

March 28, 2018

ANTITRUST IN CHINA – 2017 YEAR IN REVIEW

To Our Clients and Friends:

China's antitrust regulators had a noteworthy year of enforcement of the Anti-Monopoly Law ("AML") in 2017. Although there were fewer high-profile, record-breaking cases, 2017 saw China's antitrust regulators expand their scope of enforcement in both merger and non-merger cases and expend significant effort into producing new legislation and guidelines.

This client alert highlights the most significant developments from 2017 and what to expect for 2018. 2018 marks the tenth anniversary of the AML and is expected to be another active and notable year for the continued development of antitrust enforcement in China. Notably, the Chinese State Council announced on March 13, 2018 that it would seek to merge the three existing antitrust regulators into a centralized agency, called the "National Markets Supervision Management Bureau". This merger is likely to lead to a better allocation of resources among the agencies, which should increase the level of enforcement.

1. Legislative/Regulatory Developments

Amendments to the Anti-Unfair Competition Law ("AUCL"). On January 1, 2018 amendments to the AUCL came into force. The amendments streamline China's antitrust legislation, so that abuse of dominant position, abuse of administrative power by government agencies and bid-rigging are no longer within the scope of the AUCL and are exclusively dealt with under the AML. The provisions establishing a new prohibition on abuses of a relatively superior position, which had been included in earlier consultation drafts, were not included in the final version.

NDRC Guidelines on Pricing Behaviours of Trade Associations. On July 20, 2017 the NDRC issued guidelines with the aim of preventing trade associations from distorting competition.[1] The guidelines address price-related behaviours of trade associations which are at risk of infringing the Price Law or violating the price fixing provisions of the AML. The guidelines specifically deal with the release of price information and set out factors that are relevant for considering whether this has breached the Price Law or the AML.

Revised Draft Measures on the Review of Concentrations of Business Operators. On September 8, 2017, MOFCOM released second draft amendments to its merger review measures for public consultation.[2] These consolidate the existing implementing rules relating to the merger control provisions of the AML. A first draft had been published in July 2017. The second draft amendments contain significant changes in relation to the meaning of control, the treatment of interrelated transactions, the calculation of turnover and the treatment of concentrations which are below the turnover thresholds.

The second draft amendments clarify that, when analysing control, the ability to influence decisions relating to budget, strategy and appointments of senior management should be taken into account. Interrelated transactions through which one undertaking obtains control over another will be considered as one concentration. Turnover calculations will be required to reflect the entities that the undertaking controls *at the time of filing*, which may lead to a need for amendments to audited financial statements. Lastly, and perhaps most notably, the draft amendments set out a procedure for MOFCOM to review transactions that fall below the thresholds. It is unclear when the final guidelines will be released and come into force.

Potential Amendments to the AML. In 2017, China's antitrust enforcement agencies and legislators commenced its work to revise the AML. This will result in the first revisions to the AML in its ten-year life. At this stage, it is unclear when an initial draft will be released for consultation.

Second Draft Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (Draft for Comments). On March 23, 2017, the Anti-Monopoly Commission of the State Council published the second draft of the "Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights" for public comment.[3] The draft guidelines have been jointly produced by China's three antitrust enforcement agencies and the State Intellectual Property Office. The draft guidelines introduce a case-specific analytical framework to determine whether an undertaking's exercise of its IP rights is anti-competitive. They address the definition of the relevant market and provide that, in some cases, it may be appropriate to consider the relevant technology market (as opposed to the relevant product market). They also address specific areas of anti-competitive conduct under the AML and introduce a safe harbour provision in respect of certain agreements that would otherwise fall foul of the AML. The application of the AML to intellectual property rights has been a contentious issue ever since the law first came into force. These draft guidelines do not resolve all potential issues; in particular, they lack a definition of "intellectual property right" and do not provide hypothetical examples which would assist in the NDRC's application of the analytic framework.

Planned merger of the antitrust regulators and the establishment of the new agency. On March 13, 2018, the Chinese State Council announced that as part of a wider restructuring of its government agencies, it will consolidate its three competition agencies – NDRC, SAIC and MOFCOM – into a single, centralized regulator. Called the "National Markets Supervision Management Bureau", the centralized authority "will undertake unified antitrust enforcement and standardize and safeguard market order" by overseeing mergers, pricing and non-pricing issues.[4] This move will bring to an end the eight year-old tripartite system, which had been criticized for its fragmented enforcement and arbitrary assignment of duties. On March 20, 2018, the National Markets Supervision Management Bureau has been formally established. Zhang Mao will be the head and the deputy party secretary of the new agency.[5]

2. Merger Control

MOFCOM received 400 merger filings in 2017. 30% of the cases were considered as "non-simple cases" and foreign-related M&A cases accounted for about 70% of the total in 2017.[6]

MOFCOM has improved its efficiency in 2017. As compared to 2016, MOFCOM's average official launch time after accepting merger reviews has reduced by 19% to 28 days, and the length of merger reviews by an average of 6.9% to 39 days.[7] Approximately 97% of all "simplified procedure" cases that were filed were concluded during the preliminary review stage.[8]

In addition, during the course of 2017, MOFCOM removed remedies in 11 transactions out of a total of 34 cases where it has granted conditional approvals since 2008.[9] The remaining 23 deals remain subject to MOFCOM's remedies and supervision.

Published Decisions. Only those MOFCOM decisions prohibiting a transaction, or imposing or removing remedies are published. While MOFCOM did not prohibit any transaction in 2017, it imposed remedies in seven cases, representing a significant increase from two conditional clearances in 2016.[10]

On April 29, 2017, MOFCOM conditionally approved the Dow/DuPont merger, by ordering the divestiture of certain assets and business units of DuPont and Dow. MOFCOM further ordered that, within five years after the completion of the proposed merger, Dow and DuPont must: (1) supply Chinese companies with certain active pharmaceutical ingredients ("API"s) and rice herbicide preparations on a non-exclusive basis and at reasonable prices; (2) for plant hopper control, supply Chinese companies with sulfoxaflor and sulfoxaflor-only solutions available for sale in China on a non-exclusive basis and at reasonable prices; and (3) refrain from requiring Chinese distributors to sell certain APIs and existing preparations for Dow's sulfoxaflor and rice herbicides in China on an exclusive basis.[11]

On August 22, 2017, MOFCOM imposed conditions on the Broadcom/Brocade merger clearance, namely: (i) the establishment of a fire wall to protect confidential information on third-party fibre channel adapter products and switch products; (ii) interoperability between Broadcom's switch products and third-party adapters; (iii) the continued usage of existing terms for Broadcom's switch products; and (iv) a commitment not engage in tying or bundling.

In early November 2017, MOFCOM conditionally approved two transactions, namely: the proposed merger between Agrium and Potash Corporation, and the proposed acquisition of Hamburg Süd by Maersk Line[12]. In the former, MOFCOM required the merged entity to: (i) ensure the Canadian Potash Export Corporation's ("**Canpotex**") stable and reliable supply of potash fertilizer to China on competitive terms; (ii) promote Canpotex's supply of potash fertilizer to China, with an export volume equivalent to or higher than the average in the last five years, and subject to negotiated terms and conditions; and (iii) maintain its current sales practices.[13] In the latter case, MOFCOM's approval was subject to Maersk Line's commitment not to extend a vessel sharing agreement on the Far East Asia - West Coast of South America trade route, to which Hamburg Süd was a party. Maersk Line also committed to terminate Hamburg Süd's membership of a vessel sharing agreement on the Far East Asia - East Coast of South America trade route as early as possible under the contract terms.

On November 24, 2017, MOFCOM conditionally approved ASE's proposed acquisition of Siliconware. Despite the parties' market shares in China not exceeding 30%, the decision imposed a two-year "hold-separate" condition, under which the two companies must remain independent of each other for 24 months, by keeping their financial, HR, pricing, sales, production capacity and procurement

matters separate.^[14] Furthermore, under the conditions, the holding company must exercise limited shareholders' rights during this period. In addition, the parties must provide semi-conductor packaging and testing services to clients in a non-discriminatory way and set the prices and transaction conditions in a reasonable manner. Lastly, both parties must not restrict customers' selection of, or transition to, other providers and submit a biannual report to MOFCOM regarding their compliance with the hold-separate condition.

Lastly, on December 28, 2017, MOFCOM conditionally cleared Becton Dickinson's acquisition of CR Bard, under the condition that the parties divest Becton Dickinson's soft tissue core needle biopsy device business and research assets.

Enforcement Against Non-Notified Transactions. In 2017, MOFCOM published penalty decisions for failure to notify reportable transactions in more than 17 cases. In one of these cases, OCI was fined RMB150,000 (approximately \$23,749) for failing to notify MOFCOM of a three-step acquisition prior to taking the first step. OCI had notified MOFCOM only before taking the second step of its acquisition. Similarly, Meinian Onehealth was fined RMB300,000 (approximately \$47,499) for failing to notify MOFCOM until the final stage of the acquisition.^[15] MOFCOM concluded that the various stages of the transaction were mutually dependent and served the same purpose, namely transferring control of Ciming to Meinian Onehealth.

3. Non-Merger Enforcement

Until the three enforcement agencies are merged into a National Markets Supervision Management Bureau, both NDRC and SAIC enforce the nonmerger provisions of the AML.

Due to the NDRC's fine of RMB6.088 billion (approximately \$963.9 million) on Qualcomm (which was the largest fine imposed on a single company in China), 2015 saw a record-setting level of penalties at a total of RMB7 billion (approximately \$1.1 billion) imposed by the NDRC.

3.1 NDRC Enforcement Decisions

In 2017, the fines imposed by the NDRC amounted to a total of approximately RMB466 million (approximately \$73.8 million).^[16]

The NDRC continued its aggressive enforcement against the pharmaceutical sector during the course of 2017. In February 2017, the Shandong Provincial Price Bureau imposed a fine of RMB120,000 (approximately \$18,999) on Weifang Longshunhe Pharmaceuticals Co., Ltd. ("**Longshunhe**") for obstructing its on-site investigation into purported anti-competitive pricing activities.^[17] This decision represents the first time that the NDRC has imposed a fine for such conduct. The alleged practices occurred while officials gathered evidence on the premises of Longshunhe on August 10, 2016. It has been reported that while officials tried to gather USBs as evidence, an employee of Longshunhe threw them outside of the premises and a number of other employees interfered with the officials' efforts to retrieve the USBs.^[18]

3.2 SAIC Enforcement Decisions

In 2017, the State Administration for Industry and Commerce ("**SAIC**") commenced 18 new investigations.^[19] The SAIC announced thirteen antitrust penalty decisions totaling approximately RMB49 million (approximately \$7.8 million), involving both anti-competitive agreements and abuse of dominance cases.^[20] Although the fines imposed by the SAIC in 2017 fall short of the record RMB720 million (approximately \$114 million) of penalties it imposed in 2016, which included sanctions for the leading Swedish food processing and packaging solutions company, Tetra Pak, they are noticeably higher than the fines of RMB7.05 million (approximately \$1.1 million) in 2015, and RMB14.5 million (approximately \$2.3 million) in 2014.^[21] Since 2008, SAIC has investigated a total of 86 cases, including 54 monopolistic agreements and 43 abuse of dominance cases.

The most significant enforcement action related to Wuhan Xinxing Jingying Pharmaceuticals Co., Ltd. ("**Wuhan Xinxing**"). The Hubei Administration for Industry and Commerce (the "**Hubei AIC**") imposed a fine of RMB372,321 (approximately \$56,053) on the pharmaceutical company for imposing unreasonable conditions and abusing its market dominance. The Hubei AIC determined that Wuhan Xinxing had a dominant position in the Chinese markets for the sale of methyl salicylate API. The Hubei AIC concluded that Wuhan Xinxing abused its dominant position by: (i) distorting the competitive order in the relevant markets for methyl salicylate API and final products; (ii) imposing burdensome requirements on manufacturers of final products (such as the provision of production records, payment of deposits and appointment of Wuhan Xinxing as the exclusive distributor); and (iii) harming consumers' interests, namely through a price increase from RMB 20,000 (approximately \$3,167)/tonne to RMB 60,000 – 150,000 (approximately \$9,500 – \$23,750)/tonne, which was passed on to end customers.^[22]

The decision demonstrates the effects-based approach of the Hubei AIC: the authority carefully assessed the effect of the alleged anti-competitive practices before determining that they constituted an abuse of dominance.

4. Civil Litigation

2017 saw the Guangdong High People's Court hand down a landmark judgment which upheld the lower court's decision in favour of Shenzhen Tsinghua Sware Software Hi-tech Co., Ltd. ("**Sware**").^[23] This represented one of China's first cases where a private plaintiff has successfully challenged the anti-competitive behavior of a government entity by relying on the AML's administrative monopoly provisions. Sware brought a case against the Guangdong Education Department, arguing that the authority had abused its administrative power to eliminate or restrict competition in 2014 by appointing one of Sware's competitors, Glodon Software Company Limited, as the exclusive software provider to manage all of the Guangdong province's project cost management competitions. The Guangdong High People's Court rejected the Guangdong Education Department's argument that the relevant conduct could not be challenged by private parties as well as its arguments based on public interest. The Court found that the Guangdong Education Department had in fact breached the AML by eliminating and restricting competition.

[1] Guidelines on Pricing Behaviours of Trade Associations (《行业协会价格行为指南》) (released July 20, 2017), available at <http://www.ndrc.gov.cn/zcfb/zcfbgg/201707/W020170725555925290946.pdf>.

[2] Notice of MOFCOM to Solicit Public Comments on the "Measures on the Review of Concentrations of Business Operators (Revised Draft for Comments)" (商务部关于《经营者集中审查办法(修订草案征求意见稿)》公开征求意见的通知) (released September 8, 2017), available at <http://tfs.mofcom.gov.cn/article/as/201709/20170902640565.shtml>.

[3] Guidelines on Prohibition of Abuses of Intellectual Property Rights (Draft for Comments) For Public Comment (公开征求《关于滥用知识产权的反垄断指南(征求意见稿)》的意见) (released March 23, 2017), available at <http://fldj.mofcom.gov.cn/article/zcfb/201703/20170302539418.shtml>.

[4] Central Commission for Discipline Inspection, "Statement on the Institutional Reform Plan of the State Council – The First Session of the 13th National People's Congress of the People's Republic of China on March 13, 2018" (关于国务院机构改革方案的说明 — 2018年3月13日在第十三届全国人民代表大会第一次会议上) (released March 14, 2018), available at: http://www.ccdi.gov.cn/toutiao/201803/t20180314_166243.html.

[5] Xinhua, "Establishment of the National Markets Supervision Management Bureau – Zhang Mao as the Head, and Bi Jingquan as Deputy Head" (国家市场监督管理总局成立 张茅任局长毕井泉任副局长) (released March 23, 2018), available at: http://www.xinhuanet.com/politics/2018-03/23/c_1122578408.htm.

[6] MOFCOM press release, "Year-End Overview IX for Commerce Work in 2017 - Implement New Development Concept and Do a Good Job of Anti-monopoly Work in New Era" (January 10, 2018), available at <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201801/20180102701041.shtml>.

[7] MLex, "China's MOFCOM lifts remedies in 11 transactions, 23 still under supervision, official says" (released December 15, 2017), available at <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=946260&siteid=192&rd=1>.

[8] Ibid.

[9] Ibid.

[10] See footnote 4.

[11] MOFCOM 2017, No. 25 Announcement – Announcement of the Anti-monopoly Review Decision concerning Conditional Approval of Proposed Merger between the Dow Chemical Company and

E.I. Du Pont Nemours and Company (released May 3, 2017), available at: <http://english.mofcom.gov.cn/article/policyrelease/announcement/201705/20170502577349.shtml>.

[12] MOFCOM 2017, No. 77 Announcement – Announcement of the Anti-Monopoly Review Decision concerning Conditional Approval of the Acquisition of Equity of Hamburg Südamerikanische Dampfschiffahrts –Gesellschaft KG by Maersk Line A/S (released November 9, 2017), available at: <http://english.mofcom.gov.cn/article/policyrelease/buwei/201711/20171102672906.shtml>.

[13] MOFCOM 2017, No. 75 Announcement – Announcement of the Anti-Monopoly Review Decision concerning Conditional Approval of Proposed Merger between Agrium and Potash Corporation (released November 7, 2017), available at: <http://english.mofcom.gov.cn/article/policyrelease/announcement/201711/20171102672899.shtml>.

[14] MOFCOM 2017, No. 81 Announcement – Announcement of the Anti-Monopoly Review Decision concerning Conditional Approval of Undertakings in the Case of Acquisition of Equity Interests of Siliconware Precision Industries Co., Ltd by Advanced Semiconductor Engineering, Inc. (released November 26, 2017), available at: <http://english.mofcom.gov.cn/article/policyrelease/buwei/201711/20171102677556.shtml>; also see our article, "MOFCOM Clears Semiconductor Merger with a Two-Year "Hold-Separate" Condition" (released December 8, 2017), available at: <https://www.gibsondunn.com/mofcom-clears-semiconductor-merger-with-a-two-year-hold-separate-condition/>.

[15] MOFCOM 2017, No. 206 – Decision of Administrative Penalty: Meinian Onehealth Healthcare (Group) Co., Ltd., Failing to Notify of their Concentration (May 11, 2017), available at: <http://fldj.mofcom.gov.cn/article/ztxx/201705/20170502573416.shtml>.

[16] MLex, "China's antitrust agencies bid farewell to slow 2017 as new year of expanded enforcement beckons" (released December 26, 2017), available at <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/asia/chinas-antitrust-agencies-bid-farewell-to-slow-2017-as-new-year-of-expanded-enforcement-beckons>.

[17] NDRC, Shandong Provincial Price Bureau Fines Longshunhe RMB120,000 for Obstruction of Antitrust Investigation, available at: http://www.ndrc.gov.cn/gzdt/201702/t20170213_837623.html.

[18] Ibid.

[19] PaRR, "SAIC investigates 18 antitrust cases in 2017 – China Competition Policy & Law Conference" (released January 11, 2018), available at <https://app.parr-global.com/intelligence/view/prime-2566745>.

[20] See footnote 14.

[21] Ibid.

[22] SAIC 2017, No. 4 Announcement – Antitrust Enforcement Announcement on the Case concerning the Abuse of Dominance Position in the Market by Xinxing Jingying Pharmaceutical Limited Company (竞争执法公告2017年4号 武汉新兴精英医药有限公司滥用市场支配地位案) (released March 9, 2017), available at: http://www.saic.gov.cn/fldyfbzdjz/jzzfzg/201703/t20170309_232297.html.

[23] Guangdong High People's Court, Civil Administrative Appeal Judgment – Guangdong Education Department and Glodon Software Company Limited (广东省教育厅、广联达软件股份有限公司民政行政管理(民政)二审行政判决书) (released October 23, 2017).



The following Gibson Dunn lawyers assisted in the preparation of this client update: Sébastien Evrard, Rebecca Sambrook, Emily Seo and Kobe Chow.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition Practice Group, or the following lawyers in the firm's Hong Kong office:

Sébastien Evrard (+852 2214 3798, sevrard@gibsondunn.com)

Kelly Austin (+852 2214 3788, kaustin@gibsondunn.com)

Emily Seo (+852 2214 3725, eseo@gibsondunn.com)

Rebecca Sambrook (+852 2214 3729, rsambrook@gibsondunn.com)

© 2018 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.