Annual Review of PRC Anti-Monopoly Law Enforcement (2014)

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I OVERVIEW

In 2014, China's three competition authorities have all been very active in their enforcement practices. A number of new implementing rules have been enacted as part of an effort to further refine China's antitrust regime. On top of that, a recent wave of high-profile antitrust crackdowns has established China's standing as one of the most important emerging jurisdictions for antitrust enforcement.

In terms of the rulemaking, the Ministry of Commerce (MOFCOM) has been the most active one, with four implementing rules published - covering simple case qualifications and review procedure, merger control guidance and imposition of restrictive conditions. The *Interim Provisions on Standards Applied to Simple Cases of Concentration of Undertakings* ("Provisions on Simple Cases Standards") published on 13 February 2015, the *Guiding Opinions on Notification of Simple Cases of Concentration of Undertakings* issued on 18 April 2015 are the set of rules that build up a fast-track merger review system for transactions unlikely to raise competition concern, which is a big step forward for China's merger review regime. They laid down the criteria for determining cases that qualify as a simple case and provide guidance on the procedure for the notification of simple cases. The new version of the *Guiding Opinions on Notification of Concentration of Undertakings* ("Opinions on Notification") adopted on 6 June2014significantly expanded the content of the previous 2009 version of the Opinions on Notification. Among other things, the Opinions on Notificationclarified four important areas of merger control filing, namely, definition of control, calculation of turnover, status of joint venture in identifying concentration and pre-notification consultation. The *Interim Rules on Restrictive Conditions for Concentrations of Undertakings* ("Rules on Restrictive Conditions") enacted on 17 December 2015 provide comprehensive guidance for undertakings whose concentration is highly likely to raise competition concerns and therefore restrictive measures might be imposed. The Rules on Restrictive Conditions set out the types of restrictions, determination of restrictive conditions, standard procedures for divestitures, supervision of implementation of restrictive conditions, alteration and removal of restrictive conditions, as well as legal liabilities.

The State Administration for Industry and Commerce (SAIC) has released the draft version of the *Provisions on Prohibiting the Abuse of Intellectual Property Rights to Exclude and Restrain Competition* ("Draft Provisions on Prohibiting IP Abuse") for public consultation on 11 June 2014. The Draft Provisions on Prohibiting IP Abuse advance, in effect, the first comprehensive regulation as an attemptto regulate intellectual property monopoly agreements and other intellectual property related practices involving abuse of dominance. In addition, the Draft Provisions on Prohibiting IP Abuse set forth provisions on the exercise of intellectual property rights by patent pool and collective copyright

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management organizations.

i Prioritisation and resource allocation of enforcement authorities

The National Development and Reform Commission (NDRC)stated in its press release on 13 February 2015[2]that in 2015it willaim to shake-up and abolish anti-competitive regulations and policies that hamper the creation of a unified national market and a level playing field for competition. The NDRC emphasized that it would strengthen connections between competition policy and industry policy. Similar with previous years, the NDRC said it would keep a close eye on suspected monopolistic behaviors in key sectors. For example, the NDRC said it would conduct special inspections in areas that are of particular concern to the general public such as education, healthcare, and online retail sector, etc. Apart from continuing its price supervision, the agency vowed to step up law enforcement efforts to actively investigate cases involving abuses of administrative power which exclude and restrict competition.Additionally, it will make efforts to improve the enforcement of price supervision law and push revisions to China's Price Law.It is also worth mentioning that the NDRC has undergone significant personnel change. Xu Kunlin, previously the head of the Price Supervision and Anti-Monopoly Bureau (PSAMB) under the NDRC, was appointed as the head of the NDRC's Price Department in late November 2014, and he had been the head of both departments concurrently until late February 2015 when, after the conclusion of Qualcomm's case, Zhang Handong, with a medical reform background, replaced Xu as the new Anti-trust chief while Xu officially left PSAMB.

As for SAIC, in the year to come, SAIC will enhance enforcement against cases that substantially hamper competition on the market and will seek to promote the revision and perfection of relevant laws and regulations, lay a solid foundation of competition enforcement, enhance internationalcoordination regarding competition policies, and enhance supervision, thereby maintaining fair and competitive market condition[3]. The Antitrust Enforcement Bureau of the SAIC has expanded from 5 sections to 8 sections, with an increase of personnel up to 37. Three out of these eight sections deal with antitrust issues, which are antitrust enforcement section one, antitrust enforcement section two and antitrustlegal section[4].

MOFCOM's 2015 agenda centered on drafting and enactment of implementation rules, for example, drafting of the supporting measures of the Provisions on Simple Cases Standards. MOFCOM will also drive the revision of the *Measures for the Notification of Concentration of Undertakings* and the *Measures for the Review of Concentration of Business Undertakings,* both of which are expected to be completed within 2015[5].

ii Enforcement agenda

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2 Available at: http://www.sdpc.gov.cn/gzdt/201502/t20150213_664556.html

3 As stated in SAIC's press release on 28 January 2015, available at: http://www.saic.gov.cn/ywdt/gsyw/dfdt/xxb/201501/t20150128_151702.html

4 Director Ren of SAIC spoke at "Multinational Companies Investment Forum" held by *Global Times*, available at: http://china.huanqiu.com/article/2014-12/5229637.html

5 Director Shang of MOFCOM spoke at "China Competition Policy and Law Annual Meeting " on 9 February 2015, available at: http://finance.sina.com.cn/world/gjjj/20150210/013921513727.shtml

In 2014, the number of received and concluded cases by MOFCOM has slightly increased compared with the 2013 figures. In 2014, MOFCOM received a total of 262 concentration filings (17% increase) and concluded 245 cases (18% increase)[6]. Four of these cases were conditionallyapproved, accounting for 1.6% of all concluded cases. One case was blocked. The remaining cases were unconditionally approved. Simple case procedure was formally adopted on18 April 2014. Since its introduction, MOFCOM has accepted 87 simple cases as of the end of 2014. Among all the cases cleared by MOFCOM within 2014 (including both unconditionally approved and conditionally approved cases), simple cases accounted for almost 40%.

The NDRC imposed total fines of aroundRMB 1.8 billion in major antitrust cases concluded in 2014. These casesmainly involved four sectors: (1) The automotive industry – *Japanese Auto Parts and BearingManufacturers*case and *Audi and Chrysler case*, with combined fines of RMB 1.548 billion. These automotive-related investigations have prompted some international automakers to voluntarily lower their prices of cars or automobile parts in China. (2) The insurance sector–*Zhejiang Car Insurance case*, involving a fine of RMB 110 million. (3) The cement sector–*Jilin Cement case*, involving a fine of RMB 114 million. (4)The spectacle lenses market–*Spectacle Lenses case*, involving a RMB 19.57 million fine.

In 2014, SAIC and its local counterparts launched 15 new antitrust investigations, which spanned tobacco, salt, telecom, gas and insurance industries. According to SAIC's press release on 28 January 2015, a total of 45 antitrust cases have been launched either directly by the SAIC or by its local counterparts under the authority of the SAIC. Of the 45 cases, 20 have been concluded[7]. SAIC's provincial counterparts in Jiangxi, Sichuan, Chongqing and Xinjiang have conducted investigations into local governments' suspected abuses of administrative power to exclude or restrict competition, and advanced recommendations on correction measures, which facilitated removal of regional blockages and industry monopolies.

II CARTELS

Monopoly agreements are governed by SAIC and NDRC. Specifically, the SAIC is responsible for enforcement against non-price related monopoly agreements, while the NDRC is responsible for enforcement against price-related monopoly agreements. In 2014, SAIC's Draft Provisions on ProhibitingIP Abuseset out provisions to prohibit cartels formed during the exercise of intellectual property rights, while NDRC did not publish any guidelines or implementing regulations governing cartels.

In 2014, SAIC has disclosedeight cases that were concluded by SAIC and its local counterparts nationwide, three of which are enforcement against cartels, which is a sharp decrease from 2013 (13 cartel cases in 2013). A violation of Article 13(3) of the AML –"competing undertakings are prohibited from concluding monopoly agreements on allocating the sales market or the purchasing market for raw and semi-finished materials" is found in all three cases. Two of the agreements were reached directly between undertakings, and one was reached indirectly through an industry association.

[6] As stated in MOFCOM's 29 January 2015 press release, available at http://www.mofcom.gov.cn/article/ae/ai/201501/20150100882509.shtml
[7] Note 3.

The three cases encompass wholesalers of fireworks and firecracker, quarry and concrete companies. However, none of the companies and industry associations in these three cases is considered an influential or large enterprise. In contrast to the enterprises recently penalised by the NDRC, the SAIC cases involved much smaller amounts of money and significantly lighter penalties, with a combined amount of merely RMB 2.7 million.

In contrast to the SAIC, the NDRC has undoubtedly attracted unprecedented attention worldwide by cracking down on several landmark antitrust cases. The enforcement in *Japanese Auto Parts and Bearing Manufacturers* case, with a RMB 1.24 billion fine, marked the commencement of enforcement against the automotive industry, including not only auto parts manufacture and vehicle sales but also car insurance, spreading across different layers of the industry. In this section, we will briefly discuss these high-profile investigations concluded by the NDRC in 2014.

i Significant cases

Spectacle Lenses case[8]

The NDRC launched its investigation of major optical lens manufacturers in Beijing, Shanghai and Guangdong in August 2013 after it received whistleblower reports. In May 2014, the NDRC announced the conclusion of its investigation on five companies including Essilor, Nikon, Zeiss, Bausch & Lomb, and Johnson & Johnson for their resale price maintenance and imposed fines totaling more than RMB 19 million. However, Hoya and Weicon were exempted from fines because they had proactively reported to the NDRC regarding the monopoly agreements and provided important evidence and actively rectified their behavior.

These optical lens manufacturers required distributors to adhere strictly to the suggested resale prices, and some contact lens manufacturers and distributors had been holding a "buy three get one free" promotion all year round, which was regarded by the NDRC as a form of resale price maintenance. The manufacturers also resorted to punishing distributors that failed to stick to their suggested retail prices.

The fines imposed on the five companies ranged from 1% to 2% of the companies' previous year's sales. After the investigation began, the targeted companies all took steps to rectify their behavior, including immediately ceasing resale price maintenance, adjusting sales contracts, commencing antitrust compliance training and reducing ex-factory prices.

As the third vertical price monopoly case investigated by the NDRC, this decision indicates the NDRC's determination in enhancing enforcement against vertical price monopoly agreements. In particular, it further specified that "recommended price" with strings attached could be regarded as resale price maintenance which has the same effect as monopoly agreements that restrict or eliminate competition.

8 The original Chinese notice issued by the NDRC is available at: http://www.ndrc.gov.cn/gzdt/201405/t20140529_613562.html

Japanese Auto Parts and Bearing Manufacturers case[9]

According to the NDRC's announcement in August 2014, from January 2000 to February 2010 eight Japanese auto parts manufacturers (Hitachi, Denso, Furukawa Electric, Yazaki, Sumitomo, Asian Industry, Mitsuba and Mitsubishi) held frequent meetings in Japan. The purpose of the meetings was to negotiate price quotations aimed at minimizing competition in order to win auto parts contracts at the most advantageous price. They reached agreements on the price quotations on multiple occasions and acted accordingly. The price negotiations involved 13 products (including starters, alternating current generators, throttle bodies and wire harnesses) that were sold in China. The parts and components were used in more than 20 car models made by companies including Honda, Toyota, Nissan, Suzuki and Ford. The eight auto parts manufacturers continued to supply related auto parts in accordance with collusive agreements in the Chinese market until the end of 2013.

From 2000 to June 2011 four Japanese bearing manufacturers (Nachi-Fujikoshi, NSK, NTN and JTEKT) held a number of meetings in both Japan and Shanghai, China. The meetings were held to discuss price increase strategies, the timing and range of price increases of bearings in the Asian and Chinese markets, and the implementation of price increase strategies. The four manufacturers increased the price of bearing products in China based on pricing information exchanged and collusion reached at these meetings.

The NDRC concluded that the manufacturers had reached price-fixing agreement related to auto parts and bearings. The illegal conduct lasted for 10 years and violated the AML by restricting and excluding competition in the relevant markets and exerting undue influence on the price of auto parts and bearings in China. This impaired the interests of downstream manufacturers and Chinese consumers.

Hitachi was exempted from fines because it was the first company to report voluntarily and come forward with key supporting evidence. Denso, as the second company to report, was fined 4% of its sales for the previous year. Yazaki, Furukawa and Sumitomo were given fine of 6% of their sales for the previous year for price-fixing on one product. Aisan, Mitsubishi Electric and Mitsuba were fined 8% of their sales for the previous year for concluding price-fixing agreements on more than two products.

In the bearings investigation, the NDRC exempted Nachi from fines for being the first company to report.NSK was fined 4% of its sales for the previous year for being the second company to report and provided China market-related evidence and sales figures.NTN was fined 6% of its annual sales for retreating from an Asian research meeting in 2006 but continuing to participate in China export market meetings. JTEKT was fined 8% of its annual sales for proposing to convene export market meetings specifically targeting the Chinese market.

This case is the first horizontal case in which the leniency programme has been applied, the NDRC

[9] The original Chinese notice issued by the NDRC is available at: http://www.ndrc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201408/t20140820_622757.html

specified the order of the voluntary reporting and granted reductions or exemptions from penalties in accordance with the regulations. This demonstrates the more transparent and stringent application of the programme. The antitrust actions in the automobile and auto parts industries are undoubtedly among the most prominent cases in 2014. Under the pressure of antitrust law enforcement, a number of major foreign automobile manufacturers have announced price cuts for their auto parts.

Zhejiang Car Insurance case[10]

This is the first case in which the NDRC published its full penalty decisions, which imposed combined fines of RMB 110 million on 23 insurance companies (including leading Chinese insurers such as China Life, Ping'an Insurance and China Pacific Insurance) and a local trade association in Zhejiang Province for price fixing in relation to car insurance. The NDRC found that 23 local insurers organised by the Zhejiang Insurance Industry Association had held multiple meetings and concluded and executed horizontal monopoly agreements to fix car insurance premiums and handling fees.

The Zhejiang Insurance Industry Association met with the 23 local insurers in July 2009 to discuss premiums for new and high-end cars. It was agreed that the new car discount ratio would be no lower than 0.95 and the discount ratio for high-end cars would be no lower than 0.9 or 1, depending on the purchase price. The insurers acted accordingly on these agreements. In May 2009 and May 2010 the local insurers held meetings and agreed on a uniform handling fee for commercial car insurance based on market share. The Zhejiang Insurance Industry Association also established a penalty mechanism whereby companies that violated the agreements would be fined. The insurers also implemented these agreements accordingly.

Among the companies involved in the case, PICC Zhejiang Branch was fully exempted from penalties, as it provided a detailed report on the meetings and price-fixing agreements along with other key evidence. Second reporter China Life Zhejiang Branch was exempted from 90% of its penalties, as it provided key evidence and a detailed report on the price-fixing agreement for car insurance premiums. Third reporter China Ping'an Zhejiang Branch was granted a 45% reduction in fines, as it also provided key evidence. The fine for the remaining cartel member was 1% of their respective sales for the previous fiscal year.

The decisions provide welcome clarity on practical issues such as the extension of leniency, identification of entities subject to fines and calculation of turnover. In comparison with *Japanese Auto Parts and Bearing Manufacturers* case, the second reporters were treated very differently. Also, the third reporter was identified for the first time in China in this case and was granted a significant reduction of fine. A degree of inconsistency between this case and *Japanese Auto Parts and Bearing Manufacturers* might indicate that the NDRC retains considerable discretion to determine the specific amount of fines. It is also notable in this case that the voluntary reports were submitted after the investigation had been launched, while in the *Japanese Auto Parts and Bearing Manufacturers* case the voluntary reports were submitted before the official investigation had commenced. It seems that the NDRC has adopted a flexible approach in its application of leniency.

[10] The original Chinese notice issued by the NDRC is available at: http://www.ndrc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201409/t20140902_624514.html

Jilin Cement case[11]

In September 2014, the NDRC announced a penalty decision issued by the Jilin province Price Bureau against three cement companies, Jilin Yatai Group, Jidong Cement's Jilin Branch and North Cement, for price fixing and imposed a combined fine of RMB 114.39 million. According to the press release, the NDRC had been investigating certain cement companies for suspected price fixing ever since March 2013.

The NDRC found that the three companies had met on 14 April 2011 to set regional clinker cement prices and discuss implementation in Jilin province. The three companies fixed the ex-factory price of clinker cement at RMB 300 per ton to be sold outside Jilin province, with a minimum of RMB 300 per ton for the cement sold in Liaoning province. The collusion further extended to Changchun, Songyuan and Panshi regions in Jilin province at new prices the companies agreed upon on 16 April 2011. The NDRC also found that North Cement and Jilin Yatai had agreed on 11 May 2011 to fix cement prices in the Tonghua and Baishan regions in Jilin province.

For colluding and not actively cooperating with the investigation, Jilin Yatai Group and Jidong Cement's Jilin Branch received fines equal to 2% of their 2012 sales. The Jilin Price Bureau fined North Cement 1% of its 2012 sales, as the company actively cooperated and corrected its illegal practices.

Audi and Chrysler case[12]

On 11September 2014the Hubei Price Bureau imposed a fine of RMB 248.58 million on FAW-Volkswagen Sales Co, Ltd and a combined RMB29.96 million fine on eight Audi dealers in Hubei Province for concluding and implementing price monopoly agreements. Two Audi dealers – Hubei Aozeand Wuhan Aojia – were exempted from the penalty. On the same day, Shanghai's municipal price authority imposed a fine of RMB31.68 million on Chrysler (China) Automotive Sales Co, Ltd and a combined RMB2.14 million fine on its three dealers in Shanghai, also for concluding and implementing price monopoly agreements. This marks the first time that both horizontal and vertical monopolies have been found in the same case in China. Both FAW-Volkswagen and Chrysler concluded vertical agreements with their respective dealers to restrict the resale price of cars and after-sale services. Further, their respective dealers concluded and implemented horizontal agreements to fix prices.

According to the Hubei Price Bureau, from 2012 the Audi sales division of FAW-Volkswagen organised multiple meetings with 10 Hubei Audi dealers to conclude and implement car and service price monopoly agreements. Moreover, the Audi sales division set up a supervisory board to monitor

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[11] The original Chinese notice issued by the NDRC is available at: http://www.ndrc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201409/t20140909_625065.html

[12] The original Chinese notice of the decision is published on the website of Hubei Price Bureau and Shanghai Price Bureau, available at:http://www.hbpic.gov.cn/chn201201110924533/article.jsp?articleId=45084, http://www.shdrc.gov.cn/searchresult_detail.jsp?main_artid=24981&keyword=%BF%CB%C0%B3%CB%B9%C0%D5

and supervise Audi dealers to ensure that the price policy was strictly implemented. In addition, from 2013 eight of the 10 Audi dealers concluded separate inter-dealer monopoly agreements on car sales.

From 2012 to 2014 Chrysler signed dealership agreements containing resale price maintenance terms with three dealers in Shanghai. Chrysler also issued business policies to control resale prices and penalised dealers that gave price quotes lower than recommended retail prices. Further, the three Shanghai Chrysler dealers held a meeting on 25April 2014 to sign a price negotiation memorandum to standardise maintenance and repair service fees and other items related to the price of Chrysler, Jeep and Dodge vehicles. They also concluded and enforced an agreement on hourly rates for maintenance, component prices, painting prices and implementation dates. These dealers thus concluded and implemented a horizontal monopoly.

The Hubei Price Bureau fined FAW-Volkswagen 6% of its annual sales from the previous year in the relevant market for playing a leading role. Seven Audi dealers were fined amounts ranging from 1% to 2% of annual sales. The Shanghai Price Bureau fined Chrysler 3% of its annual sales from the previous year, while Shanghai Yueye, as the organizer, was fined 6% of its annual sales. The other two dealers involved were fined 4% of their respective annual sales.

The antitrust investigation into the automobile industry continues with increasingly robust law enforcement. It has extended from the auto parts sector to include automobile manufacturers and their dealers, covering various layers of the relevant markets. Moreover, the NDRC is targeting all kinds of monopolistic conduct, including vertical and horizontal monopolies.

ii Trends, developments and strategies

The NDRC has clearly been highly ambitious in cracking down on cartels in the past year, while the SAIC has merely concluded three cartel cases in 2014 with relatively small amount of fines. The cases concluded by the NDRC have following major features:

a. Most of the cartel cases concluded by the NDRC featured a high amount of fines. The combined amount of the fines imposed by the NDRC on cartel members totaled 1.8 billion in 2014.
b. A variety of market entities are involved, incorporating industry associations, domestic companies, foreign-invested companies, offshore companies as well as administrative agencies.
c. The scope of investigation is becoming more extensive. In *Audi and Chrysler* case, both horizontal and vertical agreements were found.
d. Companies voluntarily reported their monopoly practices, actively cooperated in NDRC investigations and those companies that provided key evidence benefited significantly from the leniency programme.

iii Outlook

The recent anti-monopoly crackdown has swept across a lot of companies and industries. Step-by-step through the market-oriented reform in China, both the NDRC and the SAIC will further strengthen their supervision over monopolistic conducts and enforcement depths and efforts so as to uphold fair market competition. The number of companies being investigated and fined is likely to increase in the near future, and industries involved are likely to expand. Therefore, companies shall not take any chances, but instead pay attention to and strictly abide by the AML, establish and perfect anti-monopoly compliance systems.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

In 2014, there were several high-profile investigations with respect to the AML's public enforcement against the abuse of a dominant market position by both SAIC and the NDRC. In 2013, nearly all the cases concluded by the SAIC involved monopoly agreements whereas the majority of cases concluded by the SAIC in 2014 related to abuse of market dominance. As the SAIC became better experienced with respect to case analysis and execution, it has initiated more in-depth investigations in the last year. Among the eight investigations concluded by SAIC's local counterparts nationwide in 2014, five of them are related to abuse of dominance. In particular, 2014 saw the first concluded abuse of dominance case by SAIC – *Yiyuan Purified Water* case[13]. The cases concluded by SAIC are mostly in the public sector, such as utility and tobacco industries where a dominant market position is easily identifiable. By contrast, the high-profile investigations of Microsoft and Tetra Pak which undoubtedly attracted the world's attention are still pending largely due the complexity and technical nature of the investigation in such cases. Another more remarkable milestone is the conclusion of the year-long investigation of Qualcomm, with record fine of RMB 6.088 billion.

i Significant cases

Qualcomm case[14]

The NDRC initiated an antitrust investigation of Qualcomm as early as November 2013 based on a complaint filed with the NDRC. On 10 February 2015, the NDRC announced it has imposed a penalty of RMB 6.088 billion on Qualcomm for its abuse of dominance in China. The fine equals 8% of Qualcomm's China sales in 2013.

The NDRC found that Qualcomm possesses a dominant market position in the markets of standard essential patents (SEP) for CDMA, WCDMA, LTE wireless communication and baseband chips and abused its dominant market positions in the following manner: (1) Charging unfairly excessive patent royalties. Qualcomm incorporated expired patents in its patent portfolio and charged royalties on these expired patents. Meanwhile, Qualcomm demanded Chinese licensees to grant back their related patents to Qualcomm for free. Furthermore, for Chinese licensees compelled to accept package licensing arrangement that included non-SEPs, Qualcomm not only charged relatively high royalty rates but also charged royalties based on wholesale net selling price of the device.(2) Tying non-SEPs for wireless communication with the SEPs without justifiable reasons, forcing some of the Chinese

[13] The original enforcement announcement is available at: http://www.saic.gov.cn/zwgk/gggs/jzzf/201401/t20140106_140960.html

[14] The first announcement on the *Qualcomm* case by the NDRC is available at: http://jjs.ndrc.gov.cn/gzdt/201502/t20150210_663872.html, and the formal administrative punishment decision is available at: http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html

licensees to obtain licensing of non-SEPs for wireless communication. (3) Attaching unreasonable terms in baseband chip sales. Qualcomm conditioned its sale of baseband chip on the chip customer signing a license agreement and a non-challenge agreement and coerced Chinese licensees to accept these unfair and unreasonable licensing terms.

According to the NDRC's statements, after several rounds of negotiation, Qualcomm finally proposed a rectification plan package addressing the competition concerns raised during the investigation. The NDRC accepted this rectification plan and rendered a penalty decision on the basis of the rectification plan. The rectification plan is related to Qualcomm's licensing of certain wireless SEPs, including: (1) for branded devices sold for use in China, Qualcomm will use a royalty base of 65% of the wholesale net selling price of the device; (2) Qualcomm will provide patent lists to Chinese licensees during the negotiation process and will not charge royalties on expired patents; (3) Qualcomm will not seek a grant-back license of the patents from Chinese licensees free of charge; (4) in licensing wireless SEPs, Qualcomm will not tie non-SEPs for wireless communication; (5) Qualcomm will not condition the sale of baseband chips on the chip customer signing a license agreement containing unreasonable terms or non-challenge clauses in its license agreement.

The fine imposed on Qualcomm sets the record as the highest antitrust penalty ever issued in China's anti-monopoly enforcement history which accounts for more than three times the total amount of fines rendered by the NDRC in 2014. The *Qualcomm* case epitomizes the conflict and compatibility in the interaction between the intellectual property law and the anti-monopoly law, and further provides experience and enlightenment with respect to anti-monopoly regulation over the abuse of the intellectual property law. An interesting point is that on one hand the NDRC claims that Qualcomm charged unfairly high loyalties based on the device value rather than the chipset value, but on the other hand, NDRC does not request Qualcomm to change such model, instead merely requests that Qualcomm revise the model by way of charging 65% of the wholesale net selling price of the device. Qualcomm accepted NDRC's penalty decision and paid the fines within four days of the NDRC's announcement of the decision. This case is a strong indication of NDRC's growing competency in investigating complicated cases, not to mention that its innovative approach towards standard essential patents will serve as valuable precedent, not only impacting the Chinese antitrust practice, but also having wider influence to other jurisdictions.

Investigation of Microsoft

In 2014, SAIC initiated a high-profile investigation of Microsoft based on a complaint received from an unnamed company alleging that Microsoft violated AML by failing to fully disclose information related to the Windows operating system and Office software, which led to suspected anti-competitive issues such as interoperability and tie-in sales.

On 28 July 2014, the SAIC raided Microsoft China's offices in Beijing, Shanghai, Guangzhou and Chengdu, questioned senior Microsoft executives, made copies of some of Microsoft's contracts and financial statements, and extracted "a large amount of data" related to internal communications, emails and documents on computers and servers. The SAIC also seized two personal computers.

Raids were conducted by nearly 100 personnel from nine provincial SAIC offices[15].

A week later, on 6 August 2014, the SAIC launched another raid of Microsoft premises in Beijing, Liaoning, Fujian and Hubei, as well as Accenture Information Technology (Dalian), Microsoft's finance services provider[16]. On 1 September 2014, the SAIC questioned a number of Microsoft executives, and asked Microsoft to submit a written report within 20 days on alleged interoperability problems[17].

As one of the two highest-profile cases the SAIC has ever handled, the investigation into Microsoft is still in the evidence collection stage and is expected to continue for an extended period of time due to the complexity of the case. While the outcome remains unknown, the way Microsoft dealt with the investigation is nonetheless provides several lessons. Specifically, Microsoft has hired the highest number of lawyers in any case the SAIC has handled thereby maximizing the protection of its lawful rights. For example, in SAIC's first raid in late July, Microsoft's lawyers witnessed all of the enforcement activities onsite and supervised the enforcement procedure.

Investigation of Tetra Pak

As disclosed by SAIC[18], the investigation into Tetra Pak for possible abuse of a dominant market position had entered the fact verification and decision-making phase.It is alleged that Tetra Pak took advantage of its dominant position, tied the sale of packaging materials to its liquid beverage packaging equipment and engaged in discriminatory treatment that favoured top-tier dairy companies[19].Since the investigation began in 2012, SAIC has inspected two of the firm's operation sites, requested materials and documents five times and communicated with the company on 10occasions. As part of the investigation, SAIC conducted industry research and surveys in four areas (i.e. liquid food, packing equipment, packing material and raw material) and distributed questionnaires and visited the relevant companies.

While a settlement is not completely ruled out, it is expected that SAIC is more likely to impose a punishment decision, partly because the investigation had been very high profile and has lasted for a long time.

Investigation of Inter Digital, Inc (IDC)[20]

The NDRC, in June 2013, initiated a competition investigation into IDC, a US wireless research and

[15] As stated in SAIC's press release, available at: http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729_147122.html
[16] As stated in SAIC's press release, available at: http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201408/t20140806_147358.html
[17] As stated in SAIC's press release, available at: http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201409/t20140901_147993.html
[18] Please see the transcript of the press conference held jointly by SAIC, MOFCOM and NDRC, available at: http://www.china.com.cn/zhibo/2014-09/11/content_33487367.htm
[19] For a detailed discussion of this case, see *The Public Competition Enforcement Review* (Sixth Edition), pp. 80–81.
[20] The original Chinese notice issued by the NDRC is available at: http://www.ndrc.gov.cn/gzdt/201405/t20140522_612466.html

development company that holds numerous standard-essential patents (SEPs) for mobile phones pursuant to complaints about its abuse of its dominant market position through charging excessively high and discriminatory patent licensing fees.

In February 2014, IDC submitted a commitment plan to the NDRC and applied for the suspension of the anti-monopoly investigation. The commitment includes refraining from charging Chinese companies licensing fees that are discriminatory and exploitative, conducting tie-in sales of SEPs and Non-SEPs, requiring Chinese companies to provide free patent grant-back and intentionally using patent litigation to force Chinese companies to accept its unreasonable licensing terms, etc.

Considering that the commitment raised by IDC was able to eliminate the consequences of suspected monopolistic conducts, guaranteeing a fair and competitive market for Chinese companies to participate in, the NDRC issued a decision on 22 May 2014 to suspend the investigation of IDC and indicated that it would supervise IDC's fulfilment of its commitment, and the NDRC is ready to resume the investigation at any time if IDC failed to execute its commitment or due to reasons otherwise stipulated by law.

ii Trends, developments and strategies

The dominance cases concluded in 2014 as well as still ongoing investigations such as Microsoft and Tetra Pak have again demonstrated the fact that abuse of market dominance is a problem area for antitrust enforcement due to the difficulties in identifying dominant positions and proving abusive behaviors. Nevertheless, it is undeniable that after six years of law enforcement, it seems that both the SAIC and the NDRC are becoming more confident and proficient in investigating abuses of market dominance cases. Further, competition regulators have tended to attach more importance to the technology industries with respect to intellectual property rights, which is illustrated by the *IDC* and *Qualcomm* cases.

Companies facing investigation should always take a proactive approach in cooperating with the enforcement agencies, and positively coming up with practical solutions to address the existing problems. After all, the purpose of the competition authorities' investigation of suspected undertakings is to maintain a fair and competitive market for the benefit of consumers, rather than to just impose a penalty.

iii Outlook

The conclusion of Qualcomm case is evidently a milestone in the investigation of abuse of market dominance cases, which will surely provide unprecedented guidance for both enforcement agencies and companies. Moreover, although the enforcement activities have been leaning toward monopolistic agreements, abuses of a dominant market position are still on the radar of the enforcers of the AML.

IV MERGER REVIEW

In 2014, the number of cases accepted (262) and concluded (245) have both reached new heights since the implementation of the AML. Manufacturing is still the predominant industry that appeals to mergers, with 157 cleared cases. Most of the concentrations are carried out as acquisitions of equity interests and assets. 121 cases are of concentrations on a horizontal scale, which is the primary form. Publically-listed companies are among the most active participants in all cases. Concentrations between domestic companies have increased slightly, which accounted for 15% of all the cases, a 5% increase from 2013.

Since the introduction of simple case procedure, the average review period for simple cases was reduced substantially compared with that of standard cases. As of the end of 2014, the average review period of simple cases is 25 days, including 10-day public comment period. The quickest clearance took just 14 days. Virtually all the simple cases were cleared in Phase I with only one exception which entered into Phase II review. In that case, the agency took 91 days to clear the proposed transaction between two French companies.

More interestingly, MOFCOM has stepped up antitrust enforcement efforts in addition to its usual merger reviews. As early as 21 March 2014, MOFCOM has announced that it was going to publish its penalty decisions on undertakings which fail to file a notifiable merger. On 2 December 2014, for the first time ever, MOFCOM published three penalty decisions regarding concentration of undertakings.

i Significant cases

Proposed alliance among Maersk/MSC/CMA CGM - the second ever blocked case[21]

On 17 June 2014, the last day of the statutory period for merger review, MOFCOM rendered its decision to prohibit the proposed alliance of the world's three largest shipping liner operators – Maersk Line, Mediterranean Shipping Co and CMA CGM (the so-called 'P3 Alliance').

The proposed P3 Alliance would have been structured as a limited liability partnership in England and Wales, and would have overseen operations for all of the participating undertakings' container liner businesses in the world's three major shipping routes – Asia to Europe, transatlantic and transpacific. According to MOFCOM's decision and a statement outlining its reasoning, it concluded that the P3 Alliance was actually a "close joint operation" and would have had restrictive and anti-competitive effects on the Asia-Europe container shipping market. MOFCOM further pointed out that the parties could not prove that the positive impact of the proposed alliance would outweigh the negative impact, or that the alliance would serve public interests.

The parties negotiated with MOFCOM for possible remedial measures for several rounds and submitted a final remedy proposal on 9 June 2014. However, MOFCOM observed that the remedy plan lacked legal basis and convincing evidence, and it thus could not resolve MOFCOM's competition concerns.

This is the second time that MOFCOM has rejected a concentration since the implementation of the

[21] The decision is available at MOFCOM's website: http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml

AML (the first was Coca-Cola's proposed acquisition of Huiyuan Juice in March 2009). The rejection is surprising in light of its reluctance to block deals over the past five years. This case once again demonstrates the independence and importance of MOFCOM in merger reviews of global transactions. MOFCOM has grown more confident when imposing conditions or even blocking transactions outright based on its own assessment, even where they have been unconditionally cleared in other jurisdictions (e.g., the European Union and the United States, as in this case).This case is also a reminder for companies considering large-scale mergers and acquisitions with a global dimension to take MOFCOM's merger control regime into account in their strategic planning.

Thermo Fisher Scientifics' acquisition of Life Technologies[22]

On 15 January 2014, MOFCOM conditionally approved the acquisition of Life Technologies by Thermo Fisher Scientific ("Thermo"). This is the first conditional clearance decision made by MOFCOM in 2014.

Thermo Fisher (Thermo), the world leader in biotechnology product development, proposed to acquire all the shares of Life Technologies for USD 15.8 billion. The deal combines two giants of the laboratory equipment and supply business just as the promise of low-cost genetic sequencing is opening important new markets for DNA sequencing, molecular diagnostics, genomics, proteomics etc.

MOFCOM concluded that the proposed deal would likely eliminate or restrict competition in the market for the products of cell culture businesses, SSP kits, SDS PAGE Protein Standards and siRNA reagents, where the combined market share of the parties for each market is more than 50%.

According to MOFCOM's decision, in the market of cell culture business, the market entry barrier is extremely high. In the SSP kits market, market power of both parties will be enhanced, resulting in substantial increase in price and impairment of consumer interests. In the SDS PAGE Protein Standards market, an increase in Herfindahl-Hirschman Index (HHI) will be significant after the transaction, which will reduce the options available to downstream users.

In its decision, MOFCOM ordered Thermo to perform the following obligations:

a The divestiture of its global cell culture business, including the tangible and intangible assets necessary for the divested business' survivability, merchantability and competitiveness;

b The sale of 51% of the equity interest, which was held by Thermo, of Lanzhou National Hyclone Bio-Engineering Co., Ltd, a company incorporated in mainland China;

c The divestiture of its global gene modulation business, including the tangible and intangible assets necessary for the divested business' survivability, merchantability and competitiveness;

d For the next ten years, gradually reducing the market catalogue price of the SSP kits and the SDS PAGE Protein Standards at the pace of 1% per year, without reducing the discount offered to Chinese distributors;

e For the next ten years, provide the SSP kits and the SDS PAGE Protein Standards to third

[22] The decision is available at MOFCOM's website:http://fldj.mofcom.gov.cn/article/ztxx/201401/20140100461603.shtml

parties by OEM agreements in accordance with the third parties' choices; or provide permanent non-exclusive technology licensing with respect to the SSP kits and the SDS PAGE Protein Standards to third parties;

f The supervision of the implementation of the above restrictive conditions shall be conducted in consistent with this announcement, and Thermo's commitment plan shall also have binding legal effect on Thermo.

This is the first time that MOFCOM in its public announcement made clear the application of economic analysis in reaching its decision. This is a big step forward in terms of transparency, as it helps practitioners and companies better understand how MOFCOM utilizes economic analysis in its merger review. MOFCOM targeted 13 out of 59 product markets for closer scrutiny based on HHI criteria, which is the first time MOFCOM explicitly applied a concentration threshold to screen potential problem areas. Further, MOFCOM used two different methodologies to estimate the potential price increase after the merger: (1) price increases based on Margin-HHI regression and (2) indicative price rise.

Microsoft's acquisition of Nokia's Devices and Services Business[23]

On 8April 2014, MOFCOM conditionally approved the acquisition of Nokia's Devices and Services Business by Microsoft. This is the second conditional clearance decision made by MOFCOM in 2014.

MOFCOM determines that Microsoft's EUR 5.44billionacquisition of the Devices & Service Business of Nokia would enable Microsoft to enter the smart-phone manufacturing market, instead of merely providing Windows Phone operation system, and achieve vertical integration. Nokia will cease mobile phone manufacturing but will withhold all communication and smart-phone related patents.

MOFCOM concluded that once Microsoft enters the mobile terminal manufacturing industry, it would significantly reduce its reliance on mobile phone manufacturers in promoting its Windows Phone operation system. This might trigger its incentive to increase royalties on those patents that are essential to Android smart-phone technology in order to increase its market share in mobile terminal devices. The eventual result will likely harm competition and impair consumer interests. Moreover, since Nokia will cease to supply mobile phone devices and service business, which will lower its motivation to maintain a moderate average level of royalties in the whole mobile phone industry and will increase its motivation to profit from royalties.

Due to above concerns, MOFCOM ordered Microsoft to perform the following obligations:

1. With respect to Microsoft's patents which it implemented in smart phones and are necessary for industry standards, Microsoft shall:

   a make its SEPs available on FRAND terms;
   b not seek an injunction or exclusion order on the basis of those SEPs against smartphone

[23] The decision is available at MOFCOM's website: http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml

manufacturers in China;

c make those SEPs available for license without requiring grant-back, except for patents essential to the same industry standard; and

d not transfer those SEPs to any other entity unless that entity agrees to adhere to the principles outlined above.

2. With respect to Program Patents not committed to any industry standard (non- SEPs), Microsoft shall :

   a continue to make available non-exclusive licenses under its existing patent licensing program for Android smartphones, as well as its EAS, RDP and ex FAT patent licensing programs to China's smart phone manufacturers that include coverage under such non-SEPs for the manufacturing, use and sale of smartphones in China (Licenses);

   b continue to offer such Licenses (i) at royalty rates no greater than the rates in effect before this concentration or, in the case of a present Microsoft licensee, those rates specified in existing agreement; and (ii) on other terms and conditions substantially similar to those prior to the closing of this concentration;

   c not transfer certain non-SEPs to any other entity for a period of five years from the date of MOFCOM's decision. After five years, Microsoft will not transfer any such patents unless the transferee agrees to adhere to any applicable licensing promises made by Microsoft prior to the commitments; and

   d after the closing date only seek injunctions on non-SEPs if a potential licensee is not negotiating in good faith.

In its decision, MOFCOM ordered that Nokia shall:

a always make its SEPs available on FRAND terms;

b not enforce injunctions against SEPs to prevent the implementation of the standard with the FRAND commitment unless the potential licensee does not have good will to sign a FRAND license and obey these license terms;

c not grant SEP licenses restrained by FRAND obligation under the premise that the licensee must accept Nokia's patent licensing that is not restrained by a FRAND obligation; and

d transfer the SEPs only if the entity agrees to adhere to the commitments Nokia made to Standard Setting Organizations and the FRAND obligation. The FRAND obligations will transfer to the entity at the same time.

The transaction has been cleared in other major jurisdictions such as the US, with the vast majority clearing the deal without any conditions. In contrast, MOFCOM has taken on a greater role in this case in light of the huge impact of this transaction on China's smart-phone market and the special feature of the China's market. More notably, MOFCOM does not only impose conditions on the acquirer (Microsoft) but also on the seller (Nokia) in this case, which is very unusual practice with respect to imposition of restrictive conditions.

Merck KGaA's Acquisition of AZ Electronic Materials[24]

On 30April 2014, MOFCOM conditionally approved the acquisition of AZ Electronic Materials by Merck KGaA. This is the third conditional clearance decision made by MOFCOM in 2014.

London-listed AZ Electronic Materials (AZ) is a special chemical material supplier to the electronics industry, and Merck KGaA (Merck) is a leading company engaging in the production and sales of biopharmaceutical, life science instruments and specialty chemicals.

MOFCOM concluded that high market shares of Merck and AZ in liquid crystal display and photoresist markets will enable Merck to become the largest supplier that provide liquid display crystals and photoresists at the same time. If Merck engages in tie-in sales of liquid display crystals and photoresists, it could reduce the price of tied product by cross-subsidization to expand market share and eventually increase its profit, which could potentially lead to predatory pricing by abuse of its leading position in the market. Other limited number of competitors might be eventually excluded from the market. This will narrow the range of choices in the downstream market and diminish the client's bargaining power. Behavioural conditions are imposed to address competition concerns on tying and patent issues.

In its decision, MOFCOM ordered Merck to perform the following obligations:

a Refrain from tie-in sales of any kind, directly or indirectly force Chinese consumers to purchase products from Merck and AZ at the same time, including not conducting any sort of cross-subsidization between Merck's LCD products and AZ's photoresist products;

b Observe non-exclusive and non-transferable terms in the licensing of its LCD patents, and all terms shall observe reasonable and non-discriminatory business principles; and

c Report to MOFCOM semi-annually on the fulfilment of the above obligations and submit prior notification to MOFCOM if Merck intends to enter into any LCD patents licensing agreement in China.

The above obligations shall remain effective for three years until 30 April 2017.

As the third conditional approval of 2014 and the second in April alone, this clearance was undoubtedly the speediest conditional approval of the past two years (cleared in 91 days), which indicate that MOFCOM is trying to shorten its heavily criticised long review period. Notably, this marks the first time that MOFCOM has specifically identified the adjacent relationship between the relevant markets and also the first time that tying and cross-subsidisation have been considered in a merger review. The review addressed an important concern in conglomerate mergers recognised in the United States and the European Union –foreclosure through tying or bundling.

Joint Venture among Corun, Toyota China, PEVE, Sinogy, and Toyota Tsusho[25]

[24] The decision is available at MOFCOM's website: http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400569060.shtml

On 2July 2014, MOFCOM conditionally approved the establishment of a joint venture among Corun, Toyota China, PEVE, Sinogy, and Toyota Tsusho. This was the fourth conditional clearance decision made by MOFCOM in 2014.

The Joint Venture (JV), in which Corun, Toyota China, PEVE, Sinogy and Toyota Tsusho each holds a 40%, 5%, 41%, 10% and 4% stake, is scheduled to start production in 2016. It will produce auto-use nickel-metal hydride battery modules and battery packs and sell them to Sinogy Toyota Automotive Energy System Co., Ltd, a nickel-metal hydride battery pack system-focused joint venture established by Toyota Motor Corporation, Toyota China, PEVE and Sinogy in 2013.

MOFCOM concluded that in the auto-use nickel-metal hydride battery market, the top three players (i.e. PEVE, Corun and PEVE's) 19.5% shareholder Panasonic shared a mutual interest in setting up the JV, which would impair their willingness to compete with each other and therefore restrict competition. As for hybrid vehicle market, it concluded that considering the market share of Toyota in the China market – 80.3%, the market power of Toyota in the industrial chain would be reinforced, which might lead to a foreclosure effect in the hybrid vehicle market. Therefore, the transaction would impair competition in the auto-use nickel-metal hydride battery market and would impede hybrid vehicle manufacturers from obtaining auto-use nickel-metal hydride batteries.

In its decision, MOFCOM ordered the JV to perform the following obligations:

a The JV shall conform to fair, reasonable and non-discriminatory business principles by selling its products extensively to third-party buyers;

b The JV shall commence selling products to third parties within three years of launching production if the market has such demands;

c The JV shall submit written report to MOFCOM annually after its establishment regarding the fulfilment of the above obligations; and

d An operational plan regarding the above obligations shall be submitted to MOFCOM for approval.

This decision succeeded in maintaining fair competition in the market while promoting the healthy development of the new energy automotive battery market at the same time. A balance has been struck carefully among market competition, technological advancement, environmental protection and industry policy.

Unigroup case[26]

The first merger control related penalty decision published by MOFCOM was issued against integrated circuit manufacturer Unigroup for its failure to notify MOFCOM of its acquisition of RDA Microelectronics, an up-and-coming radio frequency integrated circuit manufacturer. On 11

[25] The decision is available at MOFCOM's website: http://fldj.mofcom.gov.cn/article/ztxx/201407/20140700648291.shtml

[26] The decision is available at MOFCOM's website: http://tfs.mofcom.gov.cn/article/ckts/ckzcfg/201412/20141200824277.shtml

November 2013, Unigroup entered into an agreement with RDA to acquire all of RDA's shares for USD 907 million. On 18 July 2014 Unigroup completed the transaction without making prior notification to MOFCOM. MOFCOM opened an investigation into Unigroup's suspected violation on 12 August 2014, and found that the merger filing notification threshold was reached. However, after assessing the competitive effects of the transaction, MOFCOM concluded that the transaction would not eliminate or restrict competition in the relevant market and thus imposed a fine of only RMB 300,000 on Unigroup (the maximum monetary penalty for such a violation is RMB 500,000).

This is the first published penalty decision issued against an undertaking for violating MOFCOM merger filing requirements. The first public announcement of a penalty decision against a non-filer will significantly deter any parties that attempt to avoid filing requirements for a notifiable merger. Companies must take the Chinese merger control regime seriously when planning and implementing a merger.

Western Digital case[27]

The second and third penalty decisions were issued against US portable storage device company Western Digital for its failure to comply with the "hold separate" remedy attached to the 2012conditional clearance of its acquisition of Hitachi's hard disk drive unit. This remedy required Western Digital to keep Viviti Technologies (previously named Hitachi Global Storage Technology) as a separate legal entity after the merger and maintain independent business operations[28]. MOFCOM issued a RMB 300,000 fine for each violation in the two penalty decisions. This was the first published penalty that MOFCOM has imposed on a company for not fully complying with post-merger remedies.

In March 2012 Viviti's US unit, Hitachi Global Storage Technology (HGST), was consolidated into Western Digital and became its wholly-owned entity without prior MOFCOM approval. MOFCOM opened an investigation regarding this transaction on 25 October 2012. Surprisingly, in January 2013, while the first investigation was pending, Western Digital dissolved the development division of Viviti/HGST without prior approval of MOFCOM and transferred all of its employees to Western Digital. Consequently, MOFCOM opened a second investigation of Western Digital on 21 October2013. During the investigation, Western Digital admitted to the violations and proposed rectification measures for each violation.

The new approach of publishing penalty decisions on non-compliance with post-merger remedies will improve transparency in AML enforcement and increase the risks of non-compliance. In addition, in December 2014 MOFCOM enacted the Rules on Restrictive Conditions. These provisions expand the regulatory reach over participating undertakings and trustees, subjecting them to explicit legal liabilities so that they now have a clear statutory obligation to act more responsibly. In particular, supervising trustees of undertakings must closely supervise the implementation of post-merger

[27] Both decisions related to the *Western Digital* case are available at MOFCOM's website: http://tfs.mofcom.gov.cn/article/ckts/ckzcfg/201412/20141200824263.shtml, http://tfs.mofcom.gov.cn/article/ckts/ckzcfg/201412/20141200824270.shtml

[28] The remedy imposed on Western Digital case is available at MOFCOM's website: http://fldj.mofcom.gov.cn/article/ztxx/201203/20120307993758.shtml

remedies and regularly report to the relevant authority.

ii Trends, developments and strategies

MOFCOM has accumulated extensive experience after six years of continuous efforts and is establishing its reputation as an important antitrust agency in the world. The decision to block the P3 alliance is undoubtedly a milestone in MOFCOM's merger review regime, as it blocked a high profile global transaction for the first time.

In addition, remedial measures imposed by MOFCOM are becoming more complicated and diversified. It used to be thought that MOFCOM would only impose conditions on a global transaction should other jurisdictions take the lead in attaching some conditions to the transaction. However, this is no longer the case. MOFCOM now has the confidence to render independent and even creative remedies which differ from those imposed by its US or EU counterparts.

The principle of fair, reasonable and non-discriminatory is playing important role in MOFCOM's merger review analysis as it is becoming more frequent for MOFCOM to impose remedies based on the FRAND principle. MOFCOM has substantially widened the application scope of FRAND principle, which was previously confined to standard essential patents (SEP) licensing deals.

iii Outlook

The Chinese merger control regime is gradually maturing and MOFCOM is playing a positive and special role in maintaining competitive market order. MOFCOM is becoming increasingly sophisticated in reviewing merger cases as shown in the conditionally approved cases, and in particular the prohibition of P3 alliance. We would also expect MOFCOM to further enhance its merger control enforcement either in terms of reviewing and supervising merger cases or drafting implementing rules and guidance.

v CONCLUSIONS

i Pending legislation and cases

The proposed rules pending before MOFCOM include the *Interim Measures on the Investigation and Handling of the Concentration of Undertakings below the Filing Threshold with Suspected Monopoly* (draft) and the *Interim Measures on Evidence Collection of the Concentration of Undertakings below the Filing Threshold with Suspected Monopoly* (draft).

Also, the *Provisions on Prohibiting the Abuse of Intellectual Property Rights to Exclude and Restrain Competition* (draft) are pending before SAIC.

The NDRC intends to draft detailed rules to regulate price monopolies. It may also publish certain industry-specific guidelines to regulate market competition. However, it remains to be seen whether such rules or guidelines will be published in 2015.

The two ongoing investigations (*Tetra Pak* and *Microsoft*) all involve suspected abuses of market dominance. Given the complexity of their nature, and the potentially record-high penalties that may be imposed if the companies are found guilty, the final results of these cases will have a far-reaching impact on the future enforcement of the AML, and more investigations of this kind can be expected in 2015.

ii Analysis

In general, China has put a relatively complete anti-monopoly regime in place, and the anti-monopoly law enforcement agencies have greatly enhanced their abilities. The landmark decision of the *Qualcomm* case has clearly boosted the deterrent power of China's antitrust enforcement. It is expected that all three competition agencies in China will continue playing active role in the implementation and enforcement of the AML and their respective rules in 2015. Further, as it can be seen from all penalty notices issued by the SAIC since 2013 and recently published penalty notices of *Qualcomm* case， *Zhejiang Car Insurance Case* and *Japanese Auto Parts and Bearing Manufacturers* case by the NDRC, anti-monopoly enforcement in China has taken a large step forward in terms of transparency and sophistication. In addition, the NDRC and the SAIC have repeatedly addressed allegations of targeting specific companies and selective enforcement, and have steadfastly maintained that investigations did not target any specific companies and that there has not been selective enforcement. In particular, the NDRC and the SAIC both indicated that lawyers could participate in and supervise the enforcement process in whole in order to ensure the legitimate rights and interests of the companies under investigation. Nevertheless, active companies in China, particularly those with leading market positions, should prepare diligently to meet more stringent compliance challenges and to withstand potential scrutiny from the Chinese competition agencies.