

E-ALERT | Life Sciences and Antitrust

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CHINESE PHARMACEUTICAL COMPANIES FINED FOR ANTITRUST VIOLATIONS

China's National Development & Reform Commission ("NDRC") announced this week that it has fined two domestic pharmaceutical companies for monopolizing bulk sales of promethazine hydrochloride in violation of the country's Anti-Monopoly Law ("AML"). The decision, NDRC's first AML action in the life sciences sector since the law went into effect in 2008, follows last week's public confirmation by the agency of a significant antitrust investigation of Chinese state-owned companies, also the first of its kind. These announcements indicate that NDRC is becoming more active in its enforcement of the AML's provisions regarding monopolistic conduct. Companies doing business in China – particularly those with a large share of sales in the market or that collaborate with competitors in China – should therefore consider working with counsel to ensure that their business practices comply with the AML.

BACKGROUND

Three agencies share enforcement of the AML. The Ministry of Commerce ("MOFCOM") reviews mergers and other "concentrations." The State Administration for Industry & Commerce ("SAIC") has jurisdiction over non-price "monopoly agreements" and "abuses of market dominance" (such as market allocation agreements). NDRC, which also enforces China's Price Law, has jurisdiction over price-related anticompetitive conduct (such as agreements among competitors to fix prices). Most international attention regarding AML enforcement since the law went into effect three years ago has focused on MOFCOM's decisions to block or impose conditions on mergers, many of which have been high-profile matters involving non-Chinese companies like Pfizer, Coca-Cola, Novartis, and General Motors. Non-merger AML enforcement, on the other hand – such as NDRC's decision earlier this year to fine a paper manufacturing trade association approximately \$76,000 for price-fixing and output coordination – has been modest by comparison and has received relatively little attention outside of China.

NDRC's recent announcements, however, indicate that it is becoming more active. On November 14, the agency announced its decision to fine Shandong Weifang Shuntong Pharmaceutical Co. Ltd. ("Shuntong") and Weifang Huaxin Medicine Trade Co. Ltd. ("Huaxin") a total of about \$1.1 million (including confiscated gains) for monopolizing bulk sales of promethazine hydrochloride. (An English translation of NDRC's statement is available [here](#).) The product is a key ingredient in the production of compound reserpine tablets, a high blood pressure medication that is widely-used in China. According to NDRC's statement, Shuntong and Huaxin entered into contracts in June 2011 with the only two Chinese producers of promethazine hydrochloride. The contracts prohibited the producers from selling the compound to third parties without the approval of Shuntong and Huaxin, effectively making the companies the only source of promethazine hydrochloride in China. "After gaining control over the source of the raw material," NDRC said, "the two companies then increased its sales price from less than [\$31] per kilogram to as much as [\$47-\$212] per kilogram. As a result of the companies' conduct, many reserpine manufacturers were forced to halt production in July 2011, and could only supply medical institutions from their remaining inventories, as the product was already in short supply in the market." In addition to fining Shuntong and Huaxin and confiscating their gains,

the agency has ordered the companies to terminate their supply contracts with the promethazine hydrochloride producers.

This week's enforcement action was preceded by last week's public confirmation by NDRC that it is investigating China Telecom and China Unicom, two large state-owned enterprises ("SOEs"), for alleged abuses of dominance and other monopolistic practices in the broadband market. Whether and to what extent the AML will be applied to SOEs, given their prominence in many Chinese markets, has been the subject of some speculation since the law first went into effect. NDRC's investigation appears to resolve that question, at least in part, and its public announcement suggests that the agency intends to take on a more high-profile AML enforcement role than it has played thus far.

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