

天地和律師事務所 T&D Associates

China

Monthly Anti-Trust Report

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Due to the general nature of its contents,

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

For any questions please contact T&D Associates at:

21st Floor, Times Fortune

Shuguang Xili Jia 6, Chaoyang District,

Beijing 100028, People's Republic of China

Telephone: (8610) 58678228 Facsimile: (8610) 58678227



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LEGISLATION

SAIC Promulgated the “Regulations on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition”

April 13, 2015

On April 7, 2015, the State Administration for Industry and Commerce (“SAIC”) promulgated the Regulation on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (the “Regulation”), which will take effect as of August 1, 2015.

The Regulation is intended to delineate between the legitimate exercise of Intellectual Property rights (“IPR”) and monopolistic acts, and sets forth the abuses of IPR that have the effect of eliminating or restricting competition. The Anti-Monopoly Law only has a general article dictating its relationship with IPR. Initially it was expected that the Anti-Monopoly Commission or the State Council would make an administrative law to embody the above relationship, while in the end it turns out to be a departmental regulation of SAIC. The following is the full text of the “Regulation”.

Article 1 For the purpose of protecting fair competition in the market, stimulating innovation, and prohibiting abuse of intellectual property rights used to eliminate or restrict competition, this Regulation is enacted in accordance with the Anti-Monopoly Law of the People’s Republic of China (hereinafter referred to as the “AML”).

Article 2 Anti-monopoly and intellectual property rights protections share the same goal of promoting competition and innovation, improving efficiency of economic operations, and maintaining both consumer benefits and social public benefits.

If an undertaking exercises intellectual property rights in accordance with the laws and administrative regulations related to intellectual property rights, then the AML does not apply; however, if an undertaking abuses intellectual property rights in order to eliminate or restrict competition, the AML applies.

Article 3 “Abuses of intellectual property rights for the purpose of eliminating or restricting competition” in this Regulation refers to any monopolistic act in which an undertaking violates the AML by exercising intellectual property rights in order to execute a monopoly agreement and abuse a dominant market position (excluding

price-related monopolistic acts).

The “relevant market” in this Regulation includes the relevant product market and the relevant geographical market and shall be defined in accordance with the AML and *Guidelines of the Anti-Monopoly Commission of the State Council on Definition of the Relevant Market*, taking into consideration the effect of intellectual property rights, innovation, and other factors. In AML enforcement involving licensing of intellectual property rights and other relevant issues, the relevant product market can be a technology market or a product market that contains specific intellectual property rights. A “relevant technology market” refers to a market constituted by competition between the technology involved in the exercise of intellectual property rights and similar technologies and are substitutable with the former one.

Article 4 Undertakings are prohibited from reaching monopoly agreements as prescribed in Article 13 and Article 14 of the AML through enforcing intellectual property rights; however, an agreement that can be proven to be in accordance with Article 15 of the AML is exempted.

Article 5 If an undertaking’s method of exercising its intellectual property rights meets one of the following criteria, it may be identified as not constituting a monopoly agreement as prohibited by Article 13 (1)(f) and Article 14 (c) of the AML, unless counter-evidence exists that demonstrates the agreement has the effect of eliminating or restricting competition:

- (a) The aggregate market share of competing undertakings in the affected relevant market does not exceed 20 percent, or there are at least four other substitutable technologies in the relevant market that are independently controlled by other undertakings and can be obtained within a reasonable cost; or
- (b) The market shares of both the undertaking and its trading counterpart in relevant markets are less than 30 percent, respectively, or there are at least two substitutable technologies in the relevant market that are independently controlled by other undertakings and can be obtained within a reasonable cost.

Article 6 An undertaking with a dominant market position should not abuse the dominant market position by exercising intellectual property rights to eliminate or restrict competition.

Dominant market position shall be identified or presumed in accordance with Article 18 and Article 19 of the AML. The ownership of intellectual property rights may be one of the factors to be considered in identifying the undertaking’s dominant market position, but the undertaking shall not be presumed to hold a dominant market position in the relevant market only based on the fact that it owns the intellectual

property rights.

Article 7 If an intellectual property right constitutes an essential facility for production and operating activities, then an undertaking with the dominant market position should not refuse licensing such intellectual property rights to other undertakings who offer reasonable compensation in order to eliminate or restrict competition.

To identify the acts provided for in the above paragraph, all the following factors need to be considered:

- (a) The intellectual property right cannot be substituted by reasonable means in the relevant market and is necessary for other undertakings to compete in the relevant market;
- (b) Refusal to license the intellectual property right would adversely affect competition or innovation in the relevant market, and damage consumers' or the public interests; and
- (c) Licensing the intellectual property right would not cause unreasonable damage to the undertaking.

Article 8 An undertaking with a dominant market position should not carry out the following restrictive transactions without justification to eliminate and restrict competition:

- (a) Restricting the trading counterparty to trade with it exclusively; or
- (b) Restricting the trading counterpart to trade exclusively with undertakings designated by the undertaking.

Article 9 An undertaking with a dominant market position should not use intellectual property rights to make tie-in sales without justification in order to eliminate or restrict competition, provided that all the following conditions are met:

- (a) Different commodities are compulsorily tied or combined for sales, in contrast to trade practices or consumption customs, or ignorant of the function of the commodities; and
- (b) The tie-in sale extends the dominant position of the undertaking from the market of the tying product to the market of the tied product, eliminating or restricting other undertakings from competing in the market of the tied product.

Article 10 An undertaking with a dominant market position should not carry out, without justification, the following activities in exercising intellectual property rights that impose unreasonably restrictive conditions in order to eliminate or restrict competition:

- (a) Requiring the trading counterpart to exclusively grant back the improved technology;
- (b) Prohibiting the trading counterpart from challenging the validity of the intellectual property rights;
- (c) Restricting the trading counterpart from using the competing product or technology without infringing upon intellectual property rights after the expiration of the licensing term;
- (d) Continuing to exercise those intellectual property rights which already expired or are identified as invalid;
- (e) Prohibiting the trading counterpart from trading with any third party; or
- (f) Imposing on the trading counterpart any other unreasonably restrictive conditions.

Article 11 An undertaking with a dominant market position should not carry out discriminative treatment in exercising intellectual property rights to trading counterparties of equal conditions without justification in order to eliminate or restrict competition.

Article 12 An undertaking shall not carry out activities that eliminate or restrict competition by making use of a patent pool when exercising intellectual property rights.

Participants in the patent pool shall not exchange sensitive information concerning output, market segmentation, or other sensitive information related to competition by making use of the patent pool and entering into a monopoly agreement as prohibited by Article 13 and Article 14 of the AML, unless the undertaking can prove that the agreement is in accordance with Article 15 of the AML.

A patent pool organization with a dominant market position should not carry out the following abuse of dominant market position to eliminate or restrict competition:

- (a) Restricting participants in the patent pool from licensing their patents outside the patent pool as independent licensors;
- (b) Restricting participants in the patent pool, or the licensee, from developing

- technology independently or jointly with a third party that competes against the patent pool;
- (c) Obligating the licensee to exclusively grant its improved or developed technology back to the patent pool or participants in the patent pool;
 - (d) Prohibiting the licensee from challenging the validity of the patent in the patent pool;
 - (e) Carrying out discriminative treatment on trading terms to participants in the patent pool or the licensee in the same relevant market with equal conditions; or
 - (f) Other abuse of dominant market position as identified by the State Administration for Industry and Commerce.

A “Patent pool” in this Regulation refers to the agreement by which two or more patentees jointly license their patents to the third party. The form of the agreement may be a specific joint venture established for this purpose, or an entrusted administration made by a member of the patent pool or an independent third party.

Article 13 An undertaking shall not carry out activities which eliminate or restrict competition by making use of standards setting and implementation (including the mandatory requirements in national technical specifications, similarly hereinafter) when exercising intellectual property rights.

An undertaking with a dominant market position shall not carry out the following activities in setting and implementing standards to eliminate or restrict competition without justification:

- (a) In participating in the standard setting, intentionally omitting information on its rights or expressly waiving its rights, but claiming its patent right to the standard user after the patent concerns a certain standard; or
- (b) After the patent becomes the standard essential patent (“SEP”), conducting acts that eliminate or restrict competition, including refusal to license, tying or imposing other unfair conditions in the trade, in violation of “Fair, Reasonable and Non-discriminatory” terms.

A “SEP” refers to a patent that is essential to implement the standard.

Article 14 Regarding undertakings suspected of abusing intellectual property rights by eliminating or restricting competition, the administration authorities for industry and commerce shall conduct the investigation according to the AML and the

Procedural Rules of the Administration for Industry and Commerce for Investigating and Punishing Cases of Monopoly Agreement and Abuse of Undertakings with a Dominant Market Position.

Article 15 In analyzing the undertaking's suspected abuse of intellectual property rights to eliminate or restrict competition, the following steps may be adopted:

- (a) Determining the nature and manifestation of the undertaking's exercise of intellectual property rights;
- (b) Determining the nature of the relationship between undertakings exercising intellectual property rights;
- (c) Defining the relevant market involved in the exercise of intellectual property rights;
- (d) Determining the market position of the undertaking exercising intellectual property rights; and
- (e) Analyzing the effect of the undertaking's exercise of intellectual property rights on competition in the relevant market.

In analyzing the nature of the relationship between undertakings, the characteristics of the exercise of intellectual property rights shall be taken into consideration. When licensing intellectual property rights, if the previously competing undertakings have a trading relationship in the licensing agreement, and also have a competitive relationship in the market of the product produced by both the licensor and licensee they are just using intellectual property rights. However, if there was no competitive relationship between the undertakings when reaching the licensing agreement until after it was reached, then the agreement should be regarded as one between undertakings unless the original agreement has been materially changed.

Article 16 In analyzing and determining the effect of the undertaking's exercise of intellectual property rights on competition, the following factors shall be taken into consideration:

- (a) Market positions of the undertaking exercising intellectual property rights and its trading counterpart;
- (b) Concentration degree in the relevant market;
- (c) Degree of difficulty in entering the relevant market;
- (d) Industrial practice and industrial development phase;

- (e) Time and effective scope of the restrictions on output, area, customers, and other factors;
- (f) Effect on innovation and technology promotion;
- (g) Innovation capability of undertakings and the speed of technological change; and
- (h) Other factors related to the determination of the effect of the exercise of intellectual property rights on competition.

Article 17 If an undertaking abuses intellectual property rights by eliminating or restricting competition in a monopoly agreement, the administration authorities for industry and commerce shall order the undertakings to stop the illegal activity, they will confiscate the illegal income and will impose a fine, the amount of which will be between 1% and 10% of the turnover in the previous year; if the monopoly agreement has not been implemented, a fine of no more than RMB 500,000 may be imposed.

If an undertaking abuses intellectual property rights by eliminating or restricting competition, therefore abusing its dominant market position, the administration authorities for industry and commerce shall order the illegal activity to stop, confiscate the illegal income, and impose a fine the amount of which will be between 1% and 10% of the turnover from the previous year.

In determining the specific amount of the fine, administration authorities for industry and commerce shall take into consideration the nature, details, degree, and duration of the illegal activities as well as other factors.

Article 18 This Regulation shall be interpreted by the State Administration for Industry and Commerce.

Article 19 This Regulation takes effect as of August 1, 2015.

AUTHORITY

Director of Price Supervision and Inspection Bureau of NDRC Met the Chairman of AmCham China Zimmerman and his Team

April 17, 2015

On the afternoon of April 16th, the director of the Price Supervision and Inspection Bureau of NDRC, Zhang Handong had a meeting with James Zimmerman, the chairman of the American Chamber of Commerce China and their team including many representatives from American enterprises like GE, Dell, Intel, Oshkosh, Cummins and Sheppard Mullin law firms, etc.

Zhang Handong said that NDRC always insists on doing anti-monopoly enforcement work fairly and justly in accordance with the law, and seeks to treat all fields and enterprises equally. He said he hoped the outside world could hold a objective and fair view of antitrust enforcement in China, and NDRC would like to continue close communication on antitrust issues. Meanwhile, he expected American enterprises could keep confidence in China's economic development, and the intentions of the Chinese government, in accordance with the requirements of the 18th third and fourth plenary session, to create a fair competition market environment for all enterprises.

Chairman Zimmerman showed that AmCham China was willing to give full support in acting as a communication platform, promoting all the member enterprise legally operating in China, and hope to keep up good communication with NDRC.

Li Qing, the Vice Director of the Price Supervision and Inspection Bureau of NDRC, and the Competition Policy and International Cooperation Bureau, also attended in the meeting.

Director of Price Supervision and Inspection Bureau of NDRC Met Representatives from U.S. Embassy

April 17, 2015

On the afternoon of April 16th, the director of the Price Supervision and Inspection Bureau of NDRC, Zhang Handong had a meeting with representatives from the U.S. Embassy, including the Minister commercial counselor Jonathan Fritz and Minister trade counselor James Green, etc.

Zhang Handong introduced the situation of NDRC's anti-monopoly work and practices related to the Chinese antitrust enforcement process, and the current work on increasing anti-monopoly enforcement transparency and the willingness to fully communicate with the U.S. on these issues. The U.S. representatives appreciated the NDRC's contribution on anti-monopoly work, and hope to enforce the information exchange between the two sides.

Li Qing, the Vice Director of the Price Supervision and Inspection Bureau of NDRC and the Competition Policy and International Cooperation Bureau also attended the meeting.

NDRC Issued the Results of the Administrative Anti-monopoly Case in Shangdong Province

March 30, 2015

On March 27th, the Price Supervision and Inspection Bureau of NDRC issued the results of an administrative anti-monopoly case in Shangdong. According to the report, NDRC engaged an investigation against the Shandong province transportation hall regarding eliminating and limiting the market competition in the monitoring platform market and the vehicle terminal market. In accordance with the Anti-Monopoly law, NDRC sent an enforcement letter to the People's Government Office in Shangdong, proposing that they order the transportation hall correct their behavior and restore fair competition and market order.

Last December, the principal of the Price Supervision and Inspection Bureau showed that break the administration monopoly is the main target in 2015 on the "Seminar of international competitive compliance and administrative monopoly," and pointed out the Shangdong transportation hall. This was the second case for NDRC to prosecute a local government in order to rectify an administrative monopoly after the case conduction on Hebei province last September.

ACADEMIA

The Seminar of Standard Patent License and Regulation of Anti-monopoly was Held

March 30, 2015

On March 26, the Seminar of Standard Patent License and regulation of Anti-monopoly was held at the China academy of Information and Communication Technology, and more than a dozen of delegates from government, industry association, enterprises, universities and law firms attended the seminar. Yang Hua, secretary-general of the TD Industry Association, made the report with the theme of setting up a reasonable royalty model and promoting industry development. In the report, Yang Hua used the mobile industry as an example, introduced the application of the FRAND rule, and introduced some key factors combined with some cases using FRAND in recent years in China to assess whether royalties are market driven.

The current situation in the industry made Yang Hua suggest that China's enterprises should cooperation, jointly built a law environment that respects intellectual property rights, and promote reasonable royalty standards to suit the development of China's industry. The call for China's enterprises should not only focus on the role of independent intellectual property rights on technological innovation, but also strengthen the cooperation among enterprises, gather the advantage of intellectual property in industry, expand the application range of independent intellectual property rights achievements, set up a model for intellectual property and reasonable royalties, drive the industry with respect to the law, respect the FRAND requirement principle, and truly achieve fair, reasonable and non-discriminatory behavior in patent licensing.

CASES

Mercedes Benz was Fined RMB 357 Million, Record Penalty in Auto Industry

April 23, 2015

Recently, the price bureau of Jiangsu Province made administrative punishment decision on Mercedes Benz monopoly case, and fined it RMB 350 million and several distributors RMB 786.9 million.

It is investigated that Mercedes Benz has entered into monopoly agreements with distributors of Jiangsu Province on restricting the minimum resale prices of finished automobile of E-class, S-class and partial spare parts, which violates the provisions of article 14 of the Anti-Monopoly Law, excluding and restricting competition of relevant markets, and harming consumers' benefit. Mercedes Benz restricted the minimum resale price of finished E-class and S-class automobiles in different areas in Jiangsu Province by means of a telephone notification, verbal notification or holding distributors' meetings from January 2013 to July 2014. Mercedes Benz urged compliance with the monopoly agreements using multiple methods including enlarging the assess strength against distributors, warning through interviews with distributors who don't implement restrictive price policies, reducing the supporting strength of policies, etc.

Furthermore, Suzhou distributors (from November 2010) and distributors of Nanjing and Wuxi (from January 2014) have held distributor meetings under the organization of Mercedes Benz, signing and implementing the monopoly agreements of fixing the prices of several spare parts, violating provisions of Article 13 of the Anti-Monopoly Law.

Mercedes Benz played a role of leading and pushing during the process of entering and implementing monopoly agreements. The price bureau of Jiangsu fined Mercedes Benz a penalty of 7% of its sales value in the relevant market in the previous year, i.e. RMB 350 million, and fined those distributors who signed and implemented monopoly agreements under the organization of Mercedes Benz penalties of 1% of their sales value of the relevant market in the previous year. The price bureau exempted or gave a lesser punishment to the distributors who both reported the relevant situation of entering into monopoly agreements and provided significant

evidence. The total amount of the fine against Mercedes Benz distributors in Nanjing, Wuxi and Suzhou is RMB 786.9 million.

One of Guangdong's Pharmaceutical Enterprises Sued NDRC: Enterprise Whose Drug Price is 20 Times Higher Than the Like Products can Win a Bid

April 22, 2015

Separate pricing drugs got something wrong in the new round of drug bidding. Some news media exposed yesterday that the common drug CLA (clarithromycin) can easily become a drug that is 22 times higher priced than common capsules by changing the dosage form and changing from a common capsule into a soft capsule. Soon afterwards there are industry insiders that told Yangcheng Evening News that even though the patents of some original drugs has expired, the original drugs still can enjoy separate pricing, and even though the price of the above-mentioned drugs has prices 20 times higher than the like drugs, they can also win the bid which is very unfair and impartial. As a result, one drug enterprise of Guangdong Province sued National Development and Reform Commission (“NDRC”) before the court.

Still Win the Bid with 20 times Higher Price?

The said drug enterprise of Guangdong is Guangzhou Bai Sailuo Pharmaceutical Co., Ltd. (“Bai Sailuo”) and the controversial drug is named azithromycin.

The journalist of Yangcheng Evening News found from the results of the bidding and screening for new round of medicine concentrative purchase in Hunan Province published on the Medicine Concentrative Purchase Platform of Hunan Province that there were 11 drug enterprises who manufacture the conventional tablet of azithromycin winning the bid. For the 125mg of specification, 3 drug enterprises won the bidding with bidding price of 0.193-0.238 Yuan/tablet; for 500 mg o specification, 7 drug enterprises won the bidding with a bidding price of 0.308-0.405 Yuan/tablet; while for the 500 mg specification, only one enterprise named Pliva Pharmaceutical Industry Corporation (“Pliva”) won the bidding with a bidding price of 16.550 Yuan/tablet.

However, Bei Qingsheng, the managing director of Bai Sailuo made a calculation for the journalist that the raw material of azithromycin is only 520 Yuan for one kilogram

i.e. 0.52 Yuan for one gram and even if they used the best processing technology, the total costs added up to no more than 0.5 Yuan for one azithromycin tablet of 500mg, but the price of Pliva is as high as 16.550 Yuan.

It is reported that many provinces currently give better price privileges to the high qualified class drugs including original drugs, high quality and preference price drugs and separate pricing drugs etc. For example in Guangdong Province and Shanghai or other districts, the conventional tablets of azithromycin produced by Pliva enjoy a separate pricing policy because of original drug. Similarly, according to the provisions of Medicine Concentrative Purchase of Hunan Province, it is allowable for the drugs of the types of patent, original, high quality and preference price and separate pricing as long as whose quoted prices are not higher than the enterprises' last bidding price of the previous round tender.

That is to say, it is because the original drugs can enjoy better price treatment that the conventional tablet of azithromycin produced by Pliva still can win the bidding smoothly by a price which is 20-21 times higher per 100 mg than the price of other enterprises winning the bidding.

One Drug Enterprise Sued NDRC

Bai Sailuo cannot accept the pricing mentioned above, Bei Qingsheng thinks separate pricing has no legal basis and is unfair and not impartial. The allowances made by the Development and Reform Commission of Hunan Province for azithromycin produced by Pliva to be priced separately violated the Administrative Permission Law, putting the sales of azithromycin produced by Bai Sailuo at a disadvantaged position and causing unfair competition.

So on February 4th 2015, Bai Sailuo submitted an application for Administrative Review to NDRC. The NDRC soon made a decision of non-acceptance on the 17th of February. NDRC thought the price is not a governmental guiding pricing behavior but a behavior in which Hunan Province checked the highest bidding price in the drug tender and thus has no beneficial relationship with NDRC.

Bai Sailuo insisted that NDRC should accept the case and thus sued NDRC before Beijing First Intermediate People's Court asking for revocation of the NDRC non-acceptance decision on February 25th. At the same time, Bai Sailuo also sued the Development and Reform Commission of Hunan Province before the People's Court of Tianxin District in Changsha for the reason that the pricing given to azithromycin produced by Pliva by the Development and Reform Commission of Hunan Province has violated the principle of fairness and justice of the Administrative Permission Law, surpassed legal authority and had no legal basis, asking for the court to confirm that the behavior is valid because of violation of the law.

Separate Pricing is Controversial in the Industry

In fact there are disputes about the separate pricing in the industry all the time.

As the imported drugs of foreign pharmaceutical enterprises are mostly original drugs which invested lots of funds in research and development, every country implements special protection for original drugs or brand drugs. China is no exception. In 2001, the former State Development Planning Commission set separate pricing right for original drugs and most foreign drugs reached the qualification. The industry generally has no disputes that those original drugs in the patent effective period enjoy the separate pricing right.

But what the industry generally questions is if the prices of those original drugs will decrease sharply after the patents expire in foreign countries, while in China, the foreign drugs after the patent protection period can still enjoy the privilege policy of separate pricing, and this is unfair.

Take azithromycin as an example, public materials showed that azithromycin (product name as “Shu Meite”) is a new generation of macrolide antibiotics developed by Pliva with investment of thousands of millions and 17 years of development, which the patent protection period extended to the year of 2012, i.e. the patent of “Shu Meite” has expired now. “It has enjoyed patent protection for 20 years and should be treated equally now that it has expired.” said Bei Qingsheng.

After the Glaxo Smith Kline bribery case, the industry has been more worried that the profit obtained from separate pricing will make it more convenient for enterprises to use it for bribery with the sales. It is known that as the price agency stipulates that the drug retailed by hospital shall be sold with a price which is 15% higher than its purchase price, hospital will get higher profit if the price of the drugs hospital bought is higher, and with higher price the drug enterprise sells, they will get more profit for employing more salesman to promote the products.

The First Major Anti-Monopoly Case in Hainan: Dongfang Water Company Fined RMB 630,000

April 07, 2015

On April 6, it was learned from the Hainan Provincial Administration on Industry and Commerce (Hainan AIC) that, Dongfang Water Company, which enjoyed a dominant market position, had illegally charged security deposits from the masses and the enterprises by taking restrictive measures including refusing to open accounts for its

users and refusing to supply water. Such behavior violated the provisions of the Anti-Monopoly Law. Therefore, Dongfang Water Company was ordered by Hainan AIC to return the more than RMB 6.2 million security deposits it had collected from the residents and enterprises, its illegal gains of RMB 38,521.48 was confiscated and a fine of RMB 593,208.06 was imposed. The total fines of RMB 631,729.54 have been paid in several installments.

First Major Anti-Monopoly Case in Hainan Province

We learned from the Hainan AIC that the investigation into and decision on the abuse of market dominance by Dongfang Water Company by illegally collecting security deposits from the masses and enterprises was the first major anti-monopoly case investigated by Hainan Province since the implementation of the Anti-Monopoly Law in 2008.

So, how did it start? As a public utility enterprise as well as the sole undertaking, why would Dongfang Water Company charge security deposits? How did the enforcement authority legally exercise its power? Apart from the water sector, for other industries and sectors like electricity, gas, and communications that also have dominant market positions, does this case have warning far reaching effect?

On April 23, 2014, the Hainan AIC received a complaint that the Dongfang Water Company abused its dominant market position and imposed unreasonable trade terms on the urban public water supply service by charging a certain amount of security deposit from its new resident or enterprise users. The Hainan AIC conducted an investigation into the reflected issue based on the laws and provisions, and found out that the Dongfang Water Company did charge security deposits ranging from 300 to 3000 from its new resident and enterprise users. The behaviors of the undertaking violated Article 17 of the Anti-Monopoly Law and Article 17 of the Provisions for Administrative Authorities for Industry and Commerce on Prohibiting Abuse of Dominant Market Positions. The Hainan AIC immediately reported the results of the investigation and its opinions on case initiation to the State Administration on Industry and Commerce (the "SAIC"). On July 25 2014, based on the authorization of the SAIC, the Hainan AIC initiated the present case.

How to Define Abuse of Dominant Market Position

First of all, what is a dominant market position? The Anti-Monopoly Law specifies that dominant market position means a market position held by undertakings that are capable of controlling the prices or quantities of commodities or other trade terms in a relevant market, or preventing or exerting an influence on the access of other undertakings to the market. Whether an undertaking possesses dominant market position this is the prerequisite for deciding whether the behaviors of an undertaking constitute abuse of a dominant market position.

According to the investigation conducted by the Economic Enforcement Bureau of the Hainan AIC, the undertaking, Dongfang Water Company, is the only undertaking that exclusively provides urban public water supply services within the area that it reaches. Therefore, in the aforementioned area, the market share of the undertaking is 100%.

The investigation found out that the undertaking Dongfang Water Company is a public enterprise and its operations are based on water supply and water pipe sales. Due to its nature as well as its market position as the sole undertaking, it possessed the ability to control the supply of urban public water as well as the trade terms for the supply. Because of the natural monopoly character in the public enterprise, the urban public water supply service within the area is irreplaceable, non-selectable and benefits the public. Therefore, in the geographical market of the present case, residents and other users completely rely upon the urban public water supply service provided by the undertaking. To put it in other words, with the geographical market of the present case, there is only undertaking, the residents and other users have no choice, and other undertakings have great difficulties in entering the market.

It was also found that since April 2003, the undertaking Dongfang Water Company started to charge security deposits from its new users. Each household need to pay a security deposit of RMB 300 and each commercial user needs to pay a security deposit ranging from RMB 1000 to 3000. As of June 30, 2014, the undertaking has charged security deposits from 10,864 users, amounting to RMB 6,204,102.00. Between August 1, 2008 and June 30, 2014, the total interests on the security deposits charged amounted to RMB 38,251.48.

No Reasonable Cause for Charging Security Deposits

Why did Dongfang Water Company charge security deposits from the residents and the enterprises?

During the investigation of the present case, the undertaking Dongfang Water Company provided its defense for its additional trade term of charging security deposits: First, it charged security deposits pursuant to the Regulation of Dongfang Water Company on the Principles for the Reduction of Security Deposits and Alteration (Dongfang Water Company [2005] No. 26) and therefore it had its basis. Second, the collection of security deposits was for the purpose of reclaiming the default payments and if a new user had a stable track record after a certain period, its security deposit would be returned. Third, in the Urban Water Supply Agreement signed with its users, both parties signed and enforced the agreement based on the principle of equality and free will.

With regard to this, after investigation, the Hainan AIC held that the behavior of charging security deposits on the masses and enterprises by the undertaking Dongfang

Water Company was not based on reasonable causes.

Hainan AIC specifically explains that, first of all, the party Dongfang Water Company has got no legal basis to collect cash deposit for using water from residents and enterprises users. After investigation, Hainan AIC considers that the reason provided by the party that the purpose of its doing so is to ensure the collection of unpaid water charges and after the water used by the new users is stable and the new users pay the water charge normally the cash deposit will be returned to the new users after a certain time cannot be supported, because article 30 of the Administrative Measures for Urban Water Supply Price provides that “users shall pay a water charge on a monthly basis in accordance with the stipulated measurement standard and water price. If a user did not pay its water charge after receiving a water charge notice for 15 days, overdue fines of 5% of the unpaid water charge will be imposed daily. If a user did not pay its water charge for two months in a row without any just cause or special reason, water supply enterprises can suspend its water supply according to Urban Water Supply Regulation.” Therefore, according to the stipulations of the Administrative Measures for Urban Water Supply Price and the Urban Water Supply Regulation, for users who do not pay water charge, the relevant party can collect overdue fines according to the law and suspend its water supply, while the aforementioned law did not stipulate anything about collecting cash deposit for water using.

Kai Chen, director of the Industrial and Commercial Bureau of the province, considers that “over the years, Dongfang Water Company has taken advantage of its market dominant position to collect cash deposit for using water from residents and enterprises users in violation of the law, this kind of behavior not only damages the lawful rights and interests of residents but also unlawfully occupies the right to enterprises free of charge, especially it adds an operating burden on small and micro businesses and is to the disadvantage of the development of small and micro businesses. Therefore, the investigation of this case has a warning effect not only on the water supply industry but also on other fields and industries which have a market dominant position such as power supply industry, gas supply industry and communication industry etc.” As for Dongfang Water Company itself, the behavior which takes advantage of its market dominant position to transfer the operating risk of unpaid water charge to service objects such as residents and enterprises using the simple method of collecting cash deposit for water using is to the disadvantage of improving its management level and innovation ability, while observing law and discipline, operating honestly, and constantly improving its own management level and innovation ability is a real sustainable development road for an enterprise.

FOCUS

Dual-Wheel Driving of Intellectual Property Rights Protection and Anti-Monopoly

April 22, 2015

Where is the boundary between intellectual property rights (hereinafter referred to as IPR) protection and anti-monopoly? How to enhance the operability of IPR anti-monopoly law enforcement? What is the penalty for abusing IPR? Etc. These are the uppermost concerns of law experts, lawyers, operators and law enforcement officers. Recently, the State Administration for Industry and Commerce (“SAIC”) promulgated the Regulation on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (hereinafter referred to as the “Regulation”), further clarifying these questions, which has aroused the attention of all circles of society.

Experts: clarify the boundary between IPR protection and anti-monopoly

Relevant persons in charge of SAIC pointed out that IPR protection and anti-monopoly have common goals, namely to promote competition and innovation, enhance economic efficiency, safeguard consumers’ legitimate interests and the public interest. The behavior of abuse of IPR to eliminate or restrict competition not only will not promote innovation it will also impede innovation and injure competition. It deviates from the goal of IPR protection and is prone to causing monopolistic issues.

“In order to find a balance point between competition promotion and IPR protection to ensure that competition enforcement will have a positive effect on innovation in the long run, on the one hand it will need to establish an incentive mechanism which protects IPR, enriches public products and consumer welfare; on the other hand it will also need to guarantee effective competition in the market, limiting, eliminating, or restricting competition in the field of IPR to the necessary scope required for stimulating innovation.” said Hilary Jennings, an invited expert advisor of competition policy for China-EuTrade Project.

Xianlin Wang, a member of consultative expert group of the Anti-monopoly Commission of the State Council and a law school professor of Shanghai Jiaotong University, considered that to some extent IPR are monopolistic, although further intensifying IPR protection helps to promote innovation, abusing IPR will injure the

lawful rights and interests of competitors, consumers and upstream and downstream enterprises in the industry chain, imbalance of benefits will occur, thus probably constitute monopolistic behaviors. He pointed out that “the Regulation is a further elaboration of Article 15 of the Anti-Monopoly Law, through a way of listing specifies familiar behaviors concerning IPR abuse and reasonably exercising IPR”.

The “listing” mentioned by Xinlin Wang refers to how the Regulation defines behaviors which eliminate or restrict competition by abusing IPRS in a non-price way, its main content includes: Undertakings are prohibited from reaching monopoly agreements through enforcing IPR; An undertaking with a dominant market position should not abuse the dominant market position by exercising IPR to eliminate or restrict competition; Certain circumstances on which the behavior of exercising IPR in patent pool or standard may constitute a monopoly, etc.

Yanbei Meng, an associate professor of the law school of Renmin University of China, said that, “Given the large scope of social relations, the complexity of interest relationships, the principle and abstract nature of the Anti-Monopoly Law as well as the particularity of the nature of IPR, the Regulation plays an important role in clarifying the relationship between IPRS protection and anti-monopoly.”

Yanbei Meng expressed that the Regulation defines the principles for applying the Anti-Monopoly Law in the field of IPR, puts forward that undertakings’ behaviors which eliminate or restrict competition by abusing IPRS is not the same as the fourth independent monopolistic behavior stipulated by the Anti-Monopoly Law, the illegality should be determined by analyzing the monopoly agreement and the behavior of abusing market dominant position. In addition, the Regulation also clearly points out that IPR and other property rights should be treated equally in the course of anti-monopoly law enforcement, and the undertaking shall not be presumed to hold a dominant market position in the relevant market only based on the fact that it owns the IPR.

Yanbei Meng also pointed out that the above terms have introduced the principle of a “safe harbor” for the first time, providing specific guidance for undertakings in how to exercise IPR, and enabled undertakings to exercise IPR in a foreseeable and stable regulatory environment.

Law enforcement: enhancing the operability of anti-monopoly law enforcement

What concern various local Industry and Commerce Authorities and Market Supervision Authorities most is: How to use the Regulation to reinforce anti-monopoly enforcement and safeguard competition order in the market?

Xiaomeng Li, division chief of the Fair Trade Division of Shanghai Industry and Commerce Bureau and a postdoctor of the law school of Shanghai Jiaotong University,

pointed out that IPR protection is helpful in stimulating innovation, protecting innovative products and a good competition order and is also an impetus for promoting innovation. The Regulation clarifies the boundary between IPR protection and anti-monopoly and is beneficial for building a good environment under which “millions of people establish a business and innovate”.

As for the role the Regulation plays in reinforcing anti-monopoly law enforcement of Industry and Commerce Authorities, Xiaomeng Li considered that the Regulation gives a detailed description about the behaviors which eliminate or restrict competition by abusing IPR, it has stipulated the content of principles on the one hand and specified specific illegal acts on the other hand, and also provides the analyzing principle and framework for anti-monopoly law enforcement, which is beneficial for enhancing the operability of the anti-monopoly law enforcement of Industry and Commerce Authorities and improving the transparency of enforcement procedure.

He pointed out that anti-monopoly law enforcement in the field of IPR is a professional and policy-type work, Industry and Commerce Authorities need to have pertinent measures when implementing the Regulation. He advised to implement this in three aspects: The first aspect is to improve the ability to recognize the boundary between anti-monopoly law enforcement and IPR protection and the awareness rate of the anti-monopoly law enforcement function of Industry and Commerce Authorities; The second aspect is to carry out communication with relevant law enforcement agencies and research institutes, form a cooperative and sharing mechanism concerning illegal discovery, case investigation and behavior recognition etc; The third aspect is to pay attention to summation and analysis of anti-monopoly law enforcement cases, timely finding out through experience and existing problems in law enforcement practices.

As for the above questions, journalists also interviewed competition law enforcement officers of the Industry and Commerce Authorities and Market Supervision Authorities of places such as Beijing, Guangdong, Sichuan, Liaoning, Zhejiang etc. They generally reflected that the Regulation has adopted the experience of foreign anti-monopoly law legislation and enforcement, they hoped that the SAIC will timely hold trainings relevant to the Regulation, interpreting the Regulation, helping law enforcement personnel to better study and implement the Regulation in order to better carry out relevant law enforcement work.

Lawyers: perfect detailed rules and regulations concerning IPR

Zhanling Zhao, legal counsel of the credit rating center of Internet Society of China, pointed out that the Regulation is a detailing of IPR content in the Anti-Monopoly Law. Compared with relevant provisions in the Anti-Monopoly Law, the Regulation adds new content, including forbidding an undertaking with a dominant market position from carrying out, without justification, the following activities in exercising

IPR: requiring the trading counterpart to exclusively grant back the improved technology, continuing to exercise those IPR which already expired or are identified as invalid etc.

Lixin Zhu, a lawyer from Beijing Hanzhuo Law Firm, pointed out that “Regarding IPR protection, the more important mission of law is to balance the lawful rights and interests of the rights-holder, promote technical innovation, and guarantee a fair competition order in the market and protect the public interest at the same time.” He said frankly that in recent years, besides the fact that some developed countries are suspected of using patents advantages to abuse IPR to restrict competition, domestic right-holders also show the phenomenon of malicious litigation of safeguarding legal rights, such as some right-holders maliciously refuse to grant their rights, try to obtain unreasonable fees though way of claiming for compensation etc.

As for enterprises’ behaviors which use IPR protection banner to eliminate or restrict competitors or even monopolize the market, the Regulation defines the penalty, the illegal income of relevant enterprises will be confiscated and relevant enterprises will be fined for the amount up to 10% of relevant enterprise’ turnover in the previous year; even if the monopoly agreement reached has not been implemented, a fine of no more than RMB 500,000 may be imposed.

Centering around the above penalty, Lixin Zhu pointed out that the requirement for using the Anti-Monopoly Law to regulate the behavior of abusing IPR is relatively high and the attitude of the law enforcement authorities is relatively prudent, while the penalty defined by the Regulation conforms to current marketing environment and is relatively appropriate.

Yunting You, a lawyer from Shanghai Debund Law Offices, pointed out that injury determination is an important aspect of determining IPR abuse. In the course of case investigation of abusive IPR, the party under investigation is required to provide the evidence on whether its IPR licensing agreement produces effects which injure competition to law enforcement authorities. If the documents submitted by it cannot demonstrate or is not sufficient to prove that the effect of promoting competition outweighs the effect of injuring competition, law enforcement authorities should then conduct an anti-monopoly investigation on it. He expressed that although the Regulation provides detailed penalties, it does not specify how to define injury. He suggested relevant departments further perfect detailed rules and regulations for injury determination.

Enterprises: More Focuses on Vicious Competition in Emerging Areas

The US is a traditional country that exports technologies, and it is experienced in antitrust legislation and enforcement with regard to the abuse of intellectual property. Since the last year, the IP-related behavior of US S&T enterprises such as Qualcomm

and Microsoft has been investigated in China with antitrust concerns, which drew much attention in the US news.

In the US ABA spring meeting of 2015, the Provisions issued by Chinese SAIC became a focus of the enterprises in the meeting.

The GM's legal counsel Mark Whitener emphasized in the meeting that antitrust enforcement is a dynamic progress, the international enforcement will gradually converge in the globalized future, and Chinese antitrust legislation and enforcement are constantly improving, which multinationals should pay close attention to.

Elizabeth Wang, the partner of the US medicine R&D company Charles River Laboratories International, pointed out that Chinese AML enforcement is more complex than other countries', and the main reason is that China is not only a big country but also a transforming one, from a planned economy to a market economy and from an IP importer to an IP exporter, so a number of IP mechanisms need to be improved, which requires sufficient communication between multinationals and Chinese AML enforcement departments to reach a consensus.

In comparison with foreign companies paying close attention, domestic companies are quite quiet.

On April 16, relevant officials of SAIC expressed in the State Council News Release that our country has a lot of issues in the IP area, such as infringement of trademark and other IPs; some IP owners also abuse their rights to eliminate and restrict competition, especially on the internet.

Concerning this, the reporters interviewed many well-known internet enterprises such as Baidu and Tencent, but they replied with no details and only declared that they will study the Provisions.

It is worth mentioning that, compared with the abuse of IP to restrict competition, these internet companies seem to be more interested with the vicious competition issue in the industry. In a seminar held on April 19, Baidu's senior legal counsel Qin Jian offered the data showing that among all unfair competition disputes, 42.4% were caused by vicious interference between internet service providers, 30.2% were triggered by basic service and 100% referred to discrimination which violated the principle of good faith and the admitted business ethics. The offense and defense between internet companies happened 33 times per day. He suggested that concerning the current situation of vicious competition and infringement in the internet industry, China establish general internet-based competition rules including principles of fair competition, peaceful co-existence, voluntary choice, primacy of common interest and good faith.

It seems necessary for relevant departments to promote the Provisions in the internet industry and boost fair competition and various innovations in the industry.

Follow-up of Shandong Administrative Monopoly Case: Provincial Transport Department Opens Transport Vehicle Dynamic Monitoring Market

April 13, 2015

On March 27, NDRC issued an enforcement advice letter to the Shandong Provincial Government General Office and suggested it rectify the monopolistic behavior of the transport department. It was the second time the NDRC made such corrections to local governments after it dealt with the Hebei Province Administrative Monopoly case in September last year. Recently, the Shandong Provincial Transport Department opened the terminal market of vehicle satellite monitoring and positioning to recover the market competition.

A few days back, the reporters obtained the information from the Shandong Transport Department that the Department opened the three kinds of vehicle's satellite monitoring platform market and GPS terminal market. Since then, the transport vehicle dynamic monitoring market has been all opened in Shandong province.

According to the introduction, after Shandong opened the satellite monitoring market and GPS terminal market for semi-trailer tractor and heavy truck (more than 12 tons in total), the Transport Department recently issued the Notice of Shandong Provincial Transport Department on Relevant Issues of Improving the Dynamic Monitoring of Road Transport in the Province, which opened the three kinds of vehicle's satellite monitoring platform market and GPS terminal market.

It is understood that since GPS systems were used in Shandong to monitor road transport in 2004, according to the Ministry of Transport, the dynamic monitoring scope in Shandong has gradually covered "the three kinds" of vehicles, heavy trucks (over 12 tons in total weight) and semi-trailer tractors.

During the work progress, the Shandong Transport Department researched and found that the terminal and platform market at that time was facing vicious competition – inferior terminals were squeezing good ones out and a large amount of platform data was faked, which severely affected dynamic monitoring.

For solving such problems, a series of policy documents were issued in Shandong,

and the monitoring mode has evolved to a unified monitoring platform. In that mode, every indicator of the Shandong monitoring platform was ranked among the tops within the national key commercial vehicle networking control platform. The responsibilities of both the transport enterprise monitoring subjects and transport administration of monitoring were implemented, and the safety for transport has been substantially improved.

However, for guaranteeing the quality of the terminal and the platform, Shandong Province raised a standard even stricter than that of the Ministry of Transport, asking the terminal service provider to establish a perfect after-sales service system, which caused that some terminal providers cannot enter into Shandong market and formed administrative monopoly behavior that restrict market competition to a certain degree.

Recently, the Shandong Transport Department received from NDRC General Office the Letter concerning the Proposed Rectification of the behavior of Shandong Provincial Transport Department Abusing Administrative Power to Eliminate and Restrict Competition, which points out the problems that exist in the dynamic monitoring work in Shandong. After studying the letter, the Department decided to rectify the dynamic monitoring work overall and set out related measures.

It is understood that in the future, as long as it passes the standard conformance review and after publicity by Ministry of Transport, the platform providers can enter into the Shandong market; transport enterprises and vehicle owners can choose the GPS terminals listed in the catalogue published by the Ministry and do not need to go through debugging before entering into the Shandong market.

Besides, the filing condition has been further simplified. From now on, each platform provider that has passed the conformance review and the publicity of the Ministry of Transport can engage in the dynamic monitoring service for the three kinds of vehicles, heavy trucks and semi-trailer tractors. As far as they conform to the conditions regulated in the No. 5 Order of the Ministry of Transport, all platform providers with full materials can be put on the record.

In addition, the regulation of “The terminal’s price (including the installation) cannot exceed the tender price of the Big Dipper trial project of the Ministry of Transport” has been annulled, and the operators can decide relevant terminal prices and installation fees on their own.

Relevant officials in the Shandong Provincial Transport Department said that they will strictly follow the working proposals of NDRC with respect to the transport vehicle dynamic monitoring, rectify their work, develop an open and orderly vehicle dynamic monitoring market, and continue to carry out the monitoring work well, featuring the combination of opening-up and administration in harmony.