pharmaceutical company Novartis of world-leading eye care company Alcon, subject to conditions. Occurring merely one month after the promulgation of the Interim Measures, MOFCOM's decision on the Novartis/Alcon transaction was viewed as an opportunity for applying the earlier issued Interim Measures. However, the decision turned out to adopt behavioral remedies rather than the structural remedies stipulated in the Interim Measures. The following points may be worth mentioning for the purposes of understanding and anticipating MOFCOM's merger review in time to come.

1. Controversial Remedies

MOFCOM's decision to require Novartis to withdraw its medicated eye-care products from the China market appears arguable given the fact that Novartis' additional share (less than 1 percent) to the relevant market in China was minimal. Novartis' existing market share was too small to result in a substantive increase of market power and Novartis had already communicated to MOFCOM its intention to withdraw from the market. However, MOFCOM did not explain why exiting the market by Novartis would still be necessary.

⁴ See <http://fdj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html> (last visited on November 5, 2010).

⁵ See <http://news.hexun.com/2010-06-01/123851709.html> (last visited on November 5, 2010).

2. Coordinated Effects

A significant development in the Novartis/Alcon decision is that MOFCOM, for the first time, invoked the theory of harm of coordinated effects (though this term was not used in the decision) in its published decision. According to the decision, MOFCOM ordered Novartis to terminate its supply arrangements with Hydron within 12 months and report to MOFCOM when it has finished the termination.⁶ This requirement, reflecting a concern about the existing relationship between the merging parties and competitors, is not new to observers familiar with U.S. and EU merger control regimes.

While the application of the theory of coordinated effects in the Novartis/Alcon decision demonstrates MOFCOM's growing sophistication in learning recognized methodologies from more developed jurisdictions and applying them to its own cases, the decision failed to touch on the issue of how coordinated effects would work between the merged party and Hydron. The lack of the necessary analysis of the possibility of the alleged coordination on pricing, sales volumes, and sales regions, made the decision less convincing and caused analysts to doubt the usefulness of the requirement to terminate the agreement with Hydron.

C. Observation

The Interim Measures mark yet another regulation of MOFCOM to facilitate its merger reviews, particularly to ensure actual and effective enforcement of its decisions with divestiture remedies. Although the Interim Measures were not utilized in the Novartis/Alcon case, which came about after the enactment, they may be applied soon in future decisions. Divestiture remedies (including the divestiture portion in mixed remedies) are adopted by merger review agencies more often than behavioral remedies. The Novartis/Alcon decision, the sixth occasion that MOFCOM has imposed conditions since the AML took effect in August 2008, demonstrates MOFCOM's growing sophistication and expansion of methodologies and approaches in relation to handling various types of transactions. However, a more detailed analysis and reasoning would be welcome because such information would inevitably help the public understand MOFCOM's thinking and practice.

III. NDRC AND PRICE-RELATED CONDUCT RULES AND PRACTICE

Against the backdrop of frequent price fluctuation in quite a few sectors in 2010, NDRC and its local officers investigated some price-related cases in 2010.⁷ The publicity of NDRC actions may shed some light on the development of China's price-related conduct rules and practice.

A. Guangxi Rice Noodle Case

On March 31, 2010, NDRC announced regulatory action against a group of rice noodle manufacturers in Guangxi province, due to the involvement of those manufacturers in a joint action to increase prices in the region.⁸

⁶ See <http://fdj.mofcom.gov.cn/aarticle/ztxx/201008/20100807080639.html> (last visited on November 5, 2010).

⁷ In China, while MOFCOM is the sole pre-concentration anti-monopoly review authority, NDRC and SAIC share responsibility for regulating abuse of dominant market positions, monopolistic agreements, and administrative powers depending on whether a monopolistic act involves pricing. Specifically, NDRC oversees price-related monopolistic acts, while SAIC regulates non-price-related monopolistic acts.

⁸ See http://jjs.ndrc.gov.cn/fjgld/t20100331_338262.htm (last visited on November 5, 2010).

On November 1, 2009, the individual responsible for the Nanning Xianyige Food Plant, which produces rice noodles, gathered seventeen other rice noodles producers from Nanning (the capital city of Guangxi) to discuss reorganizing the rice noodle manufacturing industry of Nanning and to propose a price increase to be implemented. Following the meeting, other producers subsequently joined the group. As a result, rice noodle peddlers and stores in Nanning raised the price for rice noodle food sold directly to consumers. Rice noodle producers from the neighbouring city of Liuzhou followed suit, and consequently the price for rice noodle also increased. NDRC found that the cartel members' collusion for price manipulation constituted an "unfair price act" in violation of the 1997 Price Law, the Provisions on Administrative Penalties for Unlawful Pricing Acts (like the 1997 Price Law, also a component of China's price-related law regime) and the AML. Accordingly, NDRC imposed a fine of RMB 100,000 on each of the three organizing factories, while eighteen cartel participants received fines ranging from RMB 30,000 to RMB 80,000, depending on the seriousness of their respective acts.

B. Other Recent Cartel Cases

More recently, on July 1, 2010, four further enforcement actions were jointly announced by the NDRC, MOFCOM, and SAIC—also focused on food sectors. As with the Guangxi rice noodle case, all four enforcement actions were taken primarily under the authority of the pre-AML laws (mainly the 1997 Price Law).⁹

An example of the above-mentioned recent cases involved the Jilin Corn Centre Wholesale Company ("Jilin Corn Centre"), a large Chinese mung bean producer. Jilin Corn Centre was found to have been playing a leading role in serious price-fixing behavior and the fabrication and spreading of price-hike information in relation to mung beans. Consequently, it was fined RMB1 million (approx. U.S.\$147,000) by local price bureaus that are supervised by NDRC, and several other participating enterprises were each fined RMB500,000 (approx. U.S.\$73,000). A number of other competitors across 16 provinces in China received warning letters for their less severe violation.

C. Special Regulation Draft

In an attempt to codify the recent practices in respect of cartel investigations over the past year, NDRC circulated for public comment a draft version of the Special Regulation on Penalties for Illegal Pricing Conduct during Periods of Abnormal Fluctuation of Market Prices ("Special Regulation Draft") on July 13, 2010.

Notably, the Special Regulation Draft stated that its legal basis was the 1997 Price Law, which means that it is a part of the price-related law regime (including the 1997 Price Law). The Special Regulation Draft essentially targets four types of conduct: the fabrication and dissemination of news on price hikes, hoarding products, driving up prices and reaping excessive profits, and price collusion. The Special Regulation Draft is meant to apply only when important goods and services fluctuate abnormally. Under these circumstances, NDRC can enjoy additional power beyond those prescribed in the 1997 Price Law. Specifically, NDRC can fine cartel participants five times the amount of any illegal gain they obtain from their unlawful collusion behavior, and suspend or revoke the operating licenses of those businesses.

As stated in the Special Regulation Draft, these powers are primarily intended to be utilized in circumstances where abnormal fluctuations are identified in respect of both the market

⁹ See http://www.sdpc.gov.cn/xwfb/t20100701_358443.htm (last visited on November 5, 2010).

price for major goods and services that are important to people's life as well as the operation of enterprises. As such, they are likely to be applied to address cartel behaviour not only in the agricultural sector, but also in other markets relating to key business inputs and basic resources or services.

D. Observation

The Guangxi rice noodle cartel case may demonstrate NDRC's willingness to take actions against price cartels by applying the anti-cartel rules of the AML, though the anti-cartel rules of the AML are not the main basis for NDRC's actions. In addition, recent cases send a signal to companies doing business in China that price-related acts will likely be subject to stricter regulation by NDRC. Not only the AML, but also the price-related law regime (including the 1997 Price Law and Special Regulation once it is finalized) will be applicable to price-related acts, and the price-related law regime will offer NDRC additional alternatives for measures to be taken against offenders.

Although it may be too early to conclude from NDRC's sanctions on cartels in 2010 that NDRC is prepared to more vigorously implement the AML conduct rules, the reference to the anti-cartels rules in the AML may prove that NDRC is willing to apply the AML to tackle price-related cartels. It can be expected that with the enactment of further conduct rules, the anti-cartels rules in the AML will play an increasingly important role in investigating cartel cases even though the price-related law regime also applies.

IV. SAIC AND DRAFT IMPLEMENTATION REGULATIONS

Publically, SAIC seems less active as compared with MOFCOM and NDRC in 2010. A notable development on the part of SAIC is the published draft rules in respect of non-price-related monopoly agreements and abuse of market dominance.

A. Summary of the Draft Regulations

On May 25, 2010, SAIC published three draft anti-monopoly regulations for public comments: Provisions of the Administration for Industry and Commerce on Prohibiting Monopoly Agreements ("Monopoly Agreement Provisions"); Provisions of the Administration for Industry and Commerce on Prohibiting the Abuse of Dominant Market Positions ("Abuse of Market Dominance Provisions"); and Provisions of the Administration for Industry and Commerce on Curbing Abusive Acts of Administrative Powers to Eliminate or Restrict Competition ("Abuse of Administrative Powers Provisions"). Earlier versions of two of these regulations—the Monopoly Agreement Provisions and the Abuse of Market Dominance Provisions were published previously for comments in April 2009. While these three regulations are not the first SAIC regulations implementing the AML, they are the first three sets of substantive regulations from SAIC intended to facilitate enforcement of the AML.

Each of the revised draft rules expands on general prohibitions in the AML, and provide some detail about the methodology SAIC and its local agencies will apply when determining if an undertaking (or, in the case of the Abuse of Administrative Powers Provisions, a governmental authority) is in breach of those prohibitions. Additionally, the revised draft version of the Monopoly Agreement Provisions and Abuse of Market Dominance Provisions elaborates on the brief non-exhaustive list of examples of relevant unlawful agreements or activities that is contained in the corresponding AML provisions, and provides further guidance on the

circumstances in which undertakings may be able to justify or raise defences for agreements or conduct that would otherwise run afoul of the prohibitions.

B. Observation

The three drafts are largely consistent with the overarching framework for prohibition of monopoly agreement acts, market dominance abuse, and administrative powers abuse set out in the AML. Apart from that, the monopoly agreement provisions and the abuse of market dominance provisions are not fundamentally different from their earlier versions. Compared with previous drafts, both the abuse of market dominance provisions and monopoly agreement provisions contain some minor changes intended to tighten up language and provide some additional detail. But neither of them introduces significant substantive changes.

On the other hand, as the AML's implementation rules, these three sets of draft regulations introduce certain detailed rules intended to supplement enforcement of the AML, and to offer clearer guidance to interested market players. These three draft regulations elaborate on the specific types of prohibited monopoly agreements, market dominance abuse, and administrative powers abuse as generally mandated in the AML.

V. PRIVATE LITIGATION

As announced by the Supreme Court, a total ten cases had been lodged with Chinese courts under the AML as of May 2010 and little litigation has been brought since then.¹⁰ The relatively scarce number of the cases demonstrates the fact that private litigation of the AML is still in an early stage.

A. Burden of Proof

A high burden of proof that is difficult to satisfy could be one reason for the slow development of private enforcement. As a matter of fact, several of the allegations before the courts were unsuccessful because the plaintiffs were not able to prove that a defendant held a dominant market position or the conduct was abusive.

The *Baidu* and *Shanda* cases not only show a general reluctance by the courts to support private claims brought under the AML when the cases do not meet the necessary evidentiary standards, but also demonstrate that private litigants, without the assistance of professional third parties, might face significant difficulties in presenting evidence satisfactory to the courts to support their claims.

As a general rule under China's Civil Procedure Law ("CPL"), plaintiffs in civil lawsuits for allegedly monopolistic acts bear the burden of proving that the alleged acts took place, and that such acts effectively eliminated or restricted competition, thus causing damage to the plaintiffs. Under this burden of proof rule, in the *Shanda* case, the plaintiff alleging abuse of market dominance by the defendants needed to prove (i) the defendants held a dominant market position at the time of their acts; and (ii) the defendants acted unreasonably, meaning the defendants abused their market dominance to the detriment of the plaintiffs. The court denied the plaintiff's claim on the grounds that (i) it failed to show sufficient evidence of the defendants'

¹⁰ See http://www.legaldaily.com.cn/index_article/content/2010-08/30/content_2264422.htm?node=5955 (last visited on November 5, 2010) and http://www.legaldaily.com.cn/index_article/content/2010-11/03/content_2337657.htm?node=5955 (last visited on November 5, 2010).

dominance in the online literature market, and (ii) the defendants' conduct was justified to prevent the plaintiff from misleading the public.

Notably, some plaintiffs may find it difficult or impossible to meet the above-listed two requirements—in particular the first one—without the aid of third parties in forms such as obtaining prior administrative rulings or presenting testimony from economics or antitrust law experts.

B. Testing Litigation

As analyzed by a senior judge at the Supreme Court, the purpose of some plaintiffs taking actions under the AML is to test how private litigation works under the AML.¹¹ For example, in the *China Mobile* case, the plaintiff, a lawyer named Zhou Ze, sued China Mobile to test if the court would render a decision against a telecoms industry giant. The plaintiff admitted in his blog that he was not confident that he could win the case, so he opted to accept settlement and believed the settlement meant partial victory. It can be expected that the threat of AML-related lawsuits will continue to be used to test the effectiveness of private action under the AML, or as a negotiation tactic to force changes to existing and proposed trading arrangements.

C. Observation

In the absence of judicial interpretations for private litigation brought under the AML, Chinese courts could only rely on the general rules within the AML and CPL to handle cases. Up until now, however, only a handful of cases have been reported, and the results of these cases (unaccepted, dismissed, or settled) might discourage potential litigants from bringing private actions at this stage.

Although no successful private actions have been reported to date, it is likely that the first finding of an AML violation is just around the corner. This is possible particularly in several ongoing antitrust cases. The key issue is that a plaintiff should be able to collect strong and sufficient evidence to establish that the defendant holds a dominant market position, and that the defendant abused its dominance without justification and to the detriment of the plaintiff. Additionally, once judicial interpretations are issued to provide specific guidance, initiation of legal actions under the AML may be more easily accepted by the courts.

VI. CONCLUSION

In summary, in 2010, the three government authorities responsible for enforcing the AML have, with the courts, gained public visibility in varying degrees for their respective implementation of the AML. However, uncertainty and concerns about the predictability of the AML enforcement remains.

Indeed, MOFCOM should be applauded for its continued efforts to maintain the transparency of the merger review regime by announcing its merger review decisions subject to remedies and formulating implementation regulations. However, further transparency is really needed in terms of detailed reasoning and analysis of its decisions in order to help undertakings plan their concentration activities.

In addition, NDRC has started to invoke the anti-cartel provisions from the AML, in addition to pre-existing price-related laws and regulations, as a major legal basis to tackle cartels

¹¹See http://www.legaldaily.com.cn/index_article/content/201008/30/content_2264422.htm?node=5955 (last visited on November 5, 2010).

in the agricultural product sector. People would expect to see NDRC investigating cartels based primarily on the prohibitions articulated in the AML.

Moreover, SAIC's second draft regulations for public consultation purposes are also welcome because they are now getting closer to international antitrust best practices; the draft rules remain open-ended and would be subject to broad discretion of the regulators. Accordingly, it is much hoped that the rules will be more specific in their final versions.

Finally, it is encouraging to see that courts, in the absence of judicial interpretations, are now willing to independently hand down judgments on private antitrust litigations within the general principles and rules applicable to ordinary civil cases. However, hopefully the Supreme Court will issue judicial interpretations to provide more guidance to courts in handling private actions.

All in all, the business community can take comfort from the fact that China's antitrust regime is heading roughly in the right direction and the legislators and the regulators are establishing a sensible framework that is, to a certain degree, compatible with those of the EU and the United States. Similar to other emerging antitrust jurisdictions, there is a long way to go for China to align with globally accepted standards and practices. As noted by the head of the Anti-Monopoly Bureau of MOFCOM in a press release in August 2010, the formulation of antitrust legislation in China, as was true in other mature antitrust jurisdictions such as the EU and the United States, will be a long-term and gradual process.

Until China becomes a widely recognized antitrust jurisdiction, a degree of uncertainty is likely to remain among market players about the predictability of China's antitrust regime. To cope with the uncertainty, market players should: (i) closely monitor the development of China's antitrust legislation as well as regulatory enforcement and private actions, (ii) seek professional advice to understand its implications for their businesses, and (iii) take precautions or make prompt responses to every development to ensure compliance and mitigate risks.