

China Competition Bulletin

The China Competition Bulletin summarises the latest developments of competition and regulatory policy in the People's Republic of China, covering laws and policies, cases, agency and other relevant news, and selected publications.

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Highlights

In the past couple of months, the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) have announced a number of high profile investigations and cases. The NDRC, which has been investigating the auto industry for the past year or so, imposed record fines on a number of Japanese auto parts and bearings manufacturers for price fixing. A number of other foreign auto manufacturers such as Mercedes-Benz and Audi are also being investigated by the NDRC. The SAIC initiated an investigation into Microsoft and raided Microsoft's offices in a number of cities. The SAIC's local office in Inner Mongolia has also published 2 decisions made under the Anti-Monopoly Law (AML), one relating to cartel conduct in the fireworks and firecracker industry, and the other an abuse of dominance case in the cigarette wholesale market.

1. Laws and Policies

1. CSRC Releases Draft Amendments of Two Regulations on Mergers and Acquisitions Among Listed Companies

On 11 July 2014, the China Security Regulatory Commission released draft amendments to 2 regulations on the mergers and acquisitions among listed companies. The two draft regulations, the *Administrative Regulation on the Reorganisation of Material Assets of Listed Companies* (《上市公司重大资产重组管理办法》) and the *Administrative Regulation on the Acquisition of Listed Companies* (《上市公司收购管理办法》) were previously amended in 2011 and 2012, respectively. The public consultation period for the draft amendments ended on 11 August 2014.

The draft amendments aim to deregulate and enhance supervision. Some administrative licenses will be removed or merged, while information disclosure, the supervision of institutions, and protection for investors are emphasised.

Further, the major purchase, sale and assets replacement of listed companies are largely exempt from administrative review and approval. The purposes of such arrangements are to balance fairness and efficiency and to accelerate mergers and acquisitions.

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Another major change is that there will be more flexibility in stock pricing. Restricted by previous regulations, stock pricing has been criticised for its rigidity, leaving little possibility for negotiation. The draft amendments increase the roles of the market and the merging parties' opinion in determining stock price. At the same time, the draft amendments impose further requirements on information disclosure in order to prevent overestimation of price.

Sources:

http://www.csrc.gov.cn/pub/zjhpublic/G00306201/201407/t20140711_257665.htm

http://www.gov.cn/xinwen/2014-07/11/content_2716291.htm

2. State Council Issues Interim Regulation on the Disclosure of Enterprise Information

On 23 August 2014, the State Council issued the *Interim Regulation on the Disclosure of Enterprise Information* (《企业信息公示暂行条例》), which will come into effect on 1 October 2014.

Compared to the disclosure of government information, the disclosure of enterprise information is viewed as much more controversial. This new regulation on disclosure aims to protect fair market competition and promote integrity and “self-discipline” among market players.

Enterprise information, as defined by the regulation, refers to all information that a registered company produces in its daily productions and operations and information generated by government departments in carrying out their responsibilities that reflects a company's circumstances. The SAIC and its local counterparts, apart from fulfilling their routine registration duties, will be required to release enterprise information including registered items, mortgages, pledges, administrative penalties received, changes of administrative licenses, and other relevant issues provided by law.

Another highlight of the regulation is that the SAIC will maintain an “abnormal operation list”. If a company fails to disclose or provide necessary information concerning its productions and operations or attempts to release false information, it may be added to the “abnormal operation list”. This list will be made publicly available.

Sources:

http://www.gov.cn/zhengce/content/2014-08/23/content_9038.htm

http://www.gov.cn/guowuyuan/2014-07/23/content_2723171.htm

2. Cases

1. NDRC Imposes Record Fines on Japanese Auto Parts and Bearing Manufacturers for Price Fixing

On 20 August 2014, the NDRC announced that 8 Japanese auto parts manufacturers and 4 Japanese bearing manufacturers had engaged in price fixing in breach of the AML. It imposed record fines totalling over RMB 1.2 billion.

The NDRC found that, from January 2000 to February 2010, Hitachi, Denso, Aisan, Mitsubishi Electric, Mitsuba, Yazaki, Furukawa, and Sumitomo Electric met on multiple occasions to engage in bilateral or multilateral talks to coordinate prices of auto parts. In the Chinese market, the price agreement affected 13 products, which were used by Honda, Toyota, Nissan, Suzuki, and Ford in more than 20 car models. As of the end of 2013, these auto parts were still supplied into China.

Further, the NDRC determined that, from 2000 to June 2011, NSK, NTN, Jtekt, and Nachi-Fujikoshi held seminars in Japan and export market conferences in Shanghai to discuss the strategies, timing, and magnitudes of price increases for bearings in China and Asia and exchange price information. The sale of bearings in China followed the prices discussed and information exchanged in these meetings.

The NDRC took into account the frequent, persistent, and serious nature of the illegal conduct, which exceeded 10 years in both cases. Fines were imposed on 7 auto parts companies and 3 bearings companies, as Hitachi and Nachi-Fujikoshi were exempt from penalty because they were the first to report the contravention to the NDRC. The fines ranged between 4–8% of the company's revenue in the previous year. Sumimoto Electric received the highest fine of RMB 290.4 million, which represented 6% of its previous year's revenue. This is the largest fine imposed on a company under the AML to date.

In addition, the Japanese auto parts and bearing manufacturers undertook to implement corrective measures and change their sales policies and practices to comply with Chinese laws, hold competition law compliance training sessions for all employees, and eliminate the effects of the illegal conduct.

Source: http://jjs.ndrc.gov.cn/gzdt/201408/t20140820_622756.html

2. Hubei Price Bureau Sanctions 4 Local BMW Distributors

On 13 August 2014, the Hubei Price Bureau announced that 4 local BMW distributors in Wuhan had been fined a total of RMB 1.62 million. It made that announcement at a "Pricing behavior in standard auto sales reminder and warning meeting" that it convened and nearly 20 automobile distributors attended.

According to the Hubei Price Bureau, the 4 BMW distributors, or 4S shops, had been charging fees for pre-delivery inspection (PDI) tests in the name of after-sale services, thereby misleading consumers. A PDI test is a regular test run by 4S shops before the delivery of a new car. Moreover, the 4 BMW 4S shops reached and implemented a price alliance to fix the standard price of PDI tests. Such conducted breached the AML, the *Price Law*, and the *Regulations on the Prohibition of Fraudulent Pricing Conduct*.

The Hubei Price Bureau emphasised the importance of compliance with these laws and regulations and warned that future violations would result in even heavier sanctions.

Source: <http://www.hbpic.gov.cn/chn201201110924533/article.jsp?articleId=44129>

3. Hainan Price Bureau Fines Aerated Bricks Cartel

On 17 July 2014, it was reported that the Hainan Price Bureau had punished 5 aerated bricks businesses for price fixing and imposed a total fine of RMB 530,000 (1% of the companies' revenues in the preceding year).

In October 2012, the five companies had formed the "Aerated Bricks Industry Association", without authorisation, to coordinate the prices and monitor the production, distribution, and sales of aerated bricks. Since November 2012, the price of aerated bricks offered by the 5 companies has significantly increased. The Hainan Price Bureau reportedly held that the 5 companies had engaged in price fixing and market sharing in breach of Article 13 of the AML.

Source: <http://www.hinews.cn/news/system/2014/07/17/016806697.shtml>

4. Inner Mongolia AIC Fines Fireworks and Firecracker Cartel

On 25 July 2014, the SAIC published the decision of the Inner Mongolia Administration for Industry and Commerce (AIC) to fine 6 fireworks and firecracker wholesale businesses for market sharing. That decision was made on 27 May 2014.

The Production Safety Supervision and Administration Bureaus in Chifeng divided the management of wholesale distribution areas within their jurisdiction. An exclusive wholesaler was appointed for each area, and retailers could only purchase products from the exclusive wholesaler within their area. Retailers also had to obtain a license in order to sell products within the area, the processing of which was delegated to wholesalers. The reason for implementing this administrative arrangement was to prevent "malicious competition", which the government believed would lead to lower quality products and safety issues, and to encourage wholesale businesses to participate in market management.

The 6 wholesalers in Chifeng applied anti-counterfeit labels to their products, inspected products of the retailers within their area, and confiscated products that were obtained from other sources. Some wholesalers required retailers to make prepayments on orders, and they punished retailers who did not comply with this requirement.

The Inner Mongolia AIC found that the regulatory framework did not prevent wholesalers from supplying retailers in other areas, nor did it stipulate that retailers could only purchase products from wholesalers within their area. The Inner Mongolia AIC decided that the 6 wholesalers breached Article 13(3) of the AML and Article 2 of the SAIC's *Regulation on the Prohibition of Monopoly Agreements*, and imposed an aggregate fine of RMB 583,700.

Source: http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201407/t20140725_147046.html

5. Inner Mongolia AIC Sanctions Abuse of Dominance in the Cigarette Wholesale Market

On 30 July 2014, the SAIC published the Inner Mongolia AIC's decision to punish the Chifeng subsidiary of the Inner Mongolia Tobacco Company (Chifeng Tobacco) for abusing its dominant position in the cigarette wholesale market in Chifeng by bundling the sales of various brands of cigarettes. The Inner Mongolia AIC made its decision on 4 July 2014.

Under the *Tobacco Monopoly Law*, licensed tobacco wholesalers have the right to distribute tobacco products within a specified area. Chifeng Tobacco is the only licensed cigarette wholesaler in Chifeng. The Inner Mongolia AIC found that this enabled Chifeng Tobacco to determine the quantity, timing, frequency, and circulation of each brand and type of cigarette, and that retailers are extremely reliant on Chifeng Tobacco. Chifeng Tobacco determined the quantity that it supplied to retailers and the terms under which they were supplied, and retailers had no bargaining power. Chifeng Tobacco also implemented its own cigarette supply policy, based on the brands of cigarettes that sold well and those that did not, the quantity that retailers purchased each month, and the wholesale price of cigarettes.

The Inner Mongolia AIC found that the effect of the supply policy was to tie the sales of the bestselling cigarettes with cigarettes that did not sell well. In its view, Chifeng Tobacco had used its statutory monopoly in the cigarette wholesale market and its control over the supply of bestselling cigarettes to force retailers to purchase less popular cigarettes. There were no reasonable grounds for the tied sales, as there were no economic or other benefits to consumers or retailers, and tying was not required by law.

The Inner Mongolia AIC determined that Chifeng Tobacco breached Article 17(5) of the AML, and ordered Chifeng Tobacco to stop the conduct and imposed a fine of RMB 5,957,000.

Source: http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201407/t20140730_147161.html

6. Baidu Loses Bundled Sales Case Against Qihoo 360

According to news reports, on 28 July 2014, a trial court in Beijing handed down its judgment on Qihoo 360's lawsuit against Baidu regarding the bundling of Qihoo 360's software with Baidu's products. The court decided that Baidu violated the principle of good faith and that its conduct constituted unfair competition. Baidu was ordered to pay RMB 50,000 to Qihoo 360 in compensation.

It was reported that Baidu had used the names and icons of Qihoo 360's software and bundled its own products when Internet users attempted to download Qihoo 360's software through Baidu's app store.

Source: http://www.ce.cn/xwzx/gnsz/gdxw/201407/28/t20140728_3244351.shtml

3. News of Anti-Monopoly Enforcement Agencies and the Courts

1. NDRC Takes Action Against Anti-Competitive Conduct in the Auto Industry

The NDRC's action against 12 Japanese auto parts and bearing manufacturers is part of its wider investigation into the auto industry.

There are reports that the NDRC has determined that Audi, Chrysler, and Mercedes-Benz have engaged in anticompetitive conduct in breach of the AML and could be subject to fines. Audi has admitted that it engaged in anticompetitive conduct and has stated that will accept the fine.

As reported in this bulletin, the auto industry has been subject to the NDRC's scrutiny since at least December 2012, when the NDRC noted that it had concerns about anticompetitive conduct in the auto industry. In August 2013, it was reported that the China Automobile Dealers Association was collecting data on the foreign and domestic prices of various brands of cars, profit margins, costs, and import duties and taxes levied on cars on behalf of the NDRC.

In response to the investigation, a number of auto companies have reduced their auto parts prices in China.

Sources:

<http://finance.qq.com/a/20140805/058567.htm>

<http://finance.chinanews.com/cj/2014/08-11/6480666.shtml>

<http://www.infzm.com/content/103144>

http://news.xinhuanet.com/fortune/2014-08/09/c_126850437.htm

http://news.xinhuanet.com/world/2014-08/18/c_126882427.htm

Background information:

"The NDRC Pays Attention to Pricing in the Automobile Sector and Plans to Formulate the Relevant Rules", China Competition Bulletin, Edition 24, November/December 2012, p 4

"Foreign Auto Makers Face Anti-Monopoly Scrutiny", China Competition Bulletin, Edition 28, July/August 2013, p 8

2. Update on the NDRC's Investigation of Qualcomm

There have been further meetings between Qualcomm and the NDRC. Derek Aberle, the President of Qualcomm, met with the NDRC on 11 July 2014 and 21 August 2014. Fabian Gonnel, Vice President of Qualcomm, was also interviewed by NDRC officials. So far, Qualcomm and the NDRC have met 4 times.

The NDRC stated that the interview focused on understanding the basis for calculating license fees, the bundling of the licensing of standard essential patents with non-standard essential patents, whether licensees were requested to grant cross-licenses for free, fee collection on expired patents, the bundling of patent licenses to the sale of chips, refusal to license chip manufacturers, and imposing unreasonable conditions on patent licensing and chip sales.

According to the NDRC, Qualcomm has stated that it is willing to solve the problems that have been pointed out by the NDRC.

It was also reported that the investigation is currently focused on Qualcomm's sales data. Around 80 NDRC officials are reportedly involved in the investigation, and both Qualcomm and its customers are being investigated.

Sources:

http://jjs.ndrc.gov.cn/gzdt/201407/t20140711_618477.html

<http://www.stcn.com/2014/0724/11588217.shtml>

http://jjs.ndrc.gov.cn/gzdt/201408/t20140822_623267.html

3. SAIC Initiates AML Investigation Into Microsoft

On 28 July 2014, the SAIC raided Microsoft's offices in Beijing, Shanghai, Guangzhou, and Chengdu. Nearly 100 staff from the SAIC's offices in Beijing, Shanghai, Guangdong, Sichuan, Fujian, Hubei, Jiangsu, Chongqing, and Hebei participated in the raids. Just over a week later, on 6 August 2014, the SAIC conducted follow-up raids on Microsoft's offices in Beijing, Liaoning, Fujian, and Hubei. It also raided the Dalian office of Accenture, which provides financial services to Microsoft.

In addition to these raids, the SAIC met with Mary Snapp, Deputy General Counsel and Vice President at Microsoft, on 4 August 2014. The SAIC made it clear to Microsoft that it was required to comply with Chinese laws, not to interfere with the investigation, and to ensure that the investigation was objective and fair.

The SAIC has been investigating Microsoft since June 2013, when it received complaints about compatibility, bundling, and document authentication of the Windows operating system and Microsoft Office software. The SAIC has spoken with Microsoft and other related companies, and Microsoft also submitted a report responding to the SAIC's concerns.

Sources:

http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729_147122.html

http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201408/t20140804_147293.html

http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201408/t20140806_147358.html

4. Guangdong AIC Reports on its Enforcement Activities in 2014 to Date

The Guangdong AIC reports that, since 2013, it has investigated 5964 monopoly conduct and unfair competition cases. In particular, it investigated 12 cases involving public enterprises and statutory monopolies, covering industries such as gas supply, water supply, funeral services, property management, and broadcast television.

Source: http://www.saic.gov.cn/jgzf/fldyfbzljz/201407/t20140730_147153.html

5. Member of the AMC Expert Advisory Group Dismissed

Shen Danyang, spokesperson for the Ministry of Commerce (MOFCOM), has confirmed that Zhang Xinzhu, an economist from the Chinese Academy of Social Sciences, was dismissed from his position on the Anti-Monopoly Commission Expert Advisory Group, effective 30 July 2014. Mr Shen stated that Zhang had violated the work discipline provisions of the *State Council Anti-Monopoly Commission Expert Advisory Group Work Rules*.

Source: <http://www.mofcom.gov.cn/xwfbh/20140818.shtml>

6. MOFCOM and the EU Chamber of Commerce Comment on the Recent AML Investigations into Foreign Businesses

Shen Danyang, spokesperson for MOFCOM, has denied that the enforcement of the AML has been targeted against foreign companies.

He stated that the recent AML investigations of foreign companies are aimed at promoting fair competition and protecting consumer interests. He pointed out that both Chinese and foreign companies have been investigated in the six years since the AML came into effect, and that all companies, whether Chinese or foreign, are equal before the law. The Chinese government will continue to treat foreign and domestic companies equally and welcome multinational companies to cooperate with Chinese businesses. At the same time, foreign investors and the companies they invest in must strictly comply with Chinese laws and regulations and fulfill their social obligations.

The European Union Chamber of Commerce in China issued a statement to respond to the recent investigations into the conduct of foreign companies. The Chamber said it believes that the increased enforcement of the AML across sectors over the past year is important and provides China an opportunity to demonstrate that the investigations will be conducted in accordance with the rule of law. However, it argues that AML enforcement lacks transparency. It is also concerned that enforcement may be biased against foreign companies.

Sources:

<http://bgt.mofcom.gov.cn/article/c/d/201408/20140800691431.shtml>

<http://www.mofcom.gov.cn/xwfbh/20140818.shtml>

http://www.europeanchamber.com.cn/en/press-releases/2132/european_chamber_releases_statement_on_china_aml_related_investigations

7. MOFCOM Meets with Uralkali and Seagate to Discuss Commitments

On 13 August 2014, MOFCOM met with representatives from Seagate to discuss the company's compliance with the commitments it gave to MOFCOM when it acquired Samsung's hard disk drive business in December 2011. Seagate had agreed to maintain Samsung's hard disk drive business as an independent competitor (but Seagate could apply to MOFCOM for the release of that commitment after 12 months). Further, for 3 years after MOFCOM's decision, Seagate would honour its commitment to invest at least US\$800 million per year in research and development.

Similarly, representatives from Uralkali met with MOFCOM on 15 August 2014 to discuss the company's performance of its commitments made to MOFCOM in June 2011 when Uralkali merged with Silvinit. The merged entity had committed to maintain current potassium chloride sales practices and procedures, to continue to supply a full range and sufficient volume of potassium chloride products into China, and maintain its usual negotiation processes.

Sources:

<http://fldj.mofcom.gov.cn/article/xxfb/201408/20140800699700.shtml>

<http://fldj.mofcom.gov.cn/article/xxfb/201408/20140800696442.shtml>

4. News of State-Owned Enterprises

1. Six SOEs Named for Pilot Reforms

On 15 July 2014, the State-owned Assets Supervision and Administration Commission (SASAC) announced that 6 central SOEs will pilot the next round of SOE reforms. The SOEs participating in these reforms are the State Development & Investment Corporation (SDIC), China National Cereals, Oils and Foodstuffs Corporation (COFCO), China National Building Materials Group (CNBM), China Energy Conservation and Environmental Protection Group (CECEP), Xinxing Cathay International Group (XXCIG), and China National Pharmaceutical Group (Sinopharm).

These reforms, referred to as the “Four Reforms”, are undertaken to implement the SOE reform that was announced at the Third Plenum in November 2013. First, SDIC and COFCO will become state investment companies. Second, Sinopharm and CNBM will try out “mixed ownership”. Third, the board of directors of XXCIG, CECEP, Sinopharm and CNBM will be responsible for hiring senior management, performance appraisal, and compensation. Fourth, SASAC will send out discipline inspection teams to 2 to 3 unspecified central SOEs.

Source: <http://www.sasac.gov.cn/n1180/n1566/n259730/n264168/15962412.html>

5. Selected Publications in English

1. ‘The Evolution of China’s Anti-Monopoly Law’ by Xiaoye Wang

Professor Xiaoye Wang has published a collection of her essays in English. Many of these essays were previously only available in Chinese. These essays cover a wide range of topics, including the legislative journey of the AML, the challenges the AML will face in implementation, and the various views that Chinese society has on the market economy, market competition, and the need for the AML.

More information available at: http://www.e-elgar.co.uk/bookentry_main.lasso?currency=US&id=15104

Major Acronyms

AML	Anti-Monopoly Law 2007, PRC
MOFCOM	Ministry of Commerce, PRC (MOFCOM is one of China's three competition enforcement agencies which applies the AML and is responsible for enforcing the merger control regime under the AML)
NDRC	National Development and Reform Commission, PRC (NDRC is one of China's three competition enforcement agencies which applies the AML and is responsible for enforcing price-related infringements of the AML in the areas of restrictive agreements and abuse of dominant market position)
SAIC	State Administration for Industry and Commerce, PRC (SAIC is one of China's three competition enforcement agencies which applies the AML and is responsible for enforcing non price-related infringements of the AML in the areas of restrictive agreements and abuse of dominant market position)
PRC	People's Republic of China

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