ADMINISTRATIVE PENALTY GUIDELINES AGAINST MONOPOLY IN CHINA – AN EMPIRICAL ANALYSIS

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I. INTRODUCTION

Since going into effect in 2008, the Anti-Monopoly Law of the People's Republic of China ("Anti-Monopoly Law") has been in force for almost ten years. The administrative enforcement of the Anti-Monopoly Law has played an important role in maintaining a free competitive order in Chinese markets and protecting the rights and interests of consumers. A fine of up to RMB 6.088 billion yuan was even imposed on an illegal monopoly. With the fine being capped at 10 percent sales achieved in the previous year, most of undertakings that violated the law were fined based on the lower limit, i.e. one percent.

The core legal interest protected by the Anti-Monopoly Law is the free competitive order in markets, and therefore penalties against violations shall be carried out according to the effect of elimination or restriction of competition arising from such violations. Specifically, the nature, extent and duration of monopolistic conduct shall be considered. In order to reflect qualitative judgements in penalties based on a relatively objective and measurable standard and make the administrative law enforcement more transparent and predictable, the NDRC,[2] under the entrustment of the Anti-Monopoly Committee of the State Council, drafted the Guidelines on Recognizing the Illegal Gains Obtained by Undertakings from Monopolistic Conducts and Determining the Amount of Fines (Draft for Comments) (the "Guidelines"). In the course of writing this article, we reviewed all penalty decisions issued by the two administrative law enforcement authorities, i.e. the NDRC and the SAIC,[3] so as to explain the core issues in the Guidelines on the basis of an empirical study on penalties.

II. PRACTICAL REFLECTION ON ADMINISTRATIVE PENALTIES AGAINST MONOPOLY

The effective implementation of the Anti-Monopoly Law has benefitted from its strict criteria for determining liabilities. Articles 46 and 47 of the Anti-Monopoly Law provide that where an undertaking, in violation of the provisions of this law, implements a monopoly agreement or abuses its dominant market position, the authority for enforcement of the Anti-Monopoly Law shall instruct it to discontinue the violation, confiscate its illegal gains, and, in addition, impose on it a fine of not less than one percent but not more than 10 percent of its sales achieved in the previous year.

What about practices? We collected all law enforcement cases announced by the authorities for enforcement of the Anti-Monopoly Law after this law came into force.[4] As of December 31, 2017, the two law enforcement authorities issued 456 law enforcement documents of which 276 were issued by the NDRC and its local branches and 180 by the SAIC and its local branches. By excluding the cases of penalties for business associations, exemption from penalties, suspending or terminating investigations, monopoly agreements concluded but not implemented and unclear fine percentage, it can be confirmed that there are a total of 357 cases where undertakings engaged in monopolistic conduct and therefore penalties were imposed.[5] The following problems exist in the current anti-monopoly penalty system in China.

2 National Development and Reform Commission ("NDRC").

3 State Administration for Industry & Commerce ("SAIC").

4 We collected and sorted these data from the law enforcement documents and made some reference to the *Study on the Relationship between Confiscation of Illegal Gains and Fines in Enforcement of the Anti-Monopoly Law* written by Wang Gui (*A Symposium on Economic Law*, Volume 18).

5 This article focuses on analysis. The specific method of analysis is excluding from all cases the cases of administrative monopoly (where conduct of administrative monopoly is not subject to fines or confiscation of illegal gains pursuant to liability-related provisions of the Anti-Monopoly Law), suspension and termination of investigations, monopoly agreements concluded but not implemented (where, pursuant to Article 46 of the Anti-Monopoly Law, an undertaking may be fined not more than RMB 500,000 yuan without confiscating its illegal gains and the amount of fines shall not be calculated as a percentage of its sales) and monopoly implemented by trade associations (where trade associations are subject to fines instead of confiscation of illegal gains pursuant to the Anti-Monopoly Law).

A. A Wide Margin of Discretion in Determining the Amount of Fines

Fine percentage for Hardcore Cartels v. Duration of Violations					
Fine percentage v. Duration of Violations	Less than 1 year	1-2 years	2-3 years	3-4 years	More than 4 years
1%	45	1	0	22	0
2%	1	1	2	13	0
3%	6	32	3	4	1
4%	0	0	2	2	2
5%	0	2	1	1	1
6%	0	0	1	1	4
7%	0	1	1	1	2
8%	0	0	1	0	7
9%	0	0	1	0	0

Table 1: Relationship between Duration of Violations and Fine percentage in Documents regarding Penalties against Hardcore Cartels

We limit the counted cases to those relating to hardcore cartels and divide the monopoly agreements into five groups based on the duration of violations, so as to examine the relationship between the finalized fine percentage and the duration of violations. The reason why we define the duration and nature of monopolistic conduct is that on one hand, we have considered the provisions of Article 49 of the Anti-Monopoly Law, and on the other hand, both of them are relatively objective and will not cause disagreements on their definitions.

As shown in the table above, there is an implied positive correlation between the duration of violations and the finalized fine percentage, i.e. a fine of up to three percent may be imposed on any hardcore cartel with a duration of less than one year (i.e. short-term cartel) and any hardcore cartel with a duration of more than four years (i.e. relatively long-term cartel) will be subject to a fine of not less than three percent, which is in line with our expectations. However, the fine percentages imposed on violations vary greatly in each group. As for undertakings that continuously engaged in monopolistic conduct for 1-2 years, some were fined only one percent of their sales and some were fined up to seven percent; some undertakings that continuously engaged in monopolistic conduct for 2-3 years were fined up to 9 percent of their sales; and few of those undertakings that continuously engaged in monopolistic conduct for 3-4 years were fined up to nine percent. Such a wide margin of discretion is worth our attention.

B. Different Understandings of Circumstances Affecting Penalties

Administrative authorities have different understandings of circumstances under which a more severe or lighter penalty shall be applicable. Take active cooperation with investigations by administrative authorities for example.

First, cooperation with investigations is only a factor to be considered instead of the sole decisive factor in deciding whether a lighter penalty is applicable. For instance, in the *Case of Monopoly Agreement among Fireworks Operators in Gushi County*, the AIC of Henan Province considered the fact that concerned undertakings actively cooperated with the investigation, but it only deemed "having taken the initiative to eliminate or lessen the harmful consequences occasioned by illegal acts" as the justification for mitigating penalties. In the *Case of Abuse of Dominant Market Position by Chongqing Qingyang Pharm*,[6] the AIC of Chongqing Municipality decided that the undertaking under investigation "falls under the circumstances where a lighter penalty is applicable pursuant to Article 27 of the *Law of the People's Republic of China on Administrative Penalty*: first, it has cooperated with the law enforcement authority, which facilitates the successful completion of the investigation…" That means cooperation with the law enforcement authority is deemed as a separate circumstance under which a lighter penalty is applicable.

6 Yu Gong Shang Jing Chu Zi [2015] No. 15.

Second, there is also a difference in applicable discretion criteria. Some administrative law enforcement authorities apply Article 27 of the Law on Administrative Penalty and the Provisions for Administrative Authorities for Industry and Commerce on Prohibiting the Conclusion of Monopoly Agreement, and some apply the free discretion criteria of their provinces.[7] As such, there is a difference in the factors to be considered when deciding giving a lighter or mitigated penalty.

C. Different Effects of the Same Factor on Penalty Decisions

Different penalties are also imposed by administrative authorities in similar cases. In the *Case of Abuse of Dominant Market Position by Inner Mongolia Chifeng Salt Industry Corporation*,[8] the monopolistic conduct continued for less than one year and the undertaking actively cooperated with the investigation by the administrative authority as well as took rectification measures. The finalized fine percentage was two percent and illegal gains were confiscated. In the *Case of Abuse of Dominant Market Position by Hunan Salt Industry Co., Ltd.*,[9] the monopolistic conduct continued for 1-2 years and the undertaking also actively cooperated with the investigation by the law enforcement authority and took rectification measures. The law enforcement authority confiscated its illegal gains and determined the finalized fine percentage as one percent.

As shown in the penalty documents, the undertakings in the two cases operated in the same industry, had the same market position, had committed illegal acts of the same nature and fell under the same circumstance under which mitigated penalty is applicable, but the former was subject to a higher fine percentage in spite of a shorter duration of its violation. That is not a special case. In the *Case of Abuse of Dominant Market Position by Urumqi Water Corporation*,[10] the undertaking continuously carried out the illegal act for 3-4 years, actively cooperated with the investigation and promptly rectified its illegal act. The finalized fine percentage was only one percent. In the *Case of Abuse of Dominant Market Position by Huizhou Daya Bay Yiyuan Purified Water Limited*,[11] the monopolistic conduct also continued for 3-4 years and the undertaking also actively cooperated with the investigation and made rectifications. However, the fine percentage was determined to be two percent and illegal gains were confiscated. It seems that the effect each factor should have on the fine percentage should be clarified, otherwise the situation of different penalties in similar cases will arise.

A difference in two administrative penalties which is equal to nine times the amount of the lesser one does have an important influence on undertakings, but the Anti-Monopoly Law in force does not provide a specific discretion criterion. A too wide margin of discretion will increase the uncertainty for undertakings to engage in business transactions, impair impartiality in the Anti-Monopoly Law enforcement and fail to provide an effective guidance for undertakings on compliance with laws and regulations or actively eliminating adverse consequences arising from their illegal acts.

D. Confiscation of Illegal Gains Plays a Less Prominent Role in Penalties.

According to Articles 46 and 47 of the Anti-Monopoly Law, "confiscate its illegal gains" is placed before expressions related to fines, i.e. "confiscate its illegal gains, and, in addition, impose on it a fine of not less than one percent but not more than 10 percent of its sales achieved in the previous year…" Illegal gains should be confiscated both in terms of the literal meaning of legal texts and based on an analysis on the functions of confiscation of illegal gains and fines. However, in practice there are few cases in which illegal gains are confiscated. As stated above, it can be determined using the method of exclusion that there are a total of 357 cases where undertakings shall be punished, i.e. subject to confiscation of illegal gains and fines, among all 456 cases announced by the two law enforcement authorities. However, there are only 44 cases (i.e. 12.3 percent) where illegal gains were confiscated in practice.

7 For example, Lu Gong Shang Gong Chu Zi [2016] No. 6.

8 Nei Gong Shang Chu Fa Zi [2016] No. 4.

9 Xiang Gong Shang Jing Chu Zi [2016] No. 2.

10 Xin Gong Shang Jing Chu Zi [2014] No. 39.

11 Yue Gong Shang Jing Chu Zi [2013] No. 2.

III. TWO WINGS OF ADMINISTRATIVE PENALTY RULES: CONFISCATION OF ILLEGAL GAINS AND FINES

Article 49 of the Anti-Monopoly Law stipulates the factors to be considered in determining administrative penalties, including the nature, extent of social damage, circumstances and duration of violations, but the law does not further specify the specific meaning of each factor. In order to reflect the principle of matching penalties with violations, prevent and stop monopolistic conduct, and ensure the sufficiently deterrent effect of the Anti-Monopoly Law, the Anti-Monopoly Committee of the State Council drafted the "Guidelines." Through several drafts, the Guidelines were finally promulgated as the 14th version for public comments. In total it contains five chapters and 34 articles of which Chapters 2 and 3 are the core contents, i.e. "Recognizing Illegal Gains" and "Determining the Amount of Fines."

Under the framework of China's administrative law system, confiscation of illegal gains and fines are different administrative penalties and have different positioning in the system and different value pursuits. Illegal gains refer to the incomes obtained by undertakings from monopolistic conduct, i.e. the additional incomes obtained or the amount of expenditure saved by undertakings from carrying out monopolistic conduct for the duration of such conduct. That means violations both on the part of sellers and on the part of buyers are all considered. No one shall benefit from illegal acts, which reflects the plain values of justice. "In essence, confiscation of illegal gains is not the cost paid by the undertaking for its monopolistic conduct, but to recover the property illegally obtained."[12] Both the confiscation of illegal gains and the imposition of fines on lawful income, aim to have a sufficiently deterrent effect on monopolistic conduct. The system of concurrent imposition of confiscation of illegal gains and fines in China vary greatly from that consisting of only fines in the U.S. and EU. The key difference is that European and American laws do not distinguish confiscation of illegal gains from fines in practice, and they only apply fines or penalties[13] to recover losses and have a deterrent effect by penalty. On the one hand, civil actions against monopoly only function as seeking damages and recovery of losses, instead of the major means to prevent, stop and impose penalties on monopolistic conduct; on the other hand, the existing private enforcement in China (i.e. civil remedies) is ineffective, rendering it impossible to rectify via civil actions the situation that undertakings obtain benefits from monopolistic conduct, so confiscation of illegal gains is the only mean to resort to. As such, from the perspective of system design, the Anti-Monopoly Law combines the two functions of confiscation of illegal gains and fines so as to punish undertakings that violate the law. Any exclusive application of confiscation of illegal gains or fines will not have a sufficient penalty.

"Deterrence is the overriding and maybe the only goal that the Anti-monopoly Law intends to achieve."[14] The realization of deterrence needs the combination of confiscation of illegal gains and fines. If confiscation of illegal gains is the sole administrative penalty to be imposed on undertakings that violate the law by engaging in monopolistic conduct, the Anti-Monopoly Law cannot hold back the illegally monopolistic conduct of undertakings. For undertakings, confiscation of illegal gains will not cause any negative cost but make illegal acts earn nothing. Even if all illegal gains can be confiscated, the law enforcement authorities cannot discover all monopolistic conduct. Therefore, undertakings will consider the probability of being discovered when making the decisions, which leads to the view on the part of these undertakings that benefits can be expected from monopolistic conduct. Instead of suppressing the motive of undertakings to violate the law, it has encouraged them to take risks.

From the perspective of pragmatism, fines must be sufficiently severe to have a deterrent effect on violations. First, fines should be expectable. On the one hand, undertakings that carry out illegal acts shall be liable to pay fines, with no exceptions; on the other hand, the amount of fines should be relatively definitive, enabling undertakings to clearly predict the correlation between the nature and duration of violations and the final amount of fines. Second, fines should be severe enough to realize the effect of deterrence. The deterrence not only affects undertakings that violate the law, but also deters general undertakings from engaging in illegal acts. According to the economics of law, the optimal amount of fines set forth in the Anti-Monopoly Law shall exceed the amount of gains actually obtained from monopolistic conduct. Imposing such severe fines as not only to reduce the actual gains made from the violations to zero, but also to make undertakings expect zero or even a negative amount of gains from the violations can fundamentally stop monopolists from taking risks to violate the law.

12 Prepared by the Treaty and Law Department under the Ministry of Commerce, *The Meaning and Application of the Anti-Monopoly Law of the People's Republic of China*, p335, Version 1 of October 2007.

13 There are written rules and regulations as well as very few cases in the U.S.

14 Wang Jian, The Criminal Sanction System of Anti-Monopoly Law under the Concept of Deterrence - A Review on the Related Provisions of the Anti-Monopoly Law of the People's Republic of China (Revised), the ZUEL Law Journal, Issue 1 of 2006.

IV. RULES FOR RECOGNIZING ILLEGAL GAINS IN THE GUIDELINES

A. Enforcement of Confiscation of Illegal Gains

In light of the written rules set forth in the Anti-Monopoly Law and the indispensably deterrent effect of confiscation of illegal gains on monopolistic conduct, the Guidelines stipulate the rules for recognizing illegal gains in Chapter 2. Law enforcement practices over the last ten years suggest that the cases where illegal gains were confiscated only account for a small percentage of all cases, and the two law enforcement authorities adopt different criteria when imposing the penalty of confiscation of illegal gains. As of December 31, 2017, 276 cases have been announced by the NDRC, of which there are 230 cases where penalties are applicable[15] and 8 of them (i.e. 3.48 percent) are subject to confiscation of illegal gains; 180 cases have been announced by the SAIC, of which there are 127 cases where penalties are applicable and 36 of them (i.e. 28.35 percent) are subject to confiscation of illegal gains.

The criteria for recognizing illegal gains can vary greatly in the same case. Take the *Case of Horizontal Agreement Regarding Cipher Devices*[16] handled by the AIC of Anhui Province for example, where a penalty decision was made on September 18, 2016. The penalties of confiscation of illegal gains and, in addition, a fine of eight percent of its sales achieved in the previous year (i.e. 2014) were imposed on each of the three concerned parties in the case. The ratios of the amount of confiscated illegal gains made by each of the three parties from the monopolistic conduct for 5 years to the amount of the fine payable by each of them are 54, 20.8 and 261.5, respectively. Although there are many factors that can influence that ratio, e.g. the percentage of illegal gains to total sales and the sales on which the calculation of fines is based, it can be concluded from above that as all illegal gains made within the duration of illegal acts shall be confiscated, it is undoubtedly an essential part of the cost to be paid by undertakings for their violations. Especially, those undertakings who have been engaged in illegal acts for a long period of time shall be subject to more severe penalties according to the principle of matching penalties with violations because such illegal acts cause serious damage to the market order and the interests of consumers and the public.

B. Criteria for Recognizing Illegal Gains

There are many views on the criteria for recognizing illegal gains in both theoretical and practical terms. In respect of the enforcement of the Anti-Monopoly Law, the drafting group held several symposiums attended by the NDRC, the SAIC and their local equivalents. One of the key issues at these symposiums is to define the criteria for recognizing illegal gains. Different understandings and the lack of truthful and complete financial information lead to insufficient justification for administrative law enforcement. This is an objective barrier in implementing the penalty of confiscation of illegal gains in practice. Among the views of using total income, profits and damages as a basis for calculating illegal gains, the view of profits is finally adopted. Articles 7, 8, 9, 10 and 11 of the Guidelines clarify this issue from different perspectives.

The principle of necessity is followed by the Guidelines in terms of administrative law enforcement, which is reflected in the recognition of illegal gains, i.e. using the difference between the results generated in reality and in an assumed reference situation (i.e. "but for" situation) as the basis for recognition. Take Article 8 (Methods for Recognition of Illegal Gains in the Form of Additional Incomes Obtained) for example. In that case, the actual income, i.e. the income obtained from monopolistic conduct, is an objective, definitive and well-documented figure. In spite of this, as time is unidimensional, the income that would be obtained if no illegal act were committed should be determined to recognize the illegal gains. To that end, there should be reference values, i.e. the reference price and the reference volume. Pursuant to Article 7 of the Guidelines, reference price and reference volume shall refer to the price and the transaction volume of the relevant product, assuming no monopolistic act is committed.

According to the rationale of economics, there is a negative correlation between the price and the effective demand if no changes occur to other transaction conditions. In case of a higher price in a monopolistic market, the demand volume A in that market is less than the demand volume B under the condition of free competition, i.e. when the price is lower. There are two methods for calculation of illegal gains. The first is multiplying the difference between the monopoly price and the competitive price by A. The second is based on the product of the monopoly price and A minus the product of the competitive price and B, i.e. the amount of illegal gains shall be equal to the result if it is positive and there are no illegal gains if it is negative or equal to zero. The difference between the two methods lies in the volume. Since A is less than B, the result obtained using the second method is relatively more advantageous for undertakings suspected of violating the law.

15 They consist of cases where illegal gains shall be confiscated and, in addition, a fine shall be calculated and imposed based on the sales of the undertaking as provided in the first half of Paragraph 1 of Article 46 and Article 47 of the Anti-Monopoly Law.

16 Wan Gong Shang Gong Chu Zi [2016] No. 1, 2 and 3.

This methodology for recognition remains to be discussed based on the view of using damages as a basis for calculation of illegal gains. The decline in the effective demand caused by a higher price in a monopolistic market will impair the interests of consumers and lead to a net social loss. Such losses cannot be recovered from recognizing the illegal gains by this methodology.

C. Rules for Recognition of Illegal Gains

The Guidelines adopt the "but for" rule to recognize illegal gains, meaning that if there is no illegal conduct, the operation conditions in a competitive market will be taken as the reference items. Given the need to simulate a "hypothetical" competitive market, the following have been taken into consideration in the design of the Guidelines.

First, according to the Guidelines, legal gains shall be "recognized," while fines shall be "determined," as legal gains are incurred objectively, however fines shall be determined by a law enforcement authority to its discretion based upon legal factors. Recognition of legal gains necessitates an entire consideration of various factors, such as change of the price and/or sale volume of a certain product, change of an undertaking's share and/or profit margins in a relevant market, and the characteristics of an industry.

Second, each hypothetical "reference item" will be considered one by one in order of priority according to "the nearest" principle, which shall include: the market share, purchase volume and past profit margin of an alleged illegal undertaking before it engages in an alleged monopolistic conduct, the profit margin in the relevant industry, and the profit margin in a similar market.

Third, since each "reference item" taken for recognizing illegal gains is simulated and given the public law nature of the anti-monopoly law enforcement, a law enforcement authority shall provide sufficient evidence in accordance with the principles of administrative penalty to recognize the illegal gains. As a result, there may be no *de-facto* illegal gains or, though there are certain illegal gains, none of them could be recognized in a scientific and reasonable way. Articles 13 and 14 of the Guidelines have set out circumstances under which no illegal gains will be confiscated.

The provisions above are drafted based upon law enforcement experience. In cases where SAIC or any of its equivalents decided not to confiscate any illegal gain, we found thirteen penalty decisions which have provided reasons why no illegal gains should be confiscated. Among those administrative decisions, ten were made in respect of the same case but against ten administrative counterparts (persons subject to a penalty). The reasons for confiscating no illegal gains as provided in such ten administrative decisions are the same, i.e.: as the party concerned has maintained no complete accounting books or bookkeeping records, the profits generated from the production and sale of shale bricks could not be calculated.[17] Except for the foregoing case, the other three cases are the *Zhejiang Jiangshan Concrete Case* (in which a penalty decision was issued against three parties concerned),[18] the *Case of Donghan Quarry in Wuxi County, Chongqing* (in which a penalty decision was issued against four parties concerned),[19] and the *Case of Fireworks in Chifeng Central Urban Area, Chifeng Municipality, Inner Mongolia* (in which a penalty decision was issued against six parties concerned).[20] In the former two cases, the reason provided for being unable to calculate the illegal gains is the impossibility to provide relevant accounting information; while in the last case, the reason provided for being unable to calculate the illegal gains is the impossibility to distinguish between turnover generated from illegal conduct and turnover generated in the ordinary course of business.

Fourth, should any administrative counterpart has any opposition to the illegal gains or sales being recognized, the competent law enforcement authority may appoint a third party institution to prepare an analysis report, so that the law enforcement authority may assess the opposition based upon such report. In each of the *Case of Abuse of Market Dominant Position by Qingdao Xinao Xincheng Gas Co., Ltd.* and the *Case of Hainan Dongfang Water Supply Co., Ltd.*, the law enforcement authority appointed an accounting firm to verify and calculate relevant data, which showed a rigorous law-enforcement attitude.

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17 *Case of Horizontal Monopoly Conducted by a Shale Brick Undertaking in Miao Autonomous County, Mayang*. Xiang Gong Shang Jing Zong An Chu Zi [2014] Nos 1-6, [2015] Nos 1-4.

18 Zhe Gong Shang An [2012] No. 16.

19 Yu Gong Shang Jing Chu [2014] No. 5.

20 Nei Gong Shang Chu Fa Zi [2014] No. 001.

V. PROVISIONS IN THE GUIDELINES FOR DETERMINATION OF FINES

Anti-monopoly fines are a penalty commonly imposed in each jurisdiction around the world. Based on our state's experience accumulated in practice and by reference to the EU's experience, the Guidelines propose the "three-step calculation." The three steps are: first, to determine the sales in the preceding year; second, to determine the basic fine percentage; third, to adjust such rate and determine the final fine percentage.

A. First Step: Determination of the Sales in the Preceding Year

1. Practical Issues

In Articles 46 and 47 of the Anti-Monopoly Law, the "sales in the preceding year" is taken as the basis to calculate fines to be imposed. In determining the sales achieved in the preceding year, two factors shall be considered, namely the time factor and geographic factor. As to the time factor, we need to determine whether the year a case is registered for investigation and prosecution or the year a penalty decision is issued for such case shall be deemed as the base year. As the level of difficulty pertaining to the investigation, evidence collection and demonstration vary in different anti-monopoly cases, the entire process from the time a case is registered for investigation and prosecution to the time such case is settled may not end in only one natural year, but may last for several years. For example, in the *Tetra Pak Case* (which was prosecuted by SAIC), there was an interval of three years and nine months between the date the case was registered for investigation and prosecution and the date the final penalty was imposed. During the investigation in a case, the operation conditions of the undertaking concerned may change significantly. Therefore, if no consistent basis is identified, we may not obtain a reasonable result. In addition, the geographic scope will affect the determination of the sales in a significant way. Specifically, a wider definition of the geographic scope will usually result in a higher determined amount of fines, while a narrower definition of the geographic scope will result in a lower determined amount of fines.

In the current practice of the Anti-Monopoly Law enforcement, no consistent rules have been established. In most cases, the "case registration year" criterion was followed. For example, in the *Tetra Pak Case*, the SAIC held that the fine to be imposed should be calculated on the basis of the operation conditions in the year 2011, and in the *Estazolam Case*, the NDRC decided that the fine to be imposed should be calculated on the basis of the operation conditions in the year 2015. However, in some other cases, the "penalty year" criterion was followed.

Take the *Case of Monopoly Agreements of Ro-ro Shipping Service Providers* as an example. The NDRC started its investigation in 2014 and issued a penalty decision in December 2015. The basis taken to calculate the fine was the sales achieved by the undertaking concerned in 2014, i.e. the sales in "the preceding year" of the "penalty year" (namely the year 2015).[21] Notwithstanding the foregoing, there are also some cases in which no base year was identified.

As to the determination of the scope of products, we will take the cases being prosecuted by SAIC or its equivalents in 2016 as examples. In 85.7 percent of such cases, the sales were defined as the amount of the undertaking's sales of products in mainland China, and only in 14.3 percent of such cases, the sales were defined as the amount of the undertaking's sales of products in the market where its sales are alleged to constitute a monopoly.[22]

2. Definition of "Preceding Year"

In determining "the preceding year," we shall first consider the basic principle of "reasonable administration." The Anti-Monopoly Law allows and requires different undertakings to be treated differently based upon the circumstance and nature of, and the degree of damage caused by, their illegal conduct; however, an undertaking shall not be burdened with heavier or lighter liability than another merely for the reason of the different base year determined for them. In other words, the base year is not the factor to be considered by an administrative authority when it is making a decision at its absolute discretion. From an arm's length view, identical cases shall be treated in an identical manner and different cases shall be treated in a different manner. Therefore, in determining "the preceding year," we shall follow a set of consistent rules. From the perspective of the cause-and-effect relationship, fines to be imposed on an undertaking shall be those which may be directly attributable to the monopolistic conduct of such undertaking. Last but not least, we shall also take into account the investigation costs incurred by an anti-monopoly law enforcement authority.

21 Administrative Penalty Decision of the National Development and Reform Commission [2015] No. 8.

22 Wen & Mi, 2016 Report of China Administrative Law Enforcement Against Monopoly, the Chinese Journal of Competition Law and Policy, Issue 1 of 2017, p. 213 to 280.

As set forth in the Guidelines, the base year taken to determine a fine to be imposed is generally the accounting year immediately prior to the year the relevant investigation is launched. In contrast to the way of taking the "penalty year" as the base year, the way above as provided in the Guidelines has primarily involved the considerations below: There may a several-year interval between the date a case is registered for investigation and prosecution and the date a penalty is imposed. Once a law enforcement authority launches an investigation, the undertaking concerned may cease its illegal conduct. In such a case, a long time has passed since the illegal conduct was taken until the "penalty year." If the "penalty year" is taken as the reference to calculate the penalty, the determined penalty is unable to reflect the illegal conduct of the undertaking concerned. In theory, a law enforcement authority may change a base year by postponing the imposition of a penalty, and in such a way, change the basic amount of the fine to be determined. Therefore, from the standpoint of limiting the administrative power, it is reasonable for the Guidelines to choose not to take the "penalty year" as the base year.

3. Arguments Against "Case Registration Year" Criterion

The reason for not taking the "case registration year" as the base year is that if an undertaking does not stop, or even intensifies, its illegal conduct after the launch of the investigation, it will acquires more and more monopoly interests during the investigation. Compared with the "penalty year," the sales being calculated based on the "case registration year" will be less, and thus will result in a poor penalty on the offender. If a law enforcement authority decides to choose the "case registration year" as the base year, "the preceding year" and the sales will be definitive, meaning that each value the law enforcement authority uses to determine the penalty to be imposed is definitive. In such a case, an undertaking may weigh the benefits to be obtained and the penalty damage to be incurred in the event of its continued illegal conduct, and may as a result elect to continue its illegal conduct.

The two arguments above involve the same consideration, which is whether an undertaking will cease its illegal conduct after a case against it has been registered for investigation and prosecution. In essence, such consideration is about whether an anti-monopoly penalty is able to effectively deter illegal conduct. As described above, illegal gains and fines are both wings of an anti-monopoly penalty. They are necessary measures for effectively deterring illegal conduct, maintaining competitive order and improving social justice. If an undertaking continues its illegal conduct during a law enforcement authority's investigation of it: (i) its income during that period will be unquestionably confiscated when such income is identified as illegal gains; and (ii) the penalty percentage will be increased, to the extent that there is any aggravating circumstance provided in Article 25 of the Guidelines. In other words, if the laws are enforced in a stringent manner and all punitive and preventive effects of administrative penalties could be achieved in the course of law enforcement, then the probability of an undertaking continuing its illegal conduct after it is aware that a case against it has been registered will be extremely low.

4. Determination of Sales

"Sales" refers to proceeds generated by an undertaking from the sales of the alleged products in the region where it is alleged to be involved in monopolistic conduct. There are two elements implied in the definition above, namely the alleged region and products. In general, pursuant to the principle of comity for administrative law enforcement, the geographic market will be defined as the market within China and the proceeds generated from the sales of the alleged products will be taken as the basis to determine the sales.

However, there are some exceptions to the principle above. Taking international cartels as an example. We may assume that A company, B company and C company have entered into a market segmentation agreement, pursuant to which A company would be responsible for the sales in the Chinese market and neither B company nor C company would be involved in competition in the Chinese market, and that by such agreement, A company would obtain an exclusive monopoly on such products in China. In such an example, should either B company or C company be held liable for its illegal conduct? Although B company and C company do not sell products in China, sales made by them from other markets may be attributable to their geographic segmentation arrangement. The rules above also apply in the determination of the scope of products.

Statutory law is always challenged by the complexity of markets, and therefore it will be a good way for statutory law to provide some exceptions to the general principles. For example, the EU's Guidelines on the Method of Setting Fines allow for consideration of the global conditions if appropriate. Accordingly, Article 18 of the Guidelines provides the general principle (i.e. the sales will be defined as the amount of proceeds generated from the sales of the "alleged products" in the "China mainland" market), as well as some exceptions.

B. Second Step: Determination of the Basic Fine Percentages

As prescribed by the Guidelines, in determining the basic amount of the fine, the nature and duration of an illegal conduct shall be taken into account. When a law enforcement authority is determining the fine percentage at its discretion, it shall first consider the damage caused by the monopolistic conduct to society, so as to ensure that the penalty imposed is proportionate to the fault. The nature and duration of a monopolistic conduct are the most direct factors to be considered in measuring the social damage. Such factors are provided by the Guidelines as the primary factors to be considered in determining the basic fine percentage.

1. Nature of Monopolistic Conduct

Illegal conduct may be classified into five categories according to their nature, i.e. hardcore cartels, non-hardcore horizontal agreements, vertical agreements, abuse of administrative power and abuse of economic power.

Price agreements, production capacity agreements and market segmentation agreements, as provided in Articles 13.(1), 13.(2) and 13.(3) of the Anti-Monopoly Law, are "hardcore cartels" which will result in more significant damage and a stronger anti-competitive effect and may enable an undertaking to obtain a higher level of illegal gains. Accordingly, the fine percentage set in respect of such agreements is higher than that set for other kinds of horizontal agreements. The initial fine percentage is three percent in respect of these three kinds of agreements, and two percent in respect of other horizontal agreements, and one percent in respect of any vertical agreement having no significant effect to exclude or restrict competition.

The Guidelines define the nature of an undertaking's illegal conduct by reference to the source of the market dominant position. If an undertaking's market dominant position is conferred by law or administrative regulation, the undertaking is usually a company engaging in public infrastructure services. An undertaking like that should have offered quality public services and products to consumers by taking advantage of its market position. Should it abuse its market dominant position, it will have failed the power conferred on it by laws and administrative regulations. In addition, due to the existence of the policy barrier, potential rivals will find it difficult to enter the market. In such a case, the competition will be excluded and restricted significantly and consumers have to face an extremely unfavorable environment. Considering the serious harmful consequences above, the Guidelines set a higher initial fine percentage for these kinds of illegal conduct, i.e. three percent. However, with respect to any undertaking winning its market dominant position through market competition, the initial fine percentage is set at two percent.

2. Time Factor

Generally speaking, the longer monopolistic conduct lasts, the greater the loss it will cause. As set forth in the Guidelines, the duration of monopolistic conduct will be counted by years, and each additional year of extended illegal conduct will lead to an increase of one percent to the fine percentage. If an illegal conduct lasts for no more than six years, the duration of it will be counted as one year, which will not lead to a 0.5 percent reduction from the basic fine percentage; if an illegal conduct lasts for more than one year but less than one and a half year, the basic fine percentage shall be increased by 0.5 percent.

C. Third Step: Adjustment and Determination of Final Fine Percentage

The purpose of the fine system is to deter monopolistic conduct and to compensate any social loss inflicted by monopolistic conduct. The basic fine percentage shall be able to reflect damage caused by monopolistic conduct and the necessity for deterrent measures. In practice, as undertakings will play different roles, behave distinctively and have different attitudes when they are engaging in monopolistic conduct, the necessity for taking deterrent measures against them and the social loss caused by them vary. Therefore, a law enforcement authority shall adjust the basic fine percentage on a case-by-case basis.

1. General Adjustment

Article 25 of the Guidelines provides circumstances under which aggravating penalty shall be imposed. First, any undertaking that plays a major role in monopolistic conduct, lures other undertakings to engage in monopolistic conduct, or obstructs other undertakings from discontinuing their monopolistic conduct shall be imposed a more severe penalty. From the view of legal theory, the undertaking abets and helps other undertakings to perform illegal conduct or even materially controls such illegal conduct, and the behavior of other undertakings are solely or partially attributable to that undertaking. Therefore, it is reasonable to impose a more severe penalty on the undertaking.

Second, any undertaking engaging in a series of monopolistic conduct in the same case or otherwise engaging in monopolistic conduct repeatedly in different cases shall be imposed a more severe penalty. Objectively speaking, the effect caused by such an undertaking to exclude or restrict competition is more significant than that caused by undertakings merely involved in a single monopolistic conduct. From the subjective view, general sanctions are not sufficient to deter such an undertaking. Therefore, the undertaking shall be imposed a severe penalty.

Third, any undertaking that takes the initiative to urge or procure an administrative authority, or an organization being granted the public affairs administration power by law and regulation, to abuse its administrative power to exclude or restrict competition shall be imposed a more severe penalty. An administrative authority generally has great power. Therefore, if it takes an action to exclude or restrict competition, the consequences will be severe and its illegal conduct is harder to be prosecuted. In addition, in a case where an administrative authority is "captured" by an undertaking, the integrity of the public power will be undermined and the legal interests of other persons will be infringed while such an undertaking is pursuing market power.

Fourth, any undertaking continuing its monopolistic conduct after being ordered by an Anti-Monopoly Law enforcement authority to cease such conduct shall be imposed a more severe penalty, because a more severe penalty will stop the undertaking's monopolistic conduct. The four circumstances described above are not only the aggravating circumstances set forth in the Anti-Monopoly Law but also the aggravating circumstances to be considered during the enforcement of the general administrative laws as provided in the Law of Administrative Penalty.[23]

Article 26 of the Guidelines sets out the mitigating circumstances. Such provision is basically consistent with Article 27 of the Law of Administrative Penalty, and further specifies the effect caused by each circumstance on the penalty to be imposed. The first two paragraphs of Article 26 of the Guidelines provide circumstances where an undertaking is coerced by other undertaking or forced by an administrative authority to engage in monopolistic conduct. Such circumstances are less severe.

Paragraph (4) of Article 26 provides the circumstance where an undertaking has voluntarily taken actions to eliminate the consequence caused by its illegal conduct. In such a case, as the undertaking concerned has rectified the loss society suffers from its illegal conduct, the penalty to be imposed shall be mitigated to a large extent. For this reason, the Guidelines set out that if any of the three circumstances above exists, the fine percentage shall be reduced by one percent.

Paragraph (3) of Article 26 provides the circumstance where an undertaking has rendered meritorious services in cooperating with the administrative authorities to investigate and deal with cases. In such circumstances, the fine percentage shall be reduced by one percent. The meritorious services shall include reporting and blowing the whistle on an offence, voluntarily indemnifying a party concerned, and taking actions to ensure a progressing and effective investigation. Merely providing cooperation in an investigation is not sufficient to constitute a circumstance under which the penalty percentage will be reduced by one percent.

Paragraphs (5) and (6) of Article 26 are respectively related to the circumstance where an undertaking has taken actions to minimize the damage caused by its illegal conduct and the circumstance where an undertaking provides evidence to prove another undertaking's breach of the Anti-Monopoly Law other than the case at hand. Although in such circumstances, damage caused by the undertaking's illegal conduct is not eliminated completely, it is still appropriate to impose a lighter penalty. However, compared with circumstance provided in paragraphs (1) to (4), the penalty to be imposed under such circumstances shall be mitigated to a smaller extent. Therefore, the Guidelines prescribe that the fine percentage will be reduced by 0.5 percent, if either of the circumstances listed in paragraphs (5) and (6) exist.

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23 For example: Article 16 of the Measures of Shandong Provincial Government for Regulating the Discretion over Imposition of Administrative Penalty provides: "a party concerned will be imposed a severer penalty in accordance with law, if any of the following circumstances exists: (1) where such party disturbs the public order, impairs the public security, infringes the personal rights or property rights of any person, or undermines the public governance, constituting a serious offence but insufficient to constitute a crime; (2) where such party engages in an illegal conduct when there is a natural disaster, accident, public health or social security emergency, or other emergent situation; (3) where such party continues its illegal conducts after the administrative authority having the power to impose administrative penalty orders it to cease or rectify such illegal conducts; (4) where such party obstructs any administrative law enforcement officer from investigating or dealing with illegal conducts in accordance with law; (5) where such party forges, conceals or destroys evidence in respect of any illegal conduct; (6) where such party has engaged in illegal conducts repeatedly and has been imposed administrative penalty for the reason of such illegal conducts; (7) where such party plays a major role in an illegal conduct jointly taken by it with other persons; (8) where such party abets, coerces or lures other persons to engage in illegal conducts; (9) where such party retaliates an informer or witness; or (10) where there are other aggravating circumstances provided by laws, regulations and rules." See the link below for details: http://www.sdqts.gov.cn/sdzj/364141/364363/index.html.

2. Special Adjustment

In general, after the basic fine percentage is adjusted upward or downward in accordance with Article 27 of the Guidelines, the adjusted fine percentage is able to reflect the degree of damage. However, in specific cases, the final fine percentage may be over-weighted or under-weighted. In particular, the duration of an illegal conduct is calculated in a rigid manner, which may result in an over-deterrent or under-deterrent effect. For this reason, law enforcement authorities shall consider the fine percentage on a case-by-case basis according to the degree of illegality.

In order to settle the conflict between the certainty and uncertainty of fines, Article 28 of the Guidelines also contains a catch-all provision. The catch-all provision allows a law enforcement authority to make the final adjustment to the fine percentage in light of the degree of illegality. Further, the Guidelines also provide a restriction on the catch-all provision, so as to prevent a too wide of a margin of discretion of the law enforcement authorities: the adjusted fine percentage shall not be higher than three percent, in the case of a minor illegal conduct; and shall not be lower than six percent, in the case of a severe illegal conduct. The degree of damage shall be evaluated on a case-by-case basis, by primarily taking into account the market share of the undertaking concerned, the degree of difficulty to enter the relevant market, the degree of concentration and competition in the relevant market, market power of the counterparties and other factors.

There is another type of adjustment which may mitigate the penalty. Pursuant to the Anti-Monopoly Law, the amount of a fine shall not be lower than one percent of the undertaking's revenue in the preceding year. The Anti-Monopoly Law contains no provision for mitigating the penalty to be imposed, except where the undertaking concerned requests leniency. The Guidelines have included provisions for mitigating the penalty to be imposed, because: (i) in specific cases, the one percent fine percentage is overly severe and will result in an over-deterrent effect; and (ii) there are provisions in the Law on Administrative Penalty for mitigating the penalty to be imposed, and the Anti-Monopoly Law, as a special law, can apply provisions set forth in the general law. Notwithstanding, penalty mitigation may not be granted for all monopolistic conduct in respect of which the final fine percentage calculated is lower than one percent. The Guidelines have set a series of strict conditions for the granting of penalty mitigation. In addition, penalty mitigation granted shall not last for more than one year, and the monopolistic conduct concerned shall be less offensive and involves at least two mitigating circumstances and no aggravating circumstances. All the conditions above are parallel with one another. For the reasons above, in administrative law enforcement there is usually no case in which the penalty to be imposed will be mitigated.

VI. CONCLUSION

Administrative law enforcement is one of the tools for rectifying the competitive order, and administrative penalties, civil actions and even criminal liabilities together constitute the liability system under the Anti-Monopoly Law. In the case of insufficient civil remedies, administrative law enforcement has played an irreplaceable role in effectively maintaining the competitive order. Especially, administrative penalties have the greatest effect. Based on the experience and learning from almost ten years of administrative law enforcement practices, both the confiscation of illegal gains and fines have a deterrent effect. But in practice, as a result of the gap existing in the penalty of confiscation of illegal gains due to objective difficulties, undertakings only have to pay a low cost for their violations. Additionally, the discretion enjoyed by administrative authorities over the determination of sales and the fine percentage that are core elements of penalty rules is too wide, which, combined with the lack of detailed and explicit provisions, has challenged the authority of administrative law enforcement. In 2017, Hainan Yutai Technology & Feed Co., Ltd. brought a lawsuit to the court because of its objection to the administrative penalty decision made by the Price Bureau of Hainan Province in accordance with the Anti-Monopoly Law.[24] Although the cause of this action is not related to the determination of penalties, it is one of the many cases where undertakings challenge the administrative penalties. Administrative law enforcement is of special and universal significance to violators, competitors, consumers and other undertakings. Particularly, administrative penalties have a direct and significant effect on violators. As an important tool, administrative penalties shall be applied prudently.

24 *Administrative Penalty Decision*, Qiong Jia Jian An Chu [2017] No. 5.