

# 天地和律師事務所 T&D Associates

China

## Monthly Anti-Trust Report

**August 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

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### **Director of the Anti-monopoly Bureau of MOFCOM Met with Commissioner Bonakele of the Competition Commission of South Africa**

August 21, 2015

On August 21, Director Shang Ming met with Tembinkosi Bonakele, commissioner of the Competition Commission of South Africa. Director Shang Ming introduce the anti-monopoly reviews of concentration of undertakings by MOFCOM, and exchanged opinions with regard to anti-monopoly cooperation between China and South Africa. Commissioner Bonakele expressed the wishes to cooperate with MOFCOM in the area of anti-monopoly law enforcement.

### **Vice-minister of the SAIC: New Achievements from Strengthening Communications and Cooperation and Promoting International Competition**

August 20, 2015

On August 19, Vice-minister Liu Yuting of the State Administration of Industry and Commerce (“SAIC”) met with visitors led by the commissioner of the Competition Commission of South Africa, Tembinkosi Bonakele and had conversations with regard to the forthcoming 4th BRICS International Competition Conference to be held in Durban, South Africa. Liu Yuting expressed the desires to strengthen the communications and cooperation with the competition authorities of South Africa and other countries and regions, and to fully support and actively participate in the BRICS International Competition Conference, so as to promote the achievement of new results in the area of international competition.

Liu Yuting welcomed the visit led by Tembinkosi Bonakele, and introduced to him the main responsibilities and functions of the SAIC of China as well as the competition law enforcement. He said that China and South Africa are the developing countries and the emerging markets of the world nowadays and the bilateral relationship between the two countries is moving forward continuously. Recent years the SAIC of

China has fully exercised its role as the main force of market supervision, kept a foothold on its responsibilities and functions and put forth efforts to build an easy and equal entry environment, the equally competing market environment and the safe and assured consumption environment to promote the steady development of the economics and society. He said that the Competition Commission of South Africa and the SAIC of China have similar responsibilities and functions and have broad room for cooperation in the areas including competition law enforcement, and he hoped that the two departments will further strengthen the communications and cooperation with each other, share the work experience and results of each other so as to promote the development of the relationship between China and South Africa.

When talking about the 4th BRICS International Competition Conference, Liu Yuting said that China is one of the countries launching and hosting the conference, and that the SAIC of China has paid high attention to the conference and has sent representatives to attend all previous conferences and thus established good communications and cooperation relationship with the competition law enforcement authorities of each country and region. He said that the SAIC would strongly support and actively participate in the current conference and wish to strengthen the communications and cooperation with the competition authorities from various countries and regions including the Competition Commission of South Africa in order to further promote the academic communications and working levels of the BRICS in the area of competition. He wished that the current conference would be successfully hosted in Durban, South Africa and that new results would be achieved on the basis of the previous conferences so as to jointly promote new progress of the international cooperation in the area of competition.

Special guest Tembinkosi Bonakele introduced the preparations for the 4th BRICS International Competition Conference and thanked Vice-minister Liu Yuting for his valuable opinions and suggestions. He said that South Africa highly valued the cooperative relationship with China in various areas. The Competition Commission of South Africa and the SAIC of China are both the responsible departments for the cooperation among the BRICS in the area of competition, and have similar working responsibilities and functions. He wished that the two departments would share the work experience of each other in the future and raise the level of communications and cooperation between the two parties and further promote the close cooperative relationship between the two departments. At the same time, he sincerely invited the SAIC of China to send representatives to participate in the BRICS International Competition Conference.

The BRICS International Competition Conference is an important pragmatic activity under the framework of the meetings among the leaders of the BRICS and has been included in the documents of the conference results from the meetings of the leaders of the BRICS. In 2009, the Conference was jointly launched by the SAIC of China and the Russia Federal Antimonopoly Service and co-hosted by the BRICS every two

years. It has now developed into a systematic conference with the BRICS as the core and the broad participations by the competition authorities of various countries.

## **NDRC: New Achievements of Anti-Monopoly and Market Price Regulation**

August 18, 2015

In the first half year, Price Departments at all levels nationwide thoroughly implemented the spirits of the 18th National Congress of the Communist Party of China, the Third Plenary Session of the eighteen, and the Fourth Plenary Session of the eighteen, and took initiative to adapt to the new normal economic development, making progress while maintaining stability. In accordance with the requirements of stabilizing growth, promoting reform, adjusting structure, benefiting people's livelihood, controlling risk, centering on the mission to maintain the basic stability of the overall price level, safeguard market order of fair competition, and protect the legitimate rights and interests of enterprises and consumers, Price Departments at all levels nationwide actively promoted the price reform, adhered to the combination of indulge and regulation, strengthened the regulation in and after the course, explored and innovated, took the responsibility, making new achievements of Anti-Monopoly and market price regulation. More than 1.6 million pieces of illegal price cases were investigated in the first half year nationwide, economic sanctions of 7.937 billion Yuan were imposed, among them, the illegal income of 674 million Yuan was confiscated, 6.826 billion Yuan was fined, and 437 million Yuan was refund to consumers.

### **I. Work highlights of the first half year**

#### **(I) New progress in Antitrust Enforcement**

Firstly, significant price monopoly cases are investigated and handled according to law. A group of price monopoly cases of significant impact such as Qualcomm and Mercedes-Benz were handled and exposed sequentially, safeguarding the market order of fair competition. Secondly, the National Development and Reform Commission of the People's Republic of China ("NDRC") strengthened the policy adjustment. Supervised and urged the Dolby Company and the HDMI Company respectively reach an accommodation with related TV companies on issue of the standard essential patents to reduce litigation costs of enterprises and create a good environment for enterprise development. Thirdly, NDRC actively eliminated the administrative monopoly. NDRC investigated and handled the cases of abusing administrative power to eliminate or restrict market competition of the Shandong provincial Communications Department and Communications Authority of Yunnan

Province, and suggested Shandong Provincial Government correcting the relevant illegal acts of the Shandong provincial Communications Department, and supervised and urged the Communications Authority of Yunnan Province stop relevant practices and rectify seriously, thus, taking a solid step towards cleaning up and abolishing the provisions and practices obstructing fair market competition.

## **(II) Achieving new results in price regulation**

Firstly, NDRC organized to carry out special inspection on drug prices. Cooperated to promote the drug price reform, reminded operators to uphold integrity management in compliance with laws and regulations by means of market inspections, holding industry association forum, reminding warning towards focused areas, etc, to ensure that drug prices remain stable after being released. Secondly, NDRC carried out special inspections on enterprise-related charges. According to the work deployment of the State Council to regulate the enterprise-related charges, NDRC conducted key inspections on construction, environmental protection, transportation and other key sectors and industries with many enterprise-related charges, such outstanding issues strongly reflected by enterprises as government administrative and intermediary service charges, especially the disorder charges involving of the small and micro enterprises, innovative enterprises, playing an important role in effectively reducing the burden on enterprises, stimulating the market vitality, helping business innovation, enhancing the dynamic of economic development. Thirdly, NDRC carried out special inspection on the environmental protection electricity price. NDRC conducted key inspections on the behaviors that the power generation enterprises implementing the national desulfurization electricity price which did not put the desulphurization device into operation as required, the sulfur dioxide, nitrogen oxides, dust emission concentration of the coal-fired generating units implementing the national desulfurization electricity price exceeded the limits, and the power grid enterprises deducted the desulfurization price and environmental price of the power generation enterprises, to ensure the completion of the energy conservation and emissions reduction binding targets in " the 12th five-year plan ".

## **(III) Handle the public price report to a new level**

To strengthen the market price regulation, maintaining the price interests of the masses, price departments at all levels spared no efforts to build and run the 12358 price reporting system of level 4 connected to the Internet, continuously improving the ability and level of serving the masses. The system was fully launched on January 1 this year, becoming the first of all market regulators to achieve the reporting system of level 4 connected to the Internet nationwide. The construction and operation of the system greatly smooth the channels for public price complaints, effectively enhance the efficiency of price regulation, and effectively safeguard the price interests of the masses, becoming a significant brand of the price regulators serving the masses. The construction and operation of the system fully reflects the attitude and determination

of accelerating the transformation of government functions and strengthening regulation in and after the matter, meaning that the entire price supervision accepts the supervision of the whole society, and it is important for regulating the price behavior of law enforcement and the prevention of corruption, and is also a application demonstration of government management innovation at age of big data.

## II. The main focus of the next step

Firstly, strengthen the price regulation of livelihood. Closely around the education, tourism, property management and other price hot issues that strongly reflected by the masses, increase the intensity of market price inspections and crack down on price violation. Pay close attention to the pharmaceutical market price dynamics, especially the price dynamics of blood products and a few cheap drugs, continue to conduct special inspections on drug price, prevent and stop the arbitrary fees and prices of pharmaceutical enterprises and medical institutions in the name of drug price reform, and maintain normal price order in the drug market.

Secondly, deeply clear the charges, governance chaos and reduce the burden. Continue to carry out key inspections on enterprise-related charges, severely investigate and punish the illegal behaviors such as continue to charge the canceled administrative fees, pre-service charges of administrative approval without legal basis, arbitrary charges of intermediary agency, arbitrary charges of industry association, effectively reduce the burden on enterprises, optimize the development environment of enterprises.

Thirdly, actively promote anti-monopoly enforcement. Pay close attention to the market competitive dynamics of key industries and important areas; timely launch the antitrust investigation against behaviors as implement monopoly agreements, abuse the dominant market position, and abuse administrative power to eliminate or restrict competition; handle and expose typical cases according to law. Strengthen the competition policy research and propaganda, enact censorship for fair competition, gradually established the basic position of competition policy. Study and formulate relevant antitrust guidelines, and constantly improve the system of anti-monopoly law.

Fourthly, further improve the price reporting work. Continue to promote the construction of 12358 price reporting system, perfecting the system function to ensure the stable operation. Make full use of the system's big data; strengthen the early warning analysis and fluctuation monitor of market price, continuously improve the pertinence and perspectiveness of price regulation. Strengthen reporting training; standardize the reporting workflow; improve the responsibility system of reporting; strengthen supervision of disposal situation; make sure that each piece of price complaint or price reporting from the masses secured.

## **Local Seminar on Competition Policy of China and Russia was successfully Held**

August 13, 2015

To further implement the spirit of *the Memorandum of Understanding* (2014-2015 year) issued by the State Administration for Industry and Commerce of People's Republic of China and the Federal Anti-monopoly Service of Russia on the implementation of *Cooperation and Communication Agreement About Anti-unfair Competition and Antitrust of the Government of People's Republic of China and the Government of the Russian Federation*, on June 24 and June 26, 2015, the Federal Anti-monopoly Service of Russia and SAIC respectively held the local seminar on competition policy of China and Russia on Blagoveshchensk City, capital of Amurskaya Oblast, Russia, and Heihe City in Heilongjiang Province, China. At the seminar, the representatives of both participants respectively introduced their own situation on antitrust enforcement, the Anti-Unfair Competition Law enforcement, advertising regulation and the typical cases investigated, meanwhile, they researched agreement re how to strengthen cooperation of the law enforcement agencies in border region and maintain bilateral trade order.

The seminar participants of China are representatives from Enforcement Bureau of Anti-Monopoly & Anti-Unfair Competition of SAIC, Department of International Cooperation, Heilongjiang Province Industry and Commerce Bureau, Jilin Province Industry and Commerce Bureau, Industry and Commerce Bureau (Market Supervisory Authority) of prefecture-level cities of Heilongjiang Province and Industry and Commerce Bureau (Market Supervisory Authority) of main ports county (city) to Russia; the seminar participants of Russia are representatives of Legal Division, Energy Regulatory Division, Finance Division, Department of Supervision on Government Procurement of Federal Anti-Monopoly Service, and Primorsky Kray Branch, Khabarovsk Branch, Vladivostok Branch, Amur Oblast Branch, Magadan Oblast Branch, Yakusika Branch, Jewish Autonomous Oblast Branch, Kamchatka Branch, Sakhalin Oblast Branch of Federal Anti-Monopoly Service.

## **Price Supervision and Anti-Monopoly Bureau of NDRC Held Conference for Drafting Anti-Monopoly Guideline for Automobile Industry**

August 11, 2015

According to the working assignment made by Anti-Monopoly Committee of State Council, the National Development and Reform Commission of the People's Republic of China ("NDRC") takes charge of leading the drafting work of Anti-Monopoly Guideline on Automobile Industry (the "Guideline"). In order to further progress the research and drafting of the Guideline and make sure the transparency, open and fair of the drafting, Price Supervision and Anti-Monopoly Bureau of NDRC held an industry expert conference on the drafting issue of the anti-monopoly guideline on the automobile industry on August 7th. The conference has invited more than 50 representatives for the whole vehicle manufacturers, automobile distributors, suppliers of automobile components, automobile trade associations as well as several law firms. The conference has mainly listened to the comments and suggestions on the draft of the Guideline from multiple relevant parties and made further arrangements for the next stage.

The head of the drafting team for the Guideline in Price Supervision and Anti-Monopoly Bureau introduced the background of drafting the Guideline at first, emphasizing the significant role of anti-monopoly enforcement in the aspects including regulating the competing behavior of Chinese automobile market, protecting fair competition, and improving the benefits of consumers, and then made a brief review of the anti-monopoly enforcement cases in the automobile industry investigated by NDRC in recent years. The head stressed the meaning of the legislation of the Guideline and the issues expected to be resolved, and also expressed appreciation for the comments and suggestion for the questionnaires on the drafting of the Guideline replied by the relevant parties.

The attendance made fully discussion on the relevant issues of the drafting of the Guideline and submitted comments and suggestion on their concerns for example the outline and form of the Guideline, the key areas the Guideline focuses on, the coordination between the Guideline and relevant industry regulations, the conversion of sales modes of the whole vehicle and components, the interest balance among relevant parties in the industry chain etc. the drafting team for the Guideline in Price Supervision and Anti-Monopoly Bureau has listened to the comments and suggestion earnestly, made relative responses and also conducted heated discussion on some issues relatively complicated.

The Price Supervision and Anti-Monopoly Bureau of NDRC has pointed out that the drafting of the Guideline will "make law by the opening door", broadly listen to and compile the concerns, comments and suggestion of each party, absorbing the best practices of relevant parties and the conference has positive help for the drafting of the Guideline. During the next stages of the drafting, NDRC will further ask for advices form relative parties and constitute the mature draft as soon as possible based on the full research and demonstration. Then the Guideline will be published by the Anti-Monopoly Committee of the State Council after it has been discussed and passed through the legal procedure.

## **The Price Supervision and Anti-Monopoly Bureau of NDRC Held Symposium on Fair Competition Censorship**

August 03, 2015

On July 31, the Price Supervision and Anti-Monopoly Bureau of NDRC (the “Bureau”) has held an internal symposium, collecting comments on the proposed censorship of fair competition from relevant departments. During the conference, Li Qing, the vice director of the Bureau has stated the specific requirements on accelerating the publication of the fair competition censorship in relevant documents of the Party Central Committee of the China Communist Party and the State Council, and hoped that each department pay high attention to and support the work actively. The Competition Policy Division has introduced the practices and experiences of other countries and explained the main consideration on the review subject, review object, review content and review procedure etc. Several personnel from the Legislative Affairs Office of the State Council, Ministry of Industry and Information Technology, Ministry of Commerce and the National Development and Reform Commission has submitted comments and suggestion on the design of the system.

## **NDRC Held Conference Starting the Theses of the Calculation of the illegal Gains of Monopoly Behavior and Penalty and the Exemption Procedure of Monopoly Agreement**

July 31, 2015

According to the working assignments of NDRC, together with Ministry of Commerce (“MOFCOM”), SAIC and other departments is in charge of drafting the Enforcement Guideline on Article 46 and Article 47 of the Anti-Monopoly Law and the Guideline of Exemption Procedure of Monopoly Agreement. In order to do a good job, the Price Supervision and Anti-Monopoly Bureau of NDRC has asked Tsing Hua University School of Law and Peking University Law School to launch thesis study on the two guidelines respectively, supporting the drafting of the guidelines in theory.

On July 29, the Price Supervision and Anti-Monopoly Bureau of NDRC have held a starting conference for the start of the two theses, discussing the study thoughts of the

theses. This conference was hosted by Li Qing, the vice director of the Bureau. The Competition Policy Division and Market Price Supervision Division have introduced respectively the study background of the two theses and the issues expected to be solved. Tsing Hua University School of Law and Peking University Law School, as the conducting units of the theses, has introduced the preliminary study thoughts and arrangements. Several personnel of Economical Law Chamber of Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, Anti-Monopoly Bureau of Ministry of Commerce, Antimonopoly and Anti-unfair Competition Enforcement Law has attended the conference and indicated their comments and suggestion on the thesis study and drafting of the guidelines.

Li Qing, the vice director stated at last that the drafting of the guidelines are the work task required by the Anti-Monopoly Committee of the State Council, and will finally be submitted to the Anti-Monopoly Committee of the State Council to be review and then published. It is the combine responsibility of all the relevant departments. Thus, Li Qing hoped each development to strength the cooperation, communication and to jointly conduct the drafting work of the guidelines well.

## **Director of SAIC Met the Chinese Affair Director of Daimler AG**

July 28, 2015

On July 27, Zhang Mao, the director of the SAIC has met Tang Shikai the Chinese Affair Director of Daimler AG (“Daimler”) and his team. Zhang Mao in the interview indicated his wish that the enterprises strictly obey the laws and regulations in China, develop and grow in the market circumstance of fair competition and make new contributions to Chinese economy.

Zhang Mao welcomed the coming of Tang Shikai team and introduced to them the main function of SAIC and the status of the reform of commercial system and competition enforcement etc. Zhang Mao indicated that the number of the newly established market subject has increased rapidly since the implement of the commercial system, and there are more than 10 thousand new registered enterprises averagely every day. The Report of the Gobal Business Environment 2015 of the World Bank stated that the ranking of the business convenience in China has further gone up and the business environment has improved significantly. The reform has created a good environment for the growth of the Chinese and foreign enterprises. The investment size of foreign enterprises in China has remained increasing. SAIC is progressing the reform deeply while at the same time improving the market supervision and administrative enforcement legally, fulfilling its legal liability in the

areas including competition enforcement, on purpose of creating a market environment of fair competition for both Chinese and foreign enterprises.

Zhang Mao listened to the introduction of the business operation in China of Daimler and affirmed the development performance of the company and its positive contribution to the growth of Chinese economy. Zhang Mao said that as the representative of Germany companies investing in China, Daimler, AG has high influence in Chinese market and hoped Daimler to understand entirely and comply with the laws and regulations on the supervision and management of Chinese market, strengthen the training and management of its dealers, further regulate its management behavior, cooperate with SAIC in the work of supervision and law enforcement actively, jointly create fair and ordered competition environment for the automobile market and perform better development in China.

Tang Shikai expressed his thanks to Zhang Mao for the interview, and said that the foreign enterprises has given affirmative evaluation on business system reform implementing in China, and the reform has provided favored opportunity for the development of Chinese and foreign enterprises in the aspects including simplifying the review procedure, lowering the market threshold etc. Since Daimler entered Chinese market, Daimler has been devoting itself to expand its business complying with the principle of fair competition and insisted of legal operation. Daimler wishes to build constant contact with SAIC in future and will consciously conform to the relevant laws and regulations, cooperate with the administrative departments in the market supervision, realizing the long-term sustainable development, and making new contributions to Chinese economy.

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## CASES

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### **Liaoning Province Fined RMB 4.33 Million on Provincial Tobacco Company for Tying**

August 05, 2015

According to the decision of administrative penalty recently published on the website of Administration for Industry & Commerce of Liaoning, the Administration has decided on June 1, 2015 to impose a fine of RMB 4.33 million yuan on Liaoning Province Tobacco Company Fushun City Branch, and order it to stop the illegal practice. Specific bases of punishment are as follows:

#### **I. The party has market dominance in the cigarette wholesale market of Fushun city**

(I). Definition of relevant market in this case. The party in the case is suspected of abusing a market dominance, relevant market should be defined in the first place in order to determine whether the party has a market dominance. Relevant market in the case is mainly defined from the aspects of relevant product market and relevant geographical market.

i. Relevant product market. Relevant product involved in the case is cigarette, or tobacco. Considering factors such as the product feature, function and usage of cigarette, existing similar products are rare in the market. And combining with consumers' preferences and habits to analyze, other similar products cannot substitute with cigarette product. Therefore, relevant product market in the case is defined as the cigarette market.

ii. Relevant geographical market. Article 3 of the *Law of the People's Republic of China on Tobacco Monopoly* (hereinafter referred to as "Law on Tobacco Monopoly") stipulates that "The State shall, according to law, exercise monopoly administration over the production, sale, import and export of tobacco monopoly commodities, and practice a tobacco monopoly license system", Article 25 of the *Detailed Rules for the Implementation of the Law of the People's Republic of China on Tobacco Monopoly* stipulates that "Enterprises that have obtained licenses for monopolistic wholesale of tobacco products should operate within the scope and areas specified in the licenses. Enterprises or individuals that have obtained licenses for monopolistic retail sales of tobacco products should buy the products for sales from the local tobacco

monopolistic wholesale enterprises and accept the supervision and control by the organs issuing the tobacco monopolistic sales licenses”. Enterprises that have obtained licenses for monopolistic wholesale of tobacco products should only operate within the relevant areas; Enterprises or individuals that have obtained licenses for monopolistic retail sales of tobacco products also should only buy the products for sales from the local tobacco monopolistic wholesale enterprises. The party in the case is the only undertaking which has the licenses for monopolistic wholesale of tobacco products in Fushun city, its exclusive monopoly operating right of cigarette wholesale business is limited to the administration region of Fushun city, cigarette wholesale undertakings from other regions cannot enter into operating region of the party to compete with it, meanwhile the only legal way of purchasing for cigarette retail traders within the region is only the party. Therefore, relevant geographical market in the case is defined as the administration region of Fushun city. In sum, relevant market in the case is defined as the cigarette wholesale sale market within the administration region of Fushun city.

(II). Determination on whether the party has a market dominance in relevant market. The party is the only enterprise within the administration region of Fushun city which is rectified by competent administrative department on tobacco monopoly of the State Council and approved and registered by industrial and commercial administrative department, and which has the subject qualification to engage in the cigarette wholesale business. Restricted by the laws and regulations on tobacco monopoly, local tobacco retail traders have to purchase from the party, their operating activities rely absolutely on the party. Relevant market in the case is the cigarette wholesale market within the administration region of Fushun city, the party has a monopoly position in relevant market, and has an absolute control of the market. Therefore, our bureau, in accordance with the stipulations of Article 18 and Article 19 of the Anti-Monopoly Law regarding undertakings’ market dominance position, determines that the party has market dominance in relevant market.

## **II. The party attached conditions during transactions using its market dominance**

Through investigation, we find that in order to achieve sales targets and increase cigarette sales, the party took a week as a period and draw up the sales plan for current period according to sales targets and tobacco retail traders’ sales condition of last period and inventory condition of current period, then worked out a current period “launch strategy for hard-to-get cigarette brands” (hereinafter referred to as “launch strategy”) for cigarette retail traders based on the plan, that is to bundle the order quantity of hard-to-get cigarette brands (the party calls them as “resource cigarette”, hereinafter referred to as “resource cigarette”) as a resource with the order quantity of some particular cigarette brands (the party calls them as “assignment cigarette”, hereinafter referred to as “assignment cigarette”). The party also called this kind of “launch strategy” as “awarding policy”. This kind of bundle sales is to bundle the

order quantity of “resource cigarette” in proportion with the order quantity of “assignment cigarette”, causing that if tobacco retail traders want to purchase “resource cigarette”, they have to purchase corresponding quantity of “assignment cigarette” according to the “launch strategy” formulated by the party, if they want to purchase more of the “resource cigarette”, they have to increase the order quantity of “assignment cigarette”. The party set up the types of brands and quantity of cigarettes which can be ordered by tobacco retail traders through its back-stage management software (namely the goods distribution system of Fushun Tobacco Company, hereinafter referred to as “goods distribution system”), and imported background data into online cigarettes ordering platform (namely the website “New Traders Alliance”, hereinafter referred to as “New Traders Alliance”) through software interface before the weekly cigarettes order date of tobacco retail traders. Tobacco retail traders log on “New Traders Alliance” on their weekly cigarettes order date to check the types of brands and quantity of cigarettes which can be ordered in the current period from the cigarettes order page of “New Traders Alliance” and order cigarettes. The party set up the function of “new products launch” in the goods distribution system and used such function to achieve bundling. This function is capable of setting up the release quantity of cigarette goods of some brands for some particular tobacco retail traders alone, namely cigarette goods were delivered directionally. The party formulated the “launch strategy” on a weekly basis, customer managers of the party informed tobacco retail traders in their administering region of the current period “launch strategy”. Tobacco retail traders gave their feedback on the choice of “launch strategy” and order situation to customer managers in advance. Customer managers of the party, combining with “launch strategy”, collected statistics regarding the order situation of tobacco retail traders in their administering region, and formulated the text documents with the name of order date, region and types of brand of cigarettes (contents of the documents include the customer code and order quantity of tobacco retail traders). Then the marketing department submitted relevant information to the order department after collecting relevant data and the order department delivered cigarette goods directionally, according to the data provided by the marketing department, through the function of “new products launch” in the goods distribution system. After ordering the quantity of “assignment cigarette” specified in the current period “launch strategy”, tobacco retail traders can see the corresponding quantity of “resource cigarette” which can be ordered on the cigarettes order page of “New Traders Alliance” on the order date of next period. During the bundling process, customer managers of the party kept records and statistics on the order implementation situation of tobacco retail traders in their administering region, for those tobacco retail traders who did not implement the “launch strategy” as required, they kept a record and asked them to replenish or restrict the launch of “resource cigarette” for them; and for those tobacco retail traders who implemented the “launch strategy” as required but the party failed to launch “resource cigarette” for them, they kept a record and replenished for them. The party conducted inspections on the implementation situation of the weekly “launch strategy” of each region through a way of random inspection. According to the data kept in the electronic marketing

system of the party, the party sold cigarettes with a total sales of RMB 433.4498 million yuan in 2013 through the way of bundling.

### **III. The party added conditions in the transaction without justifiable reason**

The party tied the ordered quantity of “resource cigarette” with that of “task cigarette” in ratio, which violated Article 17, para.1, (v) of the AML: “Undertakings are prohibited from any one of the following behaviors that abuses their dominant market position: ... (v) Implementing tie-in sales without any justification, or imposing other unreasonable trading conditions;...” The party defended the legitimacy of its behavior during the investigation and submitted that the cigarette industry belongs to state monopoly industry with a legal monopoly position and thus the ordinary market competition rules as well as the AML should not be applicable. In that regard, the investigating authority holds that: in terms of subject, the AML Article 7 para 1 provides: “The State shall protect the legitimate business activities of undertakings in the industries controlled by the State-owned economy and vital to national economy or involving national security or industries implementing exclusive operation and sales in accordance with the law. The State shall also supervise and control the price of commodities and services provided by these undertakings and the operation of these undertakings so as to protect the interests of the consumers and facilitate technology progress.” The para 2 provides: “The undertakings in the industries prescribed by the preceding paragraph shall operate, in good faith, in accordance with the law and in a self-disciplined manner, accepting public supervision and shall not harm the interests of the consumers by exploiting their controlling or exclusive dealing position.” The “law” in these paragraphs shall include the AML. The state protects the business activities in line with the laws and regulations including the AML, which does not exclude the cigarette industry. The party belongs to the state monopoly cigarette sales enterprise, which shall abide by existing laws and regulations such as AML and Cigarette Monopolistic Sales Law without exemption. Therefore, the defense of the party has no justifiable reason.

### **IV. The party’s behavior impeded fair market competition**

The cigarette industry belongs to state-owned economy and the cigarette enterprises have legally dominant positions in the cigarette wholesale market; they shall be self-disciplined and operate in accordance with law, and shall protect the market order and consumers’ legal interests. In the cigarette wholesale market, the party should have followed the principle of “willingness” and allowed the retail dealers choosing purchase quantity and brand proportion freely. However, for raising sales volume and fulfilling sales target, the party tied the quantity of “resource cigarette” available for order with that of “task cigarette” in proportion and, if not following such arrangement, the retailers would not be able to order the “resource cigarette”. From the reasonableness aspect, such tying approach not only restricted the free choice of cigarette retailers in relation to quantity and brand, but also raised the retailers’ money

expense and inventory burden, thereby causing the overstock of certain downstream retailers. From the aspect of competition promotion, such tying behavior goes against sufficient competition in downstream retail market and the survival of the fittest system of upstream manufacturers. The party's above behavior is anti-competitive and has undermined the fair competition of the cigarette sales market.

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## FOCUS

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### **Qunar Reports of MOFCOM against Ctrip Alleging that Ctrip Acquiring Elong Violates AML**

August 21, 2015

Currently, Qunar has claimed publicly that it has submitted documents to MOFCOM's Anti-Monopoly Bureau and considered the acquisition of Elong by Ctrip as violating the AML and relevant regulations.

In regard of this, MOFCOM spokesman Shen Danyang noted in the routine news press that MOFCOM has noticed relevant news reports and received the submission and learned about details from Qunar. Presently, MOFCOM has arranged meeting with Ctrip and investigating relevant transaction in accordance with the AML and for the purpose of protecting fair market competition.

According to media reports, the above report from Qunar is targeting the acquisition of Elong by Ctrip in May 2015. With regard to that transaction, Qunar claimed on August 7 that post-transaction Ctrip and Elong's combined market share will exceed 50% in the online hotel booking market, and the Ctrip will possess the de facto control over Elong (the other two acquirers Plateno and Luxuriant Holdings both have certain relations with Ctrip), which constitutes concentration of undertakings and shall trigger the notification threshold set in the *Provisions of the State Council on the Standard for Declaration of Concentration of Undertakings* (No.529 Order).

Qunar also alleged that post-transaction Ctrip will have a monopoly position in the market and, by taking advantage of that position, will manipulate hotel businesses, requiring hotels not to cooperate with Qunar or not to offer low prices, which will oppress Qunar.

On the other hand, Ctrip replied that it has always been abiding by Chinese laws and conducting businesses in accordance with law. After Ctrip invested in Elong, it will only become one of its many shareholders and is a minority shareholder. "As can be seen, Tencent is offering acquisition to Elong. Once Tencent completes such a transaction, it will hold as much share as Ctrip." Ctrip also noted that the tourist market of China is enormous and Ctrip and Elong with a combined market share of less than 5% are relatively small, which cannot have any impact on the whole market. Meanwhile, Ctrip emphasized that they consider the Qunar's report and accusation as

an irrational behavior based on its pressure from business operation.

## **Inspect on the Reform of State-Owned Enterprises: the Real Harm of Administrative Monopoly is Prohibition on Competition rather than the Monopoly itself**

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To be honestly, the monopoly power of Chinese state-owned enterprises relies on the administrative monopoly. The so called administrative monopoly, i.e. the state-owned enterprises and central enterprises rely on the public power; by means of setting up enter barrier and the regulation of price to gain the special convenience and advantage, and to constitute the situation of the different degree of monopoly power and status. In the administrative monopoly, the public power and capital (especially the state-owned capital) has formed a close contact.

It is a significant economic decision for the administrative monopoly to grant the monopoly power to kinds of (category) enterprises, which is the restrictions on the right of economic freedom of potential competitors and the right of consumers' liberty of choose. In China's practice, the majority of basis of administrative monopoly is only the normative documents of administrative authorities, which is belonging to the self-empowerment of administrative apartment.

Almost all of the present administrative monopoly industries of China are evolved from the previous planning system. After years of financial system reform, the main revenue of central government has become the tax income. Although the central government has the impetus to reform the state-owned enterprises, it has no power to break the monopoly. On the contrary, the ways to reduce financial burden brought by the state-owned enterprises can be set the administrative monopoly as a kind of preferential policies for state-owned enterprises.

Since the 15th congress put forward "to seize the large and release the small ones, and to do something or not to do something" as the reform policy for the state-owned enterprises, combined with the great success of China's economic reforms, the value of the administrative monopoly seems being increasingly highlighted. The administrative monopoly profits increase a point the monopoly enterprises will gain a point due to do not submit the profits and do not need to limit the issuance of salary and rewards. As an interest group, they will have sufficient incentive to strive for the greater administrative monopoly.

Administrative monopoly can form high price, low output and welfare loss, therefore

reduce economic efficiency and damage the interests of consumers. And due to the potential competition has been basically eliminated, the extent of the efficiency loss will higher than the general market monopoly. Also, the administrative monopoly will serious damage the social justice: to obtain illegitimate interests through setting barriers and regulation of price; to pay less profit for the companies and to dividends less profit for the shareholders; to dissipate the nonproductive rent during the rent-seeking process; and the illegal transfer of monopoly profits in associated business and so on. Monopoly profits can constitute rent dissipation (internal) through improper distribution of internal enterprises: excessive employee salaries and benefits, in inappropriate on-the-job consumption of management team, luxurious office, and so on.

Briefly, China's state-owned enterprises accounting profit contains large number of land rent, resources rent and financing cost reduction, which shall be included in the cost of rent. As well as excessive profit due to administrative monopoly, after the cost reduction, the real profits are minimal and much lower than the social average level, or even a loss.

Because public power as constitution factors of administrative monopoly and the promotion of forming, maintaining and strengthening the process of administrative monopoly, while the administrative monopoly has damaged economic efficiency, the credibility and authority of the relevant administrative authorities also weakened inevitably in certain degree.

However, what have to be particular pointed is that the administrative monopoly and monopoly formed by the market competition, is definitely two different things. In general, maintaining monopolies can only depend on the proper disposition of some natural factors. For similar power of renewable production materials, it does not usually bring permanent monopoly, new businesses can always booming. Monopoly formed by market competition, in some cases, may be a good thing: a monopoly (or an oligopoly), sometimes is a kind of ideal state as a result of competition. In other words, when competition leads to a monopoly temporarily, it does not exclude that competition may be time to make maximal function.

The disadvantages of administration monopoly, is its "administrative property", which is a kind of privilege. The terms "privilege" can only be granted in accordance with the special order, and in addition the person granted this right, any others shall not enjoy the rights. Moreover, others shall not enjoy the rights, not because the situation did not provide them with the objectivity of such rights. As long as the existence of monopoly by relying on the way to stop people trying a better way than others to provide services for customers, then it will possess a right which should always be blamed as and against.

Therefore, the real harm of administration monopoly is not the monopoly itself, but

the prohibition of competition. In many fields such as energy, telecommunications and finance, the administration monopoly ruled out the creation and production as the scattered knowledge represented by private companies in the process of competition, and therefore cut all kinds of possibilities produced by private companies participating in the competition, and the private company's own living space will be more and more narrowed. The Austrian theory of competition as a discovery process considers, competition is a procedure, which can find a lot of facts. Part of the reason for competition's value is because the unpredictable result of competition. If it is able to predict or anticipate its result, we will never needs this kind of competition.