

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.

中国竞争简报

A publication of the Competition
Law and Economics Network at
Melbourne Law School,
University of Melbourne

Edition 40: January/February
2016

Highlights

The Chinese competition authorities have been very active the past few months. The National Development and Reform Commission (NDRC), the State Administration for Industry and Commerce (SAIC), and their local offices have published decisions relating to actions taken in the insurance, shipping, pharmaceutical, concrete, Internet, and automobile-related industries. In particular, several of those cases involved abuses of administrative power. The Ministry of Commerce (MOFCOM) has also imposed its first fix-it-first remedy in its conditional approval of NXP's acquisition of Freescale.

The authorities have also taken steps to further develop the competition law legal and regulatory framework. The NDRC released its draft guidelines on leniency, commitments, and abuse of intellectual property rights (IPRs) for comment. The SAIC also published its own version of the draft guideline on abuse of IPRs for public comment. The Chinese government is also currently receiving public comments on the draft revised *Anti-Unfair Competition Law* (AUCL). The draft revised AUCL contains a number of competition-law related revisions, including the introduction of a "relatively advantageous position" concept.

We wish you the best in the year of the Monkey!

1. Laws and Policies

1. The NDRC releases draft antitrust guidelines on leniency and commitments for public comment

On 2 February 2016, the NDRC released both the draft *Guideline on the Application of Leniency in Cases Involving Horizontal Monopoly Agreements* (draft leniency guideline) and the draft *Guideline on Commitments in Anti-Monopoly Cases* (draft commitment guideline) for public comment. The public consultation period for both draft guidelines ended on 22 February 2016.

Editors

Professor Allan Fels, AO 艾伦·菲尔斯
Professorial Fellow, Melbourne Law School,
University of Melbourne, Australia

Co-Director, University of Chinese Academy
of Sciences (UCAS) Centre for Competition
Law

Former Chairman, the Australian
Competition and Consumer Commission
(ACCC)
afels@unimelb.edu.au

Professor Xiaoye Wang 王晓晔
Institute of Law, Chinese Academy of Social
Sciences (CASS) and Hunan University

Director, UCAS Centre for Competition Law

Member of the Expert's Committee of the
Anti-Monopoly Commission under the State
Council of the P R China
wangxiaoye88@live.cn

Dr Wendy Ng 吴颖诗
Lecturer, Melbourne Law School, University
of Melbourne, Australia
wendy.ng@unimelb.edu.au

Adrian Emch
Lecturer of Competition Law, Peking
University, China
adrian.emch@gmail.com

In this edition

1. Laws and Policies	1
2. Cases	6
3. News of the Anti-Monopoly Enforcement Agencies and the Courts	16
4. Central and Local Government News	20
5. News of State-Owned Enterprises	20
6. Selected Publications in English	21

Draft leniency guideline

The leniency guideline aims to provide guidance on how Article 46(2) of the *Anti-Monopoly Law* (AML) applies to cases involving horizontal anticompetitive agreements, to improve transparency, and to help businesses apply for leniency. Article 46(2) provides that, if a business voluntarily reports its anticompetitive conduct to the competition authorities and provides important evidence, the authorities may reduce or exempt that business from penalties.

According to the draft leniency guideline, a business may apply for leniency before or after an investigation has been initiated. Before applying for leniency, a business may contact the competition agency either orally or in writing, use their real name or remain anonymous.

A business seeking leniency must submit an application and important evidence in the business's possession. The application may be made orally or in writing, and must provide information on the participants in the horizontal anticompetitive agreement; the communications relating to the reaching of the anticompetitive agreement; the products, services, prices, and quantities involved; geographic scope and size of the market affected by the conduct; duration; and submit important evidence relating to those matters. The definition of important evidence depends on whether the competition authority has initiated an investigation. Important evidence is evidence that is sufficient for the competition authority to initiate an investigation measure under Article 39 of the AML. If the investigation is already underway, then important evidence is evidence that adds significant value to proving the anticompetitive agreement. If the formal application is insufficient, the competition authority will require the submission of supplementary materials. The date that the supplementary materials are submitted is taken to be the date of the leniency application.

The draft leniency guideline also adopts a marker system, of sorts. A business can first submit a preliminary report either in writing or orally. The competition authority will request that the business submit supplementary materials, usually within 30 days (but can be extended to 60 days in special circumstances). If the business submits the supplementary materials within the specified time period, then the date when the competition authority received the preliminary report will be taken as the date of the leniency application.

Leniency will not be granted unless the business also promptly stops the alleged illegal conduct (except where the competition authority requires it to continue the conduct), cooperates with the authority, keeps and provides the evidence and information, does not disclose the fact that it has made a leniency application (unless the competition authority consents to such disclosure), and does not jeopardise the smooth progress of the investigation. A "ring leader"—that is, a business that coerced or organised the conclusion or implementation of the anticompetitive agreement or prevented other businesses from stopping the conduct—will not be exempt from penalty, although a fine reduction remains possible.

Generally, no more than 3 applicants will be considered for lenient treatment in a single case. However, if the case is major, complex, and involves numerous businesses, and each applicant has provided different types of important evidence, the competition authority may consider more applicants for lenient treatment. The first-in-line applicant may be either exempt from the fine or given at least an 80% discount, the second-in-line applicant may receive a 30–50% discount, and the third-in-line applicant may receive at most a 30% discount. If the applicant is first-in-line and applied for leniency before the competition authority initiated an investigation, the competition authority must exempt it from all fines. Exemption or reduction of the amount of illegal gains to be confiscated may also be offered.

The draft guideline also covers confidentiality. The competition authority will keep all materials submitted in separate storage volumes and will not disclose such information to any third party without the applicant's consent. The draft guideline also confirms that no other authority, organisation, or individual has any right to access these materials, that these materials will not be used as evidence in related civil litigation, and that, if the leniency application is rejected, these materials will not be used in determining whether the business engaged in the alleged anticompetitive agreement.

Further, the draft guideline clarifies that if a business applies for leniency at more than one competition authority, then the competition authorities will coordinate among themselves to resolve the issue.

Draft commitment guideline

The purpose of the commitment guideline is to provide guidance on the application of commitments in antitrust investigations and the process involved with suspending and terminating investigations, to improve transparency, and to maintain the legitimate interests of businesses and consumers.

The draft commitment guideline makes it clear that, once the competition authority has completed its investigation and determined that an investigated party has engaged in anticompetitive conduct, it will not accept commitments. A company under investigation may therefore offer commitments and apply to have an investigation suspended any time after an investigation is begun but before the issuance of a preliminary administrative penalty notice. The commitments may also be revoked anytime before the competition authority makes a decision on the suspension application.

A competition authority will not accept commitments and suspend the investigation in hardcore “cartel conduct”, that is cases involving price fixing, restricting output or sales volume, market sharing, or horizontal anticompetitive agreements in raw materials procurement. For other types of anticompetitive conduct, the competition authority may decide to suspend or terminate an investigation if the investigated party volunteers commitments.

The application to suspend must be in writing and provide information on the alleged anticompetitive conduct under investigation and its possible effects, specific measures in the commitments to eliminate those consequences, the duration and method of implementing the commitments (normally between 6 months to 3 years, and in any event, no longer than 5 years), and other relevant information. The proposed commitments may be structural, behavioural, or a combination of both.

The competition authority will usually make its decision within 1 month of receipt of the application to suspend the investigation. The draft guideline also makes it clear that a decision to suspend or terminate an investigation is not a determination on whether the investigated party’s conduct was in fact anticompetitive and the competition authority can investigate and sanction other parties for engaging in similar conduct. The suspension or termination of an investigation also does not affect any civil proceedings, nor should it be regarded as evidence.

The guideline also covers the negotiation and consultation of commitments, when an investigation may be terminated, and the circumstances where an investigation may be restored and the sanctions imposed in such situations.

Sources: http://jjs.ndrc.gov.cn/fjgld/201602/t20160203_774287.html

http://jjs.ndrc.gov.cn/fjgld/201602/t20160203_774286.html

2. The NDRC and the SAIC release separate draft antitrust guidelines on the abuse of IPRs for public comment

On 31 December 2015, the NDRC issued the *Guideline on the Abuse of Intellectual Property Rights (Consultation draft)* (NDRC draft IPR guideline) for public comment. The public consultation period ended on 20 January 2016. The NDRC provided an update on consultation process on 1 February 2016. It stated that over 60 organisations and individuals submitted comments. This included foreign competition authorities, international organisations, domestic and foreign businesses, industry associations, research organisations, and law firms. These organisations and individuals made over 260 comments and suggestions on the principals, basic framework, drafting style, and content of the guideline.

The SAIC also released its own version of the IPR antitrust guideline for public comment. It released the first public draft on 6 January 2016, with an updated version following on 4 February 2016 (SAIC draft IPR guideline). The SAIC had begun preparing its IPR antitrust guideline since 2009 and had consulted with Chinese and foreign businesses in the information communications technology industry, relevant central and local government departments, chambers of commerce, lawyers, and domestic academics and experts on previous drafts. Most recently, on 6 January 2016 the SAIC held a conference to solicit comments and

suggestions on its draft IPR guideline, and representatives from technology companies such as Huawei, ZTE, China Mobile, China Telecom, Lenovo, Samsung, Tencent, and Alibaba participated in the conference.

The current SAIC draft IPR guideline released for public consultation is a more comprehensive version of the SAIC's *Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights*, which was promulgated in April 2015 and effective since 1 August 2015. While that regulation only applies to non-pricing conduct and to the enforcement activities of the SAIC and its local offices, this draft IPR guideline covers both pricing and non-pricing conduct.

NDRC Draft IPR Guideline

The NDRC draft IPR guideline consists of general provisions, categories of IPR agreements that might be anticompetitive, and abuse of dominance conduct involving IPRs. The chapter on mergers involving IPRs was left open in the NDRC draft IPR guideline.

The NDRC draft IPR guideline sets out the enforcement principles in antitrust enforcement and the approach to defining the relevant market in IPR cases. It also provides that the competition analysis involving IPRs may consider whether the exercise of IPR will eliminate or restrict competition and/or promote innovation and increase efficiency. In particular, the NDRC guideline provides that market share can be calculated using 3 methods, based on royalties, sales of downstream products using IPRs, and the number of IPRs.

With respect to anticompetitive IPR agreements, the NDRC draft IPR guidelines distinguishes between horizontal and vertical agreements. In addition to the agreements set out in Article 13(1)(1)–(5) and 14(1)–(2) of the AML, agreements that might restrict or eliminate competition are horizontal IPR agreements relating to joint research and development, patent pools, cross licensing, or standard setting and vertical IPR agreements that limit price or contain exclusive grant back clauses, no challenge clauses, or certain other restrictions. Safe harbours are provided for IPR agreements under Article 2(3) of the NDRC draft IPR guideline. An IPR agreement will be exempt from the AML if it involves competitors with a combined market share of less than 15% or non-competitors with less than 25% individual market share in any relevant market. However, if that agreement is expressly stipulated in Articles 13 and 14 of the AML and the price restrictions as per this guideline, the safe harbours are unavailable.

For abuse of dominance, the NDRC draft IPR guideline recognises that ownership of IPRs does not necessarily mean that a business has dominance. Rather, that determination requires analysis based on the dominance factors and circumstances outlined in the AML combined with the characteristics of IPR. Conduct that might constitute an abuse includes licensing IPR at unfairly high prices, refusing to license, tying, imposing unreasonable conditions, engaging in discriminatory treatment among licensees, and using injunctive relief by standard essential patent holders to compel licensees to accept unfairly high license fees or other unreasonable conditions.

SAIC Draft IPR guideline

The SAIC draft IPR guideline includes general provisions, a chapter on relevant market definition, types of IPR agreements that might be anticompetitive, abuse of dominance conduct involving IPRs, a chapter on specific IPR related conduct, and some supplementary provisions. The SAIC draft IPR guideline also leaves open the chapter concerning mergers involving IPRs.

At the very outset, the SAIC draft IPR guideline sets out the enforcement principles competition authorities will follow and lists the steps they will take in competition analysis and factors to consider when determining whether conduct involving IPRs has breached the AML. The chapter on relevant market definition provides specific guidance on defining the relevant product, technology, and innovation markets.

Like the NDRC, the SAIC sets out the types of agreements that might be anticompetitive and draws a distinction between horizontal and vertical agreements. However, the types of agreement that might be anticompetitive under each differ slightly. The SAIC draft IPR guideline provides that horizontal agreements with price restrictions, volume restrictions, market sharing, restrictions on research and development, and collective boycotts and vertical agreements containing price, geographic, and customer restrictions might be anticompetitive. Exclusive grant back licenses, whether involving competitors or not, may also be anticompetitive. The SAIC draft IPR guideline also provides safe harbours for anticompetitive agreements, but

the thresholds and scope differ, compared to the NDRC draft. Under the SAIC draft IPR guideline, the threshold for agreements involving competitors is 20% or at least 4 other substitutable, independently controlled technologies that can be obtained at a reasonable cost in the relevant market. For agreements between non-competitors, the threshold is 30% for each party or at least 2 other substitutable technologies. Further, the safe harbor applies to agreements that are prohibited by Articles 13(1)(6) and 14(3).

For abuse of dominance, the types of conduct that might constitute abuse of dominance are broadly similar between the NDRC and the SAIC. The SAIC draft IPR guideline also includes unfair high licensing fees, refusals to license, tying, imposition of unreasonable conditions, and discriminatory treatment. However, the SAIC does not specifically identify seeking or using injunctive relief as conduct that might constitute abuse of dominance. Rather, abuse of injunctive relief is a relevant factor to consider in determining whether abuse of dominance conduct has occurred.

Additionally, the SAIC draft IPR guideline contains a chapter that addresses specific conduct relating to IPRs. Standard setting, patent pooling, and the acts of copyright collective management organisations are covered.

Sources: http://jjs.ndrc.gov.cn/fjgld/201512/t20151231_770233.html

http://jjs.ndrc.gov.cn/gzdt/201602/t20160201_774051.html

http://www.saic.gov.cn/zwgk/zyfb/qt/flid/201602/t20160204_166506.html

http://www.saic.gov.cn/fldyfbzdjz/gzdt/201601/t20160108_165816.html

http://www.saic.gov.cn/fldyfbzdjz/gzdt/201512/t20151214_164859.html

http://www.saic.gov.cn/fldyfbzdjz/gzdt/201512/t20151209_164729.html

3. The MOFCOM releases model trust agreement for monitoring trustees

On 27 November 2015, the MOFCOM released a model trust agreement for merging parties that require a monitoring trustee to supervise the implementation of merger remedies. The model agreement is not legally binding but serves as a reference document for merging parties and trustees when entering into such arrangements. It can be adapted to the supervision of structural, behavioural, or hybrid remedies.

The model agreement sets out the general tasks and responsibilities of a monitoring trustee, including those specific to the supervision of a divestiture and reporting obligations, and the merging parties' responsibilities. It also provides for the handling of the trustee's conflicts of interest, payment of fees, confidentiality obligations, trustee's liability disclaimer, revision or termination of the trust agreement, and consequences in case of breach. Further, if there is a dispute between the monitoring trustee and the merging parties regarding the trust agreement, the MOFCOM will coordinate the dispute.

Source: <http://fldj.mofcom.gov.cn/article/c/201511/20151101196166.shtml>

4. Draft revised AUCL released for public comment

On 25 February 2016, the Legislative Affairs Office of the State Council released the *Anti-Unfair Competition Law (draft amendments)* for public comment. The public consultation period ends on 25 March 2016.

The draft amendment contains important revisions to the AUCL, which was first enacted in 1993. Thirty of the 33 articles in the existing AUCL have been amended, including the deletion of 7 articles and addition of 9 new articles. The revisions aim to bring the AUCL in line with more recent legislation (such as the *Trademark Law* and the *AML*), codify settled case law, and modernise the AUCL through the adoption of an array of new principles and provisions.

There are several substantial proposed revisions to the AUCL that have competition law implications. Existing AUCL provisions on administrative monopolies, predatory pricing, and tying have been deleted from the draft amendment, since they are now directly regulated by the AML.

A major competition law related reform is the introduction of a new provision targeting abuses of a “relatively advantageous position.” This new concept seems to draw heavily on German (and to a lesser extent, Japanese and Korean) competition law. According to the draft amendment, even without a dominant market position, a company’s conduct may be regulated if it has a “relatively advantageous position” in relation to the specific transaction in question. A “relatively advantageous position” is defined as an advantageous position in capital, technology, market entry, distribution channels, or raw material purchasing that makes the company’s trading partners dependent on the company and switching to other companies difficult. Specifically, pursuant to Article 6 of the draft amendment, a company in such a position is prohibited from engaging in the following conduct:

- without valid reason, restrict its trading partners’ choice of their own business partners
- without valid reason, require its trading partners to buy designated products
- without valid reason, restrict its trading partners’ transaction conditions with third parties
- abusively charge fees or unreasonably require its trading partners to provide other economic benefits
- impose other unreasonable transaction conditions

Another competition law related reform concerns the new rules on unfair competition through network technologies. Article 13 of the draft amendment codifies existing case law by prohibiting four types of unfair competition through network technology. These rules were previously developed by the courts on the basis of the vague, general provisions of the AUCL. In addition, Article 14 of the draft amendment is a catch all provision that gives the SAIC jurisdiction to determine any other unfair competition conduct not stipulated in law.

Source: <http://www.chinalaw.gov.cn/article/cazjgg/201602/20160200480277.shtml>

2. Cases

1. Fix-it first remedy imposed in the MOFCOM’s conditional approval of NXP’s acquisition of Freescale

NXP’s acquisition of Freescale was conditionally approved by the MOFCOM on 27 November 2015. Both companies are major players in the semiconductor industry. The notification was first accepted in May 2015 and review had entered extended phase 2, but the notification was withdrawn and then re-filed on 10 November 2015.

Competition assessment

The MOFCOM considered that the acquisition would impact the global markets for general purpose micro-controllers, analogue integrated circuits for power supply (for automobile applications), and radio frequency (RF) power transistors. Of the affected markets, the MOFCOM found that the acquisition might eliminate or restrict competition in the RF power transistor market.

The MOFCOM found that the acquisition might enhance NXP’s control in the relevant markets. The market is highly concentrated, with the top 8 market players accounting for over 90% of the market, and Freescale and NXP are the top 2 players with market shares far exceeding those of their competitors. Products manufactured by NXP and Freescale using LDMOS and gallium nitride process technologies accounted for 84% of the market in 2012, and are expected to have a 92% market share in 2018. The acquisition would also eliminate competition between the 2 leading, close competitors in the market. NXP and Freescale use similar process technologies, have a similar client base, and compete closely in the relevant product market. The MOFCOM found that, post acquisition, NXP might have the incentive and ability to eliminate and restrict competition in the RF power transistor market. The acquisition would also reduce customers’ supply options and increase procurement risks. Purchasers of RF power transistors are typically large wireless infrastructure

facilities suppliers who purchase products from both Freescale and NXP, and the acquisition would eliminate one of the customers' sources of supply. Further, the MOFCOM found that the acquisition would decrease the companies' motivation to engage in technology-related research and development and therefore affect the level and pace of research and development and innovation in the market. Finally, the acquisition would increase barriers to entry. The merged entity would have a substantial advantage due to their patents.

Remedies

NXP voluntarily proposed that it would divest its RF power transistor businesses to JAC Capital in the early stages of the review process. It submitted the signed purchase agreement and the final commitments to the MOFCOM on 27 October 2015 and 19 November 2015, respectively. The MOFCOM determined that the proposed remedy would be able to reduce the adverse effects of the acquisition, and it required that NXP complete the divestiture before completing the Freescale acquisition.

This is the first time that the MOFCOM has required the parties complete the divestiture before closing the proposed acquisition. These remedies were similar to those submitted and accepted by the US Federal Trade Commission (US FTC), the European Commission, and the Korea Free Trade Commission, with the European Commission also requiring the fix-it-first remedy.

Source: <http://fldj.mofcom.gov.cn/article/ztxx/201511/20151101196182.shtml>

2. Industry association fined for organising collective boycott of animation and entertainment expos in Guangzhou

On 8 December 2015, the SAIC released a decision made by the Guangdong Administration for Industry and Commerce (Guangdong AIC) on 9 July 2015 to punish the Guangdong Panyu Animation and Entertainment Industry Association for engaging in collective boycott conduct in breach of Articles 13(5) and 16 of the AML and Article 9(2) of the SAIC's *Regulations on Prohibiting Monopoly Agreements*. It was fined RMB 100,000 and ordered to stop the conduct.

In May and June 2012, the association had organised for its members to enter into an expo alliance agreement. They agreed that, beginning in 2013, association members would only participate in expos held in Guangzhou that were led, organised or hosted by the association. If a member wished to attend a conference that was not led, organised or hosted by the association, it had to submit a written request to the association at least 30 days prior to the expo and obtain the association's written permission. Fifty-two members ultimately signed and executed the agreement. The Guangdong AIC held that the conduct had the effect of eliminating or restricting competition in the animation entertainment expo industry, which would result in real or potential harm to the healthy development of the animation entertainment expo market.

In response, the association argued that it had prepared the agreement at the request of its members, that it had simply recorded the requests of its members and not organised anything, and that it had not drawn up any industry regulations or guidelines pursuant to the agreement. It also stated that the members had wished to promote the legitimate and reasonable planning of expos and did not objectively engage in anticompetitive conduct or substantially harm the industry, industry operators, or related businesses. It also contended that the expo alliance agreement was not a monopoly agreement under the AML.

The Guangdong AIC rejected all these arguments. It also determined that the association had not satisfied the requirements in Article 15 of the AML for exemption.

Source: http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201512/t20151208_164678.html

3. The Gansu DRC takes action in the car maintenance industry in Wuwei to address price fixing and administrative monopoly conduct

The Gansu Development and Reform Commission (Gansu DRC) recently undertook enforcement action in the car maintenance industry in Wuwei. One case involved pricing fixing, and the other was an administrative monopoly case.

Price fixing

The Gansu DRC fined 22 car maintenance businesses in Wuwei for fixing the price of car maintenance service fees. On 30 April 2010, 24 car maintenance businesses in Wuwei signed a “self-discipline convention” through the Wuwei Maintenance Industry Association. They agreed to fix secondary car maintenance service fees in accordance with the standards and fees for vehicle maintenance set by the Gansu Transport Bureau and the Gansu Price Bureau and that such fees would not be lower than the levels set out in the convention. This convention was implemented from May 2010 to December 2014.

The Gansu DRC found that the car maintenance businesses had reached and implemented an anticompetitive agreement by fixing the price of secondary car maintenance services and eliminated and restricted price competition in the relevant market, in violation of Article 13(1) of the AML and Article 7(1) of the *Anti-Price Monopoly Regulation*. The Gansu DRC ordered the car maintenance businesses to stop their illegal conduct and imposed total fines of just under RMB 90,000 (2% of 2013 secondary car maintenance service revenue) on 22 car maintenance businesses (it is unclear why 2 businesses were not fined). In determining the sanctions, the Gansu DRC took into the fact that the making and implementation of the convention was promoted and supervised by relevant government departments and the industry association and that the consequences were relatively minor.

Abuse of administrative power

The Gansu DRC also issued a recommendation letter to the Wuwei Transport Bureau on 5 November 2015 regarding the actions of the Wuwei Road Transport Management Bureau and related road transport industry associations. On 8 November 2010, the Wuwei Road Transport Management Bureau published a notice on the supervision and management of road transport secondary maintenance services in Wuwei. In part, it concerned the certification process for the car maintenance businesses that were used by members of the relevant industry associations. In addition, from May 2010 to April 2015, the secondary car maintenance services fees of qualified car maintenance businesses were held under escrow by the Wuwei Road Transport Industry Association. Fees would be returned to car maintenance businesses on a monthly basis, after deducting relevant fees.

The Gansu DRC found that such conduct restricted competition between businesses, forced businesses to implement the self-discipline convention, and maintained the continued implementation of an anticompetitive agreement. Such conduct breached Article 36 of the AML as it eliminated and restricted competition in the road transport secondary maintenance services market in Wuwei. The Gansu DRC recommended that the Wuwei Transport Bureau order the Wuwei Road Transport Management Bureau to rectify the relevant administrative actions and order the Wuwei Road Transport Industry Association to return the secondary car maintenance service fees to the car maintenance businesses. The Wuwei Transport Bureau was requested to report back to the Gansu DRC by 30 November 2015 on the progress of these rectification measures.

Sources: <http://www.gsdrcc.gov.cn/content/2015-11/33425.html> (1 of 22 penalty decisions)

<http://www.gsdrcc.gov.cn/content/2015-11-24/33514.html>

4. The Hunan AIC punishes market sharing in the concrete industry in Yongzhou

On 3 November 2105, the Hunan Administration for Industry and Commerce (Hunan AIC) fined concrete companies in Yongzhou for market sharing. The decisions were published on 29 December 2015.

Seven companies entered into a concrete company partnership agreement on 30 September 2011. They agreed to form an operational joint venture and establish an office to unify management, marketing, scheduling, and production. They agreed to contribute assets to the joint venture, to divide profits according to each company's market share, and to adjust production volume in accordance with the agreement. However, the joint venture was not implemented and abandoned in December 2011 due to disagreements on the amount of capital contribution and market share.

The Hunan AIC determined that the partnership agreement was a market sharing agreement under Article 13(3) of the AML and Article 5(1) of the SAIC *Regulations on Prohibiting Monopoly Agreements*. It decided that the companies had fulfilled the criteria for lighter punishment as the agreement was not implemented, the companies voluntarily stopped the conduct, the agreement would have only a limited effect, the conduct was of short duration, and the scope of the companies' business was not large. As such, six companies were each fined RMB 30,000 (total RMB 180,000). One company was exempt from penalty as it was the first party to report the conduct to the Hunan AIC, provided important evidence, and cooperated with the investigation.

Source: http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151229_165504.html

5. Shipping companies fined nearly RMB 407 million for price fixing and bid rigging

On 28 December 2015, the NDRC announced that it had fined 8 shipping companies nearly RMB 407 million for price fixing and bid rigging relating to shipping services for roll on/roll off cargo (such as cars, trucks, construction machinery, and other uncontainerised cargo) on North America-China, Europe-China, China-South America, China-Europe, and coastal China shipping routes. The NDRC's investigation, which began in August 2014, lasted over 1 year.

From at least 2008 to September 2012, the shipping companies discussed prices, tenders, and the division of customers and shipping routes through phone calls, meetings, meals, emails, and visits. The NDRC found that the shipping companies had, on multiple occasions, made and implemented price agreements relating to shipping services for roll on/roll off cargo manufacturers on Chinese shipping routes. The shipping companies also had an understanding where they would not encroach on each other's existing business. With respect to a company's existing business relating to specific customers on specific shipping routes, the companies would help each other to win tenders, and to maintain or increase prices, they would either submit high prices or not submit a bid at all. The NDRC also found that the shipping companies had used many illegitimate measures to evade antitrust monitoring.

The NDRC concluded that the 8 shipping companies had reached and implemented anticompetitive agreements in breach of Articles 13(1) and 13(3) of the AML. The shipping companies had eliminated or restricted competition in the relevant market and increased roll on/roll off cargo international shipping fees, which harmed the interests of relevant Chinese importers and exporters and end consumers. The shipping companies admitted legal responsibility under the AML and committed to strengthening their competition compliance systems, competition compliance programs, and technical competition compliance.

When setting the fines, the NDRC considered the nature, duration, and consequences of the conduct, whether the company voluntarily reported the conduct, and whether it provided relevant information and evidence. The fines were based on each company's China-related roll on/roll off international shipping service revenue in 2014. Three companies received leniency. NSK was exempt from penalty as it was the first-in-line leniency applicant, and the second (K Line) and third (Mitsui) leniency applicants were fined 4% and 7% of the relevant revenue, respectively. Eukor Car Carriers and Wallenius Wilhelmsen, whilst their conduct had serious consequences and affected many products, nonetheless provided important evidence, and were fined 9% and 8% of the relevant revenue, respectively. The conduct of CSAV, Eastern Car Liner, and CCNI was considered to have relatively minor impact and their fines (6%, 5%, and 4% of the relevant revenue, respectively) reflected this.

Source: http://jjs.ndrc.gov.cn/gzdt/201512/t20151228_769084.html

6. Insurance companies in Hubei and Jiangxi sanctioned for market sharing

Recently, the SAIC published the decisions of its local offices in Hubei and Jiangxi relating to market sharing agreements by insurance companies. Both decisions involved coinsurance arrangements relating to accidental injury insurance for the construction industry.

Hubei

The Hubei Administration for Industry and Commerce (Hubei AIC) investigated 12 insurance companies who provided accidental injury insurance in Wuhan. It found that, on 1 January 2008, the insurance companies had signed a coinsurance agreement and established a coinsurance body. As the principal insurer, China Pacific would have 12% of the total insured amount, and the remaining insurers would each have 8%. China Pacific was responsible for collecting all the insurance premiums, entering standardised insurance policies, and issuing policyholder invoices on behalf of the coinsurers, and it would distribute the premiums to the coinsurers on a monthly basis. In return, the coinsurers would pay China Pacific a management fee equal to 5% of total premiums. China Pacific was also responsible for handling and investigating claims, and liability to pay sums payable under the insurance policies was borne pro-rata by all insurance companies. The parties also formulated management policies whereby non-compliance with the agreement would be punished. In addition, the coinsurance agreement appointed the Wuhan Construction Safety Technical Consulting Centre as a consultant. The Wuhan Construction Safety Technical Consulting Centre had, in practice, some construction safety management and governmental responsibilities, and it effectively made taking an insurance policy from the coinsurance body a pre-requisite to applying for a construction permit.

The Hubei AIC acknowledged that coinsurance is a common way for insurance companies to share risks. However, coinsurance should be targeted at specific matters where it is too risky for a single insurance company to insure, and requires the sharing of both the risks and profits. Here, the Hubei AIC found that the insurance companies did not know the scale and difficulty of each project, nor the number of workers involved, prior to the signing of insurance contracts with construction companies. Hence the insurance companies could not predict the likelihood of accidents or the level of risk involved, meaning that there was no need to cooperate with other insurers to share the risk and profits.

The Hubei AIC held that the coinsurance arrangements satisfied Article 13(3) of the AML. The insurance companies had entered into an agreement to divide the market for accidental injury insurance in urban construction, distorted the normal competition order in the industry, and harmed the construction industry, the interests of the insurance companies and other direct market participants, and consumer interests. The insurance companies were ordered to stop the illegal conduct, had their illegal gains confiscated (total of RMB 4,440,900, although 1 insurance company was not subject to the confiscation of illegal gains), and fined a total of RMB 224,800. China Pacific was fined 6% of last year's revenue, whereas the remaining 11 insurance companies were each fined 2% of last year's revenue.

Jiangxi

Similarly, coinsurance arrangements for construction accidental injury insurance in Jiangxi involving 17 insurance companies were investigated and sanctioned by the Jiangxi Administration for Industry and Commerce (Jiangxi AIC). The Jiangxi AIC initiated the investigation on 9 August 2013 and handed down its decision on 28 December 2015.

In December 2009, 2 coinsurance agreements were signed by 10 insurance companies and effective for 3 years from 1 January 2010. The insurance companies agreed to divide the market for construction accidental injury insurance in Jiangxi into 2 regions. Taikang Life was the principal insurer in Nanchang and China Life was the principal insurer in the rest of Jiangxi. The principal insurers in each region would take a large share of the total premiums in their region (31.5% for Taikang Life in Nanchang and 40% for China Life Insurance in the rest of Jiangxi) and act as agent for 8% of the total premiums. The remainder of the premiums would be divided amongst the coinsurers at varying proportions. They also agreed that the principal insurers would not insure across regions and that the coinsurers would not insure businesses independently. As the agreements neared expiry, new coinsurance agreements were signed in December 2012 and the number of insurance companies participating in the coinsurance arrangements increased to 17. The arrangements were very

similar, and the market shares were adjusted to reflect the participation of more insurance companies. In addition, the agreements provided for insurance agents, pro-rata management fees, insurance premium rates, a basic bond, a shared bond system, and penalties for insurers that breached the agreement.

The Jiangxi AIC found that this conduct constituted market sharing agreements under Article 13(3) of the AML and Article 5 of the SAIC's *Regulations on Prohibiting Monopoly Agreements*. The insurance companies had divided the market by geography and market share and directly eliminated competition between the insurance companies. The coinsurance arrangements also weakened their incentive to improve product quality and service and attract good agents to develop the market, prevented competition on insurance products, price, and service quality, and decreased economic efficiency in the relevant markets.

The insurance companies were fined a total of RMB 5,392,564. China Life and Taikang Life were each fined 5% of their 2013 insurance revenue, whereas the remaining 15 insurers were fined 3% of their 2013 insurance revenue. Each insurance company made arguments for exemption or reduction of their penalty, but the Jiangxi AIC determined that none of the insurers had fulfilled the requirements under Article 46(2) for lenient treatment.

Sources: http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151229_165445.html

http://www.saic.gov.cn/zwgk/gggs/jzzf/201602/t20160203_166468.html

7. The NDRC and the Chongqing AIC take separate actions to punish cartel conduct and refusal to supply in the pharmaceutical industry

Both the NDRC and the Chongqing Administration for Industry and Commerce (Chongqing AIC) have recently taken enforcement action to address anticompetitive conduct involving allopurinol. Allopurinol tablets are a common treatment for gout (known as hyperuricemia), widely used in clinical practice, lowly priced, and listed on China's National Essential Medicines List. Allopurinol drugs are a class A drug on the National Basic Medical Insurance Drug Catalogue.

In China, there had been 15 approved allopurinol tablet manufacturers. However, since 2014, only Chongqing Qingyang Pharmaceutical, Jiangsu Tianjie, and Shanghai Sine Pharmaceutical have been active in the market. In addition to manufacturing allopurinol tablets, since 2012, Chongqing Qingyang has been the sole supplier of raw materials for producing allopurinol drugs, which are referred to as allopurinol active pharmaceutical ingredients (APIs).

Price fixing and market sharing

On 15 January 2016, the NDRC fined the 3 allopurinol tablet manufacturers and their exclusive distributors for engaging in cartel conduct in breach of Article 13 of the AML. Chongqing Datong is related to Chongqing Qingyang, whereas Shangqiu Huajie is the exclusive distributor for Jiangsu Tianjie and Shanghai Sine.

From April 2014 to September 2015, the parties held 4 meetings and agreed to jointly increase the price of allopurinol tablets. They set minimum prices for allopurinol tablets, and prices increased from RMB 10/bottle in early 2014 to at least RMB 23.8/bottle in provinces where allopurinol is listed as an essential medicine and RMB 50/bottle in provinces where it is listed as a low-cost drug. They also allocated provinces to each manufacturer and agreed to submit tenders only in their allocated provinces and not submit tenders or negotiate prices in any other province. Further, Chongqing Qingyang would stop supplying allopurinol APIs to Shanghai Sine and Jiangsu Tianjie if the agreement is breached.

The NDRC determined that, since April 2014, the parties severely eliminated or restricted competition in the allopurinol tablet market, increased the cost burden of patients with gout, and harmed consumer interests. Chongqing Qingyang and Chongqing Datong were fined RMB 1.8052 million (8% of previous year's sales of allopurinol tablets), as Chongqing Qingyang was the leader in the cartel and did not cooperate during the initial phases of the investigation. Jiangsu Tianjie, Shanghai Sine, and Shangqiu Huajie were each fined 5% of the previous year's sales of allopurinol tablets, and their cooperation with the investigation and provision of information were noted.

Refusal to supply

In a separate investigation, on 28 October 2015, the Chongqing AIC fined Chongqing Qingyang for refusing to supply allopurinol APIs to competing allopurinol drug manufacturers in breach of the AML. This decision was published on 22 December 2015.

In September 2013, Chongqing Qingyang signed 2 agreements with Xiangbaihe. One was an exclusive sales agency agreement for allopurinol API and the other was a distribution agreement for allopurinol tablets. The term of each agreement was 5 years. According to the exclusive sales agency agreement, from October to December 2013, Chongqing Qingyang must not sell allopurinol API to third parties in China without Xiangbaihe's approval. From October 2013 to March 2014, Chongqing Qingyang did not supply allopurinol API to any party and refused requests for supply from both Xiangbaihe and other allopurinol drugs manufacturers. Further, after the 6-month period during which it refused to supply allopurinol API, Chongqing Qingyang's sales figures for allopurinol tablets increased by 4.53 times in 2014 and its estimated share of the allopurinol drug market increased from around 10% to 57%. Chongqing Qingyang began supplying allopurinol API to the market again in April 2014.

Interestingly, this conduct came to the attention of the Chongqing AIC because Chongqing Qingyang approached the Chongqing AIC and asked the Chongqing AIC to determine whether it had breached the law. The Chongqing AIC initiated an investigation after receiving the SAIC's authorisation to do so in December 2014.

In coming to the conclusion that Chongqing Qingyang had breached Article 17 of the AML by using its dominance in the allopurinol API market to refuse to supply allopurinol API to purchasers, it undertook a 5-step analysis consisting of relevant market definition, determination of dominance, examining the alleged abusive conduct, considering the justifications for the conduct, and evaluating the effects of the conduct.

The relevant market was defined to be allopurinol APIs in China. The Chongqing AIC considered the substitutability of allopurinol treatments with other drugs used for treating gout. It determined that, in the treatment of gout, allopurinol was the only drug that could prevent the production of uric acid, priced cheaply, and listed as a class A national basic medical insurance drug. It also found that allopurinol APIs are essential and irreplaceable inputs in the production of allopurinol treatments. The production and sale of allopurinol APIs occurs on a nationwide basis and there are no geographic restrictions in place. However, there is a strict approval process for drugs that are produced outside of China and they cannot be imported unless such approval is obtained. Allopurinol APIs have not yet been approved for importation and customers cannot purchase it from overseas themselves.

The Chongqing AIC concluded that Chongqing Qingyang had a position of dominance in the allopurinol market. In coming to that conclusion, it found that, since July 2012, Chongqing Qingyang had no domestic competitors in the production and sale of allopurinol API and no overseas produced allopurinol API had been approved for importation. This meant that Chongqing Qingyang had the ability to control the price and supply of allopurinol API and related terms. Conversely, customers had very little bargaining power. There were also relatively high barriers to entry into the market as large capital investment and research efforts are required to obtain the relevant legal qualifications and certifications to manufacture allopurinol API. Allopurinol API purchasers also rely greatly on Chongqing Qingyang as the supplier and Chongqing Qingyang has strong and decisive influence over the production, operations, scale, and profits of other allopurinol drugs manufacturers.

After finding that Chongqing Qingyang had refused to sell allopurinol API to the market from October 2013 to March 2014, the Chongqing AIC considered whether there was any legitimate justification for the conduct. It believed that refusing to supply allopurinol API was inconsistent with Chongqing Qingyang's normal business activities and economic needs and it was instead aimed at maximising monopoly profits. It also concluded that reason given by Chongqing Qingyang for refusing to supply—that it was complying with the exclusive sales agency agreement and it was in a contractual dispute with Xiangbaihe and it did not want to supply in breach of that agreement—was not legitimate. Rather, it believed that the Chongqing Qingyang entered the exclusive sales agency agreement so that it could use the contract to abuse its dominance in the allopurinol API market, eliminate competition from other allopurinol drug manufacturers, and increase its market share in the allopurinol tablet market.

The Chongqing AIC found that the refusal to supply allopurinol API had harmful effects. By refusing to supply allopurinol API (the upstream market), this eliminated competition in the allopurinol drug production industry (the downstream market), harmed the interests of its downstream competitors, and distorted market order. The refusal to supply directly led to 4 of the 7 allopurinol drug producers either stopping production or switching production to another product. The refusal to supply also resulted in the loss of production capacity in the downstream market. The estimated loss of production capacity over the 6-month period where no allopurinol API was being supplied had an economic value of RMB 14.4681 million. Further, during this 6-month period, the average price of allopurinol API increased from RMB 240/kg to RMB 535/kg. This price increase raised the production costs of downstream competitors, which was ultimately borne by end consumers. The price of allopurinol tablets went from RMB 5.5/bottle to RMB 25/bottle.

Chongqing Qingyang was ordered to stop the illegal conduct and fined nearly RMB 440,000, representing 3% of 2013 sales revenue in both the upstream and downstream markets. It should be noted that Chongqing Qingyang was eligible for a lighter penalty because it has cooperated with the investigation, recognised that its conduct was illegal, and had corrected its behaviour.

These 2 cases are part of a larger group of antitrust cases in the pharmaceutical industry. Earlier in 2015, the NDRC took a few actions to address the abuse of administrative power in the drug procurement process, and in 2011, it sanctioned abuse of dominance conduct involving reserpine, which is a high blood pressure drug listed on the National Essential Medicines List.

Pricing reform of medicines might be a reason for the close antitrust scrutiny of the pharmaceutical industry. In May 2015, the government decided that the pricing of the vast majority of medicines would no longer be determined by the NDRC. Instead, prices would be determined by the market. When that decision was made in May 2015, the NDRC also launched a campaign to inspect unlawful pricing activities in the pharmaceutical industry, and the AML may be viewed as a means to address such conduct as this reform progresses.

Sources: http://jjs.ndrc.gov.cn/fjgld/201601/t20160128_772982.html

http://jjs.ndrc.gov.cn/fjgld/201602/t20160202_774107.html

http://jjs.ndrc.gov.cn/fjgld/201602/t20160202_774108.html

http://jjs.ndrc.gov.cn/fjgld/201602/t20160202_774110.html

http://jjs.ndrc.gov.cn/fjgld/201602/t20160202_774113.html

http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151222_165152.html

http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201512/t20151221_165120.html

8. The Inner Mongolia AIC suspends investigation into the supply of broadband Internet services by China Unicom's Inner Mongolia branch

On 28 October 2015, the Inner Mongolia Administration for Industry and Commerce (Inner Mongolia AIC) suspended its abuse of dominance investigation into China Unicom's branch in Inner Mongolia (Inner Mongolia Unicom).

The Inner Mongolia AIC found that Inner Mongolia Unicom had tied the supply of Internet broadband services to the sale of mobile phone devices and services. It offered these services in the form of 2 different service packages ("family package A" and "family package B"), in which the fees for both services were also bundled together. This meant that, if fees were owed on the mobile phone service or landline service, Inner Mongolia Unicom would suspend all services, including the associated broadband service.

Inner Mongolia Unicom admitted to engaging in such conduct. On 9 August 2015, it submitted a request to suspend the investigation and proposed a number of commitments:

- Offer new Internet products to ensure that consumers have more business options
 - Customers will be able to choose the standalone broadband service or a “smart home” package which offered broadband and mobile phone services as a bundle (the new bundle was announced in March 2015)
 - By 31 December 2015, stop offering the 2 existing packages and the practices of tying the sale of broadband services with mobile phone services and suspending all services where there were outstanding mobile phone fees
- Optimise and upgrade Internet products and access
 - Contact existing customers and tell them about the new product offerings and allow them to change packages by 30 October 2015
 - Increase investment in the broadband network and implement the fibre optic network transformation by 31 December 2015
 - Lower fees for high speed broadband products by 31 December 2015
 - By 31 December 2015, strengthen training for its staff by increasing operational training, disseminating relevant legal knowledge, and improving awareness of legal compliance
 - Improve its ability to service customers by 31 December 2015

In deciding to suspend the investigation, the Inner Mongolia AIC took into account Inner Mongolia Unicom's cooperation with the investigation, the corrective measures it had adopted already, and the ability of the commitments to address the effects of the conduct. Inner Mongolia Unicom must provide a written report to the Inner Mongolia AIC on compliance with the commitments on 15 November 2015 and 10 January 2016. Inner Mongolia AIC will monitor Inner Mongolia Unicom's compliance with the commitments before 30 November 2015 and 20 January 2016, and make its final assessment before 20 June 2016. The investigation will be terminated if Inner Mongolia Unicom fulfills the commitments during the rectification period and Inner Mongolia AIC has assessed the effect of complying with the commitments. However, the Inner Mongolia AIC reserved the right to resume the investigation if Inner Mongolia Unicom violates Article 45(3) of the AML and Article 19(2) of the SAIC's *Regulations on Investigating Monopoly Agreements and Abuse of Dominance Cases*.

This case arose from a more general investigation that the Inner Mongolia AIC took into the telecommunications industry and broadband services. China Mobile's branch in Inner Mongolia was also investigated, but the conduct in that case related to the inability of users to roll over unused mobile phone data to the next month. As reported in the September/October 2015 edition of the China Competition Bulletin, Inner Mongolia AIC had also suspended its abuse of dominance investigation.

Source: http://www.saic.gov.cn/zwgk/gggs/jzjf/201511/t20151106_163706.html

http://www.saic.gov.cn/zwgk/gggs/jzjf/cfjd/201511/t20151106_163705.html

9. The Gansu DRC investigates administrative monopoly involving GPS platforms

On 1 December 2015, the Gansu DRC published its letter to the Gansu Transport Department recommending that the latter take certain measures to address the administrative monopoly conduct of its transport management authorities relating to the adoption of a global positioning system (GPS) platform. This is the third administrative monopoly case involving the adoption of GPS systems by local governments, with the first occurring in Guangdong in July 2011 and the second in Shandong in March 2015.

On 7 November 2013, the Gansu Transport Management Bureau and Satellite Navigation and Communications Co. Ltd (SatNav) made a joint request to the Gansu Industry and Information Technology Commission to establish a GPS integrated logistics service platform (GPS platform). After it received the approval, the Gansu Transport Management Bureau and SatNav signed a memorandum of understanding (MOU) to cooperate on the GPS integrated logistics services platform for 3 years. They agreed that SatNav would be responsible for establishing satellite navigation and positioning centres (province and local levels) and installing 70,000 GPS units on logistics vehicles. Further, they agreed that the price of the GPS devices would not exceed RMB 2,600/unit (including full cost of the equipment,

software, and installation).

The Gansu Transport Management Bureau issued a notice on 4 April 2014 to its lower level authorities to implement the GPS platform. The GPS platform would be adopted throughout the province, compatible GPS devices would need to be installed on 70,000 heavy-duty trucks, and the GPS platform would access data from the installed GPS devices. Local transport management authorities were required to set up local offices and platforms and ensure the installation of the GPS devices. The notice also provided that SatNav was responsible for funding, operating, and maintaining the GPS platform. A number of local level transport management bureaus entered into agreements and issued notices to implement the GPS platform in accordance with the April 2014 notice. In particular, the price of the GPS devices to be installed would not exceed RMB 2,600/unit. The implementation of the GPS platform was later abandoned when the Gansu Transport Management Bureau issued a notice on 28 May 2015 announcing 14 GPS platform service providers and abolishing the April 2014 notice. However, the notice did not rectify the local level conduct.

The Gansu DRC concluded that the Gansu Transport Management Bureau and its local authorities had violated Articles 8, 32, and 37 of the AML by designating SatNav as the GPS platform and device provider, requiring SatNav to be fully responsible for costs associated with the GPS platform, requiring local authorities to adopt the specified GPS platform, having the GPS platform access vehicle data, and effectively recommending the sale price of GPS devices. Such conduct eliminated or restricted competition in the GPS platforms and GPS devices, deprived road transport operators of choice of GPS platform and device, and unreasonably increased the price of GPS devices and increased the business costs of road transport operators.

The Gansu DRC made the following recommendations to the Gansu Transport Department:

- Make the Gansu Transport Management Bureau responsible for establishing and maintaining a road transport dynamic information public service platform, fully liberalise the establishment of control monitoring systems, and give road transport users the choice of whether to access a control monitoring platform that satisfies the transport management bureau's technology standards or a public service platform
- Remove the import restrictions on GPS devices, allow road transport operators to choose to buy and install any GPS device that satisfies the transport bureau's technical standards, and allow access to relevant control monitoring platforms
- Eliminate the fixed price for GPS devices and promote market determined prices
- Urge the local transport management departments to rectify their conduct in accordance the above

The Gansu DRC requested that the Gansu Transport Department report on the progress of its actions by 30 December 2015.

Source: <http://www.gsdrcc.gov.cn/content/2015-12-01/33571.html>

10. Shanghai High People's Court rejects abuse of dominance case against China Telecom

Mr Yang Zhiyong, a handicapped telecoms user, sued China Telecom and its Shanghai branch for allegedly committing a variety of abuse of dominance conduct in violation of the AML. At first instance, the Shanghai Intermediate People's Court dismissed Mr Yang's case. On 24 December 2015, the Shanghai High People's Court agreed and upheld the first-instance judgment. The second-instance decision was published on the court's website on 6 January 2016.

Mr Yang took issue with China Telecom's prices for packaged broadband access and other services offered to handicapped people, which he perceived to be too high. The court considered the following questions:

- *High prices for special offers to handicapped people:* the court upheld the first-instance finding that there are other operators available to Mr Yang in his neighborhood that provide network services at a lower price. This means that China Telecom did not have the capability to control the prices and therefore did not have dominance
- *China Telecom's fee policy for telecommunications services:* the court found that the evidence provided was not sufficient to conclude that China Telecom had abused a dominant market position when charging monthly

- telephone rental fees and phone number retention fees
- *Wireless Internet access device only running on China Telecom's network and not on other telecommunications operators' networks*: the court ruled that this was due to a contractual arrangement between Mr Yang and China Telecom rather than China Telecom setting barriers on interoperability

In addition, the court emphasised that, for private antitrust litigation, a plaintiff must provide sufficient evidence to prove the illegality of the defendant's acts. Otherwise, the risk of abusive litigation may increase.

Source: <http://wenshu.court.gov.cn/content/content?DocID=025efcd7-7c54-454b-98ad-8f6fb329ad6a&KeyWord=%E5%9E%84%E6%96%AD>

11. LeTV sues Baidu for unfair competition, demanding RMB 1 million in compensation

LeTV reportedly filed an unfair competition case against Baidu before the Beijing Haidian District Court in February 2016. It accused Baidu of blocking LeTV's advertisements in the online streaming of its videos via the Baidu Video mobile application. LeTV claimed that, because its advertisements are blocked, users see LeTV's videos but without reference to LeTV and will therefore mistakenly believe that Baidu is the source of the videos. LeTV demanded that Baidu stop the unfair competition conduct and pay damages of RMB 1 million. The court has accepted the case on file, but a decision is pending.

Source: http://news.xinhuanet.com/legal/2016-02/23/c_128742307.htm

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

1. Chinese competition authorities negotiate the China-Japan-Korea Free Trade Agreement competition policy chapter

From 12–14 December 2015, the 3 Chinese competition agencies participated in the 9th round of negotiations for the China-Japan-Korea Free Trade Agreement held in Japan. They negotiated the competition policy chapter with their counterparts in Japan and Korea. The SAIC led this round of negotiations, with the NDRC's and the MOFCOM's participation. Important issues were clarifying the common enforcement principles that would be followed by the competition agencies under a multilateral framework, stopping harm arising from anticompetitive conduct in multilateral trade and investment, increasing external understanding of China's antitrust enforcement situation, and promoting multilateral trade liberalisation and investment.

Source: http://www.saic.gov.cn/fldyfbzdjz/gzdt/201512/t20151214_164867.html

2. BRICS competition authorities agree to enter MOU

Representatives from the MOFCOM, the NDRC, and the SAIC attended the 4th BRICS International Competition Conference was held in Durban, South Africa from 11–13 November 2015. The theme of the conference was competition and inclusive growth. At the conclusion of the conference, the competition authorities of Brazil, Russia, India, China, and South Africa signed a joint statement in which they agreed to enter into a MOU to strengthen cooperation and coordination in the field of competition policy. They agreed that the MOU would cover matters such as sharing best practices, joint participation in capacity building initiatives, and conducting joint studies, and coordinating enforcement proceedings.

Source: http://jjs.ndrc.gov.cn/gzdt/201511/t20151116_758672.html

<http://fldj.mofcom.gov.cn/article/xxfb/201511/20151101193067.shtml>

<http://www.compcom.co.za/wp-content/uploads/2015/11/JOINT-STATEMENT-OF-THE-HEADS-OF-BRICS-COMPETITION-AUTHORITIES.pdf>

3. Unconditional merger clearances for 2015 Q4 released

On 11 January 2016, the MOFCOM released a list of 80 mergers that it unconditionally cleared in the fourth quarter of 2015. This brings the total number of mergers that were unconditionally approved by the MOFCOM in 2015 to 312.

Source: <http://fldj.mofcom.gov.cn/article/zcfb/201601/20160101230538.shtml>

4. The MOFCOM summarises its 2015 antitrust activities

On 15 January 2016, the MOFCOM issued a statement that provided a brief summary of its antitrust related activities in 2015.

In terms of cases, a total of 352 mergers notifications were received, of which 338 cases were accepted for review. The MOFCOM concluded 312 cases, which is the highest number since the AML came into effect. Of those 312 cases, 310 were cleared unconditionally and 2 cases (Nokia's acquisition of Alcatel-Lucent and NXP's acquisition of Freescale) were approved conditionally. The MOFCOM has also sanctioned parties in cases where they completed a merger without first obtaining its approval as required under the AML (9 cases) and revised or removed merger conditions (8 cases).

The MOFCOM has also streamlined the merger review process. A single department is now responsible for the pre-notification consultation, case acceptance, and review for each case, and it has adopted a simple merger review process, electronic reporting, and online case handling. The average time for case acceptance is reported to have decreased by 13% and most simple case reviews are completed within the first 30 days.

On the law and regulation front, the MOFCOM has pushed for revisions to be made to the AML, issued guiding opinions on standardising case names in merger review cases, and released a model monitoring trustee trust agreement. It has also started to revise the *Merger Notification Measures* and *Merger Review Measures*, widely consulted with relevant government departments, industry associations, domestic and foreign competition authorities, experts, and lawyers.

The MOFCOM has enhanced its level of international cooperation and exchange. It has signed MOUs with the competition authorities in Canada and South Africa and a framework for cooperation on merger review with the Directorate-General for Competition of the European Commission, and has come to a basic agreement on a MOU with the competition authorities of other BRICS countries. It is also negotiating the competition policy chapter in the China-Japan-Korea Free Trade Agreement. Further, it has organised and participated in international conferences and discussions with other competition agencies.

The MOFCOM has also been involved with the drafting of 4 antitrust guidelines (the abuse of IPRs, Articles 46 and 47 of the AML, investigation procedures, and the auto industry). It has initiated research on competition in some industries, strengthened antitrust data information systems, established the second expert advisory group for the Anti-Monopoly Commission, and supported experts to organise the China Competition Policy Forum.

Source: <http://www.mofcom.gov.cn/article/ae/ai/201601/20160101235053.shtml>

5. Update on the MOFCOM's activities

On 16–17 November 2015, the MOFCOM Anti-Monopoly Bureau held an anti-monopoly forum for nationwide commerce authorities. Attendees included representatives from the commerce authorities of provinces, autonomous regions, and municipalities, chambers of commerce, and industry associations. The MOFCOM Anti-Monopoly Bureau discussed its antitrust activities in 2015, current antitrust work, and the thinking for future antitrust work.

Then Director-General Shang Ming met with representatives from the US FTC, the US Department of Commerce (US DoJ), the Japan Federal Trade Commission (JFTC), and the UK Competition and Markets Authority (UK CMA). They discussed merger review and international cooperation matters.

Separately, Deputy Director-General Han Chunlin met with representatives of the Competition Commission of Singapore and discussed competition policy, antitrust enforcement, and related issues. Deputy Director-General Han also visited companies in the Beijing Economic and Technological Development Zone on 19 February 2016.

Sources: <http://www.mofcom.gov.cn/article/ae/ai/201601/20160101235053.shtml>

<http://fldj.mofcom.gov.cn/article/xxfb/201511/20151101187940.shtml>

<http://fldj.mofcom.gov.cn/article/xxfb/201511/20151101166851.shtml>

<http://fldj.mofcom.gov.cn/article/xxfb/201511/20151101187515.shtml>

<http://fldj.mofcom.gov.cn/article/xxfb/201512/20151201198165.shtml>

<http://fldj.mofcom.gov.cn/article/xxfb/201602/20160201261845.shtml>

<http://fldj.mofcom.gov.cn/article/xxfb/201602/20160201263645.shtml>

6. Update on the NDRC's activities

On 25 November 2015, the NDRC and Tsinghua University Competition Law and Industry Promotion Research Centre held an antitrust lawyer seminar and an antitrust expert forum to discuss issues relating to the calculation of illegal gains from anticompetitive conduct and penalties and to solicit views on the related draft antitrust guideline.

At the end of December 2015, the NDRC issued a notice for its local authorities to strengthen their price supervision work over the 2016 Lunar New Year period, focusing on 3 aspects: strengthening early warning monitoring and emergency management to maintain normal price order; ensuring the smooth operation of the 12358 price reporting system; and strengthening price regulation in industries relating to people's livelihood to create a good consumption environment for over the holiday period. It also released a brochure, which reminded and guided businesses to abide by price-related laws and regulations.

The NDRC Price Supervision and Anti-Monopoly Bureau signed an antitrust cooperation framework agreement with the Shanghai Zhangjiang Hi-tech Zone Commission on 22 December 2015. Next, the parties will engage in substantive cooperation in research on competition policy and strategy and training. The aim of the cooperation is to jointly explore effective ways and means to implement competition policy and fully realise the role of competition policy in promoting economic development.

The NDRC Price Supervision and Anti-Monopoly Bureau held an antitrust forum on 11 December 2015 for embassies and chambers of commerce to discuss the NDRC's antitrust work in 2015 and receive comments and suggestions. Representatives from the US, EU, UK, South Korean, and Japanese embassies, the EU Chamber of Commerce in China, the American Chamber of Commerce in China, the US-China Business Council, and Japanese Chamber of Commerce and Industry in China participated in the discussion.

Zhang Handong, Director-General of NDRC Price Supervision and Anti-Monopoly Bureau, met with representatives from the US FTC and US DoJ in Beijing. They discussed the drafting and progress of the 6 antitrust guidelines that are currently being prepared, competition advocacy in China, and the upcoming US-China high-level antitrust dialogue (held in January 2016). Director-General Zhang also met with representatives of the JFTC in Beijing, and they discussed recent cases.

Li Qing, Deputy Director-General of the NDRC Price Supervision and Anti-Monopoly Bureau, attended 2 international competition conferences in Washington, DC to discuss the NDRC's recent antitrust enforcement activities. Representatives from the US, EU, UK, and Belgium competition authorities, some businesses and law firms, and academics from Harvard University, Yale University, Columbia University, and the University of Michigan participated in these events.

Sources: http://jjs.ndrc.gov.cn/gzdt/201511/t20151130_760102.html

http://jjs.ndrc.gov.cn/gzdt/201511/t20151130_760102.html

http://jjs.ndrc.gov.cn/gzdt/201512/t20151223_768366.html

http://jjs.ndrc.gov.cn/gzdt/201511/t20151103_757403.html
http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhd/201512/t20151223_768349.html
http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhd/201512/t20151211_762181.html
http://jjs.ndrc.gov.cn/gzdt/201511/t20151117_758771.html
http://jjs.ndrc.gov.cn/gzdt/201511/t20151118_758916.html
http://jjs.ndrc.gov.cn/gzdt/201511/t20151110_758089.html
http://jjs.ndrc.gov.cn/gzdt/201511/t20151110_758088.html

7. Update on the SAIC's activities

On 5 January 2016, the SAIC released a statement that it had requested that Microsoft explain some major issues arising from the electronic data that it has obtained in its antitrust investigation. The SAIC did not specify what those issues were. Microsoft is required to submit a complete explanation, with related materials, following the inquiry.

The SAIC held a number of training seminars for administration and commerce authorities around China. Representatives from 29 provinces and municipalities recently attended a competition law enforcement case analysis meeting to discuss some hot topics in competition enforcement. Seminars on typical competition cases were also held in a number of provinces around China, covering antitrust and unfair competition cases, cases where public enterprises have restricted competition, protection of trade secrets, and commercial bribery in medicine. The SAIC also attended a number of conferences on IPRs, and participated in China Mobile's compliance workshop held on 17 November 2016.

Ren Airong, Director-General of the SAIC Antimonopoly and Anti-Unfair Competition Enforcement Bureau, met with representatives of the US FTC and US DoJ and they discussed developments in antitrust enforcement and the IPR antitrust regulation. Director-General Ren also met with the head of the UK CMA.

On 2 February 2016, a forum was held by the SAIC Antimonopoly and Anti-Unfair Competition Enforcement Bureau and International Taxation Department of the State Administration of Taxation. They discussed anti-tax avoidance and antitrust enforcement experiences and the future cooperation between the two authorities.

Sources: http://www.saic.gov.cn/fldyfbzdjz/gzdt/201601/t20160105_165678.html

http://www.saic.gov.cn/jgzf/fldyfbzljz/201601/t20160106_165695.html
http://www.saic.gov.cn/fldyfbzdjz/gzdt/201511/t20151126_164382.html
http://www.saic.gov.cn/fldyfbzdjz/gzdt/201511/t20151127_164400.html
http://www.saic.gov.cn/fldyfbzdjz/gzdt/201511/t20151112_163899.html
http://www.saic.gov.cn/fldyfbzdjz/gjjl/201512/t20151210_164797.html
http://www.saic.gov.cn/fldyfbzdjz/gzdt/201511/t20151110_163777.html
http://www.saic.gov.cn/fldyfbzdjz/gzdt/201512/t20151218_165083.html
http://www.saic.gov.cn/fldyfbzdjz/gzdt/201511/t20151118_164120.html
http://www.saic.gov.cn/fldyfbzdjz/gjjl/201511/t20151118_164121.html
http://www.saic.gov.cn/fldyfbzdjz/gjjl/201512/t20151204_164547.html
http://www.saic.gov.cn/fldyfbzdjz/gzdt/201602/t20160203_166450.html

4. Central and Local Government News

1. The Hebei AIC to regulate unfair competition activities

The Hebei AIC has launched a special law enforcement action plan targeting unfair competition activities from March to November 2016. The targeted industries and areas include public services, medicine, education, construction and decoration, and air and water purification products.

Source: http://www.saic.gov.cn/jgzf/fldyfbzljz/201603/t20160302_166958.html

2. Shanghai launches the Zhangjiang Competition and Antitrust Research and Consulting Centre

On 19 February 2016, Shanghai Zhangjiang Hi-tech Zone Administration Committee and the NDRC Price Supervision and Anti-Monopoly Bureau officially launched the Zhangjiang Competition and Antitrust Research and Consulting Centre. The centre's research will focus on competition policy theory and practice. It will support the NDRC to further understand and research economic development and trends and optimise national competition policies and antitrust regulation.

Source: <http://sh.people.com.cn/n2/2016/0219/c134768-27770495.html>

3. The Hunan Anti-Monopoly and Anti-Unfair Competition Law Research Association has first meeting in Changsha

On 11 December 2015, the Hunan Anti-Monopoly and Anti-Unfair Competition Law Research Association held its first meeting in Changsha. The main tasks of this newly established research association are to research and discuss new features, laws, policies, and measures of antitrust and anti-unfair competition enforcement, concentrations, analyse public reaction and case leads, analyse and evaluate cases, undertake government outsourcing, training, and exchange.

Source: http://www.saic.gov.cn/jgzf/fldyfbzljz/201512/t20151216_164974.html

5. News of State-Owned Enterprises

1. Interim measures adopted to promote incentive plans in state-owned technology enterprises

The Ministry of Finance, the Ministry of Technology, and the State-owned Assets Supervision and Administration Commission (SASAC) jointly issued interim measures to promote the implementation of equity and dividend incentives in technology SOEs. Under the interim measures, qualified technology SOEs may adopt incentive plans for critical technical and managerial personnel that include equity sales, equity awards, stock options, other equity incentives, project bonuses, dividends, and other dividend incentives. The interim measures also contain more streamlined approval procedures and outline supervision responsibilities.

Source: <http://www.sasac.gov.cn/n85881/n85901/c2236119/content.html>

2. Functional definition and classification of SOEs into for-profit and public interest SOEs adopted

A guiding opinion was jointly issued by the SASAC, the Ministry of Finance, and the NDRC on 31 December 2015 that classifies SOEs into for-profit and public interest, based on their function. Different industrial policies are implemented for differently classified SOEs. Such functional classification is an important aspect in deepening SOE reform.

Source: <http://www.sasac.gov.cn/n85881/n85901/c2169765/content.html>

3. The SASAC holds seminar on promoting SOE and State assets reform

On 23 February 2016, the SASAC held a seminar on promoting SOE and State assets reform in Beijing. In accordance with the *Guiding Opinion on Deepening Reform of State-Owned Enterprises* and relevant supportive documents, SOEs and SASAC offices at all levels have carried out substantial reform activities.

Source: <http://www.sasac.gov.cn/n85881/n85901/c2233251/content.html>

6. Selected Publications in English

1. China-Korea IP & Competition Law Annual Report 2014

The China-Korea Market & Regulation Law Center (MRLC) published its first annual report on the major developments in intellectual property and competition law in China and Korea. Chinese and Korean scholars in the fields of intellectual property law and competition law contributed to the report, and it will be published annually to become an up-to-date academic resource in these fields.

MRLC is an interdisciplinary research center established between the Economic Law Research Center of Renmin University of China Law School and the Innovation, Competition and Regulation Law Center of Korea University Law School to provide a platform for the academic, educational, and practical cooperation in the fields of competition law, intellectual property law, and related economic regulation.

More information is available at: <http://mrlclaw.org/mrlc/publication/publication/45>

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

Disclaimer:

*By clicking on the links you are entering third party websites. Please refer to the relevant websites for terms and conditions of use. *This publication provides general information only.