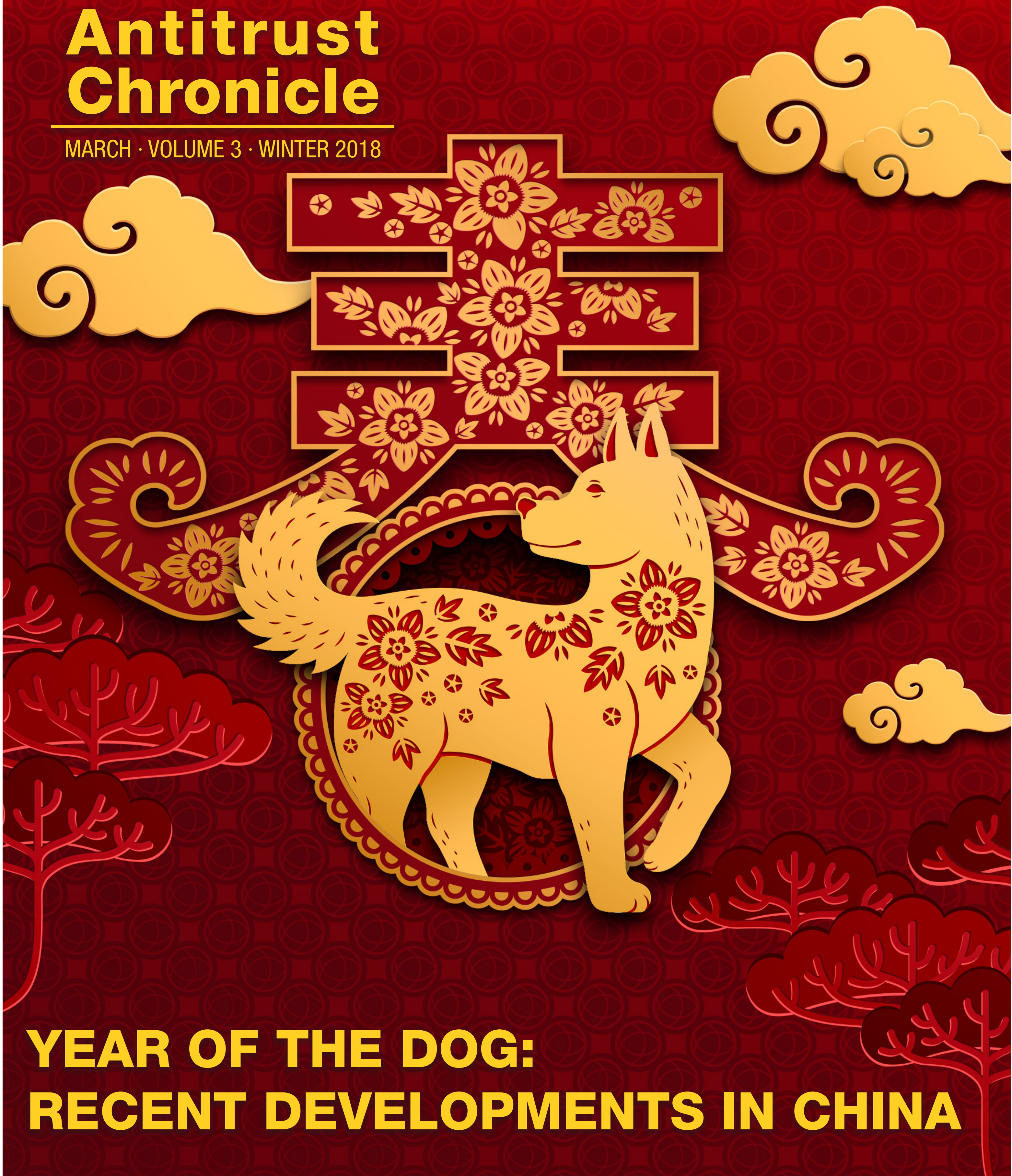

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

We are delighted to release our CPI Antitrust Chronicle issue for March 2018, **Year of the Dog: Recent Developments in China**.

In August 2018, China will celebrate its 10th anniversary of the enforcement of the Anti-Monopoly Law. It's a critical moment to review the achievement of antitrust enforcement in 2017 and look forward for the next ten years. Within a broader picture, President Xi's Chinese dream aims to bring benefits to the people, and consumer welfare will still stay in the center of antitrust enforcement.

This special China issue starts with the comprehensive analysis of the antitrust enforcement of China's National Development and Reform Commission ("NDRC") and State Administration for Industry and Commerce ("SAIC") by Susan Ning, Wu Han, and Jia Menglin of King & Wood Mallesons. Through reviewing the enforcement achievements and the legislative developments in 2017, they summarize the key sectors that will be targeted in 2018 and provide practical compliance advice for specific problematic behaviors.

2017 has been an important year for MOFCOM, where a total of 400 merger filings were received. Michael Han, David Boyle and James Muirhead of Fangda Partners look into MOFCOM's merger cases with remedies and cases for failures to notify in 2017, and conclude that the enforcement agency does not shy away from using its powers. They suggest that undertakings intending to engage in the merger filing process shall plan ahead and ensure that provisions are made for the Chinese merger filing process in global transactions.

Antitrust civil litigation has played an increasingly important role in China, and has now become an essential approach for market participants to resolve disputes. Wu Peng, Cheng Cheng, Zhang Xiangyu, and Zhang Yilan of Zhong Lun Law Firm introduce the antitrust civil litigation system under the Chinese laws and explain the major differences between antitrust civil lawsuits and administrative antitrust investigations, and come up with suggestions on how to choose from these two legal procedures.

Shall the resale price maintenance ("RPM") agreements stipulated in Article 14 of the Anti-Monopoly Law ("AML") be analyzed further in conjunction with Article 13(2)? How should we understand Article 13(2) of the AML? The answers lie in the judgment at second instance of the Hainan Higher People's Court in the first judicial review of RPM administrative sanction decision *(Hainan Yutai Technology Feed Co., Ltd. v. Hainan Price Bureau)*. As the attorneys representing Hainan Price Bureau at second instance, Wei Huang, Fan Zhu and Wendy Zhou of Tian Yuan Law Firm analyze the major issues in this case.

In the evolving digital era, the dispute over data related issues has competition policy and antitrust implications. Vanessa Yanhua Zhang of Global Economics Group and Renmin University and John Jiong Gong of UIBE and Global Economics Group analyze the seven main characteristics of data competition, discuss three representative cases, and provide insight into how courts and regulators in China tend to treat data-related competition issues.

Administrative penalty is one of the most important means in administrative law enforcement. Through empirical analysis of antitrust enforcement cases since AML came into force, Chengying Zhang of Tsinghua University finds out the factors that affect the final amount of fines.

In light of the recent announcement that China's three antitrust agencies will be merging into one enforcer, it's a critical moment to review the achievements of China's antitrust enforcement in 2017.

We thank our contributors for their efforts and dedication to our March 2018 CPI Antitrust Chronicle. And hope you enjoy reading this special China issue.

Sincerely,

Vanessa Yanhua Zhang, Ph.D.
Global Economics Group and Market & Regulation Law Center, Renmin University

SUMMARIES

Antitrust Enforcement of the NDRC and SAIC: Retrospect and Prospect

By Susan Ning, Wu Han & Jia Menglin

2017 marks the 10th anniversary since the promulgation of the AML. The antitrust enforcement of the NDRC and SAIC was stable and normalized in 2017. A highlighted feature was the significantly increased attention towards administrative monopolies. In addition, legislative developments in 2017 were very active, with the upcoming introduction and formulation of antitrust guidelines for certain industries, typical monopolistic conduct and enforcement procedures, and with the detailing of the fair competition review system. Most importantly, in 2018, the NDRC and SAIC will likely continue to target key sectors that impact people's livelihood and fight against administrative monopoly, and we provide practical compliance advice for specific problematic behavior.

Overview of Chinese Merger Control in 2017

By Michael Han, David Boyle & James Muirhead

This article gives an overview of the major developments in the context of merger control in China in 2017. This includes an analysis of major trends in merger filings generally, a review of the conditional approvals of mergers granted in 2017, enforcement actions for failures to notify mergers to the Antitrust Bureau of the Chinese Ministry of Commerce, as well as a look at upcoming changes in policy which will clarify the merger review process and that are due to come into force in 2018.

Strategies in Bringing Antitrust Civil Claims in China

By Wu Peng, Cheng Cheng, Zhang Xiangyu & Zhang Yilan

As an integral part of efforts to safeguard a sound market order, antitrust civil litigation, a mechanism widely adopted by countries with a well-established antitrust system, has been in place in China for years. Antitrust civil litigation shares the same procedures with other civil litigations, generally, while following some special rules customized to accommodate its characteristics and purposes. In this article, we briefly introduce the antitrust civil litigation system under the Chinese laws, then we compare antitrust civil litigation with investigations initiated by antitrust enforcement agencies from several crucial aspects, including the standard of case docketing, evidence collection, cost, etc., and give suggestions to alleged victims of monopolistic conduct in choosing between these two approaches. We also briefly mention a hotly discussed new type of antitrust civil litigation, which may be helpful to companies that face risks of being alleged monopolists.

Beyond a Snapshot: Insight of the First Judicial Review Case of RPM Administrative Sanction Decision in China

By Wei Huang, Fan Zhu & Wendy Zhou

There is a long-lasting divergence between the courts' approach and the antitrust enforcement agencies' approach towards RPM in China. This divergence may be reconciled in a recent administrative litigation case, *Hainan Yutai Technology Feed Co., Ltd. v. Hainan Price Bureau*. For the first time, a court in China explicitly supported the enforcement agencies' approach towards RPM practices. As the attorneys for the Hainan Price Bureau, the authors analyze three main issues relating to the legal application towards RPM in this article, and explain why "prohibited in principle, and exempted individually" is the correct enforcement approach against RPM in China.

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The Economic Characteristics of Data Competition in China's Digital Economy

By Vanessa Yanhua Zhang & John Jiong Gong

The importance of data in the digital era cannot be more emphasized. In this article, Zhang and Gong visit the issues pertaining to data ownership, property rights and allocation of value from data among stakeholders in the context of data competition in China's digital economy. The two economists summarize seven main characteristics of data competition and present three recent cases of data competition in China. By analyzing how courts and regulators in China tend to treat data-related competition issues, the authors shed light on the direction of regulation and potential legislation over data competition in China.

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Administrative Penalty Guidelines Against Monopoly In China – An Empirical Analysis

By Chenying Zhang

Public enforcement, which played an important role in the China Anti-Monopoly system, faces some challenges, including wide discretion of fines, different application and understanding of rules, and few confiscations of illegal gains. China drafted guidelines on calculating the illegal gains and fines to resolve these issues. The guidelines take a profit-based criterion to calculate illegal gains, using the difference between the results generated in reality and in an assumed competitive situation. The guidelines propose the "three-step calculation" to determine fines: first, determine the sales in the preceding year; second, determine the basic fine percentage based on the nature of monopolistic conduct and duration; third, adjust the rate based on the degree of illegality.

WHAT'S NEXT?

Our April 2018 Antitrust Chronicle will focus on the recent debates on the issue of **Hipster Antitrust**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In the coming months of 2018, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLE MAY 2018 & JUNE 2018

The May 2018 Antitrust Chronicle will address the hot topic of **Online Platforms**.

Our topic for June 2018 will focus on issues related to the upcoming **LeadershIP Conference**.

Contributions to the Antirust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers in any topic related to competition and regulation, however, priority will be given to articles addressing the above mentioned topic. Co-authors are always welcome.

ANTITRUST ENFORCEMENT OF THE NDRC AND SAIC: RETROSPECT AND PROSPECT

BY SUSAN NING, WU HAN & JIA MENGLIN[1]

1 Susan Ning is a senior partner and the head of the Commercial and Regulatory Group of King & Wood Mallesons. Wu Han is a partner of the Commercial and Regulatory Group of King & Wood Mallesons. Jia Menglin is an associate of the Commercial and Regulatory Group of King & Wood Mallesons.

I. OVERVIEW OF ANTITRUST ENFORCEMENT IN 2017

Administrative antitrust enforcement in China continuously intensified in 2017. The most distinctive feature was hitting a record high for investigations involving abuse of administrative power. It is expected that in 2018, enforcement authorities will continue to target key sectors that impact the people's daily lives and may prioritize enforcement on certain typical patterns of monopolistic activities.

A. Highlights in Antitrust Enforcement of the NDRC in 2017

In 2017, the National Development and Reform Commission ("NDRC") investigated and closed over 60 cases on abuse of administrative power to restrict or eliminate competition.[2] This is a record high for antitrust enforcement and the industries involved are closely related to the people's livelihood such as pharmaceuticals, engineering, construction, transportation, insurance, tourism, public utilities, etc. The cases took place in more than 20 provinces, which on the one hand shows the prevalence of administrative monopoly across the country and on the other hand indicates the remarkably increased enforcement towards administrative agencies and organizations.

With regard to the types of conducts, a vast majority of the cases relate to the abuse of administrative powers to restrict the sale, purchase or use of commodities provided by designated undertakings. In accordance with Article 51 of the Anti-Monopoly Law ("AML"), all administrative agencies and organizations being investigated have shown a cooperative attitude and taken the initiative to make rectifications in a timely manner with the aim of protecting fair competition and promoting an orderly market system.

In addition, the NDRC investigated and closed 16 price-related monopoly cases in 2017 and the total financial sanctions amounted to RMB 560 million (U.S. $86 million). The 16 cases involved industries such as electricity, Polyvinyl chloride ("PVC"), papermaking, cement, ports, telecommunications and the auto sector. Considering the background that China is implementing supply-side structural reforms in order to shutter over-capacity and enhance innovation, the NDRC is keen to target companies that respond by price-fixing.

Among the price-related monopoly cases last year, a representative one is the *PVC* case, in which the NDRC official handling the case obtained key evidence of the producers' price collision in their group chats on the mobile texting app WeChat. The WeChat interactions led to 13 price monopoly agreements, resulting in a surge of product prices in the market and severely increasing the burden on downstream players. In the penalty decision, the NDRC imposed an aggregate fine of RMB 457 million (U.S. $69 million) on 18 PVC producers in October 2017, equivalent to 1-2 percent of the relevant sales of the cartel participants in 2016.

Another representative case is the *Paper-Making* case, in which the industry association was found to have breached Article 16 of the AML and was ordered to de-register. It was found that the industry association, i.e. Fuyang District Paper Manufacturers' Association, organized a meeting between the 17 paper manufacturers to reach an agreement on collectively raising prices of whiteboard sheet rolls and all of the participants implemented the agreement. In its penalty decision, Zhejiang Provincial Price Bureau imposed an aggregate fine of RMB 7.78 million (U.S. $1.14 million) on 17 local paper manufacturers in July 2017, equivalent to one percent of the relevant sales of the cartel participants in 2016.

B. Highlights in Antitrust Enforcement of the SAIC in 2017

In 2017, the State Administration for Industry and Commerce ("SAIC") opened 18 antitrust investigations, while closing 5 cases.[3] Among the 18 investigations, 10 concerned cartels and 8 concerned abuse of market dominance. In addition, the state and provincial administrations for industry and commerce ("AICs") investigated 13 cases involving administrative monopoly last year. While the SAIC continued to prioritize industries that are closely related to the people's livelihood such as public utilities, fireworks, medicine, liquefied petroleum gas, natural gas, insurance, telecommunications, etc., the ratio of punishment seemed to significantly climb up in 2017 with some reaching 5 percent or even 7 percent of the relevant sales in the preceding year.

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2 As introduced by Zhang Handong, Director-General of the Price Supervision and Anti-Monopoly Bureau of the NDRC, on the China Competition Policy and Law Conference 2017/2018.

3 As introduced by Wanli Lu, Deputy Director-General of the Anti-monopoly and Anti-Unfair Competition Enforcement Bureau of the SAIC, on the China Competition Policy and Law Conference 2017/2018.

Since the implementation of the AML in 2008, the AICs have launched 91 antitrust investigations of which 45 related to cartels and 46 related to abuse of market dominance, involving sectors such as medicine, tobacco, radio and television broadcasting, insurance, gasoline, natural gas, power supply, computer software, furniture, household appliances and food packaging. According to decisions published on the SAIC's website, the AICs that have been playing an active role in antitrust enforcement include those in Jiangsu, Henan, Hunan, Zhejiang, Sichuan, Inner Mongolia and Chongqing.

II. LEGISLATIVE DEVELOPMENTS AND IMPLICATIONS

The six antitrust guidelines for the automobile industry, intellectual property, leniency program, commitments, exemptions, illegal gains and fine calculation were not formally published in 2017. Some argue that the guidelines for illegal gains and fine calculation were stymied by internal debates and may not be issued ultimately. In addition, the NDRC is active in publishing price behavior guidance for particular industries and for industry associations. Moreover, the Implementation Rules for the Fair Competition Review System were finalized and published in October 2017.

A. Antitrust Guidelines

From the end of 2015 to June 2016, the antitrust authorities successively published the drafts of the antitrust guidelines, seeking public comments. In August 2017, the antitrust guidelines for the automobile industry and IPRs were submitted to the Anti-Monopoly Commission under the State Council. In November 2017, Director-General Handong Zhang revealed that the NDRC had finalized the antitrust guidelines for the automobile industry and will publish it soon. In the drafting and comment process of the above guidelines, the antitrust authorities have sought various opinions and made numerous amendments. This reflects the sensitivity and importance of the issues covered in the guidance as well as the prudent attitude of the antitrust authorities.

In addition to the automobile industry, the NDRC pays extra attention to the pharmaceuticals industry. In November 2017, the NDRC published the Price Behavior Guidelines on Operators of Active Pharmaceutical Ingredients and Drugs Prone to Shortages, which prohibit operators of active pharmaceutical ingredients ("APIs") and drugs prone to shortages from reaching monopolistic agreements with other parties to maintain resale prices, including entering into agreements for fixing prices at which they resell drugs and APIs to third parties, and other agreements identified by the antitrust authorities.

Meanwhile, the influence and participation of industry associations in anticompetitive conduct regulated by the AML, as well as a proliferation of their law-breaching activities, has been increasingly highlighted. It is notable that multiple decisions issued by different antitrust authorities involved industry associations, such as penalties against Shanghai Gold & Jewelry Trade Association, Zhejiang Insurance Association, Shanxi Electric Power Association, Lianyungang Building Materials and Construction Machinery Industry Association, Liaoning Building Materials Industry Association, a number of insurance associations in Hunan, Xishuangbanna Tourism Association, Shangyu Concrete Industry Association, etc. In this context, the NDRC published the Industry Association Price Behavior Guidance in July 2017, which is aimed at guiding industry associations to promote healthy development of industries, and safeguard market price order and fair competition. It is stipulated that industry associations that severely breach price and antitrust laws and regulations run the risk of being blacklisted by price supervision departments and can face joint penalties imposed by multiple relevant authorities.

Apart from the above, since November 2017, the NDRC has begun drafting regulations on pricing of standard essential patent ("SEP") licenses and antitrust guidelines on price-related vertical agreements or conduct concerning resale price maintenance. The SAIC also plans to draft similar guidelines on non-price vertical restraints.

With the upcoming introduction and formulation of these guidelines in the near future, it is expected that the antitrust authorities will take a more in-depth look at specific significant industrial sectors and refine relevant regulations that are applicable to various industries respectively, which can serve as important guides for a wider range of industries. Furthermore, following the upcoming guidelines, the antitrust authorities will implement more transparent procedures in different stages of antitrust enforcement. From the perspective of enterprises, these guidelines will provide more legal certainty and transparency for enterprises to rely on, and will also raise awareness of compliance and require enterprises to establish and improve their compliance system.

B. Fair Competition Review System

Over the past decades, China has made extraordinary economic progress in a relatively short period of time. Notwithstanding this development, China's transition to a modern market system is still on-going and the legacy of a centrally planned and highly administered and regulated system still remains in some areas of the economy. For example, certain current administrative and economic management systems give central and local government bodies extensive powers to intervene and participate in markets relevant to the industries and geographical areas in their jurisdictions.

Against the above background, the Opinions on Establishment of Fair Competition Review System during the Development of Market System issued by the State Council ("State Council's Opinions") on June 1, 2016 confirm the decisive role of the market in the allocation of resources and set out the overall requirement and fundamental principles of establishing the fair competition review system. This review system aims to prevent the government from excessively or inappropriately impairing market competition, and to successively eliminate and abolish provisions and practices that may impede the unified domestic market and the fair competition, such as local protectionism, regional foreclosure, industrial barriers, enterprise monopoly, illegal favorable policies or impairment of market players' interests.

Following the State Council's Opinions, the NDRC, the Ministry of Finance, the Ministry of Commerce, the SAIC and the Legislative Affairs Office of the State Council have jointly published the Detailed Rules for the Implementation of the Fair Competition Review System which provides details on review mechanisms and procedures, review standards, exceptions, social supervision and accountability system. The NDRC, the Ministry of Finance and the Ministry of Commerce have also jointly issued a 2017-2018 work plan on removing existing anticompetitive policy measures, according to which government agencies at different levels have been asked to scrutinize regulations, prescriptive documents, and other policy measures that are currently in force, and to remove any content or practice that may possibly lead to local protectionism, designating transaction parties or creating barriers to market entry.

III. ENFORCEMENT TRENDS AND OUR ADVICE

A. Targeted Industries and a "New" Competition Enforcement Landscape

In 2018, certain key industries and areas will continue to be the focus of the NDRC and SAIC's antitrust enforcement. The NDRC will target key sectors that impact the people's daily lives, such as natural gas, pharmaceuticals, intellectual property, mobile phone chip manufacturing, automobile manufacturing,[4] tobacco and alcoholic beverages,[5] and may plan to place more emphasis on enforcement against industry associations that organize their members to participate in anticompetitive conduct. The SAIC will pay particular attention to the industries related to the national economy and the people's livelihood, including pharmaceuticals, public utilities, and so forth.

Meanwhile, it should be noted that the State aims to boost enforcement against local governments with the Implementation Rules for the Fair Competition Review System having been finalized and published in 2017, and that government agencies at each level are mobilized to implement the new system by conducting self-review in the policy-making process. In January 2018, the NDRC established a new division called the Fair Competition Review Division in order to restrict local governments from intervening in pricing during their formulation of policies, such as through discriminatory terms for market entry or designating preferred suppliers of goods and services. It is likely that the State's fight against administrative monopoly through the AML, which is an *ex-post* control, will be stiffened with the fair competition review system, as the *ex-ante* control mechanism, being brought into the competition enforcement landscape.

B. Specific Problematic Behavior and Emerging Issues

Considering the enforcement characteristics in 2017 and the legislation development in 2018, we are of the view that the following specific behaviors shall be carefully reviewed:

4 Available at: http://news.china.com.cn/2018-01/30/content_50349566.htm.

5 Available at: http://travel.china.com.cn/txt/2018-02/13/content_50509796.htm, see also: http://finance.ifeng.com/a/20180207/15975186_0.shtml.

1. Information Exchange Between Competitors

From the perspective of horizontal monopoly agreements, apart from monopoly agreement being explicitly prohibited by Article 13 of the AML, information exchange between competitors should also be closely monitored.

Based on the AML, information exchange itself does not constitute an illegal conduct. However, if companies, on the basis of information exchange, engaged in coordinated conduct such as price fixing, output or sales restriction or market division, such conduct may constitute monopoly agreement prohibited by Article 13 of the AML. Therefore, if competitors exchange information related to pricing, output restriction or customer division etc., which can be used to facilitate the constitution of monopoly agreements prohibited by Article 13 of the AML, such conduct may attract attention from the antitrust authorities.

On July 20, 2017, the NDRC published the Industry Association Price Behavior Guidance, which is the first antitrust regulation that explicitly elaborates anticompetitive effects and legal risks of information exchange and again rings the alarm for business operators. The Guidance indicates the antitrust authorities' attitude towards information exchange to some extent and it is predictable that the antitrust authorities will continue to pay attention to this area in their enforcement practices. According to the Guidance, it expressly lists conduct types that bear different levels of legal risks and articles related to information exchange are mainly stipulated in Articles 7-9.

More particularly, industry associations may assist companies to share price-related information and potentially reach monopoly agreements mainly through the following three types of conduct: (1) organize members to exchange price-related information and inform other members or players in the industry of such information; (2) release indicative price information such as guide price, bench mark price, reference price, recommended price, etc.; and (3) impose restrictions on cost components and profit margins by enforcing a specific calculation formula. The legal risks of the above conduct are all extremely high as stated in the Guidance.

The Guidance also lists elements to be considered when assessing anticompetitive effects of information exchange, including characteristics of the market and the nature of the information exchanged. It is noteworthy that Article 8 of the Guidance mentions that compared with price information that is historical, general and publicly available, current or future price information of a specific company or product which is not publicly available may be more likely to result in price monopoly agreements among companies. With regard to market characteristics, market concentration, links between upstream and downstream market, and management power that can be exerted by industry associations over their members should be taken into account.

In view of the above, we would suggest:

- Avoiding exchanging information about price, output, customers and sales territories in daily operations including attending industrial seminars;

- Duly and explicitly expressing objection in the case that other attendees raise sensitive issues as mentioned above during industrial seminars; and

- Immediately leaving the seminar and raising clear objection, and leaving with a record taken in the case where the seminar continues to discuss sensitive issues.

2. Price-Related Vertical Agreement and Non-Price Vertical Restraints

Companies should be cautious of the NDRC's steadfast position on vertical monopoly agreement and this may be reflected in the antitrust guidelines on price-related vertical agreements that the NDRC is contemplating drafting.

In addition to such vertical price maintenance explicitly prohibited by Article 14 of the AML, attention should also be attached to non-price vertical restraints. No clear provision is provided by the AML regarding non-price vertical restraints that may constitute monopoly agreements. However, considering that both the antitrust guidelines for the automobile industry and the antitrust guidelines for intellectual property, which are about to be published, provide provisions related to non-price vertical restraints, companies should attach sufficient importance to compliance issues related to non-price vertical restraints in their operations in the future.

Non-price vertical restraints mainly entail territorial restraints and restraints on sales customers. The latest draft of the antitrust guidelines for the automobile industry could serve as an important reference in this regard. It stipulates that exemptions under Article 15 of the AML may directly apply when business operators that do not have substantial market power impose such restraints as long as the restrictions promote efficiency and are justified. Such restraints include: (1) requiring authorized dealers to only carry out business activities within their own business localities, without any restrictions on those dealers' passive sales to clients or cross-supply between different dealers; (2) restricting an authorized dealer from active sales in relation to areas or customers exclusively allocated to another authorized dealer; (3) restricting a wholesaler from directly selling to an end customer; and (4) auto suppliers restricting a dealer from selling components of an auto product to a type of customer so as to pre-empt the customer from purchasing the components to manufacture auto products similar to the supplier's.

However, the automobile guidelines also specify the following conduct in connection with territorial and customer restraints which could generally lead to serious competition restrictions by causing high prices and limiting customers' choices and therefore cannot be presumably exempted under Article 15 of the AML: (1) restricting an authorized dealer from passive sales; (2) restricting different authorized dealers from cross-supply; and (3) restricting an authorized dealer or an authorized repair service provider from selling parts to end customers needed for repairing their vehicles.

It is worth noting that in the NDRC's penalty decision against Medtronic's pricing monopoly there is a clear reference to the fact that vertical restraints on territories and sales customers, as well as restrictions on sales of competing products, would reinforce the implementing effect of the price-related vertical monopoly agreements. With the relevant guidance coming into force in the near future, it is expected that non-price-related restrictions may become the focus of the antitrust authorities, and that in the absence of price-related vertical restraints, non-price-related vertical restraints alone may attract the attention of the antitrust authorities as well.

In view of the above, we would suggest:

- During the daily operations, cautiously imposing restrictions regarding channel regulation, territorial and customer restriction;

- Before adopting non-price vertical restraints, analyzing the company's market power and the potential effect on competition that may be caused by the restriction; and

- Keeping an eye on the authorities' enforcement and legislation activities regarding non-price vertical restraints and making adjustment on distribution agreements accordingly.

3. Abuse of Dominant Market Position

With respect to abuse of dominant market position, apart from a single dominant player conducting typical abusive acts and other abusive acts that may fall within the "the other abusive acts" set out in Article 17(7) of the AML, attention should also be attached to multiple players' abuse of collective dominance.

In August 2017, the NDRC issued its official decision against Zhejiang Second Pharma and Tianjin Handewei Pharmaceutical for abuse of dominance in relation to isoniazid APIs and imposed RMB 443,900 (U.S. $66,002) in cumulative fines on the two companies. In the decision, the NDRC concluded that Zhejiang Second Pharma and Tianjin Handewei Pharmaceutical collectively held a dominant position in the relevant market of Chinese domestic medical-use isoniazid APIs. Their combined share exceeded two-thirds in 2013 and they had a strong control over the market with downstream manufacturers heavily relying on them. By ceasing the supply of APIs to their original customers, the two companies forced some preparation manufacturers to discontinue or suspend production, which caused significant losses. And the relevant market was deemed to have high entry barriers. Therefore, the NDRC determined that the two companies held a dominant position in the medical-use isoniazid APIs market and the abusive acts involved mainly included selling APIs at excessive prices and refusing without any justification to supply isoniazid APIs to downstream manufacturers.

As for companies that may be deemed as dominant in relevant markets, we suggest:

- Monitoring market shares of the company itself and its competitors;

- Monitoring complaints of upstream or downstream players;

- Conducting a comprehensive assessment of potential impacts upon competition of the company's price-related or non-price-related arrangements with upstream and downstream players;

- Conducting the compliance assessment based on practical effects rather than forms with regard to the specific restraints provisions; and

- Reviewing underlying justifiable reasons of the company's commercial policies.

4. Related Behaviors in Emerging Industries

Apart from certain conduct stated above which may become the enforcement focus in the antitrust area in 2018, in the future, the antitrust authorities may also attach significant importance to the internet industry and "Big Data."

As stated above, restriction on territories or channels has become a primary focus of enforcement authorities. As one of the distribution channels, internet sales are cross-regional and are often restrained by suppliers in practice due to its characteristics. With relevant antitrust guidelines to be formally introduced in the near future, the legal nature of restrictions on territories or channels will be clarified and the compliance of internet sales restrictions needs to be further studied.

In addition, "Big Data" has become a continuous hot topic in global antitrust circles in recent years. With the rapid rise of internet enterprises, data has become an essential factor affecting competition. It has been widely discussed whether data could be the entry barrier for some markets and could influence the determination of players' market power. Meanwhile, as "Big Data" often relates to personal privacy, it is a more sensitive issue than normal antitrust issues.

Considering the complex nature and dynamic transformation of the internet market, it may raise new challenges for the antitrust authorities in determining anticompetitive conduct. More importantly, in these rapidly growing industries, the balance between efficiency improvements and the maintenance of competitive order shall be thoroughly analyzed and subtly handled. As explained by Yang Hongcan, Director-General of the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of the SAIC, the guiding enforcement principles for regulating e-commerce giants should be under principles of prudence and acceptance.[6]

For companies in the internet industry and companies using internet as their sales channel, we suggest:

- Prudently adopting "online" or "offline" channel restriction in distribution agreements;

- Taking non-traditional competition factors into account in evaluating the company's own market position; and

- Keeping an eye on the antitrust authorities' enforcement and legislation activities and make adjustment on internet business mode accordingly.

6 Available at: http://finance.people.com.cn/n1/2017/1119/c1004-29654870.html.

OVERVIEW OF CHINESE MERGER CONTROL IN 2017

BY MICHAEL HAN, DAVID BOYLE & JAMES MUIRHEAD[1]

1 Michael Han is a partner of Fangda Partners and is the head of its antitrust practice in China; David Boyle is a senior associate in the Hong Kong office of Fangda Partners & James Muirhead is currently a paralegal (pending admission) in the Hong Kong office of Fangda Partners.

I. OVERALL TRENDS IN CHINESE MERGER CONTROL

China's Anti-Monopoly Law (the "AML") has now been in force for almost a decade. In that time, the Antitrust Bureau of the Chinese Ministry of Commerce ("MOFCOM") has established itself as a key jurisdiction for global merger review.

2017 was a busy year for MOFCOM, which received a total of 400 merger filings, continuing a steady increase in filings.[2] MOFCOM has continued to improve its internal decision-making process accordingly, shortening the average time for accepting cases (simplified and normal case filings) by 14.2 percent and the time for concluding cases by 8 percent.[3]

2017 also saw a jump in the number of remedies cases, with impacts on a number of large international deals. MOFCOM noted that it cooperated with international agencies (in the U.S., EU, South Africa and India) to conclude over 20 cross-border merger cases in 2017.[4]

MOFCOM has also shown that it will actively take enforcement action against parties failing to notify mergers, and that it will not tolerate multi-step transactions designed to avoid the merger filing process.

There have also been developments on the policy front in 2017 with MOFCOM publishing for public comment its Draft Measures for Merger Review. The measures, once finalized, are expected to provide welcome guidance on issues such as the calculation of turnover, as well as the notification and review processes.

II. MERGER REMEDIES

A significant number of conditional approvals were granted by MOFCOM in 2017. Of the 35 conditional approvals that MOFCOM has granted since 2008, seven were granted in 2017. These decisions arose out of large international transactions, many of which were reviewed in multiple jurisdictions (including the U.S. and EU).

MOFCOM's remedies cases in 2017 were:

(i) the merger of The Dow Chemical Company ("Dow") and E.I. du Pont De Nemours And Company ("DuPont");[5]

(ii) the acquisition of Brocade Communications Systems, Inc. ("Brocade") by Broadcom Limited ("Broadcom");[6]

(iii) the acquisition of the printer business of Samsung Electronics Co. Ltd ("Samsung's Printer Business") by HP Inc. ("HP");[7]

(iv) the merger of Agrium and Potash Corporation of Saskatchewan ("PotashCorp");[8]

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2 The Chinese Ministry of Commerce, *2017 Year-end Review*, January 9, 2018, available in Chinese at: http://www.mofcom.gov.cn/article/ae/ai/201801/20180102696433.shtml.

3 Id.

4 Id.

5 MOFCOM announcement No. 24 of 2017, *Regarding the approval of the merger between Dow Chemical Company and DuPont with conditions*, available in Chinese at: http://fldj.mofcom.gov.cn/article/ztxx/201705/20170502567986.shtml.

6 MOFCOM announcement No. 46 of 2017, *Regarding the approval of the acquisition by Broadcom Co., Ltd. of Brocade Communication Systems Limited with conditions*, available in Chinese at: http://fldj.mofcom.gov.cn/article/ztxx/201708/20170802632065.shtml.

7 MOFCOM announcement No. 58 of 2017, *Regarding the approval of the acquisition by Hewlett-Packard Co., Ltd. of specified parts of the business of Samsung Electronics with conditions*, available in Chinese at: http://fldj.mofcom.gov.cn/article/ztxx/201710/20171002654063.shtml.

8 MOFCOM announcement No. 75 of 2017, *Regarding the approval of the merger between Agrium Inc. and Saskatchewan Potash Corporation Limited with conditions*, available in Chinese at: http://fldj.mofcom.gov.cn/article/ztxx/201711/20171102666641.shtml.

(v) the acquisition of Hamburg Suedamerikanische Dampfschifffahrts-Gesellschaft KG ("Hamburg Süd") by Maersk Line A/S ("Maersk");[9]

(vi) the acquisition of Siliconware Precision Industries Co., Ltd ("SPIL") by Advanced Semiconductor Engineering, Inc. ("ASE");[10] and

(vii) the acquisition of C.R. Bard, Inc. ("Bard") by Becton, Dickinson and Company ("BD").

This section briefly examines the difference in approaches taken in global transactions by MOFCOM, as compared to the European Commission ("EC"), and the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") in the United States.[11]

A. General Trends in Merger Remedies Cases

In 2017, MOFCOM continued to actively engage with other competition enforcement agencies to coordinate global remedies packages. However, where public interest/industry policy issues specific to the Chinese market arose, MOFCOM took steps to impose additional remedies to address these issues. This is especially true for deals involving sensitive sectors in China, which include sectors in which China is heavily reliant on foreign imports.

Whereas global packages for these global remedies cases have predominantly included structural remedies, MOFCOM's additional remedies have tended to be more behavioral. These are remedies requiring that specific actions be taken in the Chinese markets, instead of the insistence of additional divestment to the global divesture package accepted by the other competition agencies.

The time taken for MOFCOM to review these filings involving remedies also varies considerably from case to case. The *ASE/SPIL* case, for example, lasted over a year (456 days) from filing to completion. By contrast, *BD/Bard* lasted 191 days from filing to a decision for MOFCOM to conditionally approve. Parties to a potential remedies transaction should therefore be prepared for a degree of uncertainty when it comes to the merger review timeframes in China.

B. Summary of Remedies Imposed in Global Transactions in 2017

Increased coordination between competition enforcement authorities has meant that in global transactions, parties often devise global remedies packages to address competition concerns. This ensures consistency across multiple jurisdictions, and can include proposing up-front buyers as part of structural remedies to efficiently deal with potential concerns enforcement agencies have.

1. Dow/DuPont

This was a merger of equals between Dow and DuPont (the fourth and fifth largest biotechnology and seed companies in the world respectively) to create one of the largest chemical companies in the world (worth an estimated U.S. $130 billion). Global remedies imposed on the parties consisted of structural remedies requiring the companies to divest specified parts of their crop protection business as well as their copolymer and ionomer businesses.

In addition to the structural requirements imposed by the global remedies package, MOFCOM imposed a number of additional behavioral remedies to address the local issues.

MOFCOM had particular concerns regarding the market of rice herbicides and insecticides. This concern was compounded by MOFCOM's perception of the parties' strong R&D and innovation capabilities before the merger and its concern over the potential negative impact of the merger on R&D and innovation. As China is the largest consumer of rice in the world, it is not surprising that it would want to take additional steps to help protect local Chinese customers.

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9 MOFCOM announcement No. 77 of 2017, *Regarding the approval of the acquisition of Hamburg Suedamerikanische Dampfschifffahrts-Gesellschaft KG by Maersk Line A/S with conditions*, available in Chinese at: http://fldj.mofcom.gov.cn/article/ztxx/201711/20171102667566.shtml.

10 MOFCOM announcement No. 81 of 2017, *Regarding the approval of the acquisition by Advanced Semiconductor Engineering Inc. of Silicon Precision Industry Co., Ltd. with conditions*, available in Chinese at: http://fldj.mofcom.gov.cn/article/ztxx/201711/20171102675701.shtml.

11 In the United States, merger notifications are made to the FTC *and* the Antitrust Division of the DOJ under §7A of the Clayton Act. These decisions are confidential, though grants of early termination (indicating that neither the FTC nor the DOJ intend to investigate the merger further) are published.

Behaviorally, Dow and DuPont were therefore required to supply specific formulations of herbicide and insecticides used to protect rice crops to Chinese customers on a non-exclusive basis. These products were to be supplied at reasonable prices, and the parties were prohibited from requiring exclusive distribution by distributors in China for five years following the closing of the transaction.

2. Broadcom/Brocade

This transaction was Broadcom's acquisition of Brocade, both of which were active in the data center product market. The companies had vertical links between Broadcom's Application-Specific Integrated Circuits ("ASICs"), and Brocade's fiber channel switches and products for Ethernet switches.

MOFCOM noted specific concerns that the vertical links between the parties, as ASICs are manufactured based on the specifications from downstream fiber channel switch manufacturers. According to MOFCOM, this could enable Broadcom to misuse confidential information received from other third-party fiber channel switch suppliers to benefit Brocade's downstream fiber channel switch business.

MOFCOM also had concerns regarding the fiber channel adapter and switch markets, due to the inter-dependent nature of the two products. Brocade had a global market share of 70-80 percent (and its main competitor had a 20-30 percent market share) in 2016 in the fiber channel switch market. Broadcom had a market share of 40-50 percent in the fiber channel adapter market in 2016 (with its main competitor having a 50-60 percent market share). MOFCOM noted that there were three ways that the merger could eliminate or restrict competition post-merger: (i) Broadcom's reduction in the interoperability of its switch products with fiber switch adapters produced by other suppliers; (ii) misusing confidential information received from third-party fiber channel adapters for the benefit of its own fiber channel adapters; and (iii) bundling its switches with its adapters – especially where buyers of these products do not have the countervailing market power to push back against Broadcom, this could lead to competition being eliminated or restricted in the Chinese adapter market.

In addition to the global remedies imposed in conjunction with the U.S. and EU authorities (requiring firewalls to be set up to protect confidential information, and requiring the company to ensure interoperability), MOFCOM also prohibited the parties from engaging in tying or bundling for a period of ten years post-transaction, to avoid foreclosure in the Chinese adapter market.

3. Agrium/PotashCorp

This was the merger between two Canadian fertilizer and farm supplier companies. The combined entity, Nutrien, is now the largest producer of potash, and the second largest producer of nitrogen fertilizers in the world. The merger was not notified in the EU. U.S. remedies involved the divestment of specific Agrium facilities in the U.S. phosphate industry.[12]

MOFCOM's concerns were specific to how potassium chloride and potash are imported and sold in China. PotashCorp owns a 22 percent stake in a company named Sinofert, which is one of only four companies in China allowed to import and sell potassium chloride in China. Sinofert in turn also owns a 21 percent stake in Qinghai Salt Lake Industry Co., Ltd. ("Qinghai Salt"), which produces over 70 percent of China's potash. Separately, the merged entity would also have over a 50 percent share in Cantopex, a jointly owned company used to sell potash outside of North America.

MOFCOM required that the merged entity:

(i) dispose of its shareholding in smaller rival companies (subject to prior approval of proposed buyers),

(ii) be prohibited from acquiring (without MOFCOM approval) stakes in other potash producers for the five years following the date of the conditional approval,

(iii) convert its shareholding in Sinofert into a passive investment – namely by removing PotashCorp employees from the company (and its board of directors), restricting future appointments (of employees or directors) by the merged entity, and restricting the transfer of sensitive information from the potash producer to the merged entity; and

12 FTC decision and order: *In the Matter of Agrium Inc., a corporation; Potash Corporation of Saskatchewan Inc., a corporation; and Nutrien Ltd., a corporation*, Docket No. C-4638, February 5, 2018.

(iv) take steps to ensure that Cantopex maintains stable and reliable supplies to China (at a volume not less than the average volume for the previous five years) and maintains its existing sales methods and procedures.

Separately (outside of MOFCOM's public announcement) Sinofert entered into an agreement to sell its stake in Qinghai Salt two weeks before the clearance of the merger to SinoChem (a Chinese State-Owned-Enterprise).

4. HP/Samsung's Printer Business

HP (one of the largest printer and PC companies) acquired Samsung's Printer Business in order to expand its existing printer portfolio to enter the A3 printer market. The acquisition gave HP access to thousands of printing patents held by Samsung, as well as an expanded workforce of researchers and engineers. The FTC/DOJ and EC unconditionally approved this acquisition.[13]

In China, MOFCOM found that HP and Samsung would have a post-transaction market share of 50-55 percent in the A4 format laser printer and A4 format laser printing consumables markets (which consist of printer cartridges and toner). MOFCOM noted that the deal would give HP the capability and motivation to engage in the tying of consumables to its sales of A4 format printers, harming competition in the A4 format printing consumable market and harming consumer welfare. MOFCOM also noted the high technological barriers to entry into the printer market, and that it was unlikely for new market entrants to form effective competitive restraints on HP post-acquisition.

MOFCOM therefore imposed a number of behavioral remedies on the parties, requiring that HP:

(i) continue to offer supply of its A4 laser printer products on offer terms which are fair and reasonable and will submit relevant pricing and related data to the Anti-Monopoly Bureau every six months;

(ii) not acquire any share (even minority investments) of the A4 laser China business of any printer manufacturer;

(iii) not introduce any technical measures, firmware or updates to Samsung-branded A4 laser printers and original consumables sold in China, excluding exports that would affect the compatibility of third-party consumables;

(iv) not to implement any technical measures, firmware or updates to HP-branded A4 laser printers and relevant original consumables sold in China (excluding exports) that would affect the compatibility of third-party consumables with HP products;

(v) not engage in any false or misleading advertising or marketing directed at potential customers (located in China) of A4 laser original consumables that states that third-party consumables are not compatible with A4 laser printer products; and

(vi) not engage in tying or other unreasonable business practices with regard to A4 laser printer products (particularly with regards to A4 format printing consumables, such as printer ink).

These conditions, to be effective for five years following the date of the approval was issued, were aimed at preserving competition in the A4 format laser printer and A4 format laser printing consumables markets in China.

5. Maersk/Hamburg Süd

This was an acquisition by the largest container shipping company in the world (Maersk) of its smaller German rival (Hamburg Süd, itself the seventh largest container shipping company in the world).

This transaction was unconditionally approved in the U.S., but was conditionally approved by the EC. The conditions imposed by the EC all related to shipping routes to and from the EU, and did not include routes to East Asia.

Given the regional impacts of this transaction, MOFCOM worked closely with the Korean Federal Trade Commission ("KFTC") to coordinate efforts. Although the overall market share of the companies globally was considered to be small, MOFCOM noted that the proposed deal could restrict or eliminate competition in general (and for the refrigerated container shipping market) in routes between the Far East and South America.

13 EC decision: Case M.8254 *HP/Printer Business of Samsung Electronics*, (April 4, 2017); U.S. early termination notice: *Transaction Number 20180268: Samsung Electronics Co., Ltd.; HP Inc.*, (December 8, 2017).

MOFCOM's analysis took into account the combined market share of Maersk Line and other shipping lines in a number of Vessel Sharing Agreements ("VSAs") on routes to and from South America. Given the high market shares of the VSAs on these routes, and Maersk Line's heightened ability to influence the VSAs post-transaction, MOFCOM was concerned that Maersk Line may raise prices or take other measures to eliminate and restrict competition.

The resulting remedies in the conditional approval included prohibitions on entering into or renewing memberships in shipping alliances, terminating a number of existing memberships, and reducing the merged company's refrigerated shipping capacity. These conditions applied to various routes between East Asia and South America.

6. ASE/SPIL

ASE and SPIL are Taiwanese companies active in the semiconductor assembly and testing industry. In the global semiconductor assembly and testing OEM service market, ASE and SPIL were ranked as the first and third largest companies, and fifth and first in the Chinese markets respectively. The combined company is the largest (in terms of market share) in both the global and Chinese markets.

The FTC unconditionally approved this acquisition, and the transaction was not filed with the EC.

In China, MOFCOM had particular competition concerns that ASE would become the largest market participant in both the global and Chinese markets for semiconductor assembly and test OEM service markets. In particular, the regulator had concerns that the companies would have a substantial advantage in technology and R&D capacity, which could widen the gap between them and their competitors in the market. The technological and capital barriers in the semiconductor assembly and test industry also served as barriers to entry, meaning that new competitors were unlikely to enter the market in the short term to restrain the merged entity.

MOFCOM also noted that the transaction would limit customer choice, as customers preferred to avoid the language barrier present in dealing with international companies. Indeed, MOFCOM's investigation showed that many common clients relied on either ASE or SPIL to be their primary and backup service providers.

Due to the strong market position of the merged entity, MOFCOM also had specific concerns that the company would engage in discriminatory pricing practices, or use price hiking to eliminate or restrict competition.

MOFCOM required that the merging entities remain independent (in terms of management, finance, personnel, pricing, sales, production capacity and procurement) for a term of two years and the merged entity was only allowed to exercise certain limited shareholder rights. It is worth noting that the last time when MOFCOM imposed these types of "hold separate" remedies was back in 2013. Since then, presumably because of the controversy regarding these types of remedies, MOFCOM appeared to have ceased imposing these remedies in the past four years.

Behaviorally, ASE and SPIL were also required (during the same two year period) to refrain from discriminating between clients, and to set reasonable prices and deal terms.

SPIL also (separately) announced that it would sell a 30 percent stake in one of its subsidiaries to Tsinghua Unigroup (a Chinese State-Owned-Entity).

7. BD/Bard

BD and Bard (both listed companies) are two of the largest medical device companies globally. The companies were found to have overlaps in the Core Needle Biopsy ("CNB") markets globally, tunneled home drainage catheter systems in the U.S., and tissue markers in the EU. The transaction itself was designed to capitalize on the complementarity of the companies' portfolio of medical device products.

In this case, MOFCOM, the EC, and the FTC all required the divestiture of BD's global CNB business, including: manufacturing equipment, finished goods inventory and intangible assets required to make the products. This divestment included specific references to a product currently still in development by BD, which the antitrust agencies believe would reduce the incentive of Bard to continue to innovate in this market.

MOFCOM, however, in this case, did not impose restrictions on the parties that went beyond the global structural remedies. By contrast, the EC and FTC imposed additional remedies on the parties to address other markets in which the companies had overlaps in their respective jurisdictions.

C. Key Takeaways

MOFCOM's increased international cooperation has added a degree of clarity to the merger approval process of major international transactions, and lowered the overall costs of the merger review process.[14] The increased cooperation also means that parties seeking to file transactions in multiple jurisdictions need to ensure consistency in their approach.

Based on the conditional approvals granted in 2017, a number of important takeaways can be drawn:

(i) special care needs to be taken when dealing with merger filings involving "sensitive sectors" in China,

(ii) just because a merger has been approved unconditionally in the U.S., EU, or other jurisdictions does not mean that it will be approved unconditionally in China,

(iii) small increases in market share resulting from a transaction may not in itself result in a smooth merger review process,

(iv) MOFCOM has also shown an interest not just in the current market position of the parties, but also the potential impact of products in development and the competitive impacts R&D departments may have on competition in the future,

(v) concerns may be raised by MOFCOM at any time during the review process; and

(vi) in order to protect the Chinese market, MOFCOM may insist on remedies beyond those requested in other jurisdictions, especially behavioral remedies.

III. FAILURES TO NOTIFY

In 2017, MOFCOM also demonstrated an increased focus on enforcement against parties for failing to notify transactions. There were eight cases published by MOFCOM in 2017 for failures to notify under Article 21 of the AML.

Under Article 48 of the AML, undertakings that implement a concentration without prior approval from MOFCOM, may be fined up to RMB 500,000 (~EUR 64,000) and, in extreme cases, the transaction may be unwound.

In deciding the appropriate penalty, MOFCOM may consider a number of factors, including the nature, extent and duration of the violations.[15] MOFCOM's recently published cases on the issue of failure to notify indicate that this may include whether the parties:

(i) have been complained about by third parties,

(ii) planned to notify MOFCOM (or did in fact notify MOFCOM after the fact),

(iii) withheld any information in their filings,

(iv) cooperate with the investigation,

(v) raised any defenses during the investigation; and

(vi) have previous failures to notify.

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14 See: comments of MOFCOM's Xie Lin dated November 20, 2017, reported by *Parr* "China-international merger review cooperation increasing – 10th Anniversary of AML Forum" (November 24, 2017).

15 Article 49, AML.

The penalties in each of the eight cases published in 2017 can be broken down as follows:

	Case	Penalty (RMB)
1.	Canon/Toshiba Medical Systems[16]	300,000 (Canon)
2.	Cummins/Xiangyang Kanghao Electrical and Mechanical Services[17]	150,000 each
3.	Continental Automotive/Huayu Automotive Systems[18]	200,000 each
4.	Meinian Onehealth Healthcare (Group)/Ciming Health Checkup[19]	300,000 (Meinian)
5.	OCI Corporation/Tokuyama Malaysia[20]	150,000 (OCI)
6.	Guangdong Rising H.K. (Holding)/PanAust[21]	150,000 (Guangdong Rising)
7.	Wuhu Construction/Chery New Energy Automotive Technology/Yaskawa Electric[22]	150,000 each
8.	Maersk/Binhai County Binhai Port Investment and Development[23]	150,000 each

We have summarized a number of the key failure to notify cases below.

A. Canon/Toshiba Medical Systems

In this case, Canon was found to have failed to notify its acquisition of Toshiba Medical Systems ("TMS") from Toshiba.

MOFCOM's decision in this case draws a distinction between the "commencement of implementation" and the "completion of implementation." Specifically, it found that this transaction was structured in two steps: in the first step, a special purpose vehicle acquired the voting rights of TMS, giving Canon non-voting shares and share options; in the second step Canon was to exercise the share options to acquire control over TMS after obtaining the requisite merger clearances needed for the transaction (including from MOFCOM).

Similar to the *Meinian* case below, MOFCOM considered that the two steps in Canon were closely related, forming "integral parts for Canon to acquire all shares of Toshiba Medical." As soon as the first step in this transaction was completed (with Canon's acquisition of the non-voting shares in TMS, and the share options), this constituted a failure to notify.

MOFCOM noted that the investigation itself was triggered by a third-party complaint. MOFCOM also noted that the parties intentionally delayed filing in order to help Toshiba cope with its ongoing financial difficulties, that they did in fact notify the transaction before completing the second step, and that the larger transaction was still incomplete. Accordingly, MOFCOM ultimately fined Canon RMB 300,000 for its failure to notify.

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16 Ministry of Commerce Penalty decision (Shang Fa Han [2016] No. 965), January 4, 2017, available in Chinese at: http://fldj.mofcom.gov.cn/article/ztxx/201701/20170102495433.shtml.

17 Ministry of Commerce Penalty decision (Shang Fa Han [2017] No. 7), April 11, 2017, available in Chinese at: http://www.mofcom.gov.cn/article/xzcf/201704/20170402555469.shtml.

18 Ministry of Commerce Penalty decision (Shang Fa Han [2016] No. 682), April 12, 2017, available in Chinese at: http://fldj.mofcom.gov.cn/article/ztxx/201704/20170402556099.shtml.

19 *Stock Exchange Announcement of Meinian Onehealth regarding penalty decision received from the Ministry of Commerce*, April 28, 2017, available in Chinese at: http://www.cninfo.com.cn/cninfo-new/disclosure/fulltext/bulletin_detail/true/1203427013.

20 Ministry of Commerce Penalty decision (Shang Fa Han [2017] No. 171), May 3, 2017, available in Chinese at: http://www.mofcom.gov.cn/article/xzcf/201705/20170502568349.shtml.

21 Ministry of Commerce Penalty decision (Shang Fa Han [2017] No. 205), May 11, 2017, available in Chinese at: http://www.mofcom.gov.cn/article/xzcf/201705/20170502573385.shtml.

22 Ministry of Commerce Penalty decision (Shang Fa Han [2017] No. 408), July 20, 2017, available in Chinese at: http://fldj.mofcom.gov.cn/article/ztxx/201707/20170702612611.shtml.

23 Id.

B. Continental Automotive/Huayu Automotive Systems

MOFCOM announced on April 12, 2017 that it had fined Continental Automotive and Huayu Automotive Systems RMB 200,000 each for their failure to notify a JV set up in May 2015. The parties initially failed to file the transaction before the JV obtained its business license. In their subsequent filing, the parties also failed to state that the JV in question had already been established.

MOFCOM made note of the fact that the parties notified the transaction, but failed to disclose the fact that the underlying transaction had already been concluded. MOFCOM also found that the parties were aware of the notification requirement (as they were in the process of preparing the notification at the time the business license was obtained) but nevertheless proceeded to complete the deal.

As shown in the table above, the parties in this case received a slightly higher penalty (RMB 200,000, as opposed to the RMB 150,000 penalty in the *Cummins* case, for example). While the difference in quantum is not substantial, by setting out the improper conduct in its decision and imposing a higher monetary fine, MOFCOM has strongly indicated that it will not tolerate non-cooperation by parties during an investigation and/or the submission of any intentionally misleading submissions.

C. Meinian Onehealth Healthcare (Group)/Ciming Health Checkup[24]

Meinian Onehealth Healthcare (Group) ("Meinian") is in the business of providing health checkups in China, and is a subsidiary of Meinian Onehealth Healthcare Holdings (a listed company ultimately controlled by an individual named Yu Rong). Meinian entered into an agreement in November 2014 to acquire 100 percent of Ciming Health Checkup ("Ciming") in several stages. Some of these stages involved transfers of shares to other companies controlled by Yu Rong, and not all of the stages had been completed by the time Meinian voluntarily reported the transaction to MOFCOM (following a third-party complaint).

MOFCOM found that Meinian and its ultimate controller played a lead role in its overall transaction to acquire Ciming. Meinian was a party to the share transfer agreement, a beneficiary of the deal as well as the acquirer obtaining actual control of Ciming – it had full knowledge of the whole deal. The other parties involved in the transaction (controlled by Yu Rong) merely temporarily held the target's shares at Meinian's direction.

MOFCOM concluded that Meinian failed to notify this "single transaction" before proceeding with the first two steps, which in MOFCOM's view were interdependent as they shared the goal of conferring control over Ciming to Meinian. Accordingly, MOFCOM fined Meinian RMB 300,000 for this failure to notify.

D. OCI Corporation/Tokuyama Malaysia[25]

OCI Corporation ("OCI") is a South Korean company engaged in the business of manufacturing basic chemical and petrochemical products, as well as energy solutions. Tokuyama Corporation is a listed Japanese business operating in a number of markets, including the manufacturing of chemical products. Prior to the transaction, Tokuyama Corporation owned 100 percent of Tokuyama Malaysia.

OCI, Tokuyama Corporation, and their connected entities entered into a contract in 2016 for OCI to acquire Tokuyama Malaysia in three steps. These steps, to be carried out between October 7, 2016 and March 31, 2017, consisted of Tokuyama Malaysia issuing new shares to OCI, followed by a purchase of the outstanding shares from Tokuyama Corporation.

MOFCOM interpreted the deal as involving three inter-dependent steps. As soon as OCI acquired its first shareholding of Tokuyama Malaysia on October 7, 2016 through the initial issuance of shares (giving it a 16.5 percent stake), and officially updated Tokuyama Malaysia's shareholding, this constituted a failure to notify.

MOFCOM took into consideration the fact that OCI voluntarily notified MOFCOM before initiating the second step of the transaction, and actively cooperated during the investigation. MOFCOM nevertheless concluded that OCI violated the AML based on reasoning similar to that applied in the *Meinian* and *Canon* cases, namely that the different steps had the same ultimate purpose and were interdependent, constituting one single transaction. MOFCOM ultimately fined the company RMB 150,000 for this failure to notify.

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24 *Stock Exchange Announcement of Meinian Onehealth regarding penalty decision received from the Ministry of Commerce*, April 28, 2017, available in Chinese at: http://www.cninfo.com.cn/cninfo-new/disclosure/fulltext/bulletin_detail/true/1203427013.

25 Ministry of Commerce Penalty decision (Shang Fa Han [2017] No. 171), May 3, 2017, available in Chinese at: http://www.mofcom.gov.cn/article/xzcf/201705/20170502568349.shtml.

E. Key Takeaways

Although the fines for failures to notify are not particularly high (the maximum fines are capped at RMB 500,000 under Article 48, AML), a failure to notify violation may still lead to (i) reputational damage with MOFCOM; (ii) higher fines for repeat offences; and (iii) the potential for MOFCOM to unwind a transaction.

None of the failure to notify cases so far has been found to have had the effect of restricting or eliminating competition in a relevant market. It is therefore not clear how MOFCOM would approach a case involving a possible restriction or elimination of competition.

In terms of determining the types of conduct that may influence the value of fines handed down by MOFCOM, the published cases show that the biggest impact on an eventual fine appears to be the existence of a third-party complaint. In the *Meinian* and *Canon* cases, investigations were triggered by third-party complaints and led to fines twice as high as those in the *OCI* case despite all three cases involving multi-step transactions.

IV. POLICY CHANGES

MOFCOM solicited comments on its Draft Measures for Merger Review ("Measures"). The Measures provide welcome guidance and definitions for key terms, including guidance on the calculation of turnover, as well as the notification and review processes. A number of key changes in this draft are:

(i) A formal definition of the meaning of control, providing that control may also involve an ability to influence business and management decisions regarding budgets, business plans, and the appointment/removal of the senior management of an undertaking.

(ii) Clarifying that turnover should be calculated based on turnover in the preceding fiscal year (as defined in the place of registration of the undertaking when the concentration agreement is executed, and is based on turnover of the undertaking and any other undertakings it controls at the time of the notification.

(iii) Recognizing that transactions (such as the *Canon* or *OCI* transaction) set up as a series of transactions factually or legally conditioned on each other will be deemed to be a single concentration.

(iv) Giving MOFCOM the power to initiate investigations on its own initiative (or upon receiving complaints) into concentrations of undertakings that may have the effect of eliminating or restricting competition, but that are under the notification thresholds.

The final version of the Measures, which is expected in 2018, will help to provide clarity to parties seeking to notify transactions, but also helps to align MOFCOM's interpretation of key terms with the interpretations of other jurisdictions, such as the EU.

V. CONCLUSION

2017 has been an important year for MOFCOM, and for merger control in China. The enforcement agency has shown that it will not shy away from using its powers to require remedies to protect the Chinese markets, or to punish parties failing to notify mergers. Undertakings intending to engage in the merger filing process should therefore plan ahead, and ensure that provisions are made for the Chinese merger filing process in global transactions.

STRATEGIES IN BRINGING ANTITRUST CIVIL CLAIMS IN CHINA

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I. INTRODUCTION

Since the establishment of China's antitrust law system, administrative enforcement agencies have been actively exercising their powers, initiating dozens of antitrust investigations with a high international profile, among which, the most influential cases include Qualcomm's abuse of dominant market positions and vertical monopoly agreements of several leading automobile companies, such as Audi and Mercedes-Benz.

Meanwhile, antitrust civil litigation plays an increasingly important role in China and has become an essential approach for market participants to resolve disputes. The number of antitrust civil lawsuits filed by victims allegedly to have suffered damages due to monopolistic conduct has rapidly grown.[5]

In this article, we make a preliminary introduction to the antitrust civil litigation system under the Chinese laws, and make a comparison between antitrust civil litigation and antitrust investigation. Based on these, we further discuss potential strategies available to market participants in antitrust disputes – both the alleged victims of monopolistic conducts and the alleged monopolists.

II. BASIC INTRODUCTION TO CHINA'S ANTITRUST CIVIL LITIGATION SYSTEM

Among the existing legislation, Article 50 of the Antimonopoly Law of PRC ("AML") and Provisions of the Supreme People's Court on Certain Issues concerning Application of Laws in Adjudication of Civil Disputes Arising from Monopolistic Conducts ("Antitrust JI") are the primary grounds for antitrust civil litigations.

On the whole, antitrust civil litigation shall abide by general laws and regulations governing civil litigation, with a few special provisions. For example, regarding courts with competent jurisdiction, cases of first instance of antitrust civil disputes are generally adjudicated by intermediate people's courts (or by intellectual property courts in municipals with intellectual property courts).[6] According to some newly promulgated provisions, high people's courts may also adjudicate some first-instance antitrust civil cases involving huge amounts in dispute, containing foreign factors, or of high profile.[7] Territorial jurisdiction is determined based on the individual circumstances of each case and according to the jurisdictional provisions of infringement disputes and contract disputes set forth in civil procedural law and relevant judicial interpretations. As to the burden of proof, general civil lawsuits follow the principle of "the party who asserts must prove," i.e. the plaintiff is required to provide evidence to prove its claims and bears the burden of proof. However, in antitrust civil litigation, the defendant alleged to have concluded a monopoly agreement is burdened to prove the absence of exclusive or restrictive effect of its monopoly agreement, and the defendant alleged to have abused market dominance, where he defends by arguing justifications, must present evidence to prove such justifications. These cases always involve issues that require expertise, calling for experts (including economists, legal experts, technical experts, etc.) to participate. Parties are entitled to apply for participation of persons with professional knowledge to explain professional issues, or apply to engage professional organizations or professional persons to issue reports on specific issues.

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5 Widely-known cases include *Rainbow Technology and Trading Co., Ltd v. Johnson & Johnson (Shanghai) Medical Devices Co., Ltd and Johnson & Johnson (China) Medical Devices Co., Ltd* (August 2013, Shanghai High People's Court) concerning vertical monopoly agreement, *Huawei Technologies Co., Ltd. and InterDigital Technology Corp, InterDigital Communications Inc, and InterDigital* (October 2013, Guangdong High People's Court) concerning alleged InterDigital's abuse of dominance, *Beijing Qihoo Technology Co., Ltd v. Tencent Technology (Shenzhen) Co., Ltd and Shenzhen Tencent Computer System Co., Ltd* (October 2014, Supreme People's Court) concerning Tencent's alleged abuse of dominance, *Apple, Inc. v. Qualcomm Incorporated* (docketed by Beijing Intellectual Property Court in January 2017, pending) concerning alleged Qualcomm's abuse of dominance and licensing terms of standard essential patents, and the so-called "first antitrust case in Chinese petrochemical industry" – *Yunnan Ying Ding Bio-energy Co., Ltd. v. Sinopec Sales Co., Ltd. and Sinopec Sales Co. Yunnan Branch* (September 2017, Yunnan High People's Court) concerning Sinopec's refusal to deal.

6 See Article 3 of Notice of Supreme People's Court on Intellectual Property Courts' Jurisdiction and Relevant Issues, "an intellectual property court has jurisdiction over civil disputes of first instance in the city it locates; Guangzhou Intellectual Property Court has jurisdiction over civil disputes of first instance in Guangdong Province."

7 For example, in Beijing High People's Court's Regulations on Adjusting the Jurisdiction of Intellectual Property Civil Cases in Beijing, Article 1, "Beijing High People's Court has jurisdiction over the following cases: (1) first instance civil intellectual property cases with dispute amount over RMB 200,000,000 yuan and both parties reside in Beijing; first instance civil intellectual property cases with dispute amount over RMB 100,000,000 yuan and one of the parties reside outside Beijing; or first instance civil intellectual property cases with foreign (or Hongkong, Macau, Taiwan related) factors … (4) first instance civil intellectual property cases with huge influences in Beijing…" For another example, in Shanghai High People's Court's Regulations on Adjusting the Jurisdiction of Intellectual Property Civil Cases in Beijing, Article 3, "Shanghai High People's Court has jurisdiction over the following cases: (1) first instance civil cases with dispute amount over RMB 200,000,000 yuan; first instance civil cases with dispute amount over RMB 100,000,000 yuan and one of the parties reside outside Beijing; or first instance civil cases with foreign (or Hongkong, Macau, Taiwan related) factors, and subject matter is related to patents, plant new species, integrated circuit design, technology secret, computer software, and antitrust…"

In addition, considering the characteristics of antitrust law, many problems inevitably arise when it is combined with the civil litigation system (for example, whether "claim of affirmation" is applicable, how to determine the eligibility of both parties, how to identify "interest in suit," how to determine "losses," how to determine the causal relationship between conduct and losses, etc.). Therefore, the antitrust law and the civil litigation system are still in the running-in process, with many problems remaining to be further explored in practice.

III. ANTITRUST CIVIL LITIGATION VS ANTITRUST ADMINISTRATIVE INVESTIGATION

In China, at present, the alleged victim in an antitrust dispute who claims to have suffered losses from suspected monopolistic conduct may complain to antitrust law enforcement agencies and request an antitrust investigation into such suspected monopolistic conduct. It may also bring an antitrust civil lawsuit against the suspected monopolist before courts. Compared with the antitrust investigation carried out by an administrative law enforcement agency, which the public may be more familiar with nowadays, antitrust civil lawsuits between equal entities before the courts differ in several aspects. In the following paragraphs, we discuss the major differences between these two procedures which may impact on overall strategies of the parties concerned, to further clarify the characteristics of antitrust civil litigation compared with the administrative antitrust investigation.

First of all, in terms of standards of case docketing, the requirements of case docketing for antitrust civil litigation are relatively clear. Courts adopt a registration approach for case docketing, and accept cases as long as the requirements of case docketing for common civil litigation are met.[8] In contrast, whether an administrative agency would accept an antitrust complaint and initiate an investigation seems hard to predict. Enforcement agencies have discretion, leaving it uncertain whether a case would be docketed and when it would be docketed. Generally, antitrust enforcement agencies tend to give priority to, and thus devote limited resources to, cases with obvious competition law concerns. For example, they may pay close attention to industries which the public has alleged to have severe monopoly concerns, and focus on leading operators with high profile.

Second, with regard to possible claims, requests in an antitrust civil litigation may be subject to more restrictions than those in a complaint to enforcement agencies. A plaintiff in an antitrust civil lawsuit is required to prove "interest in suit," and claims lacking interest may be dismissed. In contrast, enforcement agencies do not impose strict requirements on whether the complainant has interests at stake. A complainant can primarily focus on issues in which it has stake, while also mentioning other relevant issues.

Third, from the perspective of the difficulty of producing evidence by both parties in dispute, the burden of proof on the plaintiff in civil litigation is heavier than that of the complainant in an administrative investigation. As mentioned above, civil litigation generally follows the principle of "the party who asserts must prove," and basically abides by the doctrine of "preponderance of evidence,"[9] meaning that the party can only prevail when the probability of evidence it produced outweighs that of the other party to a certain degree, which is a high standard that is hard to meet. In antitrust civil lawsuits, it is very difficult to prove the definition of market, the proof of market dominance, the causal relationship between monopoly behavior and loss and the amount of loss. As to the administrative investigation, informants usually need to provide some preliminary evidence to persuade the antitrust law enforcement agencies to docket the case and file an investigation. Once the antitrust law enforcement agency decides to start the investigation, it has greater authority to investigate and collect evidence. Accordingly, whistleblowers may be less likely to collect evidence.

Fourth, in terms of the standards in identifying substantive issues, the courts have some different opinions from those of the enforcement agencies. Taking identification of vertical monopoly agreement as an example – there exist two conflicting theories, i.e. "*per se* illegal" and "rule of reason." "*per se* Illegal" means that concluding and practicing vertical monopoly agreements constitutes illegality, unless there is evidence proving that such conduct does not have effects that exclude or restrict competition. "rule of reason" means that a vertical monopoly agreement is only illegal where it unreasonably excludes or restricts competition. Seen from the current cases, some courts tend to adopt the "rule of reason."

8 See Article 119 of the Civil Procedure Law of the People's Republic of China, "[t]o institute an action, the following conditions must be satisfied: (1) the plaintiff must be a citizen, legal person or other organization with a direct interest in the case; (2) there must be a specific defendant; (3) there must be a specific claim and a specific factual basis and grounds; and (4) the action must fall within the range of civil actions accepted by the people's courts and within the jurisdiction of the people's court with which it is filed.

9 See Article 73 of the Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings, "[w]here the parties to a case produce conflicting evidence on the same fact but neither has sufficient evidence to rebut the evidence submitted by the other party, the people's court shall assess whether or not the evidence submitted by one party is clearly more persuasive than the evidence submitted by the other party, taking into consideration the circumstances of the case as a whole, and if so, affirm which party's evidence has greater probative value; where the facts of a case cannot be determined due to difficulties in assessing the persuasive value of the evidence, the people's court shall adjudicate the case on the basis of the rules concerning the burden of proof."

In adjudicating the first vertical monopoly agreement case (the *Johnson & Johnson* case)[10] in China, Shanghai High People's Court expressly states that, horizontal monopoly agreements in general trigger more severe concern than vertical monopoly agreements, and "anti-competition effect" is a requirement for identifying horizontal monopoly agreement, so it makes more sense to request the plaintiff in a vertical monopoly agreement case to bear the burden of proving anti-competitive effect.

In the *Gree* case,[11] Guangzhou Intellectual Property Court takes a similar analytical approach. In contrast, recently the enforcement agencies tend to adopt a method of "restriction in principle with exemptions," i.e. where operators conclude an agreement that is expressly prohibited by law, such agreement is illegal, unless the operators can prove exemption conditions are met. It is worth noting that, in December 2017, in the first vertical price monopoly agreement administrative lawsuit,[12] from the perspective of judicial review, the court positively recognized the legality of enforcement agencies' applying the "restriction in principle with exemptions" approach in identifying a vertical price monopoly agreement.

Fifth, as to the extent of information disclosure, an antitrust civil litigation discloses more than an antitrust investigation. In an antitrust civil lawsuit, after docketing the case, some important courts (e.g. Beijing Intellectual Property Court) may issue public notice of the acceptance of a case, through a press release or its official Wechat account, draw press attention and comments. There is less restriction on plaintiffs' taking initiative to disclose information related to the litigation to the public. In comparison, in an administrative investigation, the enforcement authorities rarely disclose relevant information of such investigation in an early stage, even after docketing. Of course, where a dawn raid is taken by enforcement authorities at the investigatee's place of business, or a Request of Information has been issued to the potential investigatee and other relevant operators, prior to the official docketing, then the investigatee (or even some public) may become aware of relevant information at a relatively early stage.

Sixth, as to the cost of legal actions, the cost of an antitrust civil lawsuit may be higher than an administrative complaint in many ways. In an antitrust civil lawsuit, the parties concerned shall bear the costs for investigation, evidence collection, litigation fees (including the fee for case acceptance, fee for potential preservation, and potential authentication fees), therefore the cost is relatively higher. Although a court may adjudicate the losing party to bear all litigation fees, a plaintiff still has to pay all relevant expenses in advance. In comparison, there is no need for a complainant to pay litigation fees, though during the investigation, a complainant is entitled to submit materials, such as expert reports, to the enforcement agency, to assist the agency to issue an investigation decision that is in favor of the complainant.

Seventh, as to extent of participation, parties concerned in antitrust civil litigation generally are able to exert certain influence in the lawsuit; in comparison, a complainant usually does not have control in an antitrust investigation. For example, in principle, a plaintiff can withdraw the claim at any time before the judgment is made, for any reason (e.g. a settlement has been reached with the defendant), and a court usually will allow the withdrawal (for a withdrawal requested after the court debate, consent from the defendant is usually required); also, it is very common for a plaintiff or a defendant to request an extension period for adducing evidence. In contrast, in an administrative investigation, where a case is docketed, the enforcement agency will take the lead, and the investigation will proceed at the enforcement agency's discretion. In extreme cases, even where the complainant and the investigatee have reached a settlement and expressed their intent to terminate the investigation, the enforcement authorities can still carry forward the investigation out of certain concerns (e.g. for public interest).

Eighth, as to remedies, in an antitrust civil lawsuit, parties concerned can allege damages suffered due to the other party's monopolistic conduct, requesting the termination of infringement and remedies; in comparison, in an administrative investigation, if monopolistic conduct is identified after investigation, the sanction is always to stop the monopolistic conduct, confiscation of illegal gains, and imposing fines, however no damages will be directly rewarded.

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10 See second instance opinion of *Rainbow Technology and Trading Co., Ltd v. Johnson & Johnson (Shanghai) Medical Devices Co., Ltd and Johnson & Johnson (China) Medical Devices Co., Ltd.* ((2012) Hu Gao Min San (Zhi) Zhong Zi No.63).

11 See first instance opinion of *Dongguan Hengliguochang electronics and home appliances store v. Dongguan Shengshixinxing Gree Trading Co., Ltd. and Dongguan Heshi Electronics Co., Ltd* ((2015) Yue Zhi Fa Shang Min Chu Zi No. 33).

12 See second instance opinion of *Price Bureau of Hainan Province v. Hainan Yutai Technologies fodder Co., Ltd.* over a sanction decision dispute ((2017) Qiong Xing Zhong No. 1180).

IV. STRATEGIES UNDER THE ANTITRUST CIVIL LITIGATION SYSTEM

The Chinese antitrust civil litigation system, in legislation and in practice, has been through long and steady development, and is playing a more and more important role. Against this background, once potential antitrust disputes arise, in determining whether to file a complaint to relevant enforcement agencies, or to bring antitrust claims in court (or to do both), a party has to conduct an in-depth analysis, taking the purpose and specific circumstances into consideration, based on a clear understanding of the differences of these two legal procedures.

As antitrust civil litigation and investigations have respective characters (as mentioned in Section II above), engaging both procedures may have complementary and multiplication effect, i.e. imposing bigger pressure on the opposing party, to increase the possibility of prevailing. Under the current judicial system, there is no restriction on adopting both measures at the same time. Correspondingly, the party being sued/investigated shall take coping measures for both the procedures.

Of course, in certain cases, due to the cases' traits or specific requests of a party concerned, one procedure will be given priority. For example, in some cases, a party concerned may not want to aggravate the conflict, and desires to exert certain control over the proceedings. To set a better environment for settlement, such a party will choose civil litigation over investigation, and then as the case proceeds, it may determine whether to file a complaint for investigation depending on the circumstances. In certain other cases, the party concerned may find it difficult to bear the litigation fees, also the burden to adduce evidence is relatively heavy. In this case such party would first consider filing a complaint for investigation. Correspondingly, the party being sued/investigated will cope with such measure first. As the case proceeds, the possibility of taking the other measure cannot be excluded, and thus a party has to prepare for the other procedure to not fall in a passive position.

Another possible scenario is that, once the enforcement authority determines that one business operator has engaged in monopolistic activities, and issues the sanction decision, the victims suffering from such monopolistic conducts may bring civil claims based on the sanction decision, requesting remedies for their damages. This scenario not only applies in abuse of dominant position cases, but also in monopoly agreement cases. This scenario favors plaintiff as it lowers a plaintiff's burden of proof, because of the findings in the sanction decision. In the European Union and the U.S., this scenario is fairly common. However, to our knowledge, this scenario has been rare in China – many potential lawsuits like this are settled in private, and therefore public cases are difficult to find.

Recently, in China, there has been a type of case where a party requests "affirmation of conducts" (e.g. to affirm a plaintiff's conduct not in violation of antitrust law). Beijing Intellectual Property Court accepted a case filed by Qualcomm Incorporated ("Qualcomm") against Meizu Technology Co., Ltd., in which one of Qualcomm's claims was to confirm that the licensing terms were not in violation of AML. This case successfully went through the case acceptance stage, and eventually settled between the parties. Therefore we cannot see the court's opinion on relevant issues, including whether the court recognizes the claim of affirmation, and whether the court is willing to issue an opinion on a claim of affirmation. This shows new possibilities of using the antitrust civil litigation system. In reality, more and more business operators with significant market power are facing the risk of antitrust legal actions. In certain circumstances, such operators are of urgent need to exclude the uneasy status. Recognizing a claim of affirmation can be of help in solving this problem, balancing the interests among different market participants, and further promoting the "perfect order" of market competition.

BEYOND A SNAPSHOT: INSIGHT OF THE FIRST JUDICIAL REVIEW CASE OF RPM ADMINISTRATIVE SANCTION DECISION IN CHINA

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I. INTRODUCTION

The sharp divergence between the courts' approach and the antitrust enforcement agencies' approach towards the application of law on resale price maintenance ("RPM") practices has existed for a long time.

The antitrust enforcement agencies' approach and practice is: vertical agreements (i) fixing the price for resale or (ii) restricting the lowest price for resale (hereinafter collectively referred to as "RPM agreements") which are explicitly listed under Article 14[2] of the Anti-Monopoly Law ("AML") of China as monopoly agreements. Unless the undertaking can prove that the RPM agreements concerned satisfy the conditions for individual exemption as set out under Article 15[3] of the AML, the agencies' finding generally will be that the RPM agreements constitute monopoly agreements directly pursuant to Article 14. This approach is referred to as "prohibited in principle, and exempted individually."

The courts' approach and practice is: the RPM agreements listed under Article 14 of AML cannot be readily regarded as monopoly agreements, but merely are types of agreements that may constitute monopoly agreements; whether such types of agreements constitute monopoly agreements depends on whether the RPM agreements in question satisfy the definition of monopoly agreement under Article 13(2)[4] of the AML. Typically, some courts in their judgments held that whether RPM agreements constitute monopoly agreements shall be analyzed based on their effect of eliminating or restricting competition.[5] Such approach of the courts is understood as similar to the rule of reason analysis established by the U.S. courts in the *Leegin* case.

The above-mentioned divergence clashed upfront for the first time in the recent anti-monopoly administrative litigation case of Hainan province (*Hainan Yutai Technology Feed Co., Ltd. v. Hainan Price Bureau*). In December 2017, the Hainan Higher People's Court ("HHPC") issued the judgment at second instance (Administrative Judgment 2017 Qiong Xing Zhong No. 1180, hereinafter referred to as "Judgment No. 1180"), for the first time recognized the above-mentioned enforcement approach adopted by the antitrust enforcement agencies through judicial review. This case attracted much attention from antitrust practitioners in and outside of China.

As the attorneys representing the Hainan Price Bureau at second instance, we would like to analyze three major issues concerned in this case: (1) whether the RPM agreements stipulated in Article 14 of AML shall be analyzed further in conjunction with Article 13(2); (2) how to understand the definition of monopoly agreement under Article 13(2) of the AML; and (3) what are the competition impacts of the RPM clause in this case. Lastly, this article will briefly analyze the impacts of this case.

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2 Article 14 of the Anti-Monopoly Law sets out that: "[T]he following monopoly agreements between undertakings and trading counterparts shall be prohibited:

(1) fixing the price of commodities for resale to third party;
(2) fixing the lowest price for resale of commodities to third party; and
(3) any other monopoly agreements as defined by the anti-monopoly enforcement agency of the State Council."

3 Article 15 of the Anti-Monopoly Law sets out that: "[W]here an undertaking is able to prove that the agreement it has entered into falls under any of the following descriptions, the provisions of Article 13 and Article 14 shall not apply:

(1) where the objective is technological improvement or research and development of new products;
(2) where the objective is to raise product quality, lower costs, improve efficiency, standardize product specifications and standards or implement specialization;
(3) where the objective is to raise business efficiency of small and medium undertakings and to strengthen the competitiveness of small and medium undertakings;
(4) where the objective is to fulfill public interest such as energy conservation, environmental protection and disaster relief etc;
(5) where the objective is to alleviate serious drop in sale quantity or obvious over-production in times of recession;
(6) where the objective is to protect the legitimate interests in foreign trade and economic cooperation; or
(7) any other circumstances stipulated by the laws and the State Council.

Where the provisions of Article 13 and Article 14 do not apply under any of the circumstances stipulated in item (1) to item (5) of the preceding paragraph, the undertaking must also be able to prove that the agreement it has entered into will not severely restrict competition in the relevant market and that it will allow consumers to benefit from the interests arising therefrom."

4 Article 13(2) of the Anti-Monopoly Law sets out that: "[M]onopoly agreements referred to in this Law shall mean the agreements or decisions or other concerted actions that eliminate or restrict competition."

5 *Beijing Rainbow Yonghe Science and Technology Trade Company v. Johnson & Johnson Medical (Shanghai) Ltd., Johnson &Johnson Medical (China) Ltd.*, (2012) Hu Gao Min San (Zhi) Zhong Zi No.63.

II. BASIC FACTS

In April 2015, the Hainan Price Bureau received a complaint about suspected vertical price-related monopoly practices conducted by several fish feed manufacturers in Hainan Province. After its investigation, the Hainan Price Bureau found that eight major fish feed manufacturers in Hainan province all concluded RPM clauses in their distribution agreements, and the annual turnover of these eight fish feed manufacturers combined takes up to approximately 99 percent of the total annual turnover of Tilapia feed manufacturers in Hainan. Hainan Price Bureau imposed administrative sanction on seven of the manufacturers except one bankrupted and cancelled manufacturer.

The plaintiff in this case, Hainan Yutai Technology Feed Co., Ltd. ("Yutai"), is one of the sanctioned fish feed manufacturers. It explicitly concluded in its "Feed Products Sales Agreements" with the distributors that: "Party B (the distributor) will keep the rebates plan of Party A (Yutai) in confidential, and the sales price of Party B shall follow the guidance price offered by Party A. Otherwise, Party A has the right to reduce rebates" ("the RPM Clause"). Hainan Price Bureau found that the RPM clauses constituted monopoly agreements in violation of Article 14(1) of the AML, and ordered Yutai to cease the illicit conduct and a fine of CNY 200,000 (approximately U.S. $31,500). Yutai initiated a litigation in the Haikou Intermediate People's Court ("HIPC") in opposition to the sanction decision issued by the Hainan Price Bureau.

The HIPC, the court at first instance, held that to find a monopoly agreement under Article 14 of the AML, it cannot simply rely on the fact that an RPM agreement has been concluded. Instead, a further analysis as to whether such a price agreement has the effect of eliminating or restricting competition shall be performed. This court further concluded that, the RPM clauses in question did not have the effect of eliminating or restricting competition, thereby not constituting monopoly agreements. Therefore, the court held that the sanction decision shall be withdrawn.

The Hainan Price Bureau appealed to the Hainan Higher People's Court ("HHPC") in opposition to the judgment at first instance. In Judgment No. 1180, the HHPC upheld the "prohibited in principle, and exempted individually" enforcement approach, and further held that the judgment at first instance shall be overruled, and all claims of Yutai are dismissed accordingly.

III. ISSUE ONE: WHETHER THE RPM AGREEMENTS STIPULATED IN ARTICLE 14 OF AML SHALL BE ANALYZED FURTHER IN CONJUNCTION WITH ARTICLE 13(2)

While the court at first instance held that the RPM agreements stipulated in Article 14 of the AML shall be analyzed further in conjunction with Article 13(2), we tend to opine that this holding incorrectly interpreted Article 14 of the AML. The RPM agreements are prohibited in principle by Article 14, therefore there is no need to verify again. The main reasons are as follows.

Firstly, from the legislative language used by Article 14, the introductory phrase used to refer the three explicitly listed items is the "following monopoly agreements," and the phrase used to describe the conducts under item 3 is "other monopoly agreements." Thus, it can be inferred that the "following monopoly agreements" referred to in Article 14 comprise two types of monopoly agreements: monopoly agreements explicitly listed under items 1 and 2; and "other monopoly agreements" referred to in item 3 besides monopoly agreements listed under items 1 and 2.

Secondly, from the usage of punctuation marks in Article 14, it uses the "semicolon" as the conjunction in between the three items explicitly listed. According to Article 12(4) of the "Technical Specifications for Legislation (Trial) (I)" issued by the Standing Committee of the National People's Congress, in "multiple compound sentences, where the commas have been used within each of the parallel clauses, "the semicolons shall be used between the parallel clauses." Therefore, the three items listed under Article 14 are parallel. Given that item 3 has been explicitly listed as "other monopoly agreements," the item 1 and item 2 listed by this article shall be monopoly agreements as well.

Thirdly, judging from the language of other articles, the items explicitly listed under Article 14 shall be specific types of monopoly agreements as well. For example, for those agreements that do not apply to Article 13 and Article 14, the legislative language adopted in Article 15 of the AML is "agreements"; for the list of items to which the article might be applicable, the legislative language used in that article was "one of the following." On the other hand, Article 13 and Article 14 both adopt the following legislative language: "the following monopoly agreement," "...... other monopoly agreements." It can be seen that agreements explicitly listed under Article 13 and Article 14 of the AML, including RPM agreements, in principle, constitute monopoly agreements on their own.

Lastly, based on the legal system of the AML and the guiding ideology of the legislation, the types of agreements explicitly listed in Article 14 of the AML should also be understood as presumed to be consistent with the definition of a monopoly agreement under Article 13(2), without the necessity to verify again in individual cases. One of the guiding ideologies of the AML is: "The AML legal system must conform to international common practices, strictly prohibit the typical monopoly behaviors which are universally agreed upon by all countries in the world as restricting and eliminating competition…the institutional arrangements shall strive to be clear, impartial and appropriate, and easy to understand and apply."[6] Among the types of agreements explicitly listed in Article 13(1) as well as Article 14, all are typical monopoly agreements universally agreed upon by countries around the world as severely eliminating and restricting competition. For these types of agreements, the common legislative attitude of countries around the world is that they are illegal *per se*, prohibited in principle or presumed to be illegal, etc. Disregarding whether the agreements are explicitly listed in the AML and requiring all of them to be verified again under Article 13(2) will undoubtedly leave the type-setting efforts of the AML legislation on the sidelines, which are not in conformity with international common practices and not to mention the original legislative aim of making the system clear and easy to understand and apply.

The above-mentioned grounds of appeal and the statements of attorney have basically been supported by the court. The HHPC held in Judgment No. 1180 that: From the text of the Articles, firstly, the word "prohibit" is used before the items listed, which shows the negative attitude of the AML towards monopoly agreements; secondly, the Articles refer the listed items to as "monopoly agreements" rather than "agreements," which logically accords that what the Articles explicitly list are monopoly agreements; thirdly, the Articles expressively grant the antitrust enforcement agencies of the State Council the power to identify other monopoly agreements, which shows that the antitrust enforcement agencies enjoy certain discretion in identifying monopoly agreements in this specific field of antitrust law. Therefore, the AML directly regards such RPM agreements as monopoly agreements which shall be clearly prohibited.

IV. ISSUE TWO: HOW TO UNDERSTAND ARTICLE 13(2) OF THE AML

Another important issue involved in this case is how to understand article 13(2), the "monopoly agreement" definition clause.

In the first-instance judgment, the HIPC held that to determine whether an agreement can be categorized as the monopoly agreement "fixing the resale price to third party" under item 1 of Article 14, it is necessary to fully consider whether such conduct has the effect of eliminating or restricting competition. The HIPC further held that factors such as the scope of relevant market, the market share of Yutai in the fish feed market, the specific degree of competition in the fish feed market, the impact of the agreement on the supply volume and price, and the scale of Yutai's business, etc., shall be fully evaluated in deciding whether the contractual terms concerned have the effect of eliminating or restricting competition.

Although the second-instance judgment did not touch upon this issue directly, we tend to think that this issue is worth exploring, and thus would like to briefly present our opinions.

A. Can "Eliminate or Restrict Competition" under Article 13(2) be Equal to "Have the Effect of Eliminating or Restricting Competition"?

We tend to opine that equating "eliminate or restrict competition" with "have the effect of eliminating or restricting competition" is actually a narrowed interpretation of the law.

Firstly, the text of article 13(2) does not limit "eliminate or restrict competition" to effects. Having a thorough reading of the AML, it is obvious that the omission of the word "effect" under Article 13(2) is not due to a legislative error, nor due to the then legislative techniques. For instance, both item 3 of Article 3 and Article 28 of the AML explicitly stated the word "effect," i.e. "concentration between undertakings that have or may have the effect of eliminating or restricting competition." Instead, the text of Article 13(2) does not have the word "effect." Thus, the definition under Article 13(2) cannot be equivalent to "have the effect of eliminating or restricting competition."

Secondly, reading the language of Article 13(2) in light of the legislative history, it can be easily inferred that the phrase "eliminate or restrict competition" refers both to "effect" and "aim." A presentation titled the "Background of the Enactment of the Anti-Monopoly Law (Draft)" posted on the National People's Congress' website classified monopoly agreements into two categories: (1) those reached with an aim

6 *Explanation on the "Anti-monopoly Law of the People's Republic of China (Draft)"*, the website of the National People's Congress, http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374671.htm.

to eliminate or restrict competition; and (2) those that have an actual effect of eliminating or restricting competition.[7] And the then Minister of Legislative Affairs Office of the State Council, Mr. CAO Yongtai, explicitly stated in his presentation before the National People's Congress titled "An Explanation of the Background of P.R.C Anti-Monopoly Law Draft" that monopoly agreements are those reached with an aim to eliminate or restrict competition.[8]

Thirdly, the Treaty on the Functioning of the European Union, an important reference of the AML, also classifies monopoly agreements into those "by object" and those "by effect." Specifically, Article 101(1) sets out that: "the following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which……"

Lastly but not the least, back to the AML, all of the agreements listed under Article 13(1) and Article 14 share a commonality, i.e. they tend to be severely anti-competitive. Hence, the objects of these agreements are probably anti-competitive. For instance, the price fixing agreements between competitors always eliminate the price competition between competitors; the market allocation agreements between competitors always eliminate the sales competition between competitors; and the RPM agreements between a supplier and its distributors always eliminate the intra-brand price competition among the distributors, etc.

B. Does the Word "Competition" under Article 13(2) Only Refer to "Inter-Brand Competition"?

After narrowing the meaning of "eliminate or restrict competition" to "have the effect of eliminating or restricting competition," the court at first instance further narrowed the meaning of competition to "inter-brand competition" only, holding that to determine whether there are such effects, a full consideration of factors such as the scope of relevant market, the market share of Yutai's fish feed, the specific competition degree of fish feed, and the impact of the agreement on the supply volume and price, etc., shall be carried out. The essence of this approach is to evaluate the competitive effects of RPM from the inter-brand competition dimension only, denying the enforcement agencies' approach of evaluating from the intra-brand price competition dimension.

We tend to think that there are two flaws of the above-mentioned opinions of the court at first instance.

1. It Limits the Meaning of "Market Competition" to "Competition between Manufacturers," Ignoring the Competition at the Distribution Phase

Innovation and competition at the distribution phase is an important part of the market competition. Antitrust guidelines of multiple countries strictly prohibit RPM since it always eliminates or restricts the price competition between distributors, and limits the ability of distributors to set prices independently.

In China, innovation and competition at the distribution phase also plays a very important role. For instance, e-commerce via the internet is a typical illustration of innovation at the distribution phase. As compared to traditional ways of distribution, the internet model bears less cost, has higher efficiency, and thus is able to offer the same goods at lower prices, and creates great surplus for the society.

In the meantime, competition at the distribution phase is very fierce, and the primary parameter for competition is price. For instance, there is fierce competition among different distributors/retailors, like Suning and Guomei, or Walmart and Carrefour, etc. In order to gain competitive advantage, these distributors/retailors lower their prices and organize shopping festivals such as "6.18" to attract consumers. Competition among distributors/retailors effectively promotes the innovation and lowers cost at the distribution phase, which in the end benefits the consumers.

If we ignore the price competition among distributors/retailors completely, and allow manufacturers to fix the resale price, all the distributors/retailors regardless of their efficiency, will have to sell at a uniformed price set by the manufacturer. As a result, those cost-effective distributors cannot gain competitive advantages via reducing cost and selling at a more competitive price. Moreover, efficient market entry may be hindered as well since potential entrants are not allowed to sell at lower prices to gain an advantage. In the end, the basic rule of market economy, "the survival of the fittest," will be destroyed as well.

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7 *The Background of the Enactment of the Anti-Monopoly Law (Draft),* the website of the National People's Congress, http://www.npc.gov.cn/npc/bmzz/caizheng/2006-07/07/content_1383750.htm.

8 Supra note 6.

2. It Confounds the Elements of Monopoly Agreements with the Anti-Competitive Degree of Monopoly Agreements

In fact, the factors listed by the court at first instance could only be relevant to the gravity of the actual anti-competitive effects, rather than the necessary elements to be considered in deciding whether competition is eliminated or restricted. Specifically, Article 49 of the AML prescribes that the extent of violation is one factor to be considered in deciding the amount of fine. Article 28 of the "Draft Guidelines on the Determination of Illegal Gains and Fines in Relation to Business Undertakings' Monopolistic Conduct" further specifies the factors in assessing the gravity of monopolistic conduct: the market share of the companies being investigated, the difficulty of market entry, the degree of concentration and competition in relevant markets, the market power of the counterparty, the territory scope of the illegal conduct, the extent of implementation of illegal conduct, the extent of price change of relevant products, and the loss suffered by consumers and other undertakings, etc.

Therefore, the first-instance judgment erroneously regards the above-listed factors as elements in deciding whether an agreement constitutes a monopoly agreement, confounding the elements of violation with the gravity of violation as well as obscuring the boundary between vertical monopoly agreement and abuse of market dominance.

V. ISSUE THREE: COMPETITIVE IMPACT ANALYSIS OF THE RPM CLAUSE INVOLVED

In the current case, the court at second instance explicitly upheld the "prohibited in principle, and exempted individually" enforcement approach. The court held that the law enforcement agencies do not need to specifically prove the effects of eliminating and restricting competition by RPM behaviors in individual cases. The court did not specifically analyze the competition effects of the clause involved.

We tend to opine that even if we refer back to the definition of Article 13(2) of the AML, the RPM clause involved still satisfies the definition of monopoly agreement. The RPM clauses are aimed at eliminating and restricting the price competition among distributors with anti-competitive purposes and thus constitute monopoly agreements. Even analyzing the specific competition effects, it is clear that RPM agreements have the effects of eliminating and restricting competition.

A. The RPM Clause Eliminates and Restricts the Price Competition of Yutai Fish Feed among All Distributors

In the current case, Yutai and all its distributors clearly agreed in the "Feed Products Sales Agreements" that: "Party B (the distributor) will keep the rebates plan of Party A (Yutai) in confidential, and the sales price of Party B shall follow the guidance price offered by Party A. Otherwise, Party A has the right to reduce rebates," i.e. all distributors must "obey" the guidance price offered by Yutai, and Yutai will penalized those distributors who do not obey by reducing their rebates. This clause in fact limits the rights of distributors to decide pricing by themselves. Once implemented effectively, all distributors will sell Yutai fish feed at a uniformed price, thus completely eliminating the price competition among distributors, distorting the normal functioning of the relevant product market and hindering the market from playing a decisive role in the allocation of resources.

B. The Fish Feed Industry in Hainan Province Has an Industry-Wide RPM Problem, which Further Eliminates and Restricts Market Competition

It is noteworthy that this case has some particularity in that the fish feed industry in Hainan Province has an industry-wide RPM problem. In the administrative sanction phase of this case, Hainan Price Bureau investigated eight fish feed enterprises in total and found that the turnover of these eight fish food manufacturers in 2014 accounted for 99.3 percent of the total turnover of Tilapia feed manufacturers in Hainan Province in 2014, which accounted for 99.2 percent in sales volume, basically covered most of the fish feed manufacturers in Hainan Province.

Practices have shown that vertical restrictions on industry will further aggravate the anti-competitive effects of the agreements and may even weaken the inter-brand competition. The "Anti-monopoly Guidelines for Auto Industry (Draft for Comments)" clearly states that:

> when most and even all of the undertakings in relevant markets adopt similar agreements, in which various longitudinal restrictions form a network that fully covers the relevant markets, the restriction on inter-brand competition will be significantly weakened. The accumulative effects of similar longitudinal agreements may significantly restrict competition in relevant markets so that the relevant products and services are priced above the competition degree, which results in losses of benefits of the consumers in the end.

Back to this case, the industry-wide RPM behaviors in the fish feed industry in Hainan Province result in the vast majority of the prices of fish feed sold by the distributors being set by the manufacturers, which in fact severely eliminated and restricted the price competition among a large number of distributors, and also easily lead to the conspiracy among the fish feed manufacturers. Each of these fish feed manufacturers may ensure each other's prices are above a certain price level based on the RPM, thus, lose the incentive to compete in price, which will restrict the inter-brand competition. If not handled promptly, they will greatly increase the cost for the fish farmers and have a negative effect on consumer welfare.

VI. IMPACT OF THIS CASE

In our viewpoint, Judgment No. 1180 may also have some weaknesses. For instance, the judgment held that "eliminate or restrict competition" stipulated in Article 13(2) is not a necessary element of the monopoly agreements stipulated in Article 14. We tend to opine that this view may misunderstand the meaning of Article 14, because it means that the monopoly agreements stipulated in Article 14 by themselves "eliminate and restrict competition" rather than meaning that "eliminate or restrict competition" is not a necessary element. Also, the judgment held that the key difference between antitrust civil lawsuit and antitrust law enforcement lies in the fact that the former presupposes actual losses suffered by the plaintiff. Therefore, in the antitrust civil lawsuit, the effect of eliminating and restricting competition is an element for the RPM to constitute monopoly agreement. This view may confound the element of monopoly behavior with the factor in assessing damage claim.

Nevertheless, the weaknesses cannot overshadow the merits. As the first judicial review case of RPM administrative sanction decision in China, this case confronts controversy and shows the view of the court in a clear-cut manner. For the first time, in the form of judicial review, the court explicitly supported the correct approach "prohibited in principle, and exempted individually" in law application, which has great significance in clearing the long-lasting contradiction and confusion. It is noteworthy that shortly after the announcement of this case, on January 15, 2018, the Shanghai Price Bureau also announced two cases of administrative sanctions for RPM agreements. Given that, for a period of time from now on, RPM behaviors will remain the focus of antitrust enforcement. Enterprises should pay attention to antitrust compliance, especially the compliance of channel management, and should not leave the law application issue to chance.

THE ECONOMIC CHARACTERISTICS OF DATA COMPETITION IN CHINA'S DIGITAL ECONOMY

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I. INTRODUCTION

The importance of data in the digital era cannot be more emphasized. There have been ample discussions of the role of data, or more popularly, big data, in future economies. Data is oil, data is gold, as gurus have been saying lately. As technologies of generating, storing, processing and using data continue to move forward, their economic and legal implications start to emerge and challenge our traditional ways of dealing with data related issues. In particular, issues pertaining to data ownership and property rights, privacy protection and allocation of value from data among stakeholders have become increasingly controversial, as manifested in more litigation and regulatory oversight decisions.

The dispute over data related issues clearly has competition policy and antitrust implications. In China, we have already seen several cases centered around data-related competition. In this paper, we discuss three recent and representative cases of data competition and provide our own analysis under a framework that takes into account what we describe as the seven main characteristics of data competition: multi-homing, non-rivalry, private value, usage difference, unpredictability, externality and reciprocity. Data is a unique good, unlike many physical goods.

An analysis of these cases provides insight into how courts in China tend to treat data-related competition issues. It may also shed some light on the direction of regulation and potential legislation over data competition in China.

II. SEVEN CHARACTERISTICS OF DATA COMPETITION

The digital economy endows data specific features and characteristics which might not be common in the industrial era. Compared with the traditional physical resources, data resources, in our opinion, have the following seven characteristics from an economics perspective.

A. Multi-Homing

In the traditional industrial economy, information is usually controlled by one entity. In a digital economy, however, the structure of the value chains has evolved from linear mode to multilateral networks. Data generation accordingly has become more complicated, manifesting in a rich set of business models. Often times, data is not always generated and hosted by one party, but rather by multiple parties, which we describe as "multi-homing."[2] Take a take-out app "Meituan" as an example, end users, the app developer, delivery companies, and the restaurants are all involved in the generation of data of some sort, with each party having part or all of the information pertaining to a transaction. Additionally, when more and more users use digital products and services, ranging from various information-oriented websites to mobile apps to search, social network, entertain and communicate with each other, users' data information is generated and hosted by several parties involved in these activities. Therefore, unlike the traditional physical resources or information prior to the digital economy, data generating becomes a multi-homing phenomenon.

B. Non-Rivalry

In economics, a good is said to be rivalrous if its consumption by one consumer prevents simultaneous consumption by other consumers, or if consumption by one party reduces utility/ability to another. A good is considered non-rivalrous if, for any level of production, the cost of providing it to a marginal individual or firm is almost zero. In a way, data usage is like watching satellite television or an exhibition of art work; it does not entail additional cost for the data owner when multiple parties try to use it. That means it strides on the boundary between private goods and public goods, as one data operator's using data information virtually allows another operator to use the same data information simultaneously without incurring additional costs. Therefore from a social welfare perspective, data should be physically shared by multiple parties at multiple times so as to generate greater economic and social benefits.

C. Private Value

Although data is generated in a multi-homing environment, its nature and the associated value could be different things to different parties. In other words, data has private value characteristics. Recall the previous example of a take-out app "Meituan." The ordering app arguably has the most comprehensive information of the transaction, covering both the supply and demand side. It not only possesses the information about the

2 "Multi-homing" comes from the "two-sided market" or "multi-sided platform" theory, meaning that users on one side of the platform often participate on another platform. For more information of the two-sided market theory, see Rochet & Tirole, *"Platform Competition in Two-Sided Markets,"* 1 J. EUR. ECON. ASS'N 990 (2003). For more articles about "multi-homing," see *"Innovation, Competition and Platform Economy: Collected Paper of Jean Tirole, the Winner of Nobel Prize in Economics Sciences,"* ed. by Kou & Zhang, Law Press China (2017).

end user who places an order and the selected restaurant, but also knows more about the dynamics in a broader market context, such as the end user's search preferences and the restaurant's products and prices. Therefore, the ordering app can optimize matching results and promote targeted advertisements for both the supply and demand side. The delivery companies, however, obtain static sales information after the order is generated, and the amount of information is less rich than what was stored on the app platform. Thus, delivery companies seldom take the initiative to promote targeted advertising for both market sides.

D. Usage Difference

Even for the same data information, different users apply different methods to collect, develop and use it in order to obtain different analytical results and cover different service categories. Still use the previous take-out order example. The ordering app platform connects the end users and the restaurants to find the most suitable transaction pattern for matching each other and completing the transaction. Therefore, this economic activity occurs with the goal of completing sales. But for the delivery company, its objective of collecting and using this piece of information is to optimize delivery routes and the logistics arrangements so that delivery will be in a timely manner. This same data has distinct values for different users, and there are noticeable differences in the way it is used by multiple parties.

E. Unpredictability

The use of the data information relies not only on the prior experiences of the user, but also on future development of technologies, which might be difficult to predict. The future usage of the data may not be completely identified and defined with existing methods. For example, in 2009, Google successfully predicted when and where the H1N1 influenza outbreak would occur in the United States after analyzing the search information of billions of Internet users, which was never imagined only a few years ago.[3] As another example, cell phone location information is widely used in a variety of location-based services which were not envisioned when location-based services were first introduced. The development and utilization of big data depends not only on current real-time data but also on the accumulation of historical data in human society. When data information is collected and processed, the user may not be fully aware of how the data would be used in any specific way in the future, but it is still necessary to collect and process the data today.

F. Externality

After the data information is developed and utilized, its economic and social effect often exceeds the scope of the users who originally generated the data, and extends to affect a larger group of users or even to a wide scope of social members. In other words, it has a strong externality effect. Considering the take-out app as an example, after analyzing the search preferences of the end consumers, the app platform may recommend other restaurants visited by other consumers of the restaurant they searched. Similarly, for a certain type of restaurant, the app platform may also recommend the restaurant to other consumers with similar preferences according to the search preferences of the end consumers. Through data optimization and analytics, the app platform improves the accuracy of the marketing conversion rate and increases the possibility of successful matching.

G. Reciprocity

When users disclose their ID on the Internet, data flow will generally be bilateral rather than one way. Search engines, for example, have evolved from web-based service to location-based service. A decade ago, when we used Google or Baidu to search one restaurant near a specific location, it would pop up a list of restaurant names on both organic search results and paid-search results. Nowadays, when users preset the location information and personal data in the default settings that search engines often ask the users to choose, search results become bilateral rather than the "one-way" and "on-call" model. Search engines change their role from passively receiving search orders from the users to proactively posting search results to the users, especially on the location-based apps and websites. Personal data has been used to optimize the best consumer experience and provide efficient and effective choices to the consumers, sometime discovering the demand that consumers might not recognize themselves. Sometimes, however, such optimization might also bring hassles to the consumers who might be overloaded with information.

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3 Mayer-Schönberger & Cukier, *"Big Data: A Revolution That Will Transform How We Live, Work, and Think,"* Houghton Mifflin Harcourt, 2013.

III. CASES OF DATA COMPETITION IN CHINA

The seven economic characteristics of data help us better understand the nature and nuance of competition in the digital economy in China. Recently, with the development of the Internet industry and mobile communication, disputes and conflicts among Internet companies and their ancillary service providers have dramatically increased. The courts and industry regulators have to deal with the complicated issues even before the theories are available. In this section, we will discuss three representative cases and shed some light on the characteristics we described above.

A. Sina v. Maimai

Sina Weibo founded by Weimeng Innovation Technology Inc. in Beijing in 2010 is a social networking service ("SNS") provider which is famous for its "Weibo" (Chinese "Twitter"). Maimai owned by Taoyou Technology which was founded in 2013 is a competing SNS service. In August 2014, Sina Weibo found that many non-Maimai users appeared on Maimai's portal with their Weibo personal information such as photo, name, profession and education background, etc. Sina Weibo sued Maimai for misappropriating information about Weibo's users. Although users could log onto Maimai using their Weibo account, the non-Maimai users' information was apparently imported from Weibo's portal without Weibo's or the users' permission. Meanwhile, during Maimai registration, users were required to upload their contact lists in their mobile phones, through which Maimai displayed the names and images of cell phone contacts with Weibo accounts and exposed information about the user's profession and educational background without their acknowledgement. In April 2016, Beijing Haidian District People's Court ruled that Maimai's conduct constitutes unfair competition and that Maimai must cease such conduct immediately and compensate Sina Weibo CNY 2 million (U.S. $309,000) for economic damages.[4] Maimai appealed to the Beijing Intellectual Property Court. On December 30, 2016, the Beijing Intellectual Property Court dismissed the appeal and upheld the original ruling.[5]

The most critical dispute in the case is the use of user data. Through user registration, Weibo obtained large numbers of highly sensitive professional and educational information. The Beijing IP Court ("the Court") found that Maimai's actions constituted unfair competition because it obtained the information of non-Maimai users through their Weibo accounts without Weibo's approval, which Maimai would otherwise have had to pay for itself. Such conduct also reduced Weibo's competitive advantage. In the judgement, the Court recommended the management obligations that the network operators should perform in the acquisition of user data. In addition, during data processing, the Internet Service Provider ("ISP") should pay special attention to protect the user's right to know and the "Triple Authorization" principle, i.e. "User authorization" – "Platform Authorization" – "User Authorization," was proposed by the Court. The Court suggested that in collecting user information ISP should follow the principles of legality, propriety and necessity. From the perspective of consumer protection, "propriety" means that data collection requires the consent of user. "Necessity" means minimum sufficiency; or in other words, a platform should not collect unnecessary information. Last but not the least, the data collection process that Weibo used is considered as legitimate since Weibo had obtained users' permission and assembled the data via its business operation. Meanwhile, such information is not sensitive user information and not qualified as user's privacy. Therefore, the Court clarified that a platform could, upon users' consent, claim collection and usage rights on commercially valuable information of its users through its business operation.

B. Hantao (Dianping.com) v. Baidu

Hantao operates Dianping.com, a local information platform providing customer reviews of local services such as restaurants, hotels, hair salons, etc. and covering restaurant reservations, take-out delivery, group discounts and other O2O (Online to Offline) services. Dianping works mostly like Yelp + OpenTable + Groupon. Baidu is the most popular search engine in China. Besides search engine services, Baidu also offers key features such as online map Baidu Map, Baidu Zhidao (Baidu Knows or Baidu Q&A) and Nuomi (take-out delivery). Baidu was accused of having scraped customer reviews from Dianping.com, and, without the permission of Hantao, displayed these reviews on Baidu Map and Baidu Zhidao. On April 28, 2014, Hantao sued Baidu for unfair competition at the Shanghai First Intermediate People's Court. The court of first instance ruled in favor of Hantao on May 26, 2016 by requesting Baidu to cease the unfair competitive conduct of using customer reviewers on Dianping.com

4 First Instance Civil Judgment of Beijing Haidian District People's Court, (2015) Hai Min (Zhi) Chu Zi No. 12602, April 26, 2016, available at: http://www.bjcourt.gov.cn/cpws/paperView.htm?id=100526100768&n=1.

5 Second Instance Civil Judgment of Beijing Intellectual Property Court, (2016) Jing 73 Min Zhong No. 588, December 30, 2016, available at: http://www.bjcourt.gov.cn/cpws/paperView.htm?id=100526087782&n=1.

and to compensate Dianping.com RMB 3,230,000 (approximately U.S. $492,739).[6] Baidu appealed the decision before the Shanghai Intellectual Property Court ("the Court") but the Court dismissed the appeal and upheld the rulings of the court of first instance on August 30, 2017.[7]

The main issue in this case is whether the use of information collected by other entities is legitimate under the context of Internet competition.[8] The Court acknowledged Hantao's (Dianping.com) legitimate business interests in the customer review information and held that Baidu in fact competed with Dianping.com in providing the review service on its Baidu Map, which resulted in an infringement of Hantao's interests. The Court stated that the amount of information used by Baidu via integrating customer reviews from Dianping.com into its online mapping feature was beyond what was necessary. Such conduct, confirmed by the Court, would eventually reduce the firms' incentive to invest in data collection, thereby harming consumer welfare in the long run. Taking these factors into account, the Court held that Baidu's conduct violated generally recognized business ethics and therefore dismissed Baidu's appeal.

This case raises an important issue of ownership and usage rights of data information. In the past, most "scraping" cases in the Internet world brought under Article 2 of the Anti-Unfair Competition Law ("AUCL") focused on the appropriation of content "owned" or "created" by competitors. In this case, the "scraped" content was not "owned" by the plaintiff Dinanping.com, but was produced by the users of Dianping.com. This position seems largely consistent with the Trial Guidelines on Network Related Intellectual Property Right Cases, issued by the Beijing High People's Court in April 2016.[9] According to these guidelines, the courts in Beijing may hold the unauthorized use of information from a website to be unfair competition under Article 2 of the AUCL if: (1) the information can increase business opportunities and competitive advantages for the plaintiff; and (2) the use of the information provides users with an effective alternative to the website where the information is taken from. To rule on the "scraping" issue, a key factor in the Court's analysis was that Dianping.com had made significant efforts in the collection and use of the original user's information, even if the owners of the reviews were individual consumers. Although the Court's finding may have been fact- and case-specific, the judgment contains some upbeat language on the positive effects and efficiency of producing, collecting and using consumer-related information by Internet players. This stands in contrast to some of the developments in Europe where the handling of consumer-related information is at times viewed skeptically – not only from a privacy, but also increasingly from an antitrust, perspective.

C. Dispute between Cainiao and SF Express

SF Express is a leading express logistics service provider in China. Established in 1993, SF Express provides integrated logistics solutions. Besides high-quality logistics services, SF Express has expanded its service to other segments of the industry chain including manufacture, supply, sales and distribution, and makes use of big data analysis and cloud computing technologies to provide logistics services by integrating storage management, sales forecast, big data analysis and settlement management, etc. SF Express had its IPO on the Shenzhen Stock Exchange in February 2017. Hive Box was established in April 2015 by SF Express, STO Express, ZTO Express, Yunda Express and GLP, which provides express platforms to send and receive express products through its delivery lockers. Hive Box aims to provide solutions for "the last mile" in the logistics industry. By the end of 2016, Hive Box has had more than 35,150 cabinets in more than 75 major cities in China, and had established strategic cooperation with more than 100 well-known property companies in the country. Cainiao is an express delivery platform established by Alibaba and Yintai Group in 2013. Cainiao aims to establish a data-driven and social-collaborated platform for logistics and supply chains. It wants to establish an open, sharing and social platform for logistics infrastructures, so that any delivery to any places in China may be accomplished within 24 hours. By November 2015, more than 70 percent of the express packages, more than 1,000 logistics and storage companies, and more than 1.7 million logistics staff in China were running through the Cainiao network. In 2016, Hive Box started the cooperation with Cainiao. Cainiao provided the consumers' cellphone numbers to Hive Box, and Hive Box provided Cainiao the corresponding status of the express products at the cabinets. However, in March and April 2017 when both parties negotiated to renew the cooperation agreement, Cainiao requested to use Cainiao Guo Guo ("Cainiao Parcel," an app providing express delivery status information) for all the cabinets of Hive Box, and was rejected by Hive Box due to user privacy issues.

6 Civil Judgment of Shanghai Pudong New Area People's Court, (2015) Pu Min San (Zhi) Chu Zi No. 528, May 26, 2016, available at: http://www.pkulaw.cn/Case/payz_125774070.html?match=Exact.

7 Civil Judgment of Shanghai Intellectual Property Court, (2016) Hu 73 Min Zhong No. 242, August 30, 2017, available at: http://www.sohu.com/a/169734455_221481.

8 Jingbo Fan, Dispute between Hantao and Baidu regarding Unfair Competition ("汉涛公司诉百度公司等不正当竞争纠纷案"), Case Comments of ChinaCourt.org, November 16, 2017. http://www.chinacourt.org/article/detail/2017/11/id/3076212.shtml#6645367-tsina-1-84383-8146f288d6e862c69dbee60f4449c31d.

9 "Trial Guidelines on Network Related Intellectual Property Right Cases," Beijing High People's Court, effective as of April 13, 2016, available at: http://china.findlaw.cn/fagui/p_1/385990.html.

On June 1, 2017, SF Express claimed that Alibaba's Cainiao unilaterally disconnected Hive Box's data interface. While, Cainiao, however, argued that SF Express would suspend its data interface. State Post Bureau ("SPB") got involved on June 1, 2017 and it was concerned about the dispute. In the evening of June 2, SPB gathered executives from both companies to communicate about the interface issues, and both parties agreed to fully recover the business cooperation and data exchange on June 3.

Both SF Express and Cainiao emphasized that they were fighting for the information security of the users. The truth is they were competing for big data, which is deemed to be the main resource in the future. The logistics information is the core competitiveness of SF Express, which it cannot disclose to another third-party platform without restrictions. Cainiao has a lot of ecological logistics data, while SF Express has the closed-loop logistics data. However, in the big data era, the key issue is not to access some of the data but to control the data. How to control and make good use of the big data to build the ecological logistics system and what kind of data can or cannot be shared to the others are important issues that both parties will strive to overcome.

IV. CONCLUSION AND POLICY IMPLICATIONS

Data usage rights and control rights are the core issue of the disputes and conflicts among competitors. In China, although companies may have their competitive niches, there are more and more overlaps of their business operations when Internet companies expand their territories. Companies have blurred their traditional boundaries and competition, no matter explicit or implicit, may lead to head-to-head data "wars" when both companies eventually seek out core data to maintain their competitive advantages. Given that China is the country with the largest number of Internet users, policy makers should take into account the competitive nature of these matters when dealing with disputes involving data competition.

First, market definition would be an important step to help zooming in on the competitive nature of the conduct at issue. When analyzing unfair competition or anti-monopoly conduct, one might start with the conduct at issue. Although dynamic competition and platform competition make the market boundaries blurry, people could still catch cross-point where both companies compete to increase their comparative advantages. In the *Hantao (Dianping.com) v. Baidu* case, it's not so obvious how a search engine competes with an online review/reservation platform. Users' review data would help the court focus on the competition of review information on both Baidu Map and Dianping.com which, in general, both provide location-based consumer review services.

Second, data usage rights and control rights take more weight in the evaluation of legitimacy of competitive conduct. Although data ownership is important for the source of legitimacy, most of the time, if not all the time, data is owned by users or directly generated by users' behavior in various economic activities, such as social networking, e-commerce, searching, reviewing, etc. Individual users have no intention or capability to analyze or conduct research and development on their own data although it might seem important to them. Those entities which collect the data have more incentive or capability of making further valuable use of the data for either the entities' own interests, or for increasing all users' welfare. Therefore, discussion of ownership might be the starting point but might not be the end point. The authority should further investigate the economic effect and/or efficiency of data usage rights and control rights which take the most important role. They may need to solve questions such as whether competition for the data usage and control rights would reduce other firms' incentives to invest in data collection activities, whether such competition would bring efficiency gains, whether a firm's data collection conduct is free riding by nature, or whether interoperability and sharing of data is social welfare enhancing. Answers to all these questions should be based upon diligent theoretical and empirical analysis of the cases and should be case-by-case.

Third, when dispute and conflicts cannot be solved through government intervention, authorities might have to carefully consider whether a consent decree would be a good solution. In China, most indigenous innovations in traditional industries are top down. That said, the government then takes the lead and implements those innovations via its national innovation policy. Internet industry is an exception where the majority of innovations take place through a bottom up mechanism. Data accumulated from the business activities of the participants of the Internet ecosystem is important, but should not be considered as an essential facility. As we discussed above, data might be hosted by different hosting carriers. There might be certain hosting carriers who have more data than others, which might give the authority the temptation to issue a consent decree to request the data advantaged entities to share the data information with other data disadvantaged entities. Before doing that, the authority needs to carefully evaluate whether data belongs to the common good and whether government regulation should be involved in resource allocation or what other mechanisms might be a better solution than a consent decree.[10]

10 Tirole, "*Economics for the Common Good*," Princeton University Press (2017).

ADMINISTRATIVE PENALTY GUIDELINES AGAINST MONOPOLY IN CHINA – AN EMPIRICAL ANALYSIS

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I. INTRODUCTION

Since going into effect in 2008, the Anti-Monopoly Law of the People's Republic of China ("Anti-Monopoly Law") has been in force for almost ten years. The administrative enforcement of the Anti-Monopoly Law has played an important role in maintaining a free competitive order in Chinese markets and protecting the rights and interests of consumers. A fine of up to RMB 6.088 billion yuan was even imposed on an illegal monopoly. With the fine being capped at 10 percent sales achieved in the previous year, most of undertakings that violated the law were fined based on the lower limit, i.e. one percent.

The core legal interest protected by the Anti-Monopoly Law is the free competitive order in markets, and therefore penalties against violations shall be carried out according to the effect of elimination or restriction of competition arising from such violations. Specifically, the nature, extent and duration of monopolistic conduct shall be considered. In order to reflect qualitative judgements in penalties based on a relatively objective and measurable standard and make the administrative law enforcement more transparent and predictable, the NDRC,[2] under the entrustment of the Anti-Monopoly Committee of the State Council, drafted the Guidelines on Recognizing the Illegal Gains Obtained by Undertakings from Monopolistic Conducts and Determining the Amount of Fines (Draft for Comments) (the "Guidelines"). In the course of writing this article, we reviewed all penalty decisions issued by the two administrative law enforcement authorities, i.e. the NDRC and the SAIC,[3] so as to explain the core issues in the Guidelines on the basis of an empirical study on penalties.

II. PRACTICAL REFLECTION ON ADMINISTRATIVE PENALTIES AGAINST MONOPOLY

The effective implementation of the Anti-Monopoly Law has benefitted from its strict criteria for determining liabilities. Articles 46 and 47 of the Anti-Monopoly Law provide that where an undertaking, in violation of the provisions of this law, implements a monopoly agreement or abuses its dominant market position, the authority for enforcement of the Anti-Monopoly Law shall instruct it to discontinue the violation, confiscate its illegal gains, and, in addition, impose on it a fine of not less than one percent but not more than 10 percent of its sales achieved in the previous year.

What about practices? We collected all law enforcement cases announced by the authorities for enforcement of the Anti-Monopoly Law after this law came into force.[4] As of December 31, 2017, the two law enforcement authorities issued 456 law enforcement documents of which 276 were issued by the NDRC and its local branches and 180 by the SAIC and its local branches. By excluding the cases of penalties for business associations, exemption from penalties, suspending or terminating investigations, monopoly agreements concluded but not implemented and unclear fine percentage, it can be confirmed that there are a total of 357 cases where undertakings engaged in monopolistic conduct and therefore penalties were imposed.[5] The following problems exist in the current anti-monopoly penalty system in China.

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2 National Development and Reform Commission ("NDRC").

3 State Administration for Industry & Commerce ("SAIC").

4 We collected and sorted these data from the law enforcement documents and made some reference to the *Study on the Relationship between Confiscation of Illegal Gains and Fines in Enforcement of the Anti-Monopoly Law* written by Wang Gui (*A Symposium on Economic Law*, Volume 18).

5 This article focuses on analysis. The specific method of analysis is excluding from all cases the cases of administrative monopoly (where conduct of administrative monopoly is not subject to fines or confiscation of illegal gains pursuant to liability-related provisions of the Anti-Monopoly Law), suspension and termination of investigations, monopoly agreements concluded but not implemented (where, pursuant to Article 46 of the Anti-Monopoly Law, an undertaking may be fined not more than RMB 500,000 yuan without confiscating its illegal gains and the amount of fines shall not be calculated as a percentage of its sales) and monopoly implemented by trade associations (where trade associations are subject to fines instead of confiscation of illegal gains pursuant to the Anti-Monopoly Law).

A. A Wide Margin of Discretion in Determining the Amount of Fines

Fine percentage for Hardcore Cartels v. Duration of Violations					
Fine percentage v. Duration of Violations	Less than 1 year	1-2 years	2-3 years	3-4 years	More than 4 years
1%	45	1	0	22	0
2%	1	1	2	13	0
3%	6	32	3	4	1
4%	0	0	2	2	2
5%	0	2	1	1	1
6%	0	0	1	1	4
7%	0	1	1	1	2
8%	0	0	1	0	7
9%	0	0	1	0	0

Table 1: Relationship between Duration of Violations and Fine percentage in Documents regarding Penalties against Hardcore Cartels

We limit the counted cases to those relating to hardcore cartels and divide the monopoly agreements into five groups based on the duration of violations, so as to examine the relationship between the finalized fine percentage and the duration of violations. The reason why we define the duration and nature of monopolistic conduct is that on one hand, we have considered the provisions of Article 49 of the Anti-Monopoly Law, and on the other hand, both of them are relatively objective and will not cause disagreements on their definitions.

As shown in the table above, there is an implied positive correlation between the duration of violations and the finalized fine percentage, i.e. a fine of up to three percent may be imposed on any hardcore cartel with a duration of less than one year (i.e. short-term cartel) and any hardcore cartel with a duration of more than four years (i.e. relatively long-term cartel) will be subject to a fine of not less than three percent, which is in line with our expectations. However, the fine percentages imposed on violations vary greatly in each group. As for undertakings that continuously engaged in monopolistic conduct for 1-2 years, some were fined only one percent of their sales and some were fined up to seven percent; some undertakings that continuously engaged in monopolistic conduct for 2-3 years were fined up to 9 percent of their sales; and few of those undertakings that continuously engaged in monopolistic conduct for 3-4 years were fined up to nine percent. Such a wide margin of discretion is worth our attention.

B. Different Understandings of Circumstances Affecting Penalties

Administrative authorities have different understandings of circumstances under which a more severe or lighter penalty shall be applicable. Take active cooperation with investigations by administrative authorities for example.

First, cooperation with investigations is only a factor to be considered instead of the sole decisive factor in deciding whether a lighter penalty is applicable. For instance, in the *Case of Monopoly Agreement among Fireworks Operators in Gushi County*, the AIC of Henan Province considered the fact that concerned undertakings actively cooperated with the investigation, but it only deemed "having taken the initiative to eliminate or lessen the harmful consequences occasioned by illegal acts" as the justification for mitigating penalties. In the *Case of Abuse of Dominant Market Position by Chongqing Qingyang Pharm*,[6] the AIC of Chongqing Municipality decided that the undertaking under investigation "falls under the circumstances where a lighter penalty is applicable pursuant to Article 27 of the *Law of the People's Republic of China on Administrative Penalty*: first, it has cooperated with the law enforcement authority, which facilitates the successful completion of the investigation…" That means cooperation with the law enforcement authority is deemed as a separate circumstance under which a lighter penalty is applicable.

Second, there is also a difference in applicable discretion criteria. Some administrative law enforcement authorities apply Article 27 of the Law on Administrative Penalty and the Provisions for Administrative Authorities for Industry and Commerce on Prohibiting the Conclusion of Monopoly Agreement, and some apply the free discretion criteria of their provinces.[7] As such, there is a difference in the factors to be considered when deciding giving a lighter or mitigated penalty.

6 Yu Gong Shang Jing Chu Zi [2015] No. 15.

7 For example, Lu Gong Shang Gong Chu Zi [2016] No. 6.

C. Different Effects of the Same Factor on Penalty Decisions

Different penalties are also imposed by administrative authorities in similar cases. In the *Case of Abuse of Dominant Market Position by Inner Mongolia Chifeng Salt Industry Corporation*,[8] the monopolistic conduct continued for less than one year and the undertaking actively cooperated with the investigation by the administrative authority as well as took rectification measures. The finalized fine percentage was two percent and illegal gains were confiscated. In the *Case of Abuse of Dominant Market Position by Hunan Salt Industry Co., Ltd.*,[9] the monopolistic conduct continued for 1-2 years and the undertaking also actively cooperated with the investigation by the law enforcement authority and took rectification measures. The law enforcement authority confiscated its illegal gains and determined the finalized fine percentage as one percent.

As shown in the penalty documents, the undertakings in the two cases operated in the same industry, had the same market position, had committed illegal acts of the same nature and fell under the same circumstance under which mitigated penalty is applicable, but the former was subject to a higher fine percentage in spite of a shorter duration of its violation. That is not a special case. In the *Case of Abuse of Dominant Market Position by Urumqi Water Corporation*,[10] the undertaking continuously carried out the illegal act for 3-4 years, actively cooperated with the investigation and promptly rectified its illegal act. The finalized fine percentage was only one percent. In the *Case of Abuse of Dominant Market Position by Huizhou Daya Bay Yiyuan Purified Water Limited*,[11] the monopolistic conduct also continued for 3-4 years and the undertaking also actively cooperated with the investigation and made rectifications. However, the fine percentage was determined to be two percent and illegal gains were confiscated. It seems that the effect each factor should have on the fine percentage should be clarified, otherwise the situation of different penalties in similar cases will arise.

A difference in two administrative penalties which is equal to nine times the amount of the lesser one does have an important influence on undertakings, but the Anti-Monopoly Law in force does not provide a specific discretion criterion. A too wide margin of discretion will increase the uncertainty for undertakings to engage in business transactions, impair impartiality in the Anti-Monopoly Law enforcement and fail to provide an effective guidance for undertakings on compliance with laws and regulations or actively eliminating adverse consequences arising from their illegal acts.

D. Confiscation of Illegal Gains Plays a Less Prominent Role in Penalties.

According to Articles 46 and 47 of the Anti-Monopoly Law, "confiscate its illegal gains" is placed before expressions related to fines, i.e. "confiscate its illegal gains, and, in addition, impose on it a fine of not less than one percent but not more than 10 percent of its sales achieved in the previous year…" Illegal gains should be confiscated both in terms of the literal meaning of legal texts and based on an analysis on the functions of confiscation of illegal gains and fines. However, in practice there are few cases in which illegal gains are confiscated. As stated above, it can be determined using the method of exclusion that there are a total of 357 cases where undertakings shall be punished, i.e. subject to confiscation of illegal gains and fines, among all 456 cases announced by the two law enforcement authorities. However, there are only 44 cases (i.e. 12.3 percent) where illegal gains were confiscated in practice.

III. TWO WINGS OF ADMINISTRATIVE PENALTY RULES: CONFISCATION OF ILLEGAL GAINS AND FINES

Article 49 of the Anti-Monopoly Law stipulates the factors to be considered in determining administrative penalties, including the nature, extent of social damage, circumstances and duration of violations, but the law does not further specify the specific meaning of each factor. In order to reflect the principle of matching penalties with violations, prevent and stop monopolistic conduct, and ensure the sufficiently deterrent effect of the Anti-Monopoly Law, the Anti-Monopoly Committee of the State Council drafted the "Guidelines." Through several drafts, the Guidelines were finally promulgated as the 14th version for public comments. In total it contains five chapters and 34 articles of which Chapters 2 and 3 are the core contents, i.e. "Recognizing Illegal Gains" and "Determining the Amount of Fines."

8 Nei Gong Shang Chu Fa Zi [2016] No. 4.

9 Xiang Gong Shang Jing Chu Zi [2016] No. 2.

10 Xin Gong Shang Jing Chu Zi [2014] No. 39.

11 Yue Gong Shang Jing Chu Zi [2013] No. 2.

Under the framework of China's administrative law system, confiscation of illegal gains and fines are different administrative penalties and have different positioning in the system and different value pursuits. Illegal gains refer to the incomes obtained by undertakings from monopolistic conduct, i.e. the additional incomes obtained or the amount of expenditure saved by undertakings from carrying out monopolistic conduct for the duration of such conduct. That means violations both on the part of sellers and on the part of buyers are all considered. No one shall benefit from illegal acts, which reflects the plain values of justice. "In essence, confiscation of illegal gains is not the cost paid by the undertaking for its monopolistic conduct, but to recover the property illegally obtained."[12] Both the confiscation of illegal gains and the imposition of fines on lawful income, aim to have a sufficiently deterrent effect on monopolistic conduct. The system of concurrent imposition of confiscation of illegal gains and fines in China vary greatly from that consisting of only fines in the U.S. and EU. The key difference is that European and American laws do not distinguish confiscation of illegal gains from fines in practice, and they only apply fines or penalties[13] to recover losses and have a deterrent effect by penalty. On the one hand, civil actions against monopoly only function as seeking damages and recovery of losses, instead of the major means to prevent, stop and impose penalties on monopolistic conduct; on the other hand, the existing private enforcement in China (i.e. civil remedies) is ineffective, rendering it impossible to rectify via civil actions the situation that undertakings obtain benefits from monopolistic conduct, so confiscation of illegal gains is the only mean to resort to. As such, from the perspective of system design, the Anti-Monopoly Law combines the two functions of confiscation of illegal gains and fines so as to punish undertakings that violate the law. Any exclusive application of confiscation of illegal gains or fines will not have a sufficient penalty.

"Deterrence is the overriding and maybe the only goal that the Anti-monopoly Law intends to achieve."[14] The realization of deterrence needs the combination of confiscation of illegal gains and fines. If confiscation of illegal gains is the sole administrative penalty to be imposed on undertakings that violate the law by engaging in monopolistic conduct, the Anti-Monopoly Law cannot hold back the illegally monopolistic conduct of undertakings. For undertakings, confiscation of illegal gains will not cause any negative cost but make illegal acts earn nothing. Even if all illegal gains can be confiscated, the law enforcement authorities cannot discover all monopolistic conduct. Therefore, undertakings will consider the probability of being discovered when making the decisions, which leads to the view on the part of these undertakings that benefits can be expected from monopolistic conduct. Instead of suppressing the motive of undertakings to violate the law, it has encouraged them to take risks.

From the perspective of pragmatism, fines must be sufficiently severe to have a deterrent effect on violations. First, fines should be expectable. On the one hand, undertakings that carry out illegal acts shall be liable to pay fines, with no exceptions; on the other hand, the amount of fines should be relatively definitive, enabling undertakings to clearly predict the correlation between the nature and duration of violations and the final amount of fines. Second, fines should be severe enough to realize the effect of deterrence. The deterrence not only affects undertakings that violate the law, but also deters general undertakings from engaging in illegal acts. According to the economics of law, the optimal amount of fines set forth in the Anti-Monopoly Law shall exceed the amount of gains actually obtained from monopolistic conduct. Imposing such severe fines as not only to reduce the actual gains made from the violations to zero, but also to make undertakings expect zero or even a negative amount of gains from the violations can fundamentally stop monopolists from taking risks to violate the law.

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12 Prepared by the Treaty and Law Department under the Ministry of Commerce, *The Meaning and Application of the Anti-Monopoly Law of the People's Republic of China*, p335, Version 1 of October 2007.

13 There are written rules and regulations as well as very few cases in the U.S.

14 Wang Jian, The Criminal Sanction System of Anti-Monopoly Law under the Concept of Deterrence - A Review on the Related Provisions of the Anti-Monopoly Law of the People's Republic of China (Revised), the ZUEL Law Journal, Issue 1 of 2006.

IV. RULES FOR RECOGNIZING ILLEGAL GAINS IN THE GUIDELINES

A. Enforcement of Confiscation of Illegal Gains

In light of the written rules set forth in the Anti-Monopoly Law and the indispensably deterrent effect of confiscation of illegal gains on monopolistic conduct, the Guidelines stipulate the rules for recognizing illegal gains in Chapter 2. Law enforcement practices over the last ten years suggest that the cases where illegal gains were confiscated only account for a small percentage of all cases, and the two law enforcement authorities adopt different criteria when imposing the penalty of confiscation of illegal gains. As of December 31, 2017, 276 cases have been announced by the NDRC, of which there are 230 cases where penalties are applicable[15] and 8 of them (i.e. 3.48 percent) are subject to confiscation of illegal gains; 180 cases have been announced by the SAIC, of which there are 127 cases where penalties are applicable and 36 of them (i.e. 28.35 percent) are subject to confiscation of illegal gains.

The criteria for recognizing illegal gains can vary greatly in the same case. Take the *Case of Horizontal Agreement Regarding Cipher Devices*[16] handled by the AIC of Anhui Province for example, where a penalty decision was made on September 18, 2016. The penalties of confiscation of illegal gains and, in addition, a fine of eight percent of its sales achieved in the previous year (i.e. 2014) were imposed on each of the three concerned parties in the case. The ratios of the amount of confiscated illegal gains made by each of the three parties from the monopolistic conduct for 5 years to the amount of the fine payable by each of them are 54, 20.8 and 261.5, respectively. Although there are many factors that can influence that ratio, e.g. the percentage of illegal gains to total sales and the sales on which the calculation of fines is based, it can be concluded from above that as all illegal gains made within the duration of illegal acts shall be confiscated, it is undoubtedly an essential part of the cost to be paid by undertakings for their violations. Especially, those undertakings who have been engaged in illegal acts for a long period of time shall be subject to more severe penalties according to the principle of matching penalties with violations because such illegal acts cause serious damage to the market order and the interests of consumers and the public.

B. Criteria for Recognizing Illegal Gains

There are many views on the criteria for recognizing illegal gains in both theoretical and practical terms. In respect of the enforcement of the Anti-Monopoly Law, the drafting group held several symposiums attended by the NDRC, the SAIC and their local equivalents. One of the key issues at these symposiums is to define the criteria for recognizing illegal gains. Different understandings and the lack of truthful and complete financial information lead to insufficient justification for administrative law enforcement. This is an objective barrier in implementing the penalty of confiscation of illegal gains in practice. Among the views of using total income, profits and damages as a basis for calculating illegal gains, the view of profits is finally adopted. Articles 7, 8, 9, 10 and 11 of the Guidelines clarify this issue from different perspectives.

The principle of necessity is followed by the Guidelines in terms of administrative law enforcement, which is reflected in the recognition of illegal gains, i.e. using the difference between the results generated in reality and in an assumed reference situation (i.e. “but for” situation) as the basis for recognition. Take Article 8 (Methods for Recognition of Illegal Gains in the Form of Additional Incomes Obtained) for example. In that case, the actual income, i.e. the income obtained from monopolistic conduct, is an objective, definitive and well-documented figure. In spite of this, as time is unidimensional, the income that would be obtained if no illegal act were committed should be determined to recognize the illegal gains. To that end, there should be reference values, i.e. the reference price and the reference volume. Pursuant to Article 7 of the Guidelines, reference price and reference volume shall refer to the price and the transaction volume of the relevant product, assuming no monopolistic act is committed.

According to the rationale of economics, there is a negative correlation between the price and the effective demand if no changes occur to other transaction conditions. In case of a higher price in a monopolistic market, the demand volume A in that market is less than the demand volume B under the condition of free competition, i.e. when the price is lower. There are two methods for calculation of illegal gains. The first is multiplying the difference between the monopoly price and the competitive price by A. The second is based on the product of the monopoly price and A minus the product of the competitive price and B, i.e. the amount of illegal gains shall be equal to the result if it is positive and there are no illegal gains if it is negative or equal to zero. The difference between the two methods lies in the volume. Since A is less than B, the result obtained using the second method is relatively more advantageous for undertakings suspected of violating the law.

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15 They consist of cases where illegal gains shall be confiscated and, in addition, a fine shall be calculated and imposed based on the sales of the undertaking as provided in the first half of Paragraph 1 of Article 46 and Article 47 of the Anti-Monopoly Law.

16 Wan Gong Shang Gong Chu Zi [2016] No. 1, 2 and 3.

This methodology for recognition remains to be discussed based on the view of using damages as a basis for calculation of illegal gains. The decline in the effective demand caused by a higher price in a monopolistic market will impair the interests of consumers and lead to a net social loss. Such losses cannot be recovered from recognizing the illegal gains by this methodology.

C. Rules for Recognition of Illegal Gains

The Guidelines adopt the "but for" rule to recognize illegal gains, meaning that if there is no illegal conduct, the operation conditions in a competitive market will be taken as the reference items. Given the need to simulate a "hypothetical" competitive market, the following have been taken into consideration in the design of the Guidelines.

First, according to the Guidelines, legal gains shall be "recognized," while fines shall be "determined," as legal gains are incurred objectively, however fines shall be determined by a law enforcement authority to its discretion based upon legal factors. Recognition of legal gains necessitates an entire consideration of various factors, such as change of the price and/or sale volume of a certain product, change of an undertaking's share and/or profit margins in a relevant market, and the characteristics of an industry.

Second, each hypothetical "reference item" will be considered one by one in order of priority according to "the nearest" principle, which shall include: the market share, purchase volume and past profit margin of an alleged illegal undertaking before it engages in an alleged monopolistic conduct, the profit margin in the relevant industry, and the profit margin in a similar market.

Third, since each "reference item" taken for recognizing illegal gains is simulated and given the public law nature of the anti-monopoly law enforcement, a law enforcement authority shall provide sufficient evidence in accordance with the principles of administrative penalty to recognize the illegal gains. As a result, there may be no *de-facto* illegal gains or, though there are certain illegal gains, none of them could be recognized in a scientific and reasonable way. Articles 13 and 14 of the Guidelines have set out circumstances under which no illegal gains will be confiscated.

The provisions above are drafted based upon law enforcement experience. In cases where SAIC or any of its equivalents decided not to confiscate any illegal gain, we found thirteen penalty decisions which have provided reasons why no illegal gains should be confiscated. Among those administrative decisions, ten were made in respect of the same case but against ten administrative counterparts (persons subject to a penalty). The reasons for confiscating no illegal gains as provided in such ten administrative decisions are the same, i.e.: as the party concerned has maintained no complete accounting books or bookkeeping records, the profits generated from the production and sale of shale bricks could not be calculated.[17] Except for the foregoing case, the other three cases are the *Zhejiang Jiangshan Concrete Case* (in which a penalty decision was issued against three parties concerned),[18] the *Case of Donghan Quarry in Wuxi County, Chongqing* (in which a penalty decision was issued against four parties concerned),[19] and the *Case of Fireworks in Chifeng Central Urban Area, Chifeng Municipality, Inner Mongolia* (in which a penalty decision was issued against six parties concerned).[20] In the former two cases, the reason provided for being unable to calculate the illegal gains is the impossibility to provide relevant accounting information; while in the last case, the reason provided for being unable to calculate the illegal gains is the impossibility to distinguish between turnover generated from illegal conduct and turnover generated in the ordinary course of business.

Fourth, should any administrative counterpart has any opposition to the illegal gains or sales being recognized, the competent law enforcement authority may appoint a third party institution to prepare an analysis report, so that the law enforcement authority may assess the opposition based upon such report. In each of the *Case of Abuse of Market Dominant Position by Qingdao Xinao Xincheng Gas Co., Ltd.* and the *Case of Hainan Dongfang Water Supply Co., Ltd.*, the law enforcement authority appointed an accounting firm to verify and calculate relevant data, which showed a rigorous law-enforcement attitude.

17 *Case of Horizontal Monopoly Conducted by a Shale Brick Undertaking in Miao Autonomous County, Mayang*. Xiang Gong Shang Jing Zong An Chu Zi [2014] Nos 1-6, [2015] Nos 1-4.

18 Zhe Gong Shang An [2012] No. 16.

19 Yu Gong Shang Jing Chu [2014] No. 5.

20 Nei Gong Shang Chu Fa Zi [2014] No. 001.

V. PROVISIONS IN THE GUIDELINES FOR DETERMINATION OF FINES

Anti-monopoly fines are a penalty commonly imposed in each jurisdiction around the world. Based on our state's experience accumulated in practice and by reference to the EU's experience, the Guidelines propose the "three-step calculation." The three steps are: first, to determine the sales in the preceding year; second, to determine the basic fine percentage; third, to adjust such rate and determine the final fine percentage.

A. First Step: Determination of the Sales in the Preceding Year

1. Practical Issues

In Articles 46 and 47 of the Anti-Monopoly Law, the "sales in the preceding year" is taken as the basis to calculate fines to be imposed. In determining the sales achieved in the preceding year, two factors shall be considered, namely the time factor and geographic factor. As to the time factor, we need to determine whether the year a case is registered for investigation and prosecution or the year a penalty decision is issued for such case shall be deemed as the base year. As the level of difficulty pertaining to the investigation, evidence collection and demonstration vary in different anti-monopoly cases, the entire process from the time a case is registered for investigation and prosecution to the time such case is settled may not end in only one natural year, but may last for several years. For example, in the *Tetra Pak Case* (which was prosecuted by SAIC), there was an interval of three years and nine months between the date the case was registered for investigation and prosecution and the date the final penalty was imposed. During the investigation in a case, the operation conditions of the undertaking concerned may change significantly. Therefore, if no consistent basis is identified, we may not obtain a reasonable result. In addition, the geographic scope will affect the determination of the sales in a significant way. Specifically, a wider definition of the geographic scope will usually result in a higher determined amount of fines, while a narrower definition of the geographic scope will result in a lower determined amount of fines.

In the current practice of the Anti-Monopoly Law enforcement, no consistent rules have been established. In most cases, the "case registration year" criterion was followed. For example, in the *Tetra Pak Case*, the SAIC held that the fine to be imposed should be calculated on the basis of the operation conditions in the year 2011, and in the *Estazolam Case*, the NDRC decided that the fine to be imposed should be calculated on the basis of the operation conditions in the year 2015. However, in some other cases, the "penalty year" criterion was followed.

Take the *Case of Monopoly Agreements of Ro-ro Shipping Service Providers* as an example. The NDRC started its investigation in 2014 and issued a penalty decision in December 2015. The basis taken to calculate the fine was the sales achieved by the undertaking concerned in 2014, i.e. the sales in "the preceding year" of the "penalty year" (namely the year 2015).[21] Notwithstanding the foregoing, there are also some cases in which no base year was identified.

As to the determination of the scope of products, we will take the cases being prosecuted by SAIC or its equivalents in 2016 as examples. In 85.7 percent of such cases, the sales were defined as the amount of the undertaking's sales of products in mainland China, and only in 14.3 percent of such cases, the sales were defined as the amount of the undertaking's sales of products in the market where its sales are alleged to constitute a monopoly.[22]

2. Definition of "Preceding Year"

In determining "the preceding year," we shall first consider the basic principle of "reasonable administration." The Anti-Monopoly Law allows and requires different undertakings to be treated differently based upon the circumstance and nature of, and the degree of damage caused by, their illegal conduct; however, an undertaking shall not be burdened with heavier or lighter liability than another merely for the reason of the different base year determined for them. In other words, the base year is not the factor to be considered by an administrative authority when it is making a decision at its absolute discretion. From an arm's length view, identical cases shall be treated in an identical manner and different cases shall be treated in a different manner. Therefore, in determining "the preceding year," we shall follow a set of consistent rules. From the perspective of the cause-and-effect relationship, fines to be imposed on an undertaking shall be those which may be directly attributable to the monopolistic conduct of such undertaking. Last but not least, we shall also take into account the investigation costs incurred by an anti-monopoly law enforcement authority.

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21 Administrative Penalty Decision of the National Development and Reform Commission [2015] No. 8.

22 Wen & Mi, 2016 Report of China Administrative Law Enforcement Against Monopoly, the Chinese Journal of Competition Law and Policy, Issue 1 of 2017, p. 213 to 280.

As set forth in the Guidelines, the base year taken to determine a fine to be imposed is generally the accounting year immediately prior to the year the relevant investigation is launched. In contrast to the way of taking the "penalty year" as the base year, the way above as provided in the Guidelines has primarily involved the considerations below: There may a several-year interval between the date a case is registered for investigation and prosecution and the date a penalty is imposed. Once a law enforcement authority launches an investigation, the undertaking concerned may cease its illegal conduct. In such a case, a long time has passed since the illegal conduct was taken until the "penalty year." If the "penalty year" is taken as the reference to calculate the penalty, the determined penalty is unable to reflect the illegal conduct of the undertaking concerned. In theory, a law enforcement authority may change a base year by postponing the imposition of a penalty, and in such a way, change the basic amount of the fine to be determined. Therefore, from the standpoint of limiting the administrative power, it is reasonable for the Guidelines to choose not to take the "penalty year" as the base year.

3. Arguments Against "Case Registration Year" Criterion

The reason for not taking the "case registration year" as the base year is that if an undertaking does not stop, or even intensifies, its illegal conduct after the launch of the investigation, it will acquires more and more monopoly interests during the investigation. Compared with the "penalty year," the sales being calculated based on the "case registration year" will be less, and thus will result in a poor penalty on the offender. If a law enforcement authority decides to choose the "case registration year" as the base year, "the preceding year" and the sales will be definitive, meaning that each value the law enforcement authority uses to determine the penalty to be imposed is definitive. In such a case, an undertaking may weigh the benefits to be obtained and the penalty damage to be incurred in the event of its continued illegal conduct, and may as a result elect to continue its illegal conduct.

The two arguments above involve the same consideration, which is whether an undertaking will cease its illegal conduct after a case against it has been registered for investigation and prosecution. In essence, such consideration is about whether an anti-monopoly penalty is able to effectively deter illegal conduct. As described above, illegal gains and fines are both wings of an anti-monopoly penalty. They are necessary measures for effectively deterring illegal conduct, maintaining competitive order and improving social justice. If an undertaking continues its illegal conduct during a law enforcement authority's investigation of it: (i) its income during that period will be unquestionably confiscated when such income is identified as illegal gains; and (ii) the penalty percentage will be increased, to the extent that there is any aggravating circumstance provided in Article 25 of the Guidelines. In other words, if the laws are enforced in a stringent manner and all punitive and preventive effects of administrative penalties could be achieved in the course of law enforcement, then the probability of an undertaking continuing its illegal conduct after it is aware that a case against it has been registered will be extremely low.

4. Determination of Sales

"Sales" refers to proceeds generated by an undertaking from the sales of the alleged products in the region where it is alleged to be involved in monopolistic conduct. There are two elements implied in the definition above, namely the alleged region and products. In general, pursuant to the principle of comity for administrative law enforcement, the geographic market will be defined as the market within China and the proceeds generated from the sales of the alleged products will be taken as the basis to determine the sales.

However, there are some exceptions to the principle above. Taking international cartels as an example. We may assume that A company, B company and C company have entered into a market segmentation agreement, pursuant to which A company would be responsible for the sales in the Chinese market and neither B company nor C company would be involved in competition in the Chinese market, and that by such agreement, A company would obtain an exclusive monopoly on such products in China. In such an example, should either B company or C company be held liable for its illegal conduct? Although B company and C company do not sell products in China, sales made by them from other markets may be attributable to their geographic segmentation arrangement. The rules above also apply in the determination of the scope of products.

Statutory law is always challenged by the complexity of markets, and therefore it will be a good way for statutory law to provide some exceptions to the general principles. For example, the EU's Guidelines on the Method of Setting Fines allow for consideration of the global conditions if appropriate. Accordingly, Article 18 of the Guidelines provides the general principle (i.e. the sales will be defined as the amount of proceeds generated from the sales of the "alleged products" in the "China mainland" market), as well as some exceptions.

B. Second Step: Determination of the Basic Fine Percentages

As prescribed by the Guidelines, in determining the basic amount of the fine, the nature and duration of an illegal conduct shall be taken into account. When a law enforcement authority is determining the fine percentage at its discretion, it shall first consider the damage caused by the monopolistic conduct to society, so as to ensure that the penalty imposed is proportionate to the fault. The nature and duration of a monopolistic conduct are the most direct factors to be considered in measuring the social damage. Such factors are provided by the Guidelines as the primary factors to be considered in determining the basic fine percentage.

1. Nature of Monopolistic Conduct

Illegal conduct may be classified into five categories according to their nature, i.e. hardcore cartels, non-hardcore horizontal agreements, vertical agreements, abuse of administrative power and abuse of economic power.

Price agreements, production capacity agreements and market segmentation agreements, as provided in Articles 13.(1), 13.(2) and 13.(3) of the Anti-Monopoly Law, are “hardcore cartels” which will result in more significant damage and a stronger anti-competitive effect and may enable an undertaking to obtain a higher level of illegal gains. Accordingly, the fine percentage set in respect of such agreements is higher than that set for other kinds of horizontal agreements. The initial fine percentage is three percent in respect of these three kinds of agreements, and two percent in respect of other horizontal agreements, and one percent in respect of any vertical agreement having no significant effect to exclude or restrict competition.

The Guidelines define the nature of an undertaking’s illegal conduct by reference to the source of the market dominant position. If an undertaking’s market dominant position is conferred by law or administrative regulation, the undertaking is usually a company engaging in public infrastructure services. An undertaking like that should have offered quality public services and products to consumers by taking advantage of its market position. Should it abuse its market dominant position, it will have failed the power conferred on it by laws and administrative regulations. In addition, due to the existence of the policy barrier, potential rivals will find it difficult to enter the market. In such a case, the competition will be excluded and restricted significantly and consumers have to face an extremely unfavorable environment. Considering the serious harmful consequences above, the Guidelines set a higher initial fine percentage for these kinds of illegal conduct, i.e. three percent. However, with respect to any undertaking winning its market dominant position through market competition, the initial fine percentage is set at two percent.

2. Time Factor

Generally speaking, the longer monopolistic conduct lasts, the greater the loss it will cause. As set forth in the Guidelines, the duration of monopolistic conduct will be counted by years, and each additional year of extended illegal conduct will lead to an increase of one percent to the fine percentage. If an illegal conduct lasts for no more than six years, the duration of it will be counted as one year, which will not lead to a 0.5 percent reduction from the basic fine percentage; if an illegal conduct lasts for more than one year but less than one and a half year, the basic fine percentage shall be increased by 0.5 percent.

C. Third Step: Adjustment and Determination of Final Fine Percentage

The purpose of the fine system is to deter monopolistic conduct and to compensate any social loss inflicted by monopolistic conduct. The basic fine percentage shall be able to reflect damage caused by monopolistic conduct and the necessity for deterrent measures. In practice, as undertakings will play different roles, behave distinctively and have different attitudes when they are engaging in monopolistic conduct, the necessity for taking deterrent measures against them and the social loss caused by them vary. Therefore, a law enforcement authority shall adjust the basic fine percentage on a case-by-case basis.

1. General Adjustment

Article 25 of the Guidelines provides circumstances under which aggravating penalty shall be imposed. First, any undertaking that plays a major role in monopolistic conduct, lures other undertakings to engage in monopolistic conduct, or obstructs other undertakings from discontinuing their monopolistic conduct shall be imposed a more severe penalty. From the view of legal theory, the undertaking abets and helps other undertakings to perform illegal conduct or even materially controls such illegal conduct, and the behavior of other undertakings are solely or partially attributable to that undertaking. Therefore, it is reasonable to impose a more severe penalty on the undertaking.

Second, any undertaking engaging in a series of monopolistic conduct in the same case or otherwise engaging in monopolistic conduct repeatedly in different cases shall be imposed a more severe penalty. Objectively speaking, the effect caused by such an undertaking to exclude or restrict competition is more significant than that caused by undertakings merely involved in a single monopolistic conduct. From the subjective view, general sanctions are not sufficient to deter such an undertaking. Therefore, the undertaking shall be imposed a severe penalty.

Third, any undertaking that takes the initiative to urge or procure an administrative authority, or an organization being granted the public affairs administration power by law and regulation, to abuse its administrative power to exclude or restrict competition shall be imposed a more severe penalty. An administrative authority generally has great power. Therefore, if it takes an action to exclude or restrict competition, the consequences will be severe and its illegal conduct is harder to be prosecuted. In addition, in a case where an administrative authority is "captured" by an undertaking, the integrity of the public power will be undermined and the legal interests of other persons will be infringed while such an undertaking is pursuing market power.

Fourth, any undertaking continuing its monopolistic conduct after being ordered by an Anti-Monopoly Law enforcement authority to cease such conduct shall be imposed a more severe penalty, because a more severe penalty will stop the undertaking's monopolistic conduct. The four circumstances described above are not only the aggravating circumstances set forth in the Anti-Monopoly Law but also the aggravating circumstances to be considered during the enforcement of the general administrative laws as provided in the Law of Administrative Penalty.[23]

Article 26 of the Guidelines sets out the mitigating circumstances. Such provision is basically consistent with Article 27 of the Law of Administrative Penalty, and further specifies the effect caused by each circumstance on the penalty to be imposed. The first two paragraphs of Article 26 of the Guidelines provide circumstances where an undertaking is coerced by other undertaking or forced by an administrative authority to engage in monopolistic conduct. Such circumstances are less severe.

Paragraph (4) of Article 26 provides the circumstance where an undertaking has voluntarily taken actions to eliminate the consequence caused by its illegal conduct. In such a case, as the undertaking concerned has rectified the loss society suffers from its illegal conduct, the penalty to be imposed shall be mitigated to a large extent. For this reason, the Guidelines set out that if any of the three circumstances above exists, the fine percentage shall be reduced by one percent.

Paragraph (3) of Article 26 provides the circumstance where an undertaking has rendered meritorious services in cooperating with the administrative authorities to investigate and deal with cases. In such circumstances, the fine percentage shall be reduced by one percent. The meritorious services shall include reporting and blowing the whistle on an offence, voluntarily indemnifying a party concerned, and taking actions to ensure a progressing and effective investigation. Merely providing cooperation in an investigation is not sufficient to constitute a circumstance under which the penalty percentage will be reduced by one percent.

Paragraphs (5) and (6) of Article 26 are respectively related to the circumstance where an undertaking has taken actions to minimize the damage caused by its illegal conduct and the circumstance where an undertaking provides evidence to prove another undertaking's breach of the Anti-Monopoly Law other than the case at hand. Although in such circumstances, damage caused by the undertaking's illegal conduct is not eliminated completely, it is still appropriate to impose a lighter penalty. However, compared with circumstance provided in paragraphs (1) to (4), the penalty to be imposed under such circumstances shall be mitigated to a smaller extent. Therefore, the Guidelines prescribe that the fine percentage will be reduced by 0.5 percent, if either of the circumstances listed in paragraphs (5) and (6) exist.

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23 For example: Article 16 of the Measures of Shandong Provincial Government for Regulating the Discretion over Imposition of Administrative Penalty provides: "a party concerned will be imposed a severer penalty in accordance with law, if any of the following circumstances exists: (1) where such party disturbs the public order, impairs the public security, infringes the personal rights or property rights of any person, or undermines the public governance, constituting a serious offence but insufficient to constitute a crime; (2) where such party engages in an illegal conduct when there is a natural disaster, accident, public health or social security emergency, or other emergent situation; (3) where such party continues its illegal conducts after the administrative authority having the power to impose administrative penalty orders it to cease or rectify such illegal conducts; (4) where such party obstructs any administrative law enforcement officer from investigating or dealing with illegal conducts in accordance with law; (5) where such party forges, conceals or destroys evidence in respect of any illegal conduct; (6) where such party has engaged in illegal conducts repeatedly and has been imposed administrative penalty for the reason of such illegal conducts; (7) where such party plays a major role in an illegal conduct jointly taken by it with other persons; (8) where such party abets, coerces or lures other persons to engage in illegal conducts; (9) where such party retaliates an informer or witness; or (10) where there are other aggravating circumstances provided by laws, regulations and rules." See the link below for details: http://www.sdqts.gov.cn/sdzj/364141/364363/index.html.

2. Special Adjustment

In general, after the basic fine percentage is adjusted upward or downward in accordance with Article 27 of the Guidelines, the adjusted fine percentage is able to reflect the degree of damage. However, in specific cases, the final fine percentage may be over-weighted or under-weighted. In particular, the duration of an illegal conduct is calculated in a rigid manner, which may result in an over-deterrent or under-deterrent effect. For this reason, law enforcement authorities shall consider the fine percentage on a case-by-case basis according to the degree of illegality.

In order to settle the conflict between the certainty and uncertainty of fines, Article 28 of the Guidelines also contains a catch-all provision. The catch-all provision allows a law enforcement authority to make the final adjustment to the fine percentage in light of the degree of illegality. Further, the Guidelines also provide a restriction on the catch-all provision, so as to prevent a too wide of a margin of discretion of the law enforcement authorities: the adjusted fine percentage shall not be higher than three percent, in the case of a minor illegal conduct; and shall not be lower than six percent, in the case of a severe illegal conduct. The degree of damage shall be evaluated on a case-by-case basis, by primarily taking into account the market share of the undertaking concerned, the degree of difficulty to enter the relevant market, the degree of concentration and competition in the relevant market, market power of the counterparties and other factors.

There is another type of adjustment which may mitigate the penalty. Pursuant to the Anti-Monopoly Law, the amount of a fine shall not be lower than one percent of the undertaking's revenue in the preceding year. The Anti-Monopoly Law contains no provision for mitigating the penalty to be imposed, except where the undertaking concerned requests leniency. The Guidelines have included provisions for mitigating the penalty to be imposed, because: (i) in specific cases, the one percent fine percentage is overly severe and will result in an over-deterrent effect; and (ii) there are provisions in the Law on Administrative Penalty for mitigating the penalty to be imposed, and the Anti-Monopoly Law, as a special law, can apply provisions set forth in the general law. Notwithstanding, penalty mitigation may not be granted for all monopolistic conduct in respect of which the final fine percentage calculated is lower than one percent. The Guidelines have set a series of strict conditions for the granting of penalty mitigation. In addition, penalty mitigation granted shall not last for more than one year, and the monopolistic conduct concerned shall be less offensive and involves at least two mitigating circumstances and no aggravating circumstances. All the conditions above are parallel with one another. For the reasons above, in administrative law enforcement there is usually no case in which the penalty to be imposed will be mitigated.

VI. CONCLUSION

Administrative law enforcement is one of the tools for rectifying the competitive order, and administrative penalties, civil actions and even criminal liabilities together constitute the liability system under the Anti-Monopoly Law. In the case of insufficient civil remedies, administrative law enforcement has played an irreplaceable role in effectively maintaining the competitive order. Especially, administrative penalties have the greatest effect. Based on the experience and learning from almost ten years of administrative law enforcement practices, both the confiscation of illegal gains and fines have a deterrent effect. But in practice, as a result of the gap existing in the penalty of confiscation of illegal gains due to objective difficulties, undertakings only have to pay a low cost for their violations. Additionally, the discretion enjoyed by administrative authorities over the determination of sales and the fine percentage that are core elements of penalty rules is too wide, which, combined with the lack of detailed and explicit provisions, has challenged the authority of administrative law enforcement. In 2017, Hainan Yutai Technology & Feed Co., Ltd. brought a lawsuit to the court because of its objection to the administrative penalty decision made by the Price Bureau of Hainan Province in accordance with the Anti-Monopoly Law.[24] Although the cause of this action is not related to the determination of penalties, it is one of the many cases where undertakings challenge the administrative penalties. Administrative law enforcement is of special and universal significance to violators, competitors, consumers and other undertakings. Particularly, administrative penalties have a direct and significant effect on violators. As an important tool, administrative penalties shall be applied prudently.

24 *Administrative Penalty Decision*, Qiong Jia Jian An Chu [2017] No. 5.

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