



# Antitrust in China and across the region

Quarterly Update

July to September 2016

**C L I F F O R D**  
**C H A N C E**

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# Antitrust in China and across the region

## Quarterly Update: July to September 2016

China's Ministry of Commerce (MOFCOM) issued its first conditional decision of 2016 with the approval of AB InBev's acquisition of SABMiller. MOFCOM has also maintained its focus on investigating deals which have not been notified – with at least three such deals currently being looked at, including notably the merger of Didi Chuxing and Uber China. Also, deputy Director General of MOFCOM's Anti-monopoly Bureau (AMB), Wu Zhenguo was finally confirmed as the new head of the bureau, formally replacing Shang Ming who retired earlier in the year.

On the enforcement side, the provincial counterparts of both NDRC and SAIC have continued to be active in focusing on consumer products sectors including gas distribution, pharmaceuticals, consumer electronics, insurance and food products.

Across the Asia-Pacific region, regulators have shown increased activity on both antitrust enforcement and merger control. Australia issued its first ever criminal charges for criminal cartel conduct against Japanese shipping group NYK in relation to the transportation of vehicles. In Hong Kong, the Competition Commission has proposed to grant a five year block exemption order for vessel sharing agreements between liner shipping companies. In the Philippines, the Competition Commission is making its mark early – since its establishment earlier this year, it has reviewed over 60 mergers and is currently challenging the proposed purchase of San Miguel's telecommunications business by Globe and PLDT through the courts. One area of potential concern with the new agency's approach is its view that mergers should be notified prior to signing a definitive agreement.

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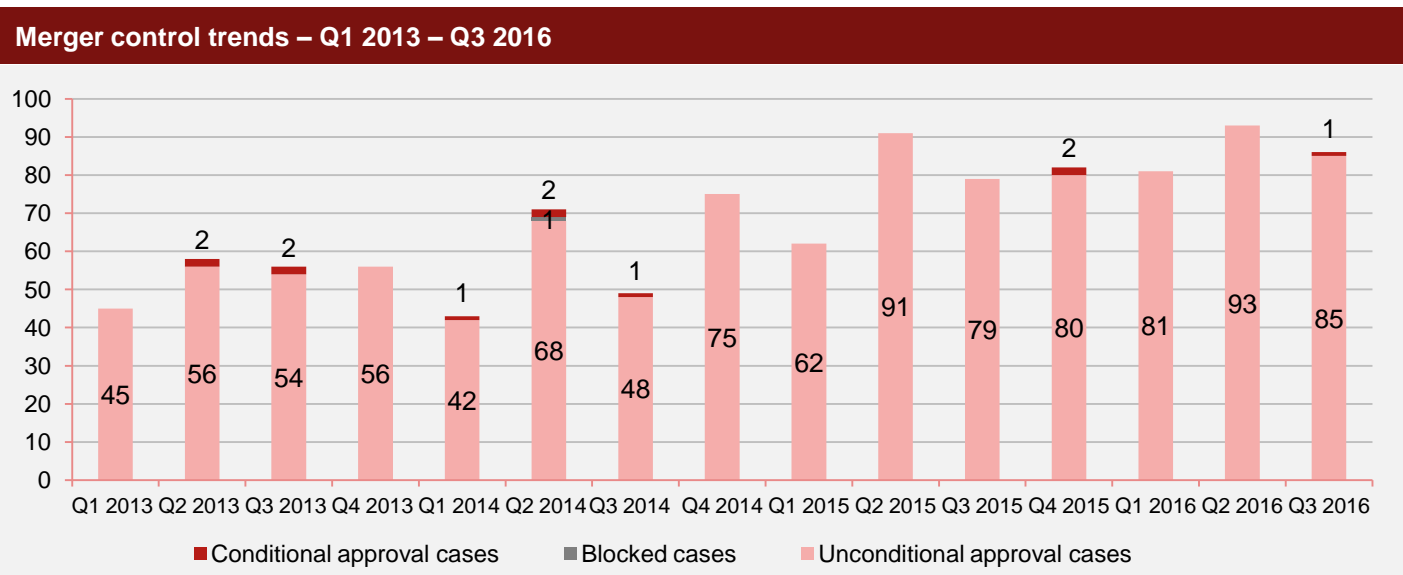


# Merger Control



## How many cases have there been?

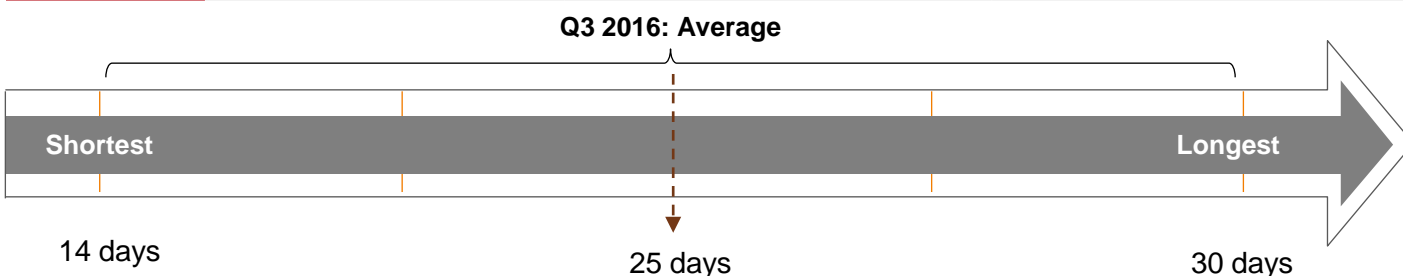
China's Ministry of Commerce (MOFCOM) issued 86 merger decisions in the third quarter of 2016, an increase of 9% compared to the third quarter of 2015. More than 75% of these cases were notified under the simplified procedure. 85 cases were unconditionally cleared, while one case was conditionally approved.



## 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                       |

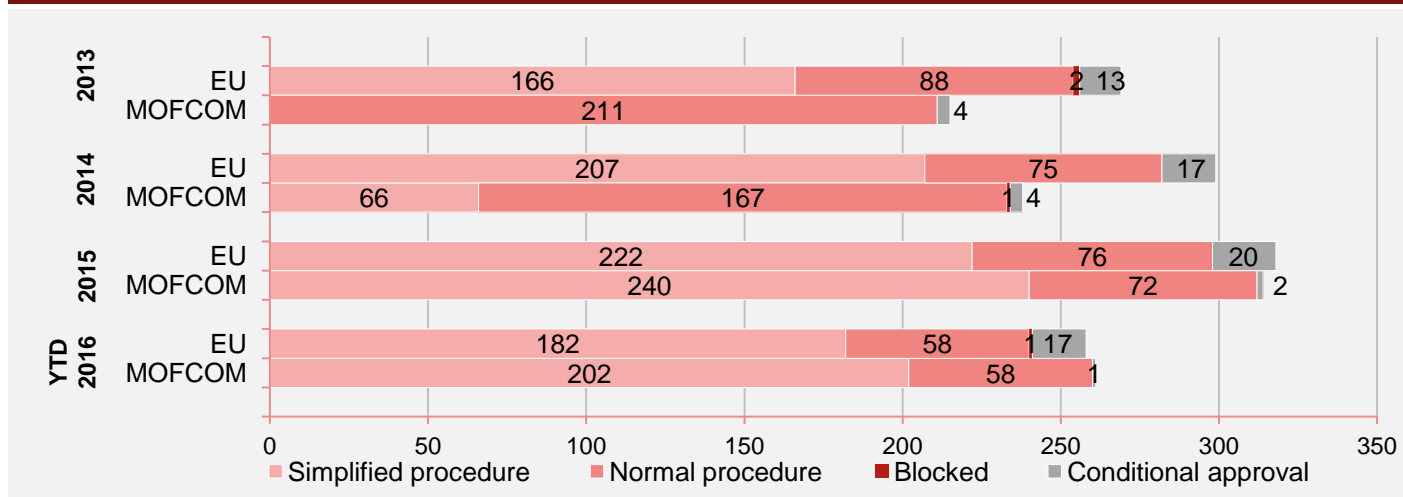


# Merger Control (continued)



## How does China compare internationally?

### Comparison with EU – 2013 – 2016



## Other news

### MOFCOM appoints new director-general

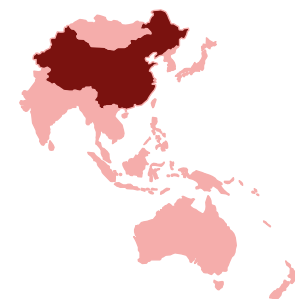
In August 2016, Mr. Wu Zhenguo was appointed director-general of MOFCOM's AMB as well as concurrently director of the Anti-monopoly Commission of the State Council. He replaces Shang Ming, who retired in January, 2016. Mr. Wu was previously deputy director general of the AMB and has been in charge of the overall management of the bureau since Mr. Shang's retirement.

### MOFCOM conditionally approves acquisition of SABMiller by AB InBev

On 29 July 2016, MOFCOM issued its decision to conditionally approve the USD108 billion acquisition of SABMiller PLC by Anheuser-Busch InBev NV subject to the divestiture of SABMiller's 49% interest in China Resources Snow Breweries to China Resources Beer within 24 hours of AB InBev completing the acquisition. The market definition MOFCOM applied in the decision is worth noting. MOFCOM considered that beers sold at different price levels differ significantly in terms of taste, sales channel and consumer group. Thus, for the first time, MOFCOM segmented the beer market into "mass brands beer" and "mid-to-high-end brands beer" based on the sales price, with CNY5 per 500ml as the cut-off point. For the relevant geographic market, MOFCOM determined that various beer brands compete with each other mainly at the provincial level due to low sales prices and high transportation costs. MOFCOM's analysis here may shed light on the factors it will consider in setting the geographic market in future cases in industries with similar characteristics. This is MOFCOM's first conditional approval since its conditional approval of NXP's acquisition of Freescale in November, 2015. The transaction was also subject to conditional clearances in other jurisdictions, notably the EU and US.

### MOFCOM is now investigating three transactions for the failure to notify

The recent Didi/Uber, Dreamworks/Comcast and Meinian/Ciming transactions are currently being looked at by MOFCOM despite not have been formally notified. In a 2 September 2016 press conference, a MOFCOM spokesperson said that MOFCOM is investigating the proposed USD35 billion merger between Chinese ride-hailing company Didi Chuxing and Uber China after reviewing complaints that the transaction should have been notified. According to Didi, neither Didi nor Uber China has begun earning profits in China yet and Uber China's operating revenues in the previous year did not reach the filing threshold of CNY400 million. On the same day, the spokesperson also said MOFCOM will probe the USD3.8 billion acquisition of DreamWorks Animation by Comcast in accordance with the AML rules after receiving unspecified complaints. Additionally, on 27 September 2016, Meinian Onehealth Healthcare (Group) disclosed in its parent company's stock exchange announcement that MOFCOM would further investigate its failure to notify the acquisition of Ciming Health Checkup Management Group following MOFCOM's preliminary probe which commenced in July 2016. It should be noted that AML rules allow MOFCOM to launch a discretionary review of a transaction or for the parties to make a voluntary notification even if the turnover of each party does not reach the filing thresholds. While there are no public instances of MOFCOM having taking such a decision to launch a discretionary review, there have been instances where parties have voluntarily notified a transaction.



# Antitrust Investigations

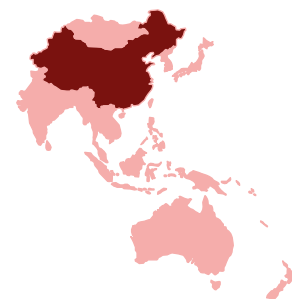
## The National Development and Reform Commission (NDRC)

NDRC has fined three pharmaceutical firms a total of CNY2.6 million (USD390,000) for reaching and implementing anticompetitive agreements on the sale of estazolam active pharmaceutical ingredients (APIs) and tablets. The three firms were Huazhong Pharmaceutical Co., Ltd., Shandong Xinyi Pharmaceutical Co., Ltd. and Changzhou Siyao Pharmaceuticals Co., Ltd. Only four companies have been granted licences to manufacture estazolam APIs; currently, only the three investigated firms are actually producing it in China. NDRC found that, after the announcement of the government's low-priced drug policy in 2014, the three companies agreed to jointly boycott other producers of estazolam tablets so withholding supply of estazolam APIs and then proceeded to coordinate price rises in relation to estazolam tablets. NDRC decided that Huazhong Pharmaceutical was the ringleader and thus gave it the highest fine of 7% of its annual sales of estazolam tablets in 2015, equal to CNY1,571,829 (USD235,568). Changzhou Siyao Pharmacy participated as a follower and was fined 3% of its relevant annual sales in 2015, equal to CNY547,563 (USD82,063). Shandong Xinyi Pharmaceutical actively cooperated with NDRC in the investigation and thus received a reduced fine of 2.5% of its relevant annual sales in 2015, equal to CNY484,431 (USD72,601). This case is unusual as there seems to have been no formal agreement to raise the price of estazolam tablets, rather a form of concerted practice based on phone calls, text messages and simultaneous price increases.

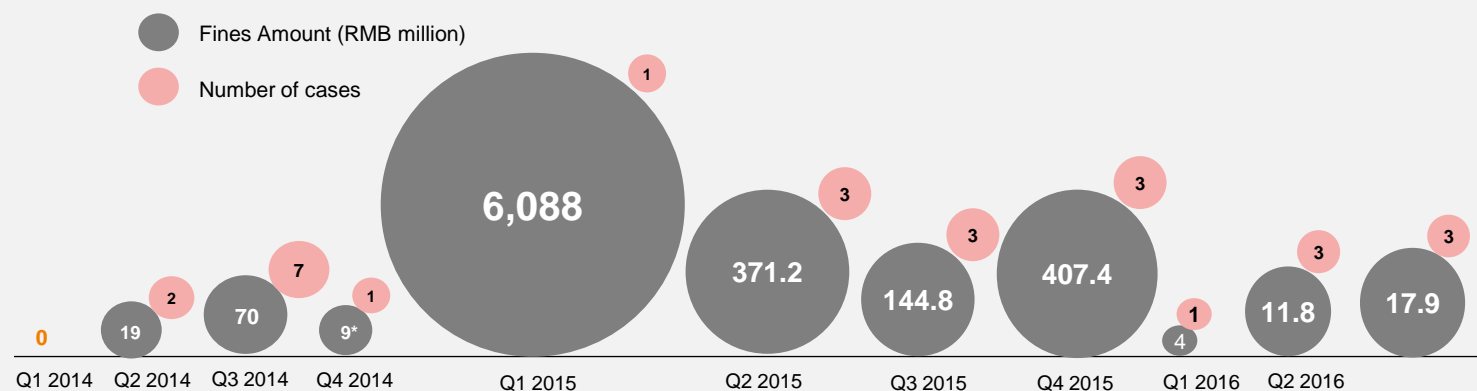
| Case   | Date announced | Issue   | Total fine (RMB '000) | Minimum (RMB '000) | Maximum (RMB '000) | % of Turnover | Leniency/ Co-operation |
|--|----------------|---|-----------------------|--------------------|--------------------|---------------|------------------------|
| <b>Natural Gas</b><br>- 5 natural gas suppliers<br><i>Hubei Price Bureau</i>         | July 2016      | Abuse of Market Dominance                         | 2,955.0               | NA                 | NA                 | 2 - 4         | Yes                    |
| <b>Pharmaceuticals</b><br>- 3 pharmaceutical firms<br><i>NDRC</i>                    | July 2016      | Conclusion of monopoly agreement; refusal to deal | 2,603.8               | 484.4              | 1,571.8            | 2.5 - 7       | Yes                    |
| <b>Household Appliances</b><br>- 3 appliance dealers<br><i>Shanghai Price Bureau</i> | August 2016    | Resale price maintenance                          | 12,348                | 265.2              | 11,784.5           | 3             | Yes                    |

# Antitrust Investigations (continued)

## The National Development and Reform Commission (NDRC)



### Enforcement trends – Q1 2014 to Q3 2016



## Other news

### Hubei price regulator fines five natural gas suppliers for abuse of dominance

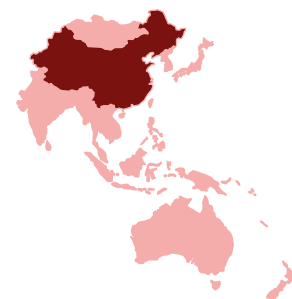
The Hubei Price Bureau announced on 12 July 2016 that it had imposed a combined fine of CNY2,955,000 (USD441,769) on five natural gas suppliers for infringing Article 17 of the AML, which prohibits abuse of dominance. Specifically, the regulator found that the natural gas suppliers had abused their dominant position in the market for the construction and installation of pipeline gas facilities by imposing excessive prices in relation to construction and instalment fees, as well as materials and by not allowing its trading counterparty to freely choose design, construction, and supervision services. Two of the companies (Jiangxia China Resources Gas and Shishou City Natural Gas Company) received reduced penalties of 2% of their annual sales in 2015 for their positive cooperation during the investigation, and for correcting their behaviour. The penalties of the other three companies involved (the Xianning branch of PetroChina Kunlun Gas, Xiantao PetroChina Kunlun Gas and Daye China Resources Gas) amounted to 4% of their annual sales in the previous year.

### Shanghai Price Bureau fines three Haier appliance dealers CNY12.4 million (USD1.86 million) over resale price restrictions

According to an NDRC announcement on 12 August 2016, the Shanghai Price Bureau imposed combined penalties of CNY12.348 million (USD1.86 million) on three dealers of Haier household appliances for imposing resale price restrictions. The three companies fined were Chongqing RRS Household Appliances Selling Company (Shanghai branch), Chongqing Haier Electrics Selling Company (Shanghai branch) and Chongqing Haier Household Appliances Selling Company (Shanghai branch). A tip-off was received through NDRC's price monitoring hotline in June 2015 that the three companies had engaged in price control and anticompetitive practices. The Shanghai Price Bureau found in its investigation that the companies had imposed minimum resale prices on its resellers since 2012. Given that the three companies positively rectified their conduct, and actively reduced the adverse impact including removing the minimum resale price restrictions in the distribution agreements before the investigation, revising anti-competitive distributor management provisions in the distribution agreements during the investigation, establishing internal compliance training and cooperating in the payment of fines the Shanghai Price Bureau reduced the companies' penalties to 3% of their annual sales in the previous year. Under the AML, it is prohibited to set a fixed or minimum resale price. While the AML does not specifically mention maximum or recommended resale prices, it does give the antitrust authorities the discretion to recognize other vertical agreements as monopoly agreements.

# Antitrust Investigations (continued)

## The State Administration for Industry and Commerce (SAIC)



On 16 August 2016, Hubei AIC announced its decision to fine the provincial insurance industry association CNY200,000 (USD30,198) for facilitating its members to enter into anticompetitive agreements. In 2003, the association arranged for four insurance companies, People's Insurance Company of China (Hubei branch), China Pacific Insurance (Wuhan branch), Ping An Property & Casualty Insurance (Wuhan branch) and Tianan Insurance (Wuhan branch), in Wuhan to sign an agreement to divide up the new car insurance market by coordinating major decisions on their policies, setting up a 'Wuhan New Vehicle Insurance Service Center' to implement insurance policies thereof and various other matters including allocating market share. According to Hubei AIC, by 30 November 2015 the Center had attracted 28 members. Additionally, in September 2006 the association issued a notice to adjust its members' market shares and issued a supplementary market share agreement in September 2008. The CNY200,000 fine was, however, reduced by Hubei AIC from its provisional fine of CNY500,000 (USD75,495) of 15 March 2016 following submissions from the association. The association submitted that the establishment of the Center was to stabilise the insurance market and that it did not intend to facilitate an anticompetitive agreement, that it had rescinded all rules inconsistent with the AML after the AML's implementation, and that it had actively cooperated with Hubei AIC in the investigation. The AIC upheld the third submission, but dismissed the two other submissions on the grounds that the market division could not be justified and the anticompetitive conduct had not been rectified until the probe began. The decision reinforces the principle that lack of intent does not absolve an undertaking of responsibility for infringements of the AML.

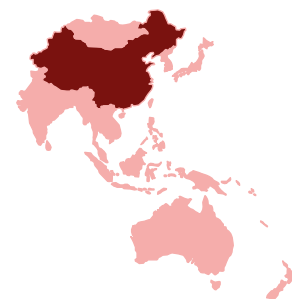
| Case   | Date announced | Issue  | Total fine (RMB '000) | Minimum (RMB '000) | Maximum (RMB '000) | % of Turnover  | Leniency/ Co-operation |
|--|----------------|--|-----------------------|--------------------|--------------------|----------------|------------------------|
| <b>Insurance</b><br><i>Hubei*</i>            | August 2016    | Monopoly Agreement - Sales Market Partitioning                               | 200                   | NA                 | NA                 | NA             | Yes                    |
| <b>Payment Cipher Device</b><br><i>Anhui</i> | September 2016 | Monopoly agreement – Sales Market Partitioning                               | More than 334.7**     | NA                 | 258.5              | No more than 8 | NA                     |
| <b>Salt</b><br><i>Inner Mongolia</i>         | September 2016 | Abuse of market dominant position – differential treatment in trading        | 1,047.8               | NA                 | NA                 | 2              | Yes                    |
| <b>Electricity</b><br><i>Jiangsu</i>         | September 2016 | Abuse of market dominant position – Imposing unreasonable trading conditions | None***               | NA                 | NA                 | NA             | Yes                    |

\* The decision was issued in Q2 2016 and published in August 2016

\*\* Three companies were penalized by Anhui AIC, but only two of them disclosed the fine amount, and it was reported that the third company received a lower fine compared to the fine amounts of the other two

\*\*\* The investigation was suspended on 5 September 2014, and terminated on 19 August 2016, for the reason that the company actively cooperate in the investigation and implemented the requisite rectification measures. SAIC decided that there was no practice that warranted the revival of the investigation

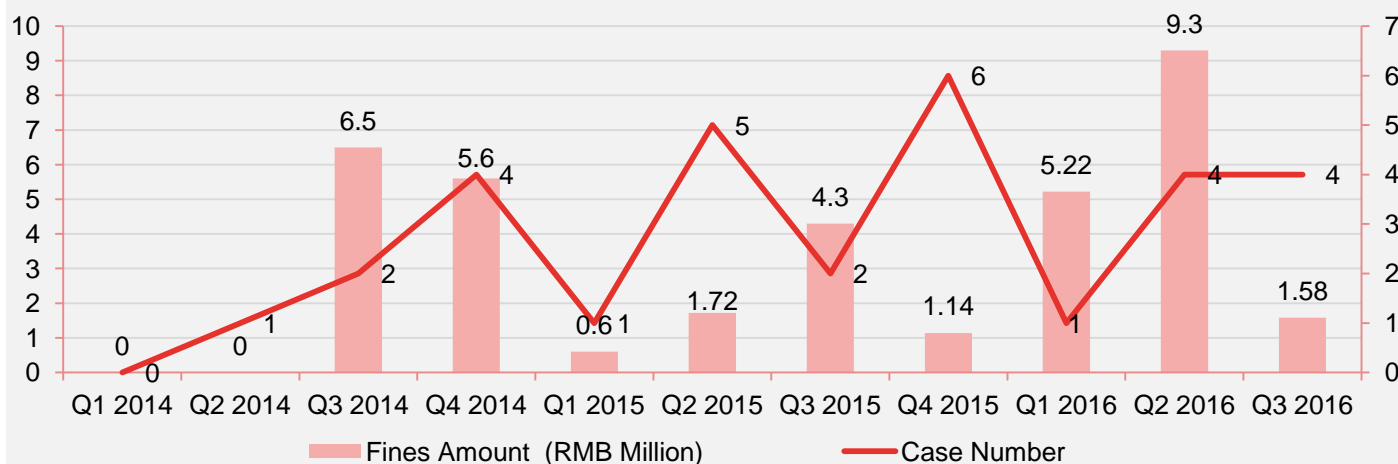




# Antitrust Investigations (continued)

## The State Administration for Industry and Commerce (SAIC)

### Enforcement trends – Q1 2014 to Q3 2016



## Other news

### Three Chinese payment cipher device suppliers fined by Anhui AIC for market division

On 21 and 22 September 2016, respectively, Sunyard System Engineering (SSE) and Sinosun Technology (ST) announced that they had received penalty decisions from the Anhui AIC for alleged collusion to divide up the market for sales of payment cipher devices in Anhui by dividing customers among themselves. Under Article 13 of the AML, it is prohibited for competing undertakings to enter into agreements to divide the sales market or procurement market for raw materials. The Anhui AIC therefore concluded that the companies' conduct resulted in the elimination or restriction of competition in the market for payment cipher devices, disturbed market order and hindered economic efficiency. The Anhui AIC fined SSE CNY76,171 (USD11,418) and ST CNY258,502 (USD38,760), which amounted to 8% of their respective sales in Anhui in 2014, and imposed CNY4,113,690 and CNY5,380,259 in unlawful gains respectively. Additionally, sources familiar with the investigation also indicated that a third company, Haijiye, was also fined. Although Haijiye, a private company, did not disclose the specific amount of fine imposed, it is believed to be less than the fines imposed on SSE and ST.

### China's Inner Mongolia AIC fines Chifeng Salt USD 157,070 for Abuse of Dominance

On 29 September 2016, the Inner Mongolia AIC fined Chifeng Salt Industry Company for abuse of dominance. The Inner Mongolia AIC had launched an investigation into the company on 21 November 2014 after receiving consumer complaints. The company was the only wholesaler licensed by the Chifeng local government to purchase edible salt from manufacturers as well as sell edible salt to retailers in Chifeng. Thus it had a statutory monopoly for the edible salt market in Chifeng. The AIC found that the company provided different types of edible salt products to different retailers within Chifeng depending on the retailers' location. Thus the AIC found the company's conduct amounted to abuse of dominance through discriminatory treatment between different retailers, including refusal to deal. The Inner Mongolia AIC confiscated illegal gains of CNY 1,940,544 (USD 289,525.40) from the company and imposed a fine of CNY 1,047,814 (USD 156,331.80), 2% of the company's annual sales in 2013) on it.

# Other Asia Pacific news in brief

## India

On 31 August 2016, the Competition Commission of India (CCI) imposed combined penalties of INR 67.15 billion (USD1 billion) on 11 cement makers and the industry association, Cement Manufacturers Association (CMA), for price fixing. The 11 companies reportedly shared details related to prices, capacity utilisation, production and dispatch through the platform provided by CMA. In addition to the fine, the 11 companies and the CMA were directed to cease their unlawful conduct. This decision is a re-issue of a previous CCI order from 20 June 2012 against the cement industry which the Competition Appellate Tribunal had set aside and remitted to the CCI in December 2015 for a re-hearing and new decision.

## Philippines

Although the Philippines Competition Commission (PCC) was only officially set up earlier this year, it has already been very active, reviewing over 60 merger cases and publishing a series of guidelines. The PCC has also been pursuing its review of the proposed purchase of San Miguel Corporation's telecommunications business by Globe and PLDT through the courts, appealing a court decision to grant PLDT a temporary restraining order preventing the PCC from challenging the deal. A clarification note issued in September 2016 confirmed the PCC's position that qualifying mergers need to be notified to the PCC prior to the signing of a definitive agreement. This differs from other jurisdictions where deals are typically notified only after signing a binding agreement and it remains to be seen how the PCC will apply this in practice.

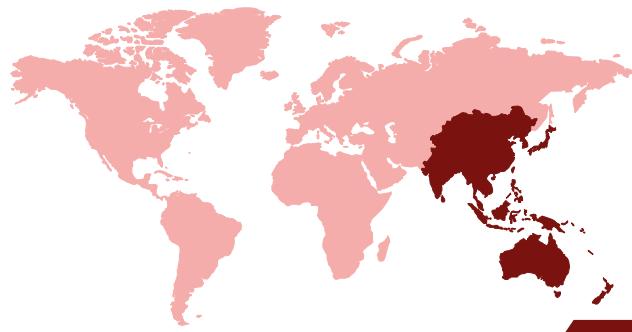
## Singapore

In July 2016, two US-based investment funds filed an antitrust class action in the US alleging 20 investment banks conspired to rig the prices of financial derivatives that incorporate the Singapore Interbank Offered Rate (SIBOR) and Singapore Swap Offer Rate (SOR). These 20 banks allegedly made false SIBOR submissions and entered into collusive transactions in the swap market, fixing the prices of SIBOR and SOR-based derivatives traded in the US. While the allegations continue to be considered in the US, the head of the Competition Commission of Singapore (CCS) has stated that such global financial benchmark cases are not a pressing concern, as they are not typical price fixing cases, and such cases may lack clear evidence of a direct impact on businesses and consumers in Singapore.

## Australia

On 14 July 2016, the Australian Competition & Consumer Commission (ACCC) filed a case against Nippon Yusen Kabushiki Kaisha (NYK) for its alleged cartel conduct in connection with the transportation of vehicles. This is the first-ever criminal charge against a corporation to be brought under the Australian Competition and Consumer Act. Shortly after commencement of the investigation, NYK pleaded guilty to criminal cartel conduct in Australia's Federal Court. The investigation is ongoing, but if the Court finds NYK liable, the maximum fine it faces will be the greater of: (i) AUD10 million (USD7.59 million); (ii) three times the total benefits obtained or attributable to the offence; and (iii) 10% of NYK's annual turnover connected with Australia.

On 31 March 2015, the Australian Government released the Harper Review which contained recommendations for reforming Australia's competition laws including on the merger control regime. Over the next few months, the Australian Government is expected to release the exposure draft legislation implementing the recommendations in the Harper Review that it supports. Concerning merger control, one of the proposed reforms would be to merge the currently separate merger authorisation and formal merger review process and vest the ACCC with first instance decision-making power. Post reform, the Tribunal would have appellate responsibilities only in the merger control regime.



## South Korea

On 18 July 2016, the Korea Fair Trade Commission (KFTC) issued its final decision to block SK Telecom (SKT) from acquiring cable television content provider CJ HelloVision. According to the KFTC, the merged entity would control 21 of Korea's 23 cable television markets and it was unlikely that competition concerns could be addressed by behavioural measures and partial asset sales. On 25 July, SKT announced the termination of the acquisition and nullified the merger agreement. After the KFTC blocked the deal, the Ministry of Science, ICT and Future Planning and the Korea Communications Commission, which were also reviewing the deal, cancelled their respective reviews at the request of SKT.

After imposing a combined fine of KRW59 million (USD53,000) on Deutsche Bank and HSBC in March 2016, the KFTC launched a further investigation into anticompetitive conduct involving an unidentified number of investment banks that allegedly rigged rates on foreign exchange swaps sold in Korea. In contrast, the head of the Financial Supervisory Services (FSS), South Korea's financial regulator, said that the FSS had no plan to launch a separate investigation in this regard. The FSS's task is to investigate violations of the Financial Investment Services and Capital Market Act, which prohibits "acts manipulating the price, sales conditions or commission" of financial products to limit competition. FSS previously had been active in imposing fines for similar conduct by financial institutions, fining each of DBS, ANZ and BNP Paribas KRW50 million in 2013 for colluding to fix bids for currency swaps.

## Hong Kong

On 14 September 2016, in response to the Hong Kong Liner Shipping Association's (HKLSA) application, the Hong Kong Competition Commission (CC) issued its proposed five-year block exemption order (BEO) for vessel sharing agreements (VSAs) in consideration of economic efficiencies generated by such agreements. The CC, however, rejected the HKLSA's submission to include voluntary discussion agreements (VDAs) into the proposed order on the grounds that such agreements do not enhance overall economic efficiency like VSAs do. The proposed BEO would exempt VSAs from the first conduct rule (which prohibits anti-competitive agreements) if the parties' combined market share is 40% or lower, the VSA does not allow or require shipping lines to engage in cartel activity and shipping lines can freely withdraw from a VSA without risk of penalty by giving reasonable notice. The final decision will be issued after public consultation which lasts until 14 December 2016. In response to the proposed BEO, Hong Kong's liner shipping industry plans to make use of the public consultation process to increase the currently proposed 40% market share cap, and also demonstrate to the CC how VDAs contribute to ensuring greater efficiency in the distribution and transportation of goods in Hong Kong.

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