

China Antitrust Review 2017

January 31, 2018

Last year saw a high level of enforcement activity under China's Anti-Monopoly Law ("**AML**"), which will mark its tenth anniversary in 2018. As discussed in our review, the year was notable on several fronts, with heightened levels of enforcement activity, particularly in mergers, enforcement across an expanded range of industries, and use of unusual remedies that continue to depart from the approaches taken by Western antitrust authorities.

China's Ministry of Commerce ("**MOFCOM**"), the country's merger control authority, issued a number of important merger decisions in 2017, imposing conditions on seven transactions, compared to only two in 2016. Meanwhile, the National Development and Reform Commission ("**NDRC**"), China's antitrust agency for price-related conduct, continued enforcement efforts in the medical industry and expanded its focus to include electric power firms, polyvinyl chloride ("**PVC**") manufacturers, coal traders and producers, and ports.

The key takeaway is that while China's antitrust agencies are ramping up activity and focusing more on the domestic market, they continue to approach antitrust enforcement in ways that often put them at odds with their Western counterparts. For example, MOFCOM coordinated its merger reviews with other jurisdictions in some deals, but MOFCOM has also demonstrated a willingness to depart from the U.S. and the EU in imposing remedies, including by requiring favorable price commitments for Chinese customers. More generally, as U.S. antitrust enforcers become more averse to behavioral remedies, Chinese antitrust enforcers continue to embrace them. In addition, some have questioned whether political tensions between China and a foreign company's home jurisdiction could potentially contribute to delays or more onerous remedies in antitrust actions.

I. Merger Control

A. Merger Control Decisions

In 2017, MOFCOM received 400 notifications (up 5.8% from 2016), reviewed 353 cases (down 1.9% from 2016), and closed 344 cases (down 12.9% from 2016). The number of major and complicated cases increased significantly in 2017, with non-simple cases accounting for 30% of the total, and cases related to the manufacturing industry accounting for more than 50% of the total. Most importantly, MOFCOM imposed remedies in seven transactions, compared with only two in 2016.¹ As in 2016, MOFCOM did not block any deals.

MOFCOM has continued to make efforts to speed its review process. For example, its average acceptance time and closing time in 2017 fell by 14.2% and 8%, respectively, as compared with 2016. The agency also introduced a policy to notify the filing parties of supplemental requests within five days of the initial submission. Meanwhile, 97.8% of transactions qualifying as "simple cases" were reviewed and closed within the 30-day preliminary examination period. And in an important development for companies notifying transactions in China, MOFCOM has announced that it expects to speed up disclosure for

¹ Press Release, Ministry of Commerce, "Year- End Overview IX for Commerce Work in 2017 - Implement New Development Concept and Do a Good Job of Anti-monopoly Work in New Era" (January 9, 2018), *available at* <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201801/20180102701041.shtml>.

unconditional approvals so that it can post them publicly on the same day they are approved, rather than on a quarterly basis.

Below are overviews of the transactions in which MOFCOM imposed conditions in 2017.

Dow/DuPont

In April 2017, MOFCOM imposed structural and behavioral conditions on the merger of The Dow Chemical Company (“**Dow**”) and E.I. Du Pont De Nemours And Company (“**DuPont**”).²

MOFCOM’s concerns centered on horizontal overlaps in rice selective herbicides, rice pesticides, acid copolymers, and ionomers. Specifically, MOFCOM deemed profit margins for these products as already high and determined that barriers to entry would prevent the emergence of competitive alternatives. MOFCOM further concluded that in a market for rice selective herbicides, the combined firm would control almost 40% in China, for acid copolymers, the combined firm would control 48% globally and 75% in China, while for ionomers the totals would be 91% globally and 100% in China.

As conditions of clearance, MOFCOM required the parties to divest DuPont’s assets and personnel in relation to two rice selective herbicide active ingredients, three rice pesticide active ingredients, and related registered products or products pending registration, along with Dow’s acid copolymer business and ionomer business. MOFCOM must approve the divestiture buyers and terms. In addition to these divestitures, MOFCOM imposed several behavioral remedies, including that for five years, Dow and DuPont (1) must continue supplying certain active ingredients and formulations to any voluntary Chinese third-party purchaser on a non-exclusive basis at “reasonable” prices (i.e., not higher than the average price for the past 12 months); and (2) cannot request any Chinese distributor to enter into exclusive arrangements with Dow and DuPont for certain active ingredients and formulations.

These remedies have some similarities to the approaches taken in the U.S. and the EU, but also some critical distinctions. On the one hand, the Antitrust Division of the U.S. Department of Justice (“**DOJ**”) required that the parties divest a herbicide, certain pesticide products, and Dow’s U.S. acid copolymers and ionomers business.³ The European Commission (“**EC**”) likewise required divestitures of certain herbicides, pesticides, and assets related to copolymers and ionomers, among other assets.⁴ On the other hand, however, the EU required the complete divestiture of DuPont’s global R&D organization for its pesticide business—a remedy not reflected in China’s approach to the deal. In addition, the remedy in Dow/DuPont reflects a longstanding willingness in China to impose behavioral remedies, including price controls, in horizontal transactions, which remains relatively rare and disfavored in the U.S.

² Announcement of the Ministry of Commerce [2017] No. 25: Announcement of the Anti-Monopoly Review Decision to Approve, with Restrictive Conditions, the Concentration of Undertakings in Respect of the Merger of The Dow Chemical Company and E.I. Du Pont De Nemours And Company (April 29, 2017), *available at* <http://www.mofcom.gov.cn/article/b/c/201705/20170502568059.shtml> (Chinese language).

³ Press release, U.S. Department of Justice, “Justice Department Requires Divestiture of Certain Herbicides, Insecticides, and Plastics Businesses in Order to Proceed with Dow-DuPont Merger” (June 15, 2017), *available at* <https://www.justice.gov/opa/pr/justice-department-requires-divestiture-certain-herbicides-insecticides-and-plastics>.

⁴ Press release, European Commission, “Mergers: Commission Clears Merger Between Dow and DuPont, Subject to Conditions” (Mar. 27, 2017), *available at* http://europa.eu/rapid/press-release_IP-17-772_en.htm.

Broadcom/Brocade

In August 2017, MOFCOM imposed behavioral remedies to address vertical concerns arising from the acquisition of Brocade Communications Systems, Inc. (“**Brocade**”) by Broadcom Ltd. (“**Broadcom**”).⁵ Broadcom (at the time headquartered in Singapore) is a manufacturer of application-specific integrated circuits (“**ASICs**”) and provides a broad range of semiconductor connectivity solutions. Brocade is a U.S. company specializing in Fibre Channel Storage Area Network (“**SAN**”) and Internet Protocol networking products.

With respect to the upstream market for Fibre Channel ASICs, MOFCOM determined that Broadcom holds 30%-40% globally, and that Brocade’s products account for 70%-80% and 40%-50% of the global and Chinese downstream markets for Fibre Channel SAN Switches. MOFCOM raised the concern that the combined firm could potentially misuse confidential information from third-party suppliers of Fibre Channel Switches that currently purchase ASICs from Broadcom.

With respect to Fibre Channel Host Bus Adapters (“**HBAs**”), MOFCOM was concerned that the transaction could lead Broadcom (1) to reduce interoperability between third-party HBAs and Broadcom Switches, (2) to misuse confidential information furnished by third-party HBA manufacturers, and (3) to engage in tying or bundling Broadcom products.

To address its concerns, MOFCOM imposed the following conditions for a period of 10 years:

1. Broadcom shall ensure that interoperability between its own Switches and third-party HBAs will be at least equivalent to that between its own Switches and HBAs.
2. Broadcom shall create a firewall to protect confidential information about third-party HBAs and Switches.
3. Broadcom shall maintain existing terms of sale for the Chinese market for HBAs, and shall not engage in any form of tying or bundling.

The EC likewise required the parties to commit that they would not degrade the interoperability between their Fibre Channel Switches and third-party HBA cards.⁶ Both the EC and the U.S. Federal Trade Commission (“**FTC**”) also insisted on firewalls to protect the confidential information of third-party competitors.⁷ Neither the EC nor the FTC required commitments related to terms of sale.

HP/Samsung

In October 2017, MOFCOM imposed behavioral remedies on HP Inc.’s (“**HP**”) US\$ 1.05 billion acquisition of Samsung Electronics Co.’s (“**Samsung**”) printing business.⁸

⁵ Announcement of the Ministry of Commerce [2017] No. 46: Announcement of the Anti-Monopoly Review Decision to Approve, with Restrictive Conditions, the Concentration of Undertakings in Respect of the Acquisition of Brocade Communications Systems, Inc. by Broadcom Limited (August 22, 2017), *available at* <http://fdj.mofcom.gov.cn/article/ztxx/201708/20170802632065.shtml> (Chinese language).

⁶ Press release, European Commission, “Mergers: Commission Clears Acquisition of Brocade by Broadcom, Subject to Conditions” (May 12, 2017), *available at* http://europa.eu/rapid/press-release_IP-17-1309_en.htm.

⁷ *Id.*; Press Release, U.S. Federal Trade Commission, “FTC Accepts Proposed Consent Order in Broadcom Limited’s \$5.9 Billion Acquisition of Brocade Communications Systems, Inc.” (July 3, 2017), *available at* <https://www.ftc.gov/news-events/press-releases/2017/07/ftc-accepts-proposed-consent-order-broadcom-limiteds-59-billion>.

⁸ Announcement of the Ministry of Commerce [2017] No. 38: Announcement of the Anti-Monopoly Review Decision to Approve, with Restrictive Conditions, the Concentration of Undertakings in Respect of the Acquisition of Samsung Electronics Co.’s Printing (cont.)

MOFCOM determined that in the Chinese markets for A4 format laser printers and A4 format laser printing consumables, HP and Samsung, respectively, held 45%-50% and 5%-10% market shares. MOFCOM also found that the two companies were close competitors in the relevant markets.

To address its concerns, MOFCOM imposed a series of behavioral remedies, including commitments related to continued supply, reasonable prices, interoperability with third-party components, and no further related acquisitions, all for a period of five years.

The remedial measures suggest that MOFCOM will closely scrutinize transactions resulting in highly concentrated markets, even where the increase in concentration is relatively small. The U.S. and EC granted clearance without conditions.⁹

ASE/SPIL

In November 2017, MOFCOM conditionally approved the acquisition of Siliconware Precision Industries Co., Ltd. (“**SPIL**”) by Advanced Semiconductor Engineering, Inc. (“**ASE**”).¹⁰

MOFCOM’s concerns centered on the global outsourced semiconductor assembly and test (“**OSAT**”) service market, in which MOFCOM concluded that Taiwan-based ASE and SPIL, respectively, held the first and the third largest market shares. According to MOFCOM, ASE would become the top player in the OSAT service market after the transaction with 25%-30% market share, approximately twice that of the next-leading competitor. In particular, MOFCOM concluded that substantial R&D requirements created high barriers to entry.

As conditions of clearance, MOFCOM imposed a hold-separate and other behavioral remedies for a period of 24 months. While still relatively infrequent, MOFCOM’s track record of *global* hold-separates—such as in Western Digital’s 2012 acquisition of Hitachi’s hard disk drive (“**HDD**”) subsidiary and Seagate’s 2011 acquisition of Samsung’s HDD business—represents another departure from typical enforcement practices in the U.S. and EU.

It is worth noting, however, that ASE/SPIL is the first case in the past four years where MOFCOM imposed hold-separate remedies to address its competition concerns (the last one being MediaTek/MStar in 2013, also involving two Taiwanese companies). Of particular interest here, the hold-separate condition will automatically terminate after 24 months, whereas in previous cases, MOFCOM retained the right to review and extend the hold separate after the initial period.

The transaction did not trigger U.S. or EC merger control filings; the U.S. FTC conducted an investigation of the transaction but closed the investigation without conditions. Additionally, the Taiwan FTC reviewed the transaction, clearing it without conditions.

Maersk Line/Hamburg Süd

In November 2017, MOFCOM imposed behavioral remedies on the Maersk Line A/S’s (“**Maersk Line**”) acquisition of Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG (“**Hamburg Süd**”).¹¹

Business by HP Inc. (October 5, 2017), available at <http://fdj.mofcom.gov.cn/article/ztxx/201710/20171002654063.shtml> (Chinese language).

⁹ U.S. Federal Trade Commission Early Termination Notices, “20180268: Samsung Electronics Co., Ltd.; HP Inc.” (Dec. 8, 2017), available at <https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notice/20180268>; European Commission Daily News, “Mergers: Commission clears acquisition of Samsung’s Printer Business by HP” (Apr. 5, 2017), available at http://europa.eu/rapid/press-release_MEX-17-886_en.htm.

¹⁰ Announcement of the Ministry of Commerce [2017] No. 81: Announcement of the Anti-Monopoly Review Decision to Approve, with Restrictive Conditions, the Concentration of Undertakings in Respect of the Acquisition of Siliconware Precision Industries Co., Ltd. by Advanced Semiconductor Engineering, Inc. (November 24, 2017), available at <http://fdj.mofcom.gov.cn/article/ztxx/201711/20171102675701.shtml> (Chinese language).

MOFCOM expressed concerns related to market concentration for shipping services between certain regions, along with high barriers to entry. Maersk Line and Hamburg Süd are, respectively, the world's largest and ninth-largest container shipping companies.

As conditions of clearance, MOFCOM required one or both of the parties to withdraw from, not renew, and/or not enter into certain vessel sharing arrangements on particular routes between the Far East and South America. In a departure from Western antitrust enforcement practices, MOFCOM also required one of the parties to reduce its market share for a certain type of capacity, and to cap its capacity at that level for three years. A capacity-limiting behavioral remedy generally would be expected to benefit competitors at the expense of customers, but in another distinction from U.S. antitrust law, MOFCOM's legal mandate includes industrial policy considerations.

The U.S. DOJ granted unconditional clearance.¹² The EC, as a condition for clearance, required Hamburg Süd to withdraw from certain vessel sharing arrangements on routes between Europe and other regions.¹³

Agrium/PotashCorp

In November 2017, MOFCOM imposed structural and behavioral remedies on the merger of Agrium Inc. ("**Agrium**") and Potash Corporation of Saskatchewan Inc. ("**PotashCorp**").¹⁴ MOFCOM's concerns centered on how the merger would affect the bargaining power of Chinese customers, and some remedies related to price and supply guarantees that would tend to be disfavored by Western antitrust agencies, which have a strong preference for structural remedies in horizontal cases. MOFCOM's other remedies related to future acquisitions and the parties' interest in a Chinese potash importer.

The U.S. FTC conditioned clearance on the divestiture of two U.S. facilities involved in the production of superphosphoric acid and 65-67 percent concentration nitric acid.¹⁵ The transaction did not trigger an EC merger control filing.¹⁶

BD/Bard

In December 2017, MOFCOM conditionally approved the merger of Becton, Dickinson and Company ("**BD**") and C.R. Bard, Inc. ("**Bard**").¹⁷

¹¹ Announcement of the Ministry of Commerce [2017] No. 77: Announcement of the Anti-Monopoly Review Decision to Approve, with Restrictive Conditions, the Concentration of Undertakings in Respect of the Acquisition of Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft KG by Maersk Line A/S (November 7, 2017), available at <http://fdj.mofcom.gov.cn/article/ztxx/201711/20171102667566.shtml> (Chinese language).

¹² Chris Dupin, "Maersk will pay \$4b for Hamburg Süd," *American Shipper* (Apr. 28, 2017), available at <https://www.americanshipper.com/main/news/maersk-will-pay-4b-for-hamburg-sd-67395.aspx>.

¹³ Press release, European Commission, "Mergers: Commission Clears Acquisition of Hamburg Süd by Maersk Line, Subject to Conditions" (Apr. 10, 2017), available at http://europa.eu/rapid/press-release_IP-17-904_en.htm.

¹⁴ Announcement of the Ministry of Commerce [2017] No. 75: Announcement of the Anti-Monopoly Review Decision to Approve, with Restrictive Conditions, the Concentration of Undertakings in Respect of the Merger of Agrium Inc. and Potash Corporation of Saskatchewan Inc. (November 6, 2017), available at <http://fdj.mofcom.gov.cn/article/ztxx/201711/20171102666641.shtml> (Chinese language).

¹⁵ Press Release, U.S. Federal Trade Commission, "FTC Requires Canadian Fertilizer and Chemical Companies PotashCorp and Agrium to Divest 2 Production Facilities as Condition of Merger" (Dec. 27, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-requires-canadian-fertilizer-chemical-companies-potashcorp>.

¹⁶ See Henry Lazenby, "PotashCorp, Agrium 'merger of equals' gains Chinese competition consent," *Mining Weekly* (Nov. 7, 2017), available at http://www.miningweekly.com/article/potashcorp-agrium-merger-of-equals-gains-chinese-competition-consent-2017-11-07/rep_id:3650 ("The companies have now received clearance for the merger in Brazil, Canada, China, India and Russia. The regulatory review and approval process continues in the US and the parties expect to close the transaction before year-end.")

¹⁷ Announcement of the Ministry of Commerce [2017] No. 92: Announcement of the Anti-Monopoly Review Decision to Approve, with Restrictive Conditions, the Concentration of Undertakings in Respect of the Merger of Becton, Dickinson and Company and (cont.)

MOFCOM's concerns centered on market concentration and R&D in a product market defined as core needle biopsy devices and a geographic market limited to China. According to MOFCOM, BD and Bard together would hold approximately 50% of the relevant market. MOFCOM also concluded that barriers to entry were high and consequently had concerns about the merger's effect on innovation.

To address its concerns, MOFCOM ordered BD to divest its core needle biopsy devices business, including R&D assets and a particular R&D product within three months and subject to MOFCOM approval of the buyer(s).

Unlike the Dow/DuPont or ASE/SPIIL transactions, discussed above, China's approach in the BD/Bard transaction was relatively similar to that taken in the U.S. and the EU. Similarly, the EC conditioned clearance on the divestiture of BD's global core needle biopsy device business and related R&D projects, along with R&D projects related to tissue markers.¹⁸ The U.S. FTC likewise required the parties to divest BD's soft tissue core needle biopsy device business, and also Bard's tunneled home drainage catheter system business.¹⁹

B. Penalties for Reporting Violations

Like regulators in other jurisdictions, including the U.S., MOFCOM has authority to penalize parties who fail to comply with reporting obligations specified in the AML, either by fining them up to RMB500,000 (approximately US\$78,228) and/or unwinding an unreported transaction (though it has never exercised this latter authority).

In 2017, as in 2016, MOFCOM penalized parties for violating reporting obligations under the AML. In the past year, MOFCOM imposed penalties on nine transactions, compared to six in 2016. But whereas in 2016, MOFCOM issued the largest ever fine for violations of reporting obligations (RMB400,000, approximately US\$62,582), the fines this year were more modest, ranging from RMB150,000 (approximately US\$23,468) in a majority of cases to RMB300,000 (approximately US\$46,937). All else equal, MOFCOM typically issues larger fines for intentional disregard of reporting obligations, and smaller fines if the relevant parties take remedial actions and cooperate with MOFCOM's investigation. Of the nine fines issued for reporting failures during this past year, eight involved foreign parties.

II. NDRC Enforcement Actions

In 2016, the NDRC, China's antitrust agency for price-related violations, focused on enforcement in the pharmaceutical and medical device segments. In 2017, the NDRC expanded its enforcement efforts into the power, chemical, coal, and shipping industries.

As in 2016, the NDRC continued pursuing enforcement actions in the medical industry. In August 2017, the NDRC fined Zhejiang Second Pharma Co., Ltd. ("**Zhejiang Second Pharma**") and Tianjin Handewei Pharmaceutical Co., Ltd. ("**Tianjin Handewei Pharmaceutical**") for abuse of market dominance. The NDRC found the two companies to hold a dominant market position in the Chinese domestic medical-use isoniazid active pharmaceutical ingredients ("**APIs**") market, which NDRC deemed to have high entry barriers. The NDRC concluded that both companies were selling APIs at excessive prices. Selling a product for excessively high prices is an antitrust violation under Chinese law that has no Western

C.R. Bard, Inc. (December 27, 2017), available at <http://fldj.mofcom.gov.cn/article/ztxx/201712/20171202691390.shtml> (Chinese language).

¹⁸ Press release, European Commission, "Mergers: Commission Clears Acquisition of Bard by BD, Subject to Conditions" (Oct. 18, 2017), available at http://europa.eu/rapid/press-release_IP-17-4024_en.htm.

¹⁹ Press Release, U.S. Federal Trade Commission, "FTC Requires Divestiture of Two Medical Device Product Lines as Condition of Becton, Dickinson and Company Acquiring C. R. Bard, Inc." (Dec. 22, 2017), available at <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-requires-divestiture-two-medical-device-product-lines>.

analogue. In addition, the NDRC determined that the two companies entered into a three-year exclusive general distribution contract with Weifang Longshunhe Pharmaceutical Co., Ltd. (“**Weifang Longshunhe Pharmaceutical**”) and refused, without justification, to supply isoniazid APIs to other downstream players in order to implement price hikes. Other downstream players were forced to suspend production. Consequently, the NDRC fined Zhejiang Second Pharma RMB289,516 (approximately US\$45,296) and Tianjin Handewei Pharmaceutical RMB154,400 (approximately US\$24,157), amounting to 2% of each company’s respective sales in the Chinese isoniazid APIs market in 2016.²⁰

In the power industry, the NDRC addressed a price-fixing agreement in Shanxi Province. Energy reform in recent years—namely, power grid bidding—had caused a significant decline in the price of electric power. In early 2016, a number of power firms in the province agreed to refrain from competing and instead adopted a minimum direct supply price. In July 2017, the NDRC imposed the maximum fine for an industry association under the AML, RMB500,000 (approximately US\$78,228), against the Shanxi Electric Power Association, and aggregative fines of RMB72.88 million (approximately US\$11.4 million) against the 23 power firms that participated in the agreement. This case marks the first power price-fixing antitrust case in China.²¹

Similarly, the NDRC punished members of an alleged cartel in polyvinyl chloride (“**PVC**”) products,²² has initiated a nationwide inspection program in coal-producing areas and at port terminals to detect any attempt to fix coal prices during the winter,²³ and announced in November 2017 that it had uncovered anticompetitive conduct in the shipping industry.²⁴ Inflation is politically sensitive, and price increases attracted the NDRC’s attention in one or more of these cases. It is a reminder that companies should be cautious when significantly raising their prices in China, whether or not such increases may be justified by market conditions.

In the policy and rulemaking arenas, the NDRC has focused on pricing conduct by monopolists and government entities. Specifically, the agency issued *Opinions on Further Strengthening Price Regulation in Monopolistic Industries* (《关于进一步加强垄断行业价格监管的意见》) (the “**Opinions**”) in August

²⁰ National Development and Reform Commission: Announcement of Administrative Penalty Decision [2017] No. 1 (国家发展和改革委员会行政处罚决定书[2017]1号) (July 28, 2017), available at http://jjs.ndrc.gov.cn/figld/201708/t20170815_857737.html (Chinese language); National Development and Reform Commission: Announcement of Administrative Penalty Decision [2017] No. 2 (国家发展和改革委员会行政处罚决定书[2016]2号) (July 28, 2017), available at http://jjs.ndrc.gov.cn/figld/201708/t20170815_857735.html (Chinese language).

²¹ The First Direct Power Supply Price Monopoly Agreement Investigated and Concluded (首例直供电价格垄断协议案被依法查处), the NDRC news release, (August 3, 2017), available at http://zys.ndrc.gov.cn/xwfb/201708/t20170803_856989.html (Chinese language).

²² 18 PVC Businesses Fined for Price Monopoly Agreement (18家聚氯乙烯树脂经营者实施价格垄断被依法查处), (September 27, 2017), available at http://www.ndrc.gov.cn/qzdt/201709/t20170927_861744.html (Chinese language).

²³ Fa Gai Ban Jia Jian [2017] No. 1737: Notice on Strengthening Price Supervision in Coal Market in the Coming Winter (国家发展改革委办公厅关于做好迎峰度冬期间煤炭市场价格监管的通知), (October 23 2017), available at http://bqt.ndrc.gov.cn/zcfb/201710/t20171027_865008.html (Chinese language).

²⁴ Q&A Session on Investigation of Anticompetitive Practices at Ports (规范港口生产经营行为 降低进出口物流成本, 促进实体经济持续健康发展——国家发展改革委有关负责人就港口反垄断调查答记者问), available at http://www.ndrc.gov.cn/qzdt/201711/t20171115_867074.html (Chinese language).

2017, followed by *Rules for Pricing Activities of Governments* (《政府制定价格行为规则》) (the “**Government Pricing Rules**”) in September 2017. The Opinions mapped out key standards for evaluating the pricing practices of enterprises in monopolistic industries and governments, emphasizing the principle of “cost plus reasonable profit.” Shortly after the issuance of the Opinions, the NDRC published the Government Pricing Rules, effective January 1, 2018, which further clarify and limit the scope of government pricing activities primarily to “important public utilities, not-for-profit services, and operation of goods and services which feature a natural monopoly.” The Government Pricing Rules also stipulate that the government will increasingly rely on market forces to determine the prices of goods and services. The NDRC believes that this new regulation allows and will invite public participation and social supervision of government pricing activities.²⁵

III. SAIC Enforcement Actions

The State Administration for Industry and Commerce (“**SAIC**”), China’s agency for antitrust matters related to non-price conduct, continued its high-profile investigation into Microsoft’s sales and marketing practices. Also in 2017, the agency launched 18 new antitrust investigations and closed five of those investigations.²⁶

On a regional level, local Administrations for Industry and Commerce (“**AICs**”) were also relatively active in the past year, particularly in the energy and construction sectors,²⁷ and with respect to at least one trade association.²⁸ These actions should remind companies that merger enforcement is not the only area of Chinese antitrust law about which they should be aware. Companies should work with local counsel, just as in the U.S. or Europe, to ensure that operations in or affecting China follow best practices with respect to all aspects of antitrust compliance, including non-price competitive conduct and trade association participation.

²⁵ Fa Gai Jia Ge Gui [2017] No. 1554: Opinions on Further Strengthening Price Regulation in Monopolistic Industries (《关于进一步加强垄断行业价格监管的意见》) (August 23 2017), available at http://bgt.ndrc.gov.cn/zcfb/201710/t20171027_865008.html (Chinese language); Rules for Pricing Activities of Governments (《政府制定价格行为规则》) (September 18, 2017), available at http://www.ndrc.gov.cn/zcfb/zcfbl/201709/t20170926_861597.html (Chinese language); Q&A Session on Amending Rules for Pricing Activities of Governments (国家发展改革委有关负责人就修订《政府制定价格行为规则》答记者问), available at http://www.ndrc.gov.cn/zcfb/jd/201709/t20170926_861613.html (Chinese language).

²⁶ PaRR, SAIC investigates 18 antitrust cases in 2017 — China Competition Policy & Law Conference (January 11, 2018), available at <https://app.parr-global.com/intelligence/view/prime-2566745>.

²⁷ See Jiangsu Administration for Industry & Commerce: Announcement of Administrative Penalty Decision [2016] No. 00048 (江苏省工商行政管理局行政处罚决定书苏工商案字【2016】第00048号) (December 30, 2016), available at http://www.saic.gov.cn/fw/bsdt/gg/jzzf/201704/t20170407_261189.html (Chinese language).

²⁸ See Administration for Industry & Commerce for the Guangxi Zhuang Autonomous Region: Announcement of Administrative Penalty Decision [2017] 广西壮族自治区工商行政管理局行政处罚决定书桂工商经处字【2017】) (March 20, 2017) (Chinese language).

IV. Conclusion

Chinese antitrust authorities were considerably more active in 2017 than 2016. MOFCOM cleared seven transactions with conditions and toughening enforcement of penalties for violating reporting obligations under the AML; the NDRC expanded its enforcement efforts into several new industries; and the SAIC continued and opened a number of new investigations into potentially anticompetitive non-price conduct. Importantly, while MOFCOM has taken steps toward Western norms (including by shortening the length of its reviews), it still continues to depart meaningfully from Western antitrust authorities, including with respect to the use of behavioral remedies—a consistent trend over the first decade of the AML.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Arthur J. Burke	212 450 4352	arthur.burke@davispolk.com
Joel M. Cohen	212 450 4592	joel.cohen@davispolk.com
Arthur F. Golden	212 450 4388	arthur.golden@davispolk.com
Ronan P. Harty	212 450 4870	ronan.harty@davispolk.com
Christopher B. Hockett	650 752 2009	chris.hockett@davispolk.com
Jon Leibowitz	202 962 7050	jon.leibowitz@davispolk.com
Howard Shelanski	202 962 7060	howard.shelanski@davispolk.com
Miranda So	+852 2533 3373	miranda.so@davispolk.com
Jesse Solomon	202 962 7138	jesse.solomon@davispolk.com
Howard Zhang	+86 10 8567 5002	howard.zhang@davispolk.com

© 2018 Davis Polk & Wardwell LLP | 450 Lexington Avenue | New York, NY 10017

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's [privacy policy](#) for further details.