

client alert

COMPETITION LAW | CHINA |

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RECENT DEVELOPMENTS IN PRC COMPETITION LAW

Since competition authorities¹ adopted implementing regulations and guidelines for enforcement of the Anti-Monopoly Law (AML), there have been impressive developments in their decisional practices since our last Client Alerts² on the subject. The area of merger control, overseen by MOFCOM, has made significant efforts to improve the efficiency and the transparency of its merger control procedures.

For anti-competitive practices, the NDRC³ has also taken significant actions to enforce the AML, particularly against price-related cartels. In the past two years, it has made a series of high-profile decisions with record penalties, including two cases involving vertical price fixing in the luxury liquor and powdered milk sectors.

In parallel, there has been an interesting development in private enforcement lawsuits filed before Chinese courts for breaches of the AML. The release of a new Supreme Court opinion⁴ and the first successful antitrust claim⁵ are signs that they may become more effective in the future.

Such developments in PRC competition law show the authorities' concerns to standardise the practice, make the AML more transparent for economic agents and enforce it more effectively, targeting more behaviours (vertical anti-monopoly agreements are now clearly concerned), with higher penalties at stake.

MERGER CONTROL

Updates of the merger control procedure

Last year, MOFCOM's antitrust bureau adopted a new notification form that standardised the structure, content and format of merger notifications and clarified frequent questions and issues that MOFCOM encountered from notifying parties.

¹ Ministry of Commerce (**MOFCOM**), National Development and Reform Commission (**NDRC**), State Administration for Industry and Commerce (**SAIC**).

² *Recent evolution of PRC competition law* (May 2012) and *Further steps toward enhanced private enforcement of China's Anti-Monopoly Law* (July 2012).

³ The NDRC is in charge of all price-related anti-competitive practices.

⁴ Provisions on Several Issues concerning the Application of Law in the Trial of Civil Cases arising from Monopolistic Conducts dated 3 May 2012.

⁵ Johnson & Johnson/ Rainbow case.

The new notification form in 2013 formalized the practice whereby MOFCOM may begin to accept some filings before a final transaction agreement was executed: under certain conditions, the parties may therefore notify MOFCOM of their transaction based on a preliminary agreement, such as a binding memorandum of understanding.

More recently, in October, MOFCOM launched an online filing system that allows parties to submit their notifications online.

Simplified procedure

One of MOFCOM's major goals is the implementation of a fast-track procedure for "simple cases". The purpose of the simplified procedure is to shorten the approval time for cases that *prima facie* do not raise substantive competition concerns.

In April 2013, MOFCOM released draft regulations⁶ on the eligibility criteria for these simplified procedures. Under the draft regulations, a concentration may use the simplified notification procedure if the combined market share of the parties is less than 15% in horizontal mergers or 25% in vertical or conglomerate concentrations⁷. Worth noting is these draft regulations have not been finalised.

Greater transparency

Over the past five years, MOFCOM has demonstrated its commitment to improving transparency, releasing increasingly elaborate decisions that contain informative elements on market definition, competitive assessment and remedies. Up to the date of this client alert, MOFCOM published four decisions⁸ in 2013 imposing conditions to the merger project (among which two required divestiture remedies).

ANTI-COMPETITIVE PRACTICES

Public enforcement - Greater penalties for vertical price fixing

Examples of high-profile cases include:

- **Wuliangye & Moutai**

In February, the provincial NDRC in Sichuan and Guizhou fined Wuliangye and Kweichow Moutai RMB 201 million and RMB 247 million respectively, i.e. 1% of the companies' turnover in the previous financial year, for resale price maintenance. The two companies are major state-owned producers of premium liquor, and it was the first time regulators imposed penalties for a vertical anti-competitive practice.

According to the NDRC's decision, Wuliangye and Moutai had violated Article 14 of the AML, entering into agreements through which it restricted the minimum resale price of their liquor, and penalising offenders through commercial penalties such as damages, forfeit or deposit, and reduction or restriction of supply.

- **Powdered milk case - Record fine**

Six months later, the NDRC imposed a record fine of RMB 669 million on six foreign and domestic powdered milk producers for price fixing practices that violated Article 14 of the AML. According to the NDRC's decision, the companies either directly fixed the resale price of their

⁶ *Draft Interim Regulations on Standards for Simple Cases of Concentrations.*

⁷ The above criteria are given as example, they are not exhaustive.

⁸ Glencore/Xstrata, Marubeni/Gavilon, Baxter/Gambro and MediaTek/Mstar.

products or imposed a minimum resale price on their distributors in the Chinese market. The fines represented 3% to 6% of their annual turnovers in the previous year.

While the above companies have suffered significant penalties, three companies have benefited from the leniency program of Article 46 of the AML. All were exempted from penalties because they cooperated with the NDRC's investigation and provided key evidence and information on illegal practices within the industry.

In both cases, the NDRC did not demonstrate that the resale price maintenance had anti-competitive effects on the market. Chinese courts, however, require plaintiffs to prove such anti-competitive effects.

Private enforcement - China's first successful antitrust lawsuit

In August, the Shanghai Higher People's Court ruled in favour of Beijing Rainbow Medical Equipment & Supplies Company (Rainbow), which sued Johnson & Johnson for losses caused by the latter's minimum resale price under their distribution agreements. These were not respected by Rainbow which subsequently was inflicted a series of commercial punishments by Johnson & Johnson. It was the first time a Chinese court supported private enforcement of the AML since the law entered into force.

This case calls for several comments. Firstly, it describes the series of factors taken into account by the courts to determine whether a resale price maintenance constitutes a monopoly agreement, these factors including the intensity of competition and the defendant's position in the relevant market, his motivation for fixing the resale price, and the effects thereof. Secondly, it confirms that a party to a monopoly agreement is entitled to file a lawsuit. Last but not the least, the plaintiff bears the burden of proof and has to prove that the agreement not only contains behaviour prohibited by Article 14 of the AML, but also results in the elimination or restriction of competition, such evidence not being required by the NDRC for public enforcement.

CONCLUSION

As evidenced in our Client Alert, recent trends in PRC competition law show the determination of Chinese authorities to simplify and standardise the AML procedures, but also to improve enforcement and tackle issues of anti-competitive practices on the Chinese market. The risk of penalties for such illegal behaviour, as well as the reputational damage that a sanction would create, is increasing substantially. It is therefore essential to be aware and well advised regarding these fast-changing matters.

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