Chinese payment encryption device suppliers fined for participation in government-orchestrated cartel

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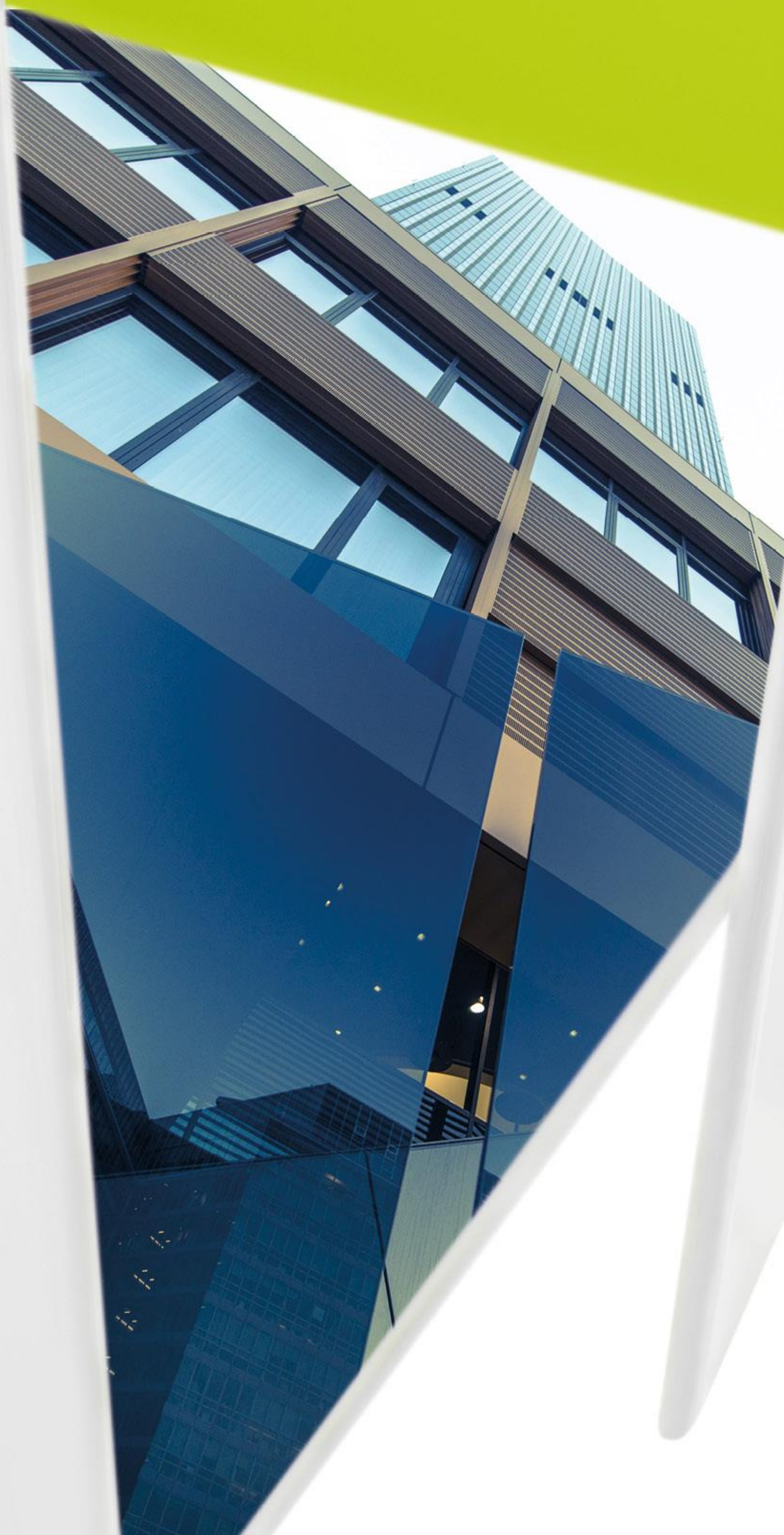

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On 4 November 2016, the State Administration for Industry and Commerce ("**SAIC**") – one of China's antitrust authorities – published on its website **three decisions**, whereby three payment encryption device suppliers were fined by SAIC's branch in Anhui Province ("**Anhui AIC**"). Payment encryption devices are used by bank customers to protect the security of payments from their bank accounts. These devices are typically distributed by the banks to their customers.

The Anhui AIC considered the companies' conduct to amount to market partitioning, prohibited under Article 13 of the Anti-Monopoly Law ("**AML**"). Interestingly, the market partitioning was orchestrated by the local branch in Anhui of the People's Bank of China ("**Anhui PBOC**"), one of the financial regulators in China.

Facts

On 20 October 2010, the Anhui PBOC selected three out of six companies as suppliers of payment encryption devices in Anhui: Sunyard System Engineering Co., Ltd., Sinosun Technology Co., Ltd., and Shanghai Haijiye Technology Co., Ltd. On 7 December 2010, the Anhui PBOC convened a meeting which was attended by the three companies and 20 local banks. In the meeting, the participants agreed, among other, that

- the 20 banks were divided into three groups, and each group would distribute the payment encryption devices for one of the three suppliers, and
- the payment encryption devices would be distributed at a fixed price agreed in the meeting.

Following the meeting, the Anhui PBOC issued two circulars to embody the agreement above. In line with the two circulars, each of the three suppliers entered into agreements with the corresponding group of banks for the distribution of the payment encryption devices.

Ruling

Based on the findings above, the Anhui AIC held that the carving-up of customers among the three companies constituted a cartel practice prohibited under Article 13 of the AML, particularly because the three companies:

- attended the meetings organized by the Anhui PBOC, where they communicated their intentions with each other, and
- conducted themselves in accordance with the circulars issued by the Anhui PBOC, for example by not supplying devices to the banks allocated to the other suppliers; jointly fixing and adjusting the sales price; jointly paying commissions to the banks; and engaging in joint marketing and promotional activities.

For each of the three companies, the Anhui AIC imposed a fine and confiscated the illegal gains resulting from the practice in question. The penalties imposed on the three companies amounted to around RMB 30 million (approximately USD 4.3 million) in total.

Takeaways

Unlike most cartel cases, the present case involved a government body playing a significant role in the cartel practices – the Anhui PBOC took the initiative to select three suppliers for local banks, organize meetings to "assign" each of the three suppliers to a fixed group of banks and set the price for the payment encryption devices. From the decision it seems that the three companies would not have been able to supply their products if they had chosen not to obey the Anhui PBOC's directions. Indeed, the three suppliers cited this point as a defence in the investigation process. However, the Anhui AIC did not agree.

This is not the first case involving cartel conduct "supported" by government actors. On several occasions in the past, the Chinese antitrust authorities have attributed liability for cartel conduct to the companies involved, even where the cartel was "organized" by a government body. For example, in the *Fireworks* case, six fireworks suppliers divided up the sales territories in Chifeng, a city in Inner Mongolia, following regulatory requirements by the local government body responsible for work safety. In that case, the decision by SAIC's Inner Mongolia branch in May 2014 similarly found the market partitioning practice to be a violation of

Article 13 of the AML.

The National Development and Reform Commission ("**NDRC**") – another antitrust authority in China – took a similar position. In June 2015, NDRC's local branch in Yunnan Province found that four telecommunications carriers had entered into an anti-competitive agreement on their promotional activities. The four carriers were fined despite the fact that the local telecommunications regulator had taken the initiative in organizing the various discussions leading to the allegedly anti-competitive agreement.

These cases stand somewhat in contrast with the Vitamin C litigation in the United States, where an **appeal court decided** to exculpate Chinese vitamin exporters found to have engaged in cartel conduct due to the regulatory intervention by government bodies in China.

In China, the government still plays an important role in both macro- and some micro-economic activities, even over 30 years after it introduced the market-oriented "reform and opening up" policy. In such an environment, the difficulty for businesses operating in China is that, on the one hand, they need to comply with the various regulatory requirements by government bodies and, on the other hand, they must ensure full compliance with the law including antitrust law. The antitrust authorities' position, as illustrated in this case, may potentially put companies in a dilemma: facing antitrust risks or losing business opportunities (if they choose not to work with a government body on a potentially anti-competitive project).

The difficulty is particularly significant for companies operating in regulated industries. For example, in the heavily-regulated telecommunications and financial sectors, the government plays a major, if not predominant, role in economic activities. Companies from such sectors need to comply with various regulatory requirements on a daily basis. This case and prior cases show the importance of legal awareness and effective compliance systems – a mandate from a government body does not necessarily protect companies from potential antitrust liabilities.

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