

# 天地和律師事務所 T&D Associates

China

## Monthly Anti-Trust Report

**December 2015**

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:

21<sup>st</sup> 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

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### **Antimonopoly and Anti-unfair Competition Enforcement Bureau of SAIC Leads the Consultation of Competition Section in the Ninth Round of Negotiation of the CJKFTA**

December 15, 2015

From December 14 to December 18, 2015, representative of the Antimonopoly and Anti-unfair Competition Enforcement Bureau of the State Administration of Industry and Commerce (“SAIC”) has attended the consultation of Competition Section in the China-Japan-Korea Free Trade Area (“CJKFTA”) Negotiation held in Japan. This is the ninth round of Negotiation since the start of the CJKFTA Agreement. The three antimonopoly enforcement authorities of China participate the consultation of the Competition Section jointly in this round where SAIC takes the lead and representatives of National Development and Reform Commission and Ministry of Commerce also take part. The Fair Trade Commission and other relevant authorities in Japan and Korea attended the negotiation.

The negotiation re competition policies in the CJKFTA Agreement has significant meaning for the confirmation of the enforcement principles jointly followed by enforcement authorities under the multilateral framework, prohibiting the monopoly behaviors which damage the multilateral trade and investment, further improving the overseas understanding of the antimonopoly enforcement status of China, and enforcing the multilateral trade liberalization and investment facilitation.

### **Price Supervision and Inspection & Antimonopoly Bureau of NDRC Held Antimonopoly Colloquia with Embassies and Chambers of Commerce of Some Countries in China**

December 14, 2015

At the forenoon of December 11, 2015, Price Supervision and Inspection & Antimonopoly Bureau held an Antimonopoly Colloquia with some countries’ Embassies and Chamber of Commerce in China, including Embassy of the United States Beijing, European Commission Delegation in China, British Embassy Beijing,

Korean Embassy in China, Embassy of Japan in China, European Union Chamber of Commerce in China, the American Chamber of Commerce in China, US China Business Council and the Japanese Chamber of Commerce and Industry in China. Handong Zhang, Director-General of Price Supervision and Inspection & Antimonopoly Bureau made a brief introduction to the antimonopoly legislation and enforcement situation of State Administration of Industry and Commerce in 2015, and listened to the comments and suggestions provided by the embassies and chambers of commerce attended. The embassies and chambers appreciated the open and honest attitude of Price Supervision and Inspection & Antimonopoly Bureau, indicated welcome to the form of listening to comments directly, and submitted expectations and suggestions from different perspectives. Qing Li, Deputy of Price Supervision and Inspection & Antimonopoly Bureau and other officials of inferior divisions attended the Colloquia.

## **SAIC: Antimonopoly and Anti-unfair Competition Enforcement Bureau Published the New Advance of Antimonopoly Enforcement in 2015**

December 3, 2015

On November 26, 2015, Antimonopoly and Anti-unfair Competition Enforcement Bureau of SAIC is held the Seminar of Antimonopoly Typical Cases in Chongqing. More than 20 of the responsible officials and professional backbones in the field of competition enforcement in 10 provincial and municipal bureaus for industry and commerce have attended the seminar. Some representatives attending the seminar of the provincial and municipal bureaus for industry and commerce have introduced the characteristics and dealing experiences of industry typical monopoly cases in the field of pharmaceuticals, insurance, etc. The representatives attending the seminar has made integrated discussion on issued faced with in the process of dealing with monopoly cases, communicated the development status of their antimonopoly enforcement respectively and provided comments and suggestions on the next stage of antimonopoly enforcement of the full system.

The representatives attending the seminar stated that the typical monopoly cases communicated in the seminar have provided precious experience for the dealing of similar cases in various jurisdictions, and improved the confidence of dealing hard cases. The representatives are inspired greatly by the typical monopoly case in the pharmaceutical industry investigated by Chongqing Administration for Industry and Commerce, in which the enforcement officials analyzed the injuries caused by the alleged monopoly behavior of the parties through establishing mathematical model, and the typical monopoly case in the insurance industry investigated by Hubei

Administration for Industry and Commerce where the enforcement officials made deep analysis on the issue of “co-insurance”. The Seminar also conducted discussions on the issues faced with during the investigation of the monopoly cases, which deepened the understanding of relevant laws and regulations of the representatives, further clarified several recognition, effectively solved the problems in reality and provided ideas for the dealing of the similar problems in the future at the same time. The good practice and successful experience of the antimonopoly enforcement shared by each jurisdiction and the comments and suggestions provided for the next stage of antimonopoly enforcement including increasing the case clues by mobilize and exert the positiveness of law enforcement officials at the basic level through multiple effective methods, setting up special investigating group to deal with monopoly cases, integrating various resources i.e. using “the outside brain” to investigate the antimonopoly cases and finding clues and collecting and fixing proofs by modern means of science and technology etc., all have significant value of reference, expands the way of working, benefits the deep development of antimonopoly enforcement of various jurisdictions.

It is known that in 2015 the antimonopoly enforcement performance of the national system of industry and commerce have made new progress. SAIC has authorized the local jurisdictions to deal with 12 cases involved in alleged monopoly behaviors in total. So far, the industry and commerce departments have initiated 58 cases, among which 31 cases are relative to the alleged monopoly agreements, 27 cases are relative to the alleged abuse of dominant market place, and have closed 24 cases as well as suspended the investigation of 4 cases. In 2015, Anhui Administration for Industry and Commerce imposed administrative punishment on the behaviors of relevant parties who did not cooperate with the antimonopoly enforcement authorities in conducting the antimonopoly investigation and/or refused to provide relevant materials. This is the first punishment notice issued by industry and commerce departments re the incoordination with enforcement authorities in the antimonopoly investigation. Moreover, SAIC issued the sixth matching regulation for *Anti-Monopoly Law*, which is *the Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition*. This regulation has detailed the provision of Article 55 of Anti-Monopoly Law, provided more explicit legal bases for the enforcement of the industry and commerce departments re prohibiting to eliminate and restrict the competition, and provided guidance for right holders to exert their Intellectual Property Rights properly.

During the seminar, the representatives visited the Laboratory of Fixing Digital Evidence of Chongqing Administration for Industry and Commerce, listened to the introduction made by Chongqing Administration for Industry and Commerce re the establishment of Intelligence Information Platform for Law Enforcement and Handling Cases and finding case clues by using the platform.

## AMB of MOFCOM Formulates Assignment Agreement of Monitoring Trustee (Model Text)

December 2, 2015

Pursuant to *Anti-Monopoly Law of the People's Republic of China, Measures for Review of Concentrations between Undertakings, Provisions on Imposing Restrictive Conditions on Concentration on Undertakings (on trial)* etc., for a business operator concentration not to be prohibited, the Ministry of Commerce (“MOFCOM”) may decide to impose restrictive conditions to reduce the adverse impact of the concentration on competition. MOFCOM can supervise the compliance status of the undertakings with the restrictive conditions by itself or via monitoring trustee. In terms of the supervision via monitoring trustee, undertakings concerned the concentration shall enter into writing entrustment agreement with monitoring trustee. In order to clear the relationship of rights and obligations, and improve the efficiency of signing entrustment agreement, Anti-Monopoly Bureau of MOFCOM (“AMB”) formulates *Assignment Agreement of Monitoring Trustee (Model Text)* (hereinafter referred to as the “Model Text”), for the application reference of consignor and monitoring trustee.

1. This Model Text is not legally binding and only for the application reference when consignor and monitoring trustee entering the entrustment agreement.
2. This Model Text is not only applicable to the cases MOFCOM attaches restrictive conditions, but also applicable to the cases attached behavioural restrictive conditions, as well as the cases attached the blending conditions including restrictive conditions and behavioural conditions. The parties signing the agreement shall select to apply relevant terms of the Model Text based on the type of the restrictive conditions. Chapter VI of the Model Text shall be only applicable to the cases attached restrictive conditions (business divestiture); chapter V of the Model Text shall be mainly applicable to the cases attached behavioural conditions (other restrictive conditions except for the business divestiture); other terms can be referred to application for all types of cases.
3. The parties need to supplement the commitment or specify relevant contents based on the specific situation of the cases for several terms of this Model Text, including (i) the content inside **【】** of the Model Text is to be supplemented by the parties; (ii) for the provisions which include “separately agreed”, “other agreements”, “reach agreements...according to specific situations” etc., the parties can make further or more detailed agreements based on the specific situation of the cases. While, the supplemental or detailed agreement shall not conflict with the purpose and/or the content of the announcement.

4. The parties can make changes to the contents of the Model Text based on the specific situation of the cases, while, the changed contents shall not conflict with the purpose and/or the content of the announcement.

5. Anti-Monopoly Bureau of Ministry of Commerce is responsible for explaining this Model Text.

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## ACADEMIA

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### **SAIC Participated in EU-China “Intellectual Property Rights of Standardization” Seminar**

December 11, 2015

On December 10, the Enforcement Bureau of Anti-Monopoly and Anti-Unfair Competition of SAIC sent to participate in the EU-China "Intellectual Property Rights of Standardization" seminar cosponsored by MOFCOM and the China-EU IPR cooperation group.

At the meeting, officials of the Enforcement Bureau of Anti-Monopoly and Anti-Unfair Competition communicated with the EU-China administrative and judicial authorities, standards-setting organizations and industry experts on how to grasp the competition policy in the field of standards and IPRs, and made a keynote speech on "New Development of IPR Anti-monopoly Rules", introducing the anti-monopoly legislation status in the field of IPR. Certain contents of the *Regulation of the Administration Authorities of Industry and Commerce on Prohibition of Intellectual Property Rights Abuses for Eliminating or Restricting Competition* were emphatically introduced, such as the basic understanding of certain issues relating to the relationship between anti-monopoly and IPR protection, the established "safe harbor" regime as well as refusal to license, patent pools, antitrust enforcement focus of standards-setting. In addition, it also introduced the work progress of participating in the drafting "*Anti-Monopoly Guidelines on Abuse of IPR*" in accordance with the relevant supporting legislation plan of the Anti-monopoly Commission of the State Council.

### **The 2015 Annual Conference of Asian Competition Law Association and Asian Competition Law International Forum was successfully Held in Wuhan University**

December 1, 2015

On November 28, 2015, the 2015 Annual Conference of Asian Competition Law Association and Asian Competition Law International Forum was successfully held in



Wuhan University, Lecture Hall 120 of Law School. The conference was hosted by the Asian Competition Law Association and organized by the Competition Law and Policy Research Center of Wuhan University, and co-hosted by the Tianfeng Securities Co., Ltd., Wuhan City Federation of Social Science, Wuhan Economic Research Association, and Competition Law Research Association of Hubei Province Law Association.

This is a Competition Law Conference of the highest standard in Asia. President of the Asian Competition Law Association, Mr. Kimitoshi Yabuki, vice president of the Asian Competition Law Association Mr. Chul-Kyu Kang, vice president of the Asian Competition Law Association Professor Xu Shiyong, as well as Mr. Zhu Kai of Price Supervision and Inspection and Antitrust Bureau of NDRC, deputy director of the Enforcement Bureau of Anti-Monopoly & Anti-Unfair Competition of SAIC Mr. Lu Wanli, Division Director of Anti-Monopoly Bureau of MOFCOM Miss Yin Yanling, etc., and together with other sixty competition law and antitrust economics leading experts and scholars from China, Japan, South Korea and Hong Kong, deeply discussing the frontier issues of competition law enforcement, broadly communicating the enforcement experience and lessons, mutually tempering academic thoughts, seeking the mutual understanding and progress among different national competition policies. Some industry representatives, antitrust lawyers and media friends also attended the conference to discuss the hot frontier issues with regards to the related fields of antitrust and competition law enforcement.

The meeting started at half past eight, and Professor Sun Jin, director of Competition Law and Competition Policy Research Center of Wuhan University presided over the opening ceremony. Professor Xiao Yongping, Dean of Law School of Wuhan University firstly speech welcoming remarks, followed by President of the Asian Competition Law Association, Mr. Kimitoshi Yabuki, vice president of the Asian Competition Law Association Mr. Chul-Kyu Kang, vice president of the Asian Competition Law Association Professor Xu Shiyong, expressing warmly congratulations to the holding of the conference.

The participating officials and scholars conducted spirited discussion about the topic "Antitrust and Competition Law Enforcement". The Conference is divided into two parts. The first part was hosted by Peking University Law School Professor Sheng Jiemin and Mr. Wonjoon Kim of Korea, Mr. Zhu Kai of Price Supervision and Inspection and Antitrust Bureau of NDRC, deputy director of the Enforcement Bureau of Anti-Monopoly & Anti-Unfair Competition of SAIC Mr. Lu Wanli, Division Director of Anti-Monopoly Bureau of MOFCOM Miss Yin Yanling, the Korea Fair Trade Commission official, Mr. Dong Kweon Shin, the Japan Fair Trade Commission official Mr. Sadaaki Suwazono respectively released the forefront status of competition policy and competition law enforcement in their respective countries, and the problems encountered among law enforcement were sent to the experts and scholars present.

The second part is the academic study session, divided into three units. The first unit, "latest developments of cartel regulation" was hosted by Wang Jian, Dean of Law School of Zhejiang Sci-Tech University, and Japanese expert Mr. Shigeyoshi Ezaki. Zhan Hao lawyer, partner of Beijing AnJie Law Firm, Professor Lin Ping of Department of Economics, Lingnan University of Hong Kong, Jae Young Kim, partner of South Korea Yoon & Yang LLP, Nobuaki Mukai, partner of Japan Momoo, Matsuo & Namba, delivered masterly speeches about the latest developments of cartel regulation in consequence. Wonjoon Kim, senior adviser of South Korean Kim & Chang, and Mr. Lin Zhong of Shanghai Ying Ming Law Firm made comments and put forward their views on the latest developments of the cartel, which won the agreed reputation and high praise from the participants.

The second unit "development trend of regulating market dominant position abuse" was hosted by deputy director of Electronic Intellectual Property Center of MIIT, Li Huiying, and Professor Makoto Kurita of Chiba University in Japan. Professor Lv Mingyu of Zhengzhou University School of Law, Dacheng Law Firm partner Dai Jianmin, Korea Sogang University professor Seonghoon Jeon, Japan Fuld Law Firm Akinori Uesugi delivered speeches and the associate professor Ding Maozhong and Zhang Zhenan lawyer of Shanghai Xie Li Law Firm lawyer made wonderful comments.

The third unit "difficult problems of concentration of undertakings control" was hosted by Associate Professor Li Junfeng of China Shanghai University Law School and Professor JiSang Chang of Kyungpook National University. Lecturer Han Wei of China Youth University for Political Sciences, associate professor Liugui Qing of Zhongnan University of Finance and Economics school of law, Soonsik Ju, lawyer and senior counsel of South Korea Yulchon Law Firm, Ryutaro Nakayama, lawyer of Japan Nishimura & Asahi Ryutaro Nakayama Law Firm delivered speeches in consequence. Anhui University Law School Professor Li Shengli made comments of the above speeches. Relevant issues in this unit had caused heated discussions among participants!

The closing ceremony was hosted by Professor Ning Lizhi of Wuhan University School of Law, Honorary Professor Quan Wucheng of Seoul National University and Professor Wang Jian, dean of the Zhejiang Sci-Tech University School of Law delivered speeches respectively. At the final stage, director of competition law and competition policy research center of Wuhan University, Wuhan University Law School professor Sun Jin thanked the many government officials, experts and scholars, lawyers and other participants for contributing intelligence, and thanked the participants and working staff of this annual conference. The conference provided an important platform for experts and scholars in China and abroad, government officials, business representatives, lawyers to communicate with each other. Although the time was tight, but the content was rich, discussions were heated and achievements were

abundant.

This seminar was not only involved in the latest developments of anti-monopoly law enforcement and legislation overseas, but also conducted in-depth discussion of the key and difficult problems in China anti-monopoly legislation and enforcement. Professor Sun Jin finally pointed out that there would be a bright future of Asian and China's anti-monopoly career through our concerted efforts!

## **Price Supervision and Inspection and Antitrust Bureau of NDRC Held the Seminar of "Guidelines to Determine the Illegal Gains from Monopoly Behaviors and Determine Fines"**

November 30, 2015

In accordance with the deployment of the Anti-monopoly Commission of the State Council, NDRC is responsible to take the lead in drafting "Guidelines to determine the illegal gains from monopoly behaviors and determine fines". To improve the scientificity of the Guidelines, NDRC Price Supervision and Inspection and Antitrust Bureau together with Tsinghua University Competition Law and Industry Promotion Research Center, respectively held the Anti-monopoly Lawyer forum and Experts Discussion conference in Beijing in the morning and afternoon of November 25 to invite renowned scholars, economists in the anti-trust field to study the key issue in determining illegal gains and fines, and solicit opinions from some law firms. Price Supervision and Inspection and Antitrust Bureau director Zhang Handong, deputy director Li Qing attended the Experts Discussion conference and listened to the comments and suggestions from experts present, deputy director Li Qing also attended the Anti-trust Lawyer Forum.

Director Zhang Handong pointed out that scientifically and reasonably determining the illegal gains from monopoly behaviors and fines was not only the key to fulfill the goal of Anti-Monopoly Law to prevent and suppress monopolistic behavior, but also the necessary measures to improve the transparency of the anti-monopoly law enforcement agencies, regulate antitrust administrative fine power, enhance the operator's law expectation. Guidelines drafting group leader introduced the background and the whole idea of guidelines, and specifically explained the key issues involved.

The participants of the meeting affirmed the necessity and importance of developing relevant guidelines and provided comments and recommendations on issues of own

concerns, such as the basic principles of the Guidelines, methods to determine illegal gains, the concept definition related to fines and key factors etc., Drafting Group listened carefully to the above suggestions of representatives and responded to the key issues.

Director Zhang Handong expressed that the conference provided as an efficient platform to communicate about the Guidelines development, and played a positive role to carry out next step of work. Price Supervision and Inspection and Antitrust Bureau of NDRC would hear and integrate views and recommendations of the each party more broadly, form a mature draft as soon as possible on the basis of adequate research and demonstration, and submit the draft to the Anti-monopoly Commission of the State Council after opinions solicited and adopted according to legal procedures.

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## CASES

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### **The Metal Patent Anti-monopoly Case which 4 Ningbo Enterprises Sued Hitachi was on Trial in Ningbo**

December 21, 2015

In May 2014, San Francisco of the United States, 4 Ningbo enterprises of 7 enterprises launched a negotiation with Hitachi Metal, Ltd. (“**Hitachi**”) regarding to rare-earth permanent magnet (“**REPM**”), the 4 Ningbo enterprises including Ningbo Tongchuang Strong Magnet Material Co., Ltd., Ningbo Huahui Magnetic Industry Co., Ltd., Ningbo Ketian Magnet Co., Ltd., Ningbo Permanent Magnetics Co., Ltd., etc. The negotiation finally failed with no result, the 7 enterprises have failed to obtain licensing of patent.

Then, the 7 enterprises of REPM set up alliance means of counterattack. Through hard efforts, the 7 enterprises’ application was supported by the United States Patent and Trademark Office (“**USPTO**”) supported, and finally the 2 metal pants of Hitachi were ruled invalid.

On the end of the year, 4 Ningbo enterprises have filed a lawsuit to Intermediate People's Court of Ningbo Province for the abuse of dominant market position, which constituted monopoly. The trials began yesterday.

#### **The Origin of Patent Dispute**

Sintered NdFeB is alloys of rare earth, iron, boron, and so on, as one of NdFeB materials, it is known as the strongest magnets, so called as "the king of magnet". Due to the unique high performance of Sintered NdFeB, it is an irreplaceable material in many fields of modern industries, such as vibration motor, speaker and camera crew module of smart phones, hard disk drives, the auto electric power steering system.

Hitachi is the world's largest enterprises engaging production and sales of Sintered NdFeB, it is also the patent holders of more than 600 global NdFeB patents. The huge "patent pool" acted as a "weapon" holding in Hitachi’s hand. In order to maintain their own IPR and market, three years ago, Hitachi and its associated companies raised "337 investigations" in the United States against 29 global companies which including 3 Chinese companies, for the reason of patent infringement of 4 pieces of Sintered NdFeB technology. In the end, Hitachi reached an accommodation with three Chinese

companies, and agreed to authorize patents for charging a certain form of royalties. In 2013, Hitachi has authorized 8 rare earth companies in China to use its patented technology. However, more than 200 NdFeB companies are still excluded.

Thus, the 7 domestic enterprises including 4 Ningbo enterprises set up a Rare Earth Alliance to communicate and negotiate with Hitachi, hoping it can grant its patent. After the failed series of efforts, Rare Earth Alliance has submitted an application to the USPTO to claim the invalidity of Hitachi's core Sintered NdFeB patent. In August of 2015, 2 core patents of Hitachi in the United States was preliminarily determined as invalid.

### **Ningbo Enterprises sued for monopoly**

At the end of last year, 4 Ningbo enterprises have filed a lawsuit to Intermediate People's Court of Ningbo Province for the abuse of dominant market position. They considered, Hitachi has necessary "patent package" that is no substitute and can not to avoid the in the field of Sintered NdFeB production, Hitachi abuse its dominant market position in the field of licensing patent of sintered NdFeB, by refusing to license the patent, it make the most of Sintered NdFeB manufacturers in China unable to enter the overseas markets such as the United States, the European Union, Japan and others, at the same time it also faces the threat of patent litigation in the Chinese market. Meanwhile, Hitachi also conducted abusive behaviors like patent bundling, and continuously extended its patent licensing period.

4 enterprises required Hitachi terminating the abusive behaviors of dominant market position as bundling and refusing to deal, and compensating to 4 enterprises respectively 5.5 million Yuan to 7 million Yuan of their loss for infringement of Hitachi, the claim amount is 24 million Yuan in total.

For the prosecution of enterprises in Ningbo, Hitachi first proposed to the jurisdiction objection, which was rejected by the court. Later in reply, Hitachi thought as the patentee, it shall have the right to choose the licensee, and there is no abuse of dominant market position for bundling and refusing the deals, and it does not have the dominant position in the relevant market. If Ningbo enterprises believed Hitachi formed monopoly, they should bring the evidence for dominant market position in the relevant market of Hitachi and the abuse of dominant market position.

On December 18, 2015, after 9 hours of trial, the court did not sentence in the court. This case is the first domestic case related to the abuse of dominant market position of Non-SEPs, which has led to many focus from the field of legal and industry, the results of the case will have a profound impact on domestic NdFeB industry.

## **Economical Monopoly + Administrative Monopoly : the Punishment and the Suggestion of NDRC Gansu Branch in Parallel**

November 27, 2015

On November 24, the Price and Supervision Bureau of NDRC of Gansu Province has made the administrative punishment determination to several vehicle repair plants including Wofeng Vehicle Repair Plants of Wuwei City Liangzhou District, who participating the Wuwei Repair Industry Association ("the association"), ordered them to terminating the price monopoly, and imposed a fine. At the same time, NDRC of Gansu Province also sent a letter to Bureau of Transportation of Wuwei City regarding to the letter of Suggestions on rectify the abuse of administrative power to exclude or restrict the competition of Wuwei Road Transport Administration, to suggest rectifying the related behaviors conducted by Wuwei which is abuse of administrative power to exclude or restrict the competition, and required to submit the rectification to inform the NDRC on November 30 2015.

The case involves the economical monopoly and administrative monopoly at the same time. In this case, the above 24 enterprises who participated the association have fixing the price of vehicle's secondary maintenance fee and the uniform policy of delivery service under the name of association. Wuwei Road Transport Administration issued the Notice on Measures of the Secondary Maintenance and Supervision Management of Road Transport Vehicle (Trial) to require the implement of the related provisions of the association. NDRC of Gansu Province considered, the 24 enterprises have reached the monopoly agreement with competitive undertakings regarding to the fixing price of vehicle's secondary maintenance fee, which has exclude or restrict the market price competition. In violation of AML and Regulations on Anti-Price monopoly, the above behaviors of Wuwei Road Transport Administration and the association, objectively had the impact on restricting the competition of undertakings and forcing the enterprises to implement the monopoly of service fee set up in the Self-discipline of one or second type of vehicle maintenance enterprise, aggravated the burden of vehicle maintenance enterprise, and maintained the continually executing of price in monopoly agreements, eliminated and restricted the competition of Wuwei secondary road transport vehicle maintenance market. The related behaviors violated the Article 8 of AML, which belongs to the behaviour of abuse the compel undertakings to engage in monopolistic conducts that are prohibited by this Law.

In addition, NDRC of Gansu Province has found that some areas of Gansu province were still in the implementation of *the Notice on vehicle maintenance and repair service hour norm and standards in Gansu province* (Gan Jiao Yun [2000] No.11

Notice) issued by Transportation department of Gansu and the Price and Supervision of Gansu Province. Due to the vehicle maintenance service fee was not included in scope of government pricing catalog issued by the state and province, which belongs to the market regulation, thus shall be independent pricing by the undertakings. If continue to execute the files, it will not conducive to the market competition of automobile maintenance industry, thus recommended that Transportation department of Gansu province dispatching the notice.

## **20 Accounting Firms in Linyi Suspected of Monopoly, AIC Department Held Hearing**

November 26, 2015

On November 25, according to the news release of Shandong Provincial Administration of Industry and Commerce, regarding the suspected monopoly agreement reached among the 20 accounting firms in Linyi, Shandong Provincial Administration of Industry and Commerce held public hearing. The results of the hearing will serve as the important basis of the final determination.

Article 13 of the Anti-monopoly Law stipulates that monopoly agreements refer to protocols, decisions, or other coordinated behavior for eliminating or restricting competition. The Anti-monopoly Law prohibits undertakings that have competitive relationship from entering into the following monopoly agreements: fixing or changing the prices of a commodity; limiting the production or sales volume of a commodity; dividing a sales market or material purchase market; restricting the purchase of new technology or new equipment or preventing the development thereof; boycotting trading; and other monopoly agreements as determined by the State Council anti-monopoly law enforcement authorities.

Pursuant to the procedure of the hearing, the legal authority informed the parties by writing 7 days in advance and made public announcement by posting notices and the official website. During the hearing, the organizer strictly followed the legal procedure, carefully reviewed the qualification of the participants, informed the participants of the hearing discipline and the relevant rights and obligations and performed the relevant procedures including hearing investigation, evidence confrontation, debating, final statement, review of the minutes of the hearing as well as sign and seal, etc. The legal representatives of the parties and their agents sufficiently exercised their rights including applying for challenge, stating defense, and confronting evidence and debating. Personnel from certain provincial departments and representatives of the parties sat in for the hearing. The results of the hearing will serve as the important basis of the final determination.



The 20 accounting firms that are suspected of conducting monopoly agreements include Linyi Anfenglian Accounting Firm, Shandong Hongcheng Accounting Firm Co., Ltd., Shandong Tianyuan Tongtai Accounting Firm Co., Ltd. Linyi Branch, New Lianyi Accounting Firm Co., Ltd. Xiancheng Branch, Linyi Xinde Jinqiao Joint Accounting Firm, Shandong Hongxin Accounting Firm Co., Ltd., Pingyi Yimeng Limited Liability Accounting Firm, Linyi Qiyang Joint Accounting Firm, Shandong Dacheng Joint Accounting Firm, Shandong Huizheng Joint Accounting Firm, Linyi Hengdaxin Limited Liability Accounting Firm, New Lianyi Accounting Firm Co., Ltd. Linyi Branch, Linyi Zhonghao Limited Liability Accounting Firm, Linyi Shengda Joint Accounting Firm, Shandong Hengyu Accounting Firm Limited Liability Company, Linyi Hengzheng Limited Liability Accounting Firm, Shandong Tianhengxin Limited Liability Accounting Firm, Linyi Yuanzhen Limited Liability Accounting Firm, Shandong Wanxingde Accounting Firm Co., Ltd. and Shandong Taixin Accounting Firm Co., Ltd. Linyi Branch.

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## M&A

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### **MOFCOM Approved Acquisition of Freescale by NXP Subject to Conditions**

November 30, 2015

On November 25, the Anti-monopoly Bureau of MOFCOM approved the acquisition of all shares of Freescale by NXP with restrictive condition.

On April 3, 2015, MOFCOM received the notification of the concentration of undertakings. After review, MOFCOM decided that the notifying materials were incomplete and requested the notifying parties to supplement. On May 15, MOFCOM confirmed that the notifying materials were in accordance with Article 23 of the Anti-monopoly Law and initiated the notification of concentration of undertakings for further review. After further review, MOFCOM decided that the concentration might have effects of restricting and eliminating competition in the RF power transistor market. On September 11, with the consent of the notifying parties, MOFCOM decided to further extend the time limit of review. After the further extended review period expired, the notifying parties applied to withdraw the case and the application was approved by MOFCOM. On November 10, MOFCOM initiated the re-submitted notification by the notifying parties.

NXP and Freescale have horizontal overlap in general-purpose microcontrollers, analog integrated circuits exclusively for power supply (used in the area of automobile applications) and RF power transistors. The relevant geographic market for such products is all the worldwide market. Pursuant to the provisions of Article 27 of the Anti-monopoly Law, MOFCOM conducted thorough analysis of the effects of the proposed concentration on market competition from perspectives of market intensity, market shares of the parties participating in the concentration and their market power and the difficulty of market entry, etc., and believed that the proposed concentration is likely to have effects of restricting and eliminating competition in the RF power transistor market: (1) the transaction would result in the further strengthening of NXP's market dominance in the relevant market; (2) the transaction would eliminate the competition between two of the leading close competitors in the area; (3) the transaction would narrow the range of choice of the customers and raise the risks associated with procurement; (4) the transaction would influence technology R&D and innovation; and (5) the transaction would further raise the entry barrier of the relevant market.

Considering that the transaction is likely to have effects of restricting and eliminating competition on the RF power transistor market, at the preliminary stage of the review of the case, NXP submitted to MOFCOM the remedy proposal of divesting the RF power transistor business of NXP and selling it to Beijing JAC Capital Management Ltd ("JAC Capital"). At the later stage of review, MOFCOM timely informed NXP of its review opinion that the transaction may have effects of restricting and eliminating competition. NXP then submitted to MOFCOM the Share Purchase Agreement Acquiring All the Issued and Outstanding Shares of the Share Capital of Samba Holdings Netherland Co., Ltd. (the "Samba Agreement") entered into between NXP and JAC Capital as well as its final commitments resolving the competition issues of the concentration on October 27, 2015 and November 19, 2015, respectively.

With regard to the Samba Agreement as well as the final commitments submitted by NXP, MOFCOM conducted review pursuant to the Provisions on Imposing Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation), focusing on the scope and effectiveness of the divested business, the survival property, competitiveness and marketability of the divested business, the qualification of purchaser and the attitude of downstream consumers about the remedy proposal, etc. After review, MOFCOM believed that the Samba Agreement and final commitments submitted by NXP are able to reduce the adverse effects of the concentration of undertakings on competition.

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### **The Anti-Monopoly Guideline of Automotive will be Issued Next Year Accessories will be in the Scope of Adjustment**

December 16, 2015

“The Anti-Monopoly Guideline of Automotive will be issued next year, the department releasing the document will not be some department, rather it will be the State Council of the higher level”, Tongwei WEI, the secretary-general of the accessories working committee of the China Automotive Maintenance and Repair Trade Association, said recently.

#### **Distribution of spare and accessory parts will be included into the scope of anti-monopoly**

The latest word in the past is that in one press conference of early November, Yanchun LU, the deputy director general of the Price Supervision and NDRC publicly announced that the first draft of the anti-monopoly guideline in the automotive industry has been finished, which means that the issuance of the document is not far away.

Much attention in the industry has been paid on when the Anti-Monopoly Guideline of Automotive (hereinafter referred to as “the Guideline”) will be issued. Since 2014, many car enterprises including Mercedes Benz, BMW, Nissan, etc. have been punished in China for the suspected monopoly, while the close accessories system of the 12 suppliers including Hitachi, Mitsubishi Electric and Nachi, etc. has received a huge fine of 1.235 billion Yuan RMB by the Chinese NDRC for manipulating the supply price of the product.

The Guideline will not only regulate on the sale of new cars, distribution and management of accessories will also be included in the adjustment scope of the document. For a long time, in the domestic car accessories market, fake goods with low price and low quality have been crazily sold by roadside stores on the one hand, on the other hand, the price of accessories of the original factory of 4S is extremely high.

One of the reasons causing this situation is the monopolistic control by the car enterprises of the accessories of 4S stores. Out of the consideration of the two reasons

of easy management and the margin control, car enterprises usually will not allow accessories of the original factory in their own systems to be flown out. Once finding out 4S stores selling accessories outside of their system, they will punish severely on the dealers. Plus that the construction and operation of 4S stores themselves requires expensive cost, price of the accessories sold is naturally raised pretty high.

One big controversy of the anti-monopoly of accessories is that quite a part of the R&D expenses of accessories suppliers in the earlier stage are prepaid by the car enterprises or amortized by them afterwards, to some extent there is a relationship similar to the relationship of manufacturing consignment. If accessories are allowed to be flown outside of the system, the interests of the car enterprises who have invested lots of R&D expenses in the earlier stage will surely be injured.

The attitude of the anti-monopoly bureau of NDRC is very clear on this, namely, car enterprises should not restrict the right of outsourcing accessories of authorized dealers and maintainers, neither should they restrict the right of selling the accessories outside of the system of accessories manufactures and authorized maintainers.

### **Hoping accessories with the same quality will break the old interest's pattern**

As for roadside car repairing stores, since they cannot retrospect all the way of the upstream accessories information, naturally they have no ability to recognize the high or low quality of the accessories not from the original factories, it is natural that they purchase the low-price accessories which are more easily to be sold.

“It is possible that in the goods supplied to you from the upstream, 2 pieces out of 10 are quality goods, the others are all fake, but roadside stores cannot distinguish the fake from the quality goods.” Wenkai CHEN, founder of yangche51.com, considers, one way of solving this drawback is to vigorously promote the accessories with the same quality whose information could be retrospected and quality could be proved.

## **The First Draft of the Guideline of the Commitment of Undertakings in Anti-Monopoly Cases has been Accomplished and will Solicit Public Opinion**

December 15, 2015

In the afternoon of December 11, NDRC held the timing press conference of specific theme of December, press secretary and director of Policy Research Office, Zihai SHI attended the press conference, introduced the important work of reform of the economic system, promoting investment and increasing the economy stably. Price of

main goods and services and relevant conditions of national price reporting and disposition, etc. since November. In the meeting, director Zihai SHI expressed that the first draft of the Guideline of the Commitment of Undertakings in Anti-Monopoly Cases has been accomplished, and public opinions will be solicited from the whole society in the next step.

## **The Making of the Anti-Monopoly Law Enforcement Guideline in the Field of Intellectual Property is Speeding Up**

November 26, 2015

Recently, the Anti-Monopoly and Anti-Unfair Competition Law Enforcement Bureau of the State Administration of Industry and Commerce (SAIC) has sent personnel to attend the seminar of the panel committee of the draft of Anti-monopoly Guideline on Forbidding the Behavior of Abusing Intellectual Property Rights to Eliminate or Restrict Competition. In the meeting, three anti-monopoly law enforcement agencies of our country respectively submitted and introduced the preliminary results of the draft of the guideline of their own departments. Currently, three anti-monopoly law enforcement agencies have reached a preliminary consensus, they will respectively submit their own draft to the Anti-monopoly Commission Office of the State Council before the end of January of next year.

According to the introduction, SAIC has started the research work of the anti-monopoly guideline in the field of intellectual property since as early as 2009.

On April 7 of 2015, SAIC released the first anti-monopoly regulation of our country which specially aims at the abuse intellectual property, namely the Regulation on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (the Regulation) which took effect as of August 1, 2015.

The Regulation states contents such as the relationship between anti-monopoly and intellectual property protection, the definition of abusive behaviors which eliminate or restrict competition and the relationship between intellectual property and dominant market position, etc. Meanwhile, the Regulation sets up several important mechanisms including “safe harbor”, refusal to license, rules of patent pool as well as the standard setting and implementation rules involving patents, etc, which makes up the blank of relevant provisions in the Anti-Monopoly Law.

In May of 2015, under the coordination of the Anti-monopoly Commission Office of the State Council, three anti-monopoly law enforcement agencies of China started

drawing up the first draft of the anti-monopoly law enforcement guideline in the field of intellectual property respectively.

## **Chinese Government Commits to Protecting Trade Secrets According to Law in the Process of Anti-Monopoly Law Enforcement**

November 24, 2015

The twenty-sixth meeting of China-US Joint Commission on Commerce and Trade (JCCT) was held from 21 to 23 of November in Guangzhou. Chinese government commits in the meeting of JCCT of 2015 to protecting trade secrets according to law in the process of anti-monopoly law enforcement.

JCCT meeting of 2015 is jointly presided over by the vice prime minister of China State Council, Wangyang, secretary Pritzker of US Department of Commerce and US trade representative Frohman, US Secretary of Agriculture Vilsack attended the meeting. The topic regarding trade secrets protection is repeatedly mentioned by both parties. While issued related to Chinese anti-monopoly law enforcement also becomes one of the main concerns of the US.

“In the meeting of 2015, China confirms they will clarify the relationship between the Anti-Monopoly Law and intellectual property and will consider issues such as the license of intellectual property etc. in the process of anti-monopoly enforcement”, US trade representative Frohman said in the US press conference after the close of the JCCT meeting, “China also confirms that they will not be influenced by other departments when carrying out the work of anti-monopoly enforcement and commits to protect the trade secrets obtained in the process of law enforcement work”.

Vice secretary of MOFCOM Xiangchen Zhang also said after the meeting that China and the US promised that they will provide powerful protections on trade secrets, promote innovation and fair competition, both parties will share the experiences and practice related to the protection of trade secrets in the process of investigation and court procedure. Both parties agreed to provide an effective and balanced protection of intellectual property.

China promised that the purchasing policy related to IT products of banking industry and the informatization supervision regulations of insurance agencies will solicit comments from the public and will protect trade secrets according to law in the process of anti-monopoly enforcement.

“In the area of trade secrets, China has clarified their intention.” Secretary Pritzker of US Department of Commerce said, “When encountering steal of trade secrets, enterprises in China will hopefully obtain better remedies from the judicial level, etc.”

In fact, in recent years, China has gradually to come to realize that the work of trade secrets protection not only involves the innovative development of enterprises but also closely relates to the image and reputation of Chinese enterprises in international competition. China will strengthen the protection of trade secrets, meanwhile it will carry out communication and cooperation with the international community including the US. In October of 2015, the seminar of China-US trade secrets was held in Zhejiang province, during which China and the US conducted discussions regarding the practical issue of trade secrets protection.