

Your World First



# China anti-trust developments in 2017 and predictions for 2018



# Overview

Anti-trust continues to be an important legal area for businesses in China. In the last 12 months, we have seen revised measurements both locally and nationally, updated guidelines on drug prices and proposals to update IPR guidelines and stricter enforcement on merger control filing.

As we look ahead to the next 12 months, we expect to see more developments and more attention being given to competition activity in sectors including TMT, Life sciences & Healthcare, Utilities and Automotive.

We will be closely monitoring the developments and providing you with regular updates on them through our free eAlert service, Law-Now, and also WeChat 'CMSAsia'.

For now, we hope you find our reflections and predictions of interest and help to your business as you plan for the year ahead.

If you would like to discuss any of the developments with us, please do let me know.



**Nick Beckett**

Managing Partner, Beijing Office

**T** +86 10 8527 0287

**M** +86 186 1842 8030

**E** [nick.beckett@cms-cmno.com](mailto:nick.beckett@cms-cmno.com)

Follow us on **WeChat** to keep up-to-date on the latest legal developments, events and news from CMS.



# Top 10 developments

1



## **Revised 'Measures for Examination of the Concentrations of Undertakings' released for public comments:**

MOFCOM issued the revised 'Measures for Examination of the Concentrations of Undertakings' in October 2017 for public comment. The draft provided that a series of transactions shall constitute one concentration if the transactions are conditional upon one another. Accordingly, merger control filing shall be made before the implementation of the first transaction. Under the draft, the criteria to find concentration of undertakings are broader and clearer. For example, a concentration is regarded to exist if one operator obtains the controlling rights in another operator by acquiring part of the revenue-generating assets such as intellectual property rights or production lines, and certain turnover thresholds are met. The draft also provides more guidance on how to determine the turnover of the undertakings, as well as the due timing to make the filing. Once adopted, the new measures are expected to replace all previous regulations concerning the review of concentration of undertakings and will be the main guidance on merger control filing review.

2



**Reckitt Benckiser and Mead Johnson:** Although the acquisition of Mead Johnson by Reckitt Benckiser was eventually cleared, the case provided a glimpse on how regulators determine what constitutes 'markets relevant to the concentration'. When the acquisition was notified to MOFCOM, it was filed under the simple procedure, but a standard procedure was eventually adopted. Mead Johnson is a US based infant-milk manufacturer, and Reckitt Benckiser is a UK based consumer-healthcare product manufacturer. Neither had a share of 25% or more on any market relevant to the concentration. However, during public consultation, it was noted that Reckitt Benckiser's Durex business enjoyed a market share of over 25%, and that market was considered relevant to the concentration.

3



**Stricter enforcement trend on merger control filing:** In 2017, MOFCOM approved 7 cases conditionally. This is a significant increase when compared to the 2 cases with conditions approved in 2015 and 2016. In addition to the strict attitude on cases being filed, MOFCOM has shown severer enforcement of China Anti-monopoly Law by imposing higher penalties on 'gun jumping'. 9 penalty decisions were published by MOFCOM last year and quite a few transactions involved multi-step structures, including Canon's acquisition of Toshiba Medical, Meinian Onehealth's acquisition of Ciming Checkup and Dade Holding's acquisition of Jilin Sichang. In response to the increased enforcement, MOFCOM issued draft measures on the review of concentration to solicit public comments, with the aim to provide clearer guidance for merger control filing.

4



**Drug pricing guidelines released:** Drug pricing is prone to regulation due to public pressure. On 16 November 2017, NDRC issued guidelines on pricing behaviour in relation to drugs that are in short supply and active pharmaceutical ingredients. A dominant business operator will be punished for placing unfairly high or low prices and for refusing unreasonably to conduct transactions. Operators are also prohibited from hoarding drugs beyond the normal storage quantity or period. The guidelines provided clarity on the affected markets and monopolistic agreements. After the guidelines were published, it was reported that some drugs that were previously in short supply were more adequately provided to the market.

5



**New Anti-Unfair Competition Law comes into force:** After a lengthy legislative process that lasted 23 years, the National People's Congress has approved the final revision of the PRC Anti-Unfair Competition Law. The revised legislation came into force on 1 January 2018. The revision sees amendments made to provisions concerning, among others, commercial bribery and trade secrets. The latest version has removed provisions concerning competition restrictions, below-cost pricing behaviours, and administrative monopolies. Although the amendments have clearly separated anti-monopoly laws from anti-unfair competition laws, companies should not be too quick to dismiss the latter when considering anti-trust compliance, especially in a situation where the applicable regime is not immediately clear.

6



**NDRC probes the PVC sector for reaching monopoly agreements via WeChat:** The chemical and industrial products industry has been in the regulatory spotlight this year. NDRC has launched an investigation of the sector, with a focus on the polyvinyl chloride (PVC) sector, amid price surges. PVC caught the attention of regulators when domestic PVC spot prices raised to RMB 8,000 per metric ton in November 2016, reaching a 5-year high. Following the probe, 18 chemical manufacturers that had colluded to form a cartel, were fined RMB 457 million for fixing the prices of PVC. According to the NDRC, the companies have entered into 13 price-fixing agreements via the popular messaging app, WeChat.

7



**Shandong AIC wins administrative proceeding against accountancy cartel:** The Shandong branch of SAIC finally won its year-long battle against an accountancy cartel. In May 2016, the Shandong AIC announced a penalty against an accountancy cartel when it discovered that 25 firms had colluded to a market allocation scheme. Following the announcement, the firms filed for administrative reviews against the decision to three separate bodies: the Shandong Provincial Government, the SAIC, and the Jinan Lixia District People's Court. For each review dismissed, the firms applied for a corresponding appeal. Shandong AIC's victory took a year of multiple hearings, 14 administrative review appeals and 44 administrative lawsuits.

8



**Draft IPR anti-trust guidelines released for public comment:** Over recent years, intellectual property rights (IPR) has been subject to increasing scrutiny from regulators. In April 2017, the Office of Anti-monopoly Committee of the State Council issued the long awaited draft guidelines concerning the abuse of IPR for public comment. The draft touched upon monopoly agreements relating to intellectual property rights, abuse of dominant market position relating to IPRs, and concentration of undertakings relating to IPRs. Operators may be comforted by the safe harbour provisions, one of which is that where an agreement was reached between operators which possess an aggregate market share of no more than 20 percent in the relevant market, the agreement is not likely to be deemed as monopolistic.

9



**Guangdong Education Department was challenged for abuse of administrative power by a private plaintiff:** In an unprecedented case, a private plaintiff successfully challenged a governmental agency for violations of anti-monopoly laws. Tsinghua Sware, a software company, sued the Guangdong Education Department for abuse of administrative power when it appointed Glodon Software as the exclusive software provider for a national vocational skills competition. The education department argued that anti-monopoly laws should not apply, as there were no market forces involved. The Guangdong High People's Court did not accept the argument and held that the education department had operated an administrative monopoly by mandating participants of the competition to use the software from a company that it selected.

10



**Nationwide authorities rectify administrative monopolistic conduct:** The PRC State Council issued the Action Plan for 2017-2018 in December 2017, aiming to remove administrative monopolistic conducts in local governments. Upon the publication of the plan, nationwide authorities have stepped up their efforts to eliminate the prohibited conduct. In late December 2017, over 31 local authorities across various sectors have taken the initiative to rectify any instances of abuse of power and eliminate anti-competitive policies. These authorities include local health authority, local construction planning authorities, local pricing authorities, NDRC, etc. The details of the efforts are published by the NDRC Bureau of Price Supervision and Anti-Monopoly.





# Top 10 predictions

1



**Internet:** In a data driven economy, it is a matter of time before China regulates competition in its cyberspace. Due to China's Great Fire Wall, China's dominant internet companies see little competition from the west. In China, Baidu, Alibaba and Tencent have amassed control across various subsectors. There is a pattern of consolidation within the industry. China's recent revision of the anti-unfair competition law provided hints as to how the Internet will be regulated from the anti-trust perspective. The new anti-unfair competition law provides that Internet operators cannot implement incompatible measures to other competitive operators. This is a starting point, and should be taken as a sign for further regulations.

2



**Sharing Economy:** The sharing economy is a booming market in China, and its growth will continue in 2018. During the merger of Didi and Kuaidi in 2015, competition concerns were raised in relation to the sharing economy. Authorities face the dilemma of balancing economic growth against monopoly regulation. 2017 saw the bankruptcy of many second tier bike-sharing companies. The market speculates that first tier companies such as Mobike and OFO are in merger negotiations. If the Mobike-OFO merger proceeds, the authorities may draw from their experiences in the Didi-Kuadi merger and provide a better framework on how to regulate this kind of merger.

3



**Automobiles:** In November 2017, a top anti-trust official at the NDRC stated that the regulator is monitoring the global automobile sector for anti-trust violations. NDRC has signed various memorandum of understandings with anti-trust regulators in various jurisdictions including the US, the UK, South Korea and Europe. The area of focus includes pricing behaviours by auto dealers operating in the same city, the use of vertical restraints in ancillary markets, and the fixing of re-sale prices. The final version of the anti-trust guidelines for the auto sector has been submitted to the Anti-monopoly Commission of the State Council and is expected to be adopted formally in 2018.

4



**Pharmaceuticals:** There have been a number of major cases within the pharmaceuticals industry in which anti-trust issues have played a pivotal role. This year, the NDRC has issued guidelines concerning pricing behaviours of operators dealing in drugs in short supply and APIs. NDRC provided instructions for the evaluations of the legitimacy of the different price behaviours. The publication of the guideline is an indicator for the stricter enforcement in the future. Pharmaceuticals has also been one of the enforcement targets of SAIC last year. For 2018, we can expect corresponding detailed measures to be issued for the successful implementation of the guidelines.

5



**Anti-Monopoly Law:** The revision to the Anti-Monopoly Law may kick off in 2018. The Anti-Monopoly Commission has held three seminars to solicit comments from judges, scholars, officers and lawyers. The Anti-Monopoly Commission of the State Council will need to come up with a unified version of the various revisions from China's three competition regulators. The draft would then be submitted to the State Council's Legislative Office for review, after which the office would publicise it for public comments. After 10 years of being in force, it is expected that some grey areas will be addressed in the revision of this law to fit the new Internet economic era.

6



**Public Utilities:** Public utilities, such as suppliers of municipal electricity, heating, gas, water and telecommunications services, have long been on the anti-trust regulator's agenda, and will continue to be a priority for 2018. In October 2017, NDRC announced its plan to conduct a nationwide inspection from 1 November 2017 to 30 June 2018 into public utilities, with a particular focus on compliance with pricing regulations. NDRC called for its provincial branches to focus on irregular charges and any abusive pricing conduct such as the collection of unauthorised fees and the provision of false or misleading information in relation to the products.

7



**Industry Association:** In July 2017, NDRC issued the 'Guidelines for Price-related Activities of Industry Association', revealing the regulator's attention to monopolistic activities by industry associations. Just one month after the release of the guidelines, NDRC imposed fines on two industry associations. Shanxi Power Industry Association and its 23 member thermal power enterprises were fined RMB7338 million for reaching a monopoly agreement to control direct power trading prices. Hangzhou Fuyang District Papermaking Industry Association was shut down for bringing together 17 members to reach a price fixing monopoly agreement. Other industry associations allowed to have conducted monopolistic activities, such as Music Copyright Society of China and China Audio-Video Copyright Association entities, are expected to be on the regulator's radar in 2018.

8



**Further implementation of fair competition review system:** One year has passed since the State Council issued its opinions on the establishment of a fair competition review system in 2016. Further implementation and improvement of this system will be a focus of 2018. The publication and enthusiastic reception of the Action Plan for 2017-2018 signal the regulator's intention for tougher enforcement to eliminate administrative monopolies. 2018 will see all levels of the government conduct analysis and searches to eliminate any administrative measures and policies which may restrict or prohibit competition. The government is to remove any unreasonable market entry or exit barriers and any unfair restrictions or rejections of external bidders. Considering the determination of the State Council, it is likely that local government branches will actively adhere to the action plan and reduce the administrative barriers, in favour of businesses outside their respective region.

9



**Penalties guidelines:** In a welcome move, the PRC State Council's Anti-Monopoly Commission has requested NDRC to further review and revise the anti-trust guidelines on how penalties and illicit gains are calculated. NDRC has published draft guidelines for public comment. The draft introduces a framework to calculate penalties, providing transparency and predictability to the enforcement process. The draft also introduces sanctions on parent companies that exerted influence over entities engaged in anti-competitive conduct. It remains unclear when the final version of the guidelines will be published, however robust cartel enforcement can be expected to continue.

10



**IP and Anti-trust Interface cases:** In March 2017, the Anti-Monopoly Committee of the State Council issued its latest draft of the 'Anti-Monopoly Guidelines on Intellectual Property Abuse' for public comment. The tension between anti-trust and intellectual property has been identified as an area of concern from early days. 2017 had some eye-catching IP-related anti-trust cases, such as Qihoo 360 vs Tencent and Apple vs Qualcomm. More IP and anti-trust related cases will emerge in the new Internet era, and Chinese competition authorities will continue to consider the interplay between IP and anti-trust from both legislative and enforcement perspectives.



# Contact us



## Nick Beckett

Managing Partner, Beijing Office

**T** +86 10 8527 0287

**M** +86 186 1842 8030

**E** [nick.beckett@cms-cmno.com](mailto:nick.beckett@cms-cmno.com)



## Huawei Zhang

Of Counsel, Anti-Trust

**T** +86 10 8527 0259

**M** +86 136 2119 5628

**E** [huawei.zhang@cms-cmno.com](mailto:huawei.zhang@cms-cmno.com)



## Vera Zhang

Senior Associate, Corporate, Anti-Trust

**T** +86 10 8590 0799

**M** +86 185 1825 3570

**E** [vera.zhang@cms-cmno.com](mailto:vera.zhang@cms-cmno.com)



## Roxie Meng

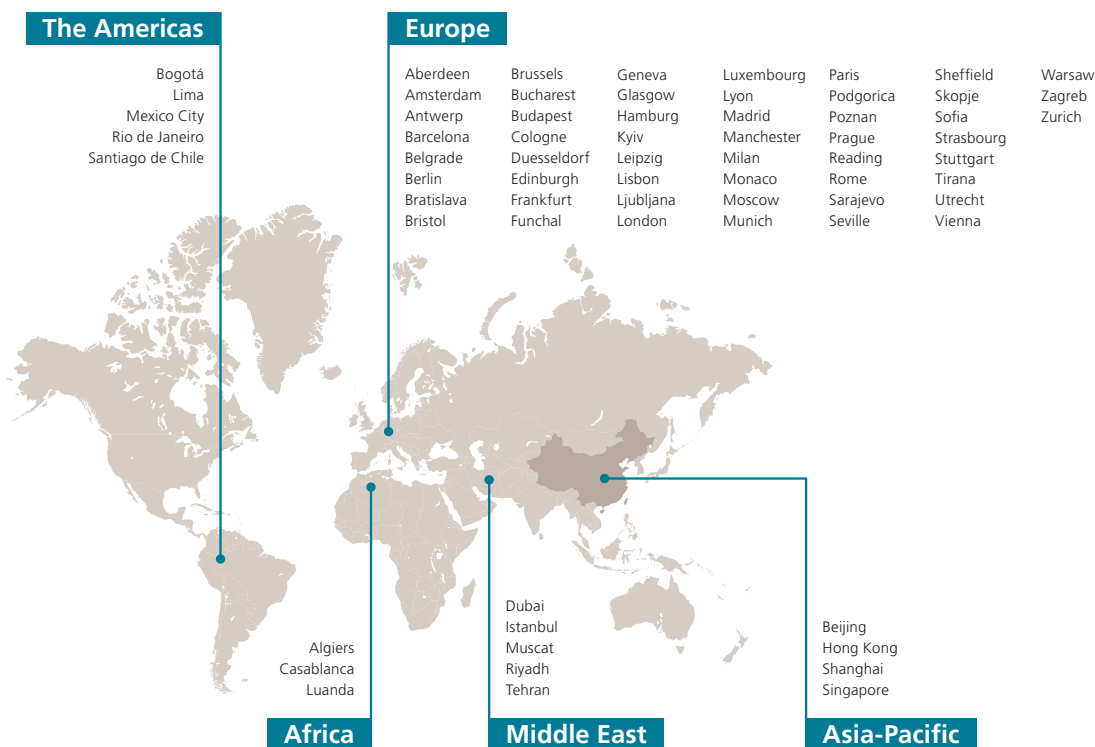
Associate, Corporate, Anti-Trust

**T** +86 10 8527 0259

**M** +86 185 1825 3576

**E** [roxie.meng@cms-cmno.com](mailto:roxie.meng@cms-cmno.com)

## About CMS



- **74 offices**
- **68 cities**
- **> 1,000 partners**
- **> 4,500 lawyers**
- **> 7,500 total staff**
- **Combined annual turnover:**  
EUR 1.05bn (2016)\*  
\* when currency fluctuation is removed
- **42 countries**

### European countries

Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, France, Germany, Hungary, Italy, Luxembourg, Macedonia, Monaco, Montenegro, the Netherlands, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Switzerland, Turkey, Ukraine and United Kingdom

### Outside Europe

Algeria, Angola, Brazil, Chile, China, Colombia, Iran, Kingdom of Saudi Arabia, Mexico, Morocco, Oman, Peru, Singapore and United Arab Emirates



Law . Tax

**Your free online legal information service.**

A subscription service for legal articles  
on a variety of topics delivered by email.  
**cms-lawnow.com**



Law . Tax

**Your expert legal publications online.**

In-depth international legal research  
and insights that can be personalised.  
**eguides.cmslegal.com**

CMS, China  
Beijing Representative Office  
Room 1909, China Youth Plaza  
No.19 Dongsanhuan North Road  
Chaoyang District, Beijing,100026  
China

T +86 10 8527 0259  
F +86 10 8590 0831

CMS, China  
Shanghai Representative Office  
2801 Plaza 66 Tower 2  
1266 Nanjing Road West  
Shanghai  
200040  
China

T +86 21 6289 6363  
F +86 21 6289 9696

CMS Hasche Sigle,  
Hong Kong LLP 27/F,  
8 Queen's Road Central Central,  
Hong Kong S.A.R.

T +852 3758 2215  
F +852 3758 2235

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

**CMS locations:**

Albania, Algeria, Angola, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Chile, China, Colombia, Croatia, Czech Republic, France, Germany, Hungary, Iran, Italy, Kingdom of Saudi Arabia, Luxembourg, Macedonia, Mexico, Monaco, Morocco, Montenegro, the Netherlands, Oman, Peru, Poland, Portugal, Romania, Russia, Serbia, Singapore, Slovakia, Slovenia, Spain, Switzerland, Turkey, Ukraine, United Arab Emirates and United Kingdom.

**cms.law**

1802-0041860-2