China Competition Bulletin

The China Competition Bulletin summarises the latest developments of competition and regulatory policy in the People’s Republic of China, covering laws and policies, cases, agency and other relevant news, and selected publications.

Highlights

The Ministry of Commerce (MOFCOM) has conditionally approved Anheuser-Busch InBev’s (AB InBev) takeover of SABMiller, requiring that SABMiller divest its 49% interest in China Resources Snow Breweries (CR Snow). The deal was approved after a formal review period of about 4 months, however AB InBev had also engaged in pre-notification discussions with the MOFCOM for 3 months.

The National Development and Reform Commission (NDRC) has fined 3 pharmaceutical companies for engaging in price fixing and joint boycott behavior in relation to estazolam, which is strictly regulated by the state. The NDRC’s local bureaus in Shanghai and Hubei also sanctioned companies for engaging in resale price maintenance (RPM) and abuse of dominance, respectively. For the State Administration for Industry and Commerce (SAIC), its local bureau in Hubei sanctioned an industry association for organising and implementing a market sharing arrangement relating to new car insurance.

1. Cases

1. Conditional clearance of Anheuser-Busch InBev’s acquisition of SABMiller granted by the MOFCOM

On 29 July 2016, AB InBev’s acquisition of SABMiller was conditionally approved by the MOFCOM. With the acquisition, AB InBev acquires SABMiller’s 49% interest in CR Snow. When Anheuser-Busch acquired InBev back in 2008, the MOFCOM approved that acquisition on the condition that, inter alia, if AB InBev sought to acquire shares in CR Snow, it must notify the MOFCOM and seek its approval.

Whilst the formal review period took just over 4 months, in fact AB InBev had begun pre-notification discussions with the MOFCOM in December 2015. This was 3 months before it submitted a formal notification on 8 March 2016, which was regarded as incomplete by the MOFCOM. AB InBev then submitted proposed remedies to the MOFCOM, along with a sale and purchase agreement relating to the sale of SAB Miller’s 49% interest in CR Snow to China Resources Breweries, on 14 March 2016. The notification was declared complete on 29 March 2016. The MOFCOM’s review had entered into extended phase 2 when it made its conditional clearance decision.
Competition assessment

The MOFCOM concluded that the proposed acquisition would eliminate and restrict competition in the relevant markets and harm the interests of Chinese consumers.

The relevant product market was defined as the production and sale of beer, segmented into the popular beer and premium beer markets. The geographic market for beer was defined as provincial, and the MOFCOM examined the 24 provinces where the parties have competitive overlaps. It also examined the beer market on a national basis.

The MOFCOM determined that the proposed acquisition would enhance AB InBev's control in the relevant markets. The Chinese beer market is quite highly concentrated, with the top 5 players accounting for over 80% of the market. The combined market share of AB InBev and CR Snow in 2014 was 43% in the Chinese beer market. Further, their combined market shares in the popular beer and premium beer markets were much higher than those of their competitors' in 11 and 13 provinces, respectively, and there is lack of competitive constraint. The MOFCOM also found that, in the other provinces, AB InBev and CR Snow would have the ability to enter the market and gain market power quickly.

The MOFCOM also found that the proposed acquisition would reduce competition between the 2 leading and closest competitors in both the popular beer and premium beer markets, as AB InBev and CR Snow were found to compete fiercely with each other on multiple dimensions including beer brands, distributors, and consumers. Barriers to entry would also increase as a result of the proposed acquisition. The MOFCOM found that the AB InBev and China Resources Breweries have both the incentive and ability to integrate their distribution channels, customer relationships, and other important resources in China and to control distribution channels so as to squeeze out their competitors' beer products and make it more difficult for them to gain access to distribution channels. The MOFCOM also determined that the proposed acquisition would harm the interests of downstream distributors. Most distributors are small in size and have limited operational scope. They do not have much bargaining power vis-à-vis beer producers and depend on them. As the proposed acquisition would reduce competition between AB InBev and CR Snow, distributors may have even less bargaining power.

Remedies

The MOFCOM concluded that the final proposed remedies submitted by AB InBev and SABMiller (accepted on 14 July 2016 and 21 July 2016, respectively) were sufficient to address its concerns that the proposed acquisition would eliminate and restrict competition. It decided to approve the proposed acquisition on the condition that AB InBev and SABMiller divest SABMiller’s 49% interest in CR Snow in accordance with the sale and purchase agreement they submitted to the MOFCOM. That sale needed to be completed within 24 hours after the completion of AB InBev’s acquisition of SABMiller. The parties are also required to comply with Article 20 of the MOFCOM’s Regulation on the Imposition of Restrictive Conditions in Concentrations Between Business Operators (Trial) to ensure the viability, competitiveness, and marketability of the divested business.


2. The NDRC sanctions 3 pharmaceutical companies for price fixing and engaging in joint boycott

On 22 July 2016, the NDRC sanctioned 3 pharmaceutical companies for engaging in price fixing and joint boycotts in relation to estazolam tablets and active pharmaceutical ingredients (API), in breach of Articles 13(1)(1) and 13(1)(5) of the Anti-Monopoly Law (AML).

The 3 companies (Huazhong Yaoye, Shandong Xinyi, and Changzhou Siyao) are the only active licensed producers of estazolam, a drug used to treat insomnia. Estazolam is strictly controlled by the state and is listed on the National Essential Medicines List and the National Low-Cost Medicines List.
According to the NDRC, after the introduction of the low-cost medicines policy in 2014, the 3 companies agreed to stop selling estazolam API to external parties and to increase the price of estazolam tablets. They communicated through meetings, telephone calls, text messages, and emails. In 2013 and 2014, the 3 companies had supplied 16 downstream manufacturers with estazolam API. However, since October 2014, the 3 companies stopped supplying external downstream estazolam tablet manufacturers and retained estazolam API for their own use. As a result, the vast majority of the estazolam tablet manufacturers stopped production due to shortage of supply of estazolam API. This restricted competition in the downstream estazolam tablet market. Since December 2014, the price of estazolam tablets produced by the 3 companies increased significantly, with the magnitude and timing of the price increases being uniform across the companies. This greatly increased patients’ financial burden and harmed the interests of consumers. The combined effect of the 2 monopoly agreements was output reduction of estazolam tablets, which impacted the availability of medicines to patients.

The NDRC ordered the 3 companies to stop the illegal conduct and fined them over RMB 2.6 million in total. The ringleader Huazhong Yaoye was fined 7% of its 2015 estazolam tablet sales revenue. Shandong Xinyi and Changzhou Siyao were fined 2.5% and 3% of their 2015 estazolam tablet sales revenue, respectively.

Source: http://jjs.ndrc.gov.cn/gzdt/201607/t20160727_812589.html

3. Hubei Price Bureau fines 5 natural gas suppliers for abusing their dominance by selling at unfairly high prices

On 12 July 2016, the NDRC announced that the Hubei Price Bureau had fined 5 piped natural gas suppliers a total of nearly RMB 3 million for abuse of dominance. The companies were found to be in breach of Article 17 of the AML for charging unfairly high prices.

These 5 companies are authorised to supply piped natural gas and related services in their respective regions, and have done so since 2013. The Hubei Price Bureau found that the companies had obtained positions of market dominance by signing piped natural gas infrastructure installation contracts with non-residential users. The Hubei Price Bureau also concluded that the piped gas suppliers had abused their dominant positions by depriving the non-residential users of their rights to choose the suppliers to design, construct, and manage the infrastructure, and to purchase construction materials. They also charged unfairly high fees, as the fees were significantly greater than the actual costs incurred, the cost of materials charged to the non-residential users was much higher than the actual procurement cost, and the fees and profits were substantially higher than those of similar businesses.

Two of the 5 piped natural gas suppliers were fined 2% of their previous year’s relevant revenue because they had cooperated with the investigation and voluntarily undertaken corrective measures to mitigate the effects of the illegal conduct. The remaining 3 piped natural gas suppliers were fined 4% of their previous year’s relevant revenue.

Source: http://www.sdpc.gov.cn/fzggz/jgjyflid/fjgld/201607/t20160712_811024.html

4. Shanghai Price Bureau fines 3 Haier-affiliated companies for RPM

On 8 August 2016, the Shanghai Price Bureau fined the Shanghai branches of 3 companies over RMB 12 million for RPM. These companies, which are affiliated with Haier, a Chinese consumer electronics and home appliances manufacturer, signed distribution agreements in Shanghai. The investigation began in response to multiple reports made through the NDRC’s 12358 price supervision platform in June 2015 that the 3 companies were controlling their distributors’ prices.

Since 2012, the companies have made and implemented monopoly agreements to restrict minimum resale prices to third parties, which involved refrigerators, air conditioners, range hoods, and other products supplied to supermarkets and specialty stores. They did so by announcing sales policies, sending notices and market management letters, signing distribution agreements containing restrictions on pricing, fining
distributors for non-compliance by deducting bond moneys, periodically issuing a restricted retail price
guidebook, and stopping supply and/or cooperation with non-complying distributors.

The Shanghai Price Bureau found that the companies had breached Article 14(2) of the AML and Article 8(2)
of the NDRC’s *Anti-Price Monopoly Regulation* by restricting competition, distorting the normal market
competition order, and harming the legitimate interests of other businesses and consumers. The companies
were ordered to stop their illegal conduct and were fined 3% of the relevant revenue in the previous year. In
determining the sanctions, the Shanghai Price Bureau took into account the fact that the companies had
voluntarily undertaken corrective measures, returned fines, and mitigated the effect of the illegal conduct.


5. **Hubei Insurance Association fined for market sharing**

On 6 May 2016, the Hubei Administration for Industry and Commerce (Hubei AIC) fined the Hubei Insurance
Association for organising and implementing a market sharing arrangement relating to the new car insurance
market in Wuhan. It began its investigation in March 2013, after receiving authorisation from the SAIC in
Beijing.

In May 2003, the Hubei Insurance Association arranged for the Wuhan branches of 4 insurance companies
to sign an agreement whereby the parties agreed to centralise the management of new car insurance
policies and divide the market for new car insurance in Wuhan. Under the agreement, the parties
coordinated major underwriting decisions and established a customer service centre where new car
insurance policies were allocated in accordance with agreed market shares. The market shares were
adjusted annually. The agreement also provided for cost-sharing arrangements, the control and monitoring of
market shares, personnel management, and liability for breach. Revisions to adjust market share calculations
and to take new participants into account were made in 2004, 2006, and 2008. Revisions made after 2009
stepped back from the market sharing arrangements, and in November 2013, documents and arrangements
that were inconsistent with the AML were repealed. As of 30 November 2015, 27 car insurance providers
were party to the agreement and had a presence in the customer service centres.

The Hubei AIC determined that the Hubei Insurance Association and insurance companies had breached
Articles 16 and 13 of the AML, respectively.

The Hubei AIC had originally decided to impose a fine of RMB 500,000 on the Hubei Insurance Association,
but subsequently adjusted the amount downwards to RMB 200,000 as it took into account the Hubei
Insurance Association’s cooperation with the investigation. However, the Hubei Insurance Association’s
specific arguments advocating for a lighter penalty were rejected. It had argued that the purpose of
establishing the customer service centre was to maintain the stability of the insurance industry, and that it
had, after the AML came into effect, studied the law and continually revised the arrangements, leading to the
repeal of the illegal documents and arrangements in 2013. The Hubei AIC did not accept these arguments
as the parties should not have implemented a market sharing arrangement to achieve the goal of market
stability, and it had taken until November 2013 to eliminate these arrangements, which was after the Hubei
AIC began the investigation.


6. **Court dismisses administrative proceedings relating to Shandong AIC’s decision to fine accounting firms in Linyi for market sharing**

In May 2016, 7 accounting firms began administrative proceedings in the Lixia District People’s Court in
Jinan, Shandong Province, to set aside a penalty decision made by the Shandong Administration for Industry
and Commerce (Shandong AIC) pursuant to the AML. In that decision, which was reported in the May/June
2016 edition of this bulletin, the Shandong AIC found that 25 accounting firms in Linyi had engaged in market
sharing in breach of Article 13(1)(1) of the AML.
The proceedings were dismissed by the court on 11 August 2016. The court determined that the decision had been made in accordance with proper procedures and that the facts were clear, evidence valid, and law appropriately applied.


7. **Beijing IP Court finds Sogou’s use of Baidu’s registered trademarks in breach of the AUCL**

On 15 July 2016, the Beijing Intellectual Property Court upheld the first instance decision relating to a claim brought by Baidu against Sogou for engaging in unfair competition.

Baidu, an online search engine provider in China, filed a lawsuit against Sogou, which operates sogou.com and Sogou Mobile Explorer. Users can choose to have Baidu’s search engine as the search bar in Sogou Mobile Explorer, and Baidu’s icon would appear in the search bar. Baidu claimed that this search bar recommended content in the drop-down list that directed users to online information from sogou.com, without using Baidu’s search engine.

The court decided that Sogou’s recommendation of content from its own website in the drop-down list of Baidu’s search bar was an infringement of Baidu’s registered trademark. The court held that Sogou’s conduct of inserting content links to sogou.com in the drop-down list without stating that the recommended content was not provided by Baidu may cause confusion among users. Therefore, Sogou was found to have infringed Baidu’s trademark in violation of Article 5 of the *Anti-Unfair Competition Law* (AUCL).

Baidu’s second claim that Sogou’s conduct constituted traffic hijacking was dismissed.


2. **News of Anti-Monopoly Enforcement Agencies and the Courts**

1. **Update on the MOFCOM’s Activities**

In mid-August and early September 2016, Deputy Director-General of the MOFCOM Anti-Monopoly Bureau, Han Chunlin, carried out studies relating to the fair competition review system in Shijiazhuang, Tianjin, Zhengzhou, Taiyuan, and Beijing.


2. **The NDRC issues internal notice on implementing the fair competition review system**

On 27 July 2016, the General Office of the NDRC issued a notice to departments, bureaus, and offices of the NDRC on the implementation of the fair competition review system within the NDRC.

According to the notice, the NDRC unit responsible for drafting the measure or policy also needs to undertake the related fair competition review. During the drafting process, the unit will self-assess to determine the object, standards, and requirements of the review. It will submit a written conclusion, along with relevant materials, to the leaders of the NDRC. Where necessary, the unit may seek the opinion of the NDRC Price Supervision and Anti-Monopoly Bureau. Further, when submitting the measure or policy to the NDRC Department of Laws and Regulations for legal review, the drafting unit must also provide its conclusion on the fair competition review. The legal review will include a check that the unit has complied with the fair competition review procedures.

3. **Update on the NDRC’s Activities**

On 28 July 2016, the NDRC provided an update on its consultation on the draft guideline on determining illegal gains from monopolistic conduct and the setting of fines that it released on 17 June 2016. It received nearly 200 comments and suggestions from foreign competition agencies, domestic and foreign businesses, industry associations, research institutes, and law firms.


4. **Update on the SAIC’s Activities**

The SAIC attended a workshop held by its local bureau in Hunan on AML cases on 15 July 2016. The Hunan Administration for Industry and Commerce (Hunan AIC), along with academics from Hunan University and Changsha University of Science & Industry, discussed the legal issues arising from recent cases investigated by the Hunan AIC.

The SAIC met with representatives from the State Grid Corporation and China Gas Association on 25 July and 3 August 2016, respectively. They discussed the SAIC’s enforcement campaign aimed at addressing anti-competitive conduct by public utilities and the potential competition issues in their respective industries.

The Sichuan Trade and Industry Bureau provided an update on its activities in response to the national enforcement campaign against the anti-competitive conduct of public utilities. As at the end of June 2016, it has initiated 59 cases and concluded 24 cases. The cases related to 10 industries, including the supply of water, electricity, and gas, public transportation, and funeral services. Separately, the Jiangsu AIC held a briefing on the next stage of its work in relation to the national enforcement campaign.


3. **Central and Local Government News**

1. **State Council divides key tasks for improving intellectual property development**

On 18 July 2016, the State Council released a plan to strengthen intellectual property rights (IPRs). The State Council specifically requested that the NDRC, the MOFCOM, the SAIC, the State Intellectual Property Office, and the Legislative Affairs Office of the State Council take charge of improving the legal system to regulate abusive conduct related to IPRs and formulating related antitrust law enforcement guidelines. It also stated that the 3 Chinese competition agencies should be responsible for improving antitrust scrutiny over IPR abuses and investigating and sanctioning anti-competitive conduct, including the abuse of IPRs to restrict competition. The State Council also requested that relevant authorities support industry associations and professional institutions to release information about trends in IPR and competition.

*Source: [http://www.gov.cn/zhengce/content/2016-07/18/content_5092397.htm](http://www.gov.cn/zhengce/content/2016-07/18/content_5092397.htm)*
2. **State Council issues plan to break up geographic segmentation and sectoral monopolies**

On 22 August 2016, the State Council released its plan on reducing costs for real economy enterprises. One of the key tasks under that plan is breaking up geographic segmentation and sectoral monopolies to enhance fair market competition.

The State Council emphasised that restrictive provisions formulated by local governments that impede the formation of a single market across China need to be cleaned up and abolished, and that introduction of competition into monopolistic industries should be accelerated. It also stressed the importance of implementing the fair competition review system to prevent anti-competitive measures taken by government bodies. The State Council also stated that competition policies and rules need to be improved and that enforcement under the AML and the AUCL should be strengthened. These tasks are the responsibility of the 3 Chinese competition agencies.

*Source: [http://www.gov.cn/zhengce/content/2016-08/22/content_5101282.htm](http://www.gov.cn/zhengce/content/2016-08/22/content_5101282.htm)*

4. **News of State-Owned Enterprises**

1. **SASAC stresses fair competition in transactions involved state-owned assets**

On 1 July 2016, the State-owned Assets Supervision and Administration Commission released measures on transactions involved state-owned assets. It requires that, in the transfer of property rights, no qualification conditions should be set for the transferee. If it is necessary to set qualification conditions, then such conditions should not be discriminatory or violate the principle of fair competition.

*Source: [http://www.sasac.gov.cn/n85881/n85921/c2370781/content.html](http://www.sasac.gov.cn/n85881/n85921/c2370781/content.html)*
Major Acronyms

AML Anti-Monopoly Law 2007, PRC
MOFCOM Ministry of Commerce, PRC (MOFCOM is one of China’s three competition enforcement agencies which applies the AML and is responsible for enforcing the merger control regime under the AML)
NDRC National Development and Reform Commission, PRC (NDRC is one of China’s three competition enforcement agencies which applies the AML and is responsible for enforcing price-related infringements of the AML in the areas of restrictive agreements and abuse of dominant market position)
SAIC State Administration for Industry and Commerce, PRC (SAIC is one of China’s three competition enforcement agencies which applies the AML and is responsible for enforcing non price-related infringements of the AML in the areas of restrictive agreements and abuse of dominant market position)
PRC People’s Republic of China

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