

# 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

After nearly 6 years, the State Administration for Industry and Commerce (SAIC) adopted its long-awaited regulation on the abuse of intellectual property rights (IPRs).

The National Development and Reform Commission (NDRC) investigated an administrative monopoly in the transport in Shandong and published its recommendation. The NDRC's bureau in Jiangsu fined Mercedes-Benz for engaging in resale price maintenance and price fixing. Some of Mercedes-Benz's dealers were also fined for price fixing.

Further, each anti-monopoly enforcement agency and the Supreme People's Court (SPC) provided annual reports on their Anti-Monopoly Law (AML) related activities in 2014.

## 1. Laws and Policies

### 1. The SAIC adopts IPR regulation

The SAIC published its Regulation on the Prohibition of Conduct Eliminating or Restricting Competition Through the Abuse of Intellectual Property Rights (IPR Regulation) on 7 April 2015. The IPR Regulation will come into effect on 1 August 2015.

The IPR Regulation aims to clarify and provide further detail on the relationship between the AML and the exercise of IPRs, which is addressed in only very general terms in Article 55 of the AML. The IPR Regulation applies to non-price related anticompetitive conduct involving IPRs only (as the NDRC is responsible for price-related conduct).

The IPR Regulation provides safe harbours for agreements involving the exercise of IPRs that might otherwise be considered anticompetitive. The agreement is presumed not to breach the AML if either:

- the combined market share of the competing undertakings does not exceed 20% in the relevant market or there are at least 4 substitutable technologies that are independently controlled by other undertakings and can be obtained at a reasonable cost, or

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- the market shares of the undertaking and its trading partners are all less than 30% or there are at least 2 substitutable technologies that are independently controlled by other undertakings and can be obtained at a reasonable cost

However, the IPR Regulation does not clarify which types of potentially anticompetitive agreements can benefit from the safe harbours (cartel-like agreements and resale price maintenance cannot).

The IPR Regulation also effectively imposes an obligation on dominant companies to license their IPR on reasonable terms if that IPR is an essential facility for production or operation, unless they can provide a valid reason for doing so. Factors to be taken into account include the reasonable substitutability and necessity to competitors of the IPR, whether the refusal to license would adversely affect competition or innovation and harm consumer or the public interest, and whether licensing would cause unreasonable harm to the dominant companies. "Essential facility" is not defined in the regulation.

The IPR Regulation also covers exclusive dealing, tied sales, imposing unreasonably restrictive conditions (such as requiring the exclusive grant-back of licenses), discriminatory treatment, patent pooling, and standard setting and implementation (such as violating fair, reasonable, and non-discriminatory terms in the licensing of standard essential patents). The previous draft of the regulation had also included copyright collective management associations and the abusive issue of infringement warning letters, but these provisions were deleted in the adopted regulation.

The SAIC has worked on the IPR Regulations since 2009, having issued 8 drafts and consulted with a number of external parties, including lawyers.

Sources: [http://www.saic.gov.cn/zcfg/xzgzjgfwj/xxb/201504/t20150413\\_155104.html](http://www.saic.gov.cn/zcfg/xzgzjgfwj/xxb/201504/t20150413_155104.html)

[http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201504/t20150414\\_155125.html](http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201504/t20150414_155125.html)

## **2. MOFCOM issues guidance on merger filing case names**

On 6 February 2015, the Ministry of Commerce (MOFCOM) issued a guiding opinion to provide some guidance on case names in merger filings. The same case name must be used in all notification materials, and it must reflect the basic particulars or the concentration and not use generic terms. Examples of case names include "Merger of A and B", "Acquisition by A of B's shares", and "A and B establish a new joint venture, C".

Source: <http://fldj.mofcom.gov.cn/article/i/201502/20150200891361.shtml>

## **3. SPC releases draft judicial interpretation on conduct preservation cases in intellectual property and competition disputes for public consultation**

On 26 February 2015, the SPC released a draft judicial interpretation on the applicable law in conduct preservation cases relating to intellectual property and competition disputes for public consultation. Conduct preservation is a Chinese civil procedure concept, referring to interim measures aimed at preserving assets or prohibiting certain types of behaviour; it is similar to the concept of preliminary or interim injunctions in other jurisdictions. The public consultation period ended on 30 March 2015.

The draft interpretation aims to regulate the review of conduct preservation cases relating to IPRs and competition disputes. Currently, these matters are covered by the Civil Litigation Law, the General Principles of Civil Law, the Patent Law, the Trademark Law, the Copyright Law, the Contract Law, the Anti-Unfair Competition Law, and the AML.

The draft interpretation covers matters such as standing, the review procedure, factors that a court will consider when determining whether to grant the application, the guarantee requirement, and release from the interim measure.

Source: <http://www.court.gov.cn/hudong-xiangqing-13517.html>

## 2. Cases

### 1. The NDRC investigates administrative monopoly in the transport sector in Shandong Province

On 9 March 2015, the NDRC issued a recommendation letter to the Shandong Province People's Government on its investigation into the establishment and operation of a road transport monitoring services platform by the Shandong Department of Transportation. This may be the first administrative monopoly recommendation made publicly available by the NDRC.

In November 2006, the Shandong Department of Transportation entered into a 10 year exclusive contract (ending on 31 December 2015) with Shandong Jiutong for the provision of a road passenger transportation operations and safety monitoring system. Since 2011, the Shandong Department of Transportation issued a number of notices requiring that certain categories of vehicles directly connect to Shandong Jiutong's monitoring platform and that the global positioning system (GPS) devices sold in Shandong be compatible with Shandong Jiutong's technical services platform and not exceed a certain price.

The NDRC found that such conduct had restricted competition in the monitoring services platform and GPS device markets. This conduct was found to have breached Articles 8, 32, and 37 of the AML.

Since the NDRC began its investigation, the Shandong Department of Transportation adopted some corrective measures. However, the NDRC believed that these measures were insufficient to restore fair market competition. It recommended that the Shandong Province People's Government order the Shandong Department of Transportation to allow all road transport operators to choose a platform and GPS device that have passed the Department of Transportation's technical standards requirements and inspections and to remove the price cap on GPS devices.

This case is similar to a 2011 investigation made by the SAIC into administrative monopoly practices in GPS traffic monitoring systems in Guangdong.

Source: [http://jjs.ndrc.gov.cn/fjgld/201503/t20150327\\_668911.html](http://jjs.ndrc.gov.cn/fjgld/201503/t20150327_668911.html)

### 2. The NDRC imposed a fine of RMB 350 million on Mercedes-Benz and over RMB 7 million on local dealers

On 23 April 2015, the Jiangsu Price Bureau (the local counterpart of the NDRC in Jiangsu Province) announced that it had fined Mercedes-Benz RMB 350 million and some of its local dealers a total of RMB 7.9 million for concluding monopoly agreements.

According to the Jiangsu Price Bureau, Mercedes-Benz set minimum resale prices for its E- and S-Class vehicles in Jiangsu Province from January 2013 to July 2014. The Jiangsu Price Bureau found that Mercedes-Benz had implemented resale price maintenance through checks, warnings, and penalties such as reducing policy support. The Jiangsu Price Bureau concluded that such conduct violated Article 14 of the AML.

Further, the Jiangsu Price Bureau found that Mercedes-Benz's dealers in Suzhou, Wuxi, and Nanjing had engaged in price fixing in violation of Article 13 of the AML. Organised by Mercedes-Benz, its dealers in Suzhou (since November 2010), Wuxi, and Nanjing (both since January 2014) held several regional conferences to conclude and implement agreements to fix the prices of some auto spare parts.

Mercedes-Benz was fined 7% of its annual turnover in 2014 in the relevant market, whereas the dealers were fined 1% of their annual turnover in 2014. Some dealers had applied for leniency and submitted important evidence, and they were granted either an exemption from or reduction of penalty.

Source: [http://www.jswwj.gov.cn/office\\_new/eo\\_comm\\_zxnrxs.php](http://www.jswwj.gov.cn/office_new/eo_comm_zxnrxs.php)

### **3. Investigation into the bathhouse industry in Heilongjiang Province**

Over the Lunar New Year period, the Heilongjiang Price Bureau investigated more than 200 bathhouses in Qiqihar City for collectively increasing prices. It is currently conducting an antitrust investigation.

The Qiqihar City Bathing Association was formed on 25 December 2014. At the inaugural meeting, members discussed entry fees. They agreed that entry fees for small bathhouses would increase from RMB 8/person to RMB 10/person (not to exceed RMB 10/person), and for medium to large bathhouses, entry fees would increase from RMB 10/person to RMB 15/person (not to exceed RMB 15/person). Representatives from more than 200 bathhouses voted to approve the proposal, and each bathhouse increased their prices accordingly on 1 January 2015.

Source: <http://hlj.people.com.cn/n/2015/0116/c220027-23574304.html>

### **4. The MOFCOM confirms that Applied Materials and Tokyo Electron have officially abandoned their merger plan**

On 28 April 2015, the MOFCOM announced that Applied Materials and Tokyo Electron had officially notified the MOFCOM that they had called off their proposed merger.

According to MOFCOM, the proposed merger would significantly change the structure of the relevant market and have had a severe impact on the interests of Chinese chip manufacturing customers. The MOFCOM also mentioned that it was in close contact with the US Department of Justice and the Korea Fair Trade Commission. Since the parties were not able to propose sufficient remedies to address the MOFCOM's competition concerns and those of the competition authorities in other jurisdictions, the parties decided to abandon the proposed merger.

MOFCOM also stated that its review of the proposed merger had lasted for 15 months, during which the parties withdrew and re-filed the case twice.

Source: <http://www.mofcom.gov.cn/article/ae/ai/201504/20150400955517.shtml>

### **5. ZTE found not to have infringed InterDigital 4G patent**

On 22 April 2015, a federal jury in Delaware decided that ZTE Corp, a large Chinese manufacturer of telecommunications devices, did not infringe one of InterDigital's patents. The patent at issue related to 4G LTE technology.

This case is part of a wider patent related dispute between ZTE and InterDigital. InterDigital had brought 2 patent cases against ZTE before the US International Trade Commission. Further, ZTE and InterDigital are scheduled to meet in court again, as ZTE initiated antitrust proceedings against InterDigital in China. That case is scheduled for 11 and 13 May 2015, to be heard by the Shenzhen Intermediate People's Court.

Sources: <http://www.law360.com/articles/646642/jury-finds-zte-did-not-infringe-interdigital-patent>

[http://www.zte.com.cn/en/press\\_center/news/201504/t20150424\\_433380.html](http://www.zte.com.cn/en/press_center/news/201504/t20150424_433380.html)

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

#### 1. The MOFCOM releases the list of unconditional merger clearances for the first quarter of 2015

On 3 April 2015, the MOFCOM released a list of 62 mergers that it unconditionally cleared in the first quarter of 2015.

Source: <http://fldj.mofcom.gov.cn/article/zcfb/201504/20150400932418.shtml>

#### 2. Update on the MOFCOM's enforcement activities

From 9 to 11 March 2015, Zheng Wen, Deputy Director-General of the MOFCOM Anti-Monopoly Bureau, led a delegation to visit Qingdao for a survey on merger review related projects.

From 23 to 25 March 2015, Shang Ming, Director-General of the Anti-Monopoly Bureau, led a team to visit Harbin for an antitrust review survey.

Both teams visited a few local companies and met with the local counterparts of MOFCOM.

Sources: <http://fldj.mofcom.gov.cn/article/xxfb/201503/20150300908477.shtml>

<http://fldj.mofcom.gov.cn/article/xxfb/201504/20150400929688.shtml>

#### 3. Recap of the MOFCOM's antitrust enforcement activities in 2014

On 29 January 2015, the MOFCOM released a summary of its AML enforcement activities in 2014. In particular, its summary noted that:

- it received 262 merger notifications in 2014, and in 245 of these cases the review process was completed. This was an increase of 17% and 18%, respectively, as compared to 2013
- it investigated and sanctioned two cases for failure to notify their mergers for pre-merger review and clearance (to our knowledge, only 1 such decision has been made publicly available to date)
- it discussed and consulted with notifying parties over 80 times and made information publicly available on 79 simple mergers
- in the MOFCOM Anti-Monopoly Bureau's capacity as the secretariat office for the Anti-Monopoly Commission, it organised the first general meeting of the entire commission, strengthened competition policy research, promoted the establishment of an antitrust data information system, and conducted research into the state of competition in the steel industry

Source: <http://www.mofcom.gov.cn/article/ae/ai/201501/20150100882509.shtml>

#### 4. Update on the NDRC's enforcement activities

Zhang Handong was appointed the new Director-General of the NDRC Price Supervision and Anti-Monopoly Bureau (NDRC Bureau).

The NDRC has been engaging in an internal campaign to transition the NDRC's position. Under the campaign, the NDRC Bureau's role is changing from price setting to price supervision. It will promote enforcement of the AML, improve the efficiency of its supervision, and improve its work style.

On 29 January 2015, the NDRC and the Korea Fair Trade Commission extended their Memorandum of Understanding (MOU) on antitrust cooperation by 2 years. The original MOU was signed on 30 May 2012 and effective for a period of 2 years. The MOU is now effective until 29 January 2017.

On 18-19 March 2015, the NDRC and the European Commission Directorate-General for Competition (DG Competition) jointly held a training workshop on price-related anticompetitive conduct during the 10th EU-China Competition Week. The workshop was on IPRs in competition cases and covered issues related to enforcement, calculation of penalties, and enforcement procedures in IPR cases.

On 21 March 2015, Mr Zhang attended the “Antitrust and IPRs Conference” held by the Chinese Academy of Social Sciences (CASS) Institute of American Studies. At that conference, Mr Zhang said that the NDRC will streamline AML enforcement, expand its breadth and depth, and improve its quality. He also discussed the relationship between IPRs and competition.

On 16 April 2015, Mr Zhang met with the Chairman of the US Chamber of Commerce and the representatives from several US companies including GE, Dell, and Intel. Mr Zhang said that antitrust enforcement in China does not discriminate against any particular company or sector. He hoped the US companies would maintain confidence in China’s economic development and stressed that the Chinese government would create a fair and competitive market for all companies. Mr Zhang also met with representatives from the US Embassy.

Sources: [http://www.ndrc.gov.cn/xwzx/xwfb/201504/t20150421\\_688874.html](http://www.ndrc.gov.cn/xwzx/xwfb/201504/t20150421_688874.html)

[http://jjs.ndrc.gov.cn/gzdt/201503/t20150323\\_668213.html](http://jjs.ndrc.gov.cn/gzdt/201503/t20150323_668213.html)

[http://www.sdpc.gov.cn/tpxw/201502/t20150204\\_663451.html](http://www.sdpc.gov.cn/tpxw/201502/t20150204_663451.html)

[http://news.xinhuanet.com/2015-03/22/c\\_1114718582.htm](http://news.xinhuanet.com/2015-03/22/c_1114718582.htm)

[http://jckb.xinhuanet.com/2015-03/24/content\\_541963.htm](http://jckb.xinhuanet.com/2015-03/24/content_541963.htm)

[http://jjs.ndrc.gov.cn/gzdt/201504/t20150422\\_688955.html](http://jjs.ndrc.gov.cn/gzdt/201504/t20150422_688955.html)

[http://jjs.ndrc.gov.cn/gzdt/201504/t20150422\\_688954.html](http://jjs.ndrc.gov.cn/gzdt/201504/t20150422_688954.html)

## **5. Recap of the NDRC’s antitrust enforcement activities in 2014**

On 13 February 2015, the NDRC reported on its price supervision and antitrust enforcement activities in 2014. In 2014, the NDRC investigated 24,900 illegal pricing cases nationally and imposed aggregate fines of RMB 4.472 billion. With respect to antitrust enforcement, the NDRC investigated cases in the automobile and spare parts (3 cases), insurance (1 case), cement (1 case), and eyeglasses (1 case) sectors and imposed total fines of about RMB 1.8 billion.

The NDRC stated that it will actively promote AML enforcement in 2015 by strengthening its analytical research into market competition, paying close attention to the conduct of major market participants and in key industries, improving the coordination between competition policy and industrial policy, and improving the dissemination of AML news to the public.

The Hainan Price Supervision and Anti-Monopoly Bureau also reported on its antitrust work in 2014. It investigated a price-fixing case in the hotel laundry industry in Haikou. In 2015, it plans to increase its antitrust activities and pointed to the longstanding high prices of vegetables, eggs, and lamb and the big price fluctuations of betel nuts.

Sources: [http://www.ndrc.gov.cn/xwzx/xwfb/201502/t20150213\\_664544.html](http://www.ndrc.gov.cn/xwzx/xwfb/201502/t20150213_664544.html)

[http://hnrh.hinews.cn/html/2015-03/24/content\\_11\\_2.htm](http://hnrh.hinews.cn/html/2015-03/24/content_11_2.htm)

## 6. Update on the SAIC's enforcement activities

On 17-18 March 2015, as part of the 10th EU-China Competition Week, the SAIC and the DG Competition jointly held seminars on evidence in competition cases and competition and protection of IPRs.

During the SAIC Minister's trips to Canada, Chile, and Argentina in March 2015, the SAIC entered into MOUs with the Canadian Competition Bureau and the Canadian Intellectual Property Office, the Chilean Ministry of Economy, Development, and Tourism and the Chilean Intellectual Property Office, and the Argentine Ministry of Industry, respectively.

Sources: [http://www.saic.gov.cn/fldyfbzdjz/gzdt/201503/t20150327\\_154631.html](http://www.saic.gov.cn/fldyfbzdjz/gzdt/201503/t20150327_154631.html)

[http://www.saic.gov.cn/zzjg/zjld/zm/zyhd/201503/t20150326\\_154611.html](http://www.saic.gov.cn/zzjg/zjld/zm/zyhd/201503/t20150326_154611.html)

[http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201503/t20150331\\_154693.html](http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201503/t20150331_154693.html)

[http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201504/t20150401\\_154770.html](http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201504/t20150401_154770.html)

## 7. Recap of the SAIC's antitrust enforcement activities in 2014

On 28 January 2015, the SAIC provided a report on its AML enforcement activities in 2014. In 2014, the SAIC began investigations into the conduct of Tetra Pak and Microsoft, and its local offices initiated 15 cases relating to the tobacco, salt, telecommunications, gas, and insurance industries.

To date, the SAIC and its local offices have investigated a total of 45 AML cases, with 20 of those cases concluded.

Source: [http://www.saic.gov.cn/jgzf/fldyfbzljz/201501/t20150128\\_151703.html](http://www.saic.gov.cn/jgzf/fldyfbzljz/201501/t20150128_151703.html)

## 8. Recap of the SPC's intellectual property and competition cases in 2014

On 21 April 2015, the SPC provided its annual report on the intellectual property and antitrust cases in 2014. The SPC's intellectual property division handles these disputes.

Overall, the SPC's intellectual property division received 481 cases in 2014, 3 of which were antitrust disputes. More generally, most of the competition related cases heard by the SPC involved internet technology and new business models, with cases involving business secrets and counterfeiting on the rise.

The SPC also provided a list of its top 10 intellectual property cases in 2014. One of these cases is the *Qihoo 360 v Tencent* abuse of dominance case (reported previously in this bulletin).

Source: <http://www.court.gov.cn/zixun-xiangqing-14222.html>

# 4. Central and Local Government News

## 1. Chinese government to deepen institutional reform to accelerate innovation driven growth

On 23 March 2015, it was reported that the Chinese government had issued a document on deepening institutional reform to accelerate innovation driven growth. The aim is to establish institutional, policy, and legal environment that is conducive to innovation driven growth by 2020. This includes creating a fair, open, transparent, and competitive market environment to encourage innovation, ensuring that competition policy and industrial policy guide innovation, protecting IPRs, breaking up monopolies and market-sharing that restrict innovation, and improving access for new technologies, products, and business models.

Source: [http://news.xinhuanet.com/politics/2015-03/23/c\\_1114735979.htm](http://news.xinhuanet.com/politics/2015-03/23/c_1114735979.htm)

## **2. Hubei Government releases draft price regulation for public comment**

On 26 March 2015, the Hubei Government released a draft price regulation for public comment. The draft regulation details 12 types of fraudulent pricing conduct. It also prohibits a social organisation from using its administrative power or monopoly position to charge extra fees.

Source: <http://www.hbzffz.gov.cn/zwgk/gsgk/13386.htm>

## **5. News of State-Owned Enterprises**

### **1. Anti-corruption efforts targeted at SOEs in monopoly industries**

In the past three months, at least 15 senior managers of state-owned enterprises (SOEs) were detained and local SOEs were also investigated for corruption on a large scale. The majority of these SOEs operate in so-called monopoly industries.

Source: [http://news.xinhuanet.com/politics/2015-04/05/c\\_127656077.htm](http://news.xinhuanet.com/politics/2015-04/05/c_127656077.htm)

### **2. Number of central SOEs rumoured to be reduced**

According to a news report, the central government is apparently planning to reduce the number of centrally-owned SOEs from 112 to 40.

The State-Owned Assets Supervision and Administration Commission, which supervises central-level SOEs, has publicly declared that it had not been interviewed for the news report, nor had the information been verified by the agency.

Sources: [http://news.xinhuanet.com/finance/2015-04/27/c\\_127735729.htm](http://news.xinhuanet.com/finance/2015-04/27/c_127735729.htm)

<http://www.sasac.gov.cn/n85881/n85901/c1887512/content.html>

## **6. Other News/Media Comments**

### **1. Price-related antitrust enforcement analysis report released by the CASS**

On 18 March 2015, a report analysing recent price-related antitrust cases involving commodities was published by the CASS. The report noted that the AML enforcement system is improving, as both enforcement powers and supporting regulations are being strengthened.

That report was released at the same time as the 2015 edition of CASS's "Blue book on the rule of law", which focuses on price-related AML enforcement.

Source: [http://www.cssn.cn/fx/fx\\_fxxf/201503/t20150318\\_1551953.shtml](http://www.cssn.cn/fx/fx_fxxf/201503/t20150318_1551953.shtml)

### **2. Tuniu suspected of engaging in unfairly low pricing**

On 24 April 2015, the National Tourism Administration (NTA) announced that it had investigated Tuniu, a Chinese online leisure travel company, for allegedly engaging in unfairly low pricing conduct. The investigation was launched in response to the boycott of Tuniu by 17 travel agencies due to Tuniu's low pricing of tourism products on its website. According to the NTA, the announcement of unreasonably low prices could mislead consumers and disturb market order. Tuniu apologised and promised to rectify its conduct.

Source: <http://www.cnta.gov.cn/html/2015-4/2015-4-26-22-21-44949.html>

## 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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