



Antitrust in China and across the region

Quarterly Update

October to December 2016

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C H A N C E

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Antitrust in China and across the region

Quarterly Update: October to December 2016

China's Ministry of Commerce (MOFCOM) cleared 92 deals unconditionally last quarter and issued only its second conditional decision of 2016 with the approval of Abbott Laboratories' acquisition of St. Jude Medical. MOFCOM has also maintained its focus on investigating deals which have not been notified – it fined Canon for failing to notify its acquisition of Toshiba Medical Systems.

On the enforcement side, the National Reform and Development Commission (NDRC) issued more decisions in the previous quarter than in the rest of the year put together, including notably a fine on medical device maker, Medtronic of more than RMB 118 million (USD 17.2 million) for resale price maintenance (RPM). NDRC's local Shanghai counterpart fined GM's China joint venture RMB 201 million (USD 29 million), also for RPM. Meanwhile, the State Administration of Industry and Commerce (SAIC) issued by far its largest penalty to date when it fined Tetra Pak RMB 667.7 million (USD 97.7 million) for abuse of dominance.

Across the Asia-Pacific region, the Korean Fair Trade Commission (KFTC) issued fines of KRW 1.03 trillion (USD 850 million) against Qualcomm for abuse of dominance and Australia filed its second ever criminal charges for criminal cartel conduct against Japanese shipping group Kawasaki Kisen Kaisha (K-Line) in relation to the transportation of vehicles. The Australian Federal Court also fined Australia and New Zealand Banking Group (ANZ) and Macquarie Bank for allegedly attempting to fix the benchmark rate for the Malaysian ringgit. In Hong Kong, the Competition Commission signed its first ever international cooperation agreement since the full implementation of the Competition Ordinance with the Canadian Competition Bureau.

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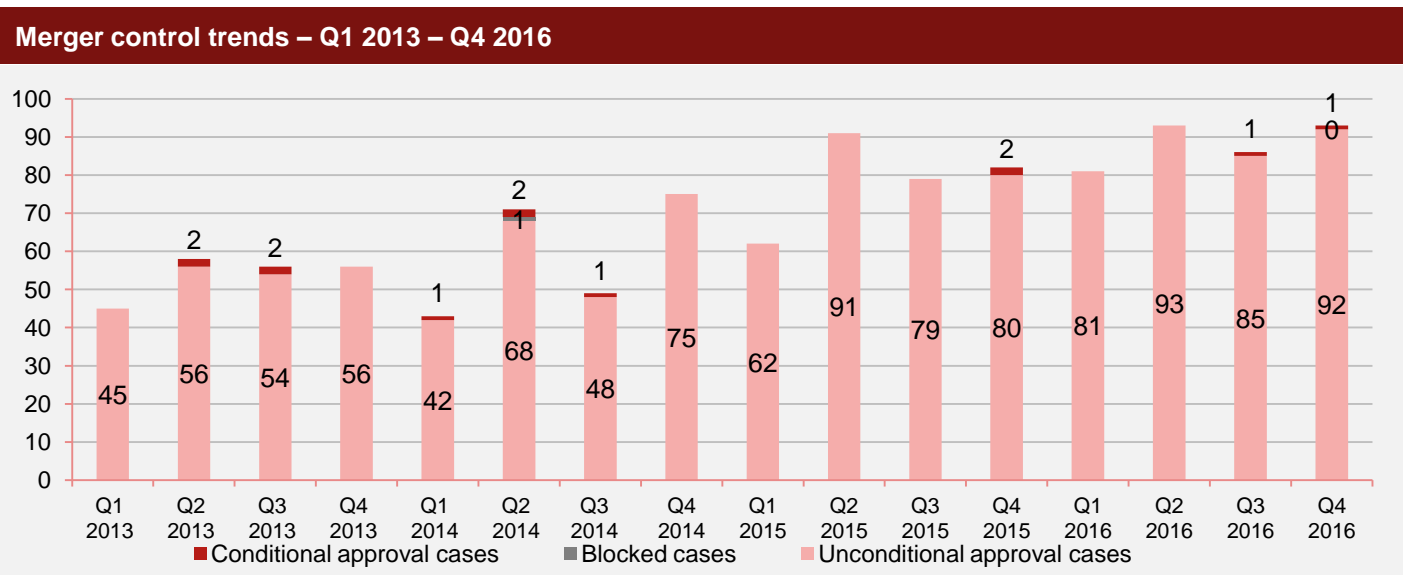


Merger Control



How many cases have there been?

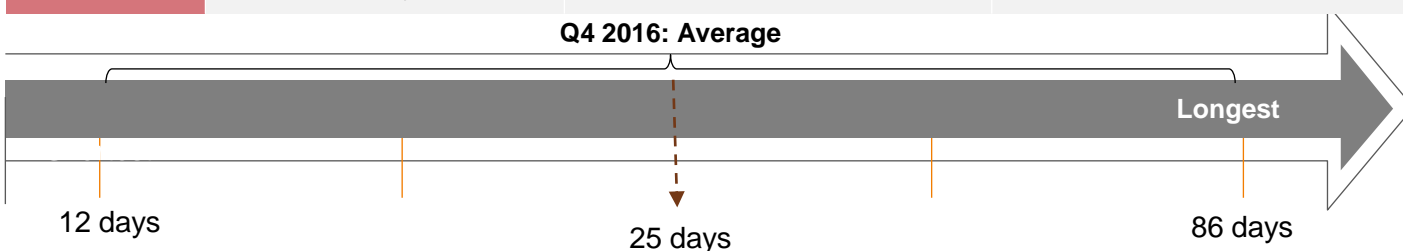
China's Ministry of Commerce (MOFCOM) issued 93 merger decisions in the fourth quarter of 2016, an increase of 13% compared to the fourth quarter of 2015. More than 77% of these cases were notified under the simplified procedure. 92 cases were unconditionally cleared, while one case was conditionally approved.



Simplified procedure: How quick is the review period?

MOFCOM's simplified procedure was introduced in April 2014 and has a non-binding target review period of 30 days for qualifying cases.

Quarter	Average review period	Simplified procedure (%)	Cases exceeding 30 days
Q4 2014	28 days	58.7%	4
Q1 2015	29 days	69.4%	11
Q2 2015	33 days	76.9%	19
Q3 2015	29 days	76.0%	12
Q4 2015	27 days	81.7%	7
Q1 2016	27 days	74.1%	2
Q2 2016	26 days	82.8%	10
Q3 2016	25 days	75.6%	0
Q4 2016	25 days	77.4%	4

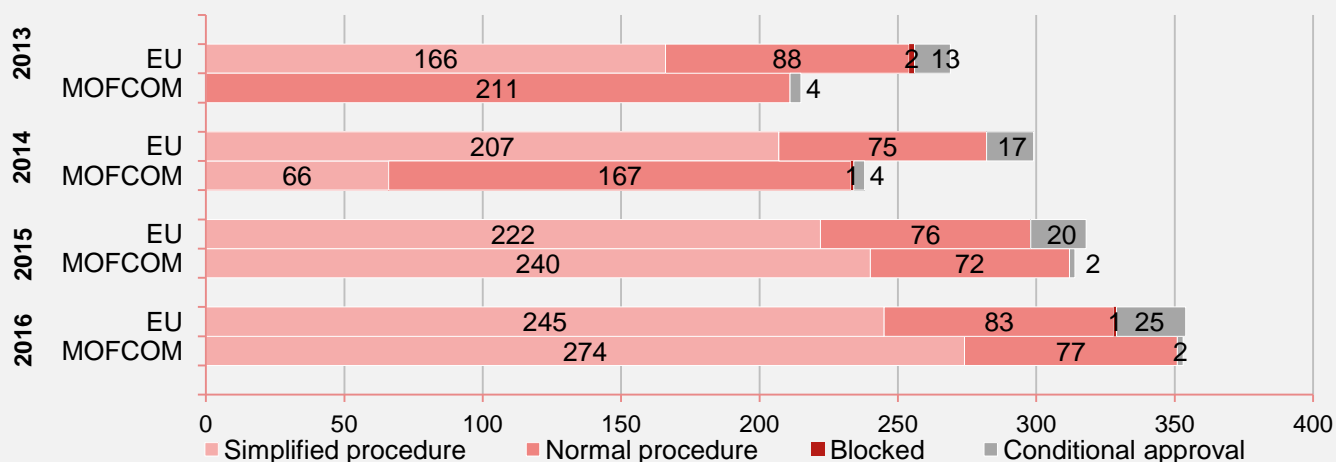


Merger Control (continued)



How does China compare internationally?

Comparison with EU – 2013 – 2016



Other news

MOFCOM official warms to upfront buyer remedy

At the 2016 China Competition Policy Forum in October, Han Chunlin, the deputy director general of MOFCOM's Antimonopoly Bureau (AMB), noted that MOFCOM was continuing to consider "upfront buyer" requirements in divestitures where MOFCOM will require merging parties to find and sign with a buyer for an asset that is being divested before it clears a merger. This could impact transaction timing given that a divestment would need to be concluded or at least binding documents for a divestment signed before clearance of the main deal is granted. While the AML and relevant merger control regulations do not specify the need for an upfront buyer, two recent conditional mergers, NXP's acquisition of Freescale and AB InBev's takeover of SAB Miller, reportedly utilised this approach.

MOFCOM conditionally clears St. Jude Medical/Abbott Laboratories

On 30 December 2016, MOFCOM conditionally cleared Abbott Laboratories' acquisition of St. Jude Medical after a Phase II review. MOFCOM found that the proposed transaction would lead to a horizontal overlap in the vascular closure devices market and would restrict competition in a market that was already highly concentrated; in 2015, in China, Abbott's market share was 71.3% and St. Jude had a 23.9% market share. MOFCOM cleared the proposed transaction on condition that St. Jude Medical would sell its vascular closure business to Terumo Corporation within 20 days of the merger taking place and provide it with relevant transitional services. Also Abbott would provide written notice of the divestiture to MOFCOM within 10 days of its occurrence and regular six monthly updates on the transitional services to MOFCOM.

MOFCOM fines Canon for failure to notify Toshiba Medical Systems acquisition

In a 16 December 2016 decision, MOFCOM fined Canon RMB 300,000 (USD 43,146) for failing to notify its acquisition of Toshiba Medical Systems in a timely manner. The transaction had been implemented in two steps. In the first step, a special purpose vehicle (SPV) purchased all of Toshiba Medical's voting A-shares and Canon purchased Toshiba Medical's only non-voting B-share along with various stock options. The second step was for Canon to convert the stock options to voting shares and for Toshiba Medical to re-purchase and write off the A-shares and B-share from the SPV and Canon respectively. Canon only filed the transaction at the second step. MOFCOM held that the two steps were closely related and formed one transaction and the fact that the first step was already implemented before the filing was made constituted a "failure to file", even though the second step had not been completed. This transaction was approved by Japan's Fair Trade Commission (JFTC) earlier this year. Although no fine was issued, the JFTC indicated that this two-step "warehousing" arrangement might breach antitrust rules and that in the future it would expect companies using a similar structure to file this first step.

Antitrust Investigations

The National Development and Reform Commission (NDRC)



On 7 December 2016, the NDRC released its decision fining Medtronic (Shanghai) Management RMB 118.6 million (USD 17.2 million) for entering into and implementing resale price maintenance agreements for medical equipment supplies used in the treatment of cardiovascular diseases, restorative therapies and diabetes. The fine amounted to 4% of Medtronic's 2015 sales of the relevant products in China. The NDRC found that Medtronic had infringed Articles 14(1) and 14(2) of the AML which respectively prohibit vertical agreements to fix resale prices and imposing minimum resale prices. Specifically, the NDRC found that Medtronic had: directly fixed resale prices by sending price lists with fixed resale prices to distributors; indirectly fixed resale prices by fixing e-commerce platform distributors' gross profit margins; fixed minimum bidding prices; and fixed minimum resale prices for sales to hospitals. Medtronic was found to have implemented the agreements by establishing an internal evaluation system and refusing to supply products to distributors that won bids by quoting low prices. In addition, Medtronic sought to strengthen the impact of the resale price maintenance by prohibiting cross-regional sales and preventing distributors from selling competing products. It is worth noting that the NDRC's assessment of restrictions on cross-regional sales and non-compete obligations was in the context of resale price maintenance (as specific measures which further strengthened the effect of the resale price maintenance). The NDRC did not provide an express view on whether the restrictions on cross-regional sales or non-compete obligations in themselves are unlawful (which may fall under SAIC's jurisdiction). Up to now, there has been no precedent for territorial/customer allocation or non-compete obligations having been prohibited in China in the context of vertical agreements.

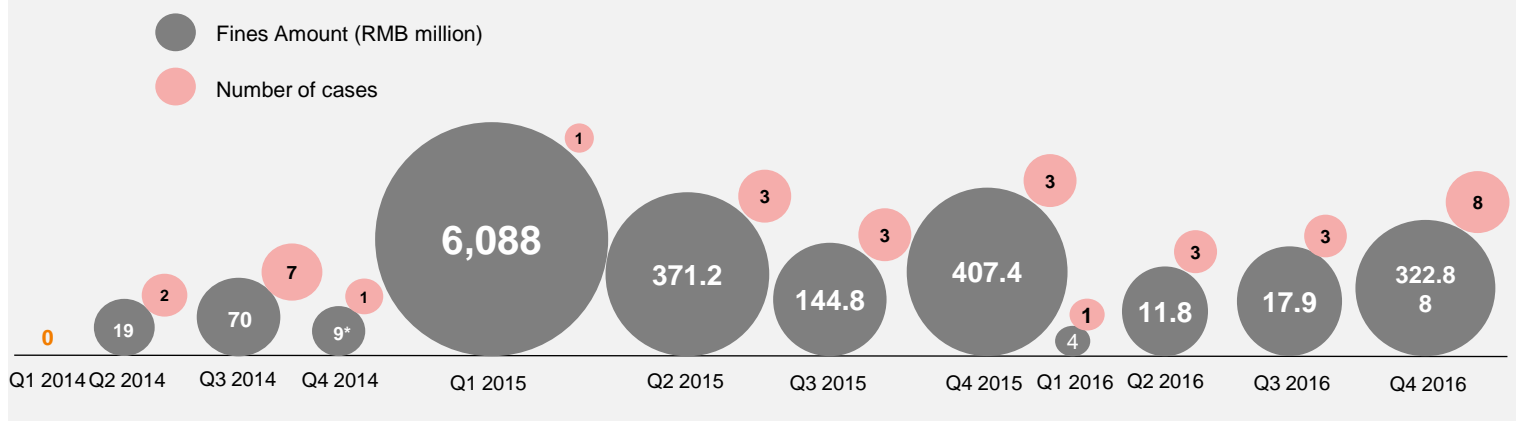
Case	Date announced	Issue	Total fine (RMB '000)	Minimum (RMB '000)	Maximum (RMB '000)	% of Turnover	Leniency/ Co-operation
Medical device - Medtronic NDRC	December 2016	Resale Price Maintenance	118,520	NA	NA	4	Yes
Auto mobile - SAIC - GM Shanghai Price Bureau	December 2016	Resale Price Maintenance	201,000	NA	NA	4	Yes
Logistics - 5 courier operators Guangdong DRC	December 2016	Price Fixing	654.177	NA	NA	NA	NA
Medical device - Smith & Nephew Shanghai Price Bureau	December 2016	Resale Price Maintenance	742.147	NA	NA	6	No
Milk - Shanghai Speed Fresh Logistics Shanghai Price Bureau	December 2016	Resale Price Maintenance	1,980	NA	NA	NA	Yes
Concrete - Beijing Municipal Commission of Housing and Rural and Urban Construction NDRC	December 2016	Abuse of administrative power	NA	NA	NA	NA	NA
Education – student uniforms - Shenzhen Education Bureau NDRC	December 2016	Abuse of administrative power	NA	NA	NA	NA	Yes
River cruise operation - Shanghai Municipal Transportation Commission NDRC	December 2016	Abuse of administrative power	NA	NA	NA	NA	Yes

Antitrust Investigations (continued)

The National Development and Reform Commission (NDRC)



Enforcement trends – Q1 2014 to Q4 2016



Other news

Shanghai Price Bureau fines GM / SAIC Motor Corp joint venture USD 29 million for resale price maintenance

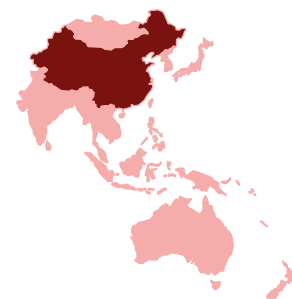
On 23 December 2016, the Shanghai Price Bureau, the NDRC's Shanghai branch, fined General Motors' joint venture with SAIC Motor Corp in China, SAIC-GM, RMB 201 million (USD 29 million) for resale price maintenance. Specifically, it found that SAIC-GM had infringed Article 14 of the AML by setting minimum resale prices for Cadillac, Chevrolet and Buick cars. The fine amounted to 4% of SAIC-GM's 2015 turnover, which was the same percentage fine imposed on Medtronic earlier in December for resale price maintenance infringements. This follows a fine of RMB 123.3 million imposed by Guangdong DRC on Dongfeng-Nissan in 2015 and fines on FAW-Volkswagen (RMB 248 million), Chrysler (RMB 31.7 million) and Mercedes Benz (RMB 350 million) for similar conduct.

NDRC announces that auto industry guidelines are nearly complete

On 10 November 2016, Zhang Handong, the director-general of NDRC's Price Supervision and Anti-Monopoly Bureau, spoke at a conference of the 2016 China Automobile Dealers Industry Convention and stated that the State Council Anti-Monopoly Commission's Antitrust Guidelines on Auto Industry (Auto Guidelines) are nearing completion. Zhang noted that the Auto Guidelines would focus in particular on new car sales, after-sale auto parts circulation, after-sale maintenance services and abuse of dominance. In terms of the role of associations, Zhang mentioned that the Auto Guidelines would contain provisions prohibiting industry associations from infringing Article 5 of the AML, which allows undertakings to increase market competitiveness by "fair competition, via voluntary combinations, via implementing concentrations in accordance with the law and via expanding their business scopes", by making unreasonable demands to restrict dealerships or assigning trading partners.

Antitrust Investigations (continued)

The State Administration for Industry and Commerce (SAIC)



SAIC fines Tetra Pak USD 97 million for abuse of dominance

On 16 November 2016, the State Administration for Industry and Commerce (SAIC) announced a fine of RMB 667.7 million (USD 97.7 million) against Tetra Pak for abuse of dominance under the AML. The fine amounts to 7% of Tetra Pak's sales revenue from the relevant products in 2011 (the year preceding initiation of the formal investigation). SAIC found that Tetra Pak had engaged in a number of forms of abusive conduct, including exclusive dealing, tying and loyalty rebates, in violation of articles Article 17(4), (5) and (7) of the AML.

SAIC found that Tetra Pak held a dominant position on the markets for sterile packaging equipment for liquid food using paper-based compound materials (Packaging Equipment), technological services (including both after-sales parts and maintenance services) for such equipment (Technological Services) and sterile paper-based compound packaging materials (Packaging Materials) in mainland China. SAIC found that Tetra Pak had a share of more than 60% in each of the three relevant markets, but also considered additional factors, including Tetra Pak's ability to control the market, reliance of trading counterparties on Tetra Pak and market entry barriers, in reaching its decision that Tetra Pak held a dominant position.

SAIC found that Tetra Pak had abused its dominant position on these markets by: tying its sales of Packaging Materials to Packaging Equipment and Technological Services: entering into an exclusive procurement agreement with Hongta, the only raw material supplier in China that can supply large amounts of coated kraft (the major raw material for Tetra Pak's Packaging Materials); and granting rebates on Packaging Materials including retroactive, cumulative rebates and individualised purchase volume target rebates.

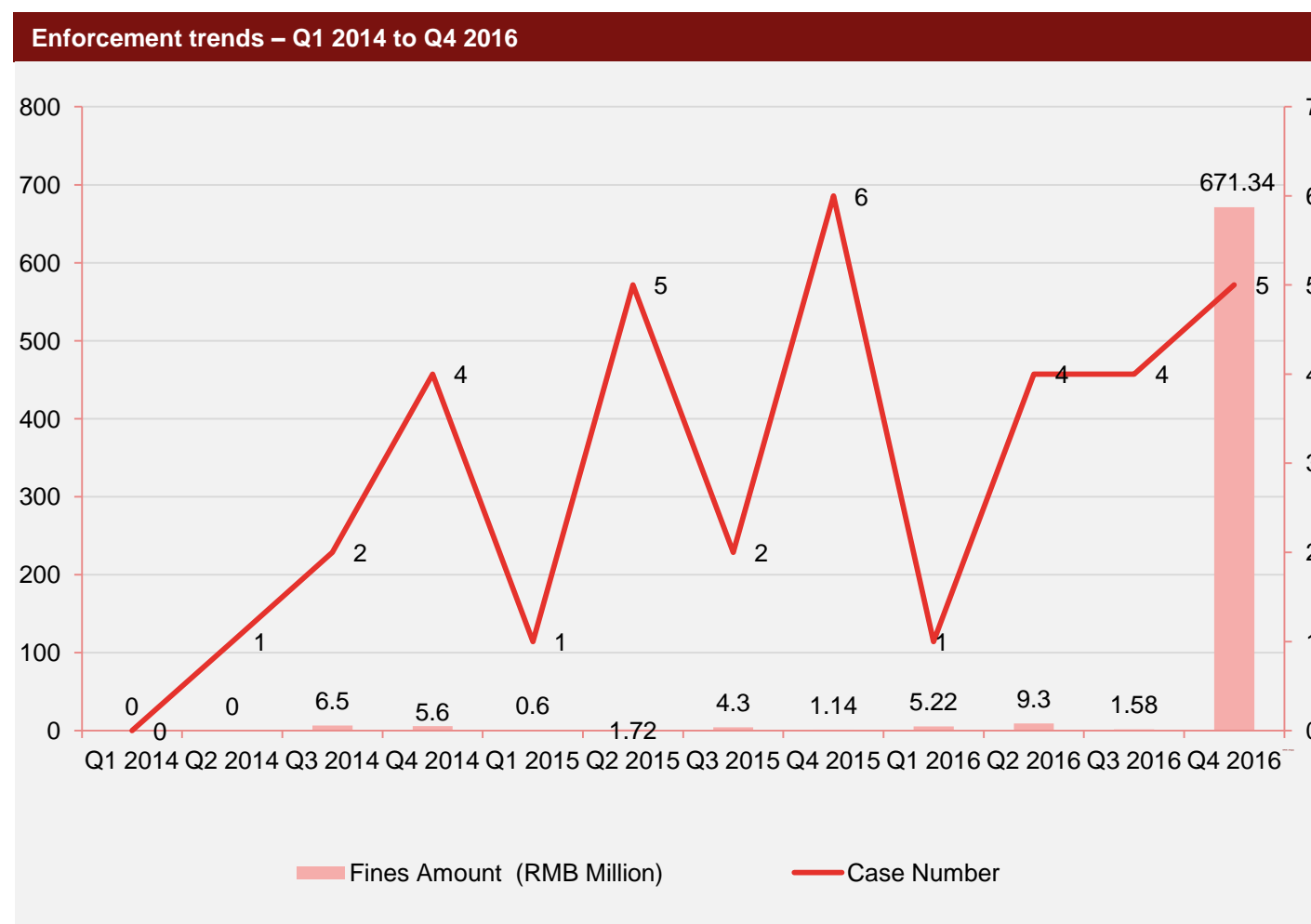
SAIC's decision on Tetra Pak is well-written and contains detailed analysis on the market definition, assessment of dominance and assessment of abusive conduct. The decision is worth noting on several aspects. First, USD 97.7 million is the largest ever fine that SAIC has imposed in an antitrust case. Second, loyalty rebates are not listed as a specific type of abusive conduct under the AML and it is the first time that SAIC referred to the "catch-all" clause under Article 17 of the AML to analyse loyalty rebates. The analysis on retroactively cumulative rebates and target rebates generally mirrors international practice, and indicates SAIC's willingness to touch upon controversial and complicated antitrust issues. However, SAIC's approach is different in that it did not expressly use the "as efficient competitor test" or the "price-cost test" as adopted in the EU or the US. Instead, SAIC focused on the specific characteristics and conditions of the relevant market when analysing the competitive effect of Tetra Pak's rebate schemes. Third, the decision provides guidance on the methods of calculating fines from SAIC's perspective. The fine imposed amounted to 7% of Tetra Pak's sales revenue "in the relevant market" (the relevant products in mainland China), which is consistent with the approach adopted by the NDRC in practice. In addition, SAIC clarified what it means by "preceding year" as the basis for calculating the fine – the fine was calculated based on the revenue in 2011, which was the "preceding year" of the initiation of the investigation. Fourth, it took four years for SAIC to conduct the investigation and reach its decision, which may reflect the complexity of the issues concerned and the economic analysis conducted in the investigation.

Antitrust Investigations (continued)

The State Administration for Industry and Commerce (SAIC)



Case	Date announced	Issue	Total fine (RMB '000)	Minimum (RMB '000)	Maximum (RMB '000)	% of Turnover	Leniency/Co-operation
Salt <i>Hunan</i>	October 2016	Abuse of Market Dominant Position – Tying	272.887	NA	NA	1	Yes
Packaging <i>SAIC – Tetra Pak</i>	November 2016	Abuse of Market Dominant Position – Tying, exclusive dealing, loyalty rebate	667,724.177	NA	NA	7	NA
Pharmaceutical <i>Chongqing</i>	November 2016	Abuse of Market Dominant Position – Refusing to conduct business	17.240	NA	NA	1	Yes
Urban Public Water Supply <i>Jiangsu</i>	November 2016	Abuse of Market Dominant Position – Exclusive dealing	1,835.072	NA	NA	3	Yes
Urban Public Water Supply <i>Xinjiang</i>	December 2016	Abuse of Market Dominant Position – Exclusive dealing	1,493.891	NA	NA	1	Yes



Other Asia Pacific news in brief

India

The Competition Commission of India (CCI) has issued a Frequently Asked Questions (FAQ) document on how it applies merger control rules to mergers, acquisitions and joint ventures. Notably, the FAQs state that parties are encouraged to engage the CCI in an informal pre-filing consultation at least 10 days before the intended date of filing. Furthermore, the FAQs also confirm that for newly established joint ventures where one or more parents contribute assets to the joint venture company, the turnover of the transferor(s) is attributed to the joint venture. Additionally, the FAQs mentioned that the CCI can also initiate inquiries into transactions which have not been notified. However, this must be done within 1 year from the date on which the combination has taken effect.

Thailand

The Thai cabinet has reportedly approved proposed amendments to the Trade Competition Act. The proposed amendments include adjusting penalties to be more proportionate to the infringing conduct, setting up an independent competition authority with power to impose fines of *at least* 10% of turnover and extending competition law to state owned enterprises which compete with private sector companies. In addition, the definition of "market domination" has been re-defined to include businesses operated by subsidiaries in the same corporate group vertically and horizontally. The amended Trade Competition Act will reportedly be implemented in mid-2017.

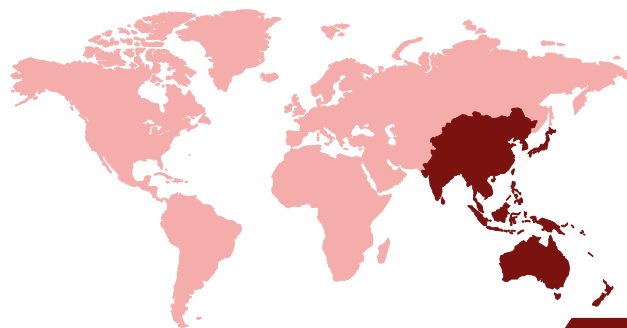
Singapore

The Competition Commission of Singapore (CCS) has published a number of new or revised guidelines and practice statements which came into effect on 1 December 2016, applying to both merger control and antitrust investigations. Notably, the CCS has introduced a new procedure called the "Fast Track Procedure" for appropriate cases under section 34 (prohibition against anti-competitive agreements) and section 47 (prohibition against abuse of dominance) of the Competition Act (the Act). The Fast Track Procedure is intended to incentivise parties to co-operate with the CCS to "fast track" proceedings where a decision of an infringement of section 34 and/or section 47 of the Act may be made. Parties who admit liability for an infringement of the Act would be eligible for a reduction of 10% of the financial penalty that would otherwise have been imposed, which may be applied on top of any reduction already conferred on a successful leniency applicant.

Australia

On 14 December 2016, the Australian Federal Court announced fines of AUD 9 million (USD 6.7 million) against Australia and New Zealand Banking Group (ANZ) and AUD 6 million (USD 4.5 million) against Macquarie Bank for allegedly attempting to fix the benchmark rate for the Malaysian ringgit. The court found that ANZ and Macquarie Bank traders had tried to coordinate with other banks on making high or low submissions for the Malaysian ringgit benchmark rate to the Association of Banks in Singapore in 2011. Unusually, all those involved in the conduct were located outside Australia. In this case, ANZ was a submitting bank and Macquarie served as a hub/coordinator between submitting banks, whose customers included Australian companies.

On 15 November 2016, the Australian Competition and Consumer Commission (ACCC) brought criminal cartel charges against Kawasaki Kisen Kaisha (K-Line), a Japan-based shipping company, for alleged criminal cartel conduct concerning the international shipping of cars, trucks, and buses to Australia between July 2009 and September 2012. This is only the second time that criminal charges have been filed against a corporation under the Australian Competition and Consumer Act 2010's criminal cartel provisions. The charges against K-Line follow a guilty plea by Nippon Yusen Kabushiki Kaisha (NYK) in July 2016 in relation to the same investigation.



South Korea

On 28 December 2016, the KFTC announced that it would fine Qualcomm and two of Qualcomm's subsidiaries a total of KRW 1.03 trillion (USD 850 million) for not offering its standard essential patents to smartphone makers and chipmakers on fair, reasonable and non-discriminatory (FRAND) terms. In addition, the KFTC found that Qualcomm had: tied use of its intellectual property to purchases of its telecommunication chips and other non-essential patents; required royalty free cross-grants on intellectual property from cell phone manufacturers; and refused to pay the appropriate price for access to smartphone makers' intellectual property. This is the largest fine ever imposed by the KFTC and Qualcomm has announced that it will appeal the decision to the Seoul High Court.

On 30 September 2016, the Korean Fair Trade Commission's (KFTC) amended Leniency Guidelines came into effect. The amended Leniency Guidelines include the introduction of new criteria for determining the extent of mitigations and exemptions to be granted to amnesty plus applicants, more stringent conditions for succession of leniency position and clarifications to the criteria for determining the timing of leniency applications.

Japan

The upper house of Japan's Parliament has passed a proposal from the Fair Trade Commission (FTC) to add a commitments system to its Antimonopoly Act. The commitments system would allow companies to resolve certain antitrust infringements by themselves without a penalty, e.g. cease-and-desist order or fines, from the authority. The amendment will come into force after the Trans-Pacific Partnership trade and investment pact takes effect.

Hong Kong

In December, the Hong Kong Competition Commission (HKCC) released a statement setting out its achievements in the first year since the Hong Kong Competition Ordinance came into full effect. In its first year, the HKCC received nearly 1,900 complaints and enquiries, with over 50% concerning the First Conduct Rule (anti-competitive agreements) and a significant number of those cases concerning bid rigging. Around 130 cases were looked at in more detail by the HKCC, with property and property management, and professional and technical services, being the two main sectors involved. The HKCC also made progress with its compliance project for trade and professional associations, with 19 out of the 20 high-risk associations identified by the HKCC having made voluntary changes to their practices to address HKCC concerns around price restrictions and/or fee scales.

On 2 December 2016, the Canadian Competition Bureau and the HKCC signed a memorandum of understanding (MOU) with the purpose of enhancing cooperation, coordination and information sharing on competition issues. The MOU envisages that the two authorities will share competition law knowledge and enforcement experience and engage in other forms of technical cooperation including staff exchanges. The MOU is the first of its kind signed by the HKCC since the full implementation of the Hong Kong Competition Ordinance in December 2015.

Indonesia

The Indonesian Parliament is reportedly reviewing draft amendments to the Indonesian competition law which are expected to be passed in January 2017. The revised competition law would give greater powers to the Indonesian Commission for the Supervision of Business Competition, including dawn raid powers where businesses are not cooperating during an investigation. Furthermore, the ceiling for fines would be raised, potentially significantly, from IDR 25 billion (USD 1.9 million) to 30% of total revenue.

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