Chinese Competition Law—the Year 2015 in Review

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Introduction

For Chinese competition law, 2015 may have been a year of transition. On the one hand, certain antitrust developments in 2015 reflect continuity with prior enforcement trends and policies. For example, throughout 2014 the Chinese competition authorities had grabbed many headlines, and many in the international antitrust and trade community—including high-level US officials such as the Secretary of Treasury[1]—voiced concerns over a perceived bias against foreign companies. The landmark *Qualcomm* decision at the beginning of 2015 can be seen as one of the most, if not the most, controversial case in the past years.[2] Post-*Qualcomm*, a clear link with pre-2015 enforcement was that high technology and intellectual property rights (IPRs) continue to play an important role in competition law enforcement in China, though perhaps in a more subdued way.

On the other hand, following the *Qualcomm* decision, there appears to have been somewhat of a change in the pace of Chinese competition law enforcement, even though it would be wrong to speak of an outright "break" with the past. For example, as some sort of departure from prior practice, more of the high-profile enforcement cases in 2015 targeted state-owned enterprises (SOEs) and/or challenged government-mandated conduct restricting competition.

To an extent, this feeling of transition—with both aspects of continuity, as well as change, relative to past enforcement—is present in the actions by all Chinese competition authorities and the courts, as we will discuss below. In the remainder of this paper, we will first provide a brief overview on Chinese competition law, and then look at the each of the competition authorities and the courts separately. The final section will conclude by attempting to distill the essence of the enforcement practices across authorities and courts.

Overview on China's competition law regime

Similar to EU competition law, the main Chinese competition statute—the Anti-Monopoly Law (AML)[3]—prohibits three types of anti-competitive conduct by business operators:

1) anti-competitive agreements;
2) abuse of dominance; and
3) anti-competitive mergers.

In addition, the AML contains a section addressing so-called "administrative monopoly" conduct which is designed to tackle anti-competitive conduct by government bodies.

Unlike the European Commission with just a single enforcement body, three authorities share competition law enforcement powers in China. The National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) are both responsible for investigating and sanctioning anti-competitive agreements and abuse of dominance—NDRC has jurisdiction over price-related anti-competitive behavior, while SAIC is in charge of non-price-related conduct.

NDRC deals with all kinds of price-related antitrust issues, which is in line with its traditional role as a price regulator. When China embarked on the Reform and Opening Policy under Deng Xiaoping in the late 1970's, NDRC's predecessor was the government body in charge of the State plan and the related "economy." Subsequently, NDRC has been, and still is, in charge of setting, guiding and/or supervising prices in a limited number of strategic sectors such as electricity, gas, etc. Under the AML, NDRC has jurisdiction over restrictive price-related agreements such as price fixing and resale price maintenance, and price-related abuses of dominance, in particular excessive, predatory or discriminatory pricing. NDRC's central office in Beijing authorised its provincial offices to conduct AML investigations.[4]

SAIC has jurisdiction over non-price related agreements and abuse of dominance cases, for example where competitors limit output or allocate markets, or refusal to deal, tying, the imposition of unreasonable conditions, and exclusive dealing by dominant companies. SAIC's branches at the provincial level carry out many AML investigation.[5] However, unlike NDRC, the

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[1] The Wall Street Journal, "U.S. Treasury Warns China Over Antimonopoly Efforts", 14 September 2014, see *http://www.wsj.com/articles/u-s-treasury-warns-china-over-antimonopoly-efforts-1410687635* [Accessed 9 February 2016].

[2] National Development and Reform Commission press release, "The National Development and Reform Commission requires Qualcomm to correct its monopoly conduct and fines it RMB 6 billion", 10 February 2015, see *http://www.sdpc.gov.cn/xwzx/xwfb/201502/t20150210_663822.html* [Accessed 9 February 2016].

[3] Anti-Monopoly Law of the People's Republic of China [2007] Presidential Order No.68, 30 August 2007.

[4] By administrative decision in 2008, NDRC authorised the price departments at the provincial level to investigate and sanction conduct in breach of the AML, see Regulation on Administrative Penalties for Pricing Violations [1999] State Council Order No.515, 10 July 1999.

[5] See for the publicly available decisions at SAIC's website, *http://www.saic.gov.cn/zwgk/gggs/jzzf/* [Accessed 9 February 2016].

provincial offices do not have general authorisation to enforce the AML but need to seek SAIC's approval at the central level for each case.

In turn, the Ministry of Commerce (MOFCOM) is the authority in charge of merger control. Similar to EU law, a notification to MOFCOM is required where a transaction qualifies as a "concentration between business operators" and turnover-based thresholds are exceeded. Prior to MOFCOM clearance, a reportable transaction cannot be implemented. Although MOFCOM has sole jurisdiction over merger control, it has in the past regularly consulted with other ministries and government bodies during the examination of merger cases, to seek their input on the respective deals. Unlike NDRC and SAIC, MOFCOM's local offices are not authorised to enforce the AML, as the law explicitly reserves the powers to central-level MOFCOM.

NDRC

For NDRC, antitrust enforcement and implementation in 2015 shows a clear link of continuity with past enforcement practices and policies. First, the *Qualcomm* case—while adopted at the beginning of 2015—is somewhat of a legacy of the past enforcement spirit, yet ongoing investigations on similar issues may indicate that NDRC remains focused on cases involving high technology and IPRs.[6]

Then let us start with this "big bang" at the beginning of the year: on 10 February 2015, a few days before the Chinese New Year, NDRC announced that it had imposed a record fine of around RMB 6 billion (approximately €873 million) on Qualcomm. To our knowledge, this fine is the second highest fine imposed on a single company in an individual case in the history of antitrust—on a global basis!

After the Chinese New Year, on 2 March 2015, NDRC published its somewhat more detailed decision, where it explained its reasons for holding that Qualcomm had abused a dominant position in the markets for the licensing of wireless communication standard essential patents (SEPs) and baseband chips.[7] In that decision, NDRC found Qualcomm to have committed several abuses of dominance, namely excessive pricing, tying (SEPs with non-SEPs), and the imposition of unreasonable conditions. In addition to imposing a fine, NDRC ordered Qualcomm to change its conduct in certain ways, for example to base its royalties for SEP licenses on only 65 per cent of the price of the handsets produced and sold to end consumers in China.

Second, the continuity with prior antitrust enforcement was also visible in NDRC's actions in the automobile industry. In 2014 NDRC and its local offices had launched numerous antitrust campaigns against automobile manufacturers and dealers (i.e., FAW-Volkswagen, Chrysler and BMW), and in 2015 continued these campaigns by targeting Mercedes-Benz and Dongfeng Nissan. In particular, on 23 April 2015, NDRC's Jiangsu branch—the Jiangsu Price Bureau—concluded its investigation into Mercedes-Benz' distribution arrangements, and sanctioned Mercedes-Benz and its dealers for engaging in anti-competitive agreements.[8]

The fine on Mercedes-Benz was around RMB 350 million (approximately €50 million) and the total fines on the dealers were over RMB 7 million (approximately €1 million). According to the decision, Mercedes-Benz had engaged in illegal resale price maintenance, setting the dealers' minimum resale prices for certain vehicle models. Moreover, the Jiangsu Price Bureau found that the Mercedes-Benz dealers had engaged in a price-fixing cartel for car parts, and Mercedes-Benz had allegedly assisted by coordinating meetings. Later in the year, on 10 September 2015, the Japanese-Chinese joint venture company Dongfeng Nissan and its dealers were fined on similar grounds (resale price maintenance, and price-fixing between dealers) for conduct in Guangdong Province.[9]

In a separate development, on 28 December 2015, NDRC published a set of decisions sanctioning eight international shipping lines for alleged price-fixing and market allocation cartels, and imposed a fine of around RMB 407 million (approximately €58 million) in total.[10] According to the NDRC decisions, the shipping lines reached a common understanding not to enter each others' business areas or to increase prices, and colluded in tenders regarding imports into and exports from China in the market for roll-on roll-off cargo shipping service. In a way, this decision is the continuation of a string of international cartel cases NDRC has been investigating. The *LCD panels* case[11] and the *Auto parts and bearings* cases[12] in 2013 and 2014 were early exponents of this string of cases.

In another area, NDRC's antitrust enforcement did not indicate continuity, but rather somewhat of a shift, as compared to 2014 and before. In particular, NDRC

[6] For example, NDRC is reportedly investigating patent assertion entity Vringo for conduct allegedly similar to Qualcomm's.
[7] National Development and Reform Commission, [2015] Administrative Penalty Decisions No.1, 9 February 2015, see *http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html* [Accessed 9 February 2016].
[8] Jiangsu Price Bureau press release, "Jiangsu Price Bureau makes administrative penalty decision on Mercedes-Benz price monopoly case", 23 April 2015, available for retrieving from the website of Jiangsu Price Bureau, see *http://www.jswjj.gov.cn/* [Accessed 9 February 2016].
[9] Guangdong Development and Reform press release, "Dongfeng-Nissan penalized for price monopoly in Guangdong", see *http://www.gddpc.gov.cn/zwgk/gzdt/gzyw/201509/t20150910_328993.html* [Accessed 9 February 2016].
[10] National Development and Reform Commission, [2015] Administrative Penalty Decisions Nos 2–8, 15 December 2015; and National Development and Reform Commission, [2015]Administrative Penalty Exemption Decision No.1, 15 December 2015; available on NDRC administrative decision publication list at *http://jjs.ndrc.gov.cn/fjgld/* [Accessed 9 February 2016].
[11] National Development and Reform Commission press release, "Six foreign enterprises penalized for price-monopoly" in LCD panels, 17 January 2013, see *http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201301/t20130117_523206.html* [Accessed 9 February 2016]; and see *National Development and Reform Commission Q&A*, 17 January 2013, see *http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201301/t20130117_523207.html* [Accessed 9 February].
[12] National Development and Reform Commission, [2014] Administrative Penalty Decisions Nos 3–9 and 11–13, 15 August 2014; and National Development and Reform Commission, [2014] Administrative Penalty Exemption Decision Nos 2 and 10, 15 August 2014, see *http://jjs.ndrc.gov.cn/fjgld/* [Accessed 9 February 2016].

stepped up enforcement against "administrative monopoly" conduct quite substantially. As noted, "administrative monopoly" is a term used in China to indicate government actions that restrict competition—for example, protectionism by local governments in favor of resident companies, or favorable treatment by sector regulators to the benefit of one or a selected group of companies. The AML contains a high-level provision prohibiting the abuse of administrative powers to restrict competition, as well as an entire chapter with more detailed rules on specific manifestations of certain types of government restrictions to competition.[13]

As part of its campaign to curb "administrative monopoly" conduct, NDRC challenged a variety of government actions in 2015, mainly at the regional and local level, throughout China. In March 2015, NDRC found the Shandong Department of Transportation to have abused administrative powers to distort competition in the monitoring service platform and GPS device markets by favouring its exclusive partner company in those markets.[14] In June 2015, NDRC's Yunnan office investigated and fined the local branches of four telecommunication operators (China Mobile, China Telecom, China Unicom, and China Tietong) for their anti-competitive agreement to coordinate their gift and promotion schemes for consumers.[15] Their agreement was directly facilitated by the local communications authority—the Yunnan Communications Bureau. In its decision, NDRC found the bureau's conduct to amount to "administrative monopoly" in breach of the AML.[16] In August 2015, NDRC challenged conduct by the local health regulator in Bengbu, a city in Anhui Province, accusing it to have discriminated against non-local companies in the local drug procurement process.[17] Following the *Bengbu* case, NDRC reported to have conducted similar investigations into the practices of local health regulators in Sichuan and Zhejiang.[18]

In parallel with these enforcement actions, NDRC also undertook wide-ranging normative efforts. In August 2015, reports first surfaced that NDRC had been entrusted by the high(er)-level coordination body, the Anti-Monopoly Commission, to draft AML implementation guidelines. During the second half of 2015, NDRC was thus busy drafting guidelines on:

1) the abuse of intellectual property rights;
2) leniency;
3) commitments;
4) exemption procedure;
5) calculation of fines and illegal gains; and
6) rules for the automobile sector.

The guidelines are expected to be adopted in the name of the Anti-Monopoly Commission in mid-2016.

Overall, in 2015, NDRC's enforcement became somewhat less headline-grabbing after *Qualcomm* and covered some new areas, in particular "administrative monopoly" cases. But, equally, the year 2015 also shows the authority's continued focus to enforce the AML in the high technology and automotive sectors.

SAIC

Similar to NDRC, the year 2015 was a "mixed bag" of both continuity and change for SAIC and its local offices.

In terms of enforcement, as noted, SAIC relies to a large extent on enforcement by the Administrations for Industry and Commerce (AICs) at the provincial level, to which it delegates powers (on a case-by-case basis) to handle cases under its supervision. As before 2015, the cases brought by the AICs in 2015 mainly focused on anti-competitive conduct taking place in a given province, city or district, but generally not nationwide.

Last year, the conduct challenged in the AIC cases varied, including restrictive agreements between companies[19] and collective anti-competitive conduct through trade associations,[20] but the AICs also continued to bring a number of abuse of dominance cases. One such case was the *Liaoning Cigarettes* case, where the Liaoning AIC held a local tobacco wholesaler (Fushun Tobacco) to have engaged in illegal tying and imposed a fine of over RMB 4 million (around €570,000).[21]

The Liaoning AIC found that Fushun Tobacco held a dominant position in the local cigarettes wholesale market. Fushun Tobacco was the only government-approved cigarette wholesaler in Fushun, which—in its defense—argued that the AML did not apply because it was essentially a state-sanctioned monopoly. The Liaoning AIC rejected that argument with an interpretation that significantly reduced the impact of a murky provision in the AML (art.7—somewhat reminiscent of art.106 of the Treaty on the Functioning

[13] Anti-Monopoly Law art.8 Ch.5.
[14] National Development and Reform Commission [2015] Fa Gai Ban Jia Jian No.501, March 2015, see *http://jjs.ndrc.gov.cn/fjgld/201503/t20150327_668911.html* [Accessed 9 February 2016].
[15] National Development and Reform Commission press release, "NDRC corrects Yunnan Telecommunications Bureau administrative monopoly conduct in breach of the AML", 2 June 2015; see *http://jjs.ndrc.gov.cn/gzdt/201506/t20150602_694801.html* [Accessed 9 February 2016].
[16] The telecommunications operators were also fined for the same conduct.
[17] National Development and Reform Commission [2015] Fa Gai Ban Jia Jian No.2175, 17 August 2015, see *http://jjs.ndrc.gov.cn/fjgld/201508/t20150826_748682.html* [Accessed 9 February 2016].
[18] National Development and Reform Commission press release, "National Development and Reform Commission announcement on the Sichuan and Zhejiang health regulators' correction of alleged anti-monopoly conduct", 2 November 2015, see *http://jjs.ndrc.gov.cn/gzdt/201511/t20151102_757331.html* [Accessed 9 February 2016].
[19] *Yongzhou* [2015] SAIC Public Announcement No.14, 29 December 2015, see *http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151229_165504.html*; and *Hubei Insurance* [2015] SAIC Public Announcement No.13, 29 December 2015, see *http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151229_165445.html*.
[20] See, for example, *Panyu Gaming Association* [2015] SAIC Public Announcement No.11, 8 December 2015, see *http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151208_164680.html*; and A. Huang, "Chinese antitrust authorities continue targeting trade associations", 23 December 2015, see *http://www.hlregulation.com/2015/12/23/chinese-antitrust-authorities-continue-targeting-trade-associations* [Accessed 9 February 2016].
[21] *Liaoning Cigarettes* [2015] SAIC Public Announcement No.7, 12 August 2015, see *http://www.saic.gov.cn/zwgk/gggs/jzzf/201508/t20150813_160208.html* [Accessed 9 February 2016].

of the European Union), which provides for a limited exemption for certain state-ordered conduct by business operators in strategic sectors.

On the substance, the Liaoning AIC held that Fushun Tobacco had bundled cigarettes that were in short supply (i.e., relatively popular brands) with less popular brands by way of setting a fixed percentage for both types which retailers were forced to buy. The AIC concluded that this amounted to tying between different products, against the will of the purchasers, and found a violation of the AML.

This case fits in well with prior abuse of dominance cases (finding illegal tying, and discriminatory treatment) against tobacco wholesalers handled by SAIC's provincial offices in Inner Mongolia and Jiangsu, and is therefore a clear sign of continuity with past enforcement practices.

Another abuse of dominance case—which, however, covers new ground—is the *Qingyang* case.[22] In that case, SAIC's local branch in Chongqing adopted its decision against the pharmaceutical company Chongqing Qingyang Pharmaceutical Co Ltd (Qingyang) for refusal to deal. To the best of our knowledge, this is the first time a Chinese competition authority published an enforcement decision that focused exclusively on a refusal to deal violation.

The facts behind the Chongqing AIC's decision followed a "classic" refusal to deal scenario, where Qingyang was a manufacturer both upstream (allopurinol active pharmaceutical ingredient) and downstream (allopurinol drugs); the upstream product was an essential ingredient for the downstream product; Qingyang was dominant upstream (e.g., held to have 100 per cent market share); and Qingyang stopped supplying the upstream product to downstream competitors. As a result of the supply stop, Qingyang's own market share downstream rose from around 10 per cent to close to 60 per cent.

The Chongqing AIC found Qingyang's behaviour to be in breach of the AML's refusal to deal provision, and imposed a fine of around RMB 440,000 (approximately €63,000).

In terms of normative efforts, in 2015, SAIC was able to complete its six-plus-year effort of drafting a regulation on how the AML applies to IPRs.[23] The regulation came into effect on 1 August 2015. However, even before that date, NDRC reported to have been authorised by the Anti-Monopoly Commission to draft six regulations, including on the IPR field. As a result of this new development, in parallel with NDRC's drafting project, SAIC renewed its efforts to draft AML guidelines for the IPR field, likewise to be submitted to the Anti-Monopoly Commission. Unlike the regulation currently in force, which only applies to the enforcement of SAIC and its local offices, the Anti-Monopoly Commission's guidelines are to apply to all three competition authorities.

Overall, for SAIC, the year 2015 was more of continuity with existing enforcement and normative efforts than a radical break with the past, although the *Qingyang* refusal to deal case is certainly "a first" of some sorts.

MOFCOM

In 2015, MOFCOM was busy handling merger filing cases. Its case load seems to grow continuously: according to its statistics, MOFCOM cleared over 310 cases in 2015, which represents an increase of around 35 per cent relative to 2014.

Unlike in previous years where many high profile cases were cleared with remedies, in 2015, MOFCOM only made two conditional approval decisions: Nokia's acquisition of Alcatel-Lucent and NXP's acquisition of Freescale.[24] No transaction was blocked in 2015 (since the AML's entry into force, MOFCOM has only issued two prohibition decisions to date[25]), though the parties in *Tokyo Electron/Applied Materials* abandoned the deal, apparently also due to MOFCOM's antitrust concerns.[26] Reportedly, the merging parties failed to submit a remedy proposal acceptable to MOFCOM.

This in itself indicates a certain degree of deviation from past enforcement practices—in a way, MOFCOM grabbed fewer headlines than in the past.[27] To some extent, one of the two cases where MOFCOM imposed remedies—*NXP/Freescale*—fits in with this trend of somewhat lower profile: MOFCOM did not "cook its own meal" to take into account just domestic concerns, but in this case was actually very much in line with what foreign antitrust regulators were doing. In fact, MOFCOM cleared the transaction with the same remedies as the Federal Trade Commission in the US and the European

[22] *Qingyang* [2015] SAIC Public Announcement No.12, 22 December 2015, see *http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151222_165152.html* [Accessed 9 February 2016].
[23] SAIC Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights [2015] SAIC Order No.74, 7 April 2015.
[24] *Nokia/Alcatel-Lucent* [2015] MOFCOM Public Announcement No.44, 19 October 2015, see *http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139743.shtml* [Accessed 9 February 2016]; and *NXP/Freescale* [2015] MOFCOM Public Announcement No.64, 5 November 2015, see *http://fldj.mofcom.gov.cn/article/ztxx/201511/20151101196182.shtml* [Accessed 9 February 2016].
[25] *Coca-Cola/Huiyuan* [2009] MOFCOM Public Announcement No.22, 18 March 2009, see *http://fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml* [Accessed 9 February 2016]; and *Maersk/MSC/CMA CGM* [2014] MOFCOM Public Announcement No.46, 17 June 2014, see *http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml* [Accessed 9 February 2016].
[26] MOFCOM press release, "U.S. Applied Materials and Tokyo Electron Limited announce giving up the merging plan after failing to solve the competitive concerns in the anti-monopoly investigation of China's Ministry of Commerce", 30 April 2015, see *http://english.mofcom.gov.cn/article/newsrelease/significantnews/201505/20150500963825.shtml* [Accessed 9 February 2016].
[27] In 2015, MOFCOM also partially waived remedy obligations imposed on companies such as Western Digital and Seagate in previous conditional clearance decisions. See MOFCOM decisions of 19 October 2015, *http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139040.shtml* [Accessed 9 February 2016] and *http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001144105.shtml* [Accessed 9 February 2016].

Commission.[28] This reflects a broader trend of "international convergence," as also illustrated by the signing of a document on practical guidance for cooperation in merger review between MOFCOM and the European Commission in October 2015.[29]

At the same time, the other remedy case in 2015 was very much of a direct continuation of past enforcement—in fact, in the *Nokia/Alcatel-Lucent* case, the company obliged to comply with the remedies (Nokia) had given practically identical commitments to MOFCOM in a prior case.[30]

In *Nokia/Alcatel-Lucent*, MOFCOM found the parties overlap in various markets, including radio access network, core network systems network infrastructure services, and the licensing market of communication technology SEPs. However, MOFCOM only had concerns in the market for communication SEPs, as it found that Nokia's post-merger position would be considerably strengthened. After several rounds of remedy proposals, MOFCOM eventually granted conditional approval. As indicated above, the remedies basically mirror the commitments which Nokia had to offer as a seller of its handset business to Microsoft in 2014 to secure MOFCOM's merger clearance back then. Hence, MOFCOM's *Nokia/Alcatel-Lucent* decision essentially extends the scope of the prior remedies to the SEPs which Nokia acquired from Alcatel-Lucent.

Yet, more MOFCOM developments indicated changes in 2015. For instance, last year, MOFCOM made efforts to consolidate the streamlining of the merger review procedure. In response to the general criticism for its often lengthy review process, MOFCOM had introduced the so-called "simple case" procedure in early 2014. This was meant as a sort of "fast track" procedure for cases that have no obvious antitrust concerns—a clearly welcomed move by the business community.

There may have been some initial caution on the part of companies to use the simple case process, as in the first year of implementation (2014) MOFCOM had accepted "only" around 80 notifications as simple cases.[31] But, in 2015, the number of simple cases surged to above 250.

Another important change to streamline the merger review process was the internal restructuring of MOFCOM's Anti-Monopoly Bureau. Previously, any filed case had to go through the pre-acceptance review conducted by the bureau's Consultation Division before it reached the final case handlers for the substantive review. In September 2015, MOFCOM decided to convert the Consultation Division into an additional case team division, together with the Legal Division and Economics Division. Today, all cases are allocated to one of the three divisions, and a single case team from one of the divisions is responsible for reviewing a case from submission to clearance. Overall, this reorganisation has helped MOFCOM improve the efficiency of its review procedure.

At the same time as making life "easier" for the companies which file a transaction with it, MOFCOM appears to be making life "more difficult" for companies which do not file. Indeed, starting from December 2014 to 2015, MOFCOM showed that it is getting serious about punishing companies for breaching the law.

In September 2015, MOFCOM made public a number of decisions fining both domestic and foreign companies for their failure to file reportable transactions. Importantly, three of the companies fined were SOEs.

Two of the decisions challenged the unreported establishment of joint ventures (*BesTV New Media/Microsoft* with 51/49 per cent, and *CSR Puzhen/Bombardier Transportation* with 50/50 per cent).[32]

In the third transaction, in the *Fujian Electronics and Information Group/Chino-E Communications* case, the acquirer had parceled the acquisition of the target's shares into two tranches—the acquisition of 35 per cent shares by the parent company, followed by the acquisition of the entirety of shares by a subsidiary—with separate sales and purchase agreements (signed within the course of about two weeks).[33] The acquirer notified the 100 per cent acquisition to MOFCOM under the AML. However, the authority found that the first tranche already constituted an acquisition of a "controlling right", the key filing criterion to establish that a "concentration between business operators" exists.

In the fourth transaction—Fosun Pharmaceutical Development's acquisition of 65 per cent shares in Suzhou Erye Pharmaceuticals—the situation was similar, though not identical. Rather than slicing the transaction into two tranches, the acquirer bought two sets of stakes (35 per cent and 30 per cent shares, respectively) from two different affiliates within the target group, and transferred the 35 per cent stake during the course of its

[28] MOFCOM identified competition concerns in the market for radio frequency power amplifiers. As a result, NXP had to divest the radio frequency power amplifiers business to secure MOFCOM approval. See, e.g., Fair Trade Commission, "Agreement Containing Consent Orders", available at *https://www.ftc.gov/system/files/documents/cases/151125nxpconsentorder.pdf* [Accessed 9 February 2016] and *https://www.ftc.gov/system/files/documents/cases/151125nxpdo.pdf* [Accessed 9 February 2016]. Also see European Commission decision, available at *http://ec.europa.eu/competition/mergers/cases/decisions/m7585_20150917_20212_4572466_EN.pdf* [Accessed 9 February 2016].

[29] European Commission press release, "Mergers: Commission signs best practices cooperation framework with China", 15 October 2015, see *http://europa.eu/rapid/press-release_IP-15-5843_en.htm* [Accessed 9 February 2016]; and MOFCOM press release, "The 10th China-EU Competition Dialogue took place in Beijing", 15 October 2015, see *http://fldj.mofcom.gov.cn/article/xxfb/201510/20151001134527.shtml* [Accessed 9 February 2016].

[30] *Microsoft/Nokia Handset Business* [2014] MOFCOM Public Announcement No.24, 8 April 2014, see *http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml* [Accessed 9 February 2016].

[31] MOFCOM press release, "MOFCOM year-end working summary No.19: carry out antitrust enforcements in accordance with law and safeguard the market order of fair competition", 29 January 2015, see *http://www.mofcom.gov.cn/article/ae/ai/201501/20150100882509.shtml* [Accessed 9 February 2016].

[32] *BesTV New Media/Microsoft* [2015] MOFCOM Administrative Penalty Decision No.671, 16 September 2015, see *http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124903.shtml* [Accessed 9 February 2016]; and *CSR Puzhen/Bombardier Transportation* [2015] MOFCOM Administrative Penalty Decision No.670, 16 September 2015, see *http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124899.shtml* [Accessed 9 February 2016].

[33] *Fujian Electronics and Information Group/Chino-E Communications* [2015] MOFCOM Administrative Penalty Decision No.668, 16 September 2015, see *http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124887.shtml* [Accessed 9 February 2016].

pre-notification talks with MOFCOM.[34] The authority's ruling in this case could be interpreted as China's first "gun jumping" decision.

In parallel with the enforcement against failure to file, MOFCOM also appeared to continue its increasing supervision of parties' adherence to remedy decisions. After MOFCOM had fined Western Digital for breaching a prior remedy decision in December 2014,[35] reports indicate that the authority also carried out on-the-spot inspections at the premises of several companies in Shanghai in December 2015 to examine whether they had complied with their remedy obligations.[36]

Overall, in 2015, there was a noticeable change in MOFCOM's enforcement practice, shifting the focus to streamlining the procedure and tackling breaches of the law. At the same time, the "tough ride" for high technology cases (e.g., *Tokyo Electron/Applied Materials*, *Nokia/Alcatel-Lucent* and *NXP/Freescale*)—and SEPs in particular—shows a degree of continuity with past practice.

Courts

For the courts, 2015 was "year 1" after the landmark judgment by the Supreme People's Court SPC) in *Qihoo 360 v Tencent*.[37] That judgment was the SPC's first to apply the AML.

Unlike what one could have expected, there appear to have been only very few cases which directly followed the SPC's guidance in *Qihoo 360 v Tencent*. The only instance that we are aware of, where lower courts drew upon the SPC's guidance, was *Emiage v Qihoo 360*.[38] On 30 April 2015, the Beijing High People's Court issued its judgment in that case, and one paragraph in the judgment—though not referring explicitly to the SPC judgment in *Qihoo 360 v Tencent* by name—is an almost-literal quote of a part of that judgment.[39]

In *Emiage v Qihoo 360*, the facts and legal arguments were somewhat similar to those in *Qihoo 360 v Tencent*: the plaintiff (Emiage) was a software company whose products allow users to share electronic business cards and exchange text messages on mobile phones. The mobile security application of the defendant (Qihoo 360) blocked out Emiage's text messaging and electronic business cards as spam. As 360 Mobile Safe users were not able to use Emiage's software to receive text messages or electronic business cards, Emiage sued Qihoo 360 for alleged exclusive dealing and tying in violation of the AML. At first instance, the Beijing Intermediate People's Court had dismissed Emiage's claims for a variety of reasons, including insufficient proof of dominance.

On appeal, the Beijing High People's Court upheld the lower court's judgment and, as noted, basically almost literally quoted a paragraph of the SPC's *Qihoo 360 v Tencent* ruling, finding that market definition is not required in all abuse of dominance cases.

Beyond *Emiage v Qihoo 360* and a handful of other AML cases,[40] there are two other notable strings of developments in AML litigation, both relating to the increasing focus on enforcement against SOEs and government-mandated restrictions to competition, which we also saw in authority enforcement of the AML.

First, on 13 August 2015, the Yunnan High People's Court overturned the Kunming Intermediate People's Court's decision in *Yingding v Sinopec*.[41] At first instance, Sinopec was found to have breached the AML by refusing to distribute Yingding's bio-fuel.[42] On appeal, the High People's Court reversed—with basically no substantive explanations—and remanded the case back to the lower court. This "win" by Sinopec follows the company's victory in the AML litigation against it before the Jiangsu High People's Court in 2014.[43]

Second, there have been two potentially leading judgments in the "administrative monopoly" area. On the one hand, on 2 February 2015, the Guangzhou Intermediate People's Court reportedly ruled in the lawsuit against the Guangdong Education Department.[44]

The plaintiff Shenzhen Sware Technology reportedly claimed that the Guangdong Education Department had abused its administrative powers by appointing Glodon, a software company competing with the plaintiff, as the exclusive designated software provider for a contest organised by the Guangdong Education Bureau for vocational students. The plaintiff is said to have argued that this exclusive appointment breached both the AML and the Anti-Unfair Competition Law. The Guangzhou

[34] *Fosun Pharmaceutical Development/ Suzhou Erye Pharmaceuticals* [2015] MOFCOM Administrative Penalty Decision No.669, 16 September 2015, see *http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124896.shtml* [Accessed 9 February 2016].
[35] *Western Digital* [2014] MOFCOM Administrative Penalty Decision Nos 786 and 787, 2 December 2014, see *http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124992.shtml* [Accessed 9 February 2016] and *http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124994.shtml* [Accessed 9 February 2016].
[36] MLex, "Mofcom site visits put remedy compliance center stage", 22 December 2015.
[37] *Qihoo 360 v Tencent*, Supreme People's Court, 8 October 2014, [2013] Min San Zhong Zi No.4.
[38] China does not follow the principle of binding precedent. Hence, in what seems to be the SPC's second judgment applying the AML—in the *Guangdong Football* case—the court did not explicitly refer to its *Qihoo 360 v Tencent* decision. *Yuechao v Guangdong Football Association and Zhuchao*, Supreme People's Court, 14 December 2015, [2015] Min Shen Zi No.2313. Against a factual rather different scenario, the SPC's *Guangdong Football* judgment contains some similarities with *Qihoo 360 v Tencent*, and some clear differences. Similarities, for example, are that the dominance analysis was qualitative, rather than based on market shares only and that the court seems to continue requiring a showing of specific anti-competitive effects in abuse of dominance cases. *Guangdong Football*, pp.19–21.
[39] *Emiage v Qihoo 360*, Beijing High People's Court, 30 April 2015, [2015] Gao Min (Zhi) Zhong Zi No. 1035.
[40] For example, a consumer sued baby milk formula producer Abbott—and supermarket Carrefour where he bought the formula—to request compensation from damages suffered as a result of the resale price maintenance conduct, which NDRC had found to be in breach of the AML in 2013. *Tian Wei Jun v Carrefour and Abbott*, Beijing High People's Court, 18 June 2015, [2015] Gao Min (Zhi) Zhong Zi No. 02717. The Beijing Intellectual Property Rights Court and the Beijing High People's Court on appeal issued procedural orders in what may be the first "follow-on" lawsuit under the AML in China.
[41] *Yingding v Sinopec*, Yunnan High People's Court, 13 August 2015, [2015] Yun Gao Min San Zhong Zi No.16.
[42] *Yingding v Sinopec*, Kunming Intermediate Court, 8 December 2014, [2014] Kun Zhi Min Chu Zi No.108.
[43] *Tongyuan v Sinopec*, Jiangsu High People's Court, 1 August 2014, [2013] Su Zhi Min Zhong Zi No.0147.
[44] At the time of writing, the judgment has not been published yet. The news has been reported by various media, such as Legal Daily, "Heated debate during the second instance trial of the first administrative monopoly appeal case", 29 May 2015, see *http://www.legaldaily.com.cn/index_article/content/2015-05/29/content_6103807.htm* [Accessed 9 February 2016].

Intermediate People's Court reportedly held that, indeed, the Guangdong Education Bureau had violated the AML's "administrative monopoly" provisions. Both Glodon (the competitor) and the Guangdong Education Department appealed the judgment, which is currently before the Guangdong High People's Court.[45]

On the other hand, the SPC rendered judgment in another high-profile case involving "administrative monopoly" under the AML in *Guangdong Football*.[46] The outcome was different from the *Guangdong Education Bureau* case, and the SPC dismissed the plaintiff's claims.

In *Guangdong Football*, the plaintiff Yuechao was a company organising sports contests. In 2009, its competitor Zhuchao was "authorized" by the Guangdong Football Association to enjoy exclusive rights in Guangdong Province for certain activities during 10 years, namely:

1) the organisation and management of five-a-side football matches;
2) the formulation of the rules for the matches;
3) the right to decide the numbers and qualifications of participating teams; and
4) all business development rights including intellectual property rights pertaining to the matches.

In its lawsuit, the plaintiff Yuechao argued that these arrangements breached the AML in various ways.

The legal arguments of the plaintiff were therefore very diverse, seemingly following a sort of a "shot gun approach." It claimed that the Guangdong Football Association's conduct was an illegal "administrative monopoly," and abuse of dominance and anti-competitive agreement. Perhaps the judgment's most interesting parts relate to the "administrative monopoly" allegation. The plaintiff's arguments rested, in part, on the ambiguous status of the Guangdong Football Association as a "hybrid" mix between a non-for-profit social organisation, a quasi-governmental entity and a business operator. The SPC dismissed the plaintiff's arguments, holding that the "authorisation" granted by the Guangdong Football Association was a commercial decision, not a governmental act.

Some of the SPC's reasons to dismiss the abuse of dominance allegations were also interesting, as the court in part focused on the effects of the conduct at stake. The court found that the exclusivity for Zhuchao was justified due to the company's investment into five-a-side football matches at an early stage of development, and held the plaintiff had not provided sufficient evidence showing (negative) effects in the relevant market, among others.

Overall, in the litigation field, 2015 was mainly a year of continuity. Perhaps contrary to our expectations, this was not because the SPC's *Qihoo 360 v Tencent* ruling was followed and implemented by lower-level courts, but more because the vast majority of plaintiffs continued to fail in their efforts to win abuse of dominance cases.

Conclusions

This paper has argued that the year 2015 was characterised by both continuity and change in Chinese competition law. Moreover, we find it interesting to see how much alignment there was between the practices of the three competition authorities (and the courts), both in terms of continuity and change. Just take the enforcement against actual or potential abuses in SEP licensing as an example—NDRC had its *Qualcomm* decision, SAIC issued the regulation on AML enforcement in the IPR field which includes a specific SEP-provision, and MOFCOM imposed SEP remedies in the *Nokia/Alcatel-Lucent* case.

As for new developments and directions, there was also some degree of alignment between authorities and courts in 2015. For example, NDRC identified priority industries for antitrust enforcement,[47] and the pharmaceutical industry featured prominently among them. Both NDRC and SAIC had enforcement cases in this sector (the *Bengbu*, *Sichuan* and *Zhejiang* healthcare cases for NDRC; and the *Qingyang* case for SAIC).

Interestingly, the more vigourous AML enforcement against both SOEs and government actions and practices in the pharmaceutical industry has a broader policy background: first, under the new leadership in the Communist Party, SOE reform and tackling illegal government conduct has become more of a focus, especially since the third plenum of the 18th party congress.[48] Second, the increase in antitrust scrutiny for the pharmaceutical sector is due in part because of the pricing reform announced in May 2015, as competition law is viewed as one instrument to ensure an orderly pricing liberalisation.[49]

Similarly, NDRC and the courts all had "administrative monopoly" cases (the *Bengbu*, *Sichuan* and *Zhejiang* healthcare cases for NDRC; and the *Guangdong Education Bureau* and the *Guangdong Football* cases in the courts). The authorities and courts also had cases involving anti-competitive conduct by SOEs (the country's key telecommunications operators in NDRC's Yunnan case; Fushun Tobacco and Qingyang for SAIC; BesTV New Media, CSR Puzhen, and Fujian Electronics and Information Group in MOFCOM's failure to file cases; and the Sinopec and other cases in the courts).

[45] Guangdong High People's Court, "The Guangdong High People's Court published the video of the second instance court trial", 28 May 2015, see *http://gd.xinshiyun.com/play/vod?id=17852&currentCourtId=13* [Accessed 9 February 2016].
[46] *Yuechao v Guangdong Football Association and Zhuchao*, Supreme People's Court, 14 December 2015, [2015] Min Shen Zi No.2313.
[47] National Development and Reform Commission press release, "National Development and Reform Commission 2015 mid-year antitrust briefing", 17 August 2015, see *http://www.sdpc.gov.cn/xwzx/xwfb/201508/t20150817_745309.html* [Accessed 9 February 2016].
[48] Xinhua News Agency, "Authorized publication: decision of the CCP Central Committee on various important issues in relation to the comprehensively deepened reform", 15 November 2013, see *http://news.xinhuanet.com/politics/2013-11/15/c_118164235.htm* [Accessed 9 February 2016].
[49] National Development and Reform Commission press release, "National Development and Reform Commission Q&A on the drug price reform", 5 May 2015, see *http://www.sdpc.gov.cn/zcfb/jd/201505/t20150505_690758.html* [Accessed 9 February 2016].

Beyond the enforcement cases, we believe 2015 was a transitional year in several ways. First, after the many complaints against the perceived bias in Chinese competition law enforcement in 2014 and before, especially by foreign stakeholders (including the US government), the Chinese authorities took somewhat a lower profile after *Qualcomm*. During that time, some of the authorities' energy went into normative projects.

To an extent, the year 2015 corresponds to a period of intense normative efforts, as all three competition authorities were busy drafting AML guidance rules (as noted, NDRC was drafting six guidelines; SAIC was preparing its proposal for guidelines on AML enforcement in the IPR field; MOFCOM was drafting guidance on IPR aspects in merger control, and worked on updating its ministerial guidance).

A good part of the drafting efforts concern procedural aspects: four of NDRC's six draft guidelines are about procedure—leniency, commitments, exemption procedure, and the calculation of fines and illegal gains—and, after ensuring the "simple case" process is up and running, MOFCOM launched an unofficial consultation on an update of its merger notification and review guidance in 2015. In part, this focus on procedure may be due to pressure by the business community and foreign stakeholders which complained about unclear procedures and a relative lack of process rules. If the guidance rules are enacted in 2016 and implemented accordingly, then the year 2015 may be seen as a transitional period in retrospect.

More generally, we would expect that, after finalising their normative projects, the officials at the competition authorities would go back full-steam to case handling. We would not be surprised if competition law enforcement were to accelerate post-2015.

On the substantive front, some of the enforcement cases in 2015—for example, the refusal to deal case against Qingyang—and the guidelines on the IPR field and the automotive sectors may take Chinese competition law into new directions going forward. For instance, it may well be that the new guidelines for the automotive sector identify new types of illegal conduct (such as territorial restrictions imposed by non-dominant suppliers on their distributors), and that such changes would expand to other sectors. Only time can tell, but to us it seems that much of the groundwork for upcoming changes may have been laid in the year 2015.