

## The new face of antitrust investigations in China

By Becky Koblitz and Michael W. Scarborough

This past year has seen a marked increase in government antitrust investigations in China, and for the first time, officials have been seriously investigating foreign companies for possible violations. At the same time, the Chinese enforcement agencies have begun to both make their decisions public and provide insight about where their enforcement efforts are headed. Putting these developments in perspective, the take-away is that even though the Chinese antitrust agencies and the rules they enforce are still developing, antitrust in China should be taken seriously by domestic and foreign companies alike.

China's Anti-Monopoly Law (AML) is just five years old. The National Development and Reform Commission (NDRC) enforces the AML with regard to price-related anti-competitive conduct, such as price-fixing and retail price maintenance, while the State Administration for Industry and Commerce (SAIC) enforces the AML with regard to non-price related anti-competitive conduct, such as market allocation, output restriction and boycotts. Sometimes enforcement is overlapping and the agencies decide amongst themselves which will take the lead.

Unlike the U.S. system, which includes criminal penalties, under the AML penalties are only civil. Penalties for violating the AML include fines ranging from 1 percent to 10 percent of turnover for the preceding year, orders to terminate illegal conduct, and confiscation of illegal gains. The AML and relevant rules do not explain what type of turnover — worldwide, China or solely the business related to the violation — will be the basis for fines. But so far, the agencies have interpreted turnover as commerce related to the relevant business. In addition, fines can be avoided or reduced depending on the application of the NDRC and SAIC's respective leniency programs, which are still evolving.

In the past, investigations involved domestic companies. That foreign companies are now being included in government investigations does not necessarily mean that they are being targeted, but if they are active in an industry that the State Council wants to support vis-a-vis domestic companies, there is a greater possibility that these foreign companies will be investigated.

The NDRC has been particularly active in fine-tuning, among others, LCD panel manufacturers (price fixing), luxury liquor producers (retail price maintenance), infant formula producers (retail price maintenance), as well as the gold jewelry trade association and five stores (price fixing), in addition to investigating companies in the eyeglass industry. Other potential tar-

get industries are the automobile and the pharmaceutical and medical equipment industries. The NDRC has also authorized industry associations such as the Chinese Auto Dealers Association to solicit from foreign car companies information related to contracts and sales structures for purposes of antitrust compliance review. These "private inquiries" may imply government fines and even potentially antitrust action if they are not satisfied. In addition to the NDRC, the SAIC is also active. It is currently investigating, for example, Tetrapak, the food-packaging giant, for abuse of market dominance.

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edge the need for transparency in decision-making in the sense that decisions can serve as guidelines for companies, highlighting the respective agency's analysis and the underlying facts of the antitrust violation. Starting this August, the SAIC implemented its new transparency program by publishing its decisions on antitrust investigations concluded between 2010 and 2013. The NDRC also is contemplating a platform for releasing decisions as a supplement to its current public outreach through TV, magazines and the internet.

Workshops offer insights as to the mindset of some officials. According to a Reuters news article, in-house lawyers from foreign companies attended a training workshop conducted by officials from the three antitrust enforcement agencies. During the meeting, an official from the NDRC stated that if they "put up a fight" during investigations, "I could double or triple your fines." According to the article, the NDRC did not respond to follow-up inquiries from Reuters.

Recent reports indicate that the NDRC is trying to soft-pedal the incident, suggesting its official was "misunderstood." Subsequently, other NDRC officials have said that they welcome legal counsel trained in antitrust to accompany the targeted parties during discussions about an investigation.

The Chinese enforcers publicly state that they are not targeting specific companies and that all companies — be they state-owned enterprises or private multinationals — are treated equally. Like antitrust enforcers around the world, the Chinese agencies react on the basis of input from informers as well as companies already

under investigation. But it is important to remember that China's antitrust enforcement agencies are not independent, and are also advocates of government policies for promoting the development, management and regulation of private investment.

For example, the Jan. 22 policy guidelines issued by 13 agencies (including the agencies responsible for enforcing the AML) contain broad sweeping statements about how consolidations will put Chinese companies on a better footing to compete globally and identify nine key industries dear to China — automobile, steel, cement, shipbuilding, electrolytic aluminum, rare earths, electronic information, pharmaceuticals and agricultural processing. Although the respective antitrust departments of each of the agencies maintain that they are independent of the other departments responsible for promoting domestic industries, it is still a very different structure from other antitrust enforcement regimes, particularly in the West.

There are signs of change, however. Referring to how the government uses selective industry policies to adjust the industry structure and support certain industries, the director general of Price Supervision and Inspection and Anti-Monopoly Bureau of NDRC, in his keynote speech at a conference held by China News Service Sept. 24, stated that "excessive intervention from the government is bad for sustained economic growth ... the administrative organ should not issue policies that restrict or eliminate competition ... it is internationally accepted that competition policy functions as a basic economic policy."

Looking forward, companies concerned about their antitrust risk in China should first consider the industry in which they operate. While there is no crystal ball as to which industries are being targeted, up to now, milk powder, pharmaceuticals, packaging and automobile companies have been investigated. Keeping abreast of government announcements regarding investment policies and industrial support can also be useful. For example, in 2004 a department within the SAIC published a report about industries vulnerable to the increased presence of foreign multinationals, identifying industries such as software, mobile phone, camera and soft packaging (see, e.g., Tetrapak). The previously mentioned 2013 policy guidelines also provide a broader perspective.

Although government enforcement is currently the primary concern for companies facing antitrust scrutiny in China, the risk of private actions also should not be forgotten.

For example, while resale price maintenance is a stated major focus of the NDRC, it was also the subject of a recent

private action. Johnson & Johnson was sued by one of its distributors, which alleged that it lost profits because of the resale price maintenance program in its distribution agreement. The high court in Shanghai held that Johnson & Johnson's resale price maintenance program restricted competition and was therefore anti-competitive, and awarded the distributor damages in the amount of RMB 530,000 (64,000 euros). Although the damages awarded were relatively low, the case was notable because (1) the lower and higher courts involved both analyzed the facts and legal principles similarly to U.S. courts; (2) Johnson & Johnson experienced significant negative publicity; and (3) it highlights the emerging risk of private antitrust litigation against foreign companies.

The new face of antitrust in China will undoubtedly continue to borrow heavily from the rest of the world as it evolves. NDRC and SAIC officials take part in training programs as well as have regular consultations and relationships with 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 the other great economic powers around the world. Over time, procedures and policies relating to the AML will become more refined, and the law will hopefully be enforced with a focus on fair competition and not protectionism. But for now, one thing is clear: China is paying more and more attention to antitrust, and companies operating there ignore that message at their peril.

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