China

Monthly Anti-Trust Report

June 2015

Due to the general nature of its contents,
This newsletter is not and should not be regarded as legal advice.
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AUTHORITY

Drafting of the Anti-monopoly Guideline for the Automobile Industry Has Been Launched, with the Preliminary Draft to be Published within the Year

June 18, 2015

With the anti-monopoly experience from the Audi automobile case, Japanese auto parts case and the Benz case, China will formulate its first anti-monopoly guidance document especially for the automobile industry.

It is believed that the Anti-monopoly Commission of the State Council has authorized the National Development and Reform Commission (the "NDRC") has led the drafting of 6 anti-monopoly related guidelines concerning abuse of intellectual property rights, anti-monopoly regulation of the automobile sector, leniency program, exemption procedure, procedure for the termination of investigation and calculation of penalty, etc. As the guideline with the most concern from the market, the Price Supervision and Anti-monopoly Bureau of the NDRC has organized a preparatory conference on June 12 and formally initiated the drafting work for the Anti-monopoly Guideline for the automobile sector.

Covering all aspects of the automobile sector

It is believed that the contents of the Anti-monopoly Guideline will cover various segments including the manufacture and supply of auto parts, the sales of automobiles and after service, and will include all aspects of common monopolistic behaviors, abuse of market dominant position, auto parts and after sale maintenance service in the automobile sector.

Responsible person of the Price Supervision and Anti-monopoly Bureau of the NDRC introduced that under the context of the government streamlining administration and delegating power to the lower levels but also strengthening the regulation of the market, the Anti-monopoly Guideline of the automobile sector will provide clearer guidance and reasonable expectations to undertakings, which will help them actively observe the Anti-monopoly Law("the AML") and promote effective competition in China's automobile market. Furthermore, the Anti-monopoly Guideline will raise the transparency of enforcement, and protect the right of defense of the investigated enterprises.
In terms of work procedure, it is understood that the NDRC in the next step will consign the relevant parties to conduct targeted subject study, and try to form the preliminary draft of the Anti-monopoly Guideline within one year on such basis.

The officials of the Price Supervision and Anti-Monopoly Bureau pointed out that considering the long industry chain of the automobile market, the various different stakeholders as well as the complicated and changeable various types of horizontal and vertical competitive behaviors, etc., the final issuance of the Anti-monopoly Guideline might take a long time.

It is also understood that the study and drafting of the Anti-monopoly Guideline will be open. After the preliminary draft is formed, the NDRC will widely solicit comments from the relevant parties and form a mature draft on the basis of sufficient study and demonstration, before it is approved after the legal procedure and published by the Anti-monopoly Commission of the State Council.

Vice Director of the Price Supervision and Anti-monopoly Bureau of the NDRC, Lu Yanchun said that based on the past enforcement practice as well as the understanding of the current enforcement phase, the study and drafting of the Anti-monopoly Guideline must follow four principles.

The first is to base on native perspective, and proceed from the actual situation. Some countries and regions have explored for a long time in the area of anti-monopoly regulation for the automobile sector before establishing a relatively sophisticated system and publishing the relevant systems and guidelines. Therefore, during the drafting of the Anti-monopoly Guideline, we must fully draw on the mature international experience and practices. At the same time, the legal system of a country must be rooted in the real situation of that country. The anti-monopoly regulation of the automobile sector is of no different.

The second is not to be stuck in the traditional frame but instead to be flexible in terms of writing. Different from laws and regulations, under the current legal framework, the Anti-monopoly Guideline should solve the common issues that exist in the industry, and provide directional or clear guidance in the key areas that are paid the most attention in the industry or common conduct in the industry, so as to give explicit expectations in terms of anti-monopoly behaviors to the enterprises.

The third is to avoid a long and comprehensive draft and should be focused on key issues. Common issues that exist widely in the industry as well as some prospective issues that have great significance to the development of the industry are without doubt the focus of the Anti-monopoly Guideline. Therefore, on the premise of being as comprehensive as possible, the Anti-monopoly Guideline should also have its focus.

The fourth is to have full demonstration and stick to the rule of “time goes behind
quality”. For the automobile sector that needs the regulation urgently, the *Anti-monopoly Guideline* is urgent to some extent, however, the drafting process of the *Anti-monopoly Guideline* should be a process of fully demonstration and wide solicitation of opinions. Therefore, the enactment of the *Anti-monopoly Guideline* should be as discreet as possible, and should effectively allow the government agencies, judicial authorities, enterprises, associations and experts to exercise their initiatives, and on the basis of full demonstration and wide solicitation of opinions, strike for a common view to the full extent.

"Tricks Played" in the Reduction of Prices after the Anti-monopoly

From early last year, a series of investigations conducted by the relevant authorities in the automobile sector no doubt provided analyzable samples for the enactment of the *Anti-monopoly Guideline*.

It is understood that from early 2014, the NDRC has conducted deep investigation into the anti-monopoly of the automobile sector. The investigation has involved domestic and foreign automakers, upstream suppliers and authorized dealers. The NDRC has determined that several undertakings constitute monopolistic behaviors and it has made penalty decisions according to the law. The reason why these companies receive anti-monopoly penalties in China is the maintenance of price.

Director of the Price Supervision and Anti-monopoly Bureau, Zhang Handong pointed out that the anti-monopoly in the automobile sector would be the key target of enforcement in the future. At the same time when the enforcement authority focuses on finished automobile dealers, it will also increase the research and enforcement work in the aftermarket, especially those distribution of spare parts that directly impact the price of the after sale service fee of automobiles as well as areas including the information disclosure of maintenance technology.

According to the analysis of the experts, the monopolistic behaviors in the automobile sector include: maintenance of the price of finished automobiles, spare parts and after service, as well as maintenance of the resale price of finished automobiles and spare parts or limitation to exclusive use of original spare parts. Other than that, some automobile enterprises also collaborate with each other forming unions and viciously raise the relevant prices and harm the interests of the consumers. It is because of such reasons that the market price of the Chinese automobile products has been maintained at a high level.

According to a responsible person of the Insurance Association of China said that after the enforcement authority wrote up tickets to some enterprises, various enterprises reduced the prices of their products. However, after inspection, it is found out that the price reduction mainly applies to products with high price and low loss rate, while for lamps and front guards that are closely related to the consumers with
high replacement frequency, some even increased the price, causing the consumers to feel less clear about the reduction of the prices of spare parts. “Even though some brands lowered the price of engines and gearboxes, their replacement frequency is only 0.0153%, which means such spare parts are rarely replaced. While for front guards and lamps that are more frequently not working and replaced with a replacement frequency of 6.2755%, very few brands reduced the prices.”

Thus, Lu Yanchun pointed out that neither penalty nor reduction of price is the purpose of the anti-monopoly enforcement of the automobile sector. The purpose is, through the anti-monopoly enforcement, to promote effective competition on the automobile market, correct market failure and return to the reasonable level of price adjustment by supply and demand. “With the increase of the degree of enforcement, there has been louder and louder voice to enact specific enforcement standards in the automobile sector and to establish common guidance on the industry compliance. No matter from the perspective of improving the system or of enforcement practice, making an Anti-monopoly Guideline in the automobile sector may not only improve the complementary system and refine the relevant provisions, but also provide clearer expectations to the undertakings in the market.”

SAIC Held the Fifth Session of Training Class for Expertise Talent of Anti-Monopoly and Anti-Unfair Competition Enforcement

June 5, 2015

The fifth session of training class for expertise talent of anti-monopoly and anti-unfair competition enforcement held by the national industrial and commercial system began on May 28th.

It is introduced that the training lasts for 21 days and is mainly focused on the enforcement backbone personnel in the competition law enforcement in economical review & case handling departments of industrial and commercial agencies of each province, autonomous region, direct-controlled municipality, city with independent planning and vice-provincial city. The purpose is to cultivate leading talents skilled at handling complicated cases and new and hot issues in the anti-monopoly and anti-unfair competition enforcement.

This training session is very compact. It added training in terms of striking pyramid marketing and regulating direct selling besides the regular training of relevant anti-monopoly and anti-unfair competition. During the training period, two international seminars, i.e. the IP protection in anti-unfair competition seminar
between China and Europe as well as the investigation skills seminar on vertical agreements between China and the US have been held.

The content of the training courses paid attention to the combination of theory and practice. Not only include the resolution with respect to new problems regarding market supervision such as direct selling mode and its system of compensation, pyramid marketing prevention and psychology treatment, but also, it contains case study in relation to the anti-monopoly enforcement at the basic level, public enterprises competition restriction, false propaganda, “false famous brand” and commercial bribe etc. The course tutors were from various areas, including outstanding enforcement staff from industrial & commercial system, market supervision departments of Shanghai, Liaoning, Neimenggu, Hebei, Jiangsu, and Guangdong etc, judges from Supreme People’s Court, Intellectual Property Court of Beijing, experts from Economic Crime Investigation Department of the Ministry of Public Security as well as the scholars of universities including Shanghai Jiao Tong University, Tsinghua University, China University of Political Science and Law and Central University of Finance and Economics.

The students attending this training got more tasks of researching topics than the former 4 sessions. Students took part in the discussions of 7 topics involving 4 issues, including supervision of direct selling, striking the pyramid marketing, anti-monopoly and anti-unfair competition. Those discussions will be focused on the current hotspots and new areas including the competition restriction of automobile, medicine areas etc. excluding and restricting competition by abusing intellectual property, overcharging of undertakings with certain dominant position, and unfair competition in the internet etc.

Previously, the State Administration of Industry and Commerce has held 4 sessions of training class for expertise talent of anti-monopoly and anti-unfair competition, and has discovered and cultivated a series of backbone force for provincial industrial & commercial units and enforcement frontline of basic level departments. This session is extended and deepen based on the abundant achievements of the former 4 sessions and will lay intention on resolving the significant problems in the enforcement, and combine the theoretical study and practical application, then actually enhance the ability of study, research, innovation and dealing with the real problems for the students.

**NDRC Officially Lead to Draft Guideline on Anti-Monopoly Regulation of the Abuse of Intellectual Property**

June 4, 2015
China will strongly regulate the behaviors of “patent troll” of technology intensive enterprises. It is known that the Price Supervision and Anti-Monopoly Bureau of the National Development and Reform Commission (“NDRC”) has held a preparatory meeting and officially started the research and draft work of the *Guideline on Anti-Monopoly Regulation of the Abuse of Intellectual Property* (the “Guideline”).

It is reported that the Guideline will detail the relevant provisions of Anti-Monopoly Law in terms of behaviors related to Intellectual Property (“IP”) including monopoly agreements, abuse of the dominant market position and concentration of undertakings. The Guideline will particularly provide detailed guidance in relation to on what conditions the exemption can be applied.

Experts stated that the drafting and issuance of the Guideline will make substantial impacts on IP behaviors as well as the product and service sales behaviors in the areas of information and communication, medicine etc.

Technology-intensive industries (including information and telecommunication, medicine, medical apparatus and instruments, automobile, agricultural machinery, seed industry etc.) are high incidence area for IP monopoly. Both IDC case and Qualcomm case handled by the NDRC and the anti-monopoly investigation to Microsoft of State Administration of Industry and Commerce (“SAIC”) were relevant to the abuse of IP, thus enhancing the anti-monopoly enforcement on those industries has become a trend.

“Even though patent right has important promotion effects on the flourish and development of technology, however, if let it become the tools for patent holders to snatch monopoly interests, the so called ‘patent troll’ would spread all around and become the stumbling block of technological progress and industrial development. At the same time, improper or excessive anti-monopoly law enforcement will possibly strike the innovation and results in the lack of research and development.” Certain officials from Price Supervision and Anti-Monopoly Bureau of the NDRC pointed out that with respect to the anti-monopoly law enforcement in IP area, keeping balance between IP and anti-monopoly is the key point.

In April, 2015, the SAIC issued the *Provision on Prohibiting the Abuse of Intellectual Property to Exclude and Restrict Competition* which regulates the non-price agreements and the abuse of dominant market position conducted by the exercise of IP. Shi Jianzhong, Professor in China University of Political Science and Law anticipated that the Guideline drafted leaded by the NDRC is expected to make detailed provisions to the top three monopoly acts related to IP, including price and non-price monopoly agreements, the abuse of dominant market position and the concentration of undertakings, especially make specific guideline on which conditions the exemption can be applied according to Article 15 of the AML, and on which conditions it may be identified to possess the “justification” requested by Article 17,
in order to reduce the discretion space of enforcement agencies and decrease the companies’ compliance costs.

It is known that the NDRC will authorize relevant organizations to carry out targeted subject study and based on which constitute a preliminary draft in the next stage of the working procedure. After that, the NDRC will widely solicit opinions of relevant parties and make a further draft in accordance with full research and demonstration. Finally, the NDRC will solicit public comments subject to the legal procedure and after the Guideline was passed via discussion, the Anti-Monopoly Committee of State Council will publish it. For how to draft the Guideline, Lu Yanchun, vice-director of Price Supervision and Anti-Monopoly Bureau of the NDRC said there are four aspects of relationships which needs to be balanced: the relationship of the background of domestic situations and the reference to global advanced experiences, the relationship of the stability of rules and the flexibility of system, the relationship of problem-orientated and moderate foresight and the relationship of fully consummating the rules and doing moderate selecting.

In terms of how to deal with the relationship of the background of the domestic situations and the reference to global advanced experiences, Su Hua, associate researcher of Institute of American Studies of Chinese Academy of Social Sciences said that, the US and EU has implemented anti-monopoly law for years and when regulating the abuse of IP to restrict competition, the rule of reason used by the US and the “prohibition plus exemption mode” used by EU are continuously modified and developed in practice, which is a worthy reference for China.

On April 28th, Korean Fair Trade Commission revealed they are investigating the Oracle Corporation to find out whether the company’s bundling new software in maintain agreements is anti competition act. Korean supervision organization stated that the Oracle Corporation also asked clients to pay maintain fee for all the Oracle software being used instead of letting clients choose which software to get the maintain service.

Meanwhile, anti-monopoly private litigation is also notable. On May 7th, California High Court overturned the determination of rejecting the lawsuit made by inferior court. The High Court started the group lawsuit procedure of the reverse payment agreement which Bayer Corporation, the Germany pharmacy giant, reached in terms of its Cipro antibiotic drugs. The agreement provided that Bayer would pay 398 million dollar to Barr Laboratories who agreed to postpone the launch of Cipro’s generic drug it developed. According to a determination of Federal Supreme Court made in 2013, the reverse payment agreement reached between the company of brand-name drug and the company of generic drug in order to reconcile patent lawsuits may violate antitrust law. The Court said that the American consumer group, the plaintiff, should prove the reverse payment agreement is not only to avoid the patent lawsuit cost between Bayer and Barr, but also to postpone the generic drug to
It is understood that the “patent troll” of the above multinational enterprises has similar situation in China, for example, in the respect of abusing of patent rights, there are complaints successively that the pricing of patent drugs and the entity owing patent rights in the telecommunication industry are alleged to be monopoly behavior. To this end, competent departments are researching.

Directorate General of Ministry of Commerce’s Anti-monopoly Bureau Visits Canada and America to Promote Antitrust Communication

May 27, 2015

From 14th to 20th May, 2015, Directorate General of Antimonopoly Bureau, Shang Ming, led a delegation to Canada and America to communicate the antitrust work. During the visit in Canada, DG Shang signed the Memorandum of Understanding between the Ministry of Commerce of the People’s Republic of China and Canadain Competition Bureau, and conducted communication re antitrust work. During the visit in America, the delegation held meetings with Department of Justice and Federal Trade Commission. This visit further enhanced the cooperation with Canada and America’s antitrust agencies and obtained good result.
Shanghai Jiaotong University held the 3rd Antitrust Youth Academic Salon

June 12, 2015

On 10th of June, the 3rd Antitrust Youth Academic Salon was held in 205 Conference Room of KoGuan law school of Shanghai Jiaotong University. The topic of the Salon is “Administrative Power and Antitrust regulation”. The deputy director of the Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission (“NDRC”), Zhou Zhigao, and the lecturer of the Economic Law School of the East China University of Political Science and Law, Dr. Zhai Wei, delivered the keynote speech respectively. The Salon invited the director of Shanghai price supervision and anti-monopoly bureau antitrust investigations office, Ma Jing; the vice professor of Shanghai Jiaotong University’s KoGuan law school, He Yuan; the vice professor, Hou Liyang; and the PhD candidate, Ren Limin; as the commentators. Wang Xianlin, the professor of KoGuan Law School, teacher Shang Lina and the students of the law school presented the Salon. The Salon is hosted by Professor Li Jian.

Zhou Zhigao delivered a presentation named “an analysis re administrative monopoly enforcement”. Based on the analysis on the rules in relation to administrative monopoly in the Antimonopoly Law and his years of practice experience, Mr. Zhou described the three administrative monopoly cases detailed in the recent two years dealt with by the NDRC: Hebei Transport Department administrative monopoly case; Shandong Transport Department administrative monopoly case; and Yunnan Communications Administration administrative monopoly case. In addition to analyzing the cases, he raised the questions in relation to assessing the conduct of abusing administrative power to eliminate and restrict competition and how to establish an ex-ante preventing mechanism.

Based on his dissertation, Zhai Wei delivered the presentation named “State regulation towards the anti-competitive activities in the field of EU public enterprises”. He firstly distinguished the states’ anticompetitive activities and administrative monopoly, pointing out that the extension of the former is wider. He also explained the EU Courts’ theory of auxiliary (Azkessoriatatsthese) and the content of regulating the anticompetitive activities conducted by the ancillary countries. At last, the presentation indicated the EU approach’s value for supervising Chinese administrative monopoly.
At the end of the presentation, four commentators provided their opinions in accordance with the above topics. Ma Jing praised the guiding and encouraging value of the NDRC’s cases to the local authorities. He also expressed the opinions in respect of Shandong Transport Department administrative monopoly case and other cases. He Yuan, on the other hand, provided his own opinions towards abuse of administrative power and distorting competition from the perspective of administrative law. He pointed out that there is a trend in judicial practices when assessing abuse of administrative power, i.e. it requires the administrative agencies’ conduct should have significant effect on eliminating or restricting competition. Hou Liyang said, when dealing with the relationship between the antitrust authorities and other administrative agencies, we can refer to EU approach. At the same time, under the structure of Legislation Law, Hou raised his own opinion on whether the specific administrative activities conducted by the antitrust agencies are able to cope with the abstract administrative activities conducted by other administrative agencies. Ren Limin gave his opinions in respect of the relations between the supervision agencies and antitrust enforcement agencies generated by industry supervision and government subsidies.

Against the comments, two presenters responded the questions which have been mentioned frequently, such as how to solve the conflicts among different administrative agencies and the questions related to government subsidies. In the end of the Salon, Professor Wang Xianlin issued Certificate to the two speakers on behalf of the Competition Law and Policy Research Centre of Shanghai Jiaotong University. The whole Salon lasted for two and a half hours, the content and communication were sufficient. This Salon gave a perfect end to the antitrust youth academic salons in this semester.
The Anti-Monopoly Case of Telecommunications in Ningxia Province is Settled, Three Operators Committed to Unbundle

June 10, 2015

After about two years, the anti-monopoly case of telecom operators in Ningxia province finally comes to an end.

On May 14, the Industrial and Commercial Bureau of Ningxia Hui Autonomous Region issued a suspension decision on the anti-monopoly case, determining to suspend the anti-monopoly investigation on three companies-China TieTong Telecom Branch of Ningxia, China Unicom Branch of Ningxia and China Telecom Branch of Ningxia. Meanwhile it authorized the Market Supervisory Bureau of Yinchuan City, Industrial and Commercial Bureau of Development Area of Yinchuan City and Industrial and Commercial Bureau of Ningdong to supervise on the performance of three companies’ commitments.

The three companies involved in this case made three rectification commitments: Firstly, carry out a company-wide self-examination and self-correction work to stop the behavior of tie-in sales; secondly, use news media such as newspapers to publish commitments for users to choose commodities (services) autonomously and strengthen propaganda by using channels such as business hall, customer service center, etc.; thirdly, if the users who were forced to buy fixed-line telephone by tie-in sales require to cancel fixed-line telephone service, all business halls of the company have to provide the service accordingly.

According to the introduction of relevant officials of the Market Supervisory Bureau of Yinchuan City, currently all market supervisory bureau stations of Yinchuan City have been arranged to emphasize on the supervision of business outlets in their respect districts. If the users who were forced to buy fixed-line telephone by tie-in sales requiring to cancel the fixed-line telephone service, three companies have to provide the service accordingly; If they refuse, citizens can complain to the Market Supervisory Bureau.

Telecom industry is prone to produce monopoly
A few years ago, consumers in many regions reflected that telecom operators in some provinces of China also conducted tie-in sales behavior of bundling fixed-line telephone during their broadband installation business.

In June 2013, the Industrial and Commercial Bureau of the Ningxia Hui Autonomous Region, authorized by the State Administration for Industry and Commerce (“SAIC”), carried out an investigation in respect to a suspected bundling behavior of China TieTong Telecom Branch of Ningxia, China Unicom Branch of Ningxia and China Telecom Branch of Ningxia abusing their dominant market position respectively.

During the investigation, the three companies admitted that they conducted tie-in sales behavior of bundling fixed-line telephone during their operating activity of landline internet. They realized that their behavior deprived consumers of option, producing adverse effect on market competition, they committed to rectify.

Professor Shi Jianzhong of China University of Political Science and Law, an expert of consultative expert group of the Anti-monopoly Commission of the State Council, said that “The fact that the telecom industry is prone to produce monopoly has something to do with the market structure in the telecom industry. Communications industry in essence is not a market with perfect competition. There are only three institutions in our country (On May 23, 2008, China TieTong Telecommunications Corporation was formally incorporated into China Mobile Communications Corporation, becoming a wholly-owned subsidiary of the latter, they maintain a relatively independent operation), presenting a market structure of monopoly.

Shi Jianzhong suggested that given that communications industry itself has a market structure of monopoly, industry regulatory authorities as well as anti-monopoly enforcement authorities should regard this industry as their focus.

**Anti-monopoly law enforcement pressuring on telecom operators**

Data shows that until August 2014 the number of undertakings’ concentration declaration case only “passively” accepted and examined by the Ministry of Commerce (“MOFCOM”) is around 860.

Industry experts point out that looking back on the past time of more than six years since the implementation of the Anti-Monopoly Law, domestic anti-monopoly law enforcement efforts have been continuously increased, the enforcement scope has been gradually expanded, and its deterrent power has gradually increased.

Since the first anti-monopoly punishment was issued in 2011, the biggest penal sum has been refreshed for many times.
On February 2013, Maotai was fined RMB 247 million Yuan for its “price monopoly”, Wuliangye was fined RMB 202 million Yuan. This is the first vertical anti-monopoly case investigated by the National Development and Reform Commission (“NDRC”) since the implementation of the Anti-Monopoly Law. 449 million Yuan had also been the biggest ticket since the beginning of history.

On August 20, 2014, the NDRC announced that 12 Japanese auto parts and bearing enterprises were fined RMB 1.235 billion Yuan, refreshing the above record.

In February 2015, the US Qualcomm Incorporated was fined RMB 6.088 billion Yuan for its monopoly behavior and was ordered to make rectification, became the biggest anti-monopoly ticket in China so far.

“Looking back on the power of Chinese antitrust enforcement agencies on monopoly behavior in recent years, after a dormancy period, it truly starts to ‘show its power’ in recent two years, and illustrated a trend of rapid development and fining out” Xiang Ligang said.

Experts predict that strong anti-monopoly law enforcement phenomenon will become “normalized” in the future.

Statistics show that currently anti-monopoly investigations include different markets, involving pharmaceuticals, cement, insurance, LCD panel, white spirit etc.

From the point of view of Xiang Ligang, although telecom operators in China have a nature of natural monopoly, their internal competition is still fierce. For domestic telecom operators, State-owned Assets Supervision and Administration Commission is not only the contributor but also a crazy regulator at the same time. It not only has requirements of revenue and profit for three telecom operators but also has market share examination for them. The total market share target for three telecom operators in some regions is even up to 120%. Under such high pressure, some operators adopt the “hit the target or leave” policy. Telecom operators on the one hand need to preserve or increase the value, on the other hand, they also need to face ever-increasing anti-monopoly supervision, their pressure can be imagined.

**Monopoly law enforcement and legislation need to be improved**

From the point of view of Xiang Ligang, “most monopoly behaviors are discovered through report”, in this case the Industrial and Commercial Bureau of the Ningxia Hui Autonomous Region, authorized by the NDRC, “initiatively” carried out an anti-monopoly investigation on three operators in Ningxia, is relatively rare.

Wang Junlin, director of anti-monopoly and anti-unfair competition specialized committee of Yingke Law Firm, considers that this has something to do with the
“water control by three dragons” structure currently used in anti-monopoly law enforcement. Wang Junlin said that “according to the division of function of the three law enforcement agencies (the NDRC, the SAIC and MOFCOM), the NDRC is mainly responsible for the investigation on monopoly behaviors related to price, the SAIC is mainly responsible for the investigation on monopoly behaviors not involving price, MOFCOM is mainly responsible for the examination on undertakings’ concentration declaration.”

Wang Junlin pointed out that “the drawback of this structure is that it is to the disadvantage of centralization of anti-monopoly law enforcement, especially it goes against the centralization of various superior resources of law enforcement authorities. For example, human resources are so disperse that law enforcement efforts are insufficient and reaction speed is slow. Meanwhile, this structure leads to the natural boundary line of many cases which is inconsistent with artificial boundary line considered by law enforcement authorities, causing many problems such as law enforcement boundary is vague, mutually making excuses or fighting for law enforcement power etc., it is imperative that the three agencies will be united”.

Shi Jianzhong considered that “the legislation of anti-monopoly law in China is relatively late, we do not have anti-monopoly law in the past. We have less awareness over this issue for a long time”. Wang Junlin also expressed that “we have a long way to go for competition culture cultivation in our country.”

This also has something to do with legislative features of anti-monopoly law in our country.

Reng Airong, director of Anti-monopoly and Anti-unfair Competition Law Enforcement Bureau of the SAIC expressed in one press conference that some provisions in the Anti-Monopoly Law are too general, while specific law enforcement situations in practice are complex. relevant regulations or guidelines are needed to formulate and clarify the boundary between the justifiable conducts of exercising rights and abusive behavior which eliminates and restricts competition, to better guide anti-monopoly law enforcement practice and increase operators’ expectedness of their own operating activities.

Yunnan Communications Administration Abused the Administrative Power to Eliminate and Restrict Competition, and was rectified by law

June 3, 2015
In 2014, during an investigation launched by Yunnan Provincial Branch of the NDRC ("Yunnan NDRC") against a pricing agreement monopoly case, it is found that Yunnan Communications Administration ("YNCA") was suspected of violating the AML. Regarding to abuse of administrative power to eliminate or restrict competition, YNCA organized several telecom operators to reach the price monopoly agreement to eliminate and restrict competition. Therefore, Yunnan NDRC initialed the investigation in guidance with NDRC.

The investigation revealed that from August to October 2009, YNCA organized many meetings between the Yunnan branches of China Mobile Communications, China Telecom, China Unicom and China TieTong. In the end of 2009, the four telecom operators signed the agreement on Specifications of All Kinds of free Promotion of Yunnan telecom operating companies ("agreement"), which set the content, amount and frequency (and so on) of free promotion, including prohibiting the companies from free promotion by means of “no deposit”, “no guaranteed consumption” and “no time limit on web” and so on. The value of free Telecommunication products is not allowed higher than the 60% of total commitment of the consumption in period, and the free products out of telecommunication should not be higher than 30% of total commitment of the consumption in period. The offer for the same user can be no more than twice a year (including twice). The consumption value and the ratio of the integral value is less than 1:1, and the ratio of the integral value and the value of exchange service shall not exceed the 1: 0.05 in the integral feedback scheme made by telecom operators.

The agreement also stipulates that the relevant implementation measures. For the behaviors of telecom operators violating the agreement, others could report to YNCA. YNCA will issue a rectification notice after confirmation to order the relevant operator to carry out rectification. In June of 2011, YNCA held the first meeting of standardizing the order of telecommunications market, and further refine the process on the solution. “The county and municipal branch of telecom operators should take the initiative to inform the party in the form of correspondence once the irregularities were found, both sides shall negotiate with each other to solve, once failed, the discovering party shall submit to the superior coordinate municipal branch”, “If still cannot solve then the case should submit to the provincial company, if failed, finally it should be submitted to the YNCA in accordance with the law.”

The four telecom operators are the major operators of telecom market and are direct competitors. As an important means of competing, various telecom operators in the market provided customers with free telephone charge, prepaid card and others which directly affect the final price of products. YNCA led four telecom operators to reach an agreement on scope, amount, and frequency (and so on) of the free promotion, and to enforce it by force through the means of rectification notice, which limit the competition ability and means of the telecom operators. At the same time, YNCA ruled for dispute resolution, requesting the telecom operators (in competitive
relationship) step by step coordinate and try to reach an agreement once the dispute appeared in free promotion, which is essentially required telecoms operators to reach a monopoly agreement on relevant issues, and eliminate and restrict the market competition. Thus, the behavior violated Article 8 of the AML, which provides that administrative departments or organizations authorized by laws or regulations to perform the function of administering public affairs may not abuse their administrative power to eliminate or restrict competition. And the above belongs to the behaviors in Article 36, to compel undertakings to engage in monopolistic conducts that are prohibited by this Law.

At present, Yunnan NDRC has urged YNCA for the rectification, stopping the related practices and the market competition order has returned to fair. The NDRC also had a communication with the MIIT. The MIIT will guide the administration of the provinces, autonomous regions and municipalities directly under the central government communication to strengthen the learning of the AML and other laws and regulations, in order to improve the ability of administration according to law, to clean up the similar behavior specification under its jurisdiction.

Meanwhile, Yunnan NDRC imposed the punishment on the four telecom operators involved in the monopoly agreement. Yunnan branch of China Mobile, China Telecom and China Unicom were respectively imposed a fine of 2% of the revenue in the relevant market of the previous year. And Yunnan branch of China TieTong was imposed a fine of RMB 200,000 Yuan. Total Fines is about RMB 13.18 million Yuan.
FOCUS

Supposed Conspiracy of China Mobile, China Unicom and China Telecom for Monopoly

June 23, 2015

Under widespread condemnation and the Premier’s urging, the three major operators eventually took measures for speed-raising and price-cutting. However, the real effect is not as beneficial as the measures are claimed to be, and thereby received even more criticisms. The fundamental cause is the reality of three major telecommunication operators’ “conspiracy” for monopoly and the vast amount of profit are divided by the three. There is a high threshold for private capital to enter into the industry, while the three state-owned operators’ lack of innovation and dynamic leads to high service price that is difficult to reduce. There are more voices for accelerating the marketization of the telecommunication industry.

Current Situation: High Price that is Unable to Decline

In this round of speed-raising and price-cutting measures, the price, in fact, cut was limited, and the tricks of 4G mobile data volume resulted in consumers’ strong disapproval.

Lately, China Unicom announced in Beijing that an overall speed-raising action will be initiated since May 17 (World Telecommunications Day), the network speed will raise at least 110% and the annual fee of single-item household broadband declined 40%. Nearly at the same time, China Mobile also initiated similar actions and reduced the annual fee of 100M broadband to no more than 2000RMB. However, it is worth noticing that, according to China Unicom and China Mobile’s financial statements, the fixed broadband business only accounts for around 20% of the total revenues, and 40% down of that business amounts to but “a small loss” to them.

Supposing they are really facing “a small loss” in fixed broadband business, they have showed no intention, not to mention any action, in facing “any loss” in the mobile broadband business where consumers have more urgent needs. China Mobile, with minority fixed broadband users, have launched eight price-cutting measures in mobile broadband business, including nighttime data volume package, holiday data volume package, 4G data volume card, etc. Remarkably, China Telecom published beneficial measures as well, such as oriented data volume and idle-time data volume. However,
Consumers complained that: “Nighttime Data Volume, they must be kidding! There is little demand for nighttime network, and at that time, people mostly use Wi-Fi at home. What’s more, those idle-time data volume and 4G data volume card are nothing new, making no change comparing with before, so the operators showed no sincerity.

**Issues: Conspiracy for Monopoly**

High service prices and low network speed did have historical elements, but the telecommunication industry has long been controlled by the three state-owned enterprises (China Mobile, China Unicom and China Telecom), which divided the large amount of profits of the industry, whether in fixed broadband or mobile broadband market.

It is worth mentioning that, according to the Ministry of Industry and Information Technology (“MIIT”)’s statistics and operators’ announcements, international roaming fees brought about tens of billions of revenues for the operators. They claimed having reduced the fee many times, but the users did not experienced significantly. As an increasing number of people are travelling abroad, such issues remain a pain point that is hard to resolve.

Regarding those criticisms, the operators seem to have their own complaints. Some insider said: “Although the operators are all state-owned, those three have fierce competition with one another, to a degree no less than other industries.”

In addition, with respect to the fixed broadband, the important technology upgrading of speed-raising – fiber-to-home often faced the difficulty of “the last one km”, i.e., many real estate management or developers restrained the operators from entry. The above insider revealed that the estate management had many forms of claiming “entry fees”, some of which are lump sum, some called single-unit coordinating fee, some in name of construction deposit. In some communities, fees are collected in ratio instead of a specific amount, and there are some asking the operators to raise money to improve the infrastructures of the neighborhood.

More importantly, the internet OTT businesses, such as WeChat, are becoming popular, which have largely occupied the markets of voice and text message businesses. The operators suffered from the impact and are confronted with the task of transition to the operation of data volume.

In sum, the long-term deformed development of domestic telecommunication industry makes the operators splitting apart, i.e., the “upper part” of them is in the market fighting to blood, but the lower part is the state-owned root, and the key issue is that...
the monopoly in the industry has never ended.

**Tendency: Private Capital Unlocking**

Having been condemned for years, the operators need to solve the conflicts with consumers. The only approach may be to promote the marketization of domestic telecommunication industry, and there are more voices for accelerating the marketization from the industry.

The State Council has issued the *Guidance on Acceleration of High-Speed Broadband Network Construction and Promotion of Broadband Speed-Raising and Telecommunication Price-Cutting*, and 14 specific guidelines are raised accordingly. For realizing those goals, there will be a total of 1.13 trillion RMB of investment in network construction in the next three years. The insider believes the speed-raising and price-cutting both depend on investment in network construction, and the trillion RMB of investment will create a huge opportunity for private capital.

Starting from early the past year, the MIIT has approved pilot licenses to over 40 private enterprises for mobile resale business, which was deemed as the icebreaking of marketization of mobile broadband. However, the vice-chairman of CACE and chairman of virtual operation branch Miao Jianhua recently revealed that, as of May this year, domestic virtual operators have developed 6 million users and the operators who have opened operation resale business are 21, accounting for half of the total virtual operators.

However, according to the survey, the 6 million users account for only a very small ratio comparing with the users of the three major operators, and the real situations are overstated as well. The virtual operators are subject to “resale over wholesale” (i.e., the price of virtual operators obtaining wholesale from the three major operators is higher than their own resale price). It is difficult to establish an effective and clear profiting mode, which means the virtual operators are facing survival problems in the telecommunication market, not to mention the ability to compete with the three major operators.

Therefore, the marketization of domestic telecommunication industry will be a long-term process. Undoubtedly, it will proceed with the gradual reduction of telecommunication fees, the private capital’s entry into the market and the diversification of operation of data volume.
Antitrust Punishment does not End: The Next Focus maybe Pharmacy

June 15, 2015

Some mature areas of law enforcement in the United States and other countries and regions, are expected to begin to enter the vision of China's antitrust enforcement.

In early May, together with the National Health and Family Planning Commission, the Ministry of Human Resources and Social Security and Other national authorities, the National Development and Reform Commission (“NDRC”) issued a notice deciding to cancel the government pricing of most drugs since June 1, 2015, improve the mechanism of drug purchase synchronously, strengthen the role of medical insurance in cost control, strengthen the supervision of medical practice and price behavior, and establish a market-oriented pricing mechanism for drugs.

However, many lawyers involved in certain antitrust cases deem that the NDRC have become more cautious now when assessing the acceptance of complaint, compared with that in the year 2013 and 2014.

They consider the Qualcomm case as a significant progress compared with early punishment decisions, but it still needs to be further improved in some respects, such as procedural transparency. In the perspective of a researcher of the NDRC, there are special difficulties for China's anti-monopoly enforcement agency and it takes time to improve gradually. This is because, as a bureau-level law enforcement agency, the transparency of its disclosure materials cannot be significantly ahead of its peer departments.

Due to the worldwide influence of Qualcomm antitrust case, these reflections also begin to trigger the heated discussion synchronously in the international arena.

Liu Jian fully participated in the investigation of Qualcomm antitrust case. In late April, he attended the ABA (American Bar Association) Antitrust Law Spring Conference held in Washington, as the representative of China's anti-monopoly law enforcement agency. In this annual global event, officials from competition authorities of EU, UK, US, OECD (Organization for Economic Cooperation and Development), etc, and lawyers all participated in the discussion and communication. Liu Jian encountered quite a few sharp questions.

Liu Jian said, the purpose of participating in this meeting was to communicate with the international counterparts about the investigation of Qualcomm case. "The main question from the international counterparts focuses on the transparency of procedure and the lack of analysis. Except one counterpart referred to the technical problem of
excessive pricing, others did not raise any substantial question." he explained.

In response to "the theory of steak", Liu Jian asked in return that China's anti-monopoly law enforcement agency was not a baby without the ability to act, why not regarded it as a thriving juvenile? In addition, the law enforcement of abusing intellectual property rights was absolutely not as complicated as to the point of untouchable.

In the view of an unnamed senior lawyer in the field of American Intellectual Property, the comments from the institutions in Europe and America mentioned above were unfair. He thought the multinational patent giants would be restrained therefore.

Besides the technical discussion, the mind behind some question is pretty complex. In the perspective of these counterparts from the United States and Europe, the initial consideration of China is to establish the Anti-Monopoly Law relates to the accession to the WTO. As young as the China's law enforcement agency is, it has already started to chew hard bones like Qualcomm.

The United States is the birthplace of anti-monopoly law, on July 2, 1890, the Federal Congress of the US adopted the Protection of trade and commerce to avoid illegal restrictions and monopoly Act, simplified as the Sherman Act. On this basis, the United States established a series of theories, the legal basis, and international trade order, followed by the Europe, who established its own judicial system of antitrust.

The other side of the coin is that the US has already actively formulated relevant detailed guidelines for antitrust in the field of intellectual property. It is understood that the US Department of Justice is indeed currently formulating the international standards crossed by the Standard Essential Patent and Antitrust. At the same time, physical method and penalty decision to assess the effect of restricting competition of the same method adopted by the US Department of Justice may affect the judgment in this area in other countries including China in the future.

In accordance with the researcher of the NDRC above, who has faced a similar situation, the question Liu Jian faced with is very normal. "I understand the accusation from Europe and America because it affected their interests", the scholar who has just returned from the conference held in Geneva said.

Legal expert, Xu Mingyan from Competition and Consumer Protection Division of the United Nations Conference on Trade and Development, further explained that, large multi-national corporation is at the high-end of international industrial chain, while post-developing countries are at the low-end. Now these high-end companies mainly produce intellectual properties and take charge of high profits from post-developing countries. As a result, the allocation of added value of international trade output between the developed countries and the developing countries is unfair;
worse still, this unfairness affects the sustainability of global economics’ development.

Although Qualcomm antitrust fines have been imposed for months, a sense of powerlessness also begins to emerge among some Chinese enforcers.

“It is overriding important for enterprises to enhance their own competitiveness while antitrust only is only for tinkering.” A number of core members who have gone through the entire process of Qualcomm case sighed that the protection of intellectual property monopoly is universal, intellectual property antitrust (abuse of intellectual property rights) was just an exception.

In their view, the deeper problems, whether in the field of telecommunication or medicine, are actually beyond the capability of the antitrust law enforcement.

**Dongfeng Nissan will Become the Fifth Car Company Penalized for Antitrust**

May 28, 2015

After the issuance of Mercedes Benz's antitrust fines, the mystery of "Who is the next one" is slowly emerging.

“Antitrust investigation and penalty for Dongfeng Nissan have entered into the final stage.” It is reported that in September last year, the law enforcement agency of the NDRC initiated an investigation for Dongfeng Nissan and the penalty result is likely to be released in the near future. This also means the Sino-Japanese joint venture may be the fifth car brand to be penalized because of monopolistic behavior, following the Mercedes and other manufacturers.

Last September, in the antitrust investigation press conference, the NDRC disclosed the antitrust penalty notice of Chrysler, Audi, and confirmed that it had initiated the investigation towards Mercedes-Benz and the other Japanese car company in Guangdong Province at the same time. This "Japanese car company in Guangdong" was then referring to Dongfeng Nissan.

Within nine months from August 2014 to May 2015, there have been BMW, Audi, Chrysler and Mercedes-Benz four car manufacturers, their distributors and twelve Japanese auto parts enterprises, including Sumitomo, Denso, etc being imposed penalty one after another by antitrust law enforcement agencies.

According to statistics, during the nine months, the total amount of the car industry...
antitrust fines is up to 1.658 billion Yuan. The penalty of Nissan case that will soon emerge has not been officially disclosed.

In fact, it is understood, early in 2011 Dongfeng Nissan was sued for monopoly management of auto parts. It is an owner of Teana car from Changsha City that sends Dongfeng Nissan to the court for the reason of a car lock.

**Highly priced accessories and bundled service are the unspoken rule in the field of automobile field.**

"In June 2009, I bought a car of Teana, in October 2010 I went to Huayuan 4S shop for repair because the left front door lock was damaged. I was told by the staff of the defendant 4S shop that the time charge of repair was 300 Yuan, so I proposed to buy accessories and repair by myself. But the staff of Huayuan refused and stressed the policy formulated by Dongfeng Nissan that it does not sale the accessories externally from Dongfeng Nissan 4S stores and it was impossible to buy accessories of Dongfeng Nissan series in the entire market." Liu Dahua stated in the trial then.

And then Liu Dahua was forced to pay 607 Yuan (including parts cost 307 Yuan, maintenance cost 300 Yuan) to replace the "small parts."

Later he found out that the price of accessories provided by the defendant was much higher than three times than the market price of the same type, and maintenance cost actually was far more than 7 times the market price.

In view of Liu Dahua, Dongfeng Nissan’s behaviors of abusing its dominant market position, formulating monopoly policy, excluding competitors together with other 4S shops, squeezing high profits, etc, belonged to Monopolistic behavior.

However, in the process of trial at the Intermediate People's Court in Changsha, the court considered that the plaintiff failed to effectively prove the existence of dominant market position of the defendant, and Liu Dahua lost the lawsuit.

The controversial behaviors in the Dongfeng Nissan case is selling accessories with excessive price and bundling the maintenance service. Such behaviors are essentially caused by vertical restraints on the supply of original accessories by car manufacturers and 4S shops.

And assuming that similar behaviors occurred in the EU, the exclusive supply behavior implemented by car manufacturers will not be exempted for constituting the core restriction expressly prohibited under Article 5 of *Block Exemption for the Vertical Agreement in Auto Industry 2010*. In the view of Su Hua, an associate researcher in Chinese Academy of Social Sciences, she said assuming that the case of Dongfeng Nissan occurs in the EU, “the Liu Dahuas” can report to the European
Commission about the suspected behaviors which may violate competition law. They can also file a private antitrust lawsuit in a Member State court which has jurisdiction for compensation.