

## Asian Antitrust Law Toughens Up

2014 was a historic year for antitrust law across Asia as fines and penalties for anti-competitive behavior rose to record highs. [Data compiled by Norton Rose Fulbright shows](#) that over \$1.7 billion in penalties and fines were issued across the region. This is an increase of 47 percent from 2013 and is 45 percent higher than the annual average for the previous five years. This rise was mainly the result of antitrust investigations carried out by Japanese and South Korean authorities which have historically been the most vigilant regimes in the region. However, efforts to combat monopolistic practices in China have increased dramatically.

We can observe antitrust watchdogs the region gaining confidence and developing more mature and sophisticated investigative methods; it is worth noting that many of these bodies were only established in the last few years. Moreover, 56 percent of the total value of fines in 2014 was issued in response to bid-rigging which would suggest that watchdogs are increasingly using competition law to fight bribery; especially in construction and infrastructure projects as the data shows. Marc Waha, a partner in the Asia antitrust practice at Norton Rose Fulbright in Hong Kong, describes this as "a distinguishing feature of competition law enforcement in many Asian countries, where authorities rely on competition law to take action against private and public corruption". However, he went on to say that "the exception is China, where competition authorities have yet to investigate and sanction bid-rigging activity." We can only speculate as to why this is the case.

The recent landmark case involving Qualcomm Inc demonstrates the growing confidence of Chinese antitrust authorities. The American chipmaker has agreed to pay a fine of \$975 million, the largest in Chinese commercial history. This deal also requires Qualcomm to lower its royalty rates on patents used in China which will be a boon to local smartphone manufacturers such as Xiaomi and Huawei. Qualcomm is one of at least thirty foreign businesses to come under investigation in China and some critics say that overseas businesses have been unfairly targeted and accuse China of protectionism. Indeed, high prices for intellectual properties would not usually be considered to be an antitrust matter unless it was to involve discriminatory practices. Moreover, the fact that the NDRC consulted with the Korea Fair Trade Commission months after the case was announced has been interpreted by some as an indication that the bureau was looking for a legal justification for a foregone conclusion.

Despite the Chinese Government's insistence that it has been fair and unbiased in its enforcement of antitrust law, there is growing anxiety among foreign businesses in China who feel that they are being targeted and victimized; fifty-seven percent of the 477 respondents to [an annual survey carried out by the American Chamber of Commerce in China](#) said that they believed recent government investigations "singled out" foreign companies. The Chamber of Commerce's chairman, James Zimmerman told journalists that "there are concerns that China will take an approach, that when the economy slows down, they become more protectionist". Indeed, China's economic growth slowed in 2014 to its lowest in 24 years, expanding just 7.4% and it is widely expected that it will continue to slow down in the years to come.

This anxiety is having a direct impact on investment in China: Japan's direct investment in China fell nearly a fifth in 2013, and dropped another 40 percent to 300.8 billion yen (\$2.8 billion) during the first half of 2014 from a year earlier. This came shortly after the National Development Reform Commission (NDRC) fined Japanese auto parts makers a record 1.235 billion yuan (\$201 million) for manipulating prices.

However, there have also been an increase in fines levied against Chinese firms that have not been so widely reported in the international media. For example, China took action against white liquor producers Kweichow Moutai Group and the Wuliangye Group, issuing more than \$70 million in fines. They have also fined domestic insurance companies and cement companies. In the aforementioned report by MOFCOM, notifications of purely domestic transactions, involving only Chinese firms, increased to 14 decisions during the quarter. This represents approximately 19 percent of all decisions, a slight decrease from 21 percent during the previous quarter. Nonetheless, this is a very high proportion compared to previous years. For the whole year, the proportion is 13.7 percent. When considering all unconditional clearances granted since the Antimonopoly Law came into effect in 2008, purely domestic transactions account for 11.6 percent of all decisions. However, these decisions would suggest that the NDRC do not show any greater leniency towards state-owned companies.

The National Development and Reform Commission has recently said that they will begin looking into pricing tactics in the nation's e-commerce sector in order to guarantee a "fair" market. This will likely involve scrutinizing companies such as Alibaba and JD.com Inc. These comments came just two weeks after the State Administration for Industry and Commerce accused Alibaba of failing to clamp down on what it called illegal business deals taking place on its shopping platforms. Although the regulator later retracted its report, the National Development and Reform Commission later said in a statement on its website that it would "organize and develop special inspections into the online retail sector's pricing behavior". This will include cracking down on activity such as falsely inflating prices before dropping them again and marketing this as a special offer. The NDRC also said it will also focus on pricing around holidays, which are often used by Chinese e-commerce firms to create eye-catching and sell astronomical amounts of goods. Alibaba said that during Singes' Day last November it saw over \$9 billion in transactions cross its online shopping platforms within 24 hours. The statement did not specify any firms involved in the inspection.

After almost two years of legal proceedings, the Supreme People's Court of China upheld the ruling of the Guangdong High Court that Tencent QQ did not abuse a market dominance position according to the Anti-Monopoly Law of People's Republic of China. In 2010, Qihoo, an advanced and free computer security and antivirus software and solution supplier in China, claimed that Tencent, through its instant messaging software QQ, was breaching the privacy of its users and misusing their personal information. Tencent retaliated against Qihoo by disabling the compatibility of QQ with Qihoo's software and sent a message to its QQ users asking them to choose between Tencent and QQ. As a consequence of this, several QQ users uninstalled Qihoo's safe guard software. Furthermore, Tencent also offered QQ Apps Manager; the security software developed by Tencent and integrated it with QQ, without charge to its QQ users, which Qihoo claimed to be tantamount to unlawful bundling sales. The situation become particularly acrimonious and Tencent and Qihoo began their respective lawsuits which included the antitrust case brought by Qihoo. In an interview with Duxes, Ken Dai, a Partner at First Law International said of the *Qihoo vs. Tencent* case as a "landmark case" and went on to say that it offers us useful guidance in defining relevant market, market dominance and abusive conduct and may set a precedent for the kind of analysis used by the Chinese enforcement authorities with respect to other markets.

Ultimately, we can see China's antitrust bodies becoming increasingly confident and tenacious in their activities and are beginning to rival those in Korea and Japan. The NDRC has emerged as one of the foremost players in China's high-profile antitrust investigations into businesses from auto parts makers and milk powder producers to drugs firms and tech companies like Qualcomm Inc. Although it would appear that Chinese companies are coming under increasing scrutiny by antitrust authorities, foreign businesses continue to be targeted more often than their Chinese competitors. This means that it is imperative to carry out extensive research before starting a business in

China and to communicate with other businesses that are already here and to get a first-hand, localized perspective on the situation. Two fantastic opportunities to do so are attending Duxes' 2<sup>nd</sup> Anti-Trust Asia Pacific Summit 2015 and 10<sup>th</sup> China Antitrust Law Seminar 2015 which are due to be held in June 25-26, 2015 and October, 2015. These summits are set to include presentations from China's leading legislators and legal experts who will give extensive explanations of antitrust law, how it is applied and how best to comply with it.