ALLEN & OVERY

Antitrust in China: 2016 highlights and an outlook on 2017

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THE UPTAKE OF A CULTURE OF COMPETITION IN CHINA

The three Chinese antitrust authorities – Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) – overall remained very active in 2016. Besides enforcing the Anti-Monopoly Law (AML), they have been busy consulting with stakeholders on proposed guidelines aimed to improve both processes and the efficiency of their work. They have also been reliably vocal in advocating the merits of a competition-driven economy.

Thanks in part to these efforts, a culture of competition is emerging in China. This conversion is expected to be boosted by the Fair Competition Review System promulgated by China's State Council in June 2016. Under the Fair Competition Review System, government and administrative bodies at all levels are required to consult with stakeholders and assess whether any proposed rule or policy could have anti-competitive effects, such as limiting market access, interfering with the pricing process or favouring local players over non-local ones. While this self-assessment is mandatory, there is no sanction for failing to do so and, to date, limited guidance on how it ought to be conducted. MOFCOM, the NDRC and the SAIC have been designated by the State Council to adopt implementing rules and put in place effective measures to promote competition in administrative actions. It is expected that the impact of the Fair Competition Review System will progressively increase as implementing rules are issued and a more systematic monitoring system is put in place.

A NEVER-ENDING RISE IN MERGER FILINGS?

With 353 filings cleared in 2016[1], MOFCOM beat all records last year. This is a 13% increase against 2015, which itself had been a historic year with MOFCOM passing the symbolic mark of 300 clearance decisions. As a merger control agency, MOFCOM is now as busy as the European Commission. With consolidation continuing to take place in China, as well as greater awareness of the rules both in China and abroad, it is expected that 2017 will push the number of filings to new heights.

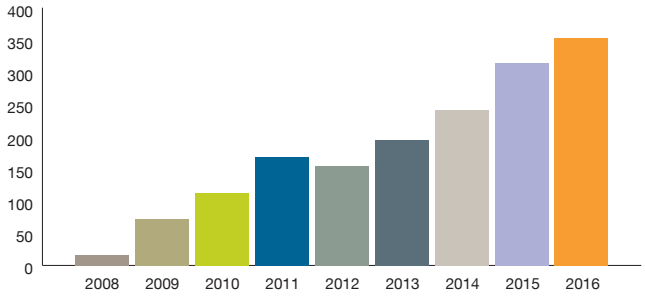
A significant proportion of the cases cleared by MOFCOM were filed under the simplified procedure, which proves to be a continued success. Some 78% of filings were simplified in 2016, a figure comparable to 2015 (75%). MOFCOM's commitment to making the simplified procedure – which had initially been viewed with a fair dose of scepticism – fully effective is best illustrated by the fact that nearly all simplified cases got clearance within Phase 1 in 2016 (97%) while more than 20% of simplified cases had been pushed into Phase 2 in 2015.

MOFCOM's generally non-interventionist stance was again demonstrated in 2016. Contrary perhaps to popular belief, conditional decisions are rare in China and blocked deals remain the exception. There were two remedy cases and no prohibitions in 2016. MOFCOM accepted "fix-it-first" packages in which the parties proposed structural remedies, in the form of the unwinding of a joint-venture (*ABInbev/SABMiller*[2]) and the sale of a business (*Abbott/St. Jude*

1. Source: Quarterly reports published on MOFCOM's website.

2. *AB InBev/SABMiller* [2016] MOFCOM Public Announcement No. 38, 29 July 2016.

MOFCOM merger decisions



Medical[3]), entered into in advance of MOFCOM clearance with third parties approved by MOFCOM. A similar arrangement had already been accepted at the very end of 2015 (*NXP Semiconductors/Freescale Semiconductor*[4]). These structural remedies are remarkable because they depart from MOFCOM's longstanding tendency to favour behavioural remedies and reflect a possible trend by MOFCOM to move closer to that of merger control agencies in other jurisdictions (in particular the United States and the European Union). However, it remains to be seen whether this will become the norm in China or if the fact that the last three conditional decisions involved structural, fix-it-first remedies is the mere result of particular circumstances.

MOFCOM also turned its attention in 2016 to deals that were not notified. Fines ranging from RMB150,000 (c. USD22,000 or EUR20,000) to RMB400,000 (c. USD58,000 or EUR54,000) were issued in four cases against companies that had failed to seek clearance before implementing their transactions. MOFCOM made it clear in 2014 that it would strengthen its efforts to enforce the AML against companies that failed to notify reportable transactions. We expect that MOFCOM will continue in this enforcement vein in 2017 and publicly expose infringement cases because the fear of reputational damage and complications with the Chinese government is probably higher than the fear of fines, which are capped at RMB500,000 (c. USD73,000 or EUR68,000).

MOFCOM also notably publicised the opening of an investigation on the headline-grabbing *DiDi/Uber* deal. The parties claimed that they fell under the filing thresholds and closed the deal. MOFCOM, however, is reported to still be checking how revenues ought to be calculated in the case of online reservation platforms and there has been no announcement that it closed its investigation yet. Even if it is indeed the case that the thresholds are not met, MOFCOM is nonetheless empowered to review cases in light of their potential impact on competition – although this would be the first time to our knowledge. It is still too early to tell whether this is an emerging trend. In any event, MOFCOM's findings on *DiDi/Uber* (if any is made public) – and its implications on online platform revenue calculation or deals below the thresholds – will be closely watched in 2017.

We also expect MOFCOM to issue updated implementing measures on the AML provisions on merger control in 2017. Consultations with various stakeholders are ongoing on draft measures that – while leaving the fundamental tenets of the Chinese merger control regime unchanged – provide useful clarification on numerous topics, including the definition of the notion of control and the possibility to consult with MOFCOM prior to formal filing.

Another topic that will surely be discussed throughout 2017 relates to the issue of successive or related transactions. MOFCOM has been confronted with this issue in a number of cases in which the parties, in a bona fide manner or not, structured transactions to best accommodate the suspension period or even circumvent the filing obligation altogether.

One would also hope that, drawing on what is now considerable experience in dealing with merger filings and in preparation for the upcoming tenth anniversary of the AML in 2018, MOFCOM will be keen to consider further improving – for its own benefit as well as that of the filing parties – some of the aspects of the review process. MOFCOM has already made considerable efforts on accelerating the review timeline and rationalising the process, despite a chronic staff shortage. The successful streamlining of the review teams at the end of 2015, the effects of which on the speed of review were felt throughout 2016, constitutes evidence that small adjustments can go a long way in solving bottleneck issues. Areas for improvements that could in our view be explored concern procedural requirements on the timing of filing, clearer standards on the completeness of the filing, the need for authentic documents and the possibility to grant waivers for information that does not appear useful for the review of a particular case.

QUIETER TIMES ON THE BEHAVIOURAL FRONT?

2015 was an unprecedented year in terms of enforcement actions, in particular with the imposition by the NDRC of the historic RMB6.088bn (c. USD875m or EUR815m) fine on Qualcomm for abusing its dominant position in the wireless standard-essential patent (SEP) licensing market and the baseband chip market[5], as well as the adoption by the SAIC of controversial rules on the abuse of intellectual property rights (IPR) in April 2015[6].

By contrast, 2016 was overall less spectacular but nonetheless showed steady progress in pursuing efforts onto well-trodden paths as well as venturing into new territories.

The NDRC showed a strong sense of continuity compared to 2015 by focusing enforcement actions against foreign companies on resale price maintenance in the automotive industry (fines against General Motors and Hankook Tyre) and the medical device industries (fines against Medtronic and Smith & Nephew). The NDRC also investigated domestic companies for resale price maintenance as well as cartels (including in the pharmaceutical industry with cases against manufacturers of pharmaceutical active ingredients allopurinol and estazolam as well as the chemical compound chlorophenol). These sectors, with the pharmaceutical industry in particular as healthcare reforms continue, are expected to be in the spotlight in 2017 as they are being kept under close scrutiny by the NDRC and feature high on the agenda of priorities set by the State Council.

The most significant development on the behavioural front came from the SAIC. In November, it announced that it had ended its four-year long investigation against Tetra Pak and imposed a record fine of RMB677.7m (c. USD99m or EUR92m) for abuse of dominance. The objections raised against Tetra Pak included imposing exclusivity provisions as well as offering anti-competitive loyalty-inducing rebate schemes. It should be emphasised that this type of infringement is not listed specifically in the AML – the SAIC relied for the first time on the catch-all clause in the provision on

3. *Abbott/St. Jude* [2016] MOFCOM Public Announcement No. 88, 30 December 2016.

4. *NXP Semiconductors/Freescale Semiconductor* [2015] MOFCOM Public Announcement No. 64, 25 November 2015.

5. *Qualcomm* [2015] NDRC Price Supervision and Anti-Monopoly Penalty Decision No.1, 9 February 2015.

6. *Provisions on Prohibiting the Abuse of Intellectual Property Rights to Exclude and Restrain Competition, Order No.74 of the SAIC, 7 April 2015.*

abuse of dominance to hold as anti-competitive the commercial practices of Tetra Pak. It is the first decision issued by the SAIC's central organ against a foreign company since the AML came into force in 2008 and constitutes to date the highest fine it has imposed for violation of the AML. It will be interesting to see whether the SAIC will conclude in the course of 2017 its investigation on Microsoft, which reportedly is also reaching its final stages and could constitute another landmark decision.

Other cases dealt with by the SAIC in 2017 concerned for a substantial part investigations against anti-competitive conduct by public utilities at a local level. Improving the competitive conditions in these areas is a priority of the Chinese government.

On the policy front, the NDRC and the SAIC are also expected to be active. Important pieces of soft law are expected to be finalised in 2017, in particular guidelines on the automotive sector and the anti-competitive use of IPRs – again, two topics that will continue to be given utmost attention in the months to come by all Chinese antitrust enforcers. Improvements to the procedural aspects of AML enforcement should also be at the forefront with separate guidelines on commitments, leniency, exemptions and fines due to be issued during the year. These guidelines should be closely analysed upon issuance as they should constitute important milestones in the modernisation of the AML.

NAVIGATING THE PERILS OF THE UNFAIR COMPETITION LAW

A close cousin of the AML, China's unfair competition law is undergoing significant amendments and a new statute may be finalised in 2017. The relevance of unfair competition law was illustrated in 2016 by fines totalling RMB58.8m (c. USD9m or EUR8m) imposed on five foreign tire manufacturers for commercial bribery in the form of illegal sales rewards to dealers.

Drafts of the new statute previously circulated have raised some eyebrows among business and legal circles: owing to the loose nature of some of its provisions, local agencies of the SAIC would effectively be given significant discretion in enforcing that new statute. Of particular concern is the clause on the newly-introduced concept of "comparative advantage". Holding a comparative advantage is loosely defined as being in a stronger bargaining position relative to a counterpart, yet falling short of holding a dominant position. If it goes through, that provision will allow SAIC officials to interfere, and potentially distort, legitimate arm's length negotiations between customers and suppliers.

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