

Annual Review of Public Enforcement of China's Anti-Monopoly Law (2016)

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I. OVERVIEW

In 2015, the Chinese market experienced rapid developments in anti-monopoly law enforcement. Further efforts also went into new guidelines and rules aimed at refining China's antitrust regime. Also, China's three anti-monopoly law enforcement agencies were very active in terms of the number of cases handled, the rate of fines imposed, and the varied grounds for investigations. In particular, high-profile antitrust cases have further profiled China as an emerging centre for antitrust enforcement. The Qualcomm case concluded by the National Development and Reform Commission (NDRC) set a new record for the highest antitrust penalty ever issued in China's anti-monopoly enforcement history, and also is the first investigation concluded by Chinese antitrust agency against the abuse of standard-essential patents (SEPs). A pharmaceuticals company in Chongqing has become the first company penalized for refusing to deal in the antitrust enforcement history of China.

On 7 April 2015, the State Administration for Industry and Commerce (SAIC) published China's first anti-monopoly regulation specifically aimed at the abuse of intellectual property rights - the Provisions on the Prohibition of Abuse of Intellectual Property Rights for the Purpose of Eliminating or Restricting Competition - which became effective on 1 August 2015. The provisions fill the legislative gap in China's anti-monopoly regulations governing the IP field and aim to balance the lawful rights and interests of IP rights holders and other interested parties, while also further promoting innovation and market competition.

However, the aforementioned Provisions on the Prohibition of Abuse of Intellectual Property Rights apply only to monopoly cases within SAIC's jurisdiction because the Provisions are ministry-issued regulations (for example, they do not apply to price monopoly cases under the NDRC's jurisdiction or merger control filings handled by the Ministry of Commerce (MOFCOM)). Abuse of IP rights has become a major focus of anti-monopoly enforcement agencies, and we strongly anticipate a superior and comprehensive set of anti-monopoly regulations over IP rights abuses. Agencies are already moving in this direction. In May 2015, the Anti-monopoly Commission of the State Council (AMC) designated the NDRC to lead an

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effort to officially initiate the study and drafting of the Anti-Monopoly Guidelines on Intellectual Property Abuse. Also, the SAIC and MOFCOM are each in the process of drafting antitrust guidelines on intellectual property abuse for their own respective enforcement areas. Their aim is to create a unified and comprehensive set of antitrust guidelines applicable to intellectual property rights.² The AMC appears likely to release a unified set of guidelines on antitrust enforcement in the intellectual property in the second half of 2016. This will provide welcome clarity on the application of antitrust laws to intellectual property rights and will facilitate the investigations on the cases involving IP rights abuse.

In addition to the Anti-Monopoly Guidelines on Intellectual Property Abuse, the NDRC is also in the process of drafting another five antitrust guidelines which will cover the automotive industry, the procedure on undertakings' exemptions, leniency programs, undertakings' commitments, and the calculation on illegal gains and fines. The guidelines are likely to set forth more detailed guidance on the practical and procedural issues with respect to the application of the Anti-Monopoly Law. In February 2016, the NDRC published two drafts, the draft of the Guidelines for Applying Leniency Program to Horizontal Monopoly Agreements and the draft for the Guidelines on Undertakings' Commitments in Anti-Monopoly Cases. The official promulgation of these two guidelines is expected in the months ahead. The antitrust guidelines in the automotive industry were drafted based on the NDRC's enforcement experience in the industry. At a seminar held by the NDRC on 7 January 2016, Mr Zhang Handong, the Director General of the Price Supervision and Anti-Monopoly Bureau of the NDRC disclosed that since 2014 the NDRC has probed and closed 12 antitrust cases in the automotive sector, imposing an aggregate of 2.047 billion renminbi in fines. According to Mr Zhang Handong, the antitrust guidelines in the automotive industry will encompass the theory, framework, principles, and methodology of antitrust enforcement in the automotive industry, with a focus on the assessment of monopolistic agreements and abuse of dominance.

In February 2015, the MOFCOM published the Guidance on Naming of Notification of Concentrations of Undertakings on its website to standardise the naming method of the merger cases. MOFCOM also initiated the revision process for the Measures for the Filing of Concentration of Undertakings and the Measures for the Review of Concentration of Undertakings.³ MOFCOM seeks to further refine the merger control review regime with its two Measures. MOFCOM also facilitated the revision of the Anti-Monopoly Law based on their practical enforcement experience, in the hopes that certain problematic areas that ignited

²As stated in a press release on 25 November 2015, available at Xinhua Net: http://www.js.xinhuanet.com/2015-11/25/c_1117257078.htm

³As stated in MOFCOM's 15 January 2016 press release, available at <http://www.mofcom.gov.cn/article/ae/ai/201601/20160101235053.shtml>

great debate or caused confusion will be better reflected and addressed in future legislation.⁴ MOFCOM's merger review- related guidelines on intellectual property rights mainly touch on the transfer and acquisition of intellectual property rights, as well as post-research and development issues with regards to patent pool, joint research, and exclusive intellectual property licensing in the merger review process. MOFCOM's guidelines will address various intellectual property antitrust issues and a merger's potential adverse impact on market competition.

i. Prioritisation and resource allocation of enforcement authorities

In 2015, the NDRC actively investigated monopolistic behaviours in consumer-related sectors such as telecommunications, automotive, insurance, and other fields. In 2016, the NDRC will continue to keep under close scrutiny industries that concern the general public, e.g. - automotive and auto parts industries, tobacco, telecommunications, education, healthcare, and the online retail sector.

In 2015, SAIC initiated 12 different cases involving the pharmaceuticals, tobacco, telecommunications, construction materials, and insurance industries. Prior to 2015, SAIC mainly focused its attention on horizontal monopoly agreements. In 2015, SAIC's enforcement priority gradually shifted to investigation of abuse of dominance. Also, the SAIC published the first penalty decision that concerns an enterprise's failure to cooperate with an investigation conducted by the antitrust law enforcement agency. This case clearly indicates SAIC's determination to safeguard the integrity of law enforcement and strengthen enforcement efforts.

MOFCOM received more merger notifications in 2015 than in any previous year, which underlines China's gradual emergence as a significant major jurisdiction for merger control enforcement. At the same time, MOFCOM toughened its stance against companies that failed to notify their deals. By the end of 2015, MOFCOM had sanctioned 15 cases for non-filing, nine sanctions of which occurred in the year 2015 alone (note that only four of nine cases were announced publicly).

ii. Enforcement agenda

The NDRC concluded 13 antitrust probes in 2015, which involved horizontal and vertical monopolistic agreements and abuse of market dominance, and covered industries including

⁴As stated in MOFCOM's 15 January 2016 press release, available at <http://www.mofcom.gov.cn/article/ae/ai/201601/20160101235053.shtml>

telecommunications, pharmaceuticals, automotive, and transportation, handing down fines over 7 billion renminbi.

The SAIC has initiated 58 antitrust investigations, consisting of 31 monopoly agreement cases and 27 abuse of dominance cases, since the commencement of the Anti-Monopoly Law in 2008. In 2015, the SAIC authorised its local branches to launch 12 antitrust investigations; four of which involved monopoly agreements and eight cases were related to abuse of dominance.

Since the Anti-Monopoly Law entered into force on 1 August 2008, MOFCOM has unconditionally cleared 1,276 merger cases, 312 of which were concluded in 2015.⁵ Among all the cases cleared by MOFCOM in 2015, 243 were simple cases, accounting for almost 80% of all merger cases. MOFCOM's merger review process has also become more efficient in 2015, with 74% of the closed cases being completed within the 30-day Phase I period, an 18% increase from 2014.⁶ MOFCOM also granted conditional clearance in two cases in 2015, with one being given structural remedies, while the other was subjected to behavioural remedies.

II. CARTELS

In 2015, the SAIC published 14 concluded cases; four of which were enforcement decisions against cartels, a slight increase from the previous year (three cartel cases concluded by SAIC in 2014). This year saw the first boycott case since the promulgation of the Anti-Monopoly Law, while the other three cartel cases involved sales market allocation. Among the four cartel cases, only one case – *Co-insurance Agreement* case – involved Sino-foreign joint ventures; the rest of the cartel cases penalised by the SAIC all involved domestic enterprises. As to the penalties, the penalties imposed by the SAIC totalled 6.34 million renminbi, including the disgorgement of 4.44 million renminbi of illegal gains in the *Co-insurance Agreement* case.

In comparison, cartel cases disclosed by the NDRC attract more attention than those published by the SAIC due to the former's imposition of larger fines. The NDRC published three cartel cases in 2015: two of which involved cartels in the automotive industry with a combined fine of more than 500 million renminbi, while the other related to the ocean shipping industry with a combined fine of 407 million renminbi. The automotive industry has undergone several rounds of antitrust crackdowns since 2014, with notable cases being

⁵ The statistics come from the presentation of Shang Ming (former director-general of the Anti-monopoly Bureau of MOFCOM) at China Competition Policy Summit on 15 January 2016.

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*Japanese Auto Parts and Bearing Manufacturers case*⁷, *Zhejiang Car Insurance case*⁸, and *Audi and Chrysler case*⁹. This year saw two cases involving the automotive industry, which is a sign that the antitrust crackdown on the automotive industry is still on-going. This section will briefly introduce some of the high-profile investigations concluded by the NDRC and SAIC in 2015.

i. Significant cases

Ocean Shipping Companies case¹⁰

At the end of 2015, the NDRC disclosed a penalty decision against eight roll-on/roll-off ocean shipping companies, imposing a combined fine of 407 million renminbi, following an investigation of a suspected ocean shipping cartel.

The eight ocean shipping companies (NYK Line, K-Line, Mitsui OSK Lines, Eukor Car Carriers, WWL, CSAV, Eastern Car Liner and CCNI) reached a consensus to not intrude into each other's existing business in order to maintain or inflate shipping fees. The eight companies frequently engaged in bilateral or multilateral communications on shipping service buyers' tendering and price inquiries, including sensitive information exchange, price negotiations, bidding intention discussions, division of clients and shipping routes, and conclusion of agreements on high price bids or non-bidding to help certain companies gain shipping orders. Such illegal conduct lasted no less than four years since 2008, the year the Anti-monopoly Law came into effect. There was wide-ranging impact on major shipping routes, covering all significant routes around China and to and from other countries. The violation also impacted on several automotive manufacturers and engineering machinery manufacturers.

According to the penalty decision, the NDRC concluded that the conduct of the eight companies had restricted competition in international roll-on/roll-off freight service market in China, pushed up international shipping fees and impaired the interests and rights of roll-on/roll-off freight importers and end customers. Such conduct violated Articles 13(1) and 13(3) of the Anti-Monopoly Law by reaching and implementing monopoly agreements concerning price fixing and market dividing.

⁷For a detailed discussion of this case, see *The Public Competition Enforcement Review* (seven edition) pp. 76-77.

⁸For a detailed discussion of this case, see *The Public Competition Enforcement Review* (seven edition) pp. 77-78.

⁹For a detailed discussion of this case, see *The Public Competition Enforcement Review* (seven edition) pp. 78-79.

¹⁰ The original Chinese notice issued by the NDRC is available at:
http://jjs.ndrc.gov.cn/gzdt/201512/t20151228_769084.html

NYK Line received exemption from the fine as it was the first company to report voluntarily and come forward with key supporting evidence of the cartel existence, notwithstanding the fact that its conduct spanned over a long period, involved many downstream manufacturers and shipping routes, and amounted to severe violations of the Anti-Monopoly Law. As the second company to make a voluntary report, K-Line was fined 23.98 million renminbi, 4% of its sales in the previous year, representing a 60% discount of the original 10% penalty, while Mitsui OSK Lines, the third company in line, was fined 7% of its sales in the previous year, a 30% reduction from the original 10% penalty.

The NDRC held that apart from the three companies that applied for leniency, the anti-competitive conduct of Eukor and WWL also lasted a long period, involved many manufacturers and shipping routes, and were severe violations of the Anti-Monopoly Law. However, as the two companies had provided relevant facts and supporting evidence which were not previously available to the NDRC, Eukor, and WWL received fines of 9% and 8% of their respective sales in 2014.

The other three companies involved in the cartel, CSAV, Eastern Car Liner, and CCNI, were fined 3.07 million renminbi, 11.27 million renminbi, and 1.2 million renminbi respectively, which amounted to 6%, 5% and 4% of their respective sales in the previous year. Although they did not report voluntarily, they were given relatively lighter fines proportional to their more limited scope of involvement, which involved fewer shipping routes and impacted fewer downstream manufacturers.

This is the most significant cartel case in 2015, given the heavy fines and extensive attention the case attracted. Furthermore, the exemption and mitigation of penalties in this case were strictly in accordance with the order of voluntary reporting by companies involved in the cartel, a clear demonstration of the transparent and stringent application of the leniency programme.

Mercedes-Benz case¹¹

On 23 April 2015, Jiangsu Price Bureau released its decision to impose penalties on Mercedes-Benz of 350 million renminbi, and some dealers in Jiangsu Province of fines amounting to 7.87 million renminbi for its price monopoly.

Like the *Audi and Chrysler case*,¹² both horizontal and vertical monopolies were found in this

¹¹ The original Chinese notice of the decision is published on the website of Jiangsu Price Bureau, available at: <http://www.jszwj.gov.cn/>

case. Mercedes-Benz had reached and implemented vertical agreements with its dealers to fix the minimum prices of its cars and certain auto components. The dealers of Mercedes-Benz also reached and implemented horizontal agreements to fix the prices of certain auto components.

Jiangsu Price Bureau fined Mercedes-Benz 7% of its annual sales in the relevant market from the previous year for its leading role in the monopoly scheme. Dealers in Nanjing, Wuxi, and Suzhou that engaged in monopolistic conduct were fined amounts equal to 1% of their annual sales in the relevant market from the previous year. In addition, dealers who voluntarily reported relevant facts of entering into a monopoly agreement and provided important evidence were either exempted from penalties or given mitigated penalties by Jiangsu Price Bureau.

The antitrust investigation into the automotive industry has extended from the auto parts sector to automobile manufacturers and their dealers, covering various layers of the relevant markets. The automotive industry remains one of the enforcement priorities of China's antitrust authorities and their investigations into the automotive industry are expected to be a "new normal" and will extend for a long time. Of all the automobile manufacturers that had been found in violation of the Anti-Monopoly Law, Mercedes-Benz topped the list with the highest fine imposed on it by the antitrust agencies.

*Dongfeng-Nissan case*¹³

Just half a year later after the Mercedes-Benz case, a similar penalty decision involving another giant automaker was announced by the Guangdong Provincial Development and Reform Commission. In September 2015, the agency imposed a 123.3 million renminbi antitrust fine on Dongfeng-Nissan and another 19.12 million renminbi fine on its 17 Guangzhou-based dealers for price fixing. The antitrust investigation into Dongfeng-Nissan started in August 2014.

Both horizontal and vertical monopolies were found in this case. Dongfeng-Nissan had severely restricted its dealers' transaction prices by issuing commercial policies and price control measures through an assessment system. The 17 Guangdong dealers of Dongfeng-Nissan were also found to have held several meetings to reach price fixing agreements for certain car models. It was found they later implemented those agreements.

Dongfeng-Nissan was fined 3% of its annual sales in the relevant market in the year 2014,

¹²For a detailed discussion of this case, see *The Public Competition Enforcement Review* (seven edition), pp. 78-79.

¹³ The original Chinese notice of the decision is published on the website of Guangdong Provincial Development and Reform Commission, available at: http://www.gddrc.gov.cn/gov/gkml/201509/t20150914_329411.html

while the dealers involved were fined 2% to 4% of their sales in the relevant market in 2014.

Guangzhou Panyu Animation Association case¹⁴

On 8 December 2015, the SAIC announced a penalty decision issued by Guangdong Provincial Administration for Industry and Commerce (Guangdong AIC) against Guangzhou Panyu Animation and Game Association (GAGA) for leading and organising 52 member-companies in a joint boycott, and imposed a fine of 100,000 renminbi on the trade association. The Guangdong AIC launched the investigation into GAGA's suspected misconduct on 21 July 2014.

GAGA had drafted an agreement of exhibition alliance on 25 May 2012, which called on its members to attend only exhibitions that were organised or sponsored by GAGA. The agreement was signed by 52 competing member-companies intending to jointly boycott industry exhibitions not organised or sponsored by GAGA. This constituted an exclusion or restriction of competition in Guangzhou's animation and game exhibition market.

According to Article 13(5) of the Anti-Monopoly Law, competing undertakings are prohibited from concluding monopoly agreements on the joint boycotting of transactions. GAGA had played an active role in the drafting and signing of the agreement of exhibition alliance and had therefore violated Article 16 of the Anti-Monopoly Law, which states that industry associations shall not organise industry undertakings to engage in monopolistic conduct.

This is the first case concerning boycott conduct that is subjected to antitrust enforcement by China's antitrust authorities, and is an important case indicating that China's antitrust authorities will not only monitor and investigate price fixing or sales market allocation agreements, but also any monopolistic conduct engaged by undertakings.

Co-insurance Agreement case¹⁵

At the end of 2015, the SAIC disclosed a penalty decision rendered by its branch in Hubei province, i.e. Hubei Administration for Industry and Commerce (Hubei AIC). As many as 12 domestic insurance companies were fined for signing and implementing a co-insurance agreement. The 12 companies had formed a co-insurance alliance to jointly write casualty insurances for construction projects in the city of Wuhan, where they shared premiums,

¹⁴The original Chinese penalty decision issued by the SAIC is available at:
http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151208_164680.html

¹⁵The original Chinese penalty decision is published on the website of the SAIC, available at:
http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151229_165445.html

insurance documents, and jointly shouldered claims. According to the penalty decision, co-insurance is a risk-sharing mechanism commonly used in the insurance industry. A legal co-insurance agreement should cover risks associated with a specific project. However in this case, the insurance companies involved had signed the agreement without first knowing the scale of the construction project, difficulty of the work involved, and the likelihood of casualties as well as the risks. Moreover, the co-insurance agreement was entered into by the companies for the purpose of eliminating competition among them, thereby constituting a monopoly agreement in the name of co-insurance.

China Pacific Life Insurance (Hubei branch) as the lead insurer, received a 979,300 renminbi penalty (a 65,300 renminbi fine and a 914,000 renminbi confiscation of illegal gains) for its anti-competitive conduct. The penalty amounted to 6% of China Pacific Life Insurance (Hubei branch)'s 2014 annual sales in the co-insured projects. Fines equal to 2% of annual sales in the co-insured projects were imposed on other companies involved in the co-insurance alliance.

ii. Trends, developments, and strategies

As in 2014, the NDRC remained highly ambitious in cracking down on cartels in 2015. In comparison with the NDRC, SAIC has exercised its law enforcement power in a relatively controlled manner while its prevention efforts against anti-competitive conduct have remained unflagging and constant. The monopoly agreement cases sanctioned in 2015 have the following major features:

- a Trade associations have been frequently involved in cartel cases, which together feature price fixing, boycotting, and bid-rigging. As indicated in the Guangzhou Panyu Animation Association case, the associations even play a leading role in organizing or facilitating the collusions among competing members. Trade associations should be especially careful when organising and holding meetings ;
- b The automotive industry is still given a higher enforcement priority, continuing the trend in 2014. Two significant cases involving two renowned automotive manufacturers have been concluded in 2015;
- c Apart from the automotive industry, a variety of industries, such as construction materials, animation and games, insurance and ocean shipping, have also been subjected to antitrust scrutiny;
- d A new form of horizontal monopolistic conduct (i.e. boycotting), other than price fixing and sales market allocation, has been fined. The scope of investigation is becoming more extensive. Any illegal behaviour violating the Anti-Monopoly Law will be investigated and duly punished by antitrust agencies; and

- e The leniency programme has been further developed. Companies that voluntarily reported their monopolistic practices, actively cooperated with NDRC investigations, and provided key evidence have benefitted significantly from the leniency programme.

iii. Outlook

Cartels will continue to remain the top priority on the antitrust authorities' agenda. Dawn raids and leniency programme applications will continue to play significant roles in antitrust investigations. In addition, on 3 February, the NDRC issued *Guidelines for Applying Leniency Program to Horizontal Monopoly Agreements (Draft for Comment)* to solicit public opinions.¹⁶ The leniency guidelines are expected to come into force in the second half of 2016, providing more specific guidance to cartel members, as well as facilitating enforcement by the NDRC. Both the NDRC and the SAIC will continue to intensify their supervision of monopolistic conduct and enforcement efforts. At the same time, they will strengthen their cooperation with competition authorities from other jurisdictions in dealing with international cartel cases.

III. ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

While nearly all the cases concluded by the SAIC in 2013 and 2014 involved monopoly agreements, the majority of cases (nine out of 13) disclosed by the SAIC in 2015 are related to the abuse of market dominance. Among these nine cases relating to the abuse of market dominance, three have been concluded, five have been suspended, and one has been terminated. Eight of the nine cases are related to the tie-in sale of products or the addition of other unreasonable trading conditions to transactions, and the last case concerns the refusal to enter into transactions with trading counterparts, the first refusal to deal case since the implementation of the Anti-monopoly Law.

However, the NDRC's investigation into Qualcomm for the abuse of market dominance, with its record fine of 6.088 billion renminbi, is undoubtedly the most significant milestone. This section will provide a summary of some remarkable cases concluded or investigated by the NDRC and SAIC.

i. Significant cases

*Qualcomm case*¹⁷

¹⁶The notice is available at the NDRC's website: http://jjs.ndrc.gov.cn/fjgld/201602/t20160203_774286.html

¹⁷The original Chinese notice issued by the NDRC is available at:

In February 2015, the NDRC announced its long-awaited penalty decision against Qualcomm for its abuse of SEPs in the wireless telecommunications industry. The NDRC imposed a penalty of 6.088 billion renminbi on Qualcomm, a fine equivalent to 8% of Qualcomm's sales in China in 2013, in addition to an order to cease the illegal conduct. As the first investigation concluded by the Chinese antitrust agencies against the abuse of SEPs, this case epitomises the areas of conflict and compatibility in the interaction between IP law and antimonopoly law. It also sheds light on how patent holders should exercise legitimate rights under the Antimonopoly Law and refrain from abuse of power.

The NDRC forced Qualcomm to change some of its longstanding business practices by, for example, cancelling the free grant-back clauses, forcing it to provide patent lists, and preventing it from conducting tie-in sales. Although the NDRC claimed that Qualcomm charged unfairly high royalties based on the device value rather than the chipset value, it did not require Qualcomm to change this model, instead merely requesting that Qualcomm charge 65% of the wholesale net selling price of the device.

In particular, the NDRC has not set a standard for 'fair and reasonable' royalty rates or directly denounced Qualcomm's rates level; it has instead left Qualcomm and its Chinese licensees to negotiate the specific rates. As pointed out by a NDRC official, the NDRC intends to provide guidance and direction on the SEPs licensing practice rather than directly decide the specific royalty rate. NDRC's concern focuses on maintaining a healthy environment for competition and preventing any SEPs holder from abusing their patent rights, while assuring that royalty fees shall be determined through the market.

This case is a strong indication of the NDRC's growing competency in investigating complicated cases. Further, its innovative approach towards SEPs will serve as a valuable precedent, not only affecting the Chinese antitrust practice, but also having a broader influence on other jurisdictions.

*Chongqing Qingyang Pharmaceutical case*¹⁸

On 22 December 2015, the Chongqing Administration for Industry and Commerce (Chongqing AIC) released its decision against Chongqing Qingyang Pharmaceutical for its refusal to deal. The case was initiated by the company contacting Chongqing AIC to seek verification on its potential breach of the Anti-monopoly Law related to an allopurinol active pharmaceutical ingredient (API) distribution agreement between the company and its

http://www.sdpc.gov.cn/gzdt/201502/t20150210_663824.html

¹⁸The original Chinese penalty decision is published on the website of the SAIC, available at: http://www.saic.gov.cn/zwgk/gggs/jzzf/201512/t20151222_165152.html

exclusive distributor in China, Hunan Xiang Baihe Pharmaceutical.

Based on the fact that Chongqing Qingyang was the only manufacturer of allopurinol API, Chongqing AIC identified that Chongqing Qingyang held a dominant position in the Chinese allopurinol API market. In addition, Chongqing Qingyang also engaged in the manufacture of allopurinol preparation, which is the down-stream product derived from allopurinol API. In the period from October 2013 to March 2014, Chongqing Qingyang refused to sell allopurinol API to its exclusive distributor and any other downstream manufacturers in order to hinder the normal production and sales activities of other preparation manufacturers. In this way, it raised ingredient prices, drove downstream competitors out of the allopurinol preparation market, and generally disturbed the market order.

According to the penalty decision, the purpose for such refusal to deal was solely to eliminate competition and was neither in line with its need for normal business activities, nor economic efficiency. Being the first company penalized for refusal to deal, Chongqing Qingyang was fined 439,308 renminbi (3% of its annual sales in 2013). Chongqing AIC took into account the company's responsive cooperation and rectification.

Tobacco case¹⁹

In a penalty decision handed down by the Liaoning Administration for Industry and Commerce (Liaoning AIC) on 1 June 2015, the agency imposed a fine of approximately 4.33 million renminbi on the Fushun Branch of Liaoning Tobacco Co, a fine equals 1% of the revenue the firm generated from tie-in sales in 2013, in addition to an order requiring the company to stop its unlawful behaviour.

The Liaoning AIC initiated the investigation into the company for suspected abuse of market dominance in June 2014 after receiving a tip-off alleging that Liaoning Tobacco Co was conducting tie-in sales of non-high-demand cigarette brands with high-demand cigarette brands. In this case, the relevant product and geographical market was defined as the cigarette wholesale and retail market in the city of Fushun, and given that Liaoning Tobacco Co was the exclusive authorised cigarette supplier in Fushun, the company held a dominant position in that market. The Liaoning AIC indicated that although the company lawfully held market dominance, it should without exception abide by the Anti-monopoly Law and other laws in China on the monopolistic operation of tobacco businesses.

¹⁹The original Chinese penalty decision is published on the website of the SAIC, available at: http://www.saic.gov.cn/zwgk/gggs/jzzf/201508/t20150813_160208.html

Investigation of Microsoft

In 2014, the SAIC launched an abuse of dominance investigation into Microsoft based on a complaint alleging that Microsoft violated the Anti-monopoly Law by failing to fully disclose information relating to the Windows operating system and Office software, raising suspicions of anti-competitive issues conduct such as interoperability and tie-in sales.²⁰

After conducting several raids on Microsoft's premises and offices in various cities in 2014, the SAIC conducted yet another raid on Microsoft's Chengdu office at the beginning of 2015. This investigation into Microsoft is still on-going. In November 2015, the SAIC asked Microsoft to respond to a long list of questionnaires regarding its business practices, to which the company has been providing answers in meetings and in writing.²¹

ii. Trends, developments and strategies

The antitrust enforcement priority of the SAIC is gradually shifting from investigating cartel conduct to targeting abuse of market dominance. Although the abuse of market dominance is fewer in case number, the landmark *Qualcomm* case evidently serves as a valuable precedent. Additionally, the competition regulators will continue to keep an eye on possible abuses of intellectual property rights in the technology sector.

2015 saw five investigations in the telecommunications industry, which may have a considerable impact on the business operations of telecom companies. Three local branches of major state-owned telecom companies China Mobile, China Telecom, and China Unicom in Inner Mongolia engaged in tie-in sales of landlines and mobile phone services when providing broadband access services and enforcing mandatory monthly expiries of unused data and talk time, and the three branches have been urged to fulfil rectification commitments by authorities in September. The investigation has since been suspended.

iii. Outlook

The investigation and assessment of abuse of dominant market position may be extremely complicated, requiring extensive market research, in-depth assessment of dominant position, detailed economic analysis, and high work efficiency. The NDRC and SAIC's enforcement expertise has been improving and they will continue to pay close attention to conduct

²⁰As stated in SAIC's press release, available at:
http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201407/t20140729_147122.html.

²¹ As stated in SAIC's press release, available at:
http://www.saic.gov.cn/fldyfbzdjz/gzdt/201511/t20151102_163469.html.

amounting to an abuse of dominant market position in 2016.

IV. MERGER REVIEW

The caseload of MOFCOM in 2015 has considerably increased compared with 2014. In 2015, MOFCOM accepted 338 filings for review, up 37% from 2014's 246. Also, MOFCOM closed 312 cases in 2015, up 27% from 2014.²² Among the closed 312 cases, 310 cases were unconditionally cleared, and two cases were conditionally approved.

The efficiency of MOFCOM's merger review has been improved, due to the introduction of the simple case review mechanism. In 2015, a total of 243 cases were cleared through the simple case review procedure with an average review period of around 28 days. Only 27 simple cases entered into Phase II review period and thus took more than 30 days to obtain clearance.

i. Significant cases

Penalties for non-filers

On 29 September 2015, MOFCOM issued four penalty decisions against parties involved in four merger cases that failed to fulfill their notification obligations under the Anti-monopoly Law. It is the second time that MOFCOM announced penalties on non-filers following the penalty decision for Tsinghua Unigroup's failure to notify its acquisition of RDA Microelectronics in December 2014.²³

MOFCOM toughened its punishment against companies that failed to notify their deals. MOFCOM sanctioned 15 non-filing cases in its enforcement history, out of which nine cases were published in 2015. Complaints of non-filing deals have increased gradually over the past few years as companies are keeping closer tabs on competitors, especially after MOFCOM started to publicise non-filer penalty decisions since May 2014.

The four non-filing penalty decisions published by MOFCOM on 29 September 2015 include:

1. *Bestv New Media/ Microsoft*²⁴

²² As stated in MOFCOM's press release, available at <http://www.mofcom.gov.cn/article/ae/ai/201601/20160101235053.shtml>

²³ For a detailed discussion of this case, see *The Public Competition Enforcement Review* (seven edition), pp.88.

²⁴The original Chinese penalty decision issued by MOFCOM is available at: <http://fdj.mofcom.gov.cn/article/ztxx/201509/20150901124903.shtml>

Bestv New Media and Microsoft were each fined 200,000 renminbi for their failure to make a merger filing prior to the establishment of a joint venture.

2. *Bombardier Transportation Sweden/ CSR Nanjing Puzhen*²⁵

Bombardier Transportation Sweden and CSR Nanjing Puzhen were each fined 150,000 renminbi for their failure to submit a merger filing prior to the establishment of a joint venture.

3. *Fujian Electronics & Information/ Shenzhen CHINO-E Communication*²⁶

Fujian Electronics & Information (Group) Co Ltd was fined 150,000 renminbi for its failure to submit a merger filing prior to its acquisition of a 35% stake in Shenzhen CHINO-E Communication.

4. *Shanghai Fosun Pharmaceutical/ Suzhou Erye Pharmaceutical*²⁷

Shanghai Fosun Pharmaceutical Industrial Development was fined 200,000 renminbi for its failure to submit a merger filing prior to its acquisition of a 35% stake in Suzhou Erye Pharmaceutical.

Publishing four penalty decisions in one day conveys a strong message to companies attempting to avoid merger notification that MOFCOM is closely monitoring merger controls in China and is determined to enhance enforcement.

Nokia's acquisition of Alcatel-Lucent²⁸

On 15 April 2015, Nokia and Alcatel-Lucent signed a deal memo, confirming that Nokia would acquire Alcatel-Lucent by way of public offer at a consideration of about EUR 15.6 billion. MOFCOM concluded that this concentration of undertakings might exclude or restrict competition in the licensing market for communication SEPs, as the number and scope of SEPs held by Nokia would increase significantly after the transaction. Nokia then submitted to MOFCOM its remedial measures on 8 October 2015. MOFCOM accepted the remedial measures.

The most notable and core relevant product market in this case is the licensing market for communication technology-related SEPs, which is also the main battlefield for conflicts between the overlapping anti-monopoly and intellectual property regimes in the recent two years.

²⁵The original Chinese penalty decision issued by MOFCOM is available at:<http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124899.shtml>

²⁶ The original Chinese penalty decision issued by MOFCOM is available at:<http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124887.shtml>

²⁷ The original Chinese penalty decision issued by MOFCOM is available at:<http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124896.shtml>

²⁸The decision is available at MOFCOM's website:<http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139743.shtml>

The licensing of telecommunications technology-related SEPs is often granted by the patent holder in package due to the large number of such patents. Communication technology-related SEPs can be further divided so that each SEP constitutes its own product market since every SEP is likely to be essential and unique. MOFCOM believed that the subdivision would not affect the conclusion of the anti-monopoly review for this concentration. Thus, it carried out an overall investigation into the licensing market for telecommunications technology-related SEPs. This is consistent with the opinion held by MOFCOM in the case of Microsoft's acquisition of Nokia's device and service business in 2014.

As to the telecommunications SEPs licensing market, MOFCOM acknowledged that since patent holders tend to look for licensees worldwide and use globally packaged licensing, it is possible that the relevant geographical markets will be defined as a global market. However, in view of the particularity of the Chinese telecommunications SEPs licensing market, MOFCOM's investigation highlighted the impact on the Chinese market.

All the restrictive conditions imposed by MOFCOM for this concentration centred on the licensing of telecommunications technology-related SEPs. According to the MOFCOM's announcement, Nokia has made a series of commitments in respect of the telecommunications SEPs owned by the company as at the day of completion of the deal. The main contents include:

1. Nokia undertakes that, under the premise of equality, if the licensee acts in good faith, it will give up seeking an SEP injunction to prevent the implementation of standards with FRAND (fair, reasonable and non-discriminatory) commitments;
2. When transferring a SEP to a third party in the future, Nokia has the obligation to promptly notify the details of the patent transfer to its existing Chinese licensees and any other Chinese enterprise that is in active licensing negotiation therewith. More importantly, Nokia undertakes that if the transfer of some SEPs to a third party has any significant impact on the value of Nokia SEP portfolios that have been licensed or will be licensed to Chinese licensees, the existing Chinese licensees (including potential licensees) have the right to renegotiate and determine the royalty rates;
3. Nokia will ensure that it will transfer corresponding FRAND obligations to the new owners upon transfer of a SEP in the future; and
4. Nokia accepts MOFCOM's supervision of the performance of its commitments and will report to MOFCOM regarding the performance progress.

NXP Semiconductors' acquisition of Freescale Semiconductors²⁹

On 27 November 2015, MOFCOM conditionally approved the proposed acquisition of Freescale Semiconductor Inc (Freescale) by NXP Semiconductors NV (NXP). This marked the second conditional merger clearance case of 2015. This acquisition is also the first case that MOFCOM adopted a structural remedy of divesting business to counter potential negative effects on competition since the implementation of the Provisions on Imposing Restrictive Conditions on the Concentration of Undertakings (Trial Version) on 5 January 2015.

When defining the relevant product market, MOFCOM made a detailed division of the analogue ICs market by differentiating general analogue ICs from special analogue ICs. The products involved in this case are special analogue ICs used for the automotive industry. MOFCOM further divided special analogue ICs into power-use special analogue ICs and non power-use special analogue ICs. Since they have different functions, IP modules and production technologies, MOFCOM held that automotive power-use analogue ICs constituted an independent product market, indicating that MOFCOM is inclined to make narrow subdivisions when defining product markets.

In this case, by taking into account the parties' market shares and control capability, the degree of concentration in the relevant market and the market entry difficulty level, MOFCOM established that the proposed deal could eliminate or restrict competition in the radio frequency power transistor product market. MOFCOM comprehensively evaluated the remedies submitted by NXP – which included divestment of its radio frequency power transistor business – and ultimately granted conditional clearance for the acquisition in light of these commitments.

In its announcement, MOFCOM made an evaluation of the viability, competitiveness and marketability of the divested business, as well as the suitability of potential buyers, setting a referential precedent for filing parties who may be required to submit structural remedies in the future. In addition, MOFCOM required NXP to perform relevant obligations during the transition period from the date of approval announcement until the divestment deal has been concluded. NXP shall endeavor:

- not to engage in unfair trade practices relating to the divested business;

²⁹ The decision is available at MOFCOM's website:
<http://fdj.mofcom.gov.cn/article/ztxx/201511/20151101196182.shtml>

- not to implement acts which may have a significant adverse impact on the value, management or competitiveness of the divested business, or which may change the nature, scope, industry or business strategy or investment policy of the divested business;
- take reasonable measures to encourage core employees to stay in the divested business and not transfer employees to NXP's non-divested business;
- ensure supplies to the divested business in a fair, reasonable and non-discriminatory manner; and
- maintain the independence of the divested business and not exchange market-sensitive information between the parties and the divested business.

Notably, the merger notification for this transaction was re-filed after withdrawal of the first filing. In complex concentrations involving sensitive competition issues, withdrawing and re-filing can be a flexible strategy to avoid having the deal be rejected by MOFCOM.

ii. Trends, developments and strategies

China has become one of the major global merger review jurisdictions over the past few years, not only because the number of cases handled by MOFCOM has steadily increased each year, but also because MOFCOM's merger review has far-reaching impact on global transactions. As demonstrated in the two conditionally approved cases, the competition analyses made by MOFCOM become more rigorous and mature and the conditions imposed become clearer and more pragmatic.

iii. Outlook

In 2015, MOFCOM only imposed conditions on two merger cases. As a comparison, an average of four cases were conditionally approved or prohibited every year in the past few years, which seems to reflect that MOFCOM is starting to adopt a more prudent approach towards making conditional approval decisions.

MOFCOM has initiated many law revision processes in 2015 and certain major legislative revisions will be expected to come in 2016. MOFCOM will also continue closely monitoring merger controls in China and is determined to enhance law enforcement. Undertakings are advised to be cautious in fulfilling their per-merger notification obligations to avoid penalty, and more particularly, reputational damage.

V. CONCLUSIONS

i. Pending cases and legislation

The proposed rules pending before the AMC is *Anti-Monopoly Guidelines on Abuse of Intellectual Property Rights*:

The proposed rules pending before the NDRC include:

- a. *Guidelines for Applying Leniency Program to Horizontal Monopoly Agreements* (draft);
- b. *Guidelines on Undertakings' Commitments in Anti-Monopoly Cases* (draft);
- c. *Antitrust Guidelines in the Automotive Industry* (draft);
- d. *Guidelines on Procedural Rules for Exemption Application with respect to Monopoly Agreements*; and
- e. *Guidelines on Calculation of Illegal Gains and Fines*.

MOFCOM's guideline with respect to intellectual property rights is in the drafting process. MOFCOM also initiated the revision process for the *Measures for the Filing of Concentration of Undertakings* and the *Measures for the Review of Concentration of Undertakings*.

The SAIC is also in the process of drafting IP related guidelines according to the AMC's assignment. Currently, the SAIC has sought public comments on the seventh draft.

In addition to legislation, the SAIC's investigations over Microsoft and Tetra Pak were still ongoing. Microsoft case was initiated in 2014 and Tetra Pak case was initiated in 2013. The outcomes of both cases are expected to have far-reaching impacts on future antitrust enforcement practice.

ii. Analysis

The NDRC, the SAIC and MOFCOM have all stepped up in their antitrust legislations and law enforcement in 2015. There is no doubt that the three agencies will continue to improve in all aspects and play important roles in the battles against monopolies in 2016. We expected to see more cases investigated and concluded and more legislation to come into effect in 2016, covering a variety of industries and all types of monopolistic conduct. Companies and their legal advisors should pay close attention to the rapid development of anti-monopoly law in China and be prepared for more stringent challenges to come.