

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.

中国竞争简报

A publication of the Competition
Law and Economics Network at
Melbourne Law School,
University of Melbourne

Edition 45: November/December
2016

Highlights

It has been an active couple of months for competition enforcement in China. The Ministry of Commerce (MOFCOM) issued its decision to fine Canon for not complying with the merger notification requirements under the Anti-Monopoly Law (AML). This is the MOFCOM's ninth published decision relating to failure to notify, and this merger is the first publicly known purely offshore merger to be sanctioned for failure to notify. The MOFCOM also conditionally approved Abbott Laboratories' acquisition of St Jude Medical, requiring the parties to divest St Jude Medical's vascular closure device business. The National Development and Reform Commission (NDRC) and its bureau in Shanghai fined a number of companies for engaging in resale price maintenance (RPM) in the medical, automotive, and dairy industries. The State Administration of Industry and Commerce (SAIC) also issued decisions relating to its abuse of dominance investigations in the water supply, pharmaceutical, and salt industries, and a market sharing arrangement in the encryption payment devices sector.

The revised Anti-Unfair Competition Law (AUCL) has been recently approved by the State Council, and it has been submitted to the Standing Committee of the National People's Congress (SCNPC) for deliberation.

Please note that the China Competition Bulletin will be switching to a quarterly publication beginning in 2017.

1. Cases

1. MOFCOM grants conditional clearance of Abbott's acquisition of St. Jude Medical

On 30 December 2016, Abbott Laboratories's acquisition of St Jude Medical was conditionally approved by the MOFCOM. On 4 July 2016, Abbott Laboratories submitted its notification to the MOFCOM, which was accepted as complete on 6 September 2016. The authority's review entered phase 2 on 6 October 2016.

Editors

Professor Allan Fels, AO 艾伦·菲尔斯
Professorial Fellow, Melbourne Law School,
University of Melbourne, Australia

Co-Director, University of Chinese Academy
of Sciences (UCAS) Centre for Competition
Law

Former Chairman, the Australian
Competition and Consumer Commission
(ACCC)
afels@unimelb.edu.au

Professor Xiaoye Wang 王晓晔
Institute of Law, Chinese Academy of Social
Sciences (CASS) and Hunan University

Director, UCAS Centre for Competition Law

Member of the Expert's Committee of the
Anti-Monopoly Commission under the State
Council of the P R China
wangxiaoye88@live.cn

Dr Wendy Ng 吴颖诗
Lecturer, Melbourne Law School, University
of Melbourne, Australia
wendy.ng@unimelb.edu.au

Adrian Emch
Lecturer of Competition Law, Peking
University, China
adrian.emch@hoganlovells.com

In this edition

- | | |
|---|----|
| 1. Cases | 1 |
| 2. News of the Anti-Monopoly Enforcement
Agencies and the Courts | 9 |
| 3. Central and Local Government News | 10 |
| 4. News of State-Owned Enterprises | 11 |

Competition assessment

The MOFCOM determined that the proposed acquisition would eliminate or restrict competition in the relevant market and harm the interests of Chinese consumers.

The relevant product market was defined as vascular closure devices, which is a medical device used for preventing the blood loss after minimally invasive cardiovascular diagnosis and surgery. China was the relevant geographic market.

The MOFCOM concluded that the proposed acquisition would further enhance Abbott Laboratories's control over the relevant market. It said that the vascular closure devices market in China is highly concentrated. The combined market share of Abbott Laboratories and St Jude Medical in 2015 exceeded 95% in China. The pre-transaction HHI of 5,678 would increase to 9,086 after the acquisition. The authority also determined that the proposed acquisition would eliminate the competition between the two leading and closest market players in the relevant market, as the product characteristics, targeted customers, and distribution channels of Abbott Laboratories and St Jude Medical were very similar. The MOFCOM also found that there were high barriers to entry since the manufacture of vascular closure devices requires high technical capability, and it takes many years for the relevant government departments (the China Food and Drug Administration and its local branches) to grant marketing approval for medical devices. Finally, the MOFCOM concluded that the proposed acquisition would harm the interests of Chinese customers as Abbott Laboratories would have the incentive to raise the price of vascular closure devices or defer price reductions, and lower service quality.

Remedies

Abbott Laboratories submitted proposed remedies to the MOFCOM on 12 December 2016, along with a purchase agreement executed among the merging parties and Terumo, who would buy St Jude Medical's vascular closure device business. The MOFCOM determined that the submitted remedies were able to reduce the negative impact brought about by the proposed acquisition. Hence, the MOFCOM decided to approve the proposed acquisition on the condition that St Jude Medical divest its vascular closure device business within 20 days after completion of the proposed acquisition. The merging parties would also be required to provide transition services to Terumo during the transitional period. Moreover, Abbott Laboratories must report to the MOFCOM in writing within 10 days upon completion of the divestment, and submit a written report to the MOFCOM on a semi-annual basis during the transitional period.

Source: <http://fldj.mofcom.gov.cn/article/ztxx/201612/20161202440204.shtml>

2. MOFCOM fines Canon for gunjumping for its acquisition of Toshiba Medical Systems

On 16 December 2016, the MOFCOM announced that it had fined Canon RMB 300,000 for failure to notify its proposed acquisition of Toshiba Medical Systems in accordance with the AML on time. Its decision was published on 4 January 2017.

The proposed acquisition proceeded in 2 stages. In stage 1, 3 natural persons formed a special purpose vehicle (MS Holding) on 8 March 2016, and a week later, all ordinary shares in Toshiba Medical Systems were converted into 3 classes: (1) 20 class A shares with voting rights; (2) 1 class B share with no voting rights; and (3) 100 warrants (right to purchase ordinary shares). On 17 March 2016, MS Holding purchased the 20 class A shares and Canon purchased the 1 class B share and the 100 warrants. In stage 2, Canon would exercise the warrants (paying nominal consideration of 100 JPY) and Toshiba would buy back and cancel the class A and class B shares from MS Holding and Canon, respectively, after which Canon would hold 100% of the shares in Toshiba Medical Systems. The completion of stage 2 was subject to antitrust approval, including in China.

The MOFCOM determined that the proposed acquisition had not been notified in accordance with the law. The 2 stages were closely related and indivisible parts of Canon's proposed acquisition of Toshiba Medical Systems. The MOFCOM also pointed out that the full purchase price had been paid upon the completion of stage 1. Therefore, although Canon notified the transaction to the MOFCOM after the completion of stage 1 and before completion of the stage 2, the MOFCOM found that the transaction was already being

implemented before it was notified for antitrust approval. Canon was therefore in breach of Article 21 of the AML. The MOFCOM also stated that the proposed acquisition had no anticompetitive effect.

Source: <http://fldj.mofcom.gov.cn/article/ztxx/201701/20170102495433.shtml>

3. Medtronic fined over RMB 118 million for RPM

On 7 December 2016, the NDRC announced that it had investigated and fined Medtronic for engaging in RPM in breach of the AML.

The NDRC found that, since 2014, Medtronic had agreed with its distributors to limit the resale, tender, and minimum prices of its cardiovascular, restorative therapy, and diabetes medical device products in China. It did so by issuing price lists that specified the resale prices for different tiers of distributors; fixing the gross margin of the products sold by platform distributors (who were not permitted to sell to end users); requiring distributors to abide by guidance tender prices and to obtain its written approval prior to departing from those prices; and fixing minimum resale prices to hospitals. In addition, Medtronic imposed customer and territorial restrictions on the distributors. To implement the agreements, Medtronic conducted internal assessments, investigated situations where distributors sold outside their allocated sales territories, and punished non-complying distributors by stopping supply, imposing fines, cancelling discounts or credit limits, or terminating the distributorship. In doing so, the NDRC found, Medtronic had limited and eliminated price competition between distributors, restricted inter-brand competition in medical devices, and harmed the legitimate rights of end users and consumer interests.

The NDRC concluded that Medtronic had breached Articles 14(1) and (2) of the AML by fixing the resale price and restricting the minimum resale price of its products. The NDRC noted that Medtronic had admitted its illegal conduct and voluntarily implemented corrective measures such as abolishing the resale price restrictions, allowing platform distributors to sell to end users and distributors to sell across sales districts, revising distribution agreements, tender management systems, and distributor management policies, and improving antitrust compliance. Medtronic was ordered to stop the illegal conduct and fined RMB 118.52 million (4% of sales revenue of the relevant products in China).

Source: http://www.sdpc.gov.cn/fzgggz/jgdyfld/fjgld/201612/t20161209_829717.html

4. Shanghai Price Bureau fines GM's joint venture RMB 201 million for RPM

The Shanghai Price Bureau imposed a fine of RMB 201 million on SAIC General Motors Corp, a 50/50 joint venture between General Motors and Shanghai Automotive Industry Corporation, a state-owned enterprise (SOE), for RPM. The decision was made on 19 December 2016, after the authority's investigation ended in November 2016.

The Shanghai Price Bureau found that, since 2014, the joint venture had restricted minimum resale prices of certain Cadillac, Chevrolet, and Buick models of its dealers in the Shanghai area. To reach the monopoly agreements, it issued price notices on Cadillac models that fixed the retail price and limited the maximum discount; released notices on the market dynamics of Chevrolet models that fixed the guidance price, gross margin, and suggested promotional cash discount; and released price guidance that set out the recommended retail price and discounts for Buick models. To implement the agreements, the joint venture engaged a third-party market research company to undertake "secret inspections" of its Shanghai dealers, and based on the information gathered, area managers would set the maximum discount for its dealers. Dealers who did not comply would face the threat of having their vehicles reclaimed or having their supply of popular models suspended for 2 weeks. The joint venture would also obtain information about retail prices from third-party websites, issue violation notices, reduce sales rebates, and make verbal requests for price adjustments.

The Shanghai Price Bureau concluded that the joint venture had restricted minimum resale prices in violation of Article 14(2) of the AML and Article 8(2) of the *Anti-Price Monopoly Regulation*. In doing so, the joint

venture had deprived dealers of their right to determine their own prices which resulted in consumers paying higher prices, the elimination of competition, and harm to consumer interests and the public interest. The joint venture was fined over RMB 201 million (equivalent to 4% of its 2015 sales of the relevant products).

Source: <http://www.shdrc.gov.cn/fzgggz/jggl/jghzcfjds/25286.htm>

5. Speed Fresh sanctioned in Shanghai for setting minimum prices

On 27 December 2016, the Shanghai Price Bureau published its decision to fine Shanghai Speed Fresh Logistics Co., Ltd. (Speed Fresh) for setting minimum prices in its distribution of pasteurised milk products. The authority had completed its investigation on 13 July 2016.

The Shanghai Price Bureau found that Speed Fresh had imposed minimum resale prices for pasteurised milk products from 2015 to 2016. The company executed distribution agreements with its dealers under which Speed Fresh set a pricing system and promotion policy, and dealers and their own distributors were required to comply. Under the agreements, dealers who deviated from the minimum prices would face financial penalties (deductions from security deposits), the potential cessation of supply, or potential termination of the distributorship. To implement the agreements, Speed Fresh issued price adjustment letters to be followed by dealers, monitored market prices, and produced reports which listed retail stores that sold pasteurised milk products at below the minimum price.

Following its assessment, the Shanghai Price Bureau concluded that Speed Fresh had engaged in minimum RPM in violation of Article 14(2) of the AML and Article 8(2) of the *Anti-Price Monopoly Regulation*. The authority held that Speed Fresh had deprived dealers of their right to independent pricing, which hiked up the price to the detriment of consumer interests. Therefore, the Shanghai Price Bureau decided to impose a fine of close to RMB 2 million (equivalent to 1% of the company's 2015 sales revenues).

Source: <http://fgw.sh.gov.cn/fzgggz/jggl/jghzcfjds/25364.htm>

6. Smith & Nephew's China business fined in Shanghai for setting minimum retail prices for over-the-counter scar treatment products

On 29 December 2016, the Shanghai Price Bureau sanctioned Smith & Nephew in China for fixing the resale price for certain of its over-the-counter scar treatment products. The authority began its investigation in October 2015.

Since 2014, Smith & Nephew has sold the products in question through an exclusive distributor in China, who resold the products to a secondary distributor, who in turn resold them to pharmacies. Smith & Nephew set the sale prices for the products at each level of the distribution chain, which were implemented by the exclusive distributor, secondary distributors, and pharmacies. Smith & Nephew also issued notices to the secondary distributors and adopted other measures to implement the resale prices and monitored compliance with its pricing policy.

The Shanghai Price Bureau concluded that Smith & Nephew had breached Article 14(1) of the AML. Smith & Nephew had restricted price competition between secondary distributors and pharmacies and deprived the distributors and pharmacies of their ability to determine their own prices, resulting in competition being eliminated and restricted and consumer interests being harmed. The authority ordered Smith & Nephew to cease the illegal conduct and imposed a fine of over RMB 720,000 (representing 6% of relevant 2014 sales), taking into account the nature, degree, and duration of the conduct, and insufficient cooperation from some Smith & Nephew employees during the early stages of the investigation.

Source: <http://www.shdrc.gov.cn/fzgggz/jggl/jghzcfjds/25365.htm>

7. Three payment encryption device manufacturers in Anhui sanctioned for market sharing

On 18 September 2016, the Anhui Administration for Industry and Commerce (Anhui AIC) sanctioned 3 companies for reaching and implementing a market sharing agreement.

In October 2010, the Hefei branch of the People's Bank of China (Hefei Bank) appointed the 3 companies as the recommended payment encryption device providers for the Anhui Province. Two months later, the 3 companies, along with 20 banking financial institutions, participated in a meeting held by the Hefei Bank. The meeting agreed on the division of the payment encryption device sales market, product models, price, promotions, sales measures, training, and other fees. The Hefei Bank issued documents that confirmed the agreement, which was then implemented by the 3 companies.

The parties made several arguments as to why their conduct was not illegal. Such arguments included that the parallel conduct was in response to requirements imposed by the Hefei Bank and not because they had deliberately divided the Anhui payment encryption device sales market or reached a market sharing agreement, and that the conduct was more properly characterised as administrative monopoly conduct. These arguments were rejected by the Anhui AIC.

The Anhui AIC found that, during the implementation of the market sharing agreement, the price was significantly higher than the competitive price, which harmed consumer interest. It concluded that the parties, who are competitors, had breached Article 13(1)(3) of the AML and Article 5(1) of the SAIC's *Regulation on the Prohibition of Abuse of Administrative Power to Eliminate or Restrict Competition*. In total, illegal gains of nearly RMB 30 million were confiscated, and the parties were fined a total of over RMB 400,000 (each party was fined 8% of 2014 sales revenue). The Anhui AIC took into account the long duration of the conduct (5 years), the large volumes involved, and the impact of the conduct on prices and consumer interest.

Source: http://www.saic.gov.cn/zwgk/gqgs/jzzf/201611/t20161104_172076.html

8. Water supply company in Urumqi sanctioned for abuse of dominance

On 12 December 2016, the SAIC released the decision made by the Xinjiang Uygur Autonomous Region Administration for Industry and Commerce (Xinjiang AIC) to fine the Urumqi Water Industry Group (Urumqi Water) for abuse of dominance. The Xinjiang AIC made its decision on 12 October 2016, after receiving authorisation from the SAIC in Beijing to undertake the investigation in December 2014.

The Xinjiang AIC determined the relevant market was that for urban public water supply services in urban areas of Urumqi. It found that Urumqi Water was dominant in the relevant market because it was the only urban public water supply company in the area, users were highly dependent on its services, and there are high barriers to entry.

Since 2011, Urumqi Water adopted measures to restrict users to transacting with designated suppliers. Such measures include issuing various documents, adopting particular management practices and work flow processes, and undertaking inspections. These measures effectively required that materials used in residential water supply projects and facilities (such as water meters, pipes, and valves) be sourced from specified providers (usually determined through tender), that they be inspected and approved by Urumqi Water before use or progressing to the next stage of the approval process, and that small-scale projects be undertaken by Urumqi Water to the exclusion of other contractors.

The Xinjiang AIC concluded that Urumqi Water had, by adopting these measures, relied on its monopoly position and users' dependence on its services to abuse that position. It had required that users choose its designated water meters and undertake internal and external water supply and drainage construction works at the same time, and stipulated that one of its subsidiaries undertake those works. Urumqi Water had argued that it needed to ensure the quality of water meters and other materials, and the compatibility of these materials with its software. It also argued that the use of bad quality materials (of other suppliers) would increase the costs of maintenance services (which it provided for free) and its workload, in a situation where it

was already making losses. Further, it believed that its conduct was in accordance with local regulations, and that the agreements were entered into voluntarily. The Xinjiang AIC rejected these arguments.

The Xinjiang AIC found that Urumqi Water had breached Article 17(1)(4) of the AML and Article 5(2) of the SAIC's *Regulation on the Prohibition of Conduct Abusing a Dominant Market Position*. It believed that Urumqi Water had no legitimate reason for engaging in such conduct, used its monopoly position, and restricted users to transacting with designated suppliers. In doing so, it harmed competition by preventing other businesses in small-scale construction and water meter sales from participating in the market and limited the right of transacting parties to choose. The Xinjiang AIC decided to impose a lighter penalty because Urumqi Water had cooperated with the investigation and implemented corrective measures. Urumqi Water was ordered to stop its illegal conduct and fined nearly RMB 150 million (representing 1% of 2013 sales revenue).

Source: http://www.saic.gov.cn/zwgk/gqgs/jzzf/cfid/201612/t20161212_173292.html

9. Chongqing Southwest Pharmaceutical abused its dominance by refusing to supply phenol API

On 24 November 2016, Chongqing Southwest Pharmaceutical was found to have abused its dominance in breach of the AML and the SAIC's *Regulation on the Prohibition of Conduct Abusing a Dominant Market Position*. It is a producer of phenol active pharmaceutical ingredients (API), which is commonly used in the production of corn plaster. The investigation was initiated in response to complaints received by the Chongqing Administration for Industry and Commerce (Chongqing AIC) at the end of 2015.

The Chongqing AIC determined that Chongqing Southwest Pharmaceutical was dominant in the relevant market, which was defined to be the national phenol API market. The Chongqing AIC made this determination based on several factors. First, Chongqing Southwest Pharmaceutical was the monopoly supplier of phenol API in China. It obtained the required certification to produce phenol API in June 2012, and was the sole producer of phenol API in China. There were no imports of phenol API, as the State Food and Drug Administration had not approved any phenol API imports. Second, Chongqing Southwest Pharmaceutical had the ability to control the price, availability, supply, and other trading conditions relating to phenol API due to its 100% market share, unchanged demand, and strong customer loyalty. Third, it was difficult to enter the market, as it required substantial investment and research and development and relevant licenses and certifications. Finally, the Chongqing AIC found that phenol producers were dependent on Chongqing Southwest Pharmaceuticals for supply of phenol API. Prior to January 2014, there were about 40 phenol producers and pharmaceutical companies. However, after Chongqing Southwest Pharmaceutical stopped supplying phenol API in February 2014, those phenol producers and pharmaceutical companies that could not procure phenol API abandoned phenol production and suffered losses.

The Chongqing AIC found that Chongqing Southwest Pharmaceutical had refused to supply phenol API to existing customers, which was an abuse of its dominance. In February 2014, Chongqing Southwest Pharmaceutical signed a 5-year national distribution agreement with Henan Shangqiu New Pioneer Pharmaceutical. Since then, Chongqing Southwest Pharmaceutical stopped supplying phenol API to its existing customers, despite requests to do so; it only supplied phenol API to 6 new customers from May 2014 to December 2015. It also did not produce any phenol API in 2016. Chongqing Southwest Pharmaceutical argued that it appointed New Pioneer as exclusive distributor to reduce the workload for its small sales team and to clean up the market (as many corn plaster producers had used industrial adulterated phenol or expired phenol in their production). It also stated that, after August 2014, it terminated the exclusive distributorship, resumed normal supply activities, and did not refuse to supply. The Chongqing AIC did not accept these arguments and concluded that Chongqing Southwest Pharmaceutical had no legitimate reason for engaging in the conduct. Instead, it found that Chongqing Southwest Pharmaceutical engaged in the conduct to earn monopoly profits, resulting in the elimination of competition between phenol producers, loss of capacity in the corn plaster production market, and harm to the interests of wholesale and retail pharmaceutical companies and consumers.

The Chongqing AIC confiscated illegal gains of over RMB 482,000 and imposed a fine of RMB 17,240 (representing 1% of 2015 sales).

Source: http://www.saic.gov.cn/zwgk/gqgs/jzzf/cfd/201612/t20161213_173318.html

10. Water supply company in Suqian punished by the Jiangsu AIC for abuse of dominance

On 28 November 2016, the Jiangsu Administration for Industry and Commerce (Jiangsu AIC) imposed a fine on Suqian Yinkong Water Supply Company (Yinkong Water), a subsidiary of United Water Corporation, for abuse of dominance.

The relevant market was defined to be urban public water supply services in the Sucheng, Yanghe, Susu, and City Economic Development Zone districts of Suqian City. Yinkong Water was determined to have a position of dominance in the relevant market because it had 100% market share as it was the exclusive operator, real estate developers were completely dependent on it for urban water supply, and market entry was difficult.

The Jiangsu AIC found that Yinkong Water had engaged in abuse of dominance conduct by requiring that real estate developers use designated water supply infrastructure construction services. When real estate developers applied to Yinkong Water for water supply services, Yinkong Water required them to use the water supply infrastructure construction services of its subsidiary, and real estate developers were forced to use those arranged services to avoid delays. Further, contrary to Yinkong Water's claims, there were no regulations requiring that water supply facilities be provided by the water service supplier. Yinkong Water argued that its conduct was necessary to ensure water supply quality and safety, that it was consistent with national policy, and that the real estate developers entered into the arrangements voluntarily. The Jiangsu AIC did not accept the arguments, instead finding that there was no legal or policy basis for Yinkong Water's actions, and that the transactions were contrary to the wishes of the real estate developers.

The Jiangsu AIC concluded that Yinkong Water had violated Article 17(1)(4) of the AML and Article 5(2) of the SAIC's *Regulation on the Prohibition of Conduct Abusing a Dominant Market Position*. It decided that Yinkong Water had fulfilled the requirements for a lighter punishment as it cooperated with the investigation, stopped the illegal conduct, and adopted corrective measures. As such, the Jiangsu AIC confiscated illegal gains of over RMB 3.6 million and impose a fine of more than RMB 1.8 million (equivalent to 3% of the previous year's revenue)

Source: http://www.saic.gov.cn/zwgk/gqgs/jzzf/cfd/201612/t20161212_173294.html

11. Hunan AIC fines salt supplier in Yongzhou for tying conduct

The Hunan Administration for Industry and Commerce (Hunan AIC) sanctioned the Yongzhou branch of Hunan Salt Industry Co (Yongzhou Salt) for engaging in tying conduct in breach of Article 17(1)(5) of the AML. The investigation was initiated in July 2015 in response to complaints received from salt retailers.

The Hunan AIC found that Yongzhou Salt had a statutory monopoly on the wholesale supply of table salt in Yongzhou. Yongzhou Salt set the 2014 and 2015 annual salt purchase requirements, sales plans, and assessment indicators for its county-level branches. From January 2014 to March 2015, to meet sales targets, Yongzhou Salt organised for a few of its county-level branches to engage in tied sales when supplying salt to retailers. The branches would tie the sale of 320g packets of seaweed iodised salt and 320g packets of green refined low sodium salt to the sale of 350g and 450g packets of common salt, at various times, to different degrees, and in varying proportions. The price of the tied salt was higher than the price of common salt. However, this conduct was stopped in April 2015. The Hunan AIC determined that Yongzhou Salt did not have any legitimate reason for engaging in the tying conduct, that this tying conduct was not normal business behaviour and had impacted the normal relationship between demand and supply and economic efficiency, and had harmed the interests of retailers and consumers.

Yongzhou Salt submitted a request to suspend the investigation, but the Hunan AIC concluded that Yongzhou Salt did not meet the requirements for suspension of the investigation under Article 45 of the AML. The Hunan AIC considered that the conduct was lengthy in time and wide in scope, and had resulted in actual harm to retailers and consumers that could not be eliminated.

The Hunan AIC decided to order that Yongzhou Salt stop its illegal conduct, confiscated illegal gains of nearly RMB 700,000, and imposed a fine of more than RMB 270,000 (1% of 2014 sales revenue of the county-level branches involved). In determining its sanctions, the Hunan AIC took into account the fact that Yongzhou Salt had cooperated with the investigation, was aware of its illegal conduct, and voluntarily rectified its illegal conduct.

Source: http://www.saic.gov.cn/zwgk/gggs/jzzf/cfid/201612/t20161223_173682.html

12. Beijing court dismisses first follow-on damages suit under AML

On 22 August 2016, the Beijing High People's Court issued its judgment in the first follow-on damages antitrust case, dismissing an appeal for insufficient evidence. The judgment was released on 4 November 2016.

In the case, the plaintiff, Mr Tian Junwei, had bought a box of Abbott infant formula at a Carrefour store in Beijing in February 2013. In August 2013, the NDRC had issued a penalty decision against Abbott and other infant formula producers for engaging in RPM. Mr Tian claimed compensation of RMB 10.44 to recover his loss from the purchase of Abbott infant formula. At first instance, the Beijing Intellectual Property Court dismissed the claim, and the Beijing High People's Court agreed with the lower court's judgment.

The Beijing High People's Court found that the plaintiff bore the burden to prove the existence of a monopoly agreement between Abbott and Carrefour, but failed to provide sufficient evidence. In particular, the commercial contracts put before the court by Abbott and Carrefour for the distribution of Abbott infant formula did not contain any resale price restrictions. The court found that, while the NDRC decision did describe Abbott's unlawful pricing conduct during the same period of time, it did not name the counterparties (such as Carrefour), and therefore the plaintiff could not rely on the NDRC decision to discharge his burden of proof. Therefore, the court upheld the first instance decision and rejected Mr Tian's claim for compensation.

Source: <http://wenshu.court.gov.cn/content/content?DocID=7ad234f9-cfdc-453a-ae0a-a8f22dc22004&Keyword=%E7%94%B0%E5%86%9B%E4%BC%9F>

13. Guangdong High People's Court dismisses antitrust lawsuit for lack of jurisdiction

On 23 December 2016, the Guangdong High People's Court upheld the first instance judgment dismissing a lawsuit filed by Chenyawang Animal Husbandry Cooperative (Chenyawang) for lack of jurisdiction.

The plaintiff filed a lawsuit against the Huazhou General Food Company and the Huazhou Yangmei Food Company, alleging that the defendants had abused their dominance in the hog slaughter and purchase market in Huazhou. According to the plaintiff, the 2 companies artificially lowered hog purchase prices while raising wholesale prices to make excessive profits. Chenyawang also claimed that the 2 companies refused to let it and other hog farmers enter into the hog slaughter and purchase business. The court of first instance had dismissed the plaintiff's claims due to lack of jurisdiction and the Guangdong High People's Court agreed, dismissing the appeal.

Source: <http://wenshu.court.gov.cn/content/content?DocID=73ae3065-a321-407c-b3da-7fc10425993f&Keyword=%E9%99%88%E4%BA%9A%E6%97%BA>

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

1. MOFCOM releases list of unconditionally cleared mergers for the final quarter of 2016

On 4 January 2017, the MOFCOM released a list of 92 mergers that it unconditionally cleared in the final quarter of 2016. This brings the total number of unconditionally cleared mergers in 2016 to 351.

Source: <http://fldj.mofcom.gov.cn/article/zcfb/201701/20170102495842.shtml>

2. Update on the MOFCOM's activities

From 10–11 November 2016, the MOFCOM held its 2016 antitrust training session in Guangzhou. Representatives from local MOFCOM offices nationwide, central and local SOEs, and Guangdong businesses associations and businesses attended. Topics covered included AML enforcement system and practice, merger review, supervision of merger conditions, investigation of mergers implemented illegally, and prevention of and responses to overseas antitrust litigation.

From 8–9 December 2016, the MOFCOM Anti-Monopoly Bureau and the GIZ jointly held a Sino-German merger seminar in Beijing. Attendees (including an editor of this bulletin) discussed competition policy developments, e-commerce and antitrust enforcement, and standard essential patents and merger review.

On 12 December 2016, the MOFCOM Anti-Monopoly Bureau and George Mason University held an antitrust event in Beijing. Director-General of the MOFCOM Anti-Monopoly Bureau Wu Zhenguo met with Carlyle Group's managing director to discuss various antitrust enforcement matters on 29 November 2016.

Sources: <http://fldj.mofcom.gov.cn/article/xxfb/201611/20161101760088.shtml>

<http://fldj.mofcom.gov.cn/article/xxfb/201612/20161202180965.shtml>

<http://fldj.mofcom.gov.cn/article/xxfb/201612/20161202211253.shtml>

<http://fldj.mofcom.gov.cn/article/xxfb/201611/20161101988370.shtml>

3. Update on the NDRC's activities

The NDRC has recently signed competition policy and antitrust cooperation agreements with the China University of Political Science and Law, Wuhan University, Jinan University, Renmin University, Shanghai University, and Dongbei University of Finance and Economics. Under the agreements, the NDRC will establish an “antitrust research and personnel training base” at each university, and the universities will consult on decision-making, undertake research and economic analysis, and provide personnel training.

On 29–30 November 2016, the NDRC Price Supervision and Anti-Monopoly Bureau held a hearing in Beijing to discuss a number of administrative monopoly cases currently under investigation. They discussed evidence gathering, competition analysis, and file production. The NDRC Price Supervision and Anti-Monopoly Bureau also held a competition policy research group meeting recently, at which research groups presented their research on various aspects of national competition policy.

On 17 November 2016, Director-General of the NDRC Price Supervision and Anti-Monopoly Bureau Zhang Handong provided a report on the fair competition review system at the National School of Administration.

Sources: http://www.sdpc.gov.cn/fzgggz/jqjdyfld/jjszhd/201612/t20161221_832041.html

http://www.sdpc.gov.cn/fzgggz/jqjdyfld/jjszhd/201611/t20161129_828242.html

http://www.sdpc.gov.cn/fzgggz/jqjdyfld/jjszhd/201612/t20161205_829284.html

http://www.sdpc.gov.cn/fzgggz/jqjdyfld/jjszhd/201612/t20161207_829489.html

http://www.sdpc.gov.cn/fzgggz/jqjdyfld/jjszhd/201611/t20161118_827046.html

4. SAIC reports on its 2016 enforcement campaign against anticompetitive conduct by public enterprises

From April to October of 2016, the SAIC undertook a nationwide law enforcement campaign to curb anticompetitive conduct by public enterprises. On 23 December 2016, the Director of the SAIC, Zhang Mao, announced the achievements accomplished in the campaign. In particular, 1,267 cases were filed across China, in which fines and disgorgements of over RMB 167 million were collected and RMB 470 million was ordered to be returned to consumers.

Source: http://www.saic.gov.cn/ywdt/gsyw/mtjj/201612/t20161223_173700.html

5. Update on the SAIC's activities

On 12 November 2016, the SAIC Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau participated in a seminar on antitrust and economic regulation. The seminar discussed AML legislative work and enforcement and the establishment and implementation of the fair competition review system.

On 1 December 2016, the SAIC Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau held an AML case analysis seminar in Nanjing. It was attended by representatives from 10 competition law enforcement bureaus nationwide. They discussed the SAIC's Tetra Pak case and other typical cases investigated by local authorities. The SAIC Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau also held an information seminar on antitrust enforcement in Nanjing on 6 December 2016. It discussed research conducted by the Renmin University School of Statistics on the market competition order analytical model and competition enforcement information system.

The Chairman of the Cairncross Economic Research Foundation visited the SAIC Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau on 25 November 2016. They discussed antitrust law and enforcement matters and the fair competition review system.

Sources: http://www.saic.gov.cn/fldyfbzdjz/gzdt/201611/t20161114_172244.html

http://www.saic.gov.cn/fldyfbzdjz/gzdt/201612/t20161201_172848.html

http://www.saic.gov.cn/fldyfbzdjz/gzdt/201612/t20161212_173278.html

http://www.saic.gov.cn/fldyfbzdjz/gzdt/201611/t20161125_172728.html

3. Central and Local Government News

1. Revised AUCL is approved by the State Council and submitted to the SCNPC for consideration

It was reported that the State Council approved the draft amendment of the AUCL on 23 November 2016. The draft amendment revises the rules applicable to commercial bribery, the protection of trade secrets, and unfair competition conduct in Internet-related sectors. In addition, the draft aims to strengthen civil liability for compensation and increase administrative penalties and credit discipline. The draft amendment has been submitted to the SCNPC for further review and deliberation.

Source: <http://news.eastday.com/eastday/13news/auto/news/china/20161124/u7ai6235642.html>

4. News of State-Owned Enterprises

1. SASAC reports on progress of SOE reforms

On 9 December 2016, the State-owned Assets Supervision and Administration Commission (SASAC) reported on the status of the ongoing reforms of SOEs and state-owned assets. The reorganisation and integration of central SOEs, reorganisation and formation of investment and operational companies, innovation and development, and the transfer of functions and supervision of the SASAC were discussed. Leaders of major SOEs, including China Aerospace Science and Technology, State Power Investment, China COSCO Shipping, China Communications Construction, and COFCO also discussed the progress made by the reforms.

Source: <http://www.sasac.gov.cn/n85881/n85901/c2500341/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

Disclaimer:

*By clicking on the links you are entering third party websites. Please refer to the relevant websites for terms and conditions of use. *This publication provides general information only.