

Annual Review of Public Enforcement of China's Anti-Monopoly Law (2017)

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I. OVERVIEW

2016 marked the eighth anniversary of the implementation of the PRC Anti-monopoly Law. All three Chinese competition authorities were very active in their enforcement practices. As in 2015 and 2014, many waves of high-profile antitrust crackdowns have further established China's standing as one of the most important emerging jurisdictions for antitrust enforcement in the world. Both the State Administration for Industry and Commerce (SAIC) and the National Development and Reform Commission (NDRC) took a tough stance against the cartel and abuse of dominance conduct in 2016 with a strong industry focus on healthcare, automotive and public utilities. In particular, after a five-year investigation, the SAIC finally published its findings and punishments on the *Tetra Pak* case. The Swiss packaging giant was fined approximately US\$97 million for abuse of dominance including the conducts of tying practice, exclusive dealing and loyalty discounts. This penalty decision set the record as the highest antitrust penalty ever issued by the SAIC.

In addition, the three competition authorities in China have increased their legislative activities to refine the antitrust regime. NDRC, SAIC and Ministry of Commerce (MOFCOM) completed their draft of the antimonopoly guidelines on abuse of intellectual property for each of their own enforcement areas. In the second half of 2016, the unified set of guidelines on antitrust enforcement in the intellectual property area was finalized and submitted to the Anti-monopoly Commission of the State Council (AMC) by the NDRC on behalf of the three competition authorities, along with the State Intellectual Property Office, which also had certain input into the guidelines, however the guidelines were not passed in 2016 as was expected. Furthermore, NDRC has submitted its latest drafts of another five antitrust guidelines to the AMC for review and approval. These guidelines cover both sector-specific substantive issues and procedural issues involving automotive industry, the process for undertakings' exemption, leniency programme, undertaking's commitments, and the calculation on illegal gains and fines. These guidelines will lay down more detailed guidance on the practical and procedural issues with respect to the application of the Anti-monopoly Law. Moreover, 2016 saw the establishment of the fair competition review system. This is a major initiative to ensure fair play among participants in the Chinese market. Under the fair competition review system, government authorities must fully consider the impact of their policies and measures on market competition during the formulation stage and review any potential impact in accordance with the requirements of establishing a unified, open, orderly and competitive market system.

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In addition to the above legislation activities, delegated by the State Council, the SAIC has led the process of amending the Anti-unfair Competition Law. After many rounds of amendments, the Standing Committee of the National People's Congress of China published draft amendments of the Anti-unfair Competition Law for public consultation on 26 February 2017.² The revised draft aims at boosting protection of commercial secrets and intellectual property, regulating anticompetitive conduct in the Internet sector and facilitating further curbs on commercial bribery. The revised draft also removes some provisions in the Anti-unfair Competition Law that are inconsistent or overlap with the Anti-monopoly Law.

i. Prioritisation and resource allocation of enforcement authorities

In 2016, the NDRC published 10 influential cases. Three of them were cartel cases and the others related to vertical restrictive agreements and abuse of dominance. In terms of industry, healthcare industry has become the major focus of the NDRC. In 2016, the NDRC concluded four cases in pharmaceutical and medical device industry. As early as the beginning of 2015, the NDRC warned in a press release³ that it would keep a close eye on suspected monopolistic behaviors in key sectors that are of particular concern to the general public such as healthcare and 2016 witnessed exactly this trend. The automotive industry is another focus of NDRC's law enforcement since the start of 'antitrust storm in automotive industry' in 2014. Three cases related to the automotive and autoparts industries. Apart from the pharmaceutical and automotive industries, the agency also continued its enforcement efforts in consumer-related sectors such as insurance, consumer goods and utilities, etc.

As for the SAIC, 14 cases were concluded in 2016—two more cases than that in 2015. Similar to 2015, these cases involved a variety of industries including pharmaceuticals, insurance, utility, salt and consumer goods, etc. In terms of the type of monopolistic conduct, four of 14 concluded cases involved cartels and the remaining cases were all related to abuse of dominance. This indicated that from 2015, the enforcement priority of the SAIC gradually shifted from horizontal monopoly agreements to abuse of dominance. In these abuse cases, the public utility companies such as gas companies, water companies, broadcast television network companies and power supply companies became the SAIC's major targets. Moreover, the SAIC concluded a particularly noteworthy case—the *Tetra Pak* case—and published its detailed analysis and its innovative identification on the new monopolistic behaviors—loyalty discounts (for detailed discussion, see Section III, *infra*).

MOFCOM received 378 merger notifications, filed 360 cases and concluded 395 cases in 2016,⁴ a steady increase compared with last year. Among those concluded cases, only two of them were cleared with conditions and no case was banned, which reflected MOFCOM's prudent attitude in relation to any intervention against concentration. Meanwhile, MOFCOM kept its tough stance against companies that failed to notify their deals. In 2016, MOFCOM

²Available at http://www.npc.gov.cn/npc/xinwen/2017-02/26/content_2008334.htm.

³Available at www.sdpc.gov.cn/gzdt/201502/t20150213_664556.html.

⁴Available at <http://www.mofcom.gov.cn/article/ae/slfw/201701/20170102496823.shtml>.

sanctioned six cases for non-filing⁵, out of which three cases were publicly announced on MOFCOM's website.

ii. Enforcement agenda

In 2016, NDRC concluded 10 major cases with total fine of around 353.1 million yuan, a sharp decrease compared with 7 billion yuan in 2015. This was mainly because the investigation of 2016 did not involve any significant penalty cases like the investigations of 2015 (e.g., *Qualcomm*⁶ and *Ocean Shipping Companies*⁷). The NDRC is expected to continue its aggressive streak and enhance its supervision of resale price maintenance and abuse of dominance as well as price-fixing cartels in 2017. The antitrust crackdown on the pharmaceutical industry is just in the early stage, thus a number of cases in relation to pharmaceuticals, medical ingredients and medical devices might emerge in the year ahead. In addition to the pharmaceutical industry, the NDRC will intensify its scrutiny in the automotive and public utility industries.

In 2016, SAIC and its local administrations for industry and commerce concluded 14 cases with a total fine of 687.57 million yuan, a dramatic increase compared with 6.34 million in 2015. The SAIC's record fine imposed on Tetra Pak (667.72 million yuan) accounted for a significant proportion of the total fines imposed in 2016. Compared with 2016, we expect that the SAIC and its local counterparts will be even more aggressive in monitoring and investigating anti-competitive conduct in pharmaceutical, insurance, automotive and utility industries in 2017.

The number of cases reviewed by MOFCOM increased significantly in 2016. It is commendable that the speed of case review has accelerated despite the agency being understaffed. We expect that both the number of received cases and concluded cases of MOFCOM will continue to grow in 2017. Meanwhile, MOFCOM will continue its effort to investigate and penalize non-filers. We also expect that MOFCOM will further improve its efficiency and reduce the merger review period.

II. CARTELS

In 2016, the NDRC published three cartel case decisions, the same as previous year. 2016 saw the first determination of concerted practice since the promulgation of the Anti-monopoly Law and the second boycott case (the first boycott case is the *Guangzhou Panyu Animation Association* case⁸). Two of the three cartel cases involved the pharmaceutical industry with a combined fine of more than 6 million yuan.

⁵ Available at <http://www.mofcom.gov.cn/article/ae/slfw/201701/20170102496823.shtml>.

⁶ For a detailed discussion of this case, see *The Public Competition Enforcement Review* (eighth edition) p 84.

⁷ For a detailed discussion of this case, see *The Public Competition Enforcement Review* (eighth edition) pp. 79-80.

⁸ For a detailed discussion of this case, see *The Public Competition Enforcement Review* (eighth edition), p. 82.

The SAIC concluded four cartel cases in 2016, the same number as the previous year. All the cartel cases related to sales market allocation.

i. Significant cases

Allopurinol drug cartel case⁹

At the beginning of 2016, the NDRC disclosed its penalty decision against five pharmaceutical companies—Chongqing Qingyang Pharmaceutical Co, Ltd (Chongqing Qingyang), Chongqing Datong Pharmaceutical Co, Ltd (Chongqing Datong), Place Pharmaceutical (Jiangsu) Co, Ltd (Place Pharmaceutical Jiangsu), Shanghai Xinyi United Medicinal Herbs Co, Ltd (Shanghai SINE), and ShangqiuHuajie pharmaceutical Co, Ltd (ShangqiuHuajie)—and imposed a combined fine of almost 4 million yuan.

One of the five involved enterprises, Chongqing Qingyang, was fined 439,308 yuan by the Chongqing Administration for Industry and Commerce (Chongqing AIC) for abuse of dominance on the distribution of allopurinol active pharmaceutical ingredient in 2015¹⁰. This time, it was investigated and punished again by another antitrust authority – the NDRC – for price-fixing and market segmentation.

Among the five companies, three companies – Chongqing Qingyang, Shanghai SINE and Place Pharmaceutical Jiangsu – were the remaining competitive enterprises that actually manufacture allopurinol tablets on the market. Chongqing Datong and ShangqiuHuajie were the downstream distributors of Chongqing Qingyang and Shanghai SINE, respectively. Between April 2014 and September 2015, the three manufacture companies and the two distributors colluded to

- (1) jointly raise the price of allopurinol tablets;
- (2) divide markets for sales of allopurinol; and
- (3) conduct bid-rigging.

According to the penalty decision, the NDRC concluded that the conduct of the involved companies had restricted competition in the allopurinol tablets market, pushed up costs for gout and hyperuricemia patients. Such conduct violated Articles 13(1) and 13(3) of the Anti-monopoly Law by reaching and implementing monopoly agreements concerning price fixing and market dividing.

Chongqing Qingyang and its downstream distributor Chongqing Datong were fined 1.8 million yuan, equivalent to 8 per cent of their sales in 2015, for playing a leading role in formulating the horizontal monopoly agreements. The other three companies were all fined 5 per cent of their annual revenues.

⁹ The original Chinese notice of the decision is published on the NDRC's website, available at: http://jjs.ndrc.gov.cn/fjgld/201601/t20160128_772982.html.

¹⁰ For a detailed discussion of this case, see *The Public Competition Enforcement Review* (eighth edition), p. 85.

This case opened up a round of antitrust crackdown against pharmaceutical industry and the NDRC vowed to continue to enhance price supervision in the pharmaceutical industry.

*Estazolam drugs cartel case*¹¹

In July 2016, the NDRC published its penalty decision against three pharmaceutical enterprises—Huazhong Pharmaceutical Co, Ltd (Huazhong Pharmaceutical), Shandong Xinyi Pharmaceutical Co, Ltd (Shandong Xinyi), and Changzhou Siyao Pharmaceutical Co, Ltd (Changzhou Siyao)—for collusively reaching and implementing price monopolistic agreements. The three companies received fines totaling more than 2.6 million yuan.

Two types of monopolistic behavior in upstream and downstream markets were identified in this case:

- (1) entering into and implementation of monopolistic agreements on the joint boycott of transactions in the estazolam active pharmaceutical ingredients (APIs) market; and
- (2) entering into and implementation of a monopolistic agreement on collusively increasing and fixing prices in the estazolam active pharmaceutical tablets market.

China has granted only four companies a license to manufacture estazolam APIs. Of those four, only the above three involved companies actually manufacture estazolam APIs. They also manufacture estazolam tablets. The NDRC alleged that from September to October 2014 the companies met in Zhengzhou City to discuss business arrangements relating to estazolam APIs and tablets. At the Zhengzhou meeting, the companies reached a consensus that they would: (1) use estazolam APIs for internal purposes only; and (2) act concertedly to increase estazolam tablet prices. Shortly afterwards, the companies gradually ceased the supply of APIs to other tablet manufacturers and increased estazolam tablet prices.

This case marks the first time in eight years of antitrust law enforcement that the antitrust authorities have imposed a penalty for monopolistic concerted practice. In the opinion of the NDRC, the following major factors shall be considered when analyzing whether the concerted practice has occurred: (1) uniformity; (2) exchange of information; and (3) market structure and changes. And the SAIC will also consider whether there is a reasonable explanation. According to the NDRC's dismissal of Changzhou Siyao's objection, Changzhou Siyao did not actively participate in the conspiracy; however, Changzhou Siyao did not object to the collusion and later followed the other two companies' lead, which constituted concerted practice.

The NDRC imposed different penalties on the three companies based on the nature, degree and duration of their respective behavior, as well as their roles, their degree of cooperation and any other meritorious conduct. Huazhong Pharmaceutical was fined 7 per cent of its sales

¹¹ The original Chinese penalty decisions are published on the NDRC's website, available at http://jjs.ndrc.gov.cn/fjgld/201607/t20160727_812579.html, http://jjs.ndrc.gov.cn/fjgld/201607/t20160727_812583.html, and http://jjs.ndrc.gov.cn/fjgld/201607/t20160727_812587.html.

in the relevant market for playing a leading role; Shandong Xinyi was fined 2.5 per cent of its sales for actively cooperating with the NDRC; and Changzhou Siyao was fined 3 per cent of its sales for acting merely as a follower.

The pharmaceutical industry has a significant impact on health, safety and quality of life. The NDRC is expected to crack down on monopolistic cases in this industry more severely than it did in the automotive industry.

Payment cipher device supplier collusion case¹²

On 4 November 2016, the SAIC published penalty decisions against three cipher device suppliers—Sunyard System Engineering Co, Ltd (Sunyard), Beijing Sinosun Science and Technology Co, Ltd (Sinosun), and Shanghai Haijiye High-tech Co, Ltd (Haijiye). The three companies were fined by Anhui Administration for Industry and Commerce (Anhui AIC) for dividing the market of payment cipher device in Anhui province through collusive conducts. Sunyard has already been penalized by the Anhui AIC for not cooperating with the investigation in 2015.¹³

According to the penalty decision, the involved companies colluded with each other to divide up the market for sales of payment cipher devices in Anhui. Although the companies did not enter into any written agreements, the conduct amounted to ‘other concerted conduct’ defined in Article 13 of the Anti-monopoly Law. The Anhui AIC concluded that the three companies’ conducts eliminated and restricted competition in the market for payment cipher devices, disturbed the market order, hindered economic efficiency and harmed the interest of consumers.

All the three convicted companies had their unlawful gains on their payment cipher devices confiscated and also received severefines on collusion. Sunyard was fined 76,171.00yuan; Sinosunwas imposed of a penalty of 258,520.50yuan and Haijiye was fined 75,913.85 yuan. All the three companies were imposed 8 per cent of their respective 2014 sales revenue in the relevant market.

It is worth noting that the alleged collusive conduct of the three companies is unusual in the sense that such conduct was instructed by the People’s Bank of China Hefei Central Sub-branch (Hefei People’s Bank). People's Bank of China is a Cabinet-level department under the State Council and an administrative department authorized by laws to formulate banking policy and related financial policies. The three companies jointly participated in a meeting held by the Hefei People’s Bankwith more than 20 banks and financial institutions. As requested by Hefei People’s Bank,the three companiesdivided the distribution market on payment cipher devices. Anhui AIC stated that in accordance with Article 5 of Provisions for

¹² The original Chinese penalty decisions are published on the SAIC’swebsite, available at http://www.saic.gov.cn/zwgk/gggs/jzzf/201611/t20161104_172076.html.

¹³ The original Chinese notice of the decision is published on the SAIC’swebsite, available at http://www.saic.gov.cn/zwgk/gggs/jzzf/201511/t20151105_163657.html.

the Administrative Authorities for Industry and Commerce to Prevent Abuse of Administrative Powers to Exclude or Restrain Competition, undertakings shall not enter into or implement monopoly agreements on the pretext of administrative restrictions set by administrative agencies. Thus, Anhui AIC concluded that the three companies have violated Article 13(3) of the Anti-monopoly Law, which prohibits undertakings splitting the sales market. However, Hefei Sub-branch was not fined as the organizer of the monopolistic conduct. This case demonstrated that even under the force or instruction of the government agencies, undertakings cannot be exempted from liability for breaching the Anti-monopoly Law. Undertakings must therefore be cautious not to engage in monopolistic conducts organized or instructed by administrative agencies.

ii. Trends, developments and strategies

Pharmaceutical companies became the new target of the Chinese antitrust enforcement authorities. And the insurance and automotive industries remained a higher enforcement priority in 2016.

It can be observed that the scope of investigation is becoming more extensive. A new form of reaching and implementing horizontal agreements (concerted conduct) has been found and identified. Further, the second boycotting case was concluded in 2016. All of these factors illustrate an intensified enforcement of cartel cases in 2016 and this trend is likely to continue in 2017.

iii. Outlook

Although the penalties in cartel cases experienced a sharp decrease in 2016, the antitrust authorities will recover their strength in the supervision of monopolistic conducts and enforcement efforts so as to uphold fair market competition. At the same time, they will strengthen their cooperation with competition authorities from other jurisdictions in dealing with international cartel cases. Moreover, the guidelines for applying the leniency programme are expected to come in force in 2017. The leniency guideline might encourage more cartel participants to voluntarily report their wrongdoings in order to secure an exemption from or reduction in penalty. This will also assist enforcement agencies in collecting substantial evidence and improve enforcement efficiency. In this sense, we expect that both the number of cartel case and the amount of penalties will increase in 2017.

III. ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

In 2016, both the NDRC and the SAIC launched several high-profile investigations on abuse of market dominance cases. The NDRC concluded six vertical restriction cases, which illustrated that resale price maintenance was one of the enforcement priorities of the antitrust authorities.

On the other hand, the majority of cases (10 out of 14) disclosed by the SAIC in 2016 related to the abuse of market dominance. The industries of the concluded cases involved gas, water, radio and television, power supply and salt supply, etc. Moreover, the SAIC's investigation into Tetra Pak lasted for almost five years. This section will provide a summary of some noteworthy cases concluded by the NDRC and SAIC.

i. Significant cases

Tetra Pak case¹⁴

On 9 November 2016, the SAIC concluded the landmark *Tetra Pak* case. The SAIC ordered Tetra Pak to cease its illegal conduct and imposed a penalty of more than 667 million yuan on Tetra Pak—equivalent to 7 per cent of the Swiss packaging giant's 2011 sales in China—for its abuse of a dominant position.

The SAIC followed its usual analytical method and identified Tetra Pak's illegal conduct by defining the relevant market, analysing Tetra Pak's dominant market position, identifying Tetra Pak's abusive behaviour, and assessing the anticompetitive effect of the abusive behaviour and whether there were justifiable reasons for it. The SAIC identified that Tetra Pak had a dominant market position in the following three markets: (1) aseptic paper packaging equipment for liquid food; (2) technology services regarding aseptic paper packaging equipment for liquid food; and (3) materials used for aseptic paper packaging for liquid food.

The SAIC concluded that Tetra Pak had abused its dominant market position in the above three markets by (1) conducting tying practices when selling and renting out equipment and providing technology services; (2) restricting upstream suppliers from selling raw material paper to its competitors; and (3) running a loyalty discount programme to exclude or restrict competition.

The SAIC found that Tetra Pak tied packaging materials when supplying its aseptic paper packaging equipment. Further, Tetra Pak had engaged in similar tying conduct when renting packaging equipment and providing technology services. By adopting such tying practice, Tetra Pak had limited its customers' choice of packaging materials; affected the sales of other competitors; and restricted overall competition in the material market. Under Article 17(5) of the Anti-monopoly Law, a business operator in a dominant position is prohibited from conducting tying practices without a justifiable reason.

Apart from the tying practice, Tetra Pak also conducted exclusive dealing by requesting its supplier of kraft base paper (the raw material paper used for its packaging materials, which has an advantage over normal material paper in terms of cost and performance) to supply raw paper exclusively to Tetra Pak and its affiliates. The supplier owned the patents for producing kraft base paper and was required by Tetra Pak not to sell such paper to other third parties or

¹⁴ The original Chinese penalty decision is published on the SAIC's website, available at http://www.saic.gov.cn/zwgk/gggs/jzzf/201611/t20161116_172375.html.

to use any Tetra Pak technologies – most of which were not proprietary technical information owned by Tetra Pak – for purposes other than producing products for Tetra Pak. In accordance with the penalty decision, Tetra Pak’s conduct violated Article 17(4) of the Anti-monopoly Law, which stipulates that a business operator in a dominant position is prohibited from exclusive dealing.

Besides the above identification, the authority made a breakthrough in its determination of illegal conduct in relation to loyalty discounts. In accordance with the penalty decision, loyalty discounts violated Article 17(7) of the Anti-monopoly Law, which was invoked for the first time as a miscellaneous provision. Unlike the preceding provisions of Article 17 of the Anti-monopoly Law, which target specific types of abusive conduct, Provision 7 is a catch-all provision that prohibits other forms of abuse of dominance determined by the antitrust authorities under the State Council.

The SAIC took an unusual approach to the controversial issue of loyalty discounts. In particular, it used concepts that were new to the Chinese antitrust enforcement regime (e.g., retrospective and customised discounts) to identify Tetra Pak’s anti-competitive conduct. The SAIC used detailed economic analysis to show that the nature of loyalty discounts would have induced downstream buyers to purchase substantial portions or all of their products from Tetra Pak, restricting competition to a great extent. As a dominant player in the materials market, Tetra Pak had been able to leverage its dominance by lowering the price of a portion of its products for customers that may have otherwise switched to different suppliers, inducing customers to continue purchasing from it.

This case provides a strong indication of the SAIC’s growing competency in complicated investigations and analysis. Further, its innovative approach to assessing unspecified monopolistic behaviour is a milestone in antitrust law enforcement and its decision will serve as a valuable precedent.

Phenol drug refusal-to-deal Case¹⁵

In November 2016, Chongqing AIC imposed 17,240 yuan in fines and 482,884 yuan in disgorgement on Chongqing Southwest No.2 Pharmaceutical Factory (Southwest No.2) for abusing its dominance by a refusal to deal.

In accordance with the decision, the market for phenol APIs and the Chinese domestic market are the relevant product and geographic markets, respectively. Southwest No.2 had, since July 2012, become the sole China-based company manufacturing and selling phenol APIs. In February 2014, it entered into a five-year contract to appoint Henan Shangqiu Xinxianfeng Pharmaceutical (Xinxianfeng) as the exclusive distribution agent of its phenol API products. Furthermore, between February and April 2014, Southwest No.2 stopped supplying phenol APIs to the market. Also, between May 2014 and December 2015, Southwest No.2 only sold

¹⁵ The original Chinese penalty decision is published on the SAIC’s website, available at http://www.saic.gov.cn/zwgk/gggs/jzzf/201612/t20161212_173297.html.

phenol APIs to six new clients, including its distribution partner Xinxianfeng, but it turned down supply requests to old clients.

Chongqing AIC identified that Southwest No.2 deliberately abused its market dominance by (1) refusing to deal with its existing counterparts without any justification; (2) increasing the sale price of phenol APIs within a short period of time in order to make more monopoly profits; and (3) refusing to deal with the competitors of its exclusive distributor to assist its distributor in enforcing unfair deal terms on the downstream customers.

Although Southwest No.2 temporarily refused to deal for merely months during which Southwest No.2 did not provide the phenol APIs to its old downstream dealers, it still made a deal with new customers. Chongqing AIC failed to prove that the refusal to deal of Southwest No.2 had competition harm on the relevant market. Southwest No.2 only manufactured phenol APIs in the upstream market and did not compete in the downstream market. Also, there were new distributors including Xinxianfeng in the downstream market. It is therefore doubtful such change of distribution model would actually be anticompetitive. Chongqing AIC's identification of this kind of refusal to deal might be a signal of SAIC's increasingly aggressive enforcement trend.

*Qingdao Gas case*¹⁶

On 17 May 2016, Shandong Administration for Industry and Commerce (Shandong AIC) fined Qingdao Xin'ao Xincheng Gas Co. Ltd (Qingdao Gas) 6.8 million yuan for its abuse of dominance behavior (i.e., imposing unreasonable trading conditions on the provision of gas). The fine amounted to 3 per cent of the company's annual sales in 2013.

Shandong AIC defined the relevant market as the market for pipeline gas supply services in Chengyang District, Qidao City of Shandong Province. In accordance with Shandong AIC's penalty decision, Qingdao Gas was the only service provider in the relevant market with a market share of 100 per cent, and faced no competition in the local market. Thus, the company had dominant market position in the pipeline gas supply services.

Shandong AIC found that there were two types of gas meters used in Chengyang District – intelligent IC card meter and normal gas meter. As to the calculation of gas fees, the former required prepayment and the latter can be paid post-consumption. Since 16 April 2010, Qingdao Gas required the users of both systems to prepay fees. Further, in the agreement with intelligent IC card meter users, Qingdao Gas required them to prepay 50 per cent of the fees of their estimated usage amount in each month. However, the pre-payment of the users could not be used as a gas fee, but simply kept by the company as deposit.

Shandong AIC concluded that the company had abused its market power to collect large amounts of 'prepaid gas bills', which had harmed the interests of users and led to a slowdown

¹⁶ The original Chinese penalty decision is published on the SAIC's website, available at http://www.saic.gov.cn/zwgk/gggs/jzzf/201605/t20160517_168618.html.

in local economic growth. The company had violated Article 17(5) of the Anti-monopoly Law for imposing unreasonable trading conditions and was fined 6.8 million yuan by Shandong AIC.

In 2016, the authorities strengthened their enforcement on the abuse of market dominance cases by utility companies. *Qingdao Gas Case* is the highest-penalty case in relation to the utility industry by the end of 2016. The application of ‘imposing unreasonable trading conditions in the transaction’ can be interpreted widely as indicated in this case. Companies with a dominant market position must be mindful and take a strict compliance approach in this regard.

*Medtronic case*¹⁷

On 5 December 2016, the NDRC imposed a penalty of 118.5 million yuan on Medtronic (Shanghai) Management – equivalent to 4 per cent of its 2015 China sales – for entering into and implementing vertical price monopoly agreements. This is the first medical device company that has been penalised by the Chinese competition authorities. Xu Xinyu, head of the No. 2 Antitrust Division of the NDRC’s Price Supervision and Anti-monopoly Bureau mentioned that more than 100 pharmaceutical and medical devices companies are under early-stage scrutiny, and the *Medtronic* case was just the ‘tip of iceberg’ of the agency’s overall investigation into the sector.¹⁸ Therefore, the *Medtronic* case is a representative case of this round of antitrust probe in the healthcare sector.

According to NDRC’s announcement, in 2014 Medtronic entered into vertical monopoly agreements with its trade counterparts, including online retailers and primary distributors in the field of cardiovascular diseases, restorative therapies and diabetes. They reached the agreements by means of distribution arrangements, verbal discussions and e-mail notifications. Specifically, the agreements entailed the following requirements: (1) directly fixing the resale price by circulating price lists to online retailers and distributors; (2) fixing gross profit rates of e-commerce retailers; (3) restricting minimum bid prices of distributors; and (4) restricting minimum resale price of pharmaceutical devices for hospitals.

The NDRC stated that the practice of Medtronic excluded or restricted market competition and harmed the interests of consumers. The NDRC concluded that Medtronic had violated Article 14(1) and 14(2) of the Anti-monopoly Law.

Interestingly, in accordance with the penalty decision, the NDRC also mentioned that Medtronic adopted other restrictive measures including vertical geographic market restraint and vertical customer restraint. This illustrates that the NDRC has noticed the geographic and customer restraints. Although the geographic and customer restraints were not expressly identified as the monopolistic behavior in the decision, it might imply such type of vertical

¹⁷ The original Chinese penalty decision is published on the NDRC’s website, available at http://jjs.ndrc.gov.cn/fjgld/201612/t20161209_829716.html.

¹⁸ Available at <http://www.chinadevelopment.com.cn/2016/12/1105615.shtml>.

restraints could be scrutinised in the future under certain circumstances.

Shanghai General Motors case¹⁹

On 23 December 2016, Shanghai Price Bureau announced its sanctions on SAIC General Motors Sales Company Limited (Shanghai GM), an auto sales joint venture between General Motors and its Chinese partner in Shanghai, for engaging in resale price maintenance behaviour. The imposed fine reached 201 million yuan, equivalent to 4 per cent of the sales of Shanghai GM in 2015.

According to the announcement, Shanghai GM entered into and implemented vertical monopoly agreements with Shanghai-based dealers through issuing regional price notices and notifications on market competition conditions and price guidance in relation to supply of certain Cadillac, Chevrolet and Buick automotive models.

Shanghai GM restricted the resale price range with dealers, and required the dealers to strictly follow the minimum resale price. The implementation of the minimum resale price requirement would be scrutinised from online price information, and the daily price information monitoring reports would be accordingly formulated. The dealers which failed to rectify their resale prices would face the consequence on the supplied vehicles being taken back. Also, the dealers would receive admonition and were penalized by a temporary suspension of popular model supply.

Through imposing the above alleged restriction, Shanghai GM had deprived its dealers' right to adjust resale prices in relation to market competition conditions and harmed consumer welfare and public interest. Therefore, Shanghai price bureau concluded that Shanghai GM's conducts constituted restricting minimum resale price, thus violating Article 14(2) of the Anti-monopoly Law and the Article 8(2) of the Anti-Pricing Monopoly Provisions.

This case further exemplifies the tendency of the ongoing antitrust scrutiny of the automotive industry since 2014. We expect that automotive and autoparts industries will remain a focus of the Chinese authorities' investigations in 2017.

Investigation of Microsoft

The investigation of Microsoft has lasted almost three years. The SAIC initiated the investigation in 2014, based on a complaint alleging that Microsoft violated the Anti-monopoly Law by failing to fully disclose information relating to the Windows operating system and Office software.

Since initiating the antitrust probe, the SAIC conducted large-scale dawn raids at many of

¹⁹ The original Chinese penalty decision is published on the Shanghai Price Bureau's website, available at <http://www.shdrc.gov.cn/fzgggz/jggl/jghzcfjds/25286.htm>.

Microsoft's China offices²⁰. On 5 January 2016, an investigation team of the SAIC sought answers to some important questions pertaining to the electronic data which the authority had accessed since the antitrust probe was launched²¹. The SAIC has collected much evidence from the above dawn raids on Microsoft. As the highest-profile case the SAIC has ever handled, the investigation into Microsoft may attract much more attention than the closed *Tetra Pak* case. *Microsoft* case is expected to continue for a while due to the complexity of the investigation.

ii. Trends, developments and strategies

Resale price maintenance played an important part in the NDRC's agenda. The NDRC concluded six cases in 2016 which share similar features such as conducting vertical restraints by circulating resale price lists and punishing disobediences of the involved downstream enterprises.

The remarkable penalty decision on *Tetra Pak* provides a vivid example of analysis in an abuse of market dominance case. More importantly, conduct (e.g., the provision of loyalty discounts in this case) that is not expressly prohibited under the Anti-monopoly Law or lawful in other jurisdictions could still be scrutinised by Chinese antitrust agencies.

Apart from *Tetra Pak* case, 2016 saw 10 abuse of dominance cases concluded by the SAIC, and most of them involved utility companies. Also, 2016 continued the trend in recent years of more abuse of market dominance cases being probed by the SAIC as opposed to the cases involving monopoly agreements.

iii. Outlook

There will emerge more abuse of market dominance cases in the coming year given that the competition authorities are becoming more confident, and even aggressive, in identifying a dominant position and abusive behavior. Moreover, the authorities will continue their antitrust crackdowns involving automotive, pharmaceutical, utilities, insurances and all the industries that have a significant impact on the people's livelihood. Additionally, very large enterprises, particularly public utility enterprises or market-influential enterprises, are more likely to trigger an antitrust investigation and be identified as abusing a dominant position.

IV. MERGER REVIEW

Compared with 2015, the caseload of MOFCOM increased significantly. In 2016, MOFCOM received 378 cases, up 7.4 per cent from 2015's total of 352 cases. Also, the number of cases accepted (360) and concluded (395) have both reached new heights –each had an increase of

²⁰ For detailed information of the dawn raids, see *The Public Competition Enforcement Review* (eighth edition), p. 86.

²¹ Available at the SAIC's website: http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201601/t20160106_165692.html.

6.5 per cent and 19 per cent from the last year.²² This year only saw two conditionally approved cases and this might indicate that remedy cases are still relatively rare in China. It's notable that an upfront buyer was required in both of these cases for the structural remedies. There were no prohibition cases in 2016.

The overall review period continued to reduce and about 82 per cent of the cases (342 cases) were concluded in the Phase I (30 days) in 2016, while 74 per cent of cases concluded in Phase I in 2015.²³ The efficiency of MOFCOM's merger review has been improved due to the proficiency of the officials and the developments of simple case review mechanism. 273 cases were filed under the simple case review procedure with an average review period of around 24 days – slightly faster on average than last year (28 days in 2015). Furthermore, approximately 98.6 per cent of simple cases were cleared in Phase I.

Moreover, MOFCOM has strengthened its antitrust enforcement efforts in relation to the non-filers that should have notified MOFCOM of their concentrations.

i. Significant cases

Penalties for non-filers

On 4 May 2016, MOFCOM issued three penalty decisions against parties involved in three merger cases that failed to fulfill their notification obligations under the Anti-monopoly Law. The three non-filing penalty decisions published by MOFCOM were:

- (1) *Biggain Holdings/ Jilin Sichang Pharmaceutical*:²⁴ Biggain Holdings was fined 150,000 yuan for its failure to notify its acquisition of a 50 per cent stake in Jilin Sichang Pharmaceutical;
- (2) *New United Group/ Bombardier Transportation Sweden*:²⁵ New United Group and Bombardier Transportation Sweden were fined 300,000 and 400,000 yuan respectively for their failure to notify before establishing a joint venture; and
- (3) *Beijing CNR Investment/ Securities Investment*:²⁶ Beijing CNR Investment (now CRRC Financial and Securities Investment) and Hitachi were each fined 150,000 yuan for their failure to notify a proposed joint venture before establishing it.

The published decisions have significantly deterrent effect on non-filing parties. Although the monetary value of each penalty is much lower compared with the transaction value, the reputational damage is relatively high due to the public disclosure of the penalty decisions.

²² As stated in MOFCOM's press release, available at <http://www.mofcom.gov.cn/article/ae/slfw/201701/20170102496823.shtml>.

²³ As stated in MOFCOM's press release, available at <http://www.mofcom.gov.cn/article/ae/slfw/201701/20170102496823.shtml>.

²⁴ The original Chinese penalty decision is published on the MOFCOM's website, available at <http://fdj.mofcom.gov.cn/article/ztxx/201605/20160501311079.shtml>.

²⁵ The original Chinese penalty decision is published on the MOFCOM's website, available at <http://fdj.mofcom.gov.cn/article/ztxx/201605/20160501311081.shtml>.

²⁶ The original Chinese penalty decision is published on the MOFCOM's website, available at <http://fdj.mofcom.gov.cn/article/ztxx/201605/20160501311092.shtml>.

*AB InBev's acquisition of SABMiller*²⁷

On 29 July 2016, MOFCOM conditionally approved the proposed acquisition of SABMiller Plc (SABMiller) by Anheuser-Busch InBev NV (AB InBev). The conditions included: (1) the divestiture of SABMiller's 49 per cent stake in China Resources Snow Breweries Limited (CR Snow, a joint venture established by SABMiller and China Resources Beer (Holdings) Co.); and (2) such divestiture shall be completed within 24 hours upon the equity transfer of the SABMiller/AB InBev deal.

AB InBev and SABMiller mainly engaged in the production and sale of beer. MOFCOM subdivided the beer market into the low-end ordinary beer market and high-end premium/super-premium beer market based on the price and consumer preference and other factors. As to the geographical market, MOFCOM considered the relevant market in accordance with the 24 overlapped provincial administrative regions as well as the national market as a whole, rather than a single Chinese market.

MOFCOM conducts in-depth analysis of the concentration's effect on the market, taking into account the concentration status of the relevant market, the market share and control power of the parties, the difficulty of market entry, the effect on the consumers and other business operators, etc. MOFCOM found that:

- (1) there were limited competitors in the Chinese beer market, which had a relatively high degree of concentration;
- (2) In 2014's Chinese low-end beer market, CR Snow and AB InBev were the first- and the third-largest competitors in terms of market share, and their combined market share would be 41 per cent after concentration. In 2014's high-end beer market, AB InBev was the biggest player while CR Snow was the second biggest and their combined market share would be 52 per cent;
- (3) According to MOFCOM's findings, AB InBev and CR Snow were the closest rivals in each of the relevant market. The deal will reduce the competition between the two close competitors in the market. MOFCOM concluded that the leading position of the combined entity would be significantly enhanced by the merger; and
- (4) The deal would harm the interests of the downstream distributors as well as customers eventually.

In anticipation of MOFCOM's competition concerns, within one week of submission of merger notification, AB InBev voluntarily submitted a remedy plan to sell the 49 per cent stake in CR Snow owned by SABMiller. MOFCOM believed the sale of the CR Snow shares to China Resources Beer (Holdings) Co could eliminate the potential anti-competitive impact of the acquisition and therefore approved the case with such divestiture remedy.

This is the first conditional case approved by MOFCOM with its geographical market

²⁷ The announcement is available at MOFCOM's website:
<http://fdj.mofcom.gov.cn/article/ztxx/201607/20160701369044.shtml>.

subdivided in accordance with provincial regions since the implementation of the Anti-monopoly Law. Such market division led to speculations as to whether MOFCOM had tightened its review standards, particularly with regard to concerns raised by the overseas companies. In fact, it is not uncommon for MOFCOM to define a local market based on administrative regions (e.g., province or city) in the merger cases. As these cases did not exclude or restrict competition, and MOFCOM did not disclose the detailed process in defining the geographical market in such cases, therefore, these cases did not cause much attention. More significantly, this case is one of the few cases in China that has used an upfront buyer strategy to secure timely approval from MOFCOM.

*Abbott's acquisition of St. Jude*²⁸

On 30 December 2016, MOFCOM conditionally cleared the proposed US\$25 billion acquisition of St. Jude Medical Inc. (St. Jude) by Abbott Laboratories (Abbott). MOFCOM was concerned that the transaction might eliminate or restrict competition in the market of small vascular closure devices in China. MOFCOM reviewed the competition impacts from the perspective of the market concentration, market share, market entry and the interests of the consumers, etc. MOFCOM found that:

- (1) Abbott and St. Jude had a 71.3 per cent and 23.9 per cent market share respectively before the concentration. They were the first - and second -largest undertakings in the small vascular closure device market in China, and the combined market share would exceed 95 per cent;
- (2) this merger would eliminate the competition between the two leading players; and
- (3) from the perspective of market entry, it will be difficult to have new competitive participants in the Chinese market in short term given the technical requirement of small vascular closure devices is high and the obtaining market access permission from the relevant regulatory authorities takes a long time.

MOFCOM concluded that after the completion of the deal, Abbott may have the incentive and ability to raise the price of related commodities, or slow down the price decline, or reduce the service quality, and ultimately resulting in damage to the interests of consumers.

To address MOFCOM's competition concerns, Abbott voluntarily proposed a remedy to MOFCOM that St. Jude would divest its vascular closure products business after several rounds of discussions between MOFCOM and Abbott. In accordance with the proposed remedy, St. Jude would sell its vascular closure products business to Terumo Corporation (Terumo) in compliance with the purchase agreements concluded among Abbott, St. Jude and Terumo. MOFCOM believed the remedy proposed by Abbott could reduce the impact of competition and approved the case conditional on the divestiture remedy proposed by Abbott.

Again, MOFCOM accepted the divestiture remedy with an upfront buyer in this case. As indicated in this case and the *AB InBev/SABMiller* case, MOFCOM seems to have embraced upfront buyer remedies in the structural cases. For those transactions with potential

²⁸ The announcement is available at MOFCOM's website:
<http://fdj.mofcom.gov.cn/article/ztxx/201612/20161202440204.shtml>.

competition harm, the parties may obtain a quicker approval or avoid a block if they can offer an upfront buyer structural remedy at the early stage of the notification. From MOFCOM's perspective, this approach would reduce the significant cost of supervision of the implementation of the divestiture plan and ensure the certainty of implementation.

ii. Trends, developments and strategies

MOFCOM has accumulated extensive experience after eight years of continuous efforts and is establishing its reputation as an important antitrust agency in the world. Moreover, MOFCOM continuously strengthens its cooperation with antitrust agencies in other jurisdiction in relation to the conditionally approved case, such as Abbott's acquisition of St. Jude²⁹ involving remedial measures. Also, MOFCOM is not as interventionist as some in the West might have perceived in the sense there have only been two remedy cases each year and no block deals in the past two years. The review standard is relatively stable and basically in line with the international practice.

iii. Outlook

In 2017, MOFCOM is committed to further improve its review process and reduce the review period. MOFCOM will also continue to monitor merger controls and is determined to enhance law enforcement. Undertakings are advised to be cautious in fulfilling their pre-merger notification obligations to avoid penalty, and in particular, reputational damage. Although MOFCOM is not aggressive in terms of interference the merger transactions, MOFCOM is quite independent and confident in rendering their remedy decisions. Parties with leading market positions shall carefully assess the competition impact in planning a big merger transaction and a proactive remedy proposal such as the upfront buyer divestiture might be an effective strategy.

V. CONCLUSIONS

i. Pending cases and legislation

Proposed guidelines pending before the AMC include:

- (1) Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights;
- (2) Guidelines for Applying Leniency Program to Horizontal Monopoly Agreements;
- (3) Guidelines on Undertakings' Commitments in Anti-Monopoly Cases;
- (4) Guidelines on Procedural Rules for Exemption Application with respect to Monopoly Agreements;
- (5) Guidelines on Calculation of Illegal Gains and Fines; and
- (6) Antitrust Guidelines in the Automotive Industry.

²⁹ As stated in FTC's press release, available at: <https://www.ftc.gov/news-events/press-releases/2016/12/ftc-puts-conditions-abbott-laboratories-proposed-25-billion>.

MOFCOM is also engaged in legislative work. On the basis of the increasingly mature practice, MOFCOM is stepping up to revise the Measures for the Filing of Concentration of Business Undertakings and the Measures for the Review of Concentration of Business Undertakings to provide guidance for business operators.

In addition to legislation, the SAIC's investigation into Microsoft is still ongoing. The outcome of the investigation of Microsoft is expected to be more prominent than the *Tetra Pak* decision given its complicated and controversial nature of the alleged monopolistic conduct.

ii. Analysis

The Chinese antitrust legislative work is gradually developing and the AMC is expected to approve the long-awaited six antitrust guidelines in 2017. These guidelines set out detailed guidance on the practical issues and procedural rules with respect to the application of the Anti-monopoly Law. Both the SAIC and the NDRC are demonstrating an appetite for substantial fines and aggressive enforcement. In 2017 we are likely to see an increased number of investigations and more high-profile decisions. In addition to the ongoing antitrust investigations in the healthcare and automotive industries, the competition agencies may focus on the consumer goods, financial service, public utilities and other industries that have a particular effect on quality of life. As demonstrated in the *Tetra Pak* and *Southwest No.2 refusal-to-deal* cases, the Chinese competition authorities are not afraid to use their discretionary power to determine an unspecified monopolistic behavior under the Anti-monopoly Law. Active companies in China, even without a leading market position, should carefully review their business practices in China to ensure full compliance with the China's increasingly challenging antitrust enforcement regime.