

# Chinese Antitrust Investigations in 2015



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## I. INTRODUCTION

In China, there are three administrative authorities that serve as enforcement authorities of the Anti-Monopoly Law (“AML”): the Ministry of Commerce (“MOFCOM”) reviews concentration of undertakings (merger review) and the National Development and Reform Commission (“NDRC”) and the State Administration for Industry and Commerce (“SAIC”) investigate monopolistic agreements (cartels and vertical restraint) and abuses of dominant market position. Specifically, the NDRC investigates cases involving pricing issues, and the SAIC is in charge of cases without pricing issues.

This article intends to present an overview of the antitrust activities of the NDRC and SAIC in 2015, followed by a discussion on the trends and prospects of the antitrust investigation in China.

## II. OVERVIEW OF THE ACTIVITIES OF THE AUTHORITIES IN 2015

During the early years such as 2013 and 2014, the public witnessed a number of antitrust investigations initiated by the authorities, some with tough measures including dawn raids. Notable cases involved multinationals including Microsoft (dawn raided by the SAIC in July 2014),<sup>3</sup> Qualcomm (dawn raided by the NDRC in November 2013)<sup>4</sup> and Tetra Pak (dawn raided by the SAIC in April 2013).<sup>5</sup> With intensive media coverage, those law enforcement activities drew a lot of attention in China and abroad, and were viewed as a series of “antitrust enforcement storms.” Domestic and foreign enterprises have learned from those high-profile cases and started to put antitrust compliance as one of the priorities during their daily operations.

Compared with the previous years, the Chinese antitrust investigation authorities may be regarded by some observers to be relatively quiet in 2015, as fewer cases were reported by the media. However, this is just a myth. As a matter of fact, the NDRC and SAIC had still been very active in antitrust investigation throughout the past year. Beyond the previous investigation into high-profile cases, their approaches towards

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<sup>3</sup> See, [http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729\\_147122.html](http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729_147122.html), last visited on January 20, 2016.

<sup>4</sup> See, [http://news.xinhuanet.com/legal/2015-02/11/c\\_127484902.htm](http://news.xinhuanet.com/legal/2015-02/11/c_127484902.htm), last visited on January 20, 2016.

<sup>5</sup> See, <http://www.chinanews.com/gn/2013/07-31/5108197.shtml>, last visited on January 20, 2016.





the law enforcement have become more and more comprehensive and sophisticated. The activities of the NDRC and SAIC in 2015 will be reviewed separately in the following sections.

## A. NDRC

AML enforcement activities by the NDRC were fruitful and diverse in 2015. As rightly pointed out by themselves, the AML enforcement by the NDRC is becoming normalized and subtilized.<sup>6</sup> Besides handling a substantial number of cases, the NDRC also exploited different measures in the enforcement, and actively participated in the relevant legislation.

### 1. *The Enforcement Activities of the NDRC Have Not Slowed Down*

Contrary to the impression to some that its enforcement activities have slowed down in 2015, the NDRC has actually maintained a robust level of anti-monopoly law enforcement. Although a relevant "low-key" approach was adopted by the NDRC in dealing with numerous cases in 2015, there were also some influential cases taking place during the year. Specifically:

- In February 2015, the NDRC concluded its investigation into Qualcomm, and determined that Qualcomm was in violation of the AML by abusing its dominant market position in several key telecom standard essential patents and chips by charging excessive royalty rates, tying wireless and non-wireless patents, and attaching conditions to chip sales. The company was fined RMB 6.088 billion (\$971.1 million), or eight percent of its sales revenue in China in 2013.<sup>7</sup>

- In April 2015, Jiangsu Province Price Bureau, a provincial branch of the NDRC, found that the dealers of Mercedes-Benz in Nanjing, Wuxi, and Suzhou violated the AML by reaching monopoly agreements to enforce minimum prices for final products and fix prices for components. Mercedes-Benz received a fine of RMB 350 million (\$56.4 million), or one percent of the company's sales revenue of the previous year. The bureau also fined the dealers a total of RMB 7.86 million (\$1.27 million).<sup>8</sup>

- In December 2015, the NDRC fined eight shipping companies (among which Nippon Yusen Kabushiki Kaisha was exempted from the fine as the first company applying for leniency) a total of RMB 407 million (\$63 million) for price-fixing (concerted bidding). The fines accounted for four to nine percent of each company's 2014 sales revenue in the international maritime transportation service of rolling cargo that were relevant to the Chinese market.<sup>9</sup>

Besides the above cases that were reported by the media, NDRC also conducted a number of investigations that were not disclosed to the public. Those unannounced investigations concerned several industries that are important for the people's livelihood. NDRC put the same efforts in those investigations as the announced case, and in some cases the targeted companies were dawn raided. The reasons that those cases were not disclosed were mainly because the investigations are still pending, or the NDRC closed the investigation by concluding the questioned activities were not illegal.

### 2. *Extensive Methods to Conduct Investigation*

Another reasons for the "being quiet" myth is that the NDRC had extensive approaches of AML enforcement in 2015. First, NDRC conducted several informal investigations, sometimes in the form of

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<sup>6</sup> See, [http://news.xinhuanet.com/mrdx/2015-03/23/c\\_134089028.htm](http://news.xinhuanet.com/mrdx/2015-03/23/c_134089028.htm), last visited on January 20, 2016.

<sup>7</sup> See, [http://www.sdpc.gov.cn/fzgggz/jgidyfld/jjszhd/201502/t20150210\\_663873.html](http://www.sdpc.gov.cn/fzgggz/jgidyfld/jjszhd/201502/t20150210_663873.html), last visited on January 20, 2016.

<sup>8</sup> See, [http://www.js.xinhuanet.com/2015-04/23/c\\_1115061914.htm](http://www.js.xinhuanet.com/2015-04/23/c_1115061914.htm), last visited on January 20, 2016.

<sup>9</sup> See, [http://www.sdpc.gov.cn/fzgggz/jgidyfld/jjszhd/201512/t20151228\\_769085.html](http://www.sdpc.gov.cn/fzgggz/jgidyfld/jjszhd/201512/t20151228_769085.html), last visited on January 20, 2016.





market survey, to examine the potential competition issues in a certain industry, which may possibly lead to formal investigation. In certain cases, NDRC may work with industrial associations to conduct the market survey.

Second, the NDRC's provincial branches were more involved in the antitrust investigations. In 2015, some of the important cases have been handled by provincial pricing bureaus, with the NDRC playing the role of supervisor offering guidance. For example, the Mercedes-Benz case investigated by Jiangsu provincial pricing bureau, and the Korean tire company case<sup>10</sup> investigated by Shanghai pricing bureau, etc.

The NDRC's provincial branches are playing a very important role in assisting the NDRC in carrying out investigations, including dawn raids. Comparing to the NDRC, it is easier and more convenient for the provincial branches to liaise with the local target companies and collect the related evidences. The NDRC's provincial branches (Shanghai Pricing Bureau is one of the good examples) have done a lot of material works during the investigations in 2015 and have been proved to be very professional and effective during its work with both companies and legal counsels. It is expected that more anti-monopoly investigations will come handled by provincial authorities.

In order to involve the provincial branches, the NDRC continually hosted trainings for the officials of the provincial branches in order to raise their level of professional skills. For example, from September 14 to September 17, 2015, the NDRC held training sessions for price supervision officials from the provincial level.

It can be seen from the above enforcement activities that the NDRC has strengthened the enforcement of the AML with different investigative methods and by coordinating its resources with the provincial branches.

### *3. Mediation Has Been Exploited As A New Tool of AML Enforcement*

Besides expanding the investigative methods, NDRC also exploited mediation as a new tool of AML enforcement. NDRC successfully supervised and urged Dolby and HDMI to settle with the relevant color TV enterprises with regard to certain standard essential patent issues.<sup>11</sup> The mediation by NDRC reduced the litigation expenses of the enterprises and created a good environment for their development.

### *4. Administrative Monopoly Has Been Targeted by NDRC*

In 2015, the NDRC has also targeted administrative monopoly. Specifically:

- On March 27, 2015, the NDRC published the decision of the administrative anti-monopoly case in Shandong. According to the report, the NDRC conducted an investigation into Shandong Department of Transportation for its alleged conduct of eliminating and restricting competition in the market of monitoring platform and vehicle terminal. Pursuant to the relevant provisions of AML, the NDRC issued an enforcement advice letter to the general office of the Shandong Provincial People's Government and advised the latter to order the Department of Transportation to correct the relevant conducts and maintain market order of fair competition.

- On August 17, 2015, the NDRC issued a letter to the Anhui Provincial Government, and requested it to correct the administrative monopolies in government drug procurement programs. The NDRC's letter concerns the abuse of administrative power to restrict and eliminate competition by the Municipal Health & Family Planning Commission of Bengbu City.

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<sup>10</sup> See, <http://auto.ifeng.com/pinglun/20150914/1046961.shtml>, last visited on January 20, 2016.

<sup>11</sup> See, <http://www.chinanews.com/life/2015/08-18/7473249.shtml>, last visited on January 20, 2016.





According to the NDRC, they will continue to advance the AML enforcement against abuses of administrative power in restricting and eliminating competition.

### 5. *The NDRC Participated in the Drafting of the Anti-Monopoly Guidelines*

In 2015, as arranged by the Anti-Monopoly Commission of the State Council, the NDRC kicked off the drafting work of the anti-monopoly guidelines on leniency, exemption procedure, commitments, determination on illegal gains and fines, automobile industry and intellectual property rights.

At the end of 2015, the NDRC started soliciting public comments on the draft Anti-Monopoly Guideline on Abuse of Intellectual Property Rights. The Guideline will regulate the exercise of the intellectual property rights and the business in technology-intensive industries. The other guidelines were under drafting or internal discussion before seeking public comments.

### B. SAIC

The SAIC, which is responsible for non-price related antitrust enforcement in China, also kept its pace in 2015 compared with the past. We provide our impression of the features of the SAIC's implementation of the AML in the last year from the perspectives of both legislation and enforcement.

#### 1. *Moving Forward the AML Enforcement in 2015*

Since the AML took effect in 2008, the SAIC has initiated 58 antitrust investigations, focusing on public service industries including water supply, power supply, fuel gas and insurance. By 2015, 27 cases were concluded, 5 were terminated. The targets included state-owned enterprises, foreign-invested enterprises, industrial associations, etc.<sup>12</sup>

In 2015, the SAIC published 14 punishment decisions. Telecommunication industry is the premier target of the SAIC. Among the 14 cases, 5 cases are related to telecommunication industry, which accounts for 35.7 percent.<sup>13</sup> Despite this, various industries were targeted by the agencies, including insurance, water, tobacco, pharmacy, concrete, etc. Most of these industries are related to people's national economy and the people's livelihood. In respect of the targets, all of the 14 cases published by the SAIC in 2015 are related to domestic companies. Among them, it is notable that China Railway Telecom, China Unicom, China Mobile and China Telecom, which are State Owned Enterprises ("SOE") in telecommunication industry, were also targeted by the SAIC. On the other hand, there are also some on-going cases related to foreign companies, including the *Microsoft* case.<sup>14</sup>

#### 2. *Active enforcement at the provincial level*

The SAIC's enforcement of the AML has a significant feature: most of the cases are completed by its provincial branches. For example, the latest case announced by the SAIC is *Ao Du Concrete Monopoly Agreement* case.<sup>15</sup> In this case, again, the SAIC authorized its Hunan Provincial branch to investigate. In fact, all 14 cases published in 2015 were investigated by the SAIC's provincial branches, among which, Ningxia (3 cases) and Hunan (2 cases)<sup>16</sup> seem to be the most active provinces. This decentralized enforcement mechanism may be beneficial to the SAIC because it may enable it to focus the scarce resources on the most difficult cases, and spread antitrust culture at the local level in the meantime.

#### 3. *Types of abusive cases*

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<sup>12</sup> See, <http://finance.sina.com.cn/roll/2016-01-13/doc-ixfnkkux1257936.shtml>, last visited on January 20, 2016.

<sup>13</sup> See, <http://www.saic.gov.cn/zwgk/gggs/jzzf/>, last visited on January 21, 2016

<sup>14</sup> *Id.*, note 10.

<sup>15</sup> See, [http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151229\\_165504.html](http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151229_165504.html), last visited on January 20, 2016

<sup>16</sup> See, <http://www.saic.gov.cn/zwgk/gggs/jzzf/>, last visited on January 21, 2016





In 2015, the SAIC and its provincial branches have dealt with various kinds of abusive cases. Tying and bundling are still the major focus of the authorities. For example, in *Shankai Sports* case,<sup>17</sup> the undertaking concerned abused its dominance in the 2014 World Cup ticket sale market, bundling the ticket with hotels and tourist product. The investigation is terminated because Shankai provided satisfactory commitments. It is also notable that, China Railway Telecom, China Unicom and China Telecom, all the three SOEs are investigated because they tied the network service and fixed-line telephone together by force. The investigations are terminated because the three companies provided satisfactory commitments.

Recently, the SAIC dealt with a case concerning refusal to deal. Before, abusive cases related to refusal to deal are mainly in courts.<sup>18</sup> However, the SAIC and its Chongqing branch has investigated Qingyang Medical Limited for its refusal to supply crude drug of allopurinol to the market for 6 months with no justifiable reasons. In this case, the authority defined the relevant market as crude drug of allopurinol and proved Qingyang had dominance in this market from the following four aspects:

- 1) Qingyang's market share in the relevant market is 100 percent;
- 2) Qingyang is able to control the downstream market;
- 3) The entry barrier of the relevant market is significant; and,
- 4) Downstream customers' dependency on Qingyang is significant.

It seems rare for a plaintiff to challenge the defendant successfully in a civil litigation involving the issue of refusal to deal. The main difficulty is to prove the defendant's market dominance. This case may provide reference for the plaintiff about how to prove the existence of the defendant's market dominance in civil antitrust cases.

As the first refusal to deal case dealt by Chinese administrative antitrust agency, *Qingyang* case indicates the SAIC's determination and ability to deal with refusal to deal cases. However, as a complicated issue in antitrust regime, how the administrative agencies will enforce the AML to refusal to deal case remains to be seen.

#### 4. Active in legislation

SAIC's *Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition* ("SAIC's IP Provisions") implemented on August 1, 2015, was a significant effort made by the SAIC.

SAIC's IP Provisions for the first time answered many difficult questions in the crossing field of antitrust and intellectual property rights protection. For example, it confirms that an operator shall not be directly inferred to have dominant market position in the relevant market only based on its ownership of the intellectual property rights. The licensors, therefore, may exercise the IPRs more freely because Article 17 of the AML will not apply to them automatically.

More importantly, Article 5 of the SAIC's IP Provisions provide a safe harbor to certain IP rights owners for the exemption of Article 13(6) and Article 14(3) of the AML:

- (1) the aggregate market shares of the competitors are no more than 20 percent in the relevant technology or product market; or there are at least four other competitors with closely

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<sup>17</sup> See, [http://www.saic.gov.cn/zwgk/gggs/jzzf/cfd/201501/t20150112\\_151219.html](http://www.saic.gov.cn/zwgk/gggs/jzzf/cfd/201501/t20150112_151219.html), last visited on January 20, 2016

<sup>18</sup> For example, *Yingding Bio oil Ltd. v. Sinopec*; *Gaoyou Tongyuan Oil Transport Ltd. v. Taizhou Petrochemical Co. Ltd, yangzi petrochemical and Sinopec, etc.*





substitutable independently controlled IP rights in the relevant technology and product markets;  
or;

(2) Neither the company nor any of its trading partners has more than 30 percent market share in the relevant technology or product market; or there are at least two other undertakings with closely substitutable independently controlled IP rights in the relevant markets.

Although the scope of this safe harbor seems limited (only Article 13(6) and Article 14(3) are covered), it is able to provide legal certainty for the licensors to a large extent. For example, there is no need for a licensor whose market share does not exceed the threshold to worry about its non-price related vertical agreement in IPR field.

This provisions also deals with other antitrust issues in IP field, such as antitrust concerns in patent pool, exclusive grant-back and standardization.

Like NDRC, the SAIC is also drafting the Anti-Monopoly Guideline on Intellectual Properties for the Anti-Monopoly Commission of the State Council. It is expected more detailed and operable rules related to antitrust enforcement in IP field will be issued soon.

### **III. TRENDS AND PROSPECTS**

After 7 years' practice since the AML took effect in 2008, NDRC and SAIC have accumulated many experiences in antitrust investigation and AML enforcement at large. In 2015, the authorities maintained the forceful enforcement, and went deeper and more sophisticated in the investigations.

Looking ahead, we expect that the authorities will actively keep pushing China's anti-monopoly law enforcement, and the industries closely related to common people's livelihood such as pharmaceuticals and medical devices will be the focus on the next steps. The involvement of provincial market regulators into the investigation will vest the authorities more resources to deal with more cases across the country. In the meanwhile, the legislation will be another focus that the authorities pay attention to. The antitrust authorities are gathering the academics and practitioners to work on drafting Anti-Monopoly Guidelines, that will be finally released by the Anti-Monopoly Commission of the State Council. It is believed that those guidelines will provide the antitrust investigation with more uniformity and foreseeability from both procedural and substantive perspective. Moreover, investigations against Chinese companies still accounts for a larger percentage of the authorities' overall enforcement works, and the multinationals and domestic companies will be treated equally as the target being investigated.

