

Q&A with Tad Lipsky

Enforcement of China's Anti-Monopoly Law Continues to Intensify

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In this interview, Latham & Watkins partner Tad Lipsky discusses the evolution of antitrust laws globally, examines the complex regulatory structure that enforces China's new Anti-Monopoly Law (AML) and talks about the increased levels of enforcement activity happening in China.

Lipsky is internationally recognized for his work on US and non-US antitrust and competition law and policy and has handled antitrust matters throughout the world. He has been closely associated with efforts to streamline antitrust enforcement around the world, advocating the reduction of compliance burdens and the harmonization of fundamental objectives of antitrust law.

Why was China so late to adopt antitrust law compared to countries in Europe and North America?

Lipsky: China is very late to the antitrust party. Canada adopted its antitrust laws in 1889, followed by the United States in 1890. The European Economic Community, which was the forerunner to the European Union, formed in 1957 and implemented its competition rules in 1962.

There is a smattering of other countries around the world, including Japan and Germany, that have antitrust laws primarily because the US deliberately implanted the idea of private markets and free competition during the American occupation following World War II. British-heritage jurisdictions often had a Free Trade Act-type structure — so you find antitrust laws in India, Pakistan, Australia, New Zealand and South Africa.

When did antitrust enforcement activity pick up worldwide?

Lipsky: Until the 1970s antitrust enforcement was almost unknown outside the United States. Serious antitrust enforcement began during the 1980s — along with the European drive to create and expand the single market beyond the original six members, plus the UK and Denmark, which had joined in 1973. A renewed emphasis on competition law included a mandate to EU Member States to have their own competition laws. This was part of the drive to integrate the single market more effectively. For the first time, the European Union adopted a merger regulation that explicitly gave them the right to review mergers, which came into effect in 1990.

That also was about the time that the Soviet Union collapsed, and the economic principles of Deng Xiaoping were taking root in China. Private economic activity was starting to be regarded as a good thing under official Chinese policy. It also was the era of the Washington Consensus — when the international community arrived at a broad consensus that democracy and free markets were the key to success. From the early 1990's the International Monetary Fund, World Bank, and the United States and European Union were all heavily promoting the adoption of antitrust law around the world. This was also the time that the World Trade Organization (WTO) was formed and the North American Free Trade Agreement (NAFTA), which had a competition provision, came into force. The idea of global competitive private markets reached its maximum range of acceptance, at least in principle, and antitrust law was promoted as the most appropriate regulatory mechanism for such a world.

During this same early-90's period, when China took steps to become integrated into the world economy and eventually to join the WTO, it began working on its own antitrust law. With increasing intensity after 2000, the Chinese began to study antitrust as it was practiced around the world, trying to figure out how they could adopt antitrust law and fulfill what they perceived as part of their obligation to get their legal system in shape so they could join the WTO. I think the origins of Chinese antitrust can be traced as far back as 1992 or perhaps even earlier, but the government didn't succeed in passing a law until 2007. The Anti-Monopoly Law became effective in 2008; that's when they started to staff up.

How is China's antitrust enforcement system structured?

Lipsky: China has an incredibly complex institutional structure for antitrust enforcement; it has three separate antitrust agencies. The agencies are coordinated by the Antimonopoly Commission, which is a multiagency body that reports directly to the State Council, which is the senior day-to-day executive management body of China's national government.

China has divided jurisdiction over different types of practices among these three agencies — this is something unique in the world of antitrust. The Antimonopoly Bureau of MOFCOM, the Ministry of Commerce, is the only agency responsible for mergers, acquisitions and corporate transactions. The National Development and Reform Commission (NDRC) is the successor to the former government economic planning ministry, a large and extremely powerful bureaucracy, and is responsible for price-related anticompetitive practices. The State Administration for Industry and Commerce (SAIC) is responsible for antitrust violations that don't involve mergers or price.

It's also complicated by the fact that there are all of these interconnections through the Antimonopoly Commission, which is supported by a panel of experts who get involved in all of the significant cases. It's a very complicated multiagency enforcement system.

What is driving the current round of antitrust activity in China?

Lipsky: I think what we are observing now is that the antimonopoly parts of the SAIC and NDRC have finally reached the point that they are sufficiently confident with their power and the government support for what they do — that they've gone into second or third gear.

The investigations of the automotive companies are somewhat consistent with a line that the NDRC has been taking for a few years. The NDRC warned foreign and domestic companies that it would be aggressive with respect to vertical price fixing — the Chinese regard this as a serious antimonopoly problem. There also are a couple of vertical cases involving infant formula and liquor distribution. Even though it's not known exactly what the NDRC is doing with these automotive cases, the betting is that the issue is with the vertical restrictions that automotive companies place on their own dealers.

The public reporting about the automotive cases, to me, suggests very strongly that these cases originated because Chinese dealers objected to the requirements placed upon them to, for example, maintain a large amount of inventory or to spend money on local promotion. It's basically a commercial argument between automobile dealers and suppliers, and the dealers are trying to get the Chinese agencies on their side and say that is a monopoly practice that violates Chinese antimonopoly laws.

I think whenever you have a bureaucracy, like an antitrust agency, that is given plenary authority over some very broad category of business conduct — it's like placing a new set of top-quality golf clubs on the first tee, somebody is going to walk up and take a swing.

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