Overview of developments in United States civil antitrust

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In this note we review a number of important trends and developments from 2012 involving private litigation and civil enforcement by the Antitrust Division of the U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”).1 As discussed below, U.S. circuit courts2 disagreed on important issues such as the ability of a brand name drug company to exclude generic competition by means of a patent settlement, and the application of U.S. antitrust laws to non-U.S. conduct. In both areas, courts issued plaintiff-friendly decisions. Potential abuses of market power by holders of standard essential patents were also a focus, with the agencies making public statements in favour of limiting the use of injunctions and addressing issues relating to enforcement of standard essential patents in both merger and non-merger investigations. The FTC continued its focus on the pharmaceutical sector, challenging settlements between branded and generic drug companies and advancing positions on other types of agreements in the sector. 2012 also witnessed a continuing trend of increased cooperation among the FTC and DOJ and other antitrust enforcers globally, and was marked in particular by significant levels of cooperation in non-merger investigations. Finally, the U.S. antitrust agencies appeared to increase their interest in most-favoured-nations clauses.

Expanding Extraterritorial Reach of U.S. Antitrust Laws

A commonly litigated question in cases involving non-U.S. defendants, particularly in those involving international cartels, is whether, as a threshold matter, a defendant’s non-U.S. conduct is subject to the U.S. antitrust laws. In June 2012, the Seventh Circuit in Minn-Chem, Inc. v. Agrium Inc.3 issued a decision that increases the ability of plaintiffs to challenge non-U.S. conduct. In addition, in light of this favourable ruling, plaintiffs challenging foreign conduct are more likely to file suit in the Seventh Circuit, which conflicts with the holdings of other circuits.

- **Background.** In Minn-Chem the plaintiffs, purchasers of potash used in fertiliser, alleged a global conspiracy to increase potash prices among a small group of producers. The plaintiffs alleged that the defendants first fixed prices in Brazil, China, and India, and used those prices as benchmarks to set prices in other countries. At issue was the application of the Foreign Trade Antitrust Improvements Act (“FTAIA”), which establishes a general rule excluding from the jurisdiction of the Sherman Act all (non-import) trade or commerce with foreign nations. The FTAIA then brings back within the Sherman Act’s scope conduct that has a direct, substantial and reasonably foreseeable effect on U.S. commerce (ie, domestic trade or commerce, import trade or commerce or export trade or commerce of a U.S. exporter). The Minn-Chem defendants moved to dismiss the complaint on jurisdictional grounds for failure to satisfy the FTAIA’s import commerce exclusion. The district court found a sufficient nexus between the alleged conduct and the imports. On appeal, a panel of three Seventh Circuit judges reversed, holding that the defendants had failed to establish jurisdiction. The plaintiffs petitioned for review by a full panel of (eight) Seventh Circuit judges, known as en banc review.

- **Scope of FTAIA.** Sitting en banc, the Seventh Circuit reversed the holding of the three judge panel, concluding that the FTAIA is not a jurisdictional statute.4 The court held that “the FTAIA sets forth an element of an antitrust claim, not a jurisdictional statute.” The decision makes it easier for a plaintiff to survive an FTAIA challenge by shifting the burden from the

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1 The FTC has only civil enforcement authority.
2 The U.S. federal court system is organised into circuits, with district courts serving as trial courts and the circuit courts serving as the intermediate appellate courts.
3 683 F.3d 845 (7th Cir. 2012).
4 15 U.S.C. § 1 et seq. Section 1 of the Sherman Act prohibits agreements among independent actors that unreasonably restrain trade and Section 2 prohibits the abuse of monopoly power by individual firms.
5 Minn-Chem, Inc. v. Agrim Inc., 657 F.3d 650 (7th Cir, 2011); see also United Phosphorus, Ltd. v. Angus Chemical Co., 322 F.3d 942 (7th Cir. 2003) (describing the FTAIA as a jurisdictional statute based on the statute’s legislative history and the opinions of courts and commentators).
6 683 F.3d 845 at 852.
plaintiff (to prove its claim meets the requirement of jurisdiction) to the defendant (to mount a successful motion to dismiss where the court is required to accept as true all of the plaintiff’s factual allegations). The decision also creates a circuit split with the Ninth Circuit and the D.C. Circuit, which have held that the FTAIA is a jurisdictional statute.\footnote{See United States v. LSI Biotechnologies, 379 F.3d 672 (9th Cir. 2004) [hereinafter LSI Biotechnologies]; Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267, 1268 (D.C. Cir. 2005). The court’s decision follows the Third Circuit’s reasoning in Animal Science Products, Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011).}

- **Showing Direct Effects.** The court in Minn-Chem addressed another important issue, which is the requisite nexus between the foreign conduct and the U.S. effect under the “FTAIA’s ‘direct, substantial and foreseeable’ standard. The court held that only a ‘proximate’ cause need be shown, adopting a standard proposed by the DOJ, and went on to conclude that the conduct of cartel members that did not sell directly into the United States, yet engaged in acts contributing to the price inflation that impacted plaintiffs, had a direct effect on U.S. commerce. The court’s holding that only a proximate cause need be shown is a more expansive interpretation than has been adopted by other courts which have required a stronger nexus.\footnote{For example, in LSI Biotechnologies, the court held that an effect was “direct” only where it was an “immediate consequence” of the defendant’s conduct. 379 F.3d 672, 680 n.5.}

“Reverse Payment” Settlements and Other Pharmaceutical Industry Developments

The settlement of a patent infringement suit between a brand name drug manufacturer and a generic manufacturer seeking regulatory approval to market a biologically equivalent version of the brand name drug often involves so-called “reverse payments.” Under the terms of such a settlement – also known as “pay for delay” – the generic manufacturer agrees to delay its entry and not to challenge the brand name manufacturer’s patent in exchange for a payment from the brand name manufacturer.\footnote{These claims arise within the framework of The Hatch-Waxman Act, which was enacted to encourage generic entry, by granting a 180-day exclusivity period to the first generic company to file a streamlined new drug application. Rather than performing expensive and time-consuming human trials, the applicant need only establish bio-equivalence with the branded drug. In addition, the application requires a certification that the underlying patent is invalid or expired. It is common for the branded manufacturer in turn to sue the generic manufacturer for patent infringement, which, under the Hatch-Waxman Act, triggers an automatic 30-month stay of FDA approval of the drug application.} While the FTC has vigorously opposed these types of settlements,\footnote{The FTC has on many occasions described challenging these types of settlements as its top enforcement priority. The FTC has lobbied Congress to adopt legislation prohibiting these types of settlements.} taking the position they are *prima facie* illegal, it has had little success and courts have largely sided against the FTC. However, on 16 July 2012, the Third Circuit in *In re K-Dur Antitrust Litigation*\footnote{686 F.3d 197 (3d Cir. 2012).} held that a pay for delay settlement is *prima facie* unreasonable, handing the plaintiffs in that case – and the FTC – a major victory. As discussed below, the decision created a split in U.S. circuit courts on the proper framework for analysing such settlements. However, on 7 December 2012, the Supreme Court agreed to review another pay-for-delay case, *FTC v. Watson Pharmaceuticals*, hopefully bringing much needed certainty to an important issue that has been hotly litigated over the past several years.

- **Background.** K-Dur involved patent settlement agreements between Schering Plough (“Schering”) and each of Upsher-Smith (“Upsher”) and ESI Lederle (“ESI”). In 1995, both Upsher and ESI sought to market a generic form of Schering’s s K-Dur, a sustained release potassium chloride supplement. Schering sued each of Upsher and ESI, alleging patent infringement. ESI and Schering settled in 1996, with Schering granting ESI a royalty-free licence to manufacture generic K-Dur, effective 1 January 2004. In addition, Schering agreed to pay ESI USD5m upfront and up to USD10m million depending on when ESI’s drug application was approved. Schering settled with Upsher in 1997, and under the terms of the settlement, Upsher agreed to delay marketing generic K-Dur until 2001. The parties also entered a licence agreement whereby Schering was licensed to make certain other products for Upsher. In return, Schering agreed to pay Upsher USD60m; the agreement listed Upsher’s promise to delay its entry as part of the consideration for the payment. The Third Circuit’s decision in

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**K-Dur** involved a challenge by private plaintiffs to these agreements. Interestingly, the FTC had previously challenged the settlements, alleging that the payments to Upsher and ESI were intended to delay generic entry and preserve Schering’s monopoly. However, the Eleventh Circuit found the agreements were not an unreasonable restraint of trade.

- **Court’s Reasoning Rejects “Scope of Patent” Test.** The Eleventh Circuit (in reviewing the Schering settlements), and the Second and Federal Circuits in other reverse payment cases, adopted the so-called “scope of patent” test. Under this standard, reverse payments are permitted provided that the excluded competition does not exceed the scope of the patent, the patent holder’s claim of infringement is not objectively baseless, and the patent was not procured by fraud on the Patent and Trademark Office. The Third Circuit reasoned that the scope of patent test amounted to an “almost rebuttable presumption of patent validity” which was unwarranted given that patent challenges by generic manufacturers were often successful. This undermined the objective of encouraging generic entry in the court’s view. Accordingly, the Third Circuit held that reverse payment settlements were subject to a “quick look” rule of reason analysis in which any payment from a patent holder to a generic patent challenger who agrees to delay entry is *prima facie* evidence of an illegal agreement. The Third Circuit held that the presumption may be rebutted by a showing that the payment (i) was for a purpose other than delayed entry or (ii) offers some type of procompetitive benefit. Thus the court’s finding created a clear split in the circuit courts that should be resolved in 2013 when the Supreme Court hears the FTC v. Watson Pharmaceutical case.

The FTC’s enforcement activities in the pharmaceutical sector extended beyond its opposition to reverse settlements. For example, in other noteworthy developments:

- **Proposed HSR Changes.** The FTC proposed a change to the Hart-Scott-Rodino (“HSR”) Act premerger notification rules which would require pharmaceutical companies to report acquisitions of exclusive patent licenses even though the licensor retains the right to manufacture patented products for the licensee. Under current HSR interpretations, an exclusive license in which the licensor retains the right to manufacture is generally not considered a transfer of the underlying intellectual property, and is therefore not subject to the notification and waiting period requirements of the HSR Act. If adopted, the change will allow the agencies to review a greater number of pharmaceutical patent licenses.

- **FTC’s Position on “Product Hopping.”** The FTC filed an *amicus* brief in a challenge to a drug manufacturer’s pattern of successive product reformulations which allegedly offered little or no apparent medical benefit to consumers. In its brief, the FTC maintains that such “product hopping” may form the basis of a plausible claim that the defendant has unlawfully preserved its monopoly power in violation of Section 2 of the Sherman Act. The FTC’s position represents an expansive view of the scope of Section 2.

**Standard Essential Patents**

The high-tech sector remained an active area of enforcement, with the U.S. antitrust agencies focusing in particular on potential anticompetitive conduct by holders of standard essential patents (“SEPs”). These cases highlight the risks to SEP holders of seeking injunctive relief against willing licensees and of refusing to license on fair,

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12 The case was dismissed by the district court and came before the Third Circuit on the plaintiffs’ appeal.
13 As an administrative agency, the FTC brought its initial complaint before an Administrative Law Judge (“ALJ”). The ALJ dismissed the complaint, but was overturned on appeal to the full FTC. Schering then appealed to the Eleventh Circuit.
14 FTC v. Watson Pharmaceuticals, 677 F.3d 1298, 1312 (11th Cir. 2012).
15 686 F.3d 197 at 214.
16 Although it was not a party to the case, in an *amicus* brief, the FTC argued the court should adopt such a presumption of illegality. See FTC Brief as Amicus Curiae, *In re: K-Dur Antitrust Litigation*, Civ Nos. 10-2077-79 (3rd Cir. 2012) at 22.
reasonable and non-discriminatory ("FRAND") terms.

- **Acquisitions of SEPs.** In February, the DOJ announced it had concluded its investigation of three major acquisitions involving SEPs: (i) the acquisition by Google of Motorola Mobility Holdings, which held 17,000 issued patents and 6,800 applications, including hundreds of SEPs relating wireless technology; (ii) the acquisition by a partnership including Apple, Microsoft and RIM, of Nortel’s portfolio of 6,000 issued and pending patents, including many SEPs relating to wireless technology; and (iii) the acquisition by Apple of certain Novell patents related to the open source Linux system. Each of the patent holders in these transactions, through their participation in standard setting organizations ("SSOs"), had made commitments to license their patents on FRAND terms.

The DOJ was concerned that the firms acquiring the Motorola Mobility and Nortel SEPs could exploit the ambiguities in the relevant SSOs’ FRAND commitments to raise competitors’ costs or foreclose competition, particularly through the threat of an injunction or exclusion order. The DOJ based its decision not to challenge the transactions in part on the fact that RIM’s and Microsoft’s low market share would make a strategy of harming rivals unprofitable. In addition, the DOJ took comfort from the fact that Apple, Google, and Microsoft each made public statements explaining its respective SEP licensing practices. However, in prescient comments, the DOJ cautioned that Google’s commitments were less clear, and that while its acquisition of the patents was not anticompetitive, “how Google may exercise its patents in the future” remained a “significant concern.” The DOJ also took the opportunity to note its broader concern regarding the use of SEPs to disrupt competition in the smart phone and tablet industry in particular.

- **Agency Statements.** In addition to its comments in the merger cases above, the DOJ has more generally been vocal on potential abuse of SEPs. For example, in September 2012, then acting head of the DOJ, Joseph Wayland, stated that while the “essence of the property right is the power to exclude,” there “may be instances in which the rights holder has gained excessive bargaining power that is not derived from, or commensurate with, the value of its invention.” Accordingly, he argued, the law of injunctions in patent cases must be sensitive to the opportunistic use of injunctions to extract excessive royalties. The DOJ has also made recommendations regarding mechanisms SSOs can adopt to minimize the potential for abuse of SEPs. The proposals include identifying which technologies the patent holder has not agreed to license on FRAND terms, requiring licensing commitments to transfer to subsequent acquirers of the licensed patents, limiting the ability of a patent holder subject to a FRAND commitment to seek an injunction, and finding ways to lower the transaction costs of determining FRAND licensing terms.

The FTC also settled two enforcement actions which highlight that agency’s expansive application of Section 5 of the FTC Act, which prohibits unfair methods of competition, to enforcement of SEPs.

- **Robert Bosch Consent.** In November, the FTC issued a proposed consent order settling charges that Robert Bosch GmbH’s proposed...
acquisition of SPX Corporation was anticompetitive. Both companies compete in the supply of air conditioning, recovery and recharge devices. In its complaint, the FTC alleged that SPX had committed to license on reasonable and non-discriminatory terms to the extent that any of its patents was essential for practicing any industry standards—conduct unrelated to the acquisition.25 Significantly, the FTC alleged that SPX had engaged in unfair competition in violation of Section 5 of the FTC Act by seeking injunctive relief against competitors (including Bosch) that were “willing licensees.” The FTC has argued elsewhere that the International Trade Commission should refuse to grant injunctive relief to holders of SEPs where the SEP holder has agreed to license on FRAND terms.26 However, the SPX consent goes one step further by alleging that seeking such relief is itself a violation of Section 5. FTC Commissioner Olhausen dissented from the Commission’s decision to accept the consent on the grounds that the alleged conduct did not in her view violate Section 5 and the consent did not lay out any meaningful limiting principles to the scope of Section 5.26

- **Google Consent.** On 3 January 2013,27 the FTC concluded its widely followed investigation of Google, entering a consent decree to settle charges that Google had not complied with Motorola Mobility’s commitment to license its patents on FRAND terms.28 Specifically, the FTC alleged that Google pursued or threatened to pursue injunctions—in federal court and at the United States International Trade Commission—against companies that need to use Motorola Mobility’s SEPs in devices. The FTC argued that this was an abuse, in violation of Section 5 of the FTC Act, of the market power Motorola Mobility acquired through the adoption of its technology as a standard. The consent generally prohibits Google from seeking an injunction against licensees willing to license on FRAND terms except in narrow circumstances. For similar reasons to her position in Bosch, Commissioner Olhausen dissented in the decision to accept the consent.

### Increased Interest in MFNs

“Most favoured nation” clauses (“MFNs”) take different forms, but most commonly entail a commitment from a seller that its customer is receiving the seller’s lowest price. The U.S. antitrust agencies have in the past raised concerns with MFNs, although these were ultimately resolved by consent decree, and there is little case law in this area. 2012 witnessed a growing emphasis by U.S. antitrust enforcers on the potential anticompetitive effects of MFNs, through agency statements and the high-profile challenge in the e-Books industry, although no bright line standards emerged.

- **Agency Workshops.** In September 2012, the DOJ and the FTC held a joint workshop on MFNs,29 with presentations by regulators, economists and practitioners, and issued a request for public comments.30 The workshop highlighted the lack of clear guidance from the courts and agencies regarding MFNs. The potential procompetitive benefits of MFNs were reviewed, such as preventing opportunism in price setting (eg, where one party has invested significantly in the supply

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24 The use of the merger consent to secure relief for conduct unrelated to the merger is noteworthy in its own right.
28 The investigation was part of a broader investigation into potential abuse of dominance by Google. Google also agreed to remove restrictions on the use of its online search advertising platform. The FTC found that allegations of bias in Google’s search results did not give rise to a competition violation. See FTC Press Release, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), available at http://www.ftc.gov/opa/2013/01/google.shtml.
29 For the workshop announcement, see www.justice.gov/atr/public/workshops/mfn/index.html.
30 The conference materials are available at www.justice.gov/atr/public/workshops/mfn/presentations/286769.pdf. Agency officials also took other opportunities in 2012 to speak about the potential anti-competitive effects of MFNs. For example, in April 2012, Fiona Scott-Morton, Deputy Assistant Attorney General of Economic Analysis, give a speech entitled “Contracts that Reference Rivals,” which also noted the anti-competitive potential of MFNs. The speech is available at http://www.justice.gov/atr/public/speeches/281965.pdf.
relationship), reducing transaction costs associated with price discovery, and allocating risk by shifting price uncertainty. The workshop also highlighted potential theories of anticompetitive harm involving MFNs, focusing on exclusionary effects (such as raising competitors’ costs), and collusive effects (such as facilitating coordination or price transparency). Presenters noted that MFNs generally raise greater concerns when (i) used by firms with market power, (ii) multiple MFNs cover a large portion of the market, (iii) include certain MFN-plus features (ie, guarantee a price lower than offered to any other competitor), (iv) they provide access to competitively sensitive information (eg, through audit rights), or (v) they are jointly adopted by competitors. The workshop and request for public comments may be a sign of a forthcoming policy statement or guidelines from the agencies in this area, which could help bring some certainty to this area.

**E-Books Challenge.** In April 2012, the DOJ challenged the use of MFNs in an enforcement action involving e-Book publishing. The DOJ sued Apple and five of the largest e-Book publishers, alleging they conspired to raise prices for e-Books by agreeing to move away from the existing wholesale model, in which the retailer set the price of e-Books, to an “agency model,” in which the publishers were able to set retail prices.31 The DOJ alleged the publishers favored the agency model because Amazon’s low pricing of e-Books under the wholesale model was pressuring prices on printed books. Moreover, Amazon’s strength in e-Book publishing had the potential to remove the publishers as intermediaries altogether. The DOJ further maintained that no individual publisher would find it profitable to move to the agency model on its own. Accordingly, the publishers allegedly signalled to each other the terms they found acceptable, using Apple as the central coordinator. A key term of the publishers’ agreement with Apple was an MFN barring the sale of e-Books on other retail platforms at prices below those in Apple’s iBook store. Four publishers have settled with the DOJ, agreeing to terminate their agency agreements (and make certain other commitments),32 while Apple and one other publisher continues to litigate.

**Blue Cross Challenge.** The challenge to MFNs in e-Books followed on the heels of the DOJ’s 2011 challenge to the use of MFNs by Blue Cross Blue Shield of Michigan (“Blue Cross”) in its contracts with Michigan hospitals. The MFNs at issue provided that the hospitals would provide services to Blue Cross policyholders at the same or at lower prices (known as MFN plus) than those paid by Blue Cross’ competitors. Blue Cross purportedly had a market share of over 60%, nine times that of its next largest competitor. The DOJ alleged that the MFNs discouraged other health insurers from entering into or expanding in the relevant Michigan markets by raising their costs, which in turn lead to higher hospital and insurance costs. If the Blue Cross case proceeds to a full trial in 2013, as scheduled, the decision may also provide some broader judicial guidance on the antitrust legality of MFNs.

Given the unique circumstances of the e-Books and Blue Cross cases, it seems unlikely the heightened attention on MFNs is indicative of a major shift in policy against MFNs. However, given the increased attention by the agencies on these agreements and their willingness to challenge them, companies are advised to more closely evaluate these types of restrictions before agreeing to them, particularly where factors suggesting a greater potential for anticompetitive effect (discussed above) are present.

**Continuing International Cooperation**

The trend of increased cooperation among international antitrust enforcers continued in 2012, and was seen in both merger and non-merger matters. In addition, the U.S. antitrust agencies also strengthened ties with their international counterparts through formal cooperation agreements and other collaborations (such as the

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International Competition Network and the OECD. The trend was evidenced in some of the examples discussed below.

- **E-Books – Major Non-merger Investigation.** In the non-merger context, the DOJ and the European Commission cooperated closely in the e-Books investigation, discussed above, with both agencies pursuing similar theories of anticompetitive harm and similar remedies. The e-Books investigations are significant in that they reflect the willingness and ability of the agencies on both sides of the Atlantic to cooperate not only in cartel or merger cases, but also in civil non-merger cases. Then Acting Assistant Attorney General, Sharis Pozen, characterized the efforts as “a shining example of how far” the agencies’ cooperation efforts have come. The European Commission and the FTC have also coordinated closely in their investigation of Google.

- **Continued Cooperation on Mergers.** On the merger front, the U.S. antitrust agencies worked closely with their international counterparts on a number of matters. For example, the DOJ coordinated closely with the European Commission and the Canadian Competition Bureau in its review of the USD18.4 billion merger between Goodrich and United Technologies, the largest merger in the history of the aircraft industry. In a sign of the level of coordination, all three agencies announced the conclusion of their investigations on the same day. Through their cooperation, the agencies were able to adopt a coordinated remedy to address competition concerns in the United States and internationally. For example, the divestitures agreed with the U.S. and EU authorities were considered by the Canadian Competition Bureau sufficient to mitigate any potential anticompetitive effects in Canada.

The DOJ and the European Commission also cooperated closely in their review of the proposed acquisition by Deutsche Börse of NYSE Euronext. In December 2011, the DOJ announced that it would clear this merger on the condition that Deutsche Börse divest its 31.5% stake in Direct Edge Holdings and agree to other restrictions. Direct Edge was the forth largest stock exchange in the United States, and the DOJ was concerned that Deutsche Börse’s representation on the Direct Edge board and its other governance rights could reduce competition in the market for U.S. equities exchange products and services. The DOJ emphasized the open dialogue between it and the European Commission. Upon the DOJ’s announcement, the European Commission acknowledged the “regular and constructive dialogue with the DOJ throughout.” Meanwhile the European Commission continued its investigation and in February decided to block the merger based on concerns that the transaction would reduce competition in the market for exchange traded financial derivatives. The divergent result is best seen as a function of the different markets at issue (U.S. equity services vs. European financial derivatives), not a lack of cooperation.

- **Other Agency Activities.** Further evidence of the growing cooperation between U.S. antitrust agencies and their foreign counterparts was evidenced by the signing in September 2012 of a Memorandum of Understanding (“MOU”) among the FTC, the DOJ, and the Competition Commission of India. The MOU provides for exchanges of information on cases and broader competition law developments, cooperation
and training. The U.S. antitrust agencies
signed a similar MOU with China in 2011 and
in 2012, pursuant to that agreement, offered
technical assistance to all three of China’s
antitrust regulators in a number of areas. For
example, the FTC and the DOJ participated in
a merger remedies workshop with the Ministry
of Commerce and in June the agencies
participated in a workshop on intellectual
property and antitrust with China’s two other
antitrust regulators -- the National
Development and Reform Commission and the
State Administration for Industry and
Commerce.