

Advanced Seminar on China Antitrust

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Responding to China Antitrust Enforcement Uptick: How to Proactively Prepare for New Risks Amid Increased NDRC and SAIC Activity

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Tweeting about this conference?

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Government antitrust investigation – Recent trend

- 1. The authorities have become much more active in various industries. An overall antitrust strategy for China is essential for companies who want to do business in the Chinese market.
- 2. Industries recently targeted: IT, manufacturing of automobiles, consumer goods, and electronic products.
- 3. Industries/businesses that may be targeted in future investigation: medicine/pharmaceuticals, aviation, household chemicals, telecommunications, and online retail.
- 4. The types of monopoly conduct recently targeted include horizontal monopoly agreements, vertical monopoly agreements, and abuse of dominant position.
- 5. The authorities tend to expand the scope of “leniency”, even in some cases involving vertical monopoly agreements. Therefore, it is quite important to know how to identify antitrust concerns in the first instance and how to cooperate with the authorities so as to secure the exemption/reduction of fines.
- 6. Based on our experience, the authorities are eager to participate in global investigations and to play a significant role, similar to their counterparts in other jurisdictions.



Government antitrust investigation – Major cases (1)

Cartel

- 1. The liquid crystal display (“LCD”) panel case: In January 2013, the NDRC penalized six LCD panel manufacturers (including Samsung, LG and several Taiwanese firms) for price fixing, imposing a fine in the total amount of around RMB 353 million.
- 2. The gold jewelry case: In 2013, five gold jewelry stores were found to have reached a consensus on the calculation method, calculation formula and fluctuating range of prices relating to gold and platinum jewelry, which consensus was coordinated by the Shanghai Gold & Jewelry Trade Association. As instructed by the NDRC, the Shanghai Price Bureau fined each of the five stores an amount equivalent to 1% of each store’s turnover for the previous year. The fines totaled RMB 10,093,700.
- 3. The auto parts case: On August 20, 2014, the NDRC issued a press release disclosing that ten Japanese companies were fined a total of RMB 1.235 billion for implementing price monopoly agreements on auto parts and bearings. The other two Japanese companies were granted leniency and received no penalty because they, on their own initiative, reported the agreements to the NDRC and provided important evidence. This is the largest fine imposed by the NDRC since the AML went into effect.



Government antitrust investigation – Major cases (2)

Vertical Restraints (RPM)

- 1. The liquor case: In February 2013, the NDRC penalized Moutai and Wuliangye, two famous Chinese liquor makers, imposing fines of RMB 247 million and RMB 202 million, respectively, for resale price maintenance (RPM). Moutai, however, may not have formally conceded to the penalty.
- 2. The infant formula case: In August 2013, the NDRC announced a disciplinary action for RPM against several infant formula producers, with a total fine of approximately RMB 669 million.
- 3. The contact lenses and eyeglass lenses case: In May 2014, NDRC ruled that several producers (Essilor, Nikon, TAG Heuer, Johnson & Johnson, and Bausch + Lomb) set minimum resale prices on the contact lenses or eyeglass lenses that they sold to distributors. Officials say the companies violated the distributors' rights to independent pricing and hurt consumers by keeping prices artificially high. The companies have been fined a total of RMB 19 million.



Government antitrust investigation – Major cases (3)

Abuse of dominant market position

- 1. IDC case: The NDRC investigated IDC and found that it abused its dominant position in regard to certain patents, including charging extremely high royalty fees, tying, etc. In March 2014, IDC reached a settlement with Huawei and submitted a commitment to eliminate the anticompetitive effect of the alleged behaviors. The NDRC accepted the commitment and suspended the investigation in May 2014.
- 2. QUALCOMM case : The Decision was released in March 2015 and will be discussed later.



Government antitrust investigation – Major cases (4)

Administrative Anti-Competitive Behavior

- 1. Toll fee case (2014): The Transportation Department, Price Bureau and Finance Department of Hebei province (the "Three Departments") issued a provincial rule, which provided that 50% discount for toll fee and transit fee were only granted to the local passenger transport company. NDRC received a report from Korean Embassy and found the behaviors of the Three Departments constitute administrative monopoly as discriminatory treatment. Then NDRC issued a recommendation enforcement letter to the people's government of Hebei province, recommended them to order the Three Departments to correct the behaviors.
- 2. THS ware v. Guangdong Education Department (2014-2015): THS ware brought a suit against Guangdong Education Department and accused it of abusing administrative power by assigning exclusive supplier of software used in provincial match. The first instance court has brought in a verdict that the behaviours of Guangdong Education Department constituted administrative monopoly.



Government antitrust investigation – Major cases (5)

Ongoing cases

- 1. Automobile manufacturers case (2014) : The NDRC has recently investigated multiple major automobile manufacturers (Mercedes, BMW, Chrysler, etc.). Recently, the NDRC announced its decisions to penalize several BMW, Audi and Chrysler dealers in China, and Audi and Chrysler were fined by the Chinese government for RPM. The case involves multiple manufacturers of vehicles and their dealers in various provinces, and targets alleged conduct pertaining to both monopoly agreements and abuse of dominance.
- 2. Microsoft case (2013) : The SAIC is investigating Microsoft for potential abuse of dominance (e.g. tying). The SAIC recently announced that Microsoft allegedly did not fully disclose sales information on its media player, internet browser, and other Windows and Office software.
- 3. Tetra Pak case (2013): Tetra Pak is the subject of an ongoing investigation by the SAIC, and the major issue is tying.



Government antitrust investigation – Qualcomm case

- The investigation was initiated in Nov 2013
- The decision was made in Feb 2015
- NDRC found that Qualcomm had abused its dominant positions in each SEP market and baseband chip market.
- The abusive behaviors include: charging unfairly high royalty fees in the SEPs market, tying SEPs with the non-SEPs and imposing unreasonable trading conditions in the baseband chip market.
- Qualcomm also provided a rectification plan.
- NDRC imposed a fine that amounts to 8% of Qualcomm's turnover in the China market in 2013.



Government antitrust investigation

- Latest local cases

- 1.Public Tap Water Case (2015 released): Upon investigation, Hainan AIC found a city public tap water supplier abused its dominant position in the market, charging its customers unreasonable guarantee fees. The illegal gains are confiscated and a fine of approx. RMB 600,000 is imposed.
- 2.Express Company Case (2015 released): It is found by the Price Bureau of Ningxia Province that eight express companies fixed their price and the investigation is triggered by the reports of e-commerce company. Six express companies were fined and two were ordered to rectify and reform.



Inhouse Counsels concerns from antitrust perspective

- (i) Key concerns of multinational companies in operation of business in China from antitrust perspective
- (ii) How to minimize anti-trust risks and respond to governmental investigations:
 - A. Efforts to minimize anti-trust risks
 - B. Responses to Governmental investigations
 - C. Effective support from outside counsels

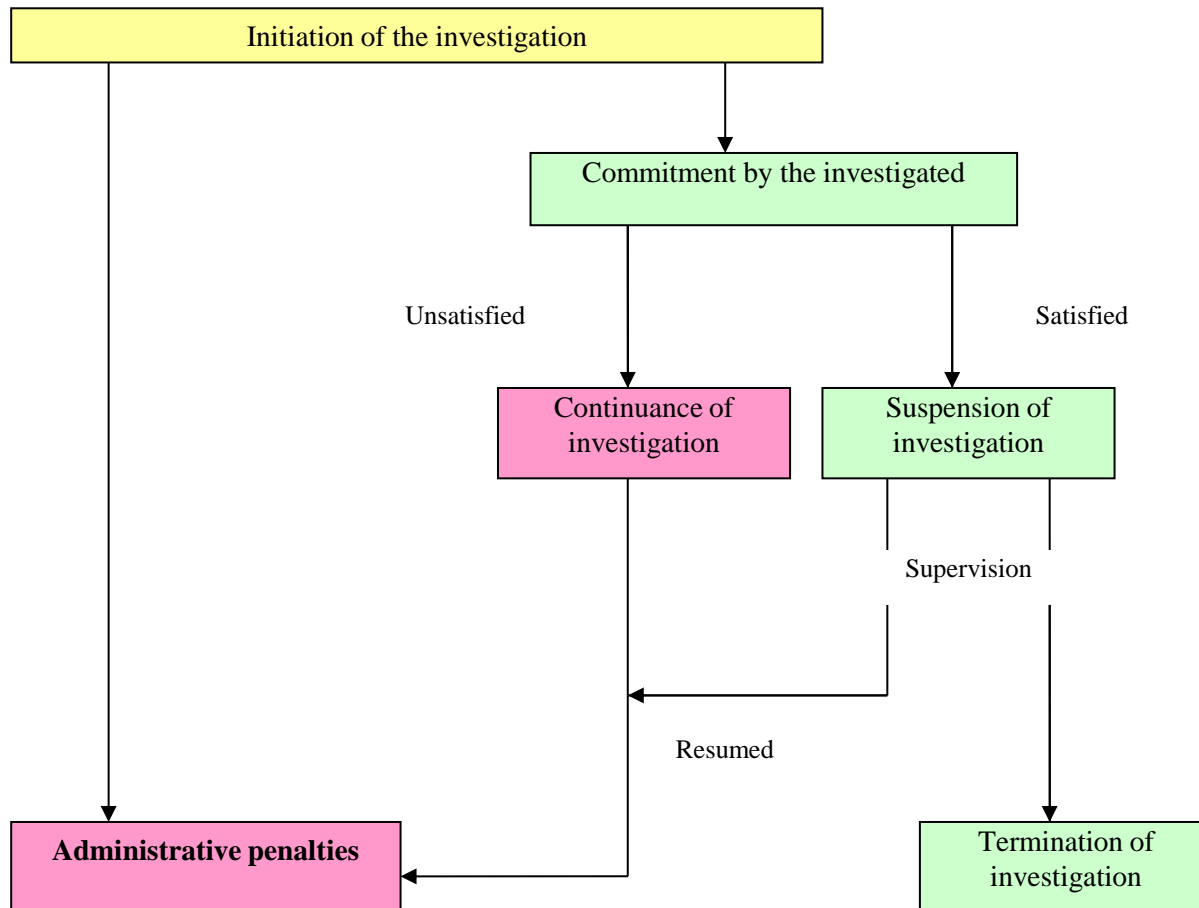


Procedural issues of NDRC (1)

- Competent Agency: NDRC and its local counterparties (local DRC and Price Bureau)
- Competence: price-related monopolistic behaviors
- The investigation may be triggered by:
 - Being reported/whistle blowing;
 - Exposed by other authorities or social organizations;
 - Attract attention of high level officials;
 - The media;
 - Voluntary exposure by members of monopolistic agreement.
- * Requirement of whistle blowing: the reporting should be in writing and relevant facts and evidences should be provided.



Procedural issues of NDRC (2)



Procedural issues of NDRC (3)

Investigation techniques

- On site investigation, dawn raid included
- Interrogate the relevant people
- Read and copy documents
- Seal up and detain evidence
- Inquire account

Rights of the party investigated

- Present opinions.
- Commercial secret protected
- Apply for administrative reconsideration or bring an administrative lawsuit.



Procedural issues of NDRC (4)

Conditions for leniency

- report initiatively
- provide important evidence

Extent of leniency

- 1st: full exemption
- 2nd : no less than 50% (Different from SAIC)
- others: no more than 50%(Different from SAIC)



Procedural issues of NDRC (5)

- Less mature than SAIC in investigating procedure since SAIC has been enforced anti-competition law for a long time.
- More aggressive in the investigation process and prefer to interview the witness or carry out the investigated by their own.
- As to leniency application, no “mark/flag scheme” is available for indicating the sequences except for the first one.
- Emphasizing cooperation of the investigated in the investigation and deeming it as a parameter as granting leniency.
- Starting to participate in on-going global investigation.



Procedural issues of SAIC (1)

- Antimonopoly and Anti-unfair Competition Enforcement Bureau of SAIC is the major responsible administrative organ.
- Investigation on non-price-related monopolistic behavior, including monopoly agreements, abuse of market dominance, and monopoly control.
 - Most cases investigated by SAIC is domestic cases involving monopoly agreements through industry association.
 - Representative cases involving foreign companies: TetraPak and Microsoft (both are ongoing cases)
 - SAIC is seeking to expand its enforcement to other areas of monopoly behavior such as vertical agreements, bundling, and the abuse of dominant market position.
- Jurisdiction (*Procedural Provisions in Jun 2009*)
 - SAIC may authorize provincial-level AIC to file cases for investigation and penalties. Provincial-level AIC should not authorize inferior agencies.
 - SAIC may authorize relevant provincial-level, deputy provincial-level AIC or AIC in a municipality separately designated to conduct the investigation.



Procedural issues of SAIC (2)

- Follow-up Regulations after 2008 Anti-Monopoly Law
 - Procedural Provisions Prohibiting Behavior Abusing Administrative Power to Eliminate or Restrict Competition (工商行政管理机关制止滥用行政权力排除、限制竞争行为程序规定, June 2009)
 - Procedural Provision on Investigating Cases Involving Prohibition on Monopoly Agreements and the Abuse of Dominant Market Position (工商行政管理机关查处垄断协议、滥用市场支配地位案件程序规定, June 2009)
 - Provision on the Prohibition of Monopolistic Agreements (工商行政管理机关禁止垄断协议行为的规定, December 2010)
 - Provision on the Prohibition on the Abuse of a Dominant Market Position (工商行政管理机关禁止滥用支配地位的规定, December 2010)
 - Provision on the Prohibition of the Anti-Competitive Abuse of Administrative Power (工商行政管理机关制止滥用行政权力、限制竞争行为的规定, December 2010)
 - Provisions to Prohibit Intellectual Property Abuse to Eliminate or Restrict Competition (Draft) (工商行政管理机关禁止滥用知识产权排除、限制竞争行为的规定(征求意见稿), Jun 2014)



Procedural issues of SAIC (3)

- **Increasing Activity**

- Build its enforcement capacity by increasing staffing and case experience;
- To Sep 2014, 43 cases investigated (13 new in 2014), 19 cases closed.

- **Current Situation**

- Pressure on “admit guilty” without providing any access to review and respond to seized evidence to companies;
- Insufficient transparency during competition reviews;
- Business models’ influence on competition reviews;
- Broad discretion in determining abuse dominate market position, e.g. resale price maintenance (RPM) agreement, relevant market, etc.

