

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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AUTHORITY

MOFCOM: in the First Half of 2015, there are 169 Antitrust Cases has been Initiated and Over 90% M&A Case has been Approved without Condition

July 21, 2015

On July 21, the Ministry of Commerce of the People's Republic of China ("MOFCOM") Spokesman Shen Danyang disclosed in the monthly meeting that in the first half, MOFCOM has received 160 concentration of undertakings cases, the year-on-year growth rate is 55%; and initiated 169 cases, the year-on-year growth rate is 46%; and closed the 156 cases, the year-on-year growth rate is 33%.

Shen said, among all of the closed cases, 153 cases were approved without condition, 2 cases were revoked after initiation, and 1 case was withdrawn. Based on this, over 90% of the merger cases were approved without condition.

Shen said, among all of the closed 153 cases, from the perspective of industry, Manufacture industry still occupied the largest proportion, accounting for more than 57%, and mainly related area including automobile and parts, shipping, machine manufacturing, electrical equipment and so on. The merger in industry of finance, communication, agriculture, and transportation was kind of active. The year-on-year rates of cases in industries like electric power industry, fuel gas, wholesale and retail industry has decreased.

From the perspective of transaction pattern, mainly were share acquisition and establishment of a joint venture, totally accounts for 87%. Jointly operation still is the main investment transactions of foreign investors to China.

From the perspective of transaction entities, the year-on-year rate of M&A between domestic enterprises has increased, and the oversea mergers of Chinese enterprises have become the new hotspot.

From the perspective of transaction scale, the transaction amount below RMB 10 billion Yuan accounted for the largest proportion, the total amount is 84%. Of them, there were 29 cases (accounted for 18%) whose transaction amount less than 100 million Yuan, and 57 cases (accounted for 36%) whose transaction amount from 100 million to 1 billion Yuan, as well as 47 cases (accounted for 30%) whose transaction amount from 1 billion to 10 billion Yuan.

The Director General of Price Supervision and Anti-monopoly Bureau of NDRC, Zhang Handong, Met with Commissioner Yamamoto from JFTC

July 20, 2015

On the morning of July 20, Zhang Handong, the director general of Price Supervision and Anti-monopoly Bureau of National Development and Reform Commission (“NDRC”), met with Yamamoto’s team from Japan Fair Trade Commission (“JFTC”). Both sides introduced their antimonopoly law and regulation system, the enforcement procedure and recent development, and confirmed the achievement in cooperation by two sides in the field of competition law. Under the circumstance of internationalization of antimonopoly law, they agreed with further deepening the cooperation and continuing working on the memorandum on communication of antitrust cooperation, and making efforts to sign it as soon as possible.

Price Supervision and Anti-monopoly Bureau of NDRC held the Seminar with the Topic as Strengthen the Fundamental Status of Competition Policy on the Present Stage

July 20, 2015

On the afternoon of July 17, Price Supervision and Anti-monopoly Bureau (“Bureau”) has held a seminar with the topic strengthen the fundamental status of competition policy on the present stage in NDRC. The deputy director general, Li Qing, as the host of the seminar, and the director general, Zhang Handong attended the seminar. Other related officials from Department of Development Planning, General Office, Department of Economic System Reform, Department of High-tech industry, as well as the dean, Wang Changyun and other researchers from the research group of Hanqing Advanced Institute of Economics and Finance (“Hanqing Institute”) of China Renmin University also attended the seminar.

The research group introduced the preliminary results and the further research thought at first. The related departments of NDRC made the comments and suggestions on the research direction and achievement transformation. Wang expressed thanks on the belief and support of NDRCs bureau, and Hanqing Institute will pay highly attention on this research, and give full play to its own multi-disciplinary advantages, make efforts on related works, improve the quality of the research report.

The director general Zhang Handong has put forward clear requirements on the research. Zhang expressed, the purpose of this topic research is to complete the important task assigned by the Party Central Committee and the State Council. The Third plenum of the CPC's 18th Central Committee profoundly pointed out "To make the market plays a decisive role in the allocation of resources". Since this year, the Party Central Committee and the State Council successively issued the documents, clearly raised "To strengthen the competition policy and industrial policy as the guide to innovation", "Speed up the fair competition censorship", and confirmed completion time as the end of the year. These are the rigid requirements to this subject, with the tight time and heavy task, be sure to attach great importance and to advance.

Director general Zhang Handong emphasized that this subject is an important strategic proposition. From the perspective of promoting rule of law, upgrade industries, structural adjustment, the effect of anti-monopoly law enforcement, effectively cope with the current economic downward pressure and so on; competition policy should play a bigger role in China's economic and social development. At the current stage, the historical responsibility that we have to bear is to put competition policy into a higher level. The research group should be fully aware for this and made the deepen research.

Zhang Handong requested that research group should pay attention to practical results, set the solving practical problems as the guidance, and to improve the maneuverability. The research group could promote the research step by step, at present, is to put forward a practical and feasible solution for build a fair competition of censorship, and the final purpose is to study a whole framework of the implementation of competition policy. Under the basis of fully understanding the national conditions, hope research group could absorb foreign relevant experience and practices to provide the reference for establishment of relevant system in our country. Further hope Renmin Univesity will take full advantage of multidisciplinary in area of economy, the science of law and public policy, etc, to feasible ensure the quality and level of the research.

ACADEMIA

The Seminar of Harmonious Development between Antitrust and Intellectual Property Rights' Protection has been Held

July 9, 2015

On 3 July, 2015, The Seminar of Harmonious Development between Antitrust and Intellectual Property Rights' Protection has been Hold in Conference Room 601 of Mingde Building, Renmin University of China. This conference is jointly held by market law regulating centre of China Renmin University and Korean University and Competition Law and Policy Research Centre of Shanghai Jiangtong University. The conference invited many famous experts from the State Administration for Industry and Commerce, China University of Political Science and Law, Chinese Academy of Sciences, China Renmin University and Shanghai Jiaotong University to deliver the speech. Almost a hundred of elites from government, research institutes, universities, law firms and national and foreign companies joined the seminar. They conducted heated discussion on the issues of harmonious development between antitrust and IPR's protection.

The seminar began at 2 pm. Meng Yanbei, the vice professor of China Renmin University, the executive director of market law regulating centre of China Renmin University and Korean University, presided a brief opening ceremony and welcomed the representatives from various fields. Then, the seminar began the speech of the first section. First, Lu wanli, the Deputy Director of Antimonopoly and Anti-unfair Competition Bureau, gave a speech to introduce the background, meaning and content of the *Provisions of the Administrative Authorities for Industry and Commerce on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition(the "Provision")*. Deputy Director Lu gave a clear retrospect approach of the history of the Provision and shared his opinions towards the Provision as the witness. Then, Professor Shi Jianzhong, the vice-principal of China University of Political Science and Law and the member of State Council's Antimonopoly Commission Expert Group, deeply analyzed the relationship between antitrust and the protection of IPR. Professor Shi emphasized that the purpose of enforcing Antimonopoly Law is to prevent and stop anticompetitive behavior rather than eliminating the monopolist. This represented the aim of Antimonopoly Law is to create the environment for innovation, which is consistent with the purpose of IPR protection. This caused resonance from the audience. After that, Professor Wu

Hanhong, the professor of economic school of China Renmin University and the member of State Council's Antimonopoly Commission Expert Group, delivered a speech entitled the economic analysis framework towards antitrust in the field of IPR protection. Professor Wu cut into this topic through the concept of "Trade-offs" and "efficiency", used his profound professional knowledge and humorous language, explained the topic with simple language from an economic perspective, and won the enthusiastic responses.

The second section of the seminar was presented by the Secretary General of Competition Law and Policy Research Centre of Shanghai Jiaotong University, Shang Linna. There are for academic speakers. First, the post doctor of University of Chinese academy of Social Sciences introduced the framework of antitrust analysis in the IP field in detail. Then, Meng Yanbei, the vice professor of China Renmin University, the executive director of market law regulating centre of China Renmin University and Korean University, analyzed the regulation during the process of standardization. After, the executive director of Competition Law and Policy Research Centre of Shanghai Jiaotong University, Li Jian delivered a speech related to tying in the IP field. Professor Li thought the focus of the relevant research should return to the problem of "single product". This showed Professor Li's profound academic foundation of more than 10 years of continuous research. At last, the Deputy Director of Competition Law and Policy Research Centre of Shanghai Jiaotong University, Professor Hou liyang, analyzed the problems of safe harbor and refusal to license in the IPR field with widely quotation and witty words.

At the end of the Keynote speech, the deputy president of law school of Shanghai Jiaotong University, the Deputy Director of law school of Shanghai Jiaotong University, the member of State Council's Antimonopoly Commission Expert Group, Professor Wang Xianlin briefly summarized the seminar. He mentioned, this seminar was held jointly held by market law regulating centre of China Renmin University and Korean University and Competition Law and Policy Research Centre of Shanghai Jiangtong University. This seminar attracted nearly a hundred of people from various fields, a lot of whom are from a great distance. This fact fully illustrated the concern from the public in relation to the topic of harmonious development between antitrust and IPR's protection. This seminar was compact organized and rich in content. The speakers deeply explained the topic from different aspects. The representatives of the seminar communicated with the speakers actively and demonstrated the professional level, enabled the seminar reached the proposed effect. At last, Professor Wang expressed the sincere thanks to the speakers and the participants. Professor Wang also wished China antitrust and IPR protection's harmonious development may had bright future with our joint effort. To this point, this seminar was ended perfectly with warm applause.

The International Trade Antitrust Issues Seminar was Held

July 3, 2015

On the afternoon of June 29, 2015, the International Trade Antitrust Issues Seminar sponsored by Professional Committee of Competition Policy and Law of CWTO and UIBE School of Law jointly was successfully held at our academy.

The seminar was hosted by the Dean Shi Jingxia, Vice-Chairman of the Professional Committee of Competition Policy and Law. Yu Xiaosong, Chairman of Professional Committee of Competition Policy and Law of CWTO and Former President of CCPIT, attended the seminar and delivered a speech. Professor Huang Yong, director of Competition Law Center of UIBE, CASS researcher Wang Xiaoye, Professor Shi Jianzhong, Vice President of CUPL and CASS Associate Researcher Su Hua delivered keynote speech respectively. Executive Chairman and Secretary General of Professional Committee of Competition Policy and Law of CWTO Wang Chengan, Deputy Secretary General Wang Jingsong, Professor Wei Ying of Chinese Academy of Governance, Associate Professor Qi Huan, Dai Long and Liu Hua of CUPL, Teacher Jiang Shan and Chen Danzhou of our academy, Doctor Cui Shufeng, the postdoctor of CASS Law Institute, Tianyuan Law Firm Partner Lawyer Huang Wei, Gao Peng Law Firm Senior Partner Lawyer Jiang Liyong, Ying Ke Law Firm Partner Lawyer Wang Junlin, etc. attended the seminar and delivered speech.

Professor Huang Yong pointed out that although discussion of competition policy topic under WTO framework had stagnated, the competition policy topic got rapid development under the framework of bilateral and regional FTAs. In recent years, there were more and more competition clauses and competition chapters in the FTAs signed by China and other countries. However, the contents of these competition clauses and competition chapters were all procedural and making it clear that they were not applied to the dispute settlement provisions in FTAs. Under this circumstance, it was worth considering why the nations, the United States as the representative, urged adding these competition clauses without hard binding in FTAs. Currently, under the AML of China, there were many clauses involved in the association and interaction between competition policy and trade policy, such as the exemption of foreign trade involved in Article 15, the competition issue between state-owned enterprises involved in Article 17, the society public interest issue involved in Article 28,ect., which need further digging.

Professor Wang Xiaoye pointed out that competition issues were related with anti-monopoly issues, since these two issues both had significant influence on the marketization of a country. The anti-monopoly law could be applicable outside the country, such as the auto parts case, the LCD case, and the merger case of foreign enterprises: Matsushita, Nokia, etc.; these cases did not take place in China, but had influence on Chinese market, thus, the Chinese competition enforcement authority

could investigate and penalize. As the same, during the export process Chinese enterprise was caught in anti-monopoly issues in order to avoid dumping, for example the US Court could make judgment although the conspiracy of Chinese vitamin C manufacturers happened in China. Currently, although it was unrealistic to establish the entity unified competition law on the international level, even if in the FTA framework it was hard to realize without unified enforcement authority, it was a beneficial tendency for the convergence of competition law of each country, and it was able to make efforts on the fairness/transparency of procedure to protect competition and the interests of domestic consumers.

Professor Shi Jianzhong held that WTO cultivated a worldwide market with trade barriers highly reduced, which made the competition issue become worldwide across the border. However, the WTO mechanism has determined the competition policy topic of this level difficult to propel, bilateral and regional cooperation was a more pragmatic choice. Meanwhile, China was gradually becoming a big and strong nation of trade and investment, especially under the background of national strategy the Belt and Road Initiative, it was necessary to consider the anti-monopoly issue of international trade such as what kind of role China wanted to play in the formulation of international economic rules, and whether to change from regulated by international rules and participate in leading the formulation of international rules. And it ought to distinguish and make it clear that what forms of multilateral cooperation should be propelled by China. In addition, on the condition that grasping the conformity of principles of Foreign Trade Law of the People's Republic of China and principles of competition law, it ought to study the anti-monopoly issue of international trade, refining and promoting the abstract provisions of anti-monopoly law.

The CASS Associate Researcher Su Hua also held that coordination of the competition policy was in slow progress because of changeable, but also expressed the halt of negotiation on competition policy issue in Doha Round did not mean it never restarts the negotiation on WTO level in the future. Later, she presented the competition clauses and competition chapters of FTAs in negotiation with foreign country of China, and pointed out that the feature reflected in the contents of these competition clauses and competition chapters was “not intervening the independence of competition enforcement of competition sides” and “excluding the appliance of dispute settlement mechanism”, and analyzed the causes and future tendency of this phenomenon.

In the free discussion session, professor Shi Jingxia proposed the question focusing on “what should be the specific attention under the framework of international trade?”, which was closely related to the topic of seminar. About this, the participating scholars and lawyers made heated discussion on the anti-monopoly issue in the international trade, competition policy and trade policy, etc. Teacher Jiang Shan expressed that the competition law commodity in international trade was mostly

limited to procedural commodity was determined by the nature of anti-monopoly itself, and it was pretty difficult to distinguish competition issue with trade issue in international trade, and should learn to focus on the issue. Teacher Chen Danzhou expressed that it was necessary to pay special attention to the functional difference between competition policy and trade policy, and China should establish the way to coordinate in perspective of developing country. Associate Professor Dai Long expressed that after systematic research of competition clauses in FTA, it was found in three different modes and could be further studied in detail. Associate Professor Qi Huan expressed that due to the high commodity in regulation of cartel of each country, it was possible to be included in multilateral coordination. Doctor Cui Shufeng expressed that it needed to attend to the overseas response of anti-monopoly law, and improved the large and medium-sized state-owned enterprises' awareness for anti-monopoly law. Lawyer Huang Wei, Jiang Liyong, Wang Junlin delivered their opinions from the level of practice combined with some anti-monopoly cases of public concern.

Executive Chairman and Secretary General of Professional Committee of Competition Policy and Law of CWTO Wang Chengan made concluding statement for the seminar and expressed that the seminar was successfully held, the contents of discussion would be in meeting minutes for reference of related departments. And it was expected the participating scholars and lawyers conducted commutation and discussion on more competition topics in the future.

FOCUS

New Rule Governing Sales of Film Tickets may Violate the Anti-monopoly Law

July 17, 2015

Recently, China Film Circulation and Projection Association and the China Film Producers' Association issued the Notice on the Standards Governing the Sales of Film Tickets (the "Notice"). According to the Notice, the retail price and promotional price of film tickets should not be lower than the agreed price that has been negotiated in the circulation and projection agreement. However, such a provision may attract the attention of the national price anti-monopoly enforcement authority, i.e. the NDRC, and may be subject to anti-monopoly investigations.

Hard core cartels refer to the behaviors of competitors that enter into agreements between each other for the purpose of fixing or maintaining the price of a certain kind of commodity or service. The Anti-monopoly Law lists monopoly agreement as the primary behavior that it prohibits. Article 13 of the Anti-monopoly Law specifies that the undertakings that are competing with each other are prohibited from entering into monopoly agreements that fix or change the prices of a commodity.

Then what does fixing or changing the prices mean? Pursuant to Article 7 of the Provisions on Anti-price Monopoly issued by the NDRC, fixing or changing prices refers to fixing or restricting the price levels, the amplitude of price fluctuation, and the auxiliary expenses, discounts or other expenses that have influence on the prices.

By reference to the above provision, it's not difficult to find out that the Notice in effect restricts the discounts offered by the relevant parties to e-commerce platforms, thereby fixing the sales prices of film tickets.

The downstream market of the sales of film tickets used to have weaker bargaining power. However, with the rise of e-commerce, the e-commerce undertakings with great advantage in terms of sales channels must have the motivation to require the upstream market to transfer more interests to the downstream market. Therefore, before the promulgation of the Notice, the e-commerce undertakings may exercise their market power so that the theater chains and cinemas would sell the film tickets to them at lower prices. However, with the promulgation of the Notice, such low-price

sales will be prevented so as to maintain the prices at a relatively high level, therefore preventing market competition.

According to the provisions of the Notice, "the retail price and promotional price of film tickets shall not be lower than the agreed price that has been negotiated in the circulation and projection agreement; the discount portion of the film tickets during promotional period shall be made up by the promotional party based on the agreed-upon price negotiated in the agreement; where the ticket price is higher than the negotiated price, the party shall settle the payment with the theater chains and cinemas based on the higher price". This means that at whatever promotional price the e-commerce undertakings sell the film tickets to consumers, they still have to settle the payment of the tickets with the theater chains and cinemas according to the higher price. In other words, theater chains and cinemas shall not sell electronic tickets to e-commerce undertakings below the minimum price. Therefore, we tend to believe that the Notice in effect concludes a monopoly agreement by way of restricting the discounts.

Due to the fact that defections usually occur in the case of horizontal monopoly agreements, such agreements normally have penal clauses to prevent any individual party from defecting so as to protect the overall interests of all the participating parties. Similarly, the Notice explicitly specifies that "for any act that violates the laws and the rules and that undermines the market order, the industry association will take measures including warning, dissuasion, blacklisting, disqualifying the party from offering and circulating movies or disqualifying the qualification of the party on the record, etc."

So, will consumers be able to purchase low-price tickets in the future? According to the provisions of the Notice, e-commerce undertakings may still adopt promotional measures. This is to say that consumers will still be able to buy film tickets at a favorable price of as low as RMB 9.9 Yuan, however, the e-commerce undertakings will need to settle the payment according to the higher contract price, thus raising the cost of the e-commerce undertakings and such cost will be bound to be transferred to consumers. Therefore, even though low-price film tickets may still exist in the future, the promulgation of the Notice will undoubtedly raise the price level of film tickets and harm the overall interests of the consumers.

It is noteworthy that no industry association shall have the right to conclude monopoly agreement by way of rules, decisions or notices in order to restrict competition. On the contrary, pursuant to Article 46 of the Anti-monopoly Law, in the case where an industry association violates the provisions of the Anti-monopoly Law by making the arrangements for the undertakings within its industry to enter into monopoly agreements, the anti-monopoly law enforcement authorities may impose a fine of no more than RMB500,000; if the case is serious, the administrative authorities in charge

of the registration of non-governmental organizations may revoke the registration of the industry association.

The cost of participating in monopoly agreements as a party is also high. According to the provisions of the Anti-monopoly Law, the anti-monopoly enforcement authorities shall confiscate illegal gains and impose a fine of between 1 and 10 percent of the previous year's sales volume.

Therefore, regarding the effect and the prospect of the Notice, we may need to wait further and see.

Equity Before the Anti-Monopoly Law

July 8, 2015

Recently, the internet industry seems not “peaceful” at all: the dispute of the legitimacy of Flashget software at first, and then the infringement battle of Baidu cookie, now the focus has transferred to online travel industry: the combination of Ctrip and Elong is accused of avoiding anti-trust filing, which really is “one trouble follows another”.

With respect to whether the old legal system and governmental supervision are able to cope with the tide, remove the outdated and create the new, there need numbers of issues to research and discuss.

In May this year, Ctrip was exposed to have acquired approximately 36% stock rights and 48% voting rights of Etrip and become the largest shareholder. It is reported that the 2014 Chinese online hotel reservation market was generally “cued up” by Ctrip, Qunar and Elong and of which, Ctrip accounts for the largest market share with 46.2% while Qunar and Elong follows closely, respectively with 16.6% and 13.5%.

The combination among leading companies of a market will unavoidably improve the market concentration and weaken the market competition which thus triggers the concern of whether the consumers’ interest will be damaged. That is also why the undertakings’ concentrations have to be under antimonopoly review in each country. However, according to the information published on the press conference of MOFCOM in June, Etrip and Elong have not submitted the premerger notification to MOFCOM.

Whether the transaction between Ctrip and Elong has reached the notification threshold of undertakings’ concentration? If yes, then whether Ctrip’ s acquisition this time can escape from the antimonopoly, the sword of Damocles? If it manages to

escape, the commitment that the Antimonopoly Law is equal for Chinese or foreign enterprises will be suspected by the public.

There are two decisive elements for reaching the notification threshold: firstly, whether the Ctrip acquisition is “concentration”, namely whether Ctrip has obtained the control power of Elong; secondly, whether the revenue of Ctrip and Elong has reached the standard stipulated by the law.

Although the calculation of revenue has been disputed in the past, the calculation standard of MOFCOM is generally simple. Considering the current annual reports of Ctrip and Elong, the business revenue of them is likely to have reached the notification standard. Therefore the key point is whether Ctrip has got Elong’s control power.

Generally speaking, holding over 50% equity or voting rights can be regarded as owning the control power. Guidance on Notification of Concentrations between Undertakings issued by MOFCOM in June 6 of 2014 provides that “Although no control can be judged from the Concentration Agreement or the Articles of Association due to the dispersed shareholding structure, the concentration in reality gives the undertaking control, which also constitutes gaining control in the concentration between undertakings.” Besides, the Draft of Foreign Investment Law published by MOFCOM in January this year also stipulated that notwithstanding the holding equity or the voting rights are less than 50%, however, if the voting rights enjoyed were enough to make significant impact on the determinations of shareholders’ committee, the general meeting of shareholders, or the board of directors and other decisive departments, it can be seen to own the control rights.

It can be seen that the acquisition of control power is decided not only by the equity or the voting rights owned by the undertaking, the key point is whether holding the practical control power.

This time Ctrip only got 37% equity and 48% voting rights of Elong, which seemingly are less than half, but compared with other shareholders, the holding share is fairly high. Moreover, no sooner after the acquisition, Ctrip carried out the integration with Elong vigorously and speedily including cutting the business of air ticket where Ctrip competed fiercely with Elong. Just imagine, if Ctrip got no control power on Elong, how could it carry out the integration measures aggressively which seems no favor of Elong but merely beneficial to Ctrip? Therefore, Ctrip’s acquisition is likely to be considered as undertaking’s concentration by MOFCOM and thus faced with the legal risk of not submitting the notification it should have done.

Certainly, reaching the notification threshold does not necessarily mean that MOFCOM will definitely refuse the transaction. The factors needed to be taken account is composed of related market share involved in the transaction, market

control power, market concentration rate, market entry and impacts on consumers and other undertakings etc.

However, in the special context of internet industry, the definition of factors above also faces new challenges.

Firstly, the fuzziness and interweaving of the internet is difficult for the definition of the relevant market. In the famous 3Q battle case, the Supreme Court has stated that the traditional “test of small but significant and non-transitory increase in price (SSNIP)” cannot be applied to the definition of relevant market involved in the internet. Thus, in the acquisition of Ctrip and Elong, whether the relevant market should be defined as online travel market or only air ticket reservation market, or online hotel reservation market, still exists uncertainty, and moreover, the feature of internet bilateral market also increase the difficulty of definition of relevant market.

Second, the consideration of the market share of internet enterprise needs more rational attitude. I have just mentioned in other passage which discuss the special tax problem that the traditional criterion of identify the monopoly using the market occupancy rate cannot be applied simply to the internet industry. The internet industry is different from other traditional industries with faster technology update rate, lower entering threshold and especially the dynamics of competition. Even the internet enterprise with very large market share could be destroyed in a day.

Thus, based on the features of internet, whether we can conclude that, there is no monopoly in the internet field, and thus no damage of restricting competition so that the antimonopoly enforcement authority or the courts should give green light to the transactions (including undertakings’ concentration) in the area of internet industry. Regarding this, I’m holding the suspicious opinion. This is no different from giving the internet giants a “no death medallion” in antimonopoly and is dangerous behavior which ignores the consumers’ rights.

After all, there is a special “scale effect” in the internet industry, namely, more users, higher dependency on the internet services and products of the consumers and who has more difficulty to transfer to other products and services. The phenomenon is rather evident to the social internet software like wechat and facebook etc. Competition among internet companies is, frankly speaking, the competition of users’ size. Larger user groups can attract more users, further expanding the network effect and squeezing the presentation space of network products or services used by small groups. The powerful combination among internet giants will maximize the advantages of “scale effects”, cultivating and monopoly consumers’ choices imperceptibly, and then create insurmountable barrier to other competitors, while the rights and rules infringed was just what antimonopoly system makes the best to protect.

Before whether the combination of Youku and Tudou, or 58City and Ganjicom, or Didi and Kuaidadi, MOFOCOM got no opportunity to review the undertakings' concentration in the internet industry, and the internet industry are in the vacuum space from the supervision of antimonopoly all the time. The acquisition of Ctrip and Elong is no doubt a good chance for MOFCOM and meanwhile a difficulty. How to find a balance between the pushing innovation and maintaining industrial rules, how to integrate the particular features of internet industry to the laws and regulations of antimonopoly still need the standpoints of supervision authorities, and thus making explicit guidance to the transactions of follow-up enterprises. But in any case, the consumers' rights and interests will always be the core of antimonopoly protection, a deadline which should be defended in antimonopoly enforcement authority's supervision in the internet industry. The protection of innovation and national industry should never be the reason of lowering the implementation of antimonopoly law.

NDRC Initiated Reform Scheme for Oil and Gas System: Break the Monopoly to Fully Open up

June 30, 2015

As we all know, oil and gas system of our country currently basically continues the industry structure left by the reorganization of two groups in 1998. Under this system, market structure is relatively unified as a whole, both exploration and development of oil and gas and right of using, even import and export of oil product, are not totally open to the market. Meanwhile, market system of oil and gas has not fully developed, mechanism of price discovery and formation is still a work in progress.

On June 13 of last year, General Secretary of China Communist Party Xi Jinping clearly pointed out on the sixth meeting of the Central Finance and Economy Leading Team that "we should actively promote energy system reform, hurry up to formulate the overall scheme for electricity system reform and oil and gas system reform, giving the strongest signal of oil and gas system reform until now." According to the plan at that time, electricity system reform scheme should be introduced at the end of last year, and oil and gas system reform scheme should be introduced within this year.

It is understood that as early as in April of this year, the Comprehensive Reform Department of NDRC has already begun to formulate The Overall Scheme for Oil and Electricity Reform, it is anticipated that the first draft will be finished in July or August, in September or October it will be submitted to central deepening reform team. The people who take charge of the reform are two deputy directors of NDRC, Liu He and Lian Weiliang.

Division of work of deputy directors on the website of NDRC shows that Liu He's main work is "responsible for comprehensive reform work of economic system"; Lian Weiliang's main work includes "assisting Liu He in comprehensive reform work of economic system".

Insiders said that "main reform thought of this reform will be put forward by Liu He and Lian Weiliang, but three big oil companies and private enterprises will be asked to give their advices first. Meanwhile, system reform offices of NDRC in all provinces will also report their schemes and thoughts on oil reform, which has already done so far. Based on the above information, a reform frame will be brought forward, relevant enterprises will be then interviewed with according to this frame, the interviewee will be equal to or higher than vice-general manager."

It is worth noting that from June 1 to 2 of this year, deputy director of NDRC and director general of National Energy Administration, Nuer Baikeli successively led investigating group to PetroChina, Sinopec and China National Offshore Oil Corporation to investigate, one of the acting points is to accelerate the reform of oil and gas system.

From the point of view of Wu Jiandong, an energy expert and specially invited researcher of China Society of Economic Reform, the core of the reform of oil and gas system is still openness; energy field needs to implement openness, and the decisive importance of open economy of energy also needs to be set up.

Wu Jiandong pointed out that "in order to achieve the above, competitive business of energy network such as oil and gas needs to be opened up gradually; competitive price of oil and gas needs to be released; investment projects of energy enterprises both at home and abroad need to be effectively released; resource exploration market needs to be released, special energy region like Sinkiang needs to be constructed freely; let go of energy efficiency, namely the fifth energy market; release technological innovation of energy. These are 'six releases'".

He considers that China will soon face with the biggest energy revolution opportunity in history. It is very important to establish an open energy economy for achieving a 10 trillion platform for Chinese economy. The reform and opening-up policy has gone through the change from rural reform to urban reform, one emphasis of it is to deregulate. "Next step we will change from the deregulation of rural reform and urban reform to the deregulation of industry. It can be said that open energy era will prop up such a theme of energy reform".

Jiang Xinmin said that "upstream monopoly restricts the downstream process of marketization. Therefore, in order to construct an oil and gas market with effective competition, monopoly must be broken, exploration market of oil and gas must be

fully opened up, the key point of which is to reform current registration system of oil and gas block”.

Under current registration system of oil and gas block, incumbent enterprises only need to take a very little money to occupy a large number of resource blocks, enclosing but not exploring is big problem. And blocks new entrants can obtain are very limited. If monopoly problem of upstream exploration is not solved, the effects of lowering exploitation cost and improving exploitation efficiency through competition to stimulate technological innovation of exploitation will be greatly reduced. While the center of reforming block registration system is to put an end to the phenomenon of “enclosing but not exploring” by ways of using competition to acquire exploration right of resource block, making strict delay conditions for current exploration right, and taking back and rebidding on blocks which are not substantially explored within a certain time limit.

Anti-Monopoly Showed Another Punch, Luxury Car Might Have to Say Goodbye to “the Era of High Profit”

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Definition of anti-monopoly behavior in the automotive field will become clearer, while anti-monopoly investigations of the automotive field will also become a normal in the future.

In the middle of June, national anti-monopoly law enforcing department officially announced in a related preliminary meeting it organized that the drafting work of the first anti-monopoly guideline specific to the automobile industry, the Anti-Monopoly Guideline of Automobile Industry (“Guideline”) was officially launched. As soon as the information was published, heated discussion was triggered in the industry.

Compared with the AML which applied to all industries, this Guideline will provide more clear supplements and detailed guidance specific to the automobile industry. Secretary-general of Joint Committee of China Passenger Car Information Cui Dongshu expressed that “Guideline will better standardize the automobile market; bring more order into the automobile trade”. Another person of the industry who did not want to tell his name said that “undoubtedly diversified competition will lower the sales price and after-sale price of luxury cars in different degree, in a more standard market, consumers will surely be the final beneficiary”. The “moisture” of luxury car consumption will be edged out again in the future.

Expecting policy to be introduced

An “anti-monopoly storm” in the automobile industry is on its way.

According to statistics, from August of last year to May of this year, anti-monopoly departments at national as well as regional level implemented anti-monopoly punishment on many luxury cars such as Chrysler, Audi and Mercedes-Benz etc. as well as their sub-brand dealers one after another, and imposed punishment on many components and parts enterprises like Sumitomo, Denso etc. The scope and relevant evidence gathering work of anti-monopoly investigation is still in progress.

On September 11 of last year, NDRC published the punishment result of Bureau of Commodity Price of Shanghai on Chrysler. Chrysler was fined RMB 31.682 million Yuan, three dealers were fined RMB 2.1421 million Yuan; Almost at the same time, Bureau of Commodity Price of Hubei Province fined RMB 0.24858 billion Yuan on Faw Volkswagen sales co., LTD; Eight dealers of Audi in Hubei province were fined RMB 29.96 million Yuan in total; On April 23 of this year, Bureau of Commodity Price of Jiangsu Province fined RMB 0.35 billion Yuan on Mercedes-Benz, and fined RMB 7.869 million Yuan on some dealers, etc. According to incomplete statistics, until now, total fine amount of anti-monopoly in the automobile industry has already exceeded RMB 1.6 billion Yuan.

Price reduction is the main measure of luxury car enterprises in response to this round of “antimonopoly storm”. In July 1, 2014, Benz was the first to promote after-sales service product, with the maintenance fee declining 30%-50%, which was the first time Benz officially announced price reduction for after-sales maintenance. Following that, Jaguar and Land Rover (China) announced an average price reduction of RMB 200,000 Yuan for three models of its vehicle. The industry insider assumed the price reduction was related to antimonopoly investigation.

In the interview, some automobile enterprises expressed their expectation for early issuance of the Guideline. It is understood that relevant departments of the government still carry on antimonopoly investigation on automobile enterprises, and it will become a regular action rather than just a storm. “For the ongoing investigation, we are very tense and expect the detailed rules for auto industry can be published early so that we can get out of the mist as soon as possible.” said some entrepreneur.

Some luxury automobile brands insiders expressed their expectation toward a normalized market: “To us, the Guideline to be made will show the direction of the industry development, and it will help us to position ourselves more clearly.”

Once the Guideline is published, it may contradict with the current work of enterprises. “No matter it will finally focus on channel or price, we will adjust the present conditions and make efforts on R&D improvement.” said the above insider. In terms of the distributors, the implementation of the Guideline may bring them some

“short-term pains”, but they are more expecting it will bring about some special exemption.

Details to be confirmed

Although the Guideline has been expected in the industry for a long time, no one knows the progress of its formulation. Some insider indicated that, “We are still in the drafting stage. The details are yet to be made rather than to be revealed, and there are still many issues to be overall considered for the policy formulation.”

Cui Dongshu said: “Comparing with the AML, the Guideline will make certain adjustments for the auto industry and realize some exemption with regard to some special issues.”

Su Hua, the associate researcher in Chinese Academy of Social Science who took part in the drafting of the Guideline, said, “The AML exemption provision of monopoly agreement mainly focuses on horizontal agreement. The substantive rules and exemption rules in the Guideline are to be established and developed on the basis of Article 14 and 15 of the AML.”

In effect, in accordance with the AML, the monopoly behavior in the auto industry mainly focuses on the points below: enterprises limit the price of sales, parts and after sales; the whole-vehicle companies limit the resale price for whole vehicle and spare parts; the original parts providers raise price; the enterprises organize the distributors to establish “price alliance” which unifies after-sales charging standard. The industry also focuses on the above aspects with regard to the detailed rules and “exemption”.

In addition, regarding the paralleled imported automobile and the antimonopoly system, the Guideline may have further regulations. At present, the AML still has “blind zone” for paralleled imported automobile. Some enterprises seemed to open the parts market though, still set barriers by means of high price so as to affect the after-sales service for paralleled imported automobile; some other companies intentionally raise displacement to raise the tax rate in order to affect the price advantage of paralleled imported automobile.

“All brands of automobile enterprises are still limiting paralleled imported automobile through different channels and measures. Whether it constitutes monopoly is worth discussing.” said Huang Wei, the secretariat of Anti-Monopoly Committee, China Lawyers Association.

The vice president of China University of Political Science and Law and the member of Antimonopoly Committee of the State Council Shi Jianzhong replied in the interview that, “apart from price limitation, there are non-price monopolistic

behaviors such as quantity, region and market division, which need to be further specified and confirmed in the Guideline.”

In sum, as the detailed rules are still uncertain, experts have estimated various possibilities; even if the final policy cannot cover every aspect, it will involve some of the above focus, which will better standardize the auto industry.

Auto Market Standardization

“Diversified competition will undoubtedly reduce the automobile sales and after-sales price. Among them, the luxury car enterprises will be the first target of rectification and will be the most evident in changes, which has been proved by the previous cases. After the Guideline is published, the profits of the distributors and manufacturers will be compressed to certain extent, and in the more standardized market, the customers will be the final beneficiary.”

“Profit condensation is very likely to happen, but it doesn’t mean a blind drop of price.” Cui Dongshu added, “But undoubtedly, the manufacturers and distributors will be better regulated under the Guideline, which will promote the standard development of the whole industry.”

Indeed, the Guideline will provide clearer behavior guidance for the enterprises and promote virtuous competition for the auto industry in China. After all, fines and price reduction are not the final goal of the AML. The final goal of the Guideline is to realize the healthy development of the whole industry.

Considering the current situation, an un-ignorable issue is the conflict between the antimonopoly matter and the Measures for the Implementation of Automobile Brand Sales Management (the Measures). Especially for the luxury automobile market, some overly high price of some products is due to the amplifying of automobile manufacturers’ rights by the Measures. According to the Measures, automobile brand distributors shall engage in sales, after-sales and parts supply under the authorization of automobile suppliers. Such requirement of “authorization” strengthened the manufacturers’ control over the distributors to a large extent. Strict business policies such as setting resale price, bundling popular models with unmarketable ones and tying sales of original parts thus occur naturally.” said Wei Shilin from Dacheng Law Firm. After the Guideline is published, such conditions will be improved greatly. “Comparing with the Measures, the Guideline is at a higher level. Although the Guideline will carry out certain individualized exemption to auto industry, it will still become the standard for relevant departments with regard to the unreasonable parts in the Measures and those conflicting with the Guideline.” said Cui Shudong.

In sum, the authority and influence of the Guideline is undoubtedly, and regarding the enforcement, the Qualcomm Case in the communication industry can be a model in

China. After NDRC fined RMB 6.088 billion Yuan on Qualcomm's monopoly behavior in this February, the antimonopoly domino effect has begun to emerge. The antimonopoly cases in medicine, IT and financial industries have increased, and the Guideline of Antimonopoly Rules on the Abuse of Intellectual Property also entered into drafting stage in June. The joint efforts of all industries will ensure the promulgation and enforcement of the Guideline.