Six Years After the Implementation of the Anti-Monopoly Law: Enforcement Trends and Developments of Anti-monopoly Investigation in China

Michael Gu, Yu Shuitian and Sun Sihui

I. Overview

Six years after the implementation of the Anti-Monopoly Law (“AML”), the National Development and Reform Commission of the People’s Republic of China (“NDRC”) and the State Administration for Industry and Commerce of the People’s Republic of China (“SAIC”) have gradually strengthened their anti-monopoly law enforcement in terms of investigation with rounds of record fines. The range of industries involved is widening, the nature of cases is diversifying, and the enforcement procedure is becoming more open to the public. Given the intensified frequency of investigation initiated and level of penalties imposed by the two competition authorities, it can be seen that China has gradually become one of the three most important antitrust enforcement jurisdictions together with the United States and the European Union. The investigation and enforcement may have far-reaching influence both on those foreign companies directly engaged in business activities within China and those multinationals indirectly connected with China.

Since early 2013, the investigations conducted by the NDRC are apparently speeding up with 11 high-profile cases investigated and closed as follows: the LCD Panel case, Moutai and Wuliangye case, Baby Formula case, Shanghai Gold Jewelers case, Spectacle Lenses case, Zhejiang Car Insurance case, Jilin Cement case and the recent attention-catching Japanese Auto Parts and Bearing Manufacturers case, as well as Audi and Chrysler case. Please refer to Table 1 below for details of penalties imposed in these cases. The NDRC had initiated its investigation into InterDigital and Qualcomm as well, and both companies indicated that they would fully cooperate. Subsequently, the NDRC has decided to suspend its investigation into InterDigital in May, 2014, while the investigation into Qualcomm has been going on for almost one year, and it is currently drawing near to the end.

With respect to the SAIC, ever since the implementation of the AML, the SAIC has filed 39 cases in its law enforcement capacity, mostly in 2013 and 2014. 36 cases were filed by provincial counterparty as authorized by the SAIC. 20 cases have been concluded, and one of them has been suspended. One of the most eye-catching investigations in 2013 was the investigation of global packaging giant - Tetra Pak. At present, Tetra Pak case has come to the fact verification and decision-making phase based on SAIC’s research and assessment. Furthermore, the investigation of Microsoft launched by the SAIC in July of 2014 caught a lot of attention both at home and abroad.

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1Michael (Zhengping) Gu is a founding partner of AnJie Law Firm based in Beijing. Michael specializes in competition law and M&A. Michael can be reached by email: michaelgu@anjielaw.com, or telephone at (86 10) 8567 5959. Yu Shuitian and Sun Sihui are associates of AnJie Law Firm.

In addition, it is worth noting that in 2013 the SAIC investigated the first case involving abuse of dominant market position and rendered relevant penalty decision – the *Daya Bay Yiyuan Purified Water* case.

This article will focus on the typical cases investigated and fined by the NDRC and the SAIC, analyzing in detail the recent trends and features, as well as future developments of anti-monopoly law enforcement, thereby providing suggestions to companies with respect to their construction of antitrust compliance program under the new circumstances.

II. Features of anti-monopoly law enforcement

Diversity of Industries involved

The NDRC once noted that the anti-monopoly enforcement centers on consumer-related areas such as petroleum, telecommunication, automotive and banks etc. However, judging from the NDRC’s recently released penalty notices and relevant news, the actual scope has not been limited to any specific area, for example, consumer-related areas such as gold and spectacles lenses have all been touched upon, obviously exceeding the scope the NDRC had previously indicated in explicit terms. With the announcement of the decision of the *Japanese Auto Parts and Bearing Manufacturers* case and the *Audi and Chrysler* case and a growing number of automobile manufacturers being involved in the “antitrust investigation crackdown”, it can be seen that automotive industry has become the targeted area in anti-monopoly enforcement. However, the enforcement of the NDRC will not stop at automobile industries. Other industries such as pharmaceutical, internet and finance etc. may trigger antitrust investigation at any time. With regards to the SAIC, a variety of industries have been covered in its investigation, including building materials, telecommunication, insurance, construction project inspection, used car dealing, travel, tobacco, public utility, and high-technology etc.

Thus, under the ever-intensified storm of anti-monopoly enforcement, any field and any industry might be subject to future investigation., This is especially true in industries connected with people’s livelihoods, for example, consumer goods, insurance, pharmaceutical, bank, telecommunication and automotive.

Domestic and foreign enterprises treated equally

Until October 2014, of all the cases investigated by the NDRC and local price supervision authorities, over 300 enterprises and relevant industry associations were involved, including varied market entities with different capital resources, e.g. state-owned enterprises, private enterprises and foreign-invested enterprises. Faced with doubts and accusations as to the damaging effect of anti-monopoly enforcement on the investment environment of foreign investors in China

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4 “There is no selective enforcement of law in Anti-monopoly enforcement in China is available at http://cpc.people.com.cn/n/2014/0912/c83083-25648487.html
resulting from unfair treatment, the NDRC, in response, disclosed that among the over 300 enterprises investigated until now, foreign-invested enterprises constituted less than 10%.\(^5\) Xu Kunlin, head of the Price Supervision and Anti-monopoly Bureau of the NDRC, expressed that no particular category of market entity was specifically targeted, nor were foreign-invested enterprises or foreign enterprises.\(^6\)

Similarly, among the 39 cases officially filed by the SAIC, quite a few involve state-owned enterprises, and only two of them involve foreign enterprises (i.e. Microsoft and Tetra Pak case), constituting a mere 5% of all the cases, not to mention the fact that both of the two cases have not been closed yet. Ren Airong, head of the Antitrust and Unfair Competition Law Enforcement Bureau of the SAIC, also mentioned that SAIC’s anti-monopoly enforcement does not target or discriminate against foreign-invested enterprises.\(^7\)

### Regulation of industry association and relevant punishment

In published horizontal monopoly cases, industry association is often a notable source of concern. Frequent deviation from their roles has led to a number of cases in which industry associations are either organizers or participants. For example, in the 20 cases released by the SAIC, 10 cases involved punishment of relevant industry associations. A remarkable example is the Shanghai Gold Jewelers case, in which the Shanghai Gold Jewelry Industry Association organized the implementation of price-fixing by five gold jewelers. Also, in the Zhejiang Car Insurance case, Zhejiang Insurance Industry Association organized and coordinated 23 property insurance companies on multiple occasions to conclude and implement horizontal monopoly agreements to fix car insurance rates and agency fees. Both industry associations in the two cases were fined RMB 500,000 amounting to the maximum penalties in the AML. Article 16 of AML explicitly prohibits industry associations from organizing the undertakings to engage in monopoly conducts. It can be seen that industry associations shall be clear about their duties, promote awareness to abide by the law, pay close attention to the trends of anti-monopoly law enforcement, facilitate fair competition within the industry instead of organizing and implementing anti-competitive monopolistic conducts in the name of “self-discipline”.

### More varied nature of cases

Unlike the early days of the implementation of the AML, when investigations only focused on horizontal monopoly agreements, at present, investigations by Chinese competition authorities have covered all types of monopolistic conducts, including not only monopoly agreements but also abuse of dominant market position. Moreover, both horizontal and vertical monopoly agreements are covered. On a proportional basis, monopoly agreement cases outnumber abuse of dominant market position cases. However, it does not mean the competition authorities put less weight on investigations of abuse of dominant market position. In light of extra resources needed, as well as

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\(^6\) Xu Kunlin, head of the Price Supervision and Anti-monopoly Bureau of the NDRC, attends the briefing held by the State Council Information Office is available at [http://jjs.ndrc.gov.cn/gzdt/201409/t20140915_625585.html](http://jjs.ndrc.gov.cn/gzdt/201409/t20140915_625585.html)

increased complexity in the analysis and assessment before a dominant market position and abuse could be identified, it usually takes much more time and higher degree of prudence to investigate into abuse of dominant market position cases. However, if one is deemed to have implemented monopolistic conduct by taking advantage of its dominant market position, the penalties imposed would normally be relatively higher than that for monopoly agreements. Moreover, the authorities are taking a more in-depth approach with respect to investigations of abuse of dominant market position cases.

For the last two years, typical cartels investigated by the NDRC included the LCD Penal case, Shanghai Gold Jewelers case, Japanese Auto Parts and Bearing Manufacturers case, Zhejiang Car Insurance case and Jilin Cement case, and vertical monopoly cases included Moutai and Wuliangye case, Baby Formula case and Spectacle Lenses case. Furthermore, the latest Audi and Chrysler case involved both horizontal and vertical monopoly agreements. In these cases two automobile manufacturers reached vertical monopoly agreements with some of their down-stream dealers respectively, to fix the sale price and service price, and to maintain the minimum resale price to third parties. In addition, certain down-stream dealers of Audi and Chrysler even reached and implemented horizontal monopoly agreements among themselves, creating an anti-competitive price cartel, consequently harming consumers’ legitimate rights and interests. Based on these cases, it can be seen that, when carrying out its investigation, the NDRC will cover each and every monopolistic conduct rather than focusing on vertical or horizontal conduct alone.

So far, cases concluded by the SAIC which involved abuse of dominant market position were Daya Bay Yiyuan Purified Water case and Inner Mongolia Tobacco case. The investigation of Qualcomm launched by the NDRC and the investigations of Tetra Pak and Microsoft launched by the SAIC are the most influential and high-profile cases on a global scale. These cases have on one hand brought new challenges to enforcement capacities of authorities in China, and on the other hand demonstrated Chinese competition authorities’ growing confidence and maturity due to the complexity of the cases and the cutting-edge issues encountered during investigations. It is likely that the conclusion of these investigations will be of landmark significance for anti-monopoly enforcement not only in China, but globally as well, and even more so when coupled with the fact that the penalties imposed may be another record-breaking figure.

More Harsh Penalties

For the last two years, penalties imposed by the NDRC have obviously increased, and this tendency is shown in two aspects: first, the total amount of the penalties repeatedly sets new high records, and secondly, the percentage of penalties imposed in the last year turnover has increased significantly.

From the LCD Panel case in early 2013 to Moutai and Wuliangye case, and to Baby Formula case and to the Japanese Auto Parts and Bearing Manufacturers case in August of 2014, increasingly more harsh penalties are being imposed by NDRC and the penalties imposed repeatedly set new all-time highs. In particular, the 12 Japanese companies were fined up to RMB 1.235 billion in total, which is the highest amount of penalties since the implementation of the China AML (surpassing
the previous RMB 449 million fine in the *Moutai and Wuliangye case* and the RMB 668 million fine in the *Baby Formula case*).

With respect to the percentage of penalties as a proportion of the last year’s turnover and in several previous anti-monopoly cases with record-breaking fines, both companies in the *Moutai and Wuliangye case* had obtained mitigation in their penalties, i.e. the penalty constitutes 1% of the last year’s turnover; in the *Baby Formula case*, penalties constitute a range of 3% to 6% of the last year’s turnover; in the *Spectacle Lenses case*, penalties constitute a range of 1% to 2% of the last year’s turnover; and in *Japanese Auto Parts and Bearing Manufacturers case*, penalties constitute a range of 4% to 8%, and three Japanese auto parts manufacturers and one bearing manufacturer were fined a severe 8% of their last year’s turnover.

<table>
<thead>
<tr>
<th>Case</th>
<th>Penalty (in million RMB)</th>
</tr>
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<tbody>
<tr>
<td>LCD Panel case</td>
<td>353</td>
</tr>
<tr>
<td>Moutai case</td>
<td>247</td>
</tr>
<tr>
<td>Wuliangye case</td>
<td>202</td>
</tr>
<tr>
<td>Baby Formula case</td>
<td>668.73</td>
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<tr>
<td>Shanghai Gold Jewelers case</td>
<td>10.10</td>
</tr>
<tr>
<td>Spectacle Lenses case</td>
<td>19.57</td>
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<tr>
<td>Zhejiang Car Insurance case</td>
<td>110.20</td>
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<tr>
<td>Jilin Cement case</td>
<td>114.39</td>
</tr>
<tr>
<td>Japanese Auto Parts and Bearing Manufacturers case</td>
<td>1235.4</td>
</tr>
<tr>
<td>Audi case</td>
<td>278.54</td>
</tr>
<tr>
<td>Chrysler case</td>
<td>33.82</td>
</tr>
<tr>
<td>Total</td>
<td>3,272.75</td>
</tr>
</tbody>
</table>

(*Table 1: penalty details of cases concluded by the NDRC*)

**Closely follow the pace of international anti-monopoly investigation**

Competition authorities in China are reinforcing cooperation and communication with international counterparts and are keeping up with international antitrust investigation trends. Among the cases already fined by Chinese antitrust enforcement authorities, two cases have already been fined in other jurisdictions. Furthermore, two companies (i.e. *Microsoft* and *Tetra Pak*) have been investigated and fined in other countries. After the investigations of and the penalties on several international leading LCD panels manufacturers in the European Union, the United States and South Korea, the NDRC released penalty decisions on six international leading LCD panel manufacturers at the beginning of 2013. Moreover, relevant companies in the *Japanese Auto Parts*...
and Bearing Manufacturers case released by the NDRC in August of 2014 have already been investigated and even punished in other countries. This is the result of the NDRC following the investigation of a series of price-fixing cases by the United States Department of Justice and the European Commission.

**Leniency program applied flexibly**

The leniency program in China refers to Article 46 of **AML**, “where any undertaking voluntarily reports the conditions on reaching the monopoly agreement and provides important evidence to the anti-monopoly authority, it may be imposed a mitigated punishment or exempted from punishment as the case may be.” Precedent shows that application of leniency program by the NDRC is flexible in three aspects. (1) Whether the leniency program is only applicable to cartels or otherwise is not specified in AML. The leniency program, as used in U.S. and E.U. practice, is usually applied in horizontal agreements since its purpose is to encourage cartel members to surrender information and further expose other members. The leniency program has been extended to vertical monopoly conducts in the practice of the NDRC. In the vertical monopoly *Baby Formula* case, Wyeth, Beingmate and Meiji were fully exempted from penalties because of voluntary reporting of relevant facts related to the conclusion of monopoly agreements, provision of important evidence and active implementation of rectification measures.

This is the first vertical monopoly case investigated by Chinese competition authorities in which leniency programs were explicitly applied. Soon afterwards, in the *Spectacle Lenses* case (vertical monopoly case), certain undertakings involved had been granted an exemption from fines by the application of the leniency program. Leniency programs are applicable both before and after the initiation of the NDRC investigation provided two major requirements have been met: report voluntarily and provide important evidence. In the *Japanese Auto Parts and Bearing Manufacturers* case, voluntary reporting occurred before the initiation of the NDRC investigation, while in the *Zhejiang Car Insurance* case, PICC was granted exemption from fines even though its voluntary reporting occurred after the initiation of the NDRC investigation. Likewise, in the *Baby Formula* case, three undertakings were exempted from fine due to their voluntary reporting during the investigation. The NDRC has wide discretion as to how to apply the leniency program in each particular case. Full exemption from fine for the first reporter is always guaranteed while the extent of exemption granted to the second or third reporter varied in different cases. For example, in the *Japanese Auto Parts and Bearing Manufactures* case, a fine imposed on the second reporter was reduced by a mere 60%, whereas in the *Zhejiang Car Insurance* case, a fine imposed on the second reporter was reduced by 90%. Moreover, even without voluntary reporting, undertakings involved in monopoly agreements may still be granted exemption due to “non-severe violation, timely rectification and lack of significant adverse effects, etc”. Although this is not the typical way that a leniency program operates, it may achieve the same result as if being the first reporter under the leniency program. In the latest *Audi and Chrysler* case, Audi dealer Wuhan Aojia was granted exemption from fine by the NDRC due to the aforementioned reason.

**Calculation of turnover**
In the recent Zhejiang Car Insurance case, the NDRC took a different approach in calculating turnover on which it based its penalties by including only the turnover of the branch (as “other organizations”) involved in the suspected monopolistic conducts rather than the overall turnover in China of the parent company. In addition, such turnover only includes those generated from specific products or services involved, not the consolidated turnover of the undertaking.

III. Future trends of antitrust enforcement and countermeasures of companies

The recent anti-monopoly crackdown has swept across a lot of undertakings and industries. Step-by-step through the market-oriented reform in China, both the NDRC and the SAIC will further strengthen their supervision over monopolistic conducts and enforcement depths and efforts so as to uphold fair market competition. The number of undertakings being investigated and fined is likely to increase in the near future, and industries involved is likely to expand. Therefore, undertakings shall not take any chances, but instead pay attention to and strictly abide by the AML, establish and perfect anti-monopoly compliance systems. It is highly recommended that undertakings conduct internal anti-monopoly auditing, and engage anti-monopoly practitioners to help with comprehensive anti-monopoly risk assessment when necessary. Chinese branches and subsidiaries of multinational companies shall thoroughly understand the features and trends of anti-monopoly enforcement in China, and shall not solely rely on global compliance manual because of the differences between China and the western countries in both procedural and substantive aspect. Thus, the compliance manual, compliance training and distribution agreement, etc must be localized in accordance with China-specific features, and shall be updated from time to time as the anti-monopoly enforcement practice has been developing and changing at a very fast pace.

With respect to undertakings involved in monopolistic conducts on a global scale, especially those which had been investigated in other countries before, Chinese enforcement authorities will keep a close eye on them and it is predictable that the number of follow-up investigations aimed at undertakings which had previously been investigated and fined in other countries before will increase in the future, and those follow-up investigations will gradually become normality. One particular thing worth mentioning to multinational corporations is that monopolistic conducts, even if occurring overseas, shall be subject to the supervision of Chinese anti-monopoly enforcement authorities as long as it has impacts on the Chinese market (including both direct and indirect impacts). Therefore, multinationals investigated, or even fined, in other countries before, have a greater possibility of being investigated in China. Hence, relevant undertakings shall timely conduct self-examination regarding the impact of its previous overseas anti-monopoly investigation over Chinese market, evaluating the necessity and feasibility of reporting to Chinese anti-monopoly enforcement authorities.

Industry associations shall enhance anti-monopoly compliance awareness, play its roles in guiding and coordinating on the positive side, and not to organize any sort of price-coordination, market allocation, or other anti-competitive conducts in the name of defending the interests of its members, so as not to step into the monopoly agreement minefield. Companies shall seek advice from its internal legal department before attending meetings and conferences held by industry associations,
and shall firmly avoid discussing any monopoly-related matter.

Anti-monopoly enforcement authorities have applied leniency program flexibly in all closed cases, and we expect the NDRC and the SAIC to further improve relevant implementing rules of the leniency program, clarify the conditions and standards of application of the leniency program, facilitate greater transparency and predictability of enforcement. The leniency program provides undertakings in potential violation of the *AML* with an opportunity to mitigate or even be exempted from possible penalties. Even if a company’s conduct is in violation of the law or the place as the first reporter cannot be secured, the company may still be granted reduction of penalties to a large extent or even full exemption provided that it can actively cooperate with the investigation, report voluntarily and rectify behavior in time. Relevant companies shall take advantage of leniency program to reduce penalties, and companies with monopolistic conducts shall timely report to enforcement authorities and rectify behavior accordingly. On account of the flexible approach of the leniency program, after a company receives investigation notice, it shall none-the-less pursue the opportunity of exemption since application for leniency program is still feasible during the investigation.

As it can be seen from all penalty notices issued by the SAIC since 2013 and recently published penalty notices of *Zhejiang Car Insurance Case* and *Japanese Auto Parts and Bearing Manufacturers case* by the NDRC, anti-monopoly enforcement in China has taken a greater step towards transparency and stringency. In addition, the NDRC and the SAIC have repeatedly addressed allegations that investigations did not target any specific companies, nor selectively enforcement had been adopted. In particular, the NDRC and the SAIC both indicated that lawyers could participate in and supervise the enforcement process in whole in order to ensure the legitimate rights and interests of the companies under investigation. Hence, in the case of a dawn raid, companies shall respond calmly, actively defend itself based on the particularity of its case. The right to defend is greatly ensured with the involvement of lawyers, for example, in *Japanese Auto Parts and Bearing Manufacturers case*, the NDRC recalculated Sumitomo’s turnover of preceding year and further reduced RMB 52.32 million in Sumitomo’s fine because of Sumitomo’s appeal.

To sum up, companies shall proactively accept the compliance challenges posed by the *AML*, pay close attention to legislation and enforcement updates in anti-monopoly law field, and adapt to the increasingly critical anti-monopoly enforcement environment.