

天地和律師事務所 T&D Associates

China

Monthly Anti-Trust Report

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Due to the general nature of its contents,

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

For any questions please contact T&D Associates at:

21st Floor, Times Fortune

Shuguang Xili Jia 6, Chaoyang District,

Beijing 100028, People's Republic of China

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



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AUTHORITY

State Council Regulates E-commerce, Monopoly Agreements are the Main Target

May 8, 2015

On May 7th, the State Council issued the *Opinion on Striving to Develop E-Commerce and Promoting and Nurture New Economic Driving Forces* (the "Opinion"). The Opinion clearly states that when regulating competition in the E-commerce market, it is important to investigate and punish the signing of monopoly agreements and abuse of market dominant position by conducting merger control in order to prevent activities that eliminate and restrict competition.

The Opinion also clearly states that it is important to preserve fair competition. It aims to regulate competition in the E-commerce market and promote the establishment of an open, fair, and healthy market competitive order in the E-commerce market. It requires research on the supervision and administration methods of quality in E-commerce, and to explore establishing a supervision mechanism for the quality of E-commerce products by risk monitor, spot checks on the internet, tracing back to the source, and territorially investigating and punishing illegal activities, so as to improve the cohesive mechanism with which different authorities and regions exchange monitoring information and cooperate.

Furthermore, the Opinion also includes provisions for legally prosecuting illegal activities including false propaganda on the internet, manufacture of counterfeit and shoddy products, cross border sales of dual purpose products and technologies subject to national export control laws and regulations and acts of unfair competition, and provisions for organizing and conducting quality improvement activities for E-commerce products to promote lawful and honest operations. The main focus is about monopoly agreements and abuse of market dominance. It is important to prevent activities that eliminate and restrict competition by enhancing the protection of intellectual property in the E-commerce area and to research further intensifying the protection of patents in the area of online business methods. It is also critical to continue to strengthen the purchase of governments using E-commerce platforms. Governments at all levels should not use their administrative orders to appoint suppliers of public services or to abuse their administrative power to eliminate and restrict E-commerce competition.

New Rule of the SAIC Will Further Strengthen Anti-Monopoly Enforcement and Create a Fair Competition Environment

May 8, 2015

On the afternoon of May 7th, the Vice-director of the Anti-monopoly and Anti-unfair competition Bureau of the SAIC, Lu Wanli visited the Strengthening Nation Forum as a guest, and communicated with internet users under the theme of how the Anti-Monopoly Law "Gets on with" Intellectual Property. Lu Wanli said in the forum that abuse of intellectual property would not lead to innovation, but would on the contrary cause competition concerns. The Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition will also better guide market undertakings to be in compliance as well as create a fair competition market environment that provides incentives for innovation.

"In recent years, the issue of abusing intellectual property to eliminate or restrict competition has increased the concerns of antimonopoly enforcement agencies." Lu Wanli expressed that the abuse of intellectual property to eliminate or restrict competition will not promote innovation; rather, it will impede innovation and impair competition, which deviates from the goal of intellectual property protection and also leads to monopoly problems.

How to protect intellectual property by means of antimonopoly? Lu Wanli holds that the competition policies shall effectively guide innovation and create an innovation-oriented, fair, and open market environment. "For effectively implementing the provisions of Article 55 of the AML, SAIC promulgated Provisions on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition, so as to better normalize the enforcement practice of the administrations of industry and commerce, enhance the undertakings in judging their activities, lead business compliance with law and create an innovation-oriented, fair, and open market environment." Lu Wanli added.

He said that the release of the Provisions further strengthens the enforcement base for administrations of industry and commerce in terms of antimonopoly. The administrations will, based on their responsibilities, keep relaxing access and strengthening regulation, further promote the implementation of the Anti-Monopoly Law and its supporting provisions, maintain market competition order, develop the function of market competition through stimulating innovation, and create a favorable market environment for business creation and innovating.

NDRC Talks on Drug Prices Reform: Price Monopolistic Behavior When Selling Drugs at High Prices Will Be Strictly Prohibited

May 5, 2015

Recently, according to the website of the NDRC, after receiving the approval of the State Council, the NDRC, together with the National Health and Family Planning Commission and the Ministry of Human Resources and Social Security, etc., decided to remove the government drug prices for most drugs, and to improve the mechanism for drug purchase, strengthen the effect of cost reduction provided by medical insurance, reinforce the regulation of healthcare activities and price behaviors and to ultimately establish a price determination mechanism of which the market is the main driving factor.

According to the persons in charge of the NDRC, after the drug price reform, the price administration authorities will strictly investigate and punish any unfair price activities and monopolistic price behaviors pursuant to laws and regulations including the Price Law and the Anti-Monopoly Law, mainly including:

Activities of making up and distributing information on price increases to force up prices and disrupt the market order;

Activities of collusion in order to control market prices;

Abuse of market dominant position by selling drugs at unfairly high prices;

Frauds in pricing including providing false original costs, displaying false prices, increasing prices before offering discounts, misleading price displays, hiding the conditions of prices, etc.;

Activities of purchasing large numbers of drugs and conducting price increases or hidden price increases without authorization;

Activities including failing to enforce the requirement of no price difference by basis level for medical institutions and public hospitals as part of the pilot reform when implementing essential drug systems.

Activities of selling drugs that do not follow the policies regarding the rate of price increase by public medical institutions;

Activities of drug manufacturers and medical institutions that violate the price administration policies of low-cost drugs and break the restriction on the standards for daily costs.

Activities of selling drugs at prices higher than the maximum retail price for government pricing drugs;

Activities of failing to mark clearly the prices of drugs and publicize all charges as required.

Li Qing, Deputy Director of Price Inspection and Antitrust Bureau of NDRC Attended China Resources Snow Forum, Talking About the Present Situation and Expectations for Antitrust Enforcement

May 5, 2015

On the evening of April 23, 2015, “the Present Situation and Expectations for Antitrust Enforcement,” one of the series of academic lectures in the “China Resources Snow Forum” of the Law Faculty of Renmin University of China held in Suite 601 of Mingde Law Building. Li Qing, deputy director of the Price Inspection and Antitrust Bureau of NDRC was the speaker at the lecture, in which Shi Jiayou, vice professor of Remin University of China acted as the host, Meng Yanbei, Xu Yanguang, Vice Professors of Remin University of China were also lecturers. Moreover, Professor Tang Weijian and Han Liyu also attended the lecture as guests.

Li Qing, the Vice Director divided the subject content into two parts of which the first part introduced the present status of anti-price monopoly from the following three aspects.

I. The anti-price monopoly duty of competent departments of price

Subject to the Anti-Monopoly Law, the antitrust enforcement authorities of the State Council should mainly be the three departments: the National Development and Reform Commission (“NDRC”), the Ministry of Commerce (“MOFCOM”), and the

State Administration of Industry and Commerce (“SAIC”). NDRC takes charge of investigating and dealing with price monopoly and the behaviors of monopoly agreements, the abuse of market dominant position and the abuse of administrative power involving price monopoly according to law; MOFCOM takes charge of the review of concentration of undertakings; SAIC takes charge of investigating into and dealing with behaviors involving monopoly agreements, abuse of market dominant position and abuse of administrative power except for price monopoly agreements.

II. The Main Legal Provisions for Anti-price monopoly

The legal provisions applicable for anti-price monopoly mainly include the Anti-Monopoly Law, and the two departmental rules made by NDRC i.e. Provisions on Anti Price Monopoly and Provisions on the Administrative Procedures for Law Enforcement against Price Fixing, except for the relevant laws such as the Administrative Procedure Law. Li Qing introduced four types of monopoly behavior and corresponding legal responsibilities at first and then explained the two departmental rules.

The Provisions on Anti Price Monopoly is a substantive provision. Li Qing the vice director made respective explanations on the three aspects including price monopoly agreements, price monopoly behavior of abusing the dominant market position and the abuse of an administrative monopoly to exclude and restrict competition. Among those, she thought the core of affirming the abuse of a dominant market place should be in affirming the place the undertaking possesses in a transaction, i.e. whether the undertaking has the ability to impact the transaction conditions and impacting barriers when other undertakings enter into the market.

Provisions on the Administrative Procedures for Law Enforcement against Price Fixing is a procedural provision which vice director Li Qing introduced in several parts including reporting measures, investigating measures, undertakings’ commitment, suspension of investigation, termination of investigation, recovery of investigation, and leniency system.

III. Introduction of Price Fixing Case

Vice Director Li Qing roughly introduced several cases like the Guangdong Marine Sand Price Fixing Agreement Case, the Transportation and Communication Department of Shandong Province Excluding and Restricting Competition Case etc. and particularly made comments on the monopoly cases of abuse of administrative power.

Vice Director Li Qing said she had the following expectation and discussed antitrust enforcement in the future in the second part:

i. Anti-Monopoly Law should be adjusted to be the real economic constitutional law, as it will become not only the legal safeguard for the deciding function in the market, but also the better means for the government to play its role.

ii. The relationship between competition policy and industry policy should be more explicit while the important precondition is unifying the definition and cognition of the two policies. She said that competition policy is the core of the market economy system; industry policy is the means the government uses to compensate for market failure.

iii. Setting up the review mechanism: i. the review mechanism of each level of legal documents: the review of the local regulations, departmental regulations and local rules; ii. The beforehand review mechanism by the administrative authority itself to its normative documents; iii. The post-review mechanism of the antitrust enforcement authorities i.e. investigation into and action towards the abuse of administrative power to exclude and restrict competition.

iv. Discussing the internal logic of Chapter 2 of the Anti-Monopoly Law. Li Qing the vice director pointed out the existing disputes: the Per se Rule and Rule of Reason using the courts as examples

v. There is serious deficiency of Professional talents and professional institutes. It is not only the lack of relevant legal talent and economic talent, but also the imbalance between data significance and less professional data companies.

vi. Regarding the issue existing in the industrial association, she said that the industry associations reformed originally by the administrative authority have administrative management inertia, lack new measures and ideas, and are likely to see problems like organizing monopoly agreements etc; while the industry associations controlled by administrative authorities are likely to designate trades or do other behavior.

vii. With regarding to the issue of confiscation of illegal gains and fines, Li Qing the vice director thought that both the confiscation and fines make the amount of the penalty too large; the smallest penalty level is stipulated as 1%, which is too much.

viii. The responsibilities of each enterprise within the monopoly agreements shall be assigned reasonably. Since in horizontal monopoly agreements, large business can get more benefits while small business may lose or lose part of competition rights because of the agreements, the small business should be given less responsibility.

ACADEMIA

Seminar for Anti-Monopoly and National Security Review was Held by Law Faculty of Shanghai Jiao Tong University

May 15, 2015

On May 11th, the Seminar for the Anti-Monopoly and National Security Review (the “seminar”) hosted jointly by Shanghai Jiao Tong University and Hogan Lovells International LLP (“Hogan Lovells”) was successfully held at Koguan Law School in the Xuhui Campus of Shanghai Jiao Tong University. The experts, scholars and lawyers attending the seminar included professor Wang Xianlin, professor Li Jian and vice professor Hou Liyang of Koguan Law School of Shanghai Jiao Tong University, as well as lawyer Katie Hellings, partner in Washinton DC and the Brussels Branch of Hogan Lovells, lawyer Brian Curran, lawyer Jan Blockx and lawyer Adrian Emch of Hogan Lovells. Moreover, many full-time staff from worldwide famous transnational enterprises, public figures in theoretical and practical circles, and parts of doctors and postgraduate students of the Law School also attended the seminar.

Wang Xianlin and Adrian Emch both made speeches. There were two themes in the seminar including Developments in Non Merger and Acquisition Field and Developments in Mergers and Acquisitions, which were hosted respectively by Professor Li Jian and lawyer Adrain Emch.

Under the theme of the Development of Non Merger and Acquisition Field, Wang Xianlin and Hou Liyang introduced new developments in China anti-monopoly and intellectual property (“IP”) field, and analyzed the impact Regulations of the Administration of Industry and Commerce Prohibiting Abuse of Intellectual Property Rights in order to Eliminate or Restrict Competition (the “Regulations”) newly issued by State Administration of Commerce and Industry (the “SAIC”) have on licensees and licencers, respectively. At first Wang Xianlin made a detailed introduction to the background and significance of the issuance of the Regulations, after which Hou Liyang interpreted and explained the relevant contents of safe harbor, refusal to license and standard essential patent (“SEP”). Lawyer Jan Blockx introduced the new changes related to the Technology Transfer Block Exemption Regulation of the European Union (“EU”). The speakers and attendees had an energetic discussion exploring the problems caused by the related provisions of the Anti-Monopoly Law prescribed regarding the abuse of IP.

Katie Hellings and Jan Blockx introduced the relevant laws of the US and the EU on prohibition of cartel behavior as for the reports with themes of the cartel enforcement in the US and the risks faced by Chinese companies, and the cartel enforcement in the EU and the risks faced by Chinese companies, respectively. The two lawyers stressed enforcement against Asian companies by anti-monopoly authorities of the US and the EU and communicated the procedure and substantial issues related to cartel enforcement with the attendees.

Under the theme of Developments in Mergers and Acquisitions, Katie Hellings and Jan Blockx reported the procedure and difficulty of the global merger filing Chinese companies need to submit when conducting mergers and acquisitions in foreign countries. The reported content included how the company should prepare the anti-monopoly aspects of the preparation stage of the trade. The two lawyers laid particular emphasis on the concrete filing process of major jurisdictions around the world, especially the relevant status in the US and the EU.

Brian Curran and Roy Liu, lawyers of Hogan Lovells, made a joint report about “How Chinese companies should deal with the review by the Committee on Foreign Investment in the U.S. (“CFIUS”)”. They explained the laws and procedures of the national security review in the US, i.e. the review mechanism of foreign investment security in the US, and how to lessen the risks in the review mechanism for foreign investment security in the US and provided practical analysis to Chinese companies.

In the closing ceremony of the seminar, Li Jian and Adrian Emch, on behalf of Shanghai Jiao Tong University and Hogan Lovells made speeches for the seminar and recognized the significance of the seminar.

Anti-trust Enforcement Case Analysis Seminar was held by Competition Policy and Legal Profession Committee

April 30, 2015

Competition Policy and Legal Profession Committee of China Society for World Trade Organization Studies (“CWTO”) held the Antitrust Enforcement Case Analysis Seminar on April 27, 2015. Yu Xiaosong, the president of the committee attended the seminar and made a presentation. Wang Chengan, the executive chairman and secretary general, hosted the seminar.

Lu Yanchun, the vice inspector of Price Supervision and Inspection of the Anti-monopoly Bureau of NDRC attended the seminar and introduced the

enforcement in the Qualcomm case. Wang Xiaoye, the consultant expert for Anti-monopoly Enforcement of the State Council, Sheng Jiemin, professor of college of law of Peking University, Wu Hanhong, the professor and consultant expert of the Anti-monopoly Enforcement of the State Council, and Cui Shufeng, post doctor of Institute of law of CASS made the presentation. The professors and experts participated in the seminar discussed regarding anti-monopoly enforcement and made responses for participants' problems. The vice secretary general, Wang Jinsong, Cen Zhaoqi, Hu tie, and Wang Ying attended the meeting.

The 2nd Annual China-British Commercial Law Seminar held

April 27, 2015

On April 25, 2015, the 2nd Annual China-British Commercial law seminar was held at Tsinghua University. As authorized by Han Dayuan, the dean of the law school of RUC, Professor Liu Junhai delegated Dean Han to make a speech at the opening ceremony. Professor Ioannis Kokkoris from the commercial law research center of Queen Mary, London University, and associate professor Shangxin from the commercial law research center of Tsinghua University also had the speech.

The seminar included three units. The theme of the first unit was "Competition Law". Huang Yong, the professor of the Law school of the University of International Business and Trade made a keynote speech. The first group discussed, "the implementation status of competition law in China" which Wang Xiaoye, the professor of Institute of Law of Chinese Academy of Social Sciences conducted as the host. Meng Yanbei, the vice professor of Remin University of China, Dai Ken, lawyer from Dacheng Law Offices (Beijing), Ms. Zhao Lili of the Anti-Monopoly Bureau of the Ministry of Commerce made speeches successively. The second group discussed, "the international perspective of the implementation of competition law" in which Professor Ioannis Kokkoris of the Centre for Commercial Law Studies of Queen Mary-University of London. Renard Francois, lawyer of Anli Partners (Beijing), Vice Professor Zhang Chenying of Tsinghua University, Mitchell Anna, lawyer of Lindlaters LLP (Hong Kong), Ha Hannah of Mayer Brown JSM (Hong Kong) made speeches as well.

CASES

The Administration for Industry and Commerce of Ningxia Hui Autonomous Region Suspended the Anti-Monopoly Investigation into the NingXia Branches of China Tietong, China Unicom and China Telecom

May 21, 2015

On May 14, 2015, the Administration for Industry and Commerce of Ningxia Hui Autonomous Region issued the Suspension Determination of the Monopoly Case, deciding to suspend the anti-monopoly investigation of the three companies including Ningxia branches of China Tietong, China Unicom and China Telecom, and at the same time authorizing Wushi Market Supervisory Authority, Industrial and Commercial Department of Yinchuan Development Zone, Ningdong Industrial and Commercial Department to supervise the fulfillment of their commitments.

In June 2013, authorized by the National Department of Industry and Commerce, The Administration for Industry and Commerce of Ningxia Hui Autonomous Region started the anti-monopoly investigation into the Ningxia branches of China Tietong, China Unicom and China Telecom for the alleged abuse of dominant market position through tie-in sale. After the two-year investigation, the law enforcement officials determined based on the evidence obtained from the investigation that the three companies to varying degrees required the users to install the fixed-line telephones before installing broadband services. The bundling behavior of the Ningxia Branches of China Tietong and China Telecom covered a larger scope while the Ningxia Branch of China Unicom only conducted tie-in sales in individual regions. But there is certain difficulty in affirming whether the three companies possessed the dominant market place or engaged in monopoly operations. During the investigation, the three parties all confessed that they were forced to bundle fixed-line telephones when engaging the business of installing the fixed interconnected network and admitted those behaviors deprived consumers from choosing correctly, and brought an adverse impact to market competition. The three companies have submitted the suspension application to the Administration for Industry and Commerce of Ningxia Hui Autonomous Region and stated to enhance the internal reform and actively eliminate the adverse impacts caused. Moreover the three companies provided three reform measure

commitments: firstly, launching the activity of self-review and self-correction all over the company, strengthening the training of sales persons and insisting on prohibiting the tie-in sales acts; secondly, issuing the commitments that users can choose products (services) by themselves through news media, and strengthening the dissemination of information through channels like sales branches and service centers etc.; thirdly, if the users who was forced to install fixed-line telephone applied to cancel the fixed-line telephone services, each sales branch needs to do so.

The target of anti-monopoly enforcement is to eliminate monopolies, protect competition, and protect the legal interests of consumers. Given the three companies have cooperated positively with law enforcement personnel in the investigation and are deeply aware of the harm of forcing tie-in sales, the submitted and conducted reform measures which can remove and repair the adverse impact caused by those behaviors. As the anti-monopoly target has been reached, the Administration for Industry and Commerce of Ningxia Hui Autonomous Region held an administrative interview meeting on May 14th, and published the suspension of the investigation, and required the parties to fulfill the commitments of applying the suspension, and to submit written reports on the status of fulfilling the commitments at the prescribed time. According to the relevant legal provisions, if the parties fulfill the commitments within a prescribed period, the Administration for Industry and Commerce of Ningxia Hui Autonomous Region will terminate the investigation. Moreover, the Administration for Industry and Commerce of Ningxia Hui Autonomous Region will publish the reform commitments of the three companies and have authorized the Market Supervisory Authority of five cities including Yinchuan, Shizuishan, Wuzhong, Guyuan and Zhongwei, as well as the Industrial and Commercial Department of the Yinchuan Development zone and Ningdong. During the period, if the parties failed to fulfill the commitments and made significant changes to the facts based on which the suspension determination was made, and the suspension determination was based on the incomplete, incorrect or misleading information provided by the parties, the Administration for Industry and Commerce of the Ningxia Hui Autonomous Region will recover the investigation pursuant to the Anti-Monopoly Law of the People's Republic of China, based on the Provisions on the Procedures for Industry and Commerce Authorities to Investigate and Sanction Monopoly Agreements and Abuse of Dominant Market Position.

Supreme People's Court of Guangdong Province Published the Notice for the Trial for the Second Instance of Administrative Monopoly Litigation

May 21, 2015

Shenzhen Tsinghua Sware Software Hi-Tech Co., Ltd. sued the Guangdong Province Office of Education Glodon for the administrative monopoly (violating the right of fair competition) on April 29, 2014 and opened the case in court on June 26, 2014. On February 2, 2015, the Intermediate People's Court of Guangdong made a determination for the first instance and confirmed that the behavior of designating the relevant softwares of the third party Glodon to use exclusively in the Basic Skill Item of Construction Costs in the Qualification Trails in Guangdong Province of the National Vocational Students Skills Competition- Group Higher Professional Technology College by Education Administration of Guangdong was inconsistent with the law.

Supreme People's Court of Guangdong Province issued the notice of the trial and constituted the Collegiate Bench, deciding to open the court on May 28, 2015 at the General Court on the fourth floor. Case No. 2015 Guangdong Province Supreme Court 228 (2015 粵高法行终字第 228 号).

The First Monopoly Case of Mobile Internet is Closed, Mishi Lost its Lawsuit Against Qihoo 360

May 14, 2015

After the “War of 3Q” brought by Qihoo 360 against the alleged monopolistic behavior of Tencent, Qihoo 360 itself was sued for monopoly, namely the eye-catching “War of 3Mi”. This case was closed a few days ago.

On May 12, according to the information of Mishi's corporate counsel, the judgment of the trial of second instance of the case brought by Mishi against the accused behavior of abusing market dominant position and unfair competition of Qihoo was pronounced. The High Court of Beijing dismissed the second trial petition of Mishi and maintained the original judgment of the first instance, considering that Qihoo did not commit any behavior of abusing market dominant position and unfair competition. Mishi expressed that it found it hard to accept the results of the judgment of the trial of the second instance.

The case of the “War of 3Mi” was registered on July 23, 2014, as the first monopoly case in the mobile internet area of China; this case caused heated debate in the industry. Mishi company, the plaintiff of this case, was founded in 2012, and two mobile application softwares it developed, “Yimipian” and “Miqia” provide services such as mobile e-card management, real-time message, document transmission, internet real-time communication etc. Mishi expressed that when users use these two types of software, the “phone guardian of 360” will intercept them. The interception

behavior includes intercepting these two Mishi software and deleting them when they are using a text message to send, and when they forward an e-card or instant message, the caller identification card function of Mishi will also be suppressed by the call show function of the “phone guardian of 360”. Mishi considered that the behavior of the “phone guardian of 360” constitutes a monopoly and unfair competition, therefore claiming 5 million Yuan RMB against Qihoo and asking for an apology.

After court was delayed three times, a court of first instance for the case of “War of 3Mi” was finally held on November 28th by the Second Intermediate People’s Court of Beijing. On December 31, 2014, the judgment of first instance for this case was pronounced, and the court dismissed all claims of Mishi. In the first instance judgment, the court considered that the evidence provided by Mishi was not sufficient to prove that the “phone guardian of 360” has a market dominant position in the relevant market, and it does not prove that the behavior conducted by the “360 phone guardian ” constitutes the behavior of abusing market dominant position and unfair competition. In this case, the behavior of the “phone guardian of 360” is not pertinence and is not on purpose. It does not target at any specific market players, rather it makes its judgment based on the content of the short message.

After the judgment of first instance was pronounced, Mishi appealed. It considered that the court of first instance was wrong in making the determination with respect to the following four aspects, namely the definition of the relevant market, whether Qihoo has the dominant position in the relevant market, whether Qihoo abused its dominant market position to restrict transactions, and whether Qihoo conducted tying by abusing its dominant market position. After accepting the appeal on February 5, 2015, the High Court of Beijing opened a hearing on April 13, 2015.

From the written judgment of second instance, it is clear to see that the High Court of Beijing supported the written judgment of the Second Intermediate People’s Court of Beijing in all of the four focus issues of the first instance. For the definition of the relevant market, the court considers that the relevant market should be defined as the Chinese mainland market, and the mobile security software market can constitute an independent relevant product market; As for whether Qihoo has a dominant market position and whether it has abused its position, the court considers that the evidence submitted by Mishi is not sufficient to prove that Qihoo has the ability to impede or affect other operators to enter into the relevant market, neither does it prove that Qihoo has a market dominant position in the relevant market; As for whether Qihoo has conducted a behavior of business discrediting, the court considers that Qihoo regards the text message sent by Mishi as junk short message based on its rule of interception which does not target at any specific market players, rather it classifies the information based on the characteristics of the information’s contents, therefore, the court supports the determination of the court of first instance that the above behavior conducted by Qihoo does not constitute a behavior of business discrediting.

As for the written judgment of the second instance, Mishi refused to accept it still. According to its attorney agent Wufei, what made Mishi feel unjust about this, besides the determination of the court on the focus issues, is the fact that there are procedural flaws in the court trial where some key evidence was not discovered and cross-examined, while the court of second instance did not correct these problems. In addition, according to the information of Wufei, after the judgment of the first instance, Mishi tried to settle the case, however, Qihoo did not respond.

FOCUS

The Bureau of Commodity Prices of Fujian Province Issued The Method to Fight Against Price Monopoly in the Free Trade Area

May 15, 2015

Recently, the Bureau of Commodity Prices of Fujian province issued The Method for Anti-Price-Monopoly Work in the Pilot Free Trade Area of China (Fujian) (hereinafter referred to as The Method) . The Method will take effect as of May 1, 2015. In order to prevent price monopoly behavior in the Pilot Free Trade Area of Fujian, the management committee can accept and hear about the anti-price-monopoly report and consultation in the pilot area and can keep the informer confidential.

According to The Method, the management committee of all districts of the pilot area perform the functions as follows: Accept the price-monopoly report and consultation in the pilot area; Assist the provincial competent authority of pricing in conducting work such as anti-price-monopoly investigation, return visits, etc; Accept the active report of the relevant circumstances where operators have reached a price-monopoly agreement in the pilot area; Carry out the publicity and training work for anti-price-monopoly laws and regulations in the pilot area; Assist the provincial competent authority for pricing in researching and analyzing the competition situation in the pilot area; Carry out research on significant problems of anti-price monopoly together with the provincial competent authority for pricing.

The management committee can accept and hear about anti-price-monopoly report and consultation in the pilot area and should keep a secret about the informer. When the report is in written form and provides relevant facts and evidence, the management committee may learn relevant facts from the informer such as the basic information about the person being reported against, whether the informer has already reported the same matter to other administrative bodies or has brought a law suit to the People's Court, and according to different situations tell the informer to directly contact the relevant administrative body or court, or examine and transfer the case according to The Method.

According to the authorization from the competent pricing authority of the State

Council, the provincial competent pricing authority of shall make a decision about the initiation of a case and carry out a relevant investigation on any suspected price monopoly behavior in the pilot area, and at the same time report to the competent pricing authority of the State Council before deciding to initiate a case according to relevant provisions; The provincial competent pricing authority shall make a decision about administrative penalty, suspension of an investigation and termination of an investigation on any suspected price monopoly behavior in the pilot area according to the law, and report to the competent pricing authority of the State Council before making relevant decisions.

Under the premise of keeping confidentiality, the provincial competent authority of price shall accomplish information docking with the management committee, strengthening information exchanging and sharing in the pilot area such as credit information of enterprises, clues in anti-price-monopoly cases, case investigation and treatment results, case registration situation etc.

Meanwhile, the provincial competent pricing authority, management committee and their staff have the duty of confidentiality on trade secrets obtained during the law enforcement process of anti-price-monopoly.

Pricing Power for Refund Fee is Handed over to China Railways Corporation, Experts say Anti-Monopoly Law Enforcement Should Keep up With This Situation

May 14, 2015

The National Development and Reform Commission is seeking opinions for the revised Central Pricing Catalogue. One significant change is that the charging standard for refund fees for railway ticket is not included in this catalogue, thus government pricing will not apply to this anymore.

Even though this is called an exposure draft, it is final, for not long ago the Standing Committee of the National People's Congress amended Article 25 of The Railway Law of the People's Republic of China, giving the pricing power for refund fees to the railway transportation industry. This amendment took effect as of April 24, 2015.

Whenever China Railways Corporation increases the charging standards for refund fees, it brings questioning from the public. The last time is when Dong Zhengwei, a lawyer from Beijing, sued the State Railway Administration last year, asking the

defendant to publicize the cost information for returning a railway ticket. After entering into the trial of second instance, this case of a civilian suing the government is currently in the state of “suspension of action” in the High Court of Beijing.

The amendment of the railway law undoubtedly gives a release to the State Railway Administration. Without examination and approval authority, it will no longer be qualified to be a defendant. However, consumers represented by the lawyer Dong Zhengwei cannot feel better because “what if the China Railways Corporation arbitrarily raises the price?”

“Then this can only be counted by anti-monopoly law enforcement” said professor Sheng Mingjie, economic law institute director of Peking University. After some price controls are released, in the area where competition is insufficient, the monopoly situation and abuse of dominant market position is more likely to occur, which needs more strict supervision by price law enforcement and anti-monopoly law enforcement. Currently, in the railway transportation area, China Railways Corporation is the “only flower” in the market. If it abuses its market dominant position to charge a monopolistic high price, attach unreasonable trading terms, etc. it will go against the provisions of the Anti-Monopoly Law, and the anti-monopoly law enforcement agency has the right to investigate.

Wang Xianlin, a law school professor of Shanghai Jiaotong University, considers that giving the pricing power for refund fees to the railway transportation industry means releasing the pricing power in some segments where there is enough competition in the natural monopoly areas. Under these circumstances, anti-monopoly law enforcement work should closely keep up with this situation.

Automobile Antimonopoly Continues with Increasing Intensity and Larger Scope

May 11, 2015

The investigation of the “Mercedes-Benz Case” brought antimonopoly industrial focus back to the automobile industry’s.

At 9:00 on April 23th, Jiangsu Provincial Price Bureau published on its website the punishment decision of for the Benz Monopoly Case: “a fine of 350 million RMB will be imposed on the Benz company, and a fine of 7.869 million RMB will be imposed on a proportion of the distributors.” Two hours later, Benz made a positive response claiming that the company “fully respects, sincerely accepts and will immediately act

in line with” the punishment decision made by the antimonopoly enforcement agency.

“So far, among automobile monopoly cases, the fine in the Benz Case is the highest.” said Shi Jiangzhong, a panelist of the Antimonopoly Committee of the State Council and a professor at the China University of Political Science and Law. However, the “highest fine” is not the end of antimonopoly in the automobile industry; quite the contrary, it is just a beginning of the enforcement agency’s investigation in this industry.

Behind the “Highest Fine”

Before the 357 million RMB fine was finally made, 4 automobile companies and 12 auto parts companies had already been punished by antimonopoly enforcement agencies, and undoubtedly Benz faces the highest fine imposed on a single brand.

Moreover, in terms of the intensity of punishment, the enforcement agency has punished Benz in a rigorous manner. As disclosed by the Wuhan Municipal Price Bureau, NDRC Antimonopoly Bureau imposed a fine of 7% and 1% of the sales for the previous year on Benz and its distributors respectively, while in the prior case, the Bureau imposed a fine of 3% and 6% of the sales in the previous year on the finished automobile companies Chrysler and Audi respectively.

Why is the Percentage for the Fine So High in the Benz Case?

Shi Jianzhong said, “Since Benz has been in the Chinese market for quite a long time and its monopolistic behavior has affected the related area and impaired the interests of consumers to a larger extent, it has been fined by a larger amount and proportion than other companies.” Besides, Shi Jianzhong also believed that as the intensity of antimonopoly enforcement is enhancing, punishments will be more severe if the rectification is made late.

In addition, “high fines” were imposed on Benz because its monopolistic behavior is typical among those investigated by the antimonopoly agencies. According to the factual basis of the punishment issued by the Jiangsu Price Bureau, Benz mainly conducted “vertical monopolies such as fixing prices for its distributors”, and its distributors in the Jiangsu area mainly conducted monopolistic behavior by “implementing price alliances in the aftermarket and unifying the standard hourly fee.” The behaviors of “competing undertakings fixing or changing the prices of commodities” and “fixing the prices or restricting the minimum price for resale to a third party” are typical monopolistic behaviors that are prohibited in the AML.

In fact, then fine imposed on Benz was already lowered during the discussion process in relevant departments. In particular, the fine of 1% annual sales previous year imposed on the three distributors was already lenient considering they actively

reported the monopoly agreement and provided important evidence.

Parallel Import is Also “Involved”

In fact, in addition to complete vehicle manufacturers, distributors, auto parts suppliers, auto insurance and transportation field, there are more behaviors involved in the automobile industry antimonopoly enforcement.

Parallel imports are becoming a new example worth discussing – in September last year, after 2015 BMW X5 was released, and emissions were raised from 2979 ml in the 2014 series to 3004 ml in the 2015 series. This 25 ml increment led to a considerable price increase in the parallel imports of BMW X5 in China. It is understood that, as a result of the emissions rise from 2979ml to 3004ml, the imposition rate of customs duties increased from 66.19% to 95%, which means the tariff value of a US version MBW X5, USD 59,425.00 for purchase price, will increase from 243,800 RMB to 350,000 RMB, namely a 106,200 RMB rise in price.

Following that, the original price advantage of parallel imports will not exist anymore. This may be the reason that PangDa Group, after starting its business in parallel imports, only imports the Middle East version of BMW X5. “It is not sure whether the Middle East version will adjust emissions. Currently the X5 version sold is still the 2014 Middle East version.” said a responsible person for Pangda’s distributor in charge of the parallel import business in Beijing.

BMW’s behavior adjusting emissions is interpreted in the industry as “confronting parallel imports”. However, from the automobile antimonopoly perspective, such behavior may be suspected of breaking rules regarding monopolies. The senior partner Wei Shilin of Dacheng Law Offices who has long been focusing on the antimonopoly field said, “Such behavior, changing its forms to control channels, is not a typical monopoly behavior, but its ultimate purpose is to restrict competition. If it in whole achieves the result of restricting or eliminating competition, it is suspected of violating the AML. Enforcement in the US and EU is more flexible in this regard.

Break and Remodel

In the context of the increasing intensity and wider scope of antimonopoly actions, the automobile industry will go through a process of breaking and remodeling.

Since the second half of 2014, the most evident result of antimonopoly work in the automobile industry is the successive announcements of price cuts by various automobile companies. Such collective price cuts reflect not only “a positive rectification and good attitude” toward the antimonopoly investigation, but also the tight nerves of many automobile companies facing the “rigorous actions” of antimonopoly enforcement. “Market price exceeds competitive price due to the

monopoly, and the active price cut from undertakings is the means to recover market competitive price. According to the AML and the Administrative Penalties Law, the active price cut from the undertakings suspected of having conducted monopolistic behavior fall under actively eliminating or mitigating the consequences of price monopoly, and shall be considered by the antimonopoly enforcement agencies as a legal situation.” said an insider in the NDRC Antimonopoly Bureau.

However, even after the collective price cut, on April 27th, Chinese Insurance Association and China Automobile Maintenance and Repair Association issued the Stage III data of auto parts/complete sales in China, which manifests the percentages of many series had exceeded 300%, “the reasonable line”. Among them, the data of Brilliance BMW 5 series F18 and Beijing Benz E-class W212 were even more than 650%.

This indicates to a certain extent that the current antimonopoly actions in the automobile industry have broken the inherent “unspoken rules”, which resulted in new situations, but it is still a long way from bringing about a real change to the automobile industry.

“The formation of a monopoly in the automobile industry is connected with Automobile Brand Sales Management Measures. In a manner of speaking, the pricing mode in the Measures will more likely cause a vertical price monopoly in the automobile industry.” Shi Jianzhong believes that, for the purpose of standardizing and promoting the development of the automobile industry, the improvement of the overall legal system is also important in addition to antimonopoly.