China Law Update Blog
The Latest Developments On China Law
Presented By SheppardMullin 美国盛智律师事务所

China Anti-Monopoly Law: What might we see in 2012?

February 28, 2012 by Sheppard Mullin

On February 16, 2012 the Beijing office of Sheppard Mullin had a reception to celebrate the opening of new office space in China World Trade Center in the central business district. Guy Halgren welcomed our 120-plus guests. Prior to the reception we had a roundtable discussion on the Anti-Monopoly Law of China ("AML"). We had 18 participants, in-house counsel for major corporations as well as the German Chamber of Commerce. Our guest speaker, Mr. Zhang Yuqing, former director general counsel of the Chinese Ministry of Commerce ("MOFCOM"), who headed the inter-agency group which developed the AML spoke on two topics which will probably be "hot" this year: a new regulation which will fine companies which didn't report their transactions and went ahead with the transactions, and another regulation that deals with national security review. Gary Halling, head of Sheppard Mullin's antitrust practice spoke about recent enforcement trends in the U.S, specifically with respect to cartels. Michael Zhang of Sheppard Mullin's Shanghai office also attended and gave his views on the use of the VIE structure. The subsequent discussion among the participants was lively.

We hold such roundtable discussions periodically, where we invite government officials and representatives of companies to exchange ideas and ask questions in an informal, off-the-record setting. If you are interested in participating in future roundtable discussions please contact Becky Koblitz, email address: bkoblitz@sheppardmullin.com. Below are opening remarks by Becky Koblitz, Special Counsel, Beijing office of Sheppard Mullin Richter & Hampton LLP.

Antitrust Roundtable, February 16, 2012 China Anti-Monopoly Law: What might we see in 2012?

Taking a look at the past three years of antitrust enforcement in China and recent trends in the US may be a start. Today, we are lucky to have with us Zhang Yuqing, former general counsel for MOFTEC/MOFCOM, who led an inter-agency working group to develop the Anti-Monopoly Law and Gary Halling, head of Sheppard Mullin's antitrust practice. I will open with a brief

summary of some highlights of antitrust enforcement in China and the US so that we have a backdrop or framework for our discussion.

China Anti-Monopoly Law: it's still evolving

Unlike other jurisdictions where antitrust enforcement is centralized, in China three agencies enforce the Chinese Anti-Monopoly Law ("AML"). The Ministry of Commerce ("MOFCOM") handles mergers while cases related to anticompetitive conduct are split between the National Development and Reform Commission ("NDRC") and the State Administration for Industry and Commerce ("SAIC"). The NDRC handles price-related violations and SAIC the non-price related violations. The AML has been in effect since August 2008 and continues to evolve as these three agencies adopt additional regulations in order to provide more guidance on and clarification of such aspects as terminology, procedures, and enforcement.

In the first three years the major focus has been merger filings. Merger notifications continue to be time consuming (some taking up to 6 months or more) involve elaborate formalities and investigations which sometimes were not necessary. Last year 160 investigations were completed (in comparison to 25 in 2008, 80 in 2009 and 117 in 2010). Of the 160, cleared, 4 were cleared with conditions (in comparison to 1 in 2008, 4 in 2009, 1 in 2010), bringing us to a total of 10 conditional clearances, all involving foreign companies. There has been only rejection (Coca Cola/Huiyuan, March 2009). This was only the second decision published by MOFCOM and there was little in-depth discussion of what was analyzed to reach the conclusion. The general reaction was that this was a political decision. Over the years MOFCOM's analysis has become more sophisticated. For your convenience I have prepared a list of the transactions which were conditionally approved and the one transaction which was rejected. Of the four conditional clearances in 2011, three are noteworthy:

1. Penelope/Savio (October 31): MOFCOM required the controlling shareholder of Penelope to divest its interest in another company which was one of two major players in the global market for yarn cleaners (the other was a subsidiary of Savio). This case is the first time MOFCOM considered how control could be exercised through portfolio interests by examining voting patterns.

2. GE/Shenhua (November 10): MOFCOM imposed conditions related to the joint venture's relationships with its licensees. This case involved a joint venture. The AML does not expressly state that joint ventures are subject to merger control, therefore this conditional approval is constructively an affirmation by MOFCOM that joint ventures are subject to the AML merger control provisions. Another interesting aspect of this case is that it involved a state owned enterprise ("SOE").

3. Seagate/Samsung (December 12): MOFCOM imposed conditions related to the relationship between the two parties and production capacities. Similar to the Sanyo/Panasonic case, this case highlights MOFCOM's divergence from the US and EU authorities which issued unconditional clearances.

Although 97% of the filings were approved, the system still needs to be streamlined, and MOFCOM is aware of this. In the recent press conference in December 2012 Shang Ming, director of the Anti-Monopoly Bureau of MOFCOM mentioned that efforts would be made to streamline the system.

Two topics which will probably gain more attention this year relate to the treatment of mergers which were not reported and national security reviews.

As of February 1st a new regulation has been in effect under which penalizes those companies who should have made a merger filing (i.e., they had met the thresholds). Based on information provided by a whistle-blower (member of the public or an entity or "other channels") MOFCOM will open a file and start a preliminary investigation. The subject parties will be notified and required to submit within 30 days information regarding the transaction. MOFCOM will determine whether to continue the investigation. In the event it continues, the parties must suspend implementation of the transaction. The second in-depth investigation can last up to 180 days. MOFCOM can fine the parties (RMB 500,000/USD 80,000) or order other sanctions such as the unwinding of the transaction. We have made an unofficial translation of the regulations for your convenience.

The AML has a provision that requires an additional review when foreign firms acquire control of domestic firms and the transaction involves national security. In 2011 final rules to implement the national security review were issued in which "national security" sectors were identified and broken down into two categories one related to the military and the other related to defense, agriculture, energy, transportation, technology and equipment manufacture. The purpose of the review is to see whether the transaction poses a threat to national security by looking at its potential impact on such areas as production of domestic products and services required for national defense, national economic stability, order within society and China's ability to research and develop key technologies involving national security. This terminology is still very vague. If the transaction meets threshold for merger review and the domestic firm that's being acquired is in possible category of national security, then two reviews will be required. Timing may be an issue. It is not clear, but you can probably submit your reviews for National Security Review and AML merger notification at the same time.

This requirement has the potential to be used politically. The US has a similar national security review process under The Committee on Foreign Investment in the United States ("CFIUS"). US's definition of "national security" is not as broad as China's. Up until now six cases involving national security have been filed. Of these three have been approved and three are still being reviewed by the committee designated to conduct the national security review. There have not been any public announcements regarding cases requiring national security reviews since there is no obligation under the rules to publish decisions.

Anti-competitive conduct

Although merger control is the area where there was more activity and drew more attention, it is not too early to consider the other component of antitrust, namely enforcement of AML provisions governing anticompetitive conduct. In early 2011 the NDRC and SAIC adopted rules setting forth how the two agencies would enforce the AML with respect to anticompetitive conduct (the terminology used in the AML is monopoly agreements and abuse of dominance, in the US we refer to contracts/combinations/or conspiracies to restrain trade). There are surprisingly few cases in China.

In 2011 SAIC had its first cartel case under the AML, fining a concrete association and 5 of its members for market allocation (RMB 200,000/$30,000). The NDRC had three cases brought under the AML (it has brought many other cases under pre-AML price law). A paper association was fined for price-fixing and output restriction (RMB 500,000/USD80,000). Two pharmaceutical companies were fined for market allocation and price-fixing (RMB 7 million/USD 1.1). The fine was for Chinese standards huge. Two SOE's (China Telecom and China Unicom) were investigated for restricting broadband access and there were hopes that NDRC would show some teeth, but subsequently the two parties applied for a suspension of the investigation in exchange for their promise to improve internet interconnection quality, adjust pricing system and improve broadband network in China. The investigation is still pending.

International cooperation

We can expect more activity in the future based on the Chinese authorities' fast learning curve and willingness to apply what has been effective elsewhere. Up until recently the EU has had more influence over the Chinese practice: the AML is modeled after the EU treaty and the Chinese authorities continue to consult the EU. However, this is changing. The Chinese antitrust authorities have started to enter into cooperation agreements with other antitrust authorities with regard to antitrust enforcement. There is no cooperation agreement between the EU and Chinese authorities. In January and March the UK Office of Fair Trading signed Memoranda of Understanding ("MOU's") with the NDRC and SAIC respectively, in which they commit to cooperate and exchange best practices on competition and consumer policy as well as

enforcement. In July, a MOU was signed between the US Department of Justice ("DOJ") and US Federal Trade Commission ("FTC") and the three Chinese enforcement agencies under which they agree to cooperate in developing competition policy and enforcement. This was followed up in November with guidelines for cooperation between MOFCOM/DOJ/FTC with respect to merger filings. Under the guidelines information related to the following issues could be shared: timing of their respective investigations, technical aspects such as market definition, evaluation of competitive effects, theories of competitive harm, economic analysis and remedies. Although enforcement in the anticompetitive conduct area is sparse in comparison to the US, the Chinese will be learning more about investigative methods as a result of the increased cooperation.

Cartel enforcement

The Chinese are also no doubt looking at recent trends in the US and other jurisdictions. The US experience is a good starting point to figure out what is likely to happen in China. Cartel enforcement is a trend in the US, involving such products as computer components, automotive electronic components, air cargo and passenger surcharges. The US investigations have targeted or charged many Asian executives. For your information we have prepared a table entitled "The $100 Million Club" which lists foreign companies and how much they were fined. Recently in the New York Times there was an article about a price-fixing case involving Japanese auto suppliers (the three companies were fined $78, $470 and $78 million and the executives received prison sentences or fined). "Since November, the Justice Department has obtained $748 million in fines from Japanese auto suppliers for price-fixing and bid-rigging, more than its antitrust division received in the entire previous fiscal year." The article quotes the acting assistant attorney general in charge of the antitrust division: "Criminal antitrust enforcement remains a top priority and the antitrust division will continue to work with the F.B.I. and our law enforcement counterparts to root out this kind of pernicious cartel conduct that results in higher prices to American consumers and businesses." The article then ends, "The plea agreements, which are subject to court approval, require the defendants to help the government in its investigation of the auto parts industry."

What does this tell the Chinese?

This type of enforcement is a great potential source of revenue. More important, however, is the how a leniency program can be an effective enforcement tool. The US program provides for no prosecution of the company and cooperating executives if they are the "first in". Such a program is a successful detection method and destabilizes cartels by creating anxiety and the race to the prosecutors. Presently the NDRC and SAIC have leniency provisions in their implementing regulations but the general public opinion is that the provisions lack specificity as to the extent of the advantages of self-reporting. Perhaps we will see additional regulations regarding leniency measures.

Wrap up

Merger enforcement will continue to be a major focus and source for consumption of time and resources for foreign companies. We may see more activity in the cartel enforcement area as the Chinese enforcement agencies interact with those of other jurisdictions.