A TEN-YEAR REVIEW OF CHINA'S ANTITRUST ENFORCEMENT IN THE CHEMICAL INDUSTRY

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I. BACKGROUND

As a backbone to the national economy, the chemical industry accounted for roughly 1/6 of China's GDP in 2017, making it a non-negligible area for antitrust enforcement. Several trends differentiate the chemical industry from other sectors of the economy and impact the antitrust practice in the field.

Following the massive fiscal stimulus in response to the 2008 financial crisis, the same year when China's Anti-Monopoly Law (the "AML") went into effect, the production capacity of the chemical industry spiraled upward and quickly went into a glut. The imbalance between supply and demand depressed the whole industry, resulting in a government-mandated cutback. The contraction, which persisted for several years, was coupled with tightening environmental regulation and dismal prices in oil, a major raw material for the chemical industry.

The tide finally turned towards the end of 2016 when excessive capacity had been reduced to a more sustainable level and oil prices started to rise. The upswing in downstream markets such as the housing, automotive, and the apparels industry prompted the chemical sector's recovery.

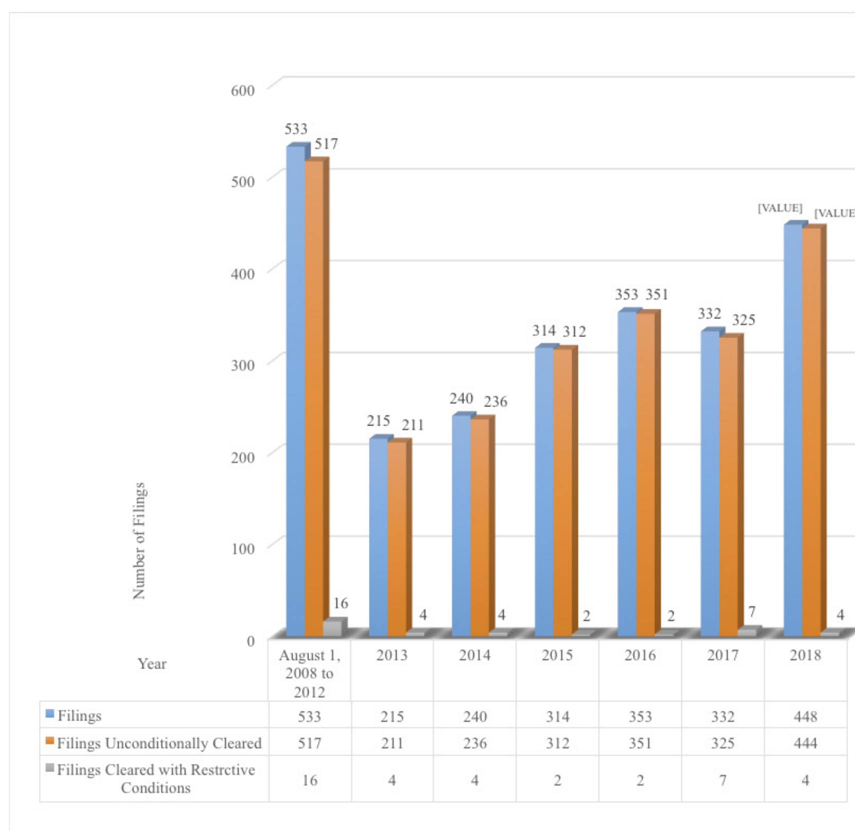
As will be illustrated below, the cyclicality affected the operational and competitive behavior of the firms involved. In down markets, the companies were more likely to engage in anticompetitive conduct, such as collusive restraints, as a means of self-help. Mergers and acquisitions were also used to strengthen the undertakings' ability to weather adverse trends. The resulting increased concentration raised eyebrows with the antitrust authorities, and as a result conditional merger clearances became more of a norm than exception.

Below we divide the review into three parts: merger control filings, antitrust investigation and penalty, and private antitrust litigation.

II. MERGER CONTROL FILINGS

On May 9, 2018 the newly established State Administration for Market Regulation ("SAMR"), as the sole antitrust and competition authority in China, completed unification and reorganization of three previously separate government agencies. Prior to the administrative structural changes in March 2018, China had three antitrust authorities, with the Ministry of Commerce ("MOFCOM") being responsible for merger review, the National Development and Reform Commission ("NDRC") being in charge of price-related antitrust enforcement, and the State Administration of Industry and Commerce ("SAIC") being responsible for non-price related antitrust enforcement. According to public information (see the chart below), MOFCOM and SAMR have reviewed a total of 2,435 cases since the AML was enacted, with 38 cases approved with conditions attached and the others cleared unconditionally. Although the institutional reform was time-consuming, the efficiency of merger control review has not been affected.

Merger Control Filings in China from 2008 to 2018



Year	August 1, 2008 to 2012	2013	2014	2015	2016	2017	2018
Filings	533	215	240	314	353	332	448
Filings Unconditionally Cleared	517	211	236	312	351	325	444
Filings Cleared with Restrctive Conditions	16	4	4	2	2	7	4

Among the above cases, global merger filings related to agrochemical and petrochemical industries have been increasingly attracted by the competition authorities globally and in China. This article will further elaborate on the significance of China's merger control review for the global filings and the coordination and divergence of decisions (e.g. restrictive conditions) imposed by different agencies in worldwide major jurisdictions.

A. The Merger of Dow Chemical and DuPont

1. Summary of the Transaction

On December 11, 2015, Dow and DuPont announced their merger with the intention to subsequently spin into three independent publicly traded companies. Dow is a US diversified chemicals company mainly active in businesses including plastics and chemicals, agricultural sciences, and hydrocarbon and energy products and services. In 2016, Dow had annual sales of $48 billion and employed approximately 56,000 people worldwide. The company's more than 7,000 product families are manufactured at 189 sites in 34 countries across the globe. DuPont, a US listed company, is mainly active in R&D, production, and sales of a variety of agrochemical products, polymers, agro-chemicals, seeds, food ingredients, and other materials since 1802. The merger between the top two and three chemical companies worldwide is regarded as the biggest M&A transaction in the chemical industry worldwide so far, and is expected to create significant cost synergies of approximately $3 billion, along with the potential for $30 billion of market value and $1 billion in growth synergies. On September 2, 2017, the merged entity, DowDuPont, which is controlled equally by Dow and DuPont, was established and listed on New York Exchange. DowDuPont, instead of BASF, is expected to be the top 1 chemical company worldwide with annual sales of $77 billion and 100 thousand employees.

In the context of merger filing in Mainland China, regarding the market for agrochemical products (defined as national market), nine horizontal overlaps concerned in this transaction were identified, including rice selective herbicides and rice insecticides (where MOFCOM imposed remedies) cereal selective herbicides, vegetables insecticides, fruits insecticides, cotton insecticides, vegetable fungicides, fruit fungicides and

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potato fungicides. Regarding the market for material science products and specialty products, there are seven horizontal overlaps (ACP, ionomers and *etc.*) and nine vertical relationships that have been identified in this case.

2. Remedies in China, the EU, and the U.S.

Announced on April 29, 2017, MOFCOM issued conditional clearance including both structural and behavioral remedies being imposed, while EC and DOJ did not require commitments for behavioral remedy. To be specific, remedies imposed by MOFCOM, EU Commission and US DOJ are compared below.

Remedy	China MOFCOM (Decision – April 29, 2017)	EU Commission (Decision – March 27, 2017)	U.S. DOJ (Decision – June 15, 2017)
Behavioral Remedy	DuPont and Dow shall supply certain herbicide, insecticide ingredients and formulations for rice crops to Chinese companies on a non-exclusive basis and at a reasonable price, and not to require distributors to sell such ingredients and formulations on an exclusive basis in China for five years after the closing of the transaction.	N/A	N/A
Structural Remedy	1. Divest DuPont and Dow's certain crop protection products and other assets (part of the global remedy) including DuPont's certain pipeline products. 2. Divest Dow's acid co-polymer(s) and ionomers business.	1. Divest significant part of DuPont's existing crop protection business, tangible and intangible, including its R&D Organization. 2. Divest Dow's two manufacturing facilities for acid co-polymers in Spain and in the US, and the contract with a third party through which it sources ionomers that it sells to its customers.	1. Divest DuPont and Dow's certain crop protection products and other assets; 2. Divest DuPont's acid copolymers and ionomers business in the US
Highlights	• The behavioral remedy was only required by China. • The transaction shall not be implemented before MOFCOM has formally approved the purchasers of the divestment businesses and the sale and purchase agreements. • MOFCOM has concerns about specific insect pests in China and imposed additional remedies (global remedies were not considered to be sufficient).		

B. Acquisition of Sole Control of Monsanto by Bayer

1. Summary of the Transaction

On September 14, 2016, Bayer announced its takeover of Monsanto for an acquisition price totaling about USD 66 billion. The transaction would create the global leading integrated player in seeds and traits, pesticides, and digital agriculture. Bayer, incorporated in Germany with a worldwide turnover in 2015 of EUR 47 billion, is active in four areas: pharmaceuticals, consumer health, agriculture, and animal health. Monsanto, incorporated in the U.S., is an agriculture company which produces seeds for crops including corn, cotton, oilseeds ("OSR"), fruit, and vegetables. Monsanto also provides crop protection products. It focuses on the herbicide glyphosate which it commercializes under the "Roundup" brand, and other herbicides used by farmers, industrial customers, lawn-and-garden professionals, and consumers. Additionally, Monsanto is involved in research on agricultural biologicals, and how they may be used to increase crop health and productivity. Monsanto also provides farmers with digital agriculture services through its Climate Corporation.

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China's MOFCOM defined 12 horizontal overlaps (*e.g.* non-selective herbicides, vegetable seeds, seeds for broad acre crops, and plant biotechnology traits) and 3 vertical relationships (bactericidal dressing and insecticidal dressing for crop seed, and hybrid corn seed) concerned in this transaction. Due to China statutory regulations of license authorization for market entry, the geographical market of relevant agrochemical products involved in the concentration are defined within national scope, i.e. Chinese market, while other relevant products are defined as global market.

2. Remedies in China, the EU, and the U.S.

MOFCOM and the DOJ imposed conditions for this clearance including both structural and behavioral remedies respectively on March 13, 2018 and May 29, 2018, while EC did not request for behavioral remedies. To be specific, remedies imposed by MOFCOM, EU Commission and US DOJ are compared below.

Remedy	China MOFCOM (Decision – March 13, 2018)	EU Commission (Decision – March 21, 2018)	U.S. DOJ (Decision – May 29, 2018)
Behavioral Remedy	Bayer, Monsanto and the merged entity shall allow (1) their digital agriculture platforms access to all Chinese agriculture applications developers' digital agriculture applications; and (2) registered and used by all Chinese users on FRAND basis in China for 5 years after Bayer, Monsanto and the merged entity entered into Chinese market.	N/A	Bayer will supply BASF with the seed treatments that Bayer currently applies to (row crop seeds) for a period of up to two years.
Structural Remedy	Bayer shall divest its global vegetable seeds business, global non-selective herbicide, global corn, soybean, cotton, oilseed rape character businesses, including infrastructure, employee, IP and other tangible and intangible assets.	Bayer committed to divest its assets and business to BASF SE including: (a) Bayer's global broad acre crop seeds and traits business, with certain limited carve-outs(i.e. hybrid rice in Asia); hybrid cotton, juncea (mustard), and millet in India, cotton in South Africa, R&D programs directed to sugarcane in Brazil, and sugarbeet in Europe; (b) Bayer's global glufosinate ammonium business; (c) assets comprising Bayer's agricultural and non-agricultural glyphosate products in EEA; (d) assets comprising Monsanto's NemaStrike nematicides business; (e) Bayer's line of research for development of herbicides, non-selective herbicides; and (f) a license to Bayer Digital Farming's global portfolio	Bayer shall divest its R&D programs associated with wheat, certain groups of Monsanto soybeans used for research and breeding, assets relating to is foundational herbicides business, certain crop protection products that are complementary to Bayer's trait business, assets relating to its seed treatment businesses, digital agriculture business to BASF, and comprehensive set of tangible and intangible assets representing Bayer's entire global vegetable seed business. As part of the divestitures, over 4,000 Bayer employees who currently support the various divestiture businesses will become BASF employees.
Highlights	• Only the EU Commission did not adopt a behavioral remedy • MOFCOM issued the earliest decision among other jurisdictions		

C. The Acquisition of Shares in Syngenta AG by China National Chemical Corp ("ChemChina")

This acquisition is viewed as one of the largest outbound investments by Chinese SOEs so far. ChemChina is a state-owned enterprise and the leading supplier of chemical pesticide both in China and the world, while Syngenta AG is a top three global agrochemical firm. The acquisition

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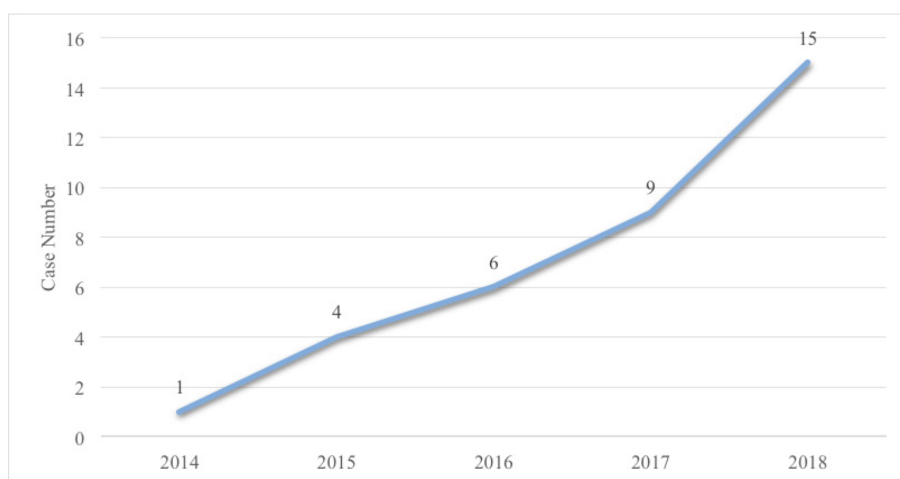
would impact the national and global agrochemical industry dramatically. Given this transaction is subject to antitrust approvals in 26 jurisdictions, coordination with filings in other jurisdictions is key to a successful completion. Moreover, MOFCOM's decision in this case may, to some extent, affect the decisions of competition authorities in other countries. During the notification process, some scholars and consumers have jointly challenged this deal. Through the local law firms' efforts, the transaction was unconditionally approved on April 12, 2017. With the transaction, ChemChina has become one of giant worldwide agrichemical companies.

It is worth noting that MOFCOM in these two cases requested for additional remedies and reached its decision earlier than some other major antitrust regulators. China's merger control review has reached a new level and exerted increasing influence over global transaction.

Furthermore, for those cases which failed to notify (i.e. gun-jumping), MOFCOM/SAMR took and will continue to take a harsher stance. There are 15 cases in 2018 out of 35 cases in total since the AML was enacted. Generally, it takes MOFCOM/SAMR an average of 4-9 months for review, and most penalties ranged from RMB 150,000-200,000 yuan; two cases in 2018 incurred penalties of RMB 400,000 yuan. Among these cases, a wide range of companies are involved, such as multinational companies, Chinese SOEs and domestic firms, and a variety of industries including chemicals, port, steel, food, paper, real estate, semiconductor, automobile parts, automobile sales, duty-free products, etc.

Enforcment Cases for Failure to Notify



III. ANTITRUST INVESTIGATION AND ADMINISTRATIVE PENALTY

By the end of October 2018 China's antitrust authorities had concluded investigations into, and imposed administrative penalties in, a total of 220 cases, 165 of them concerning monopoly agreements and 55 concerning the abuse of a dominant position. The combined fines amounted to RMB 11 billion (equivalent to USD 1.6 billion).[2] Of these administrative cases, the chemical industry made up a relatively small portion and most violations took the form of horizontal price restrictions. However, the cases set a few records in the country's antitrust enforcement history and raised important issues for the industrial and legal professions to ruminate.

In May 2016 five producers and one distributor of chlorophenal (an ingredient of pesticides and drugs) were fined RMB 3.8 million for concluding price agreements by the Jiangsu Provincial Bureau of Price Supervision and Anti-monopoly.[3] The infringers convened meetings to discuss unifying sales prices and implemented a monitoring mechanism by providing undertakings with each other and sending monitors to supervise the enforcement. They also integrated their sales channels into one distributor to better execute the price agreement. The antitrust agency found the practices to have infringed Article 13, Section 2 of the AML, which prohibits horizontal price restrictions, and assessed a penalty of 1 percent of the violators' revenues in 2014.

2 Press conference held by the State Council Information Office on the 10th anniversary of the implementation of the Anti-monopoly Law, available at http://www.scio.gov.cn/xwfbh/xwbfbh/wqfbh/37601/39282/index.htm.

3 http://www.chinanews.com/sh/2016/05-24/7881104.shtml.

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In September 2017 the NDRC published its penalty decision concerning 18 producers of PVC (a plastic ingredient widely used in construction materials, medical equipment, and home appliances).[4] Although the NDRC only assessed 1-2 percent of the infringers' relevant revenues in the preceding year, the fines totaled a whopping RMB 457 million, the largest ever imposed on domestic companies.

The NDRC found that the 18 producers, whose capacity accounted for 3/4 of the national PVC production, convened six meetings in 2016 to exchange market information and discuss production and sales, and ultimately reached 13 agreements to collectively raise PVC prices. As a result, PVC prices increased by 40 percent between June 2016 and November 2016.

A. Unlawful Online Communication

It is worth noting that this is the first time in China where the violators are found to have reached monopoly agreements on social media – Tencent's WeChat in this case, which is the largest instant messaging platform in China. The violators created a chatroom on WeChat to exchange sensitive information and post price lists for the cartel members to follow. As online communication gains increasing popularity, it has become a go-to place for antitrust enforcers to collect evidence and much attention should be paid to the risks involved.

One of the cartel members, Ningxia Jinyuyuan Energy and Chemical Company, contended that it was not a party to the price agreements because it did not voice any explicit opinion during the group discussions, i.e. it did not say it agreed to, or would be implement in, the price recommendations. The NDRC flatly rejected the argument. Article 13 of the AML provides that "[f]or the purposes of this Law, monopoly agreements mean agreements, decisions or other concerted conduct that exclude or restrict competition." Article 6 of the Anti-price Monopoly Provisions (promulgated by the NDRC) further clarifies that "other concerted conduct" is to be found by considering (1) the uniformity of the pricing behavior; (2) the existence of communications between the alleged violators; and (3) the market conditions.

Applying the rule to the facts, Jinyuyuan's behavior would fall within the "concerted conduct" category. First, by joining the chatroom and being present during the sensitive discussions, it effectively learned the content of the communications between the cartel members. Second, the prices it implemented were in conformance with the price lists posted in the chatroom. Third, it failed to proffer a justification based on market conditions for the price increases. Therefore, even a silent attendee can be held to be a co-conspirator in unlawful restrictions if its subsequent conduct conformed with the agreement.

The antitrust law does not categorically prohibit communication between competitors, and it may become increasingly common for communication to occur online. However, a business operator should be particularly alert to any dubious information exchange, as it may constitute evidence of unlawful agreements. A company that is exposed to exchanges of sensitive information such as price, volume, and clients must immediately reject such exchanges and withdraw from the discussion. In the case of online communication such as WeChat chatrooms, a participant should explicitly voice its opposition to suspect proposals and withdraw from the chatroom immediately. The participant is advised to take a screenshot of the online discussion to preserve evidence for subsequent administrative investigation, and to refrain from or delay parallel price increases or other business conduct indicative of unlawful collusions.

B. Exemptions Not Applicable

During the investigation by the NDRC, an organizer of the chatroom argued that the PVC industry had been in a severe slump over the previous five years. The proportion of loss-making firms in the entire industry notched an unprecedented 90 percent in 2015. The parties charged had no intention of reaching monopoly agreements, but rather were engaging in self-help to counter the adverse headwinds. Therefore, the agreement was entitled to one of the statutory exemptions under Article 15 of the AML, which applies to agreements reached in a sluggish economy to alleviate slumping sales or counter excess capacity. However, Article 15 specifies two additional conditions for the exemption to apply. The charged business must prove that the agreement does not substantially restrict competition in the relevant market and that consumers are able to share the benefits generated by the agreement.

4 http://www.ndrc.gov.cn/gzdt/201709/t20170927_861744.html; http://jjs.ndrc.gov.cn/fjgld/.

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The usual factors for determining the restrictiveness of an agreement include market definition, market shares of the charged parties and their competitors, the ability of the charged parties to control the sales market or the raw materials procurement market, and the financial and technical conditions of the charged parties. In this case, the 18 companies under probe accounted for 75 percent of the national PVC production in 2016, which enabled them to exert substantial influence over the entire industry. The sharp price increases were further evidence of the restrictive effect of the agreement. Consequently, the "economic downturn" exemption is not applicable to the alleged conduct.

Over the past decade the chemical industry has undergone dramatic ups and downs, which have affected sub-industries to varying degrees due to particular supply and demand situations for the chemicals concerned. Businesses experiencing negative shocks or positive windfalls are a natural phenomenon in market competition. Market disruptions are generally not a justification for chemical companies to engage in anticompetitive conduct, even if they are on the brink of going out of business altogether. In this respect, the antitrust law provides no exception. However, it is not clear whether the business conditions played a role in the penalty assessment in that the NDRC fined the two organizers two percent of their revenues and the other 16 companies a mere one percent. The NDRC cited the cooperativeness of the probed firms as a factor in making the final penalty decision.

IV. PRIVATE ANTITRUST LITIGATION

Of the more than 700 private antitrust lawsuits filed over the past ten years, the chemical industry accounts for a paltry portion. However, the limited number of cases provide some interesting arguments where multiple areas of the law are intertwined and where unique characteristics of the chemical industry are exhibited.

A. The Yingding v. Sinopec Case

The most significant case involves a refusal-to-deal claim filed by a small biodiesel producer against the country's largest petrol distributor, Sinopec.[5] In early 2014, after attempts to access the distribution channel of Sinopec failed, Yunnan Yingding Company ("Yingding") brought an action before the Kunming Intermediate People's Court, alleging that Sinopec violated Article 17, Section 3 of the AML by refusing to purchase biodiesel produced by Yingding. As the first antitrust litigation in the petroleum industry and with Sinopec, a Fortune 500 company, standing for trial, the case immediately caught the attention of various stakeholders.

Yingding claimed that the Renewable Energy Law of the People's Republic of China imposed an obligation on Sinopec to purchase its gutter-oil-made biodiesel, because Article 16 of the Renewable Energy Law provides that "petroleum distribution enterprises shall incorporate bio-liquid fuels into their fuel distribution network in accordance with the regulations of the energy department of the State Council or provincial governments." Moreover, with a two-third market share of the petroleum sales market in Yunnan Province, Sinopec presumptively held a dominant position in the relevant market under Article 19 of the AML. Sinopec then abused that dominant position by refusing to deal with Yingding, without a reasonable justification, as required by the Renewable Energy Law. Therefore, Sinopec infringed the AML and should be ordered to open its sales channel to Yingding.

The case went through a series of back-and-forth results between the first and second instance courts. After Yunnan Higher People's Court vacated the Kunming Intermediate Court's ruling in favor of Yingding and remanded the case for retrial, the lower court found for Sinopec in 2017 and the judgment was affirmed by the higher court. Yingding immediately appealed to the Supreme People's Court, the country's highest court, but the latter has not decided whether to hear the case yet.

On retrial, the court found that the Renewable Energy Law only created a general duty for petroleum distributors to sell bio-fuel, because the duty must be satisfied "in accordance with the regulations of the energy department of the State Council or provincial governments." Without specific regulations setting forth the terms of trade such as contractual parties, quantities/quota, pricing, manner of sales, rebates and subsidies, the court is simply unable and unfit to force the parties to reach a deal. Rather, the parties ought to negotiate on an equitable basis and in good faith under the Contract Law. Deals so concluded would comply with the basic principles of market economy in the absence of implementing regulations. On the other hand, transactions force-fed by the court without proper negotiation between the parties are not only impracticable, but would also violate the spirit of the Renewable Energy Law, the AML, and the Contract Law.

5 (2017) Yun Min Zhong No. 122.

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The court further found that the parties never went into the negotiation process because Yingding did not make an offer to Sinopec with specific terms. The only preliminary step that Yingding took towards a contracting process was the sending of a lawyer's notice to Sinopec which would at most count as an invitation to deal, not an offer. Without an offer with specific terms being made to it, Sinopec's mere silence did not amount to a refusal to deal within the meaning of Article 17, Section 3 of the AML, because Sinopec had simply nothing to deal on. Thus, the court fleshed out the elements of the statutory cause of action by requiring that, for the plaintiff to allege a refusal-to-deal claim, it must have made an offer with specific terms to the defendant. Again, concepts of the Contract Law played a role in the court's holding.

In the last part of the discussion, the court noted that the parties were not competitors in bio-diesel sales and Sinopec's alleged conduct did not have an anticompetitive effect in the relevant market. In fact, refusal or failure to deal between non-competitors can hardly constitute a violation of the antitrust law, because, in a non-competing relationship, it is difficult to discern an anticompetitive intent of the party defendant. This point is subsequently illustrated in the internet sector when the plaintiffs lost in their lawsuits against Tencent, the country's largest social media company, for failing to have their products placed on Tencent's platform.[6] In those cases, the parties were not in a horizontal relationship and, unsurprisingly, the courts found no significant anticompetitive effect.

The court thus nicely resolved the apparent conflict between the Renewable Energy Law, the AML, and the Contract Law. In creating the duty to purchase bio-liquid fuels, the Renewable Energy Law notes that "the nation encourages the production and use of bio-liquid fuels."[7] As part of the state's regulation of economic affairs, the Renewable Energy Law was enacted in furtherance of the public interest of environmental protection. The AML can also be regarded as the state's intervention in the functioning of the market to protect the public interest.[8] However, the state's economic regulation statutes are, by nature, more general and vague than the civil laws, such as the Contract Law, and therefore require regulations promulgated by the administrative agencies to be implemented. When the agencies fail to make specific rules, the courts, without the expertise of the agencies, would struggle to set out the exact terms on which to enforce the regulatory statutes against private parties. In fact, for the court to impose a transaction upon private parties would place it in the position of the government and undermine its role as an impartial and detached arbiter.

Therefore, the court did not attempt to fill up the holes left by the statute. Instead, it looked to contract law for guiding principles. Without an offer being made to the defendant, the court had nothing to adjudicate and no basis for finding a refusal-to-deal violation under the antitrust law.

This case was brought on the heels of the boom-and-bust cycle in the bio-diesel industry. The adoption of the Renewable Energy Law in 2005 spurred a slew of enterprises to engage in the production of bio-diesel from gutter oil. The short sprint, however, did not produce products that met the quality requirements of the ultimate consumers. Most of the hundreds of bio-diesel companies went into bankruptcy within a span of a few years. Under relevant regulations, the bio-diesel companies were not permitted to sell their products on their own. The inability to sell through distributors' channels would, therefore, deal a fatal blow to the businesses.

The Renewable Energy Law does create a cause of action for the plaintiff to claim damages and seek injunctions. Article 31 of the Law provides that petroleum sales enterprises that fail to incorporate bio-liquid fuels shall be held liable for damages and be ordered to rectify their behavior by relevant government agencies. Nonetheless, Yingding chose to sue under the AML, perhaps to circumvent the lack of implementing regulations. In recent years, as "antitrust" becomes increasingly a buzzword in the media, private parties have attempted to bring up antitrust claims when lacking confidence in bringing suits under other laws. The courts, however, have been cautious in encroaching the fields of other laws by way of the antitrust law, taking a relatively conservative approach in broadening the scope of antitrust claims.

B. The Mengbaihe Case

Mengbaihe, a furniture company, filed a litigation against four TDI manufacturers for their suspected horizontal monopoly agreements in 2018. Ningbo Intermediate People's Court accepted the case and the plaintiff claimed that the TDI price abnormally increased owing to horizontal monopoly agreements by the four defendants. The plaintiff sought an injunction on the collusive conduct and damages of RMB 45 million.

6 See, e.g. (2017) Yue 03 Min Chu No. 250; (2017) Zui Gao Fa Min Shen No. 4955.

7 Article 16 of the Renewable Energy Law.

8 Article 1 of the AML.

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This is the first non-follow-on private antitrust litigation regarding horizontal monopoly agreements in China. Since the plaintiff in parallel complained to the NDRC, coordination between the investigation and litigation proceedings is complex, challenging, and innovative. In addition, multiple challenging issues will be raised in this case, such as the applicability of the pass-on defense, given that the first instance court is Ningbo Intermediate Court and appeal of this case would be heard by the Supreme People's Court. This case is still on going, and it is foreseeable that the litigation will attract significant attention from scholars, lawyers, judges, and SAMR officials.

V. OUTLOOK

The chemical industry will continue to evolve and grow with the emphasis shifting towards new materials and new energy. Innovation and technological advances will be pivotal to the attainment of a competitive edge in the traditional, yet fast-changing industry. As the firms have returned to profitability in recent years, it can be expected that the chemical industry will cause less concerns for the antitrust authorities. Nonetheless, the market is always moving and new forms of competition will create fresh subjects for antitrust practitioners to examine.

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