CHINA ANTITRUST REVIEW 2014 AND PERSPECTIVES FOR 2015 AND BEYOND

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The liberalization of the Chinese economy started in 1978 with the "Open Door Policy" initiated by Deng Xiaoping and lately accelerated with the adoption of the first Anti-Monopoly Law ("AML"). The law was adopted in August 2007 and came into effect on August 1, 2008. The AML is the first comprehensive law entirely relating to competition issues and providing a specific regulatory framework for Mainland China's antitrust law regime.

In this regard, the AML can be seen as a strategic element in the process of transformation of China's legal landscape with the conscious goal of the Chinese authorities to set up in the country a — relatively — free and fair competitive environment among the operators doing business in China or contemplating doing it. The purpose of the law is to protect a healthy market competition mechanism from any distortion, but it is noteworthy mentioning that the aim of the law is also to "promote the healthy development of socialist market economy" (Article 1). China definitely remains a socialist market economy with its own characteristics.

The AML assigns three institutions with the task of monitoring competition and market order in China: the Ministry of Commerce ("MOFCOM") is responsible for reviewing merger control cases and business concentrations, the National Development and Reform Commission ("NDRC") is responsible for price-related conducts (agreements and abuses of market dominance) and the State Administration for Industry and Commerce ("SAIC") is responsible for non-price related conducts. In addition with these government agencies, the intermediate courts can also examine the private civil liability of any business operator engaged into a monopolistic behavior infringing the AML.

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This article examines the significant developments for the Chinese antitrust law regime that took place in 2014 and explores the perspectives for 2015.

Despite the fact that the implementation of the AML is still in its infancy, the decisions released in 2014 by the three antitrust enforcement agencies together with the China's Supreme People Court raise fears that the AML might be used as a tool of industrial policy in order to protect domestic companies or force foreign operators to lower their prices or royalties with their Chinese licensees.

In addition, the foreign business community and practitioners have expressed their growing concerns regarding the lack of fairness of the investigating methods and the aggressive raids reportedly targeting the foreign subsidiaries in China over the last months.

The latest decisions and the on-going investigations carried out by the enforcement agencies should convince the foreign operators to follow thoroughly the antitrust law developments and the necessity for them to comply with this new legal environment in China.

Given this context, it is clear today that almost seven years after the AML came into effect, China has become a major antimonopoly jurisdiction with its antitrust agencies gaining more experience and improving their ability to handle complex and high profile cases. The foreign business operators cannot ignore this anymore.

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Initiated in 1978 by Deng Xiaoping with the "Open Door Policy," the liberalization of the Chinese economy accelerated with the adoption of the first Anti-Monopoly Law ("AML"). After a decade spent on drafting, organizing rounds with public comments and consulting U.S. and European competition authorities, among other jurisdictions, Chinese authorities finally passed the AML in August 2007. The law came into effect on August 1, 2008.[1]

While previous laws already dealt with competition issues, such as the prohibition of monopolistic conducts under the Anti-Unfair Competition Law[2] (1993) or the Price Law[3] (1997), the AML is the first comprehensive law entirely relating to competition issues and providing a specific regulatory framework for China's antitrust law regime.

In this regard, the AML can be seen as a strategic element in the process of transformation of China's legal landscape with the conscious goal of the Chinese authorities to set up in the country a — relatively — free and fair competitive environment among the operators doing business in China or contemplating doing it.

Broadly inspired from the European model, Article 1 of the AML provides that the law aims at "*preventing and restraining monopolistic conducts, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and the interests of the society as a whole*."

The purpose of the law is to protect a healthy market competition mechanism from any distortion. The law protects competition in the marketplace by considering unlawful any agreement that restricts or eliminates competition, any abuse of

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1 Anti-Monopoly Law of the People's Republic of China, adopted at the 29th Session of the Standing Committee of the 10th National People's Congress on August 30, 2007 and effective August 1, 2008. The AML is available here *(in English)*: http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml

2 Anti-Unfair Competition Law of the People's Republic of China, adopted September 2, 1993 and effective December 1, 1993.

3 Price Law of the People's Republic of China, adopted December 29, 1997 and effective May 1, 1998.

dominant position in a relevant market to restrict or eliminate competition, or any transaction that has the potential to restrict or eliminate competition.

But the purpose of the AML is also to *"promote the healthy development of socialist market economy*" (Article 1). Indeed, pursuant to Article 4, "*the State shall formulate and implement competition rules compatible with the socialist market economy, in order to improve macroeconomic regulation and build up a sound market network which operates in an integrated, open, competitive and orderly manner."* The goal is clearly to instill in the Chinese market a fair competition but within the limit of the specific needs of the development of the socialist market economy. China remains definitely a socialist market economy with its own characteristics, as this is the official model of development proudly asserted by the Constitution since 1982.

The structural reforms launched since 1978 and particularly strengthened before China's entry into the World Trade Organization ("WTO")[4] have not conducted the country to a capitalist and free market economy but to a mixed system where the central authorities still have today control over the economy, notably through the Five-year plan system and the restrictions imposed on foreign investors through the Catalogue of Foreign Investments,[5] while opening up the domestic economy to foreign actors, liberalizing trade and services and adopting the western corporate governance models.

In this regard, the Chinese legal system is on its way to support the transition to a market economy in China.

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[4] In order to be entitled to enter the WTO as of January 2002, China committed to eradicate trade barriers, harmonize legal statuses of foreign invested companies with Chinese invested companies and revise its legal system to be in line with the common rules of a market economy. Structural and legislative reforms took place as early as 1986.

[5] The China's National Development and Reform Commission ("NDRC") and the Ministry of Commerce ("MOFCOM") released the last version of the Catalogue for the Guidance of Foreign Investment Industries ("the Catalogue") on March 10, 2015. This new Catalogue is effective since April 10, 2015. It serves as policy guidance for foreign investors willing to operate in China. The Catalogue classifies China's industrial sectors into three categories: encouraged, restricted and prohibited. Sectors that are not specifically listed in the Catalogue are considered to be permitted sectors.

I. General Framework of Antitrust Law Regime in Mainland China

A. AML and the Chinese regulatory authorities

The AML assigns three institutions with the task of monitoring competition and market order: the Ministry of Commerce ("MOFCOM") is responsible for reviewing merger control cases and business concentrations;[6] The National Development and Reform Commission ("NDRC"), through its Price Supervision and Antimonopoly Bureau, is responsible for price-related conducts (agreements and abuses of market dominance) and the State Administration for Industry and Commerce ("SAIC"), through its Antimonopoly and Unfair Competition Enforcement Bureau, is responsible for non-price related conducts.

In addition with these government agencies, the intermediate courts can also examine the private civil liability of any business operator engaged into a monopolistic behavior infringing the AML.[7] The AML does not require that an administrative enforcement takes place as a prerequisite to anti-competitive civil action. Accordingly, any person may file a civil lawsuit directly or after a decision

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[6] Pursuant to Article 20 of the AML: "*A concentration between business operators refers to: (1) a merger of business operators; or (2) a business operator's acquisition of a controlling right in another business operator through the acquisition of equity or assets; or (3) a business operator's acquisition of a controlling right in another business operator or its ability to exercise decisive influence over another business operator by contract or other means*." On June 6, 2014, MOFCOM released the revised Guiding Opinions on the Notification of Concentrations between Business Operators. This text defines "control" to include both sole control and joint control and provides that the determination of "control" should be based on multiple legal and factual considerations. The revised Guiding Opinions also clarify that the establishment of a joint venture must be notified to MOFCOM if at least two business operators jointly control the joint venture.

[7] The legal basis for private antitrust civil liability is Article 50 of the AML: "*Where the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liability according to law.*"

has been rendered by one of the three anti-monopoly enforcement agencies.[8] The plaintiff may file a civil action in case of anti-competitive conduct or violation of the AML by any unlawful agreement to obtain damages.

B. AML Implementation in 2014

The implementation of the antitrust Chinese comprehensive regime is still in its infancy since it all started in 2008 but things have rapidly evolved thanks to implementing regulations which have clarified key concepts and procedures[9] and thanks also to the latest decisions rendered by the three AML regulatory authorities together with the China's Supreme People Court ("SPC").

In this regard, the year 2014 was particularly relevant for significant developments for antitrust enforcement in China.

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[8] On May 3, 2012, the China's Supreme People's Court (« SPC ») issued the « *Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trials of Civil Dispute Cases Arising from Monopolistic Conducts* » (« The Judicial Interpretation ») (effective June 1, 2012). This was the first SPC judicial interpretation addressing the AML. The Judicial Interpretation provides relevant guidance on antitrust civil litigation by setting out fundamental principles and procedures for antitrust civil litigation that appear to be favourable to plaintiffs. In particular, since the Judicial Interpretation became effective (June 2012), plaintiffs have the ability to file an antitrust case before any intermediate court whereas before June 2012, the intellectual property courts had exclusive jurisdiction over antitrust suits. The Judicial Interpretation also clarifies the principles applicable to any antitrust civil litigation, by providing that any natural person, legal entity or other organization may file a civil action if the matter involves a dispute arising from losses caused by anti-competitive conducts or violations of the AML by unlawful agreements. The Judicial Interpretation also clarifies that plaintiff may bring either a stand-alone action or a follow-on action after the AML enforcement agency has defined a violation of the AML. The Judicial Interpretation is available here *(in Chinese only)*: http://news.sina.com.cn/c/2012-05-08/141824384755.shtml

[9] For example, the Guidelines for Business Operator Concentration Submission of Documents (effective 7 January 2009), the Measures on the Notification of Concentrations of Business Operators issued by MOFCOM (adopted 24 November 2009 and effective 1 January 2010), and the revised Guiding Opinions on the Notification of Concentrations between Business Operators issued by MOFCOM on June 6, 2014 clarify procedures, provide more comprehensive guidance on merger notification and detail some key concepts. In addition, the Interim Provisions on the Standards for Simple Cases of Concentrations of Operators, issued by MOFCOM (adopted 11 February 2014 and effective 12 February 2014) set up a simplified merger review process.

II. Significant Developments For Antitrust Enforcement in 2014

The three enforcement agencies together with the SPC have provided notable developments for antitrust regime in China in 2014.

A. MOFCOM

1. New simplified merger review rules

In 2014, MOFCOM implemented new regulations in order to speed up the review process under new simplified standards for transactions cases that obviously do not have any adverse effect on competition in a specific market. MOFCOM retains discretion to decide whether a case qualifies or not for the simplified review procedure or if the notifying party should submit additional explanation within the simplified review process.[10]

The first merger review under these new rules was conducted on Rolls-Royce Holding PLC's contemplated acquisition of Daimler AG's 50 percent share of their joint venture. The public notice form of the proposed transaction was posted on May 22, 2014 on MOFCOM's portal for public comment through May 31 and final approval of the transaction was listed on June 9.

Since the Rolls-Royce transaction, MOFCOM has published 80 notices regarding simple cases in 2014, the majority being cleared in the month following the expiration of the public comment period.

[10] Pursuant to the simplified review process, the notifying party is required to submit to MOFCOM a simplified case notification form as well as a public notice form, which contains many information and materials but is less exhaustive than the standard notification form. MOFCOM posts the content of the public notice form on its portal (http://fldj.mofcom.gov.cn). This public announcement triggers a 10-days period during which any entity or individual may submit to MOFCOM their objection to the case's eligibility as a simple case.

2. Failure to notify a transaction

2014 also gave the opportunity to MOFCOM to publish for the first time a penalty decision issued against a company for failure to notify an acquisition in compliance with the AML requirements.[11]

It is noteworthy that this first case is related to a state-owned company, Tsinghua Unigroup Ltd ("Tsinghua Unigroup"), marking a deliberate policy to insist on the full respect of the AML mechanisms by any kind of company. On December 8, 2014, Tsinghua Unigroup was imposed a fine of RMB 300,000 (approximately USD 48,000) for having completed the acquisition of RDA Microelectronics, Inc. ("RDA") in July 2014 without respecting the merger control review process.[12] MOFCOM found out that the acquisition had no effect on the restriction or elimination of competition in the relevant market in China. Accordingly MOFCOM did not unwind the transaction.[13]

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[11] Under Article 21 of the AML, it is mandatory to follow the pre-closing merger notification system and submit the contemplated transaction to MOFCOM approval if the transaction meets certain monetary thresholds: The buyer and the target company must have achieved respective turnovers in China in excess of RMB 400 million (USD 65 million) and their combined turnovers must exceed (i) RMB 10 billion (USD 1.5 billion) on a worldwide basis, or (ii) RMB 2 billion (USD 325 million) in China during the previous accounting year. With respect to the calculation of turnover within China, this includes products and services exported from foreign countries or regions to Mainland China and excludes products and services exported from Mainland China to foreign countries or regions. The merger review is mandatory, regardless of whether the transaction actually has any negative impact on competition in the relevant market. In the relevant case, the Tsinghua transaction met the merger filing notification threshold and should have been hence notified to MOFCOM before being implemented.

[12] Published decision on MOFCOM's portal is available here *(in Chinese only)*: http://tfs.mofcom.gov.cn/article/ckts/ckzcfg/201412/20141200824277.shtml

[13] Pursuant to Art. 48 and 49 of the AML, failure to obtain antitrust clearance before a transaction is completed can be subject to a fine of up to RMB 500,000 (USD 80,000). In addition, MOFCOM may unwind the transaction if the transaction is anti-competitive.

3. Relevant decisions

Microsoft-Nokia Decision

On April 8, 2014, MOFCOM[14] conditionally approved Microsoft's acquisition of Nokia's devices and services business, imposing several conditions on both Microsoft and Nokia, including:

- Commitment to continue licensing their Standard Essential Patents ("SEPs") on fair, reasonable and non-discriminatory ("FRAND") terms; and

- Commitment not to seek/enforce injunctive relief against smartphones made by smartphone manufacturers within China; and

- Commitment not to increase royalty rates on specified non-SEPs for a period of time of eight years.

MOFCOM focused on the vertical relationship and assumed that the acquisition by Microsoft of Nokia's smartphones business without the above commitments would have conducted Microsoft to become a fully integrated smartphone manufacturer, granting it the power to raise the prices of licenses in the Chinese market. A noteworthy fact is that the U.S. and European antitrust authorities had cleared the transaction without conditions before MOFCOM reviewed the transaction for the Chinese market.

[14] On April 8, a press conference detailing the review of the Microsoft-Nokia transaction was held by Shang Ming, Director General of the Anti-Monopoly Bureau, MOFCOM. The press conference is available here *(in English)*: http://english.mofcom.gov.cn/article/newsrelease/press/201404/20140400554324.shtml

Merck-AZ Decision

On April 30, 2014, MOFCOM approved the acquisition of AZ Electronic Materials S.A. ("AZ") by the German company Merck KGaA ("Merck") with conditions.[15] Merck is the world's largest maker of liquid crystals used in TVs, tablets, and smartphone screens and holds a 60% worldwide market share and a 70% market share in China. AZ is mainly engaged in production and sales of special chemical materials for electronic products, including photoresists. AZ's market share of photoresists is 35% worldwide and 50% in China.

Upon its review, MOFCOM decided that the contemplated acquisition might eliminate or restrict competition in China in both markets of liquid crystal and photoresist, which are used for flat panel display (FPD) in China. MOFCOM considered that the two markets were "adjacent" and "complementary" since they both use raw materials for the FPD production. Pursuant to MOFCOM, the post-merger acquisition would have conducted Merck to become the largest supplier in both markets while other competitors would have had limited capacity and would have operated only in one market. This situation would have given Merck the ability to engage in tied or bundled sales and would therefore have affected the market competition. In addition, MOFCOM pointed out the high access barriers in the relevant markets and the fact that Merck owned already more than 3,500 patents, making even more difficult the entry of new market players in a short term.

MOFCOM imposed the above conditions for a period of three years:

(i) MOFCOM required both companies not to engage in any tie-in sales or subsidies for the two products that would compel Chinese customers to buy products from both Merck and AZ at the same time, including not to give cross subsidies between Merck's liquid crystal and AZ's photoresist; and

(ii) MOFCOM required Merck to license liquid crystal patents on non-exclusive, commercially reasonable and non-discriminatory terms.

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[15] MOFCOM decision is available here *(in English)*: http://english.mofcom.gov.cn/article/policyrelease/buwei/201405/20140500591725.shtml

P3 Alliance Decision

On June 20, 2014, MOFCOM rejected the contemplated joint venture (known as "P3") among three large global shipping companies (A.P.Moller-Maersk, Mediterranean Shipping Company and CMA CGM) to pool 250 ships with the goal of utilizing their combined capacity more efficiently.[16]

Despite the separation of pricing, sales and marketing functions from the joint venture that could guarantee downstream competition, MOFCOM decided to block the project without explaining its non-compliance with the AML.

This is the second time since 2008 that MOFCOM rejects a merger.[17] Several critics have emerged regarding the fact that in this case, MOFCOM would have been guided by protectionist views in order to preserve Chinese shipping companies from foreign competitors.

B. NDRC

1. Auto Parts Decision

On March 2014, NDRC launched a large investigation into price fixing in the auto parts industries against twelve Japanese auto parts and bearing companies. From January 2000 through February 2010, it appears that manufacturers including Denso, Furukawa Electric, Hitachi Automotive. Sumitomo, Yazaki, Mitsuba, Asian Industry and Mitsubishi Electric had regular meetings in Japan and agreed on price quotations for thirteen auto components sold in China. Meetings were also conveyed in Japan and Shanghai between four bearing manufacturers (NSK, NTN, JTEKT and Nachi-Fujikoshi Corporation) from 2000 to June 2011 with the purpose to discuss price increase strategies for the Chinese market.

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16 MOFCOM decision is available here *(in English)*: http://english.mofcom.gov.cn/article/policyrelease/buwei/201407/20140700663862.shtml

17 In March 2009, MOFCOM rejected the contemplated acquisition of the Chinese juice manufacturer China Huiyuan Juice Group Limited by the Coca-Cola Company.

Under the AML, business operators are prohibited from concluding horizontal agreements on fixing prices if these agreements have an effect or will result in restricting or disordering competition in the relevant market. NDRC considered that the talks and exchange of information with respect to the prices of products resulted in massive agreements on bidding prices and an increase of the prices of the auto components sold in China and used in more than twenty car models produced by Suzuki, Nissan, Honda, Toyota and Ford.

NDRC said that such agreements had damaged the rights and interests of downstream manufacturers and Chinese consumers for more than ten years, which was a "serious offense." Accordingly, on August 20, 2014, NDRC announced its decision[18] to fine ten of twelve companies with an aggregate amount of RMB 1.24 billion (approximately USD 200 million), ranging from 4% to 8% of the companies' 2013 revenues for having engaged in price-fixing. This amount is the largest fine ever imposed by NDRC since the AML has been effective. In consideration of their active cooperation to be the first to provide information regarding their behaviors and to offer evidence to NDRC, Hitachi Automotive, a subsidiary of Hitachi Ltd, and Nachi-Fujikoshi Corporation, a bearing manufacturer, were the only two companies to be exempted from fine.

All twelve companies committed to take corrective measures to modify their sales practices.

2. InterDigital Decision

In May 2014, NDRC agreed to suspend its investigation of InterDigital, an American wireless research and development company. The suspension was notably motivated by InterDigital's commitments to offer Chinese manufacturers the option of taking a worldwide portfolio license of only its SEPs and comply with FRAND principles when entering into licenses with Chinese manufacturers. InterDigital also took the commitment not to require Chinese manufacturers to

[18] The NDRC decision is available here *(in Chinese only)*: http://jjs.ndrc.gov.cn/gzdt/201408/t20140820_622756.html

provide a royalty-free, reciprocal cross-license of their similarly categorized standards-essential wireless patents.

Since InterDigital had not yet collected licensing fees in China, no illegal revenue had yet been generated; as a result, InterDigital's commitments were considered by NDRC as sufficient to justify the suspension of the investigation.

3. Qualcomm Decision

In November 2013, NDRC started to investigate American Qualcomm Incorporated ("Qualcomm")'s licensing practices with its Chinese licensees. Qualcomm is the world's largest smartphone chipmaker and holds a significant number of SEPs. After a relatively quick investigation for such a complex case, NDRC rendered its decision on February 10, 2015.[19]

NDRC found that Qualcomm abused its market dominance by:

- "unfairly" charging high royalties for patent licenses on Chinese mobile device manufacturers;

- bundling SEP and non-SEP licenses for wireless communication to SEP licenses without justification;

- attaching the unfair conditions to the sale of baseband chips since Chinese customers were forced to accept a clause prohibiting them from challenging the validity of Qualcomm's patents.

NDRC said that Qualcomm's behavior "restricted competition in the market, curbed technology innovation and harmed the interests of consumers."

But NDRC did not mention how the relevant markets had been defined nor what was the market share held by Qualcomm. In particular, it is not clear whether

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[19] NDRC's Official decision is available here *(in Chinese only)*: http://www.sdpc.gov.cn/xwzx/xwfb/201502/t20150210_663822.html

NDRC considered all the SEPs held by Qualcomm as constituting one market or if it considered that each SEP constitutes a separate market in itself.

Accordingly NDRC imposed a record fine of RMB 6.088 billion (approximately USD 975 million) on Qualcomm for abusing its dominant position in the CDMA, WCDMA and LTE wireless communication SEPs licensing market and the baseband chip market.

Qualcomm was fined 8 percent of its revenue in China in 2013[20] and in addition, agreed to implement the following rectification measures:

- Not to bundle SEPs with non-SEP licenses for wireless communication without justification;

- Refrain from requiring its Chinese licensees to provide their own licenses to Qualcomm for free in exchange for purchasing Qualcomm licenses;

- Disclose the list of its patents to its Chinese licensees and not charge royalties for expired patents;

- Agree to calculate the royalty rates on the basis of 65 percent of the wholesale price of handsets sold for use in China, instead of 100 percent;

- Cease imposing other unreasonable conditions in its licensing agreements with Chinese customers.

This decision is significant in many aspects. This is the first decision rendered in an investigation regarding abuse of dominance. In addition, this fine is the highest in China's antitrust enforcement history. It is even one of the largest fines ever imposed by an antitrust authority in the world against a single company.

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[20] Pursuant to Article 47 of the AML, any abuse of dominance can be subject to a fine of between 1 percent to 10 percent of the annual sales revenue of the company made in the previous year. The enforcement agency can also order the company to cease and desist or confiscate illegal gains. If the company voluntarily provides information to the government agency, the government agency may reduce the penalty. Accordingly it is assumed that NDRC took into consideration Qualcomm's cooperation in the investigation to reduce the fine to 8 percent.

This decision might also set a precedent on the appreciation of reasonable royalty rates and licensing practices in China. In this regard, companies operating in the technology area or engaged in licensing where intellectual property assets are significant should consider carefully NDRC approach. It is also a fact that NDRC is today definitely able to implement the AML mechanisms on complex cases dealing with competition and intellectual property issues, which was not the case a few years ago.

C. SAIC

1. Microsoft investigation

In June 2014, SAIC initiated an investigation on Microsoft China to check potential violation of the AML through the sale of the Windows operating system and Office software. On July 28, 2014, SAIC raided Microsoft China's offices in Beijing, Shanghai, Guangzhou and Chengdu. On August 6, 2014, SAIC launched another raid in Microsoft China's offices in Beijing, Liaoning, Fujian and Hubei and one month later questioned Microsoft executives. The investigation is ongoing.

2. Tetra Pak investigation

The investigation into a potential abuse of market dominance by Tetra Pak in the liquid food packaging market is still ongoing. It was launched in July 2013 through more than twenty provincial and municipal SAIC offices all over the country.

D. Civil Litigation

1. Qihoo v. Tencent

The SPC issued on October 16, 2014 its first ruling on the AML. The facts of the case are related to the Internet industry. In November 2011, Beijing Qihoo Technology Co., Ltd. ("Qihoo"), the provider of anti-virus software Qihoo, filed a private antitrust lawsuit against Shenzhen Tencent Computer System Co.,Ltd. ("Tencent") before the Guangdong Higher Court, alleging that Tencent had abused

its dominant market position by requiring its users to choose between QQ (Tencent's instant messaging software) and Qihoo's software and asking them to uninstall the Qihoo software. In March 2013, the Guangdong Higher People's Court dismissed Qihoo's claims on the basis that Tencent did not hold a dominant position in the relevant market. Qihoo appealed the judgment of the first instance court to the SPC.

On October 16, 2014, the SPC rejected Qihoo's appeal and upholded the court judgment in a landmark decision highlighting relevant principles of anti-monopoly law:

- The SPC took into consideration several items to identify the market dominance in addition to the held market share, including the market competition situation, the capacity of the business operator to control sales price or volume of the relevant market as well as the financial and technological capacity of the business operator. Despite the fact that Tencent was holding more than a 80% share of the relevant market (defined by the SPC as the instant messaging and related services market in Mainland China), the examination of all these combined factors conducted the SPC to conclude that the instant messaging market was highly competitive, that Tencent did not control the trading conditions in a manner that restricted the competition and that Tencent did not hold a dominant position in this market.

- The SPC clarified that the plaintiff assumes the burden of proof for defining the relevant market in abuse of dominance cases.[21]

- The SPC also considered that the letter by which Tencent requested its users to uninstall the Qihoo software had only been issued for one day. As a result of this circumstance, the SPC concluded that the potential negative effect of Tencent's conduct had not been proved to result in any significant restriction of competition in the relevant market. By this approach, the SPC confirms that the assessment of the market dominance implies to take into consideration the impact of the potentially anticompetitive behavior, which is a pragmatic and logical approach.

[21] Whereas the Judicial Interpretation only provided that the plaintiff shall assume the burden to prove that the defendant has a dominant position and has abused its dominant market position.

III. Concerns and Perspectives for 2015 and Beyond

The Chinese authorities are willing to impulse a clear direction in order to regulate behaviors that might affect the fair competition in China or the Chinese consumers' interests. As a result, foreign companies wishing to operate in the Chinese market today must adapt their antitrust compliance policy to this new legal environment. Overseas transactions affecting the Chinese market are also submitted to the Chinese enforcement agencies since the AML also applies to anti-competitive activities taking place outside the territory of Mainland China but having the effect of eliminating or restricting competition in the Chinese domestic market.[22]

In 2014, NDRC reportedly conducted a series of aggressive raids on foreign companies, leading the foreign business community to express its rising concern about the alleged unfair treatment that would be reserved to foreign companies in China. Foreign companies operating in China or wishing to strengthen their market shares in the Chinese market must keep in mind that anti-competitive behaviors or agreements likely to affect the fair competition in China are now under high scrutiny by the Chinese competition regulators. Many complaints from the U.S. enforcement agencies, practitioners as well as the foreign business community have been formulated last year regarding the lack of fairness of the investigating methods (with the use of intimidation, the lengthy process and the absence of transparency of the investigation process). Foreign companies are reported to fear personal retaliation against their executives and hence would be reluctant to send key people in China for meetings with the enforcement agencies.[23]

Meanwhile, it also emerges from the most recent decisions that the Chinese regulators seem to base their analysis on the grounds of China's industrial policy and

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[22] AML, Art.2. It should be noted also that the AML is enforceable within Mainland China and not in Honk Kong, Taiwan and Macau.

[23] For instance, on February 12, 2014, InterDigital released a statement ensuring that it would continue cooperating with NDRC's anti-monopoly investigation. The statement was issued after InterDigital's CEO reportedly refused to send representatives to China (for fear of arrest) for providing information to NDRC in the framework of the investigation. The statement is available here:
http://ir.interdigital.com/releases.cfm?Year=2014&ReleasesType=&PageNum=3

the needs to develop the domestic economy. This is the opposite purpose of a competition law as it is understood and applied by the other antitrust enforcement authorities in the world. Critics have particularly focused on the suspicious trend of the Chinese government to use the AML mechanisms in order to protect its domestic industries and to force foreign companies to lower their prices and royalties.[24]

According to a report released in September 2014 by the U.S. Chamber of Commerce and the U.S.-China Business Council,[25] it is troubling to see that every merger case that has been rejected or conditionally approved by the MOFCOM so far involved a foreign company. These decisions often aimed at avoiding the contemplated acquisition of a famous Chinese brand or preserving a competitive position for Chinese companies. Indeed, the most recent developments of Chinese antitrust enforcement indicate that the ultimate goal of the "healthy development of the socialist market economy" entitles the Chinese antitrust agencies to protect and promote domestic industry by considering non-competition factors when assessing the agreements and contemplated transactions. In doing so, if such approach was to be confirmed on a long-term perspective, China would deviate from international norms with respect to antitrust law and intellectual property rights.

On the other side, Chinese enforcement agencies wish to ensure the international community that they apply the AML rules in a consistent and fair manner for any operator, regardless its nationality. That was the purpose of the joint press conference held by the representatives of the three Chinese enforcement agencies

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[24] FTC Commissioner Maureen K.Ohlhausen has expressed these concerns in her speech entitled "*Antitrust Enforcement in China- What next*?", Second Annual GCR Live Conference, New York, 16 September 2014. In particular, she noted that "*China reportedly is relying on non-competition factors in analyzing mergers and acquisitions; China appears to be rebalancing the value of intellectual property to favor short term efficiency gains over longer dynamic efficiency gains that come from strong protection of those rights. (…) Western businesses and organizations are increasing their scrutiny of Chinese antitrust law enforcement for not adhering to agency best practices (…). In particular, a growing chorus is claiming that the Chinese are using the AML to promote industrial policy* (…)." The speech is available here: https://www.ftc.gov/system/files/documents/public_statements/582501/140915gcrlive.pdf

[25] The U.S.-China Business Council, "Competition Policy and Enforcement in China" (sept.2014): https://www.uschina.org/reports/competition-policy-and-enforcement-china

on September 11, 2014.[26] At this occasion, Xu Kunlin, Director General of the Price Supervision and Inspection & Anti-Monopoly Bureau at NDRC insisted on the fact that the Chinese administration does not specifically target foreign companies in a discriminatory manner and that it respects procedures and transparency. As an echo to reflect this goal, the enforcement agencies have been multiplying the publications of their decisions since the last months of 2014.

Only the next developments will tell us how the Chinese antitrust agencies will shape the competition policy for China in the coming months and if they will correct the tendencies currently observed.

But what is clear is that almost seven years after the AML came into effect, China has become a major antimonopoly jurisdiction with its antitrust agencies gaining more experience and improving their ability to handle complex and high profile cases. Foreign operators cannot ignore this anymore.

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[26] Mr. Shang Ming, Director General of the Anti-Monopoly Bureau of MOFCOM, Mr. Xu Kunlin, Director General the Price Supervision and Inspection & Anti-Monopoly Bureau of NDRC and Ms. Ren Airong, Director General of Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of SAIC attended the press conference. Ms. Ren Airong mentioned that since the implementation of the AML, SAIC had been conducting 39 investigations and only two targeted foreign companies (Microsoft and Tetra Pak). Mr. Xu Kunlin and Ms. Ren Airong mentioned that both NDRC and SAIC strictly followed the law and that all the operators were treated equally. In particular, Ms. Ren Airong ensured that the Microsoft investigation had been conducted in full compliance with the fairness and transparency required by the AML. On his side, Mr. Shang Ming denied that MOFCOM would be motivated by protectionist views when enforcing the AML.