



BY SUSAN NING, KATE PENG, SIBO GAO & TING GONG¹



I. INTRODUCTION

Since the enactment of the Anti-monopoly Law (“AML”) in 2008, China’s AML enforcement has gained momentum, especially over the past three years. This development makes China one of the most important jurisdictions to which companies need to pay close attention.

Under the AML, the enforcement activities are shared by three Chinese agencies, based on the type of targeted behaviors. Specifically, the Ministry of Commerce (“MOFCOM”) is entrusted with the task of reviewing proposed mergers; the National Development and Reform Commission (“NDRC”) and the State Administration for Industry and Commerce (“SAIC”) are in charge of regulating non-merger monopoly behaviors, including monopoly agreements and abuse of dominance. Furthermore, the NDRC is responsible for regulating price related monopoly behavior and the SAIC is responsible for regulating non-price related monopoly behavior.

2016 was an intensive year for the NDRC. Looking back, the NDRC’s work mainly focused on i) AML enforcement against monopoly behavior by undertakings, ii) AML enforcement against abuse of administrative power by government and the introduction of the fair competition review system; and iii) promulgation of six antitrust guidelines.

With respect to the NDRC’s enforcement against undertakings in 2016, as disclosed at a conference by Deputy Director General Li Qing of Price Supervision and Anti-monopoly Bureau (“PSAMB”) of the NDRC, the authority and its local agencies investigated a dozen price related monopoly cases, mainly in the pharmaceutical, automobile, public utility and consumable product industries.² These cases mainly concern horizontal monopoly agreements and vertical monopoly agreements. In particular, 2016 has seen some new developments in NDRC investigations — one is the concerted action being identified in a cartel case and the other is non-price related vertical monopoly agreement which facilitates or strengthens the effect of resale price maintenance (“RPM”). As to the abusive behaviors of dominant firms, there is only one closed case by Hubei Price Bureau (a local DRC) concerning five natural gas companies. In the meantime, according to publicly available information, the NDRC is still in the process of investigating several technology companies for their suspected abuses of IP rights.

¹ Susan Ning is a senior partner and the head of Antitrust team at King and Wood Mallesons; Kate Peng is an antitrust partner; and Sibo Gao and Ting Gong are antitrust associates at King and Wood Mallesons.

² See Chinese news report, available at: <http://www.sccom.gov.cn/bwxx/-/articles/v/3027264.shtml>.

Generally speaking, the cases closed in 2016 have shown some industry specific characteristics. Alongside the comprehensive reform in the pharmaceutical industry and auto industry, the NDRC and its local agencies have been stepping up their enforcement efforts. We expect that the pharmaceutical and automobile industries will continue to be the NDRC's enforcement priorities in 2017 and onwards. In the meantime, for the consumable industry and the medical device industry, we have seen the NDRC and its local agencies becoming more active in enforcing Article 14 of the AML, aiming at correct the long-standing RPM practice in the industries.

In addition, the NDRC also made a great effort in the introduction of the fair competition review system. The fair competition review system is regarded as *ex-ante* and a systematic measure to prevent abusive conduct by administrative organizations. The NDRC's active participation in the mechanism, alongside the NDRC's enforcement against abuse of administrative power, embodies the NDRC's determination to correct the government's monopolistic behavior. As disclosed at a conference by the Deputy Director General Li Qing of the NDRC, the authority and its local agencies completed 17 abuse cases of administrative power, among which the administrative authorities in 15 cases have rectified their abusive behavior.³

In terms of legislative efforts, the NDRC, under the authority of the Anti-monopoly Commission of the State Council, was occupied with the drafting of the six antitrust guidelines on the leniency program, commitment program, exemption procedures, calculation of fines and illegal gains and for the auto sector and IP related area. These draft guidelines have been published by the NDRC to solicit public comments, and the final versions are expected to be issued by the Anti-monopoly Commission in 2017. These guidelines are expected to provide more legal certainty in the agencies' antitrust enforcement activities. Most of the above mentioned guidelines are procedural rules, while two concern the auto sector and IP related area in particular. This reflects the AML enforcement agencies' special attention to the auto sector and IP antitrust enforcement. In addition, it also, to some extent, reflects the Chinese regulators' efforts to learn from the most mature jurisdictions and adapt such experiences to China's unique context. At last, in light of the NDRC's efforts in 2016, we will present our speculation of the NDRC's enforcement priorities in year 2017 and the future.

II. AML ENFORCEMENT AGAINST UNDERKTAKINGS

A. Pharmaceutical Industry

In 2011, the NDRC investigated and imposed fines on two compound reserpine API (Active Pharmaceutical Ingredient) manufacturers for their monopolistic behavior.⁴ Afterwards, the NDRC was reported to have paid close attention to the pharmaceutical and medical device industries in 2013.⁵ In March 2014, the NDRC issued questionnaires to some pharmaceutical companies for an informal inquiry.

In 2015, drug price reform began. The Chinese government issued the *Opinions on Promoting the Drug Pricing Reform* to scrap the "government-set prices" for most pharmaceuticals and let the drug manufacturers set the prices according to market mechanisms.⁶ On this backdrop, the NDRC ordered its local agencies to immediately launch a half-a-year pharmaceutical pricing inspection to ensure the smooth implementation of the drug pricing reforms.⁷ The targets of the inspection are pharmaceutical manufacturers and operators, medical institutions, centers for disease control and prevention, blood banks, centralized purchasing platforms of drugs, etc., to see if these operators take the opportunity of drug pricing reform to conduct behavior that would distort the market prices.

3 See Chinese news report, available at: <http://www.sccom.gov.cn/bwxx/-/articles/v/3027264.shtml>.

4 See the NDRC's news release, available at: http://jjs.ndrc.gov.cn/fgld/201203/t20120306_465386.html.

5 See Chinese news report, available at: <http://news.qq.com/a/20131125/000933.htm>.

6 See the NDRC's official notice, available at: http://www.sdpc.gov.cn/zcfb/zcfbtz/201505/t20150505_690664.html.

7 See the NDRC's official notice, available at: http://jjs.ndrc.gov.cn/zcfg/201505/t20150505_690681.html.

Approaching 2016, the NDRC's attention to the pharmaceutical industry continued. In early 2016, the NDRC listed the pharmaceutical industry as one of its antitrust enforcement priorities for the year.⁸ Following that, the NDRC issued questionnaires to pharmaceutical companies and medical device companies for a general survey.⁹ In June 2016, having noticed that there were some price related illegal behavior in the drug and API markets, which affected fair competition, increased the patients' burden and aroused objections from consumers and enterprises, the NDRC decided to initiate another round of national special inspections into drug prices.¹⁰ In particular, behaviors to be investigated and punished include:

- (i) Whether enterprises manufacturing and operating APIs or drugs reach and implement monopoly agreements, and whether industry associations organize relevant enterprises to reach and implement monopoly agreements; and
- (ii) Whether enterprises manufacturing and operating APIs or drugs abuse dominant market position to sell APIs or drugs at an unfairly high price.

In August, 2016, it was reported that the NDRC distributed a second round of questionnaires to pharmaceutical companies and medical device companies and to short-listed companies that had caught the agency's attention during the first round.¹¹

As a result of several rounds of surveys and inspections conducted by the NDRC, the agency investigated and issued administrative penalty decisions on two cases in 2016. As drugs concern people's livelihood, and in order to facilitate the drug pricing reform, the pharmaceutical industry is likely to be listed as one of the NDRC's enforcement priorities in 2017 and the antitrust enforcement of the pharmaceutical industry is likely to become the NDRC's "new normal."

1. Allopurinol Case¹²

On March 2, 2016, the NDRC published its decision to fine five domestic pharmaceutical companies, i.e. Chongqing Qingyang Pharmaceutical Co., Ltd. ("Chongqing Qingyang") and its affiliated sales company Chongqing Datong Pharmaceutical Co., Ltd. ("Chongqing Datong"), Shimao Tianjie Pharmaceutical (Jiangsu) Co., Ltd. ("Shimao Tianjie"), Shanghai Xinyi United Medical Materials Co., Ltd. ("Shanghai Xinyi") and its exclusive distributor Shangqiu Huajie Pharmaceutical Co., Ltd. ("Shangqiu Huajie"), for a total amount of almost RMB 4 million. These companies were found to have reached and implemented monopoly agreements on increasing the price of allopurinol tablets together, allocating sales market of allopurinol tablets and agreements to bid in designated areas in the period between April 2014 and September 2015.

As Chongqing Qingyang, Shanghai Xinyi and Shimao Tianjie were the only three manufacturers of allopurinol tablets in the Chinese market since 2014, the NDRC concluded that the five companies' monopolistic conduct seriously eliminated and restricted competition within the market. Therefore, Chongqing Qingyang, together with Chongqing Datong, were fined 8 percent of their sales revenue in 2014; Shimao Tianjie, Shanghai Xinyi and Shangqiu Huajie were fined 5 percent of their sale revenue in 2014 due to their cooperation in the investigation.

8 See the NDRC, *Priorities in Price Supervision and Anti-monopoly Working Arrangements in 2016*, China Price Supervision and Anti-monopoly, Page 5, Volume 2, 2016.

9 See Chinese news report, available at: <http://opinion.caixin.com/2016-08-24/100981127.html>.

10 See the NDRC's official notice, available at: http://jjs.ndrc.gov.cn/zcfg/201605/t20160527_805088.html.

11 See news report, available at: <https://app.parr-global.com/intelligence/view/1461170>.

12 See the NDRC's administrative penalty decision in Chinese, available at: http://jjs.ndrc.gov.cn/fjgld/201602/t20160202_774107.html, http://jjs.ndrc.gov.cn/fjgld/201602/t20160202_774108.html, http://jjs.ndrc.gov.cn/fjgld/201602/t20160202_774110.html, http://jjs.ndrc.gov.cn/fjgld/201602/t20160202_774113.html.

2. Estazolam Case¹³

On July 27, 2016, the NDRC published its final decision regarding the *Estazolam* case. In that case, three local pharmaceutical companies, i.e. Huazhong Pharmaceutical Co., Ltd. (“Huazhong Pharmaceutical”), Shandong Xinyi Pharmaceutical Co., Ltd. (“Shandong Xinyi”), and Changzhou Siyao Pharmaceutical Co., Ltd. (“Changzhou Siyao”), were fined RMB 2.6 million in total for reaching and implementing monopoly agreements on jointly boycotting the sales of estazolam API and on raising the prices of estazolam tablets.

According to the final decisions published, the NDRC found that following the Chinese government’s announcement of the low-priced drug policy in 2014, the three companies concluded and implemented monopoly agreements by means of meetings, phone calls, text messages and emails about the estazolam API market to jointly boycott other estazolam tablet manufacturers and to fix or change the prices in the estazolam tablet market. The NDRC found that between September and October 2014, the three companies held meetings in Zhengzhou City of Henan Province, where they reached a consensus on the following two points: (1) estazolam APIs shall be for internal consumption of these three companies and they shall refuse supply of estazolam APIs to other business operators, and (2) the three companies shall raise their respective estazolam tablet prices. In addition, the NDRC found that after October 2014, these companies implemented the monopoly agreement by gradually ceasing the supply of estazolam APIs to other business operators and raising the price of estazolam tablet through companies’ notice of price adjustment at similar timings. It is worth noting that although Changzhou Siyao did not express its consent with the joint boycott and price raising arrangement, the NDRC nonetheless identified it as a participant to the cartel. The NDRC found that Changzhou Siyao did not raise any objection to the above arrangement, nor did it report the monopoly agreement to the AML enforcement agencies. In this situation, the NDRC was of the view that the companies communicated with each other. Such communication together with the subsequent consistent actions constitutes “concerted action,” which is a form of monopoly agreement in violation of Article 13 of the AML. This is the first case where the AML enforcement agency found that undertakings had engaged in “concerted actions.”

In the end, the NDRC decided that since Huazhong Pharmaceutical played a leading role in the events, the company should be imposed a fine of CNY 1,571,829, amounting to 7 percent of its annual estazolam tablet sales in 2015; since Shandong Xinyi actively cooperated with the NDRC in the investigations, which constituted meritorious conduct, it received a mitigated penalty and its fine was reduced to 2.5 percent (CNY 547,563) of its annual estazolam tablet sales in 2015; for Changzhou Siyao, since it acted merely as a follower and had actively and voluntarily rectified its wrongdoings, the NDRC fined the company 3 percent (CNY 484,431) of its annual estazolam tablet sales in 2015.

B. Medical Device Industry

The NDRC has been keeping a close eye on the medical device industry since 2013. In both 2015¹⁴ and 2016,¹⁵ the NDRC listed the medical device industry as one of its enforcement priorities and distributed questionnaires to medical device companies for industry survey.

In December 2016, the NDRC finally issued its administrative penalty decisions on its investigation against Medtronic (Shanghai) Management (“Medtronic”).¹⁶ This case is the first case in the medical device industry where the NDRC imposed a fine according to publicly available information. According to DG Zhang Handong of the PSAMB, in the recent years, the NDRC has been highly concerned about the market competition in the medical and health field and has conducted in depth studies and research regarding monopolistic behavior, competition-restricting behavior and excessively high prices, etc.¹⁷ It is understood that in 2017, the NDRC will likely list the medical device industry as one of its enforcement priorities.

13 See the NDRC’s administrative penalty decision in Chinese, available at: http://jjs.ndrc.gov.cn/fjgld/201607/t20160727_812579.html, http://jjs.ndrc.gov.cn/fjgld/201607/t20160727_812583.html, http://jjs.ndrc.gov.cn/fjgld/201607/t20160727_812587.html.

14 See KWM Client Alert, *Highlights of NDRC’s Antitrust Enforcement in 2016*, available at: <http://www.kwm.com/en/cn/knowledge/insights/2016-ndrc-legal-highlights-of-the-antitrust-law-20160322>.

15 See *supra* note 8.

16 See the NDRC’s administrative penalty decision in Chinese, available at: http://jjs.ndrc.gov.cn/fjgld/201612/t20161209_829716.html.

17 See Xinhuanet news report, available at: http://news.xinhuanet.com/legal/2016-12/08/c_1120079132.htm.

1. *Medtronic* Case

On December 9, 2016, the NDRC posted its penalty decision on Medtronic over price monopoly agreements in relation to medical devices for cardiovascular diseases, retroactive therapies and diabetes in China.

In the decision, the NDRC concluded that Medtronic entered into and implemented RPM agreements beginning in 2014 or earlier, for the purpose of fixing or restricting resale prices of relevant products with its transaction counterparts, which include a platform distributor and first-level distributors.

Specifically, the content of the monopoly agreements include:

- (i) Directly fixing the resale price by circulating the price lists for relevant products at each resale level;
- (ii) Fixing the platform distributors' gross profit rates, thereby indirectly fixing the platform distributors' resale prices;
- (iii) Restricting the distributors' minimum bid prices; and
- (iii) Restricting the minimum resale price to hospitals.

The NDRC found that the monopoly agreements on fixing and restricting the resale prices had been implemented by the platform distributors and the first-level distributors. Moreover, the NDRC found that Medtronic also took such measures as restricting the distributors' target customers and sale regions, prohibiting distributors from selling competing products, etc., to further reinforce the effect of the distributors' implementation of the monopoly agreements. The NDRC is of the view that the high-value consumable and implantable medical device market has relatively high technology barriers; the fair competition among distributors is the key to ensure reasonable market prices, considering that most medical device manufacturers took the resale model. However, the above non-price restrictions restrict the competition among Medtronic's distributors and thereby harm consumers' interests.

Regarding the influence on the competition among distributors, the NDRC found that Medtronic's behavior also restricted the inter-brand competition in the medical device industry. In particular, the NDRC found that the competition in the medical device industry is not sufficient, to the extent that consumers have limited choices of different brands of medical devices. In that case, considering that Medtronic is the leader in cardiovascular diseases, retroactive therapies and diabetes market, the company's RPM arrangement and the prohibition of its distributors from selling competing products further strengthened the adverse effects on market competition. Moreover, as Medtronic restricted the minimum resale price, bidding price and minimum price to hospitals, the company harmed end-customers' legitimate interests and increased the burden on patients.

In light of the above, the NDRC concluded that Medtronic violated Article 14(1) and Article 14(2) of the AML, which prohibit undertakings from fixing the resale price or from restricting the minimum resale price. Considering that Medtronic's illegal behavior involved the wholesale process from the platform distributor, distributor to end-user, and that Medtronic also imposed comprehensive vertical restrictions in relation to not only to resale prices, but also to sale targets, regions and the sale of competing products, the NDRC decided to fine the company 4 percent of its sales revenue generated in 2015 (i.e. RMB 118.52 million).

In the *Medtronic* case, the NDRC expressly addressed how the non-price vertical restrictions facilitated the implementation of the RPM arrangement, which indicates the NDRC's intention to strengthen the enforcement against other types of vertical restrictions. Although non-price vertical restrictions are not expressly prohibited by the AML, theoretically they could be caught by Article 14(3), a catch-all clause of the law. The AML enforcement agencies have never invoked this clause up to the present. However, in the draft anti-trust guidelines for the auto sector and IP related area, there is a list of specific non-price vertical restrictions that the AML enforcement agencies may find problematic. This shows that non-price vertical restrictions have come into the sight of the enforcement agencies. We expect to see more cases like *Medtronic* where non-price vertical restrictions would be addressed, and moreover, cases where non-price vertical restrictions become the subject matter of enforcement activities.

C. Automobile Sector and the Industries of Related Products

The automobile sector and the industries of related products have always been the focus of the NDRC's enforcement. It is reported that in 2012, the NDRC engaged the China Automobile Dealers Association ("CADA") to conduct studies and research regarding whether there was any AML violation in the automobile industry.¹⁸ In the same year, through the CADA's platform, Deputy Director General Mr. Lu Yanchun of the PSAMB disclosed that the NDRC planned to reinforce its enforcement efforts in the automobile industry and had identified its enforcement priorities on the whole car sale price, the after-sales service and the practice of refusal to deal.¹⁹ In 2013, Mr. Lu further disclosed that the NDRC had investigated a case where the distributors of a certain car brand had convened meetings to discuss the cars' sale prices in 2011.²⁰

In 2014, with the exposure of "parts-to-whole price ratio" of a car, the antitrust issues in the automobile sector first came to public attention. A few months later, the NDRC sanctioned several automobile manufacturers and auto parts manufacturers²¹ for more than RMB 2 billion in total, which further pushed the automobile and related products industries to the forefront of AML enforcement.

Thereafter, the NDRC, the MOT and the SAIC, together with other authorities, successively publicized a series of policies in furtherance of the institutionalization and legalization of antitrust practice in the automotive industry, including the ceasing of brand authorization registration for auto distributors,²² the publication of *Guiding Opinions on Promoting the Transformation and Upgrading of the Auto Maintenance Industry to Improve Service Quality, Administrative Measures on the Publication of Auto Maintenance and Repair Technical Information*, etc. Moreover, on March 23, 2016, the NDRC released the draft Antitrust Guidelines for Auto Sector ("Draft Auto Guidelines"), seeking public comments.

In 2016, the NDRC listed the auto and component part industry as one of its enforcement priorities. On April 15, 2016, the NDRC's local agency in Shanghai, the Shanghai Price Bureau, published an administrative penalty decision against Shanghai Hankook Tire Sales Co., Ltd. ("Shanghai Hankook")²³ and on December 23, 2016, Shanghai Price Bureau issued another administrative penalty decision against SAIC-GM Sales Co., Ltd. ("SGM").²⁴

1. Hankook Tire Case

The Shanghai Price Bureau found that Shanghai Hankook and its distributors reached monopoly agreements that restricted the minimum resale price of commodities to a third party. Further, the Shanghai Price Bureau found that the monopoly agreements had been implemented as Shanghai Hankook drafted and issued the minimum price list for tires of trucks and buses, collected deposits from distributors for ensuring the market "order" and issued notices to regulate minimum sale prices of tires for passenger cars.

In light of the above, the Shanghai Price Bureau concluded that Shanghai Hankook violated Article 14(2) of the AML and Article 8(2) of the Rules on Anti-Price Monopoly, which prohibit undertakings from reaching and implementing monopoly agreements that "restrict

18 See news report, available at: <http://www.chyxx.com/news/2013/0814/216346.html>.

19 Ibid.

20 Ibid.

21 In 2014 and 2015, cases in relation to the automobile and component parts industries include i) the cartel investigation against twelve Japanese auto parts manufacturers, ii) the cartel investigation against four BMW dealers in Hubei Province, iii) the investigation against FAW-VW Audi and eight dealers in Hubei Province, iv) the investigation against Chrysler and eight dealers in Shanghai, v) the investigation against Benz and several dealers in Jiangsu Province, and vi) the investigation against Nissan and 17 dealers in Guangdong Province.

22 Previously, the automobile manufacturer or its general distributor were required to file certain dealer-related documents, including the brand authorization agreement, with the SAIC before the dealers could apply for business registration at the local AIC. The business scope as indicated on the dealer's business license would be "brand specific automobile sales." Once registered at a local AIC, a dealer could not engage in the sales of other brands of automobiles, as this would be outside its business scope, which would be a violation of the Company Law.

23 See Shanghai Price Bureau's administrative penalty decision, available at: <http://www.shdrc.gov.cn/fzgggz/jggl/jghzcfjds/23432.htm>.

24 See Shanghai Price Bureau's administrative penalty decision, available at: <http://www.shdrc.gov.cn/fzgggz/jggl/jghzcfjds/25286.htm>.

the minimum resale price of commodities to a third party” with transaction counterparts. However, considering that Shanghai Hankook had already removed the clause that restricted the minimum resale price from the Franchised Distribution Agreement before the initiation of the investigation, proactively rectified certain illegal conduct, actively cooperated with the investigation, voluntarily submitted certain evidence that the agency did not know and refunded the deposits, the Shanghai Price Bureau imposed a lighter penalty, which was one percent of Shanghai Hankook’s sales in 2014 generated from the relevant market, amounting to about RMB 2.17 million.

2. SGM Case

On December 23, 2017, the Shanghai Price Bureau issued its administrative penalty decision against SGM for its engagement in a vertical monopoly agreement that restricted its Shanghai distributors’ minimum resale price of Cadillac SRX, Chevrolet TRAX, Buick Verano, Excelle GT, etc.

The agency found that SGM circulated documents, such as a Regional Price Notice, Market Competition Updates and Notice of Price Guidance, to set the minimum resale price restrictions and monitored the distributors’ compliance through engaging a third party to conduct secret inspections, online surveys, etc. In addition, for those distributors that did not follow SGM’s price guidance, the company would, by publishing the secret inspection report or interviewing the relevant distributors, ask the distributors to adjust their sale price; or the company may even punish the non-compliant distributors by ceasing to supply popular cars, imposing fines on the distributors or deducting rebates.

In light of the above, the Shanghai Price Bureau concluded that SGM violated Article 14(2) of the AML and Article 8(2) of Rules on Anti-Price Monopoly that prohibits undertakings from reaching and implementing monopoly agreements that restrict the minimum resale price of commodities. The Shanghai Price Bureau found that SGM’s behavior deprived the distributors’ right to adjust prices in accordance with the market competition status and resulted in end consumers paying higher prices than should have been paid under competitive markets. Therefore, the monopoly agreement eliminated and restricted the market competition and harmed the interests of consumers and the public.

By considering the nature and the degree of SGM’s illegal conduct, the Shanghai Price Bureau fined SGM four percent of its relevant sales revenue generated in 2015, i.e. about RMB 201 million.

3. Draft Auto Guidelines

Compared to the newly promulgated policies in the automotive industry as mentioned above, the Draft Auto Guidelines, which are the first comprehensive industrial antitrust guidelines, have made a great breakthrough by covering a wide scope of issues.

The Draft Auto Guidelines set forth a series of business arrangements in the automotive sales market and aftermarket that may constitute vertical monopoly agreements or abuse of dominant market position. In analyzing these arrangements, the Draft Auto Guidelines require an evaluation of both pro-efficient effect and anti-competitive effect. Also, the Draft Auto Guidelines put forward presumptive exemptions for vertical agreements that are evidenced in practice to be pro-efficient without seriously restricting competition.²⁵ As for vertical agreements that fall outside the presumptive exemption, the Draft Auto Guidelines require a case-by-case analysis on whether it meets the statutory requirements specified in Article 15. In addition, it is worth noting that for the first time, the Draft Auto Guidelines clearly identify non-price vertical restrictions, e.g. territorial and customer restrictions, which may constitute monopoly agreements. This would bring more positive effect in furthering the corporation’s efforts on antitrust compliance by providing more clarity.

Moreover, the Draft Auto Guidelines provide for rights and obligations of auto suppliers, component part suppliers and auto distributors, and cover multiple levels of the industry chain, including production, wholesale, retail and aftermarket, etc. The Draft Auto Guidelines introduce a series of new concepts, including significant market power, single branding in the aftermarket, cumulative effect, passive sales, intermediaries and genuine subcontracting agreements. Some of these concepts are broadly employed in well-developed antitrust jurisdictions; while for Chinese antitrust-related legislations, this will be the first time these concepts will be recognized. The

²⁵ The State Council Anti-Monopoly Commission will provide relevant guidelines in relation to specific procedures through which undertakings may claim exemption under Article 15 of the AML. On May 12, 2016, the NDRC published the Draft Exemption Guidelines to seek public comments.

promulgation of the Antitrust Guidelines for Auto Sector will have a far-reaching influence on China's antitrust practice in the days to come.

D. Consumable Product Industry

The consumable product industry has always been one of the areas to which the NDRC pays attention, as it concerns people's livelihood. In 2016, the NDRC and its local agencies investigated several cases concerning companies' engagement in vertical monopoly agreements. For example, the Shanghai Price Bureau investigated and fined two cases in relation to household electrical appliances and dairy products during the past year for RPM arrangements.

In January 2017, the NDRC warned household electrical appliance manufacturers against behaviors of engaging in horizontal monopoly agreements, vertical monopoly agreements, abusing dominant market position, artificially pushing up prices, predatory pricing and price fraud.²⁶ It is understood that the NDRC will continuously monitor the manufacturers' behavior in the consumable product industry

1. Shanghai Haier Case²⁷

On August 12, 2016, the Shanghai Price Bureau published its decision on three of Haier's subsidiaries (collectively, "Shanghai Haier") for their engagement in RPM violations. Through the investigation of Shanghai Haier, the Shanghai Price Bureau found the following behavior:

- (i) Issued various sales policy and notice, asking distributors not to sell below the guiding price;
- (ii) Issued various managing documents, communication document, notices, etc. from time to time, asking distributors not to cross sell and deviate from the guiding price, so as to regulate the online and offline product value chain;
- (iii) Signed Haier Product Distribution General Agreement and Reward Agreement with distributors, asking distributors not to deviate from guiding prices and to follow the standard retail prices for retail sales; and
- (iii) Signed a Deposit Agreement with distributors, which stipulates that once the online distributors were found violating Haier's regulation (including the RPM requirement), the deposit would be deducted.

Further, the Shanghai Price Bureau found that Shanghai Haier implemented the RPM monopoly agreement by periodically issuing a retail price restriction manual, monitoring the price deviation behavior of online and offline distributors, punishing distributors who repeatedly dishonored the guiding prices and informing distributors, orally or through WeChat, of the price adjustments. Therefore, the Shanghai Price Bureau concluded that Shanghai Haier violated Article 14(2) of the AML and Article 8(2) of the Regulation of Anti-Price Monopoly, which prohibit undertakings from restricting resale price of commodities to a third party, and fined Shanghai Haier three percent of its relevant sales generated in the previous year, totaling about RMB 12.35 million.

2. Bright Dairy Case²⁸

On December 29, 2017, the Shanghai Price Bureau posted its administrative penalty decision on Shanghai Speed Fresh Logistics Co., Ltd. ("Speed Fresh"), a unit of Chinese dairy product supplier Bright Dairy & Food Co. Ltd., for its engagement in an RPM arrangement regarding the sale of Bright Dairy pasteurized milk products.

According to the decision, the Shanghai Price Bureau found that Article 4 of the Distribution Agreement concluded between Speed Fresh and its distributors expressly required distributors to follow the price system and promotion policy set by Speed Fresh and asked distributors not to sell to a third party at prices lower than those set by Speed Fresh. Article 6 of the agreement also asked the distributors to regulate their sale points and strictly prohibit sale points from selling at lower prices over a long period of time. Article 28 of the

²⁶ See NDRC's news release, available at: http://jjs.ndrc.gov.cn/gzdt/201701/t20170111_834826.html.

²⁷ See Shanghai Price Bureau's administrative penalty decision, available at: <http://www.shdrc.gov.cn/fzgggz/jggl/jghzcfjds/24137.htm>.

²⁸ See Shanghai Price Bureau's administrative penalty decision, available at: <http://www.shdrc.gov.cn/fzgggz/jggl/jghzcfjds/25364.htm>.

agreement stipulated punishment for distributors who violated the above mentioned requirements. Therefore, the Shanghai Price Bureau concluded that Speed Fresh had reached a monopoly agreement with its distributors to restrict the minimum resale price of commodities.

Further, the Shanghai Price Bureau found that Speed Fresh implemented the monopoly agreement by issuing an integrated price system (including sale price of distributors and retail price) and, from time to time, a price adjustment notice. The Shanghai Price Bureau also found that Speed Fresh, on the one hand, asked distributors to mutually monitor each other's behavior and, on the other hand, asked Speed Fresh's relevant business staff to do shop inspections and prepare reports in this regard.

In light of the above, the Shanghai Price Bureau concluded that the Speed Fresh has violated Article 14(2) of the AML and Article 8(2) of the Regulation of Anti-Price Monopoly, which prohibit undertakings from restricting resale price of commodities to a third party. As Speed Fresh had ceased the illegal conduct before initiation of the investigation, proactively took the rectification measures, actively cooperated with the investigation and voluntarily submitted evidence that the agency did not know, the Shanghai Price Bureau imposed a fine on Speed Fresh for one percent of the relevant sales revenue generated in 2015 amounting to around RMB 1.98 million.

III. NDRC'S ENFORCEMENT IN IP RELATED AREA

Although the IP related area was listed as one of the NDRC's enforcement priorities, the NDRC and its local agencies did not publish an administrative penalty decision in 2016. However, according to publicly available information, the NDRC's investigation into technology firms' implementation of their IP rights never stopped. In particular, it is reported that the NDRC initiated some new investigations against technology companies last year.²⁹

Furthermore, the NDRC released the Draft Antitrust Guidelines for Abuse of Intellectual Property Rights ("Draft IP Guidelines") on December 31, 2015, seeking public comments.³⁰ Besides the NDRC, the SAIC, MOFCOM and the State Intellectual Property Office ("SIPO") also drafted their own IP antitrust guidelines and have submitted the drafts to the Anti-monopoly Commission for integration into one comprehensive version. The final IP antitrust guidelines are expected to be issued by the Anti-monopoly Commission in 2017.

In the NDRC's Draft IP Guidelines, it proposes the following four principles in the course of analyzing IP related cases:

- (i) When enforcing the AML to regulate the exercise of IP rights, the AML enforcement agencies should adopt the same regulatory standards applied to other property rights and follow the basic analytical framework of the AML, while taking into account the characteristics of IP rights;
- (ii) IP rights holders shall not be directly assumed as having dominant market position due to their possession of IP rights;
- (iii) When analyzing the exercise of IP rights that may eliminate or restrict competition, the AML enforcement agencies should fully consider the positive effects on competition and innovation by the exercise of IP rights on a case-by-case basis; and
- (iii) The AML enforcement agencies should adhere to fairness and transparency, and fully consider the facts, evidence and reason raised by the undertakings in relation to whether the exercise of IP rights is justifiable.

Highlights of the Draft IP Guidelines include an introduction of safe harbor mechanism, regulation on non-price related vertical restrictions that may have adverse impact on market competition, such as exclusive grant-back, non-challenge clauses, geographic restriction and customer restriction, etc., and restriction on the standard essential patent holders' implementation of injunctive relief.

The Draft IP Guidelines reflect the NDRC's experience gained through the agency's intensified enforcement activities in IP related area, for instance, the enforcement against Qualcomm and IDC. With the issuance of the IP antitrust guidelines, undertakings will be better placed to evaluate whether their exercise of IP rights may raise antitrust concerns and it is understood that the AML enforcement

29 See news report, available at: <https://app.parr-global.com/intelligence/view/1485513>.

30 See NDRC's release of the Draft IP Guidelines, available at: http://jjs.ndrc.gov.cn/fjgld/201512/t20151231_770233.html.

agencies will further intensify their enforcement in IP related areas in the future.

IV. ABUSE OF ADMINISTRATIVE POWER

In recent years, the NDRC has stepped up its enforcement against abuse of administrative power, which is a unique type of monopolistic conduct set forth in the AML. According to publicly available information, in 2014, the NDRC investigated the abuse of administrative power exerted by the Hebei Department of Transport, the Hebei Price Bureau and the Hebei Finance Bureau and suggested that the three departments to rectify their behavior.³¹ Thereafter, in 2015, the NDRC and its local agencies also investigated at least seven cases concerning abuse of administrative power.

At the end of 2016, the NDRC announced four cases concerning abuse of administrative power, respectively:

(i) The municipal governments of 12 provinces designated certain electricity companies to construct power supply and distribution facilities and collect fees from end users. The NDRC looked into the issue and asked municipal governments to rectify the competition restricting behavior. Up to the December 2016, 10 out of 12 provinces had rectified the behavior.³²

(ii) The Shenzhen Education Bureau set a minimum bidding price for school uniforms in 2011, where the Shenzhen Education Bureau was found to induce business operators to reach a monopoly agreement. In 2014, the Shenzhen Education Bureau used the 2011 minimum bidding price as the ceiling for the bidding and asked undertakings to quote discounts that they would like to offer. Such behavior was found to have violated the undertakings' pricing right. In addition, the Shenzhen Education Bureau set discriminatory conditions for the bidders and set discriminatory evaluation standards against non-local undertakings. The NDRC and its local agency in Guangdong province concluded that the Shenzhen Education Bureau abused its administrative power. The Shenzhen Education Bureau committed to rectify its behavior.³³

(iii) The Shanghai Municipal Transportation Commission was found to have organized, guided, coordinated and guaranteed relevant pleasure boat operators to reach and implement monopoly agreements on fixing or changing of service prices. The Shanghai Municipal Transportation Commission committed to rectify its behavior and let the NDRC, together with relevant departments, monitor the implementation of the rectification measures.³⁴

(iiiii) The Beijing Municipal Commission of Housing and Urban-Rural Development was found to have issued the quality control price of concrete, which it was using as the minimum contract price. The NDRC considered that such policy in fact organized business operators to reach price monopoly agreements in violation of the AML. Therefore, the NDRC concluded that the Beijing Municipal Commission of Housing and Urban-Rural Development engaged in abuse of administrative power and the Commission committed to take rectification measures.³⁵

More importantly, the introduction of the fair competition review mechanism represents a landmark progress in developing a market economy in China.³⁶ It brings a significant change in the government's thinking about the role of the state and its relationship with the economy. Despite China's remarkable economic development over the past decades, its transition to a modern market system is still ongoing and the legacy of a centrally planned and highly regulated system still remains in some areas of the economy. In this regard, conceived by the highest level of the Chinese government, the State Council of China issued *Opinions on Establishing the Fair Competition Review System in the Development of Market System* on June 14, 2016 ("Opinions") to first formally bring the fair competition review mechanism into being. The Opinions feature four categories of benchmarks for the substance of the fair competition review system:

31 See news report, available at: <http://www.competitionlaw.cn/info/1018/22257.htm>.

32 See NDRC's press release, available at: http://jjs.ndrc.gov.cn/gzdt/201612/t20161229_833273.html.

33 See NDRC's press release, available at: http://jjs.ndrc.gov.cn/gzdt/201612/t20161229_833266.html.

34 See NDRC's press release, available at: http://jjs.ndrc.gov.cn/gzdt/201612/t20161229_833265.html.

35 See NDRC's press release, available at: http://jjs.ndrc.gov.cn/gzdt/201612/t20161229_833264.html.

36 Zhang Qiong, an adviser to the State Council's Antimonopoly Commission, published an article in People's Daily, June 24, 2016, available at: <http://theory.people.com.cn/n/2014/1208/c207270-26167950.html>.

1. Standards of market entry and exit;
2. Standards of free flow of goods and factors;
3. Standards of affecting manufacturing and operating costs; and
4. Standards of affecting manufacturing and operating behaviors.

The major method of review contained in the Opinions is the self-review by the policy-making authorities based on the four categories of criteria. Given the inherent weakness of self-review, an independent third party review mechanism may also be introduced. Currently, the NDRC is taking the lead in drafting the implementing rules. More details as to the actual enforcement remain to be seen. The fair competition review system forms part of China's broader effort to tackle administrative monopolies and is regarded as an *ex-ante* measure to prevent administrative monopolies, alongside the AML framework, which is an *ex-post* measure to target specific administrative monopoly acts. With more resources provided to the Chinese competition authorities to fight against administrative monopolies, we are expecting a more vigorous development of China's market featured with more fair competition among market participants.

V. NDRC'S LEGISLATIVE EFFORTS

Besides the above mentioned Draft Auto Guidelines and Draft IP Guidelines, in 2016, the NDRC also issued Draft Guidelines on Commitment Made by Undertakings in Antitrust Cases ("Draft Commitment Guidelines"), Draft Guidelines on the Application of Leniency Programme to Cases Involving Horizontal Monopoly Agreements ("Draft Leniency Guidelines"), Draft Guidelines on General Conditions and Procedures on the Exemption of Monopoly Agreements ("Draft Exemption Guidelines") and Draft Guidelines on Determining Illegal Income of Undertakings' Monopolistic Behaviours and Fines ("Draft Fines Guidelines"). These guidelines mostly concern procedural rules and are aimed at providing legal certainty and transparency to the AML enforcement.

A. Draft Commitment Guidelines

The Draft Commitment Guidelines prescribe that the commitment program under Article 45 of the AML would not be applied to hard-core cartel violations, including horizontal monopoly agreements on price fixing, output restrictions and allocation of the sale or procurement market. In addition, the application to the commitment program could be brought up at any time after the initiation of the investigation and before the enforcement agency issues the advance notice of administrative penalty. The Draft Commitment Guidelines also clarify that pursuant to the commitment program, a decision on suspension or termination of an investigation shall not be interpreted as an affirmation on whether the undertaking's conduct constitutes a monopoly and the decision shall not affect other undertakings' or consumers' rights to institute a civil action with the people's court against the suspected monopoly.

B. Draft Leniency Guidelines

The most important highlight of the Draft Leniency Guidelines is that the guidelines for the first time introduce a marker system into the Chinese leniency program that a leniency applicant could submit a preliminary report to mark its ranking and supplement other materials within a prescribed time period. In addition, the Draft Leniency Guidelines also provide detailed rules regarding the scope of important evidence and the information that should be included in the report. Moreover, the Draft Leniency Guidelines stipulate that the first applicant would receive full immunity or no less than an 80 percent fine reduction; the second applicant would receive a 30 to 50 percent fine reduction; the third applicant could receive no higher than a 30 percent fine reduction. The above sliding scale could unify the different standards that the NDRC and SAIC are currently using and could provide more legal certainty to undertakings.

C. Draft Exemption Guidelines

Under the Draft Exemption Guidelines, undertakings could apply for an exemption pursuant to Article 15 of the AML after the initiation of an investigation and before the issuance of an administrative penalty decision. The AML enforcement agencies would review the undertakings' application and normally would consult with relevant undertakings and consumer representatives for their comments. Unless concerning state secrets, the AML enforcement agencies would publish the exemption decision to the public.

Except in the above scenario, the Draft Exemption Guidelines leave it to the undertakings to self-evaluate whether they could fulfill Article 15, the exemption clause, of the AML. Undertakings or industry associations may consult with the AML enforcement agencies for their opinion, but the agencies generally would refuse to provide consultation.

D. Draft Fines Guidelines

Compared with past practices, the Draft Fines Guidelines have made certain breakthroughs — first, the guidelines emphasize the significance of the confiscation of illegal gains and clearly define the scope of illegal gains; second, for the first time, the guidelines introduce a three-step fine calculation method.

Specifically, based on the logic of the AML, the Draft Fines Guidelines define the illegal gain as the additional income earned or the expense reduced resulting from an undertaking exercising monopoly agreement or abuse of market dominance in violation of the AML, during the period when the above mentioned monopoly conduct lasts.

The “three-step” fine calculation method refers to Step One — determination of sales revenue of the undertaking in the preceding year; Step Two — determination of the basic percentage for calculating the basic amount of fines by considering the nature and duration of the illegal conduct; and Step Three — making adjustments to the basic percentage determined in Step Two by considering other factors in relation to heavier, lighter or mitigated punishment and in accordance with the seriousness of the illegal conducts, thereby determining the final percentage for calculating the fines and calculating the final amount of fines to be imposed

VI. LOOKING FORWARD

We expect that the antitrust enforcement in pharmaceutical, medical device and automobile related industries will remain the NDRC's enforcement priorities in 2017. Moreover, the NDRC will further intensify its enforcement against vertical monopoly agreements in the consumable products industry, where the NDRC may likely evaluate undertakings' non-price related vertical restraints and consider them as strengthening the effect of RPM arrangement or even as a violation of Article 14(3)³⁷ of the AML. With respect to the IP related area, it is understood that the NDRC's enforcement in this regard will be further intensified with the issuance of the IP antitrust guidelines.

In addition, the efforts of the NDRC, together with SAIC and MOFCOM under the authorization of the Anti-Monopoly Commission, in drafting the six guidelines, will have significant impact on the landscape of antitrust enforcement in China. Once enacted, these guidelines will provide detailed rules for both the enforcement agencies and undertakings to follow, in turn increasing the transparency and consistency of enforcement activities.

³⁷ Article 14(3) of the AML is a catch-all clause, which prohibits undertakings to engage in other vertical monopoly agreements as determined by the AML enforcement agencies.