T&D Associates
Attorneys at Law

China

Monthly Anti-Trust Report

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Due to the general nature of its contents,
This newsletter is not and should not be regarded as legal advice.
For any questions please contact T&D Associates at:
21st Floor, Times Fortune
Shuguang Xili Jia 6, Chaoyang District,
Beijing 100028, People's Republic of China
Telephone: (8610) 58678228 Facsimile: (8610) 58678227

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LEGISLATION

MOFCOM Released the “Guidance on Notifications for Simplified Cases of Concentrations of Undertakings (Trail Version)”

April 18, 2014

On April 18, 2014, the Anti-Monopoly Bureau ("AMB") of the Ministry of Commerce (“MOFCOM”) released the “Guidance on Notifications for Simplified Cases of Concentrations of undertakings (Trail Version)” (“Guidance”).

The Guidance stipulates supporting procedural rules for the “Interim Provisions on Standards for Application for Simplified Cases of Concentrations of Undertakings” (“Provisions”) issued on February 11, 2014.

The general process for the simplified procedure is as follows:

<u>Consultation before the Application</u>

Before application for a simplified case, undertakings can apply in writing for a consultation with the AMB about whether the proposed transaction meets the simplified case standards. The undertakings can make such decisions at their discretion, as the consultation is not a mandatory procedure.

<u>Application</u>

If undertakings decide to notify as a simplified case after consulting with the AMB and their own counsel, they shall submit the following documents and materials:

a) Notification Letter;
b) Analysis of the effects that the proposed concentration will have on

competition in the relevant market;

c) Concentration agreements;

d) Financial reports from the previous financial year after an accounting firm's audit;

e) Other documents and materials the AMB may request.

MOFCOM also included in that Notice an "Antitrust Notification Form for Simplified Cases of Concentration of Undertakings" and asked the notifying parties to use the "Antitrust Notification Form for Concentrations of Undertakings" client notification software which can be downloaded from the website of the AMB of MOFCOM.

Review and Initiation

After receiving the application for a simplified procedure in the notification form, MOFCOM will preliminarily review the application based on the "Provisions." If the transaction satisfies any of the conditions in the Provisions, MOFCOM will officially initiate the case as a simplified case.

Public Notice

At the same time, while preparing the notification documents and materials, the notifying parties shall fill in the "Public Notice Form for Simplified Cases" (hereinafter simplified as the "Public Notice Form"). After the initiation of a simplified case, the AMB will publish the Public Notice Forms on their website (http://fldj.mofcom.gov.cn). The public notice period is 10 days. There is no "stop the clock" in MOFCOM practice and the 10-day period for public comments will be included in Phase 1.

Approval or Revoke

If any third party thinks the proposed transaction should not be considered a simplified case and provides sufficient evidence after the determination is made by the AMB or the AMB itself finds the case does not meet the criteria in the "Provisions" during its review, AMB will revoke its determination of a simplified case. In that case, the notifying party needs to re-submit the notification to MOFCOM and go through the whole standard procedure for review of concentrations between undertakings for a normal case and meet with possible legal liability according to the Anti-Monopoly Law ("AML").

However, the AMB will verify comments and evidence from third parties. If they cannot confirm the authenticity of the comments and evidence, or do not have contact information for third parties, the AMB will not accept the comments.

What's more, if the AMB rejects the application for a simplified case, or threatens to revoke the determination of a simplified case after initiation, they will listen to the comments of the notifying parties and verify all facts, reasons, and evidence provided by the notifying parties.

Based on the above, the notifying party should consider the possible effect of MOFCOM releasing information on the proposed transaction to the public and carefully choose whether to apply for the simplified procedure.

AUTHORITY

NDRC Abolished the "Administrative Measure for Salt Franchise Licenses" – Edible Salt Industry Fell in the Spiral of "Franchise Profits" Again

April 21, 2014

The National Development and Reform Commission ("NDRC") published a notice about abolishing "Administrative Measures for Edible Salt Franchise Licenses". Some media understands this action to be abolishing the salt franchise.

Professor Sun Jin, as a director of China's Economic Law Institute and supervisor in Competition Law and the Competition Regulation Research Center of Wuhan University, stated that the abolishment of the "Administrative Measures for Edible Salt Franchise Licenses" did not mean the abolishment of exclusive salt trading and selling. It only canceled the examination and approval step. Strictly speaking, only after the abolishment of both the "Salt Industry Regulations" and the"Edible Salt Franchise Regulations", the Edible Salt Franchise System is avoidable . Since the "Administrative Measures for Edible Salt Franchise Licenses is only department rules and its upper laws such as the "Salt Industry Regulations" and the "Edible Salt Franchise Regulations" remain in effect, the policy of the salt franchise does not change. The abolishment only leads to an alternation of administration principals.

The edible industry has been exercising a franchise system. This system is mainly regulated and adjusted pursuant to the "Salt Industry Regulations" issued in 1990 and the "Edible Salt Franchise Regulations" issued in 1996 by the State Council. According to the above documents, the government implements a designated production system for the edible salt industry and a wholesale licensing system for the wholesale of edible salt. The wholesale business of edible salt is operated by salt industry companies at different levels. Based on the above administrative documents, they formed a monopoly system between the Chinese National Salt Industry Corporation (“CNSIC”) and provincial salt industry companies in the wholesale edible salt field of. Usually, the monopolies formed by franchise systems for tobacco, salt, etc. belong to a national monopoly, which is a legal monopoly.

However, Sun Jin said that the purpose of implementing the edible salt franchise system is to ensure the security and strategic reserves of edible salt. The system itself shall not be doubted. However, the implementation in reality resulted in large deviation, and even lead to unreasonable phenomenon like the salt industry companies' abnormal vertical monopoly in the edible salt market. This made the edible salt industry depart from what the system ought to be. The monopoly power of the salt industry companies has continuously expanded, breaking through the legal limit, and these companies even have control of the upstream production field and downstream retail field. The right of franchise (legal monopoly) in specific markets has spiraled into a monopoly in the whole industry of producing, supplying and selling salt. This vertical monopoly behavior directly leads to such results as the salt industry companies being the only dealer of edible salt products and having a pricing monopoly in specific markets. In the absence of a systematic supervisor, the edible salt dealers can depress the supply of producers and elevate market sales prices by virtue of their dominant positions in order to gain monopoly profits.

The long-term integration of government administration with enterprises and the various problems brought by this fatal system defect are the cause behind the “windfall profits” of the China edible salt circulation industry.

Sun Jin stated that before the management of the national salt industry was transferred to the Ministry of Industry and Information Technology, the NDRC was the authorized administrative department of the national salt industry per decree of the State Council. The Salt Industry Management Office was the specific agency. However, in practice, since the Salt Industry Management Office of the NDRC is short of staff and strength, the industry management of the office usually needs certain assistance from CNSIC. In other words, CNSIC fulfilled a considerable part of the government administrative functions. At the local level, most of the provinces, cities and districts have a management mode of integrating government with enterprises. This means the salt industry companies and the Salt Administrative Agencies are usually “one institution and two brains” and form a “community of interests”. All the above conditions result in the direct involvement of salt industry companies in the salt industry administration and law enforcement. Some companies even act on behalf of the government agencies.

Integration of government administration with enterprises is the fatal system defect in the current salt industry. If the monopoly can be broken up and market competition can be introduced, the problem may be solved. What the government should do is regulate the market by means of preferential policies and fiscal incentives in order to protect the interests of residents and vulnerable groups in remote regions.

MOFCOM Held a Special Press Conference on Anti-monopoly Work

April 8, 2014

On April 8, MOFCOM held a special press conference regarding recent anti-monopoly work. SHANG Ming, Director General of the Anti-Monopoly Bureau, briefed the media on MOFCOM's conditional approval of Microsoft’s acquisition of Nokia's device and service business, as well as its handling of illegal concentrations of undertakings. The details of the press conference are as follows:

I. <u>MOCOM conditionally approved Microsoft’s acquisition of Nokia’s device and service divisions.</u>

On March 6 and 27, 2014, respectively, Nokia and Microsoft submitted their final solutions. MOFCOM, after conducting a market assessment, decided that the solutions provided could reduce the negative effect of the concentration of undertakings on competition.

1) Microsoft's commitments include:

a) They will not seek injunctive relief from Android phones produced by Chinese manufacturers based on their standard-essential patents.

b) They will use non-exclusive licenses on Android phones using Microsoft's patents, and the fees and other licenses after the transaction will not exceed the current level; Microsoft may give preferential treatment based on market conditions and the specific circumstances of the licensee.

c) For non standard-essential patents, injunctive relief will only be sought in the case that the potential licensee does not negotiate in good faith.

d) The commitment on standard-essential patents will be effective permanently, whereas the commitment on nonstandard-essential patents will be valid for eight years.

2) Nokia's commitments include:

a) Continuing to follow the fair, reasonable and non-discriminatory (FRAND) principles on standard-essential patent licensing, and not pursuing licensing terms that are not in compliance with the FRAND principles.

b) Not using injunctive relief to implement standard-essential patents when licensee's act in good faith.

c) Not making tie-in sales with standard-essential patent license.

d) The transferee of Nokia’s standard-essential patents will also be bound by the obligations of these commitments as well as the FRAND principles.

e) Nokia promised not to deviate from the current FRAND piecework rates, but would allow reasonable adjustments based on these factors.

f) These said commitments will be effective permanently.

It is worth noting that it is necessary to read the official announcement in its entirety so as to understand appropriate responses. Otherwise, one may come to inaccurate conclusions. The review has been completed, and the related announcement has been released on MOFCOM's website. This Merger review has demonstrated the professionalism and capability of the Chinese regulatory authorities to handle complex cases.

MOFCOM has determined that as a result of the deal the Microsoft and Nokia merger could reduce potential threats to market competition. After the deal is completed, MOFCOM will supervise the honoring of commitments made by both Microsoft and Nokia according to the law. We hope that both parties will strictly stand by and honor their commitments. The conditional approval of the concentration of undertakings is only a precaution to prevent possible future behavior that may impair competition. Should there be an abuse of a dominant position or other 'monopolistic behavior' in the future, apart from the effective supervision by the M&A reviewing authorities, other anti-monopoly law-enforcement departments will also investigate and deal with such behavior according to the relevant provisions of the AML with a view to maintaining a fair market and competitive environment.

II. MOFCOM's disclosure of information regarding administrative penalties for undertakings that fail to notify proper authorities according to law

According to the AML and the Provisions of the State Council in the Thresholds for Prior Notification of Concentrations of Undertakings (hereinafter referred to as the

"Provisions"), where a concentration of undertakings reaches any of the thresholds set out by the State Council, the undertaking(s) concerned shall file a prior notification, and no such concentration may be implemented without prior notification and clearance by the appropriate authorities. Since the implementation of the AML, MOFCOM performed its duties according to the law, and has conducted anti-monopoly reviews on more than 700 concentrations of undertakings. It is proven that the anti-monopoly reviews on concentrations of undertakings have played an important role in preventing monopolistic behavior, protecting fair market competition, improving economic efficiency, safeguarding the interests of consumers and the public, and promoting the sound development of the socialist market economy.

Since the enactment of the AML and the Provisions, most undertakings have filed a prior notification according to the law. But we have also noticed that there were still some undertakings who implemented concentrations without prior notifications, thus violating the stipulations of the AML and the Provisions. Therefore, the Ministry of Commerce released the Interim Measures for Investigating and Handling Failures to Notify According to Law of the Concentration of Undertakings on December 30, 2011 (effective on February 1, 2012), which reinforced the investigation procedures for and penalties for illegal concentrations of undertakings. Since the enforcement of the Interim Measures, MOFCOM investigated and imposed penalties on a series of such cases according to the law, and based on each different situation made corresponding decision as to how each case should be handled.

To enhance the transparency of the investigation, punish illegal concentrations of undertakings, and further urge undertakings to make prior notification according to law, MOFCOM released in the News section of the MOFCOM website on March 20, 2014 a notice that for those fail-to-notify cases which are filed after May 1, 2014, the Ministry would publish its administrative penalty decisions on its website. At the same time, MOFCOM also posted a fax and telephone number (65198998) to accept reports from any entity or individual regarding suspected illegal concentrations of undertakings.

After its release, the above news attracted wide attention from general society. Firms and intermediary agencies called to consult with us. Some media organizations have also timely cited this information. In response to concerns from all parties, MOFCOM has made the following clarifications:

Firstly, for those fail-to-notify cases accepted before May 1, the administrative penalty will be imposed according to the law if MOFCOM finds such administrative penalties are necessary after review. There is no impunity granted for previous behavior. It is just that publishing the administrative penalty decisions is not mandatory for such cases.

Secondly, for those fail-to-notify cases accepted after May 1, the MOFCOM will make its administrative penalty decisions according to the law if such administrative penalties are found necessary, and the decision will be published on MOFCOM's website.

Thirdly, publishing the administrative penalty decisions is a measure MOFCOM takes to administer by law, further enhance enforcement transparency, provide an early warning to related businesses of the potential risks, show respect to law-abiding businesses, and ensure that those that break the law are held accountable.

Finally, MOFCOM wanted to stress that in the course of future reviews and handling of concentrations of undertakings, MOFCOM will continue to strictly administer according to the law, earnestly safeguarding the lawful rights and interests of the notifying parties, the informer, and all third parties, in addition to making legal, reasonable, objective and fair decisions, preventing and terminating monopolistic behavior, protecting market competition order, defending the interests of the consumers and the public, and promote the sound development of the socialist market economy. MOFCOM welcomes media scrutiny. MOFCOM invites friends from the press to report concentrations without prior notification, and provide us with related leads.

MOFCOM Announced the Unconditional Approval Lists of Undertaking Concentration in First-quarter

April 4, 2014

In the first quarter of 2014, MOFCOM has unconditionally approved 42 cases regarding concertration of undertakings.

CASES

Qingdao Court Made Public of its Decision of a Case Where a Customer Sued a 4S Store for Violating the AML

April 23, 2014

On April 23, 2014, the Qingdao Intermediate People's Court in Shandong Province made public its decision of 28 April 2013 dismissing an abuse of dominance claim against Tongbao Automobile – one of the four licensed Honda "4S" (sales, spare parts, service, and survey) dealers in the city of Qingdao. The customer approached Tongbao in October 2012 to purchase filters and engine oil but Tongbao refused to sell the products separately from maintenance services in accordance with Honda's distribution policy. He sued Tongbao for violating Article 17(5) of the Antimonopoly Law, which prohibits a dominant market player from bundling products or imposing unreasonable trading terms without justifications.

Making application of Article 8(1) of the Regulation on Issues concerning the Application of the Law in the Adjudication of Civil Cases caused by Monopolistic Conduct issued by the Supreme People's Court in May 2012, the court held that in respect of allegations of abuse of dominance, the burden of proof falls upon the plaintiff to demonstrate the defendant's dominant position and abusive conduct. The court considered that the relevant market is the market for filters and engine oil suitable for Honda Fit sedans in the city of Qingdao. The court found that the plaintiff had failed to establish Tongbao's dominance in view of the presence of alternative licensed Honda 4S suppliers and the existence of third-party products substitutable to the genuine Honda spare parts. As the plaintiff did not satisfy the first condition to establish an Article 17 violation, the court dismissed the claim without further considering whether the behavior was abusive.

The Qingdao court's judgment is consistent with the decision of 15 December 2011 of the Chashang Intermediate People's Court, which had dismissed a similar claim against Dongfeng Nissan and one of its 4S dealers.

Merger between Ctrip and Qunar, in which the Parties' Fight for Dominant Power is Suspected of being a Monopoly

April 18, 2014

Recently, it is said that Ctrip Network ("Ctrip") and Qunar.com ("Qunar") will carry out a merger. On April 15, 2014, the CEOs of the two companies launched "an internal email war", which shows that they all want to lead the future tourist industry, but did not deny the rumor regarding the merger. At the same time, this raised suspicions of a fight for the leadership of the new company that would be established through the merger.

Insiders indicate that once the merger is completed, based on the current market value of the two companies a giant enterprise in online tourist industry would be created, the market value of which would exceed USD10 billion. If the merger is suspected of being a monopoly, they would face the anti-monopoly investigation by the relevant authority.

Reporter from China Economic Network contacted Ctrip and Qunar for verification information, but both of the parties did not give any comments on the rumor.

Relevant materials show that Ctrip and Qunar are a duopoly, the user share of which reaches 33.9% and 22.1% separately in the online travel booking market in 2013. There are comments that the new company arising from the merger between Ctrip and Qunar and incorporated into Baidu would be a crazy idea. If the merger is completed, it would create an online tourist industry monopoly in China and impact on the whole industry structure.

Insiders consider the rumor regarding the merger between Ctrip and Qunar is likely Baidu's layout for an acquisition battle. Moreover, the merger can make Baidu directly dominate the online travel industry where its competitiors Tencent and Ali do not have a strong market share.

Yang yanfeng, a deputy researcher of the China Tourism Academy indicated in a media interview that Baidu would face some difficulties in investing in Ctrip. First, Baidu would face the risk of a monopoly due to the total market share of Ctrip and Qunar together exceeding half of the whole market share. Meanwhile, the shareholding structure of Ctrip is dispersed and complicated, which would make the negotiation on price with all those shareholders very difficult.

The latest information shows that the market value of Ctrip and Qunar is USD7 Billion and USD3.4 billion separately. Once the companies merge, their total market value would exceed USD 10billion, which means a giant enterprise would be created in the online tourist industry.

Zhao Huanyan, Chief Knowledge Officer for the advisory body of the Wharney Hotel indicates that from Ctrip's point of view, its competitors, Qunar and Elong get support from Baidu and Tencent Wechat separately. Moreover, it is previously said that Alibaba also intended to control Ctrip which develop independently now, except Baidu. The competition among the several online travel platforms is actually the competition among Baidu, Ali and Tencent.

In addition, Zhao Huanyan considers that in the case that the merger is suspected of forming a monopoly, even though Ctrip and Qunar intend to merge, they would still have to deal with the anti-monopoly review by the relevant authorities.

Cui Guangfu, CEO of the Elong Travel Network, in an interview with the media also indicated that if the merger of Ctrip and Qunar as the leaders in online travel market is suspected of creating a monopoly, they shall be subject to approval by the State Council and MOFCOM.

Cui Guangfu believes that the merger of the two companies is not necessarily in favor of industrial innovation. Even if they carry out the integration, they would also encounter the risk of failure. With a reduction of the degree of the monopoly in the industry, the impact of the merger on the online travel industry would be limited.

Academia

NSD's Report on the Energy Regime: The first step is to Break the Administrative Monopoly

April 19, 2014

A few days ago, the National School of Development at Peking University ("NSD") published a report on the reform of the Chinese energy regime, which restates the current energy situation in China and explicitly mentions the administrative monopoly and natural monopoly in China's energy regime.

The report says that the oil and gas industry is a typical example of an administrative monopoly. In 1998, China restructured the petroleum industry and established two giants: China National Petroleum Corporation ("CNPC") and China Petroleum & Chemical Corporation ("Sinopec"). In addition, government departments promulgated the Measures for the Area Registration and Administration of Mineral Resources Exploration and Survey, dismantled or closed small-scale oil refineries and regulated the circulation and distribution of crude oil and refined oil, which resulted in the formation of the petroleum industry's monopoly. In the field of electricity, the management of the power grid, namely the integration of transmission, distribution and sales, reflects the characteristics of a natural monopoly.

Wang Min, an assistant professor at NSD said, "there are two reasons for the formation of an administrative monopoly. One is that energy industry is capital intensive, therefore in the early stage of development, it is difficult for private enterprises to establish energy enterprises. Then, the government must provide support. The other one is that China's extremely quick economic development imposed a heavy burden on the energy industry of ensuring a constant supply, yet reform measures for marketization were not in place. As a result, there was a need for government regulation.

Energy price controls exist in petroleum, natural gas, electricity and coal to some degree. “Price controls result in the ineffectiveness of market mechanisms in resource allocation, distortion of resource prices and market behavior, and finally cause gasoline and power shortages”, said Wang Min.

The report suggest that the first step to breaking an administrative monopoly is to deregulate the wholesale, retail, imports and exports of oil and gas, and increase competition within the industry. The second step should be to try to take the first step towards free trading in oil and gas fields, and discarded oil wells could be transferred to private enterprises, but in order to reduce corruption, a public trade market is required. Third, the supervision of a gas pipeline network and power grid should be enhanced. The gas pipeline network and power grid cannot be involved in any trading other than transmission.

In short, the core of energy regime reform is “market and government should carry out their own duties properly”. In particular, various kinds of administrative monopolies should be broken to establish a perfectly competitive market with prices is formed by the market; price controls in competitive industries should be removed in good times and government regulation should follow up in time, as necessary.

Huang Zhou of the NSD suggests that the sally ports for energy regime reform should be the electricity industry and the unconventional energy industry because “unconventional energy industries like shale gas have significant growth potential, fewer conflicts of interest and more diversified market players, which is already conducive to promoting reform”.

In terms of the reform of the electric power system, whether or not to separate transmission from distribution in the power grid is a very controversial issue. Sun Shengpeng, Vice Director of the research center under the State Grid Corporation of China, said that there are no unified models and generally accepted standards on energy regime reform, so decisions need to be made based on each country’s conditions, such as development productivity, the stage of social development, and resource endowment.

The 21st Century Business Heard learned that in 2013, China's National Energy Administration drafted the Several Opinions on further deepening reform of the electric power system ("Opinions") and relevant documents and would formally issue these Opinions this year.

Officials from the NDRC said in the launch event of the aforesaid report that according to the requirements of the central leading group for overall reform, the NDRC is leading the study on developing solutions for how to deepen the reform of the electrical power system, oil and gas, pricing of resource products and mixed ownership. The NDRC also proposes that mixed ownership reform could be implemented in fields such as electricity, finance and petroleum.

FOCUS

Anti-monopoly Review in China Slows Down the Process of Global Mega Deals

April 1, 2014

China is becoming a big obstacle slowing down the process of global mega deals.

Anti-trust experts said that since Chinese anti-monopoly enforcement authorities are comparatively short-staffed but have to supervise a relatively wide range of affairs and take into consideration the effects of transactions on China's domestic economic development, some large-scale merger transactions have been held up.

These experts said that because of the potential delay in China and the fact that remedies made by transaction parties are always required in order to deal with Chinese anti-monopoly enforcement authorities' competition concerns, trading advisers are making an attempt to minimize the Chinese government's impact on transactions and if possible, even avoid review by Chinese anti-monopoly enforcement authorities.

China has not yet approved the USD 35 billion merger transaction between the two advertising giants Publicis Groupe SA and Omnicom Group Inc. However, this transaction had already been approved by the US and the EU agencies, although previously analysts expected it would face the most rigorous review in America due to the fact that the estimated market share in the media spending market of the merged company in America would exceed 40%.

Maurice Levy, President and CEO of Publicis said last week in a conference in London that 14 out of 15 jurisdictions have approved this transaction and now they are waiting for Chinese.

China "can be a bit of a wild-card in the international merger control system," said Dave Anderson, an anti-trust lawyer in Brussels.

Reviews are triggered if the parties defined revenue thresholds when including sales in China. Some deal makers try to construct or rework agreements to avoid review, lawyers say. "I'm working more on restructuring the transaction in order to potentially avoid review," said Janet Hui, a partner at a Chinese law firm in Beijing.

However, it is not easy for multinational corporations to avoid review, they say, prompting lawyers around the globe to strategize on how to navigate China's process more efficiently.

China introduced its anti-monopoly law in 2008. The country's rapid economic ascent has turned its anti-trust authority into a powerful actor on the world stage.

Global companies pay close attention to its merger enforcement because they are eager to increase their market share in China and generally do not want to make divestitures there. Also, China at times has asked for actions that are not required by anti-trust authorities elsewhere.

"If you are the seller and receive two bids for about the same amount, but one is subject to Chinese merger control and the other is not, you will seriously consider going with the bid that will enable a quicker closing," said U.S.-based lawyer Deidre Johnson. "Some folks are losing deals because of it."

MOFCOM, which reviews mergers, has a smaller staff than most major anti-trust agencies around the world, a concern acknowledged by a Chinese official this month.

"In MOFOCM, the number of actual case handlers is about 20, but the workload is almost identical to those enforcement agencies in the EU and in the U.S.," SHANG Ming, Director General of MOFCOM's Anti-Monopoly Bureau, told a packed room of lawyers at an anti-trust conference in Washington.

The European Commission, the European Union's central anti-trust watchdog, has about 100 staff members who review mergers. In the U.S., the Federal Trade Commission has around 115 staffers involved in merger review. The Justice Department's Anti-trust Division, which shares enforcement authority with the FTC, also employs several hundred staffers who work on a wide range of anti-trust matters, from mergers to criminal price-fixing.

"With the increasing number of cases year to year, our scarce resources become even scarcer," Mr. Shang said through a translator. He said China urgently needed "to find a solution to distinguish cases that will not harm competition and expedite the review process."

The ministry has introduced rules that aim to shorten the time it takes to review simple cases, such as those involving parties with a small market share after the merger.

The lack of resources is compounded by a focus on issues that go beyond the traditional remit of competition law, including whether deals might harm Chinese national economic development. For deals in sensitive sectors such as energy, food, and technology, MOFCOM tends to consult extensively with other government ministries on conditions for the deal—conditions that may not be directly linked to anti-trust concerns.

Glencore PLC's acquisition of mining group Xstrata is an example. Beijing approved the Glencore deal in April 2013, more than a year after being notified of it and five months after the EU and U.S. had waved it through.

To secure Beijing's blessing for the USD 62 billion acquisition, Glencore agreed to sign a long-term contract to supply copper concentrate to Chinese customers at specific prices—even though the companies' combined share in those markets were below levels that would normally raise issues for U.S. or EU regulators, according to a report published in October by Fei Deng, a partner with Edgeworth Economics, and Cunzhen Huang, a lawyer with Cleary Gottlieb Steen & Hamilton LLP.

In approving the deal, regulators also required that Glencore divest the giant Las Bambas copper mine in Peru. China, the world's biggest copper consumer, imposed this condition even though Glencore does not operate any copper-mining or processing facilities in China. Chinese regulators also have to approve of the buyer for Las Bambas. The company can scrap the sale, but it would then have to auction other assets that China has identified.

A spokesman for Glencore-Xstrata declined to comment.

New Regulations will scrap the Monopoly Position of Foreign Invested Enterprises

April 1, 2014

Yesterday, the new version of the "Supervision and Administration Regulations for Medical Devices" (hereinafter referred to as the "Regulations") was published after repeated revising over the past 6 years, and the Regulations shall enter into force on June 1, 2014.

Information disclosed at yesterday's press conference of the State Food and Drug Administration showed that the Regulation will fully cover research, production, distribution, and use of medical devices – additionally establishing a clinical review procedure, and an innovation special review procedure for medical devices and etc.; production processes including good manufacturing practice certification and etc.; distribution processes including Internet sales, third party logistics, and management specification for operating quality etc.;, use processese including making yellow or black lists, fully starting electronic supervision. In addition, the Regulations, for the first time, clearly include rules for adverse events supervision and product recalls system.

Yesterday, a senior manager of a domestic, well-known, listed company for medical devices who participated in many rounds of discussions and consultations regarding the drafted Regulations disclosed that the new version of the Regulations will not result in obvious changes to market structure in the short term, but mergers and acquisitions driven by policies will increase, and “competition” within domestic enterprises will certainly intensify.

Based on the calculation of the China Association for the Medical Devices Industry, industry output value for 2013 is about 400 billion yuan. According to conservative estimates, the value will reach 450 billion to 500 billion yuan by 2015. As of the end of 2013, manufacturers of medical devices number more than 17,000.

On the other hand, although the medical device industry has developed rapidly in China, the overall level still remains on the lower-end equipment and technical level.

The“2013 blue book of the Chinese medicine industry’s annual development situation” showed that, as of the end of 2012, the number of domestic medical device producers was more than 17,000, in which around 90% of medical device production enterprises are low-tech small and medium-sized enterprises whose annual income is between 10 million and 20 million yuan, and the business income of just 20 enterprises is over 1 billion yuan. Meanwhile, enterprises that can produce high-tech products through an independent brand such as electronic monitoring equipment, CT, etc with income of over 500 million Yuan are very few.

After rough calculation, China’s current annual output value of medical devices is more than 1 billion yuan, but local device companies are more concentrated in the low-end of the regular consumption products market, internationally well-known medical device manufacturers including GE of the U.S., Johnson & Johnson of the U.S., Siemens of Germany, Philips of the Netherlands and others have formed their market monopoly position in high-grade, precision and advanced interdisciplinary fields with large-scale imaging devices such as magnetic resonance imager and cardiac intervention devices. In major cities, the foreign invested medical devices almost fully monopolize key hospitals.

Related officials of the China Association for the Medical Devices Industry told us that, “Previously, transnational enterprises operated in the high-end market, Chinese enterprises operated in the low-end and middle market, and parts of the middle market are operated by both”; with the new healthcare reform of 2009, more bonus policies were launched in the grass-roots market, and transnational medical device companies that traditionally were entrenched in the high-end market accelerated development in low-end market, and began to compete with Chinese enterprises; while precisely in order to cope with competition and further development, mergers and acquisitions among many Chinese enterprises increased rapidly.

Be Alert of Transnational Enterprises monopolizing Prices in the Chinese Bearing Market

April 1, 2014

Recently, 6 transnational enterprises of bearing suppliers, such as Svenska Kullager Fabriken (SKF) and Schaeffler confessed that they once conspired to establish a cartel coalition for car bearing prices. 5 out of the 6 transnational enterprises – SKF (a European company), Schaeffler, Nippon Seikō Kabushiki Kaisha (NSK), NFC, and NTN were punished by the European Commission (EC), which had strong repercussions in the Chinese automobile bearing industry.

On March 25, 2014, Tao Faxun, president and general manager of Beijing Taichengxin measurement and control technology Co., Ltd (a leader in automobile bearing technology) said to reporters that, “The wheel bearing is the most critical component of the automobile chassis system. In terms of basic functions such as wheel control, bearing vehicle weight and rotation capacity, wheel bearing has developed into an extremely high-tech and specific product. A Bearing is the key part of all machines, and not every company can make it well. At present, bearing production in the world is mainly concentrated in 10 transnational enterprises, and world-class bearing products are supplied only by several transnational bearing enterprises. Therefore, these enterprises have conditions that constitute price monopoly agreements. ”

Many international bearing manufacturers only focus on improving the quality of bearing products, and it results in the usability of their bearings not fully meeting the actual demand of automobile enterprises. Automobile enterprises lack an understanding of bearing characteristics, so it is difficult for them to assemble qualified automobile products. Meeting customer demand is the source of technological innovation in an enterprise. Therefore, those powerful transnational bearings enterprises have developed an automobile bearing unit which facilitated the assembly of finished automobiles, and created a large market.

Very few of the transnational enterprises that monopolized automobile bearing unit technology are blinded by a lust for money, and do not dare to establish a price monopoly alliance in the EU's extremely strong anti-monopoly system in order to obtain high monopoly profits. Many foreign bearing enterprises established wholly foreign owned enterprises or joint ventures in China. In the Chinese market, the prices of products such as automobile parts that cannot be produced independently and have to be supplied are especially high and rely on foreign-funded enterprises.

Tao Faxun warned that, “The price competition situation of the domestic automobile bearing market is very serious. Related departments in China must be alert to transnational enterprises monopolizing prices in the Chinese bearing market.

Prices are related to everyone, and are closely related to consumers' interests. On March 26, 2014, Niuhui, Deputy Secretary General of the China Association for the Medical Devices Industry said to reporters that: "Price monopolies have an adverse impact on market competition and seriously injure the interests of consumers. Many countries are opposed to price monopolies, and among them, the EU's penalty for price monopolies is particularly heavy." The AML went into effect on August 1, 2008. Niuhui also said that, "Many transnational bearing enterprises are highly concerned about the situation of China's AML. Since the promulgation of the AML, multinational bearing enterprises have often consulted with us about anti-monopoly governance in China. Investigating, identifying and dealing with major price monopoly behavior according to law is one of the main responsibilities of the Price Supervision and Inspection in NDRC. If someone provides evidence to report price monopoly in the bearings industry, then we will actively support and participate in an anti-monopoly investigation."