

Antitrust in China: business as usual, but be vigilant

By Becky Koblitz

The dust is beginning to settle after a recent increase in Chinese antitrust enforcement. This enforcement flurry was accompanied by a barrage of media articles and complaints on behalf of foreign business interests, including reports by the U.S.-China Business Council and U.S. Chamber of Commerce and statement by the EU Chamber of Commerce, raising concerns about discrimination against foreign companies. In short, there was panic in the air in business circles in China. It appears antitrust enforcement in China — at least for now — may be motivated more by industrial policy rather than classic competitive concerns. Therefore, antitrust compliance for operations in China must carefully consider and fuse basic antitrust issues and China's overall economic goals.

In essence, China's economic goal is to build up its domestic companies so that these companies can compete globally. A second goal is to become less dependent on other nations' innovations. The Chinese antitrust authorities are departments within



three major agencies. Consequently, the antitrust authorities appear to wear two hats: regulators to promote China's industrial policies and enforcers of the antitrust law. The agency that handles price-related antitrust violations is part of the National Development and Reform Commission (NDRC), which is responsible for enforcing the pricing law regulating the pricing of commodities. The agency responsible for non-price related antitrust violations is part of the State Administration for Industry and Commerce (SAIC), which also oversees and regulates business. The agency responsible for merger control is part of the Ministry of Commerce (MOFCOM), which also formulates policy on, among other things, trade and foreign direct investments.

In the area of enforcement related to anticompetitive conduct, there are two controversial aspects to recent enforcement: (i) uncertainty as to which conduct was an antitrust violation; and (ii) the way the investigations were handled. The uncertainty about how the companies allegedly violated the antitrust laws stems from the lack of publication of the decisions by the agencies. Sometimes there are announcements made by officials, but these announcements merely contain the name of the companies, the amount of any fines and the ultimate conclusion that the antitrust law was violated. Other times

Chinese regulators have launched a series of anti-monopoly investigations of foreign automakers and technology providers, stepping up pressure on foreign companies that feel increasingly unwelcome in China.

there are media reports that some companies reduced the prices of their products as a result of an investigation, but this does not necessarily mean that the companies violated the antitrust law. The various accounts of the investigators' aggressive conduct during the investigation and negotiation process may not necessarily be the general rule, but nevertheless they are unsettling.

In the area of merger control, where MOFCOM conditionally approves mergers, many of the imposed merger conditions served to promote domestic industry. Such conditions have included assuring a continued supply of goods to domestic manufacturers; making the provision of technical support part of the conditions of a divestiture of a business unit (ultimately purchased by a Chinese company); maintaining supply of raw materials to China; and having patent holders agree to licensing terms the patent holders already voluntarily agreed to within the standard setting organizations. In the two mergers that MOFCOM blocked, the decisions lacked detailed analyses of anticompetitive effects and the general opinion was that the motivation to block the mergers was protectionist.

That foreign companies are being investigated is not surprising,

as foreign companies are in the forefront for certain commodities, like automobiles and intellectual property related to technology. At the present time, it appears that the NDRC is focusing on pricing of commodities that compete with domestic companies (infant formula powder, eye wear, cars and wireless communication devices), an approach that brings to mind the pricing law. The law's original purpose is to establish a pricing system for the socialist or command market economy. It does recognize market-based prices, but provides for "guided prices" with a limited set of commodities. Under the law, price discrimination and seeking excessive profits are prohibited. Perhaps the NDRC could have used the pricing law to go after many of the foreign companies that it investigated for allegedly violating the antitrust law. And perhaps it opted for the antitrust law because the fines could be higher (one to 10 percent of revenue from the previous year) rather than a cap of five times the illegal proceeds under the pricing law. Not only is the fine higher under the antitrust law, but it is difficult to calculate illegal proceeds.

Because of such uncertainties raised by how the Chinese authorities are going to continue to enforce the antitrust law, foreign companies

concerned with their antitrust risk in China should first consider the industry in which they operate. Is it an industry that has already been investigated or is currently being investigated? There may be a chance that companies within these industries have provided information about other companies in the industry in exchange for a decrease in fine or termination of an investigation. Foreign companies should also find out what their local staff is doing. Sometimes foreign headquarters only focus on profit and loss figures, leaving local staff alone as long as the numbers look good. Merely having a global antitrust compliance policy may not be adequate unless the local staff is thoroughly familiar with the "dos and don'ts" of antitrust compliance.

Chinese antitrust officials continue to interact with their counterparts in other jurisdictions with more mature antitrust enforcement bodies, such as the U.S., EU and Japan. Chinese officials take great pride in their professional approach to antitrust enforcement — similar to other great economic powers around the world. Some of the "bumps" along the way could very well be attributed to personalities rather than to the agencies as a whole. Overtime, procedures and policies relating to the Chinese antitrust law will no doubt become

more refined, and the law will hopefully be enforced with a focus on fair competition and not protectionism.

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