

Kluwer Competition Law Blog

Pharma sector under antitrust scrutiny in China

Adrian Emch (Hogan Lovells, China) · Tuesday, August 9th, 2016

In June 2015, China pushed through a relatively bold liberalization of drug prices, moving from a regime where the government decides the prices or price ranges of the most commonly used drugs to a regime where the prices of most drugs are determined by market forces.

Already then, the National Development and Reform Commission (**NDRC**) – which has both antitrust enforcement powers and has been in charge of setting drug prices – announced that it would use antitrust as a tool to prevent problems in the implementation of the drug pricing reform.

Now, let us look at what the situation looks like a year later. Today, we can see that there is considerable appetite for antitrust enforcement in the pharma sector in China. Recent enforcement actions cover all three antitrust authorities in China, and all types of anti-competitive conduct.

Agreements and abuse of dominance

Over the past year there have been two *Qingyang* cases – one investigation against abuse of dominance, and one against cartel conduct.

Qingyang is a manufacturer of both allopurinol active ingredients and allopurinol drugs for the treatment of gout, a type of arthritis disease. In November 2015 and in February 2016 respectively, the local office of the State Administration for Industry and Commerce (**SAIC**) in Chongqing and NDRC each punished Qingyang for engaging in antitrust infringements.

From October 2013 to March 2014, Qingyang was found to have refused to supply allopurinol active ingredients (in the upstream market, where it was the sole supplier) to its allopurinol drug competitors (in the downstream market). SAIC's Chongqing office imposed a fine of close to RMB 440,000 (around EUR 60,000).

From April 2014 to September 2015, Qingyang restarted supplies of allopurinol active ingredients to three of its competitors downstream. However, Qingyang and the three competitors also reached an agreement to increase prices of allopurinol drugs, and to allocate spheres of influence by dividing up several of China's provinces among them. NDRC imposed a fine on the cartelists in the amount of around RMB 4 million (approximately EUR 540,000) in total.

In May 2016, NDRC's Jiangsu branch reported actions taken against a similar price fixing cartel at

the local level.

Merger control

Since mid-2014, the Ministry of Commerce (**MOFCOM**) – China’s merger control authority – operates a streamlined filing regime for transactions deemed “simple cases.” Compared to standard cases, “simple case” filings require less information to be submitted to MOFCOM and are generally cleared faster – in most cases, within phase 1 of the procedure. Over the past months, several pharmaceutical deals have gone through the “simple case” procedure, for example Furen Medicines Group’s acquisition of equity in Kaifeng Pharmaceutical.

At the same time, MOFCOM has started cracking down harder on reportable transactions that were not filed, in breach of the law. Over the past few months, MOFCOM has published several decisions where it sanctioned companies for breach of the AML’s merger control rules. Two of these decisions were addressed to pharmaceutical companies.

The first case concerned Fosun Pharmaceutical Development’s acquisition of 65% in Suzhou Erye Pharmaceuticals. Fosun Pharmaceutical Development sought consultation with MOFCOM but – during the discussions with the regulator – already completed the acquisition of 35% (of a total of 65%) of shares. MOFCOM found the 35% stake acquisition to give the company a “controlling right,” without further explaining the details of its reasoning. In September 2015, MOFCOM fined Fosun Pharmaceutical Development RMB 200,000 (around EUR 27,000).

The second case was Dade Holdings’ acquisition of 50% of shares in Jilin Sichang Pharmaceutical. Here too, Dade Holdings split the acquisition into two steps: 19% of shares in the target were acquired in 2011, and the remaining 31% in 2015. MOFCOM considered the second step to amount to an acquisition of a “controlling right,” triggering the merger filing obligation. Since Dade Holdings had already implemented the second step of the transaction, MOFCOM imposed a fine of RMB 150,000 (around EUR 20,000).

“Administrative monopolies”

China’s Anti-Monopoly Law (**AML**) does not only target anti-competitive conduct by market players, but also by government entities. Abuses of administrative powers restricting competition, colloquially dubbed “administrative monopoly,” are illegal.

Since the AML’s entry into force, its “administrative monopoly” provisions have only been sporadically used. However, in the past few months we have seen a tick-up of enforcement actions against “administrative monopolies,” and the pharmaceutical sector has been disproportionately represented in those actions.

The first action took place in Bengbu, a city in Anhui Province. In April and May 2015, the local healthcare authority laid out rules for collective tenders for around 90 hospitals. The authority designated the specific producers of 30 types of drugs, and set different requirements for local companies and non-local companies to be admitted to the tenders. NDRC intervened, finding that the authority had abusively used its administrative powers to restrict non-local bidders’

participation in the tenders.

Shortly after, NDRC took two actions in Sichuan and Zhejiang Provinces against very similar government activities in the healthcare area.

Conclusions

The multiple enforcement actions in the past months put the pharma sector very clearly into the spotlight. NDRC seems to be keeping its “promise” to use antitrust in parallel to the implementation of the drug pricing reform, and the other antitrust authorities do not stay far behind.

This blog post is based on a paper published in CPI Antitrust Chronicle, as adapted to fit the small screen.

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