



China

# Monthly Anti-Trust Report

## September 2014

Due to the general nature of its contents,

This newsletter is not and should not be regarded as legal advice.

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## TABLE OF CONTENTS

AUTHORITY .....	2
SAIC: Minister Zhang Mao Communicated that All kinds of Enterprises must Strictly Comply with Laws and Regulations and Accomplish the Development of Fair Competition When Meeting with CEO of Microsoft.....	2
NDRC: The Shanghai Development and Reform Commission Issued the Guidelines for Anti-Price Fixing Work in China (Shanghai) in the Pilot Free Trade Zone .....	4
Premier Li Keqiang: Anti-monopoly Investigation Involving Foreign Companies Only Accounts for 10% of Investigations, and these Investigations are not Selective .....	5
CASE .....	7
Hebei Province: “Vehicles Belonging to Hebei Paying Tolls at Half Price” Violates AML .....	7
EU’s Auto Parts Manufacturers in Favor of China’s Anti-monopoly Investigations in the Auto Industry .....	9
Three Cement Enterprises were Fined 11.4 Billion for Price-fixing.....	11
Violation of AML by Insurance Industry of Zhejiang Province was Fined 110 Million Yuan	13
Vice President of Microsoft was Questioned by SAIC and Required to Submit a Written Statement within 20 Days .....	14

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## AUTHORITY

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### **SAIC: Minister Zhang Mao Communicated that All kinds of Enterprises must Strictly Comply with Laws and Regulations and Accomplish the Development of Fair Competition When Meeting with CEO of Microsoft**

September 26, 2014

On September 25th, the Minister of the State Administration for Industry & Commerce (“SAIC”) Zhang Mao met with the CEO of Microsoft Satya Nadella and his colleagues. Minister Zhang pointed out that as a department charged with market supervision and administrative enforcement, SAIC is trying to construct a new supervision model that in its core includes public disclosure of companies’ information. All kinds of market entities should strictly comply with laws and regulations and accomplish development in order to create the win-win outcome of a fairly competing market environment.

Minister Zhang first welcomed Satya Nadella and his colleagues and introduced the current progress of economic development and reform in China. Minister Zhang stated that China was in a key period of comprehensively deepening reform and a transforming period of economic development, and various kinds of market entities were flourishing. Both Chinese and foreign companies receive benefits from the reform policy. At the same time, China constantly sticks to its opening-door policy, developing towards the direction of international practices, further intensifying the market-opening process and actively absorbing foreign capital. In order to get accustomed to the new condition of development of the economy and society, the SAIC exerts itself in changing the model of market supervision. First, the facilitation of reform of corporate registration accomplishes the phrased objectives, as new market entities are increasing and the number of newly-registered foreign-capital

companies' rebounds. Second, SAIC strengthens their market supervision, accelerating fair and orderly competition, reinforcing supervision now and for the future with a new system that in its core includes public disclosure of companies' information, and urges that the companies shall operate sincerely. Also, SAIC will work harder in the area of anti-monopoly and prevent unfair competition, treating Chinese and foreign companies equally, without discrimination, and creating a fair competition market environment for them.

Regarding the Microsoft monopoly case, Minister Zhang presented three points: first, Microsoft should comply with Chinese laws and comprehensively cooperate with the investigation work of SAIC. Second, Microsoft shall trust that SAIC will investigate this case objectively, fairly and transparently. They could present any comments on problems in the investigation. Third, Microsoft should envisage the questions asked by SAIC during the investigation and submit required materials frankly and in a timely manner, communicating with the SAIC positively. SAIC will carry out its investigation by complying strictly with legal authority and procedure in order to ensure the fairness and transparency of the investigation process.

Satya Nadella thanked Minister Zhang for his meeting. Nadella expressed that the policy and system the Chinese government has adopted regarding economic development and the measures of strict market supervision can not only help the development of domestic companies, but also comply with international practices. He agreed that Microsoft would comprehensively abide by Chinese laws and regulations, positively cooperate with the investigation work, submit required materials accordingly, communicate with the SAIC in a timely manner, and believe in the SAIC. Microsoft is confident of its development in China and will ensure the legality of their behavior in market competition in order to accomplish their goals in the Chinese market.

## **NDRC: The Shanghai Development and Reform Commission Issued the Guidelines for Anti-Price Fixing Work in China (Shanghai) in the Pilot Free Trade Zone**

September 23, 2014

On September 23rd, the website of the Shanghai Development and Reform Commission showed that the *Guidelines for Anti-Price Fixing Work in China (Shanghai) in the Pilot Free Trade Zone* ( “the Guidelines” ) will come into effect on October 15th.

According to the Guidelines, the management commission of the Shanghai Pilot Free Trade Zone will accept reports and consultations of price fixing and shall keep the reporters anonymous. If the report is in the form of written materials and provides relevant evidence and facts, the management commission can ask the reporter for the basic information of the people being reported, and whether the reporter has reported to other administrative authorities or prosecuted the entity in the People’s Court based on the same issue, etc. The management commission will inform the reporter that he should directly contact the relevant administrative authority and court based on the practical situation, or carry out screening and transfer the case pursuant to the Guidelines.

Regarding clues concerning price fixing cases like the issues presented by the consultants, relevant facts and evidence provided by the reporter, results from other investigations within the Shanghai Pilot Free Trade Zone and active reporting of price fixing agreement among undertakings in Shanghai Pilot Free Trade Zone, etc., the management commission should primarily carry out screening and analysis, then transfer the cases to the Shanghai price supervision department.

In line with authorization from the Price Supervision Bureau of National Development and Reform Commission (“NDRC”) and *Procedural Rules of Anti Price*

*Fixing Administrative Law Enforcement*, the Shanghai price supervision department shall determine whether or not to initiate a case and conduct an investigation against alleged price monopoly behaviors in the Free Trade Pilot Zone.

The Shanghai price supervision department shall make determinations regarding administrative punishments, suspending investigations and terminating investigations regarding alleged price monopoly behavior in the Shanghai Pilot Free Trade Zone, and report to the NDRC before making relevant determinations.

Also, the staffs of the Shanghai price supervision department and Shanghai Pilot Free Zone Management Commission should under the confidentiality obligation regarding the business secrets relevant to the process of law enforcement of anti-price monopolies.

## **Premier Li Keqiang: Anti-monopoly Investigation Involving Foreign Companies Only Accounts for 10% of Investigations, and these Investigations are not Selective**

September 10, 2014

On September 9th, Premier Li Keqiang of the State Council was invited to attend a seminar with more than 200 leaders of the world's top multinational companies, research institutions and journalists at the eighth Summer DAVOS Forum in Tianjin. The President of the World Economic Forum hosted the seminar.

The President of the World Economic Forum, Schwab, asked Premier Li if since the beginning of this year, relevant authorities in the Chinese government had intensified anti-monopoly investigations. Even though they stated in public on several occasions that anti-monopoly investigations are not aimed at foreign enterprises, many foreign enterprises still have started to worry about the commercial environment in China. Schwab wanted to know if Premier Li could clarify this for them.

Premier Li answered, “I am also indeed worried about why you are worried about that. I hope those foreign enterprises in China who encounter any problems can propose these issues directly to Chinese government, as we are ready for the development of any enterprises that wish to create a kind environment in China.

As for the anti-monopoly investigation, China has had this legislation since the year 2008. For nearly more than a year, China has simplified administrative procedures, lessened the power spectrum and intensified the before-and-after supervision of these investigations, for the purpose of creating a free and fair market environment for all enterprises. In addition to anti-monopoly investigations, China also intensified the punishment of behaviors such as the theft of commercial secrets, infringing upon intellectual property, bluff and deception, the production of fake commodities etc. All of these measures do not just point to any specific sort of enterprises or show any special selection. As far as I know, foreign enterprises investigated account for only 10% of all the enterprises being investigated, and this proves that anti-monopoly investigations are not targeting any sort of enterprises.

Several major media in the world paid attention to the issue and because we increased transparency of supervision before and after, more attention has been attracted and some measures have even been sensationalized. In fact, the before-and-after supervisions we have advanced include anti-monopoly investigations that are transparent, fair and pursuant to the law. Moreover, these measures do good to China’s further opening, which lets more foreign capital, and foreign products that want and dare to enter into the Chinese market due to the fair competition environment. ”

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## CASE

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### **Hebei Province: “Vehicles Belonging to Hebei Paying Tolls at Half Price” Violates AML**

September 28, 2014

NDRC announced on September 27th that according to the laws, the Communications Department, Price Bureau, and Finance Department of Hebei Province violated relevant provisions of the Anti-monopoly Law (“AML”), for carrying out a preferential policy to cut tolls for passenger vehicles belonging to Hebei Province which resulted in the exclusion and restriction of competition through the abuse of administrative power. The NDRC suggested the People’s Government of Hebei should rectify relevant Departments who abused administrative power to exclude and restrict competition.

NDRC found through the investigation that the Communications Department, Price Bureau, and the Finance Department of Hebei Province together issued “*Notice on Unifying the Classification Criteria for Passenger Vehicles Paying Highway Tolls in the Province*” which regulates the classification of types of vehicles paying highway tolls, and carries out a preferential policy regarding tolls for passenger vehicles belonging to Hebei from December 1st, 2013. The passenger vehicles can get a 50% discount on the toll price through highway ETC cards or monthly tickets.

On October 30th, 2013, “Notice on the Implementation of the Relevant Provisions on the Classification Criteria for Passenger Vehicles Paying Highway Tolls” issued by the Hebei Provincial Communications Department further proves the preferential policy “only applies to passenger vehicles approved by Hebei Provincial road transportation authorities who have regular transport operating routes.

According to a survey, the toll expenditure has great influence on the profit rates of

transport operators. Highway tolls account for almost 10%-20% of their general income based on the figures calculated by a transport company. The preferential policy on tolls implemented by the related Departments in Hebei Province for the provincial passenger vehicles essentially is financial compensation on the basis of toll price for those passenger transportation operators of Hebei Province, which competitively disadvantages top transport operators from other provinces for they have to spend far more on tolls.

Take the route from Tianjin to Shijiazhuang as an example. Transport companies from Tianjin are required to pay ¥360 for tolls one way, while companies from Hebei travelling in the opposite direction pay ¥180, giving them a price difference of ¥180 each time. According to the calculation of a transport company in Tianjin, companies of Tianjin spend 1.3 million yuan more than those of Hebei on the one line within one year.

NDRC indicated that the above practices of related Departments in Hebei Province have injured the fairness of competition between the passenger transport operators of Hebei and other provinces with the same transport line, and have violated Article 8 of the AML, that “Administrative agencies and organizations with the management power for public affairs authorized by statutes and regulations must not abuse administrative powers to exclude and restrict competitions”, and also constitute the behaviors prohibited by Article 33 Paragraph 1, “to set discriminatory charge items for nonlocal commodities, discriminatory charge standards, or discriminatory prices.”

After confirming with the Ministry of Transport concerning related practices, the NDRC sent a *Law Enforcement Recommendation Letter* to the General Office of the People’s Government of Hebei Province, which is advised to ask related Departments like the Communications Department etc. to correct related behaviors in order to allow fair treatment regarding tolls for all passenger transport companies who operate inside Hebei Province with regular times and routes. Correcting related behaviors will benefit fair competition between all passenger transport companies.

It has been stipulated in the Third Plenary Session of the 18th Central Committee of the Communist Party of China that the Party must “clean-up and abolish various regulations and behaviors which hamper the united nationwide market and fair competition, prohibit and punish any illegal acts of carrying out preference policies, oppose regional protectionism, and oppose monopolies and illicit competition.” NDRC indicated to continue in accordance with relevant requirements to further increase the intensity of work, to maintain the market environment of fair competition, and promote the establishment of market rules with fairness, openness, and transparency.

## **EU’s Auto Parts Manufacturers in Favor of China’s Anti-monopoly Investigations in the Auto Industry**

September 10, 2014

On September 10th, The European Union Chamber of Commerce in China, on behalf of over 100 European auto parts manufactures and related corporation interests, gave support to China’s authorities to strike at market monopolies, and asked auto manufacturers to release the sales’ control on automobile components in China, and also suggested China’s authorities should force down the prices of related products for consumers through antimonopoly regulations.

The European Union Chamber of Commerce in China said that auto manufacturers control China’s auto parts market and other aftermarket service areas so that both dealers and consumers have to pay higher prices than in other places. The Chamber of Commerce, in this report, pointed out that “the auto parts supply is totally controlled by the auto manufacturers who distribute only to dealers they authorize, leading to overpriced maintenance parts, and entities that coerce the stock level of vehicles and parts, creating an additional burden for dealers.”

The report said that the auto parts manufacturer dare not express discontent openly, worrying about revenge from auto manufacturers.

China's anti-monopoly regulators recently investigated foreign manufacturers of upstream cars who dominate the auto parts sales market in China, and asked Audi who when united with BMW and Mercedes Benz of Daimler Group controls 70% of the market share in China's luxury car market to reduce auto parts prices. All of the companies responded to the request and have been coordinating with the investigators' actions.

Audi and Mercedes Benz didn't immediately reply to the report, and BMW refused to make comments.

The report of The European Union Chamber of Commerce in China does not refer to the specific component suppliers who expressed dissatisfaction. Several European component suppliers including GKN said nothing to this report at first, while British Delphi Automotive and France Faurecia refused to respond.

Similar complaints were lodged in 2013 in a document by auto parts suppliers, but the words in the latest report were tougher, which exposed the pressures foreign auto manufacturers may suffer in China, as the market becomes more and more important.

Some analysts estimated that along with the anti-monopoly investigations, the distribution and sales mode of automobile and auto parts by auto manufacturers in China may be entirely readjusted.

The report from the industry organization gave the public a new interpretation of China's anti-monopoly law enforcement as it is becoming increasingly tougher.

The European Union Chamber of Commerce in China, including over 1800 member enterprises, has also made several recommendations in the report on China's anti-monopoly law, saying that the statute lacks definite standards and enforcement methods.

## **Three Cement Enterprises were Fined 11.4 Billion for Price-fixing**

September 9, 2014

NDRC announced on September 9th that the Price Bureau of Jilin Province would impose a penalty of ¥11.439 billion on 3 cement enterprises including Jilin Yatai Group Cement Sales Co. Ltd. ( “Yatai Company” ), North Cement Co. Ltd. ( “North Company” ) and Jidong Cement Jilin Co. Ltd ( “Jidong Company” ) for Price-fixing. It is the first time the cement industry has been fined by China’s anti-monopoly enforcement authorities and two A-share listed companies have been involved in a price fixing fine.

The NDRC said, considering the excess capacity of cement in China, the 3 companies above to have had limited time to carry out the price-fixing agreements, and they have damaged market competition in finite areas. Therefore, Yatai Company and Jidong Company, which did not cooperate with the investigation, were fined 2% of their 2012 annual sales, ¥60.04 million and ¥13.38 million respectively, and North Company which did well in cooperating with the investigation and rectification was fined 1% of its 2012 annual sales, ¥40.97 million.

On April 14th, 2011, several representatives of North Company, Yatai Company and Jidong Company convened a conference about the prices and implementation policies of cement (clinker) in one area and finally made a paper of the “*Decision of the Area Price Setting Meeting Among the Leading Cement Enterprises in Jilin Province*” which fixed the factory price of export clinker to 300 yuan per ton, and the factory price of the clinker supply for Liaoning Province to not lower prices to less than 300 yuan per ton.

The meeting built “*The Cement Price Implementation Table for Changchun,*

*Songyuan, and Panshi*”, which lists the specific execution prices of cement for sale including 3 types of cement, PC32.5, PO42.5, PI-I52.5, both by the bag and in bulk. The meeting indicated the price of each kind of cement in tables to be the lowest ex-factory exercise price of the 3 companies and the listed price and quotation could be raised at least 10 to 20 yuan/ton according to different situations.

It was determined through the investigation that some representatives of North Company and Yatai Company on May 11th of the same year 2011, assembled for a meeting at Tonghua Cement Incorporated of Yatai Group to decide the cement price around the Tonghua and Baishan area, they worked out a file called “*The Minutes of Second Meeting on Cement Industry Around Tonghua and Baishan Area in Jilin Province in 2011*”, which made a table for cement prices in the Tonghua and Baishan area for the two parties, and listed the specific execution prices of cement for sale including 3 types of cement, PC32.5, PO42.5, PI-I52.5 both by the bag and in bulk, and the two parties agreed to carry out the prices confirmed in the file from May 12, 2011.

The second meeting on May 26th, 2011 also suggested discussing the operational conditions in the regional market to reach a market price agreement for the next step.

Yatai, Jidong refused to cooperate in the inquiry

The Price Supervision and Anti-monopoly Bureau of NDRC thought that Yatai Company, North Company and Jidong Company made price collusions for cement sale by means of frequent meetings and implemented the prices fixed by the conference resolutions. They have concluded and carried out the price monopoly agreements, which violated the provisions of China’s AML, excluded and restricted market competition, fixed prices for cement sale, and as a result damaged the interests of downstream industries and consumers.

## **Violation of AML by Insurance Industry of Zhejiang Province was Fined 110 Million Yuan**

September 2, 2014

According to reports from the public, NDRC has investigated the Insurance Industry of Zhejiang Province regarding the problems of establishment and implementation of price-fixing agreements, finding that 23 provincial property insurance companies of the Insurance Industry Associations of Zhejiang Province had held many meetings to negotiate and fix new car discounts, and agreed on a unified agency commission of commercial auto insurance based on market share. The above acts of the Insurance Association of Zhejiang Province violated Article 16 of the AML where “Industry Associations shall not organize industry operators to engage in monopolistic practices that are prohibited by the law”, the property insurance companies involved in this case violated Article 13 of the AML that prohibits competitive operators from reaching a monopoly agreement by “fixing or changing commodity prices”.

The Insurance Industry Association of Zhejiang Province is the main planner and organizer of the monopolistic price behavior of the case and liability of the property insurance companies is less. Therefore, according to the AML, the NDRC imposed the maximum fine of 500,000 yuan on the Insurance Industry Association of Zhejiang due to their having primary responsibility, and imposed a fine of 1% of the previous annual sales of commercial insurance on the involved property insurance companies that have secondary responsibility, totaling 110,198,800 yuan.

According to the Investigation, 9 companies including the Zhejiang Branch of Liberty Insurance Company Limited, the Zhejiang Branch of Aioi Nissay Dowa Insurance Company Limited, the Zhejiang Branch of Zhejiang Property and Casualty Insurance Company Limited, Zhejiang Branch of ZKING Property & Casualty Insurance Co. Ltd, the Zhejiang Branch of China Huanong Property & Casualty Insurance Co. Ltd, the Zhejiang Branch of Cathay Insurance Co. Ltd, the Zhejiang Branch of Cinda

Property & Casualty Insurance Co. Ltd, the Zhejiang Branch of YINGDA TAIHE Property Insurance Co. Ltd, and the Zhejiang Branch of TAISHAN Property and Casualty Insurance Company Limited, etc., did not participate in the establishment and implementation of the monopoly agreements, therefore, the authority stopped the investigation on the 9 companies according to the Law. The Zhejiang Branch of the People's Insurance Company (Group) of China, the Zhejiang Branch of China Life Insurance (Group) Company, and the Zhejiang branch of Ping An Insurance (Group) Company of China, Ltd. reported price-fixing agreements and provided important evidence, according to Law, and as such the authority exempted them from a majority of the punishments and mitigated their fine.

## **Vice President of Microsoft was Questioned by SAIC and Required to Submit a Written Statement within 20 Days**

September 2, 2014

On September 1st, 2014, SAIC announced that SAIC had sent an anti-monopoly investigation questionnaire to the vice president of Microsoft Corporation Chen Shi, and required him to submit a written statement within 20 days. Previously, the expert panel has given an anti-monopoly questionnaire to the global vice president of Microsoft Corporation, Mary Snapp.

The written statement mentioned above should include the comprehensive status of Microsoft Corporation and also the allegation of the compatibility issue due to the non-disclosure of information about the Windows operational system and Office software, tying and file validation.

Microsoft responded that “we have always strictly obeyed the laws and are actively cooperating with the investigation conducted by the SAIC.”

On August 4, the expert panel submitted an anti-monopoly investigation questionnaire to the global vice president, Mary Snapp and on the afternoon of the same day, SAIC officially warned Microsoft that it should not interfere or block the investigation in any way to ensure an impersonal and impartial investigation.

On July 28, 2014, pursuant to the AML, SAIC conducted Dawn Raids on four of Microsoft's business offices, i.e. Microsoft China and its branch companies in Shanghai, Guangzhou and Chengdu. The personnel who were investigated included the vice president, the senior managerial officers and the relevant officers in marketing and the financial departments of Microsoft. The enforcement officials of the SAIC copied some contracts and financial statements from Microsoft, extracted large amount of electronic data including the internal communication documents and emails, and sealed and confiscated 2 working computers.

According to previous SAIC statements, in June 2013, some enterprises alleged that the compatibility, tying and file validation issues due to the non-full disclosure of information about the Windows operational system and Office software conducted by Microsoft violated the Chinese AML.

On August 26, the Minister of SAIC, Zhang Mao indicated that Microsoft was investigated due to the non-full disclosure of information about the Windows operational system and Office software, and the sale of Windows Media Player and browser.