China’s Anti-Monopoly Law Enforcement: a Quest for Transparency, Consistency and Fairness

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Abstract

This paper analyzes inconsistent enforcement issues by reviewing aspects of China’s anti-monopoly law (AML) enforcement practice based on a case information sample covering 80% of undertakings under AML probes and punishment.

Section 1 identifies the issue of defining undertaking and sales revenue and determining jurisdiction. Section 2 summarizes the factors affecting penalty amounts. Section 3 lists several types of unequal treatment for similar monopoly offences. Section 4 explores four ways to restrict the exercise of discretionary power: fine guidelines to unify the exercise of fining practice, transparency to facilitate public monitoring, right to a hearing for safeguarding targeted companies’ interests; and the provision of reason to improve the fairness of a decision. Unfortunately, all of these practices are all currently employed to an unsatisfactory degree.

To ensure that the AML may be implemented fairly, equally and transparently, the paper provides policy suggestions at the end of each section after issues have been analyzed and identified. The main policy proposals are as follows:

(i) issue rules to clarify and unify the meaning of key legal terms, such as undertaking, sales revenue, etc.;

(ii) strictly enforce the AML to disgorge the illegal gains from the lawbreakers;

(iii) publish and enforce objective, measurable, and workable fine guidelines to specify aggregating, attenuating, and immunity circumstances and how those factors should be weighted;

(iv) all enforcement decisions should be publicized unless there are prevailing legitimate interests to protect confidential information;

(v) an enforcement agency should be required to hold a hearing before imposing a fine higher than one million RMB, and hearing result should have a binding effect on enforcement decisions; and

(vi) enforcement agencies should provide detailed competition analysis, and provide reasons in the enforcement decisions.

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Introduction

China’s Anti-Monopoly Law (AML) was first enforced on August 1, 2008. But only after NDRC’s aggressive enforcement in 2013 did companies start to take administrative enforcement seriously. Thereafter, the National Development Reform Commission (NDRC) and the State Administration of Industry and Commerce (SAIC) punished more than 300 companies and industry associations. ¹ China has become the third largest jurisdiction in the world to enforce anti-trust law.

China’s AML administrative enforcement, however, was also criticized by the international community. The EU Chamber of Commerce in China pointed out two outstanding issues in the anti-monopoly investigation: lack of transparency and unequal treatment. ² The American Chamber of Commerce in China’s member companies also reported that they became the target of investigation for violating AML and other Chinese laws, ³ and 55% of surveyed companies claimed that recent law enforcement activities target foreign companies. ⁴

Chinese officials, however, did not accept those comments. Xu Kunlin, Director General of NDRC’s Anti-Monopoly Bureau (AMB), said that “AML enforcement just targets monopolistic activities … we treat (foreign companies and domestic companies) equally, there is no issue of selective enforcement.” ⁵

So what is the reality? Did Chinese government in fact enforce the AML faithfully, equally and fairly in practice? In this paper I shall give an evaluation based both on cases published by the government and disclosed by the media.

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¹ This essay will cover the investigation and punishment against monopoly offence which was committed by the companies in the past. The National Development Reform Commission and the State Administration of Industry and Commerce enforce the AML to punish monopoly offence. This essay will not touch on the issue of the undertaking’s concentration, i.e., merger filing, which needs pre-approval from the Ministry of Commerce.
² EUCCC, Aug. 13th, 2014
³ Am-Cham, Sep. 2nd, 2014
⁴ Am-Cham, Feb. 11th, 2015, 2015 Business Environment Survey Report
⁵ Xu Kunlin, Sep. 11th, 2014, the State Council’s Press Conference on AML Enforcement Activities
Researchers on China’s AML enforcement activity have always found the data to be a big challenge to the research. Although the SAIC uploaded all decisions to levy a fine on offending companies on its website, the NDRC failed to do the same. By March 10th, 2015, the AMB only published on its official website the full text of 37 punishment decisions in 4 cases, which were enforced against 1 trade association and 36 undertakings. With the goal of collecting more information for my research, I extended my data sources to the following channels: (i) public announcement on AML cases by the NDRC on its website; (ii) the press conference held by the NDRC and/or SAIC to celebrate the anniversary of AML’s implementation; (iii) AML case information on the website of NDRC’s provincial offices; (iv) AML case information on media which has been delegated by enforcement agencies to disseminate; and (v) AML case information disclosed by lawyers who represented clients before the enforcement agency. In total, the database finally covers 48 cases, 276 undertakings and trade associations, including 29 foreign brand companies (for details, please refer to Appendix I). According to Premier Li Keqiang, China investigated and punished 335 enterprises by Sept. 11th, 2014. 6 There is no updated figure that has ever been announced by the Chinese government. Admittedly, AMB and NDRC’s provincial chapters should continuously conduct enforcement activities, but the implementation speed has seemed to slow down because of the aforementioned international community feedback. Appendix I lists almost 80% of undertakings under AML probe and punishment, all cases handled by SAIC have been included there, with data recorded on all cases with administrative fine at RMB 100,000,000 or higher. Therefore, those cases are representative of the AML administrative enforcement practice. In addition to those cases, there are also cases that the AMB investigated between January 2008 and December 2013, included in Appendix II. The investigation information under Appendix II was only published on a journal titled China Price Supervision and Check but the NDRC has not disclosed them on the web yet.7

7. Dr. Liu Xu, a research fellow at Shanghai Tongji University, published several articles on his blog: http://www.weibo.com/competitionlaw. His articles draw my attention to a Journal titled China Price Supervision and Check (《中国价格监督检查》), which was renamed as Pricing Supervision and Anti-Monopoly in China in 2014. Dr. Liu is sharply critical of China's AML enforcement practice. His articles shed lights on evaluating the defects of China's AML enforcement.
The structure of this paper is as follows: Section 1 will summarize issues existing in determining jurisdiction, and defining undertaking and sales revenue; Section 2 will shift to factors that have been considered by the AML enforcement agencies in making a decision to exempt, to aggregate, to reduce, or to impose a lighter punishment decision; Section 3 discusses how similar cases have been dealt with differently and with the tremendous gap in the final fine decision. One reason for inconsistent enforcement is China’s lack of a sufficient mechanism to exert control the over broad discretion granted by the AML to the enforcement agency. This calls for a unified Fine Guidelines and more effective procedural control. Section 4 discusses how China can draft a feasible AML Fine Guidelines to narrow down the room for discretion, and to make transparency, hearing rights, and provision of reason meaningful and workable.

**Section 1: Determination of Jurisdiction, Defining Undertaking and Sales Revenue**

**Jurisdiction**

* Determination of Jurisdiction
  
  According to the AML, the State Council established an Anti-Monopoly Commission (AMC) to conduct research and draft policies relating to competition, and to formulate and issue Anti-Monopoly Guidelines. The AMC does not take any specific enforcement role. The NDRC has jurisdiction over price-related offenses; and the SAIC has jurisdiction over non-price related offenses. The NDRC’s AMB and the SAIC’s Anti-Unfair Competition and Anti-Monopoly Law Enforcement Bureau (CLEB) are in charge of the investigation work respectively. Furthermore, the NDRC issued a rule in 2010, which delegated power to Provincial Development Reform Commissions (DRCs) to investigate and reach penalty decisions against price-related monopoly conducts. The SAIC, however, allows Provincial Administrative and Industry Authorities (AICs) to investigate and impose punishment on a case by case approval basis.

  Where an undertaking with dominant market position sold a dominant product at an excessively high price such as double price, it may be deemed as price-related monopoly behavior. If the undertaking
combined another product whose price was the same as the dominant product, and forced the consumer to buy it together with the dominant product, the tied-in sale, at a first look, was not a price related behavior, but behavior related to quantitative considerations. In effect, the tied-in sale and the double-price cases have the same result on the buyer. Market competition is, in its essence and in the end, a competition in price. Western scholars have a hard time understanding the rationale behind China’s separation of monopoly conduct into two separate price-related and non-price-related understandings. A possible explanation for this distinction is to leverage the NDRC’s enforcement expertise. The NDRC has enforced Price Law for many years before the AML was enacted and gained expertise on the investigation of excessive pricing offences. By this means the NDRC sustained its jurisdiction in this area.

**Coordination between the SAIC and the NDRC**

Where an undertaking’s monopoly conduct has both a price-related aspect and non price-related aspect, how did the SAIC and the NDDRC exercise the jurisdiction? From observation of the published decisions, the SAIC only punished the undertaking’s non price-related offence.

The practice is a little bit different, however, at the NDRC and local DRCs. When the AMB investigated Qualcomm for the latter’s abuse of dominant market position, it based its jurisdiction on Qualcomm’s “discriminative patent royalty fee”. In the final decision, the NDRC not only punished Qualcomm for its price-related offence, but also non price-related offence, such as tied-in sale and imposing unreasonable transaction terms, which actually falls into the SAIC’s jurisdiction. Neither public notice on the investigation nor its penalty decision gave explanation as to why the NDRC can exercise jurisdiction over non price-related matters.

*To solve the jurisdiction conflict, it’s best to combine the AML enforcement agencies into one agency in the future. Currently, the NDRC and the SAIC may need to establish regular communication mechanisms. The agency who launched the investigation at first may ask for clearance from the other agency.*

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agency after discovering existence of the other agency’s jurisdiction, or it can call to set up a joint case team to investigate the case and render a punishment decision separately.

**Jurisdiction between the NDRC and Provincial Enforcement Agencies**

Among the SAIC system, the SAIC has not made any punishment decision yet, its CLEB conducted investigation on Tetra Pak and Microsoft, both of which are still in process, and Beijing Shankai Sports International whose investigation was terminated after receiving satisfactory commitment. All punishment decisions were made by local AICs with SAIC’s pre-approval. The SAIC’s *Rules on the AML Enforcement Procedure* divided the jurisdiction between SAIC and Provincial AICs. It stipulates that the SAIC shall conduct investigation in cases of national wide impact and Provincial AICs have jurisdiction over cases which happened in the Province or where major offence occurs in the Province.

Both the NDRC and Provincial DRCs rendered punishment decisions for monopoly offences. The NDRC’s *Anti Price Monopoly Administrative Enforcement Rules* only states that NDRC shall investigate big and important cases while Provincial DRCs in charge of enforcement in the province.

Which cases are “big and important” cases? There has been no clear guidance provided by the NDRC. In practice, Case A7 (Zhejiang insurance industry) was investigated and fined by the NDRC, Case B1 (Maotai liquor) was handled by Guizhou DRC and Case B2 (Wuliangye liquor) was probed and punished by Sichuan DRC. From the perspective of competition impact, Case A7 in Zhejiang only affected the local market; it could have be entrusted to Zhejiang DRC to investigate, but the AMB stepped in. Maotai and Wuliangye’s monopoly conduct in Case B1 and Case B2 affect the national liquor market. Why was the NDRC’s investigation task entrusted to local DRCs? In Case A9 (Shanghai gold and platinum ornament industry), although the headquarters of investigated jewelry shopping centers located in Shanghai, “those jewelry shopping centers have nationwide chain stores, and their pricing

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9. If we take into consideration of other cases under Appendix I and Appendix II, it’s obvious that China’s top three insurance companies have committed monopoly offences in Zhejiang, Hubei, Hunan, Xinjiang and other provinces. It’s understandable that the AMB may investigate Case A7 in Zhejiang because there is nationwide insurance price collusion phenomena, but the final decision was issued to Zhejiang branch companies but not to the full insurance group companies.
decision affects thousands of chain stores throughout the country”, the aggregated sales of those chain stores take an 85% share of the national market. It should have been investigated by the AMB instead of the Shanghai DRC in that case. Finally, Guizhou, Sichuan, and Shanghai DRCs all imposed a floor fine of 1% of last year’s sales revenue of their major taxpayers, which reflects one important defect of conferring the AML enforcement power to local DRCs, which is to open a door for local protectionism.

To solve the problem, it’s suggested that all cases of national impact or cross the provincial border shall be investigated by the central government, while at the provincial level, AML enforcement agency should limit its jurisdiction to cases that affect the provincial markets.

Determination of Undertaking

A Company, Group of Companies or Branch Company

Chapter VII of the AML set forth an undertaking’s liabilities for a monopoly offence. As to the definition of undertakings, Article 12 stipulates that, “For the purposes of this Law, an undertaking shall be referred to as any natural person, legal person, or other organization that engages in product manufacturing, business operations, or providing services.”

The concept of undertaking may encompass several legal entities or natural persons. Subsequently, the corporate law principle of various legal personalities gives way in the area of competition law to the economic concept of an undertaking. Thus the undertakings under the AML could be a company group. For example, in Case C3 (Qualcomm’s abuse of dominant market position), Case B1 (Maotai’s resale price maintenance), Case F5 (Chongqing Gas Group Corporate’s abuse of dominant market position), the full company group has been treated as the undertaking who violates the law. This understanding echoes the EU’s concept of Single Economic Entity under its competition law.  


“[T]he fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.” Case C-286 Stora Kopparbergs Bergslags AB v Commission, [2000] ECR I-9925, [2001] 4 CMLR 12
But in some cases, like Case E4 (Liaoning construction material industry), Case A13 (Shanghai Chrysler auto dealers), Case A15 (Hubei Faw-Volkswagen auto dealers), Case A9 (Shanghai gold and platinum ornament industry), etc., it is not the full company group but the company, which directly committed the offence, was treated as the undertaking committing offence. Similarly, in a series of insurance industry cases like Case A2, Case A4, Case A7, Case E5, Case E6, Case E7, Case E8 and in tobacco wholesaler cases, such as Case F3 and Case F4, the local DRCs and AICs only list branch company or even sub-branch company as the undertaking which carried out the monopoly conduct. Since the sales revenue of a company is lower than that of the full company group, the base of fine shall be reduced substantially and final fine will be much lower, thus reducing the deterrent effect of a penalty decision. Furthermore, the situation is even worse where the authority only punishes the branch company or even the sub-branch company. Where a fine decision was addressed to a subsidiary but not the company group, the issue may not even be reported to the Board of the company group and to draw its attention, which will delay the Board’s remedial action to improve corporate governance and strength anti-monopoly compliance. Thus, similar illegal conduct may occur again in other subsidiaries of the same company group.

To address the issue, the State Council’s AMC needs to make rules to clarify the range of undertakings, especially whether the EU’s single economic entity concept shall be recognized in China’s AML enforcement. Where a subsidiary commits an offence, the company group should be punished unless the company group can adduce evidence to prove that its subsidiary was independent in taking the challenged business conduct. The subsidiary’s offence may be considered as a factor affecting the geographic market in evaluating the monopoly conduct’s impact on competition. Secondly, if the AMC adopts the policy that a branch company could be treated as an undertaking under the AML, it should also...

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12. For example, all insurance companies, which are public companies, did not disclose their subsidiary’s involvement in the price cartel in Zhejiang Province, and the issue was not listed on Board’ meeting agenda in the year of 2013.
require the AML enforcement agencies to send a copy of penalty decision to the head-quarters of the company, so that the company group can improve its risk control in a timely manner.

**Industry Associations**

Article 46 of the AML stipulates that, “If an industry association violates this Law by organizing undertakings in that industry to conclude monopoly agreements, the AML enforcement agency may impose a fine of no higher than RMB 500,000. In serious cases, the administrative authority for the registration of social groups may be able to deregister such industry association in accordance with the law.”

In the cases covered under Appendix I, there are industry associations organizing monopoly agreements in 11 out of 15 horizontal cases handled by Provincials AICs, and in 6 out of 15 cases handled by the NDRC and Provincial DRCs. Those cases are concentrated in the insurance, travel agency, construction material, and jewelry industries. According to an incomplete statistic conducted by China Insurance Industry Association, the insurance industry associations in Hunan, Xinjiang, Zhejiang, Henan, Liaoning, Anhui and other Provinces have been investigated and/or punished by authorities because of their self-regulations composed of monopoly agreements. ¹³

In Case A5 (Yunnan Lijiang travel agency industry), Case A7 (Zhejiang insurance industry), and Case E11 (Sichuan Yibing brick and tile industry), industry associations which organized the cartel have been imposed the highest fine of RMB500,000. In Case A9 (Shanghai gold and platinum industry), Shanghai Gold and Platinum Ornament Industry Association has organized the price cartel for more than 10 years, but it paid only RMB500,000 pursuant to the penalty decision and continued operating. The punishment of deregistering the industry associations has not ever been imposed yet. One reason for the defect is that there is no statutory obligation for the AML enforcement agencies to share case information with the administrative authority for the registration of social groups. If the AML enforcement agency did

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¹³ Nov.22th, 2013, Legal Daily, A6
not request to deregister the industry association, the industry association did not voluntarily report its
offence, the administrative authority for the registration of social groups would never be able to get the
monopoly offence information, not to mention to make judgment whether the offence is a serious case
and the association should be deregistered.

To solve the problem, it’s suggest that: (i) the AML enforcement agency should publicize penalty
decisions, and send a copy to the administrative authority for the registration of social groups where an
industry association violated the AML; (ii) the AML enforcement agency should issue a written
deregistration proposal to the administrative authority for the registration of social groups where an
industry association has committed a serious offence.

Determining “Last Year” Sales Revenue

According to Article 46 and 47, where an undertaking violated the AML, the relevant
enforcement agency shall order the undertaking to stop the illegal conduct, confiscate illegal gains, and
impose a fine between 1% and 10% of the undertaking’s sales revenue in last year. Therefore, the first
step to set the fine is to calculate the undertaking’s sales revenue in last year.

Is the “last year” a reference to the last year before the monopoly conduct occurred, the
investigation started, or the punishment decision was issued? The enforcement practice varies. The AML
enforcement usually uses the year before the punishment decision was issued as the basis to calculate the
fine. In Case F5 (Chongqing Gas Group Corporate’s abuse of dominant market position), however,
Chongqing AIC started investigation in 2011 and issued penalty decision in 2014, finally the year of
2010, the year before the investigation, was selected as the “last year”. But, in Case C3 (Qualcomm’s
abuse of dominant market position), the AMB started the investigation in 2013 and the NDRC issued the
decision in 2015, but the penalty decision picked the year of 2013, neither 2012 nor 2014, as the “last
year”.
Is the term “sales revenue” aforementioned referring to the undertaking’s complete products’ sales revenue or the sales revenue of relevant products concerned in the case? There are also different understanding of this. (i) In most cases, it is the sales revenue in the products concerned which decides the result, in other limited cases, the company’s complete revenue was used instead. For example, in the monopoly agreement cases, the NDRC only counted in the auto insurance revenue in Case A7 (Zhejiang insurance industry), the investigated products’ revenue in A11 (Japanese auto parts bid-rig) and A12 (Japanese auto gear); in Case B2 (Wuliangye’s resale price maintenance), Sichuan DRC specified that the amount of fine is one percent of Wuliangye’s sales revenue of investigated product in last year. As to the abuse of dominant market position offence, Jiangsu AIC only cared about the sales revenue of the high end cigarette, the dominant product in Case F4 (Peizhou tobacco). But in the Qualcomm case, also an abuse of dominant market position case, the NDRC’s fine was based on Qualcomm’s complete sales revenue in Mainland China, although the NDRC only found Qualcomm’s dominance in CDMA/WCEMA/LTE mobile communication essential patent licensing market and baseband chip market. (ii) In the same cases, the AML enforcement agency even used different criteria when it calculates the sales revenue. E. g, in Case B3 (Eyeglasses and contact lens), the NDRC picked the sales revenue in contact lens product in last year as the baseline to calculate the fine to Bausch Lomb (Beijing), but it counted in the complete sales revenue in all products for Johnson Vision Care (Shanghai) Ltd. and other undertakings in the same case.

To ensure that every case is dealt with on an equal and fair basis, the State Council’s AMC should enact guidelines, or the SAIC and the NDRC should issue joint rules, to specify how the sales revenue should be determined, whether it is that of complete products or of concerned products, and whether it’s the revenue of the last year before the penalty decision was made or the last year before the investigation started.

Section 2: Factors Considered in Penalty Decisions

Illegal Gains
According to Article 46 and 47, where an undertaking violates the AML, the relevant enforcement agency shall confiscate its illegal gains, and concurrently impose a fine between 1% and 10% of the undertaking’s sales revenue in the last year. The NDRC further issued the Several Opinions on Clarifying the Administrative Penalty Power in Price Law Enforcement in 2014, Article 11 of that Rules make it clear that “where there is illegal gains, it shall be confiscated”, Article 15 of the Rules further stipulates that the Rules shall be applied as a reference in price-related monopoly law enforcement.

Corrective justice could be pursued through taking from the antitrust violator any benefits from the violation, e.g., disgorge the gains earned. The confiscation of illegal gains also helps to restore the market competition to the normal situation before the monopoly offence. Comparing with imposing a fine, confiscation of illegal gains contributes more to the deterrent effect on the violator as it reduces the law breaker’s expected benefits from the offence. If the illegal gains were not confiscated, the law offender may still make profit after deducting the fine it paid to the government, which may induce more undertakings to commit monopoly conducts. To deepen our understanding of the importance of disgorgement, we may take a look to a price cartel case handled by Shanghai DRC in 2013. In Case A9 (Shanghai gold and platinum ornament industry), the basis of fine imposed was the business revenue from gold ornament and platinum ornament, five gold ornament sellers were punished and total fine was RMB10,000,000, 1% of the revenue produced by concerned products in 2012, but the illegal gains were not confiscated. The price cartel had been operated for more than 10 years, the price conspiracy covered all gold, silver and other jewelries, and the overcharge on the relevant product is around 23%

Laofengxiang, one of the five companies under investigation, had an annual business revenue of RMB 25,550,000,000 in 2012. The illegal gains from 10 years’ price conspiracy for one participating undertaking, Laofengxiang, is much higher than the total fine imposed on five cartel members. After the punishment decision was announced, Laofengxiang’s stock price increased quickly, beating out the then
weak Shanghai Stock Composite Index, because the punishment decision was much weaker than the public expected.\textsuperscript{14}

Admittedly, the calculation of illegal gains is not an easy task. For a price related offence, such as a price cartel, or charging unfair high price by a dominant market player, it will be relatively easier for the NDRC to calculate the overcharge by a law offender on downstream companies or consumers. For a non price-related offence, which falls into the SAIC’s jurisdiction, it may be a bit more difficult to calculate the illegal gains. Therefore, the SAIC issued \textit{Rules on The Determination of Illegal Gains in Administrative Penalty Cases} in 2008. Article 2 of the Rules specifies: “Illegal gains refers to the violator’s complete revenue after deducting those reasonable expenses directly used for the manufacture and business operation activities.” \textsuperscript{15}

There are two issues in the enforcement practice which are not in line with the AML and relevant Ministry rules regarding to the confiscation of illegal gains. 

\textbf{Firstly, in cases handled by the NDRC and provincial DRCs, illegal gains were not confiscated.} Regardless of the clear and specific requirements set forth by the AML and the NDRC, neither the NDRC itself nor the Provincial DRCs ever explained why they had not disgorged the illegal proceeds from relevant undertakings. For example, there is no confiscation of illegal gains from Maotai, Wuliangye, and auto dealers in Case B1, Case B2, Case B5 and Case B6, where monopoly offences of setting minimum resale price have been found. Neither did the illegal gains disgorged in horizontal monopoly agreement cases in the insurance industry, such as Case A2 and Case A7, and in the cement industry, such as Case A8, where overcharge existed. In Case C3, while the NDRC challenged Qualcomm’s practice of charging excessive high patent royalty, the NDRC failed to specify the extent


\textsuperscript{15} Cf. The State Council’s Legislative Affairs Office’s official reply to Ministry of Commerce in 2003, “Illegal gains are the complete revenue acquired from the illegal activities.” SAIC’s interpretation on \textit{Anti-Unfair Competition Law} in 1999 when that law also covers monopoly conducts at that time: “Illegal gains include the following situations: fees or expenses charged higher than statutory standard fee, fees or expenses charged without statutory grounds.”
and amount of unreasonable royalty fee in its decision, and more significantly, the NDRC failed to confiscate the illegal gains in the penalty decision.

As to faithfully implement the AML’s requirements in this regard, the SAIC system did a relatively better job than the NDRC and Provincial DRCs. In the 15 horizontal monopoly agreement cases handled by local AICs, illegal gains were confiscated in three cases, i.e. Case E1 (Lianyungang concrete), Case E2 (Taihe LPG) and Case E4 (An’yan second-hand car); illegal gains were exempted from confiscation in Case E3 (Liaoning construction material) because the violator faced a loss in the year the illegal activity was committed. In six penalty decisions against the conduct of abusing dominant market position, illegal gains were confiscated in two cases, i.e., Case F1 (Huizhou water) and Case F6 (Dongfang water); illegal gains were exempted from confiscation in Case F4 (Peizhou tobacco) because the price and quantity of concerned products are set forth by government through pre-announced plan and the relevant illegal conduct did not add new revenue to the violator. 16

Secondly, in several cases, AICs declared that the undertaking should be treated as no illegal gains as they found it’s difficult to second guess the amount of the illegal gains. In Case E11 (Yibing brick and tile industry), Sichuan AIC did not confiscate illegal gains from one offender because it’s difficult to calculate illegal gains. In Case F3 where firework dealers divided market, the Inner Mongolia AIC claimed that it’s difficult to separate the market deal from coerced transaction in that case, therefore the violator’s illegal gain shall be assumed as no illegal gain.

In addition to confiscation of illegal gains, another important issue is the relationship between the confiscation and return the overcharged money to consumer or other stakeholders, which unfortunately is not specified under the AML. Consumers are not the directly beneficiary if illegal gains are confiscated and paid to the State Treasury. Actually, the NDRC has rich experience in disposing the illegal gains as it

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16. The tobacco case is worthy of further discussion. As it is a case where an SOE, whose de facto monopoly status was recognized by Article 7 of the AML and China’s Tobacco Exclusive Distribution Law, was punished for its conduct of abusing its exclusive distribution position to discriminate against various dealers with the result of favoring one dealer called Gold Eagle. Gold Eagle was granted more quotas to sell top end cigarettes and therefore gained profits thereof. Gold Eagle happened to be an investment vehicle established for the interests of the Peizhou Tobacco Company. The Jiangsu AIC, however, did not go further to confiscate the illegal gains transferred to the violator’s affiliated companies.
has implemented the Price Law for many years. In a punishment decision issued against Samsung and other five LED screen manufacturers for their price conspiracy in 2013, the NDRC applied *Price Law* to order those undertakings to return unjustified profits to downstream industry, those which cannot be returned shall be confiscated. This disposition is very professional, nevertheless, the NDRC did not follow this good practice in the AML enforcement. It should be added that in the monopoly case of fixing minimum resale price, both Maotai and Wuliangye voluntarily returned security bond, which they illegally charged in the past, to the dealers. In Case F6 recently publicized by the SAIC, Hainan Province AIC ordered the Dongfang Water Company to return the service bond to the users. However, only principle was returned, the lawbreakers still keep the interest portion of the overcharged money, which was also a substantial amount.

*To address the aforementioned issues, the AML enforcement agencies should strictly implement the provisions concerning disgorgement of illegal gains set forth by the AML. Where the AML enforcement agency fails to confiscate the illegal gains, relevant agencies and officials should be held liable for the omission. In addition to that, the State Council’s AMC should issue guidelines to define the calculation formula of illegal gains and clarify the relationship between the confiscation and restitution.*

**Exemption**

**Monopoly Agreement Exemption**

Article 15 of the AML exempted liability for 7 types of agreement which have been concluded:

“(i) To improve technologies, or to conduct research and development of new products; (ii) to enhance product quality, reduce cost, increase efficiency, or unify product specification, standards, or implement division of work based on specializations; (iii) to increase SMEs’ operational efficiency and enhance their competitiveness; (iv) to save energy, protect environment, assist in disaster relief work, or realize other social public interests; (v) to relieve severe decrease of sales or apparent overproduction during times of economic depression; (vi) to protect legitimate interests in foreign trade and foreign economic cooperation; and (vii) other circumstances specified by the law or the State Council.” With regard to
circumstances which fall under items (i) to (v), Paragraph II of Article 15 further requires the undertaking to prove that the agreements concluded would not severely limit competition in the relevant market and may enable consumers to share the interests resulted therefrom.

**Horizontal Agreement Exemption**

In all 15 horizontal monopoly agreement cases investigated, Provincial AICs stated clearly in 12 cases that Article 15 of the AML was not apply and corresponding reasons were briefly provided in the penalty decisions.

As to the horizontal cases dealt by the NDRC and local DRCs, there is no case where the applicability of Article 15 has ever been discussed in the publicized decisions. The NDRC may consider the exemption issue in practice. The cement producers in several regions concurrently ceased production and increased sales price in the beginning of 2013. As Appendix II indicates, the AMB set up 20 investigation panels in March and dispatched them to investigate suspected price parallel behaviors, targeting cement companies in Beijing, Chongqing, Jilin, Hunan, Hubei, Jiangxi and other Provinces. Thereafter, Lu Yanqun, the Deputy Department General of the AMB held a face to face meeting on May 2nd and received explanation from China Construction Material Group Company and North Cement Company on the overcapacity in the cement industry and parallel capacity-cut conducts. ¹⁷ The details of the meeting were not publicized. According to a media report, the leaders of China Cement Industry Association visited the NDRC to make a presentation on the parallel price behavior in the cement industry. They submitted detailed market data to support their exemption request, including the overcapacity in cement industry, the thin profit of the industry in 2012, and the relatively short period of the parallel behavior. Finally, “The NDRC determined that the parallel conduct in the industry is not a monopoly offence, but several cement companies in Northeast China shall be punished because of their

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¹⁷. 10 China Price Supervision and Check (2013)
monopoly conduct of jointly locking the manufacturing facility.” 18 After the meeting, three cement companies in Jilin were punished by Jilin DRC at the mandate from the NDRC, no other cement company has been punished by the NDRC or local DRCs thereafter. It appears that the NDRC exempted the horizontal agreement in the cement industry. But the NDRC did not confirm the news report, neither did it disclose further information on its website.

It is interesting to compare the NDRC’s view with the SAIC’s position concerning the industry’s exemption request. Liaoning Construction Material Industry Association organized its member companies to jointly cease the cement production in early 2013 and was caught by Liaoning AIC.

The Association asked for the exemption and claimed for the application of Item (iv) and Item (v) under Paragraph I of Article 15. The AIC rejected and provided the following explanations. Firstly, Article 15 applies to the unusual circumstance of macro depression or economic crisis, while the loss in the current case was the result of normal commercial risk from over investment in expanding production capacity. Furthermore, there is no direct relationship between the undertakings’ joint closure behaviors and environment protection or energy saving. Secondly, the application of the exemption was based on two required conditions set forth by Paragraph II of Article 15. The evidence in the current case indicated that the joint activity of ceasing the production brought about a huge damage result to the cement final product market, substantially increased the manufacture cost of downstream industry, and finally impaired consumers’ interests. Therefore, the conditions for the exemption have not been satisfied. Liaoning AIC levied a fine against the Association. The punishment decision indicated that it “has been approved by the SAIC”, thus hinted the SAIC’s attitude regarding the exemption, i.e., the loss in the industry or the company is not a legitimate reason to organize a horizontal cartel or to stop the production to maintain the sale price over the competitive level.

18 “Locking the manufacture facility” refers to the practice adopted by three cement companies, which locked the other’s cement facilities. The cement facility shall not be able to put into use without keys from all three companies. Chen Qijue, No Monopoly Conduct after the Investigation in Cement Industry, Shanghai Securities News, Mar. 26th, 2013
In the US, antitrust values enjoy a very wide consensus and price-fixing is considered to be immoral, like theft.\textsuperscript{19} In China, it’s very common for an industry association to organize and implement a self-imposed protection price, as this was deemed as an effective way to avoid evil competition. In some overcapacity industries, the industry association’s conduct of jointly enforcing the production cut or manufacture facility closure destroyed the competition mechanism in the industry, saved those companies which should have been exited from the market, and passed on the cost to consumers and downstream industries. The SAIC’s view, comparing with the NDRC’s position, is more close to the letter and spirit of the AML.

\textit{Vertical Agreement Exemption}

As to the vertical cases dealt with by the NDRC and local DRCs, there is only one case where the applicability of Article 15 was briefly mentioned. In Case B4 (baby formula milk powder), where 6 formula milk powder producers were required to pay RMB 668,730,000 as punishment for their conduct of fixing resale price, the NDRC mentioned in its public announcement that, “in the course of investigation, companies under probe admitted that their resale price maintenance conducts were suspected monopoly offence, and they failed to prove that the price control activities satisfied with the exemption conditions set forth by Article 15 of the AML.” It can be deduced from the statement that the target companies did raise exemption requests. The NDRC’s statement was so concise that observers were unable to know whether the “failed to prove” refers to the situation where those companies did not provide any evidence, or whether those companies provided evidence but failed to convince the NDRC. The European Commission issued \textit{Guidelines on the Vertical Restrictive (Competition) Agreements} in 2010, which specified situations where the vertical restrictive agreements may be exempted from challenge for prevailing efficiency reasons. But the NDRC has not issued any rules in this regard. It’s yet to see how NDRC’s understanding of those two preconditions were set forth by Article 15.

\textsuperscript{19} Donald I Baker, The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging, \textit{69 George Washington Law Review} 693, at 714
To solve the aforementioned problems, the State Council’s AMC should clarify in more detail the conditions for applying the exemption and evidence should be provided by the target companies.

**Immunity from Punishment**

**Leniency Program**

To provide incentive to cartel members to report monopoly offences and provide key evidence, both the U.S. and EU have established leniency programs under their competition law. Immunity or reduced punishment may be provided to those companies who cooperated with the competition authority to unveil the cartel activity. For certain types of monopoly offences, in particular secret price cartels, the participating undertakings and their staff could be the only information source. The leniency provided to the informer and the heavy punishment imposed on other cartel members changed the consensus of shared benefits and cost among various cartel members. The AML also introduced the “carrot and stick” policy to beat cartel activity. Article 46 of the AML stipulates that where an undertaking voluntarily reports information concerning the monopoly agreement to the AML enforcement agency and provides important evidence, it may be imposed a mitigated punishment or be exempted from punishment as the case may be.

In China, the leniency program is applicable to both horizontal monopoly agreement and vertical monopoly agreement. But the US and EU only grant leniency to hard-core cartels, i.e. price fixing, bid rigging, market division, or customer allocation schemes among competitors. As the horizontal agreement is organized in a secret way, it is more difficult to detect, therefore the leniency program was applied to break the information dissymmetry.

The NDRC and the SAIC both issued rules in 2009 to implement the AML. Both agency may grant exemption of punishment to the undertakings, who are the first to report the establishment and operation of monopoly agreements and provide important evidence, so that the enforcement agency can investigate and punish the monopoly agreements. The SAIC Rules clearly announced that the immunity
shall not be applied to undertakings who have organized the monopoly agreement. This is in line with the practice in the US and EU. In the US, amnesty is not available to a company that coerced another party to participate in the illegal conduct or clearly was the leader in, or originator of, the illegal scheme. 20 In EU, an undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity. 21 The NDRC’s Rules, however, lack such restrictions. The NDRC’s Rules did specify that the first informer may be granted immunity, the second informer maybe cut its fine at the level of 50% or higher, the other late comers may be granted the reduction of punishment of no higher than 50%. This is similar to the US policy. The US Department of Justice’s practice is to agree to a cooperation discount with an average in the order of 30 to 35 per cent for companies that are the second to cooperate. A third cooperating company receives a significantly lower discount, the fourth even less, and so on. 22 Important evidence refers to the evidences making key contribution to the identification and determination of monopoly agreement.

**Reporting Cartel Offences to Preempt Investigation**

Based on the case information, Hitachi in Case A11 (Japanese auto parts) and Nachi in Case A12 (Japanese auto gear) are the only two companies which provided the intelligence of monopoly agreement before the NDRC officially launched the investigation. “Twelve Japanese auto parts manufacturers were imposed a fine of RMB 1,200,000,000. We started the investigation after relevant companies reported the cartel offence to us.” 23 There is no reported voluntary provision of cartel intelligence before the investigation in the cases handled by the SAIC and local AICs.

Although the AML use “may be” instead of “shall be” to grant leniency to an informer, the NDRC exempted punishment to Hitachi and Nachi. This practice may help the undertakings to get a

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20. ABA Section of Antitrust Law, Antitrust Compliance---Perspectives and Resources for Corporate Counselors, 2005, P.48
23. Xu Kunlin, Sep. 11th, 2014, the State Council’s Press Conference on the AML Enforcement
definite and ensured expectation of receiving immunity as an informer, and encourage more companies to report undiscovered monopoly agreement. The NDRC’s enforcement philosophy is also in line with US and EU practice.

**Providing Intelligence and Important Evidence in the Course of an Investigation**

There is no description of this in the decisions publicized by the SAIC and provincial AICs. There are, however, cases where the NDRC or local DRCs granted immunity or fine reduction to informers after the investigation began.

The following undertakings have been exempted from punishment because of voluntarily reporting to the AML enforcement agency intelligence and provision of important evidence: (i) one companies in Case A3 (sodium hyposulfite); (ii) four companies, i.e., Wyeth Nutrition (China), Wyeth (Shanghai) Trading Company, Zhejiang Beingmate Co. Ltd, and Meiji Milk Trading (Shanghai) Company in Case B4 (baby formula milk powder); (iii) two companies in Case A14 (Hainan concrete block); (iv) Dijia Crystal Shopping Center in Case A10 (Sanya crystal); (v) Hubei Aozhe in Case A15 (Hubei FAW-Volkswagen auto dealers); (vi) Five insurance branch companies in Case A2 (Hunan Loudi insurance industry).

The following undertakings’ fine has been reduced because they voluntarily reported cartel intelligence and provided important evidence: (i) Guangdong Baohai in Case A1 (Guangdong sea sand); (ii) three companies in Case A3 (sodium hyposulfite); (iii) China Life Property Insurance Zhejiang Branch Company and China Pin’an Property Insurance Zhejiang Branch Company in Case A7 (Zhejiang insurance industry); (iv) companies other than the first informer in Case A11 (Japanese auto parts) and Case A12 (Japanese auto gear).

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24 In Case A7 (Zhejiang insurance industry), as Zhejiang Insurance Industry Association was the leader and organizer of the monopoly agreements, all members of the Association were deemed by the NDRC as non-leaders and non-organizers, therefore they were all imposed a gentle fine at the level of 1% of relevant product revenue in last year. China Life Property Insurance Zhejiang Branch Company was further deducted 90% of its fine as it is the second company to provide important evidence, and China Pin’an Property Insurance Zhejiang Branch Company was further deducted 45% of its fine as it is the third company to provide important evidence.
To destroy the cartel organization’s unity and to encourage competition to disclose important evidence earlier, the AML enforcement agency usually limits the immunity treatment to the first informer. Thus cartel members should compete with each other to become the first running to the house of the enforcement agency. This “winner-takes-all” dynamic generates tension and mistrust among cartel members, and further undermines the cartel’s unity.

But in some cases, as mentioned before, the NDRC and local DRCs granted leniency to several companies, including four companies in Case B4, and even five companies in Case A2, this is very unusual. If the first undertaking did not provide important evidence which was assumed to have significant added value to help the government to detect and punish the cartel, why should the enforcement agency exempt it from the punishment? If the first undertaking provided important evidence, how can other late comers in the line still provide important evidence and even be exempted from punishment? This also violated the NDRC’s rule that the exemption shall be provided only to the first cooperative cartel participant!

As the NDRC did not provide very detailed information and disclose what specific evidences were ever received from the informers, it’s hard for us to second guess how the NDRC determines which type of evidence and by whom added value, making it sufficient to be treated as important evidence. From the limited information disclosed in the NDRC and local DRCs’ concise decisions, evidence such as the monopoly agreement concluded, documents concerning the payment of security bond, the proof related to jointly shut down the production facility, and meeting minutes of monopoly agreement have been accepted as important evidence. Perhaps there are other items can be added to the list of “important evidence”? This decision waits for the NDRC’s clarification and guidelines.

Minor Illegal Conduct

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25 ABA Section of Antitrust Law, Antitrust Compliance---Perspectives and Resources for Corporate Counselors, 2005, p.49
According to Article 27 of the *Administrative Penalty Law*, “Where a person committed a minor illegal act, and promptly put it right and caused no harmful consequences, no administrative penalty shall be imposed.” When applying aforementioned provision into practice, the SAIC and the NDRC have different attitudes.

When Hunan AIC investigated Case E5 (Hunan Yongzhou insurance industry), PICC Yongzhou Branch Company requested for the application of Article 27, claiming that it did not reap monopoly gain from the establishment of New Auto Insurance Center which has been used as the platform to divide market, and it quickly and actively dissolved the New Auto Insurance Center. The Hunan AIC, however, rejected its application, arguing that the illegal activity has already led to harmful consequence to the society. On the contrary, when Hubei DRC dealt with Case A15(Hubei FAW-Volkswagen auto dealers), it exempted Wuhan Jiaao’s liability because the undertaking only committed a minor illegal conduct, and promptly put it right and caused no harmful consequences.

*There is no objective or measurable criteria to decide whether an illegal activity is minor. To restrict overly broad discretion granted to the AML enforcement agency, the central government should issue rules to clarify how Article 27 of the Administrative Penalty Law should be executed.*

**Factors Considered by AML Enforcement Agencies in Setting the Amounts of Fines**

The AML only stipulates that the fine imposed on monopoly offence shall be in the range between 1% and 10% of the undertaking’s sales revenue in last year. Now, let’s turn to real cases to understand what factors have been considered by the AML enforcement agencies when they set the amount of fines.

**Aggravating Factors**

- **Leaders of a Cartel**, such as: (i) Dongguan Jianghai and Guangdong Baohai in Case A1 (Guangdong sea sand), where they received a fine at the level of 10% of sales revenue; (ii) the Lijiang Travel Agency Industry Association in Case A5 (Yunnan Lijiang travel industry) and
Zhejiang Insurance Industry Association in Case A7 (Zhejiang insurance industry), where each of them received the highest fine of RMB 500,000; (iii) Shanghai Yueye in Case A13 (Shanghai Chrysler auto dealers) and FAW-Volkswagen Sales Company in Case B6 (FAW-Volkswagen resale price maintenance), where each received a fine at the level of 6% of its sales revenue;

- **Companies earning a major portion of profits from the monopoly offence**, such as Shenzhen Donghai in Case A1 (Guangdong sea sand) where it received a fine at the level of 10% of sales revenue;

- **Recidivism and offence occurring over a long period of time**, such as the Aisan-ind, Mitsubishi, and Mitsuba in Case A11 (Japanese auto parts bid-rig), NTN in Case A12 (Japanese auto gears), where each of them received a fine starting at the level of 10% of sales revenue in relevant products;

- **Commission of a serious offence and with active rectification of illegal conduct**, such as the Guangzhou Biostime in Case B4 (baby formula milky powder) where it received a heavier fine at the level of 6% of its sales venue.

**Mitigating Factors**

The major factor considered by the enforcement authority in imposing a lighter fine is the company’s cooperation in the investigation and active rectification of the illegal activity, such as in Case B1 (Maotai’s resale price maintenance), Case B2 (Wuliangye fixing resale price), Case B3 (Eyeglasses and contact lens), and in most cases dealt with by Provincial AICs, where a fine at the level of only 1% of sales revenue has been imposed. It is more obvious in Case A8 (Jilin cement). In that case, since Yatai Company and Jidong Company were not cooperative in the investigation, each of them received a fine around 2% of their sales revenue respectively. For the North Cement Co. Ltd., it was imposed a fine at the level of 1% of its sales revenue as it cooperated with the investigation agency.

There has been no objective criteria ever announced by authorities to determine “cooperation” during the enforcement procedure. Whether a target company is cooperative or not is usually decided by
the enforcement officials’ subjective judgment, which is easily in conflict with the target company’s defense rights. To take an example, a company may present proof before the investigation officials, arguing that its business practice is compatible with the AML or is in line with the provisions of exemption or mitigation. In the enforcement practice, if the company defends its rights in very early stage of the investigation, the defending behavior could be recognized as “not acknowledge its illegality” or “uncooperative”, and may be imposed a heavier punishment. “In the course of the AML investigation, the enforcement agency usually requires the company under probe to submit or sign on a report to admit its illegality, and shows its attitude whether satisfied with a proposed fine figure. If the company’s self-assessment report is unsatisfactory, it will be demanded to resubmit another one, or it will be faced heavier punishment for its uncooperative attitude. Under such circumstance, and also in seeking for a lighter fine, most undertakings submit a report and evidence in the very early stage of the investigation to admit that it committed the challenged conduct. This also means that it’s very difficult for the target company to bring an administrative reconsideration request or lodge an administrative suit against the punishment in the future (as it already admitted the offence with written acknowledgments”).

But how can an enforcement agency compel an undertaking to provide it with answers which might involve an admission of an infringement? It is incumbent upon the enforcement agency to prove that the companies under investigation have committed suspected monopoly conducts and those conducts violated the AML. The trade between cooperation in the investigation stage and reduction of fine in the final decision is very risky, which was already prohibited by Administrative Penalty Law, “Administrative agency shall not impose heavier penalties on the parties just because the parties have tried to defend themselves.”(Article 32)

There is no direct link between the undertaking’s cooperation in the investigation process and the nature of the challenged monopoly offence which the AML enforcement agency should be considered in

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making a fine decision. Therefore, except for the leniency program, the cooperation in the investigation process should not be listed as a mitigating factor.

The punishment against the undertaking’s conduct of refusing or obstructing the investigation, which is a separate offence from the monopoly offense, should apply the Article 52 of the AML. For example, in Case A10 (Hainan Sanya crystal), Haishi Crystal and Changyuan Crystal have been fined to pay RMB 99,000 for hiding and destroying their financial documents.

The other factors that the NDRC ever considered are the passive role of the undertaking in a cartel activity. Under EU competition law, an exclusive passive role is treated as an attenuating circumstance.27 Likewise, the NDRC granted reduction of fine to all insurance companies in Case A7 (Zhejiang insurance industry) as they just take a passive role, although debatable, while the industry association takes a leading role there.

**Anti-Monopoly Compliance**

Multi-national companies make a lot of investment in building anti-monopoly infrastructure, including anti-monopoly compliance education, training, detection and monitoring. Should a penalty be reduced to reward companies that have put in place a compliance program? In the US, a well-designed compliance program may, in some circumstances, help the company to receive sentence mitigation. The advisory, but well respected by the Federal Courts, *U.S. Federal Sentencing Guidelines* for organization crimes have made the existence of an “effective” internal compliance program a basic requirement for obtaining mitigation credit that can reduce the amount of a criminal fine following a conviction or plea agreement. However, in the EU, “the [European] Commission considers that it is not appropriate to take the existence of a compliance program into account as an attenuating circumstance for a cartel infringement, whether committed before or after the introduction of such a program.”28

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A robust and effective anti-monopoly compliance contributes to reduce and eliminate the occurrence of monopolistic conducts. One case shows the difference between companies with compliance infrastructure and other companies lacking of such investment. When the NDRC carried out the probe into Zhejiang insurance industry, it “investigated all 32 property insurance companies which have business in Zhejiang Province, finding that Zhejiang Branch Company of a US insurance company, Liberty Mutual Insurance, per to the requirements from its headquarters, enacted and implemented Liberty Mutual Insurance Company’s Anti-Monopoly Compliance Rules, therefore it neither participated nor implemented monopoly agreements”. The national wide price conspiracy, insurance premium fix, market division, and other monopoly offences occurred in China’s insurance industry which indicates that domestic insurance companies have serious defects in either the compliance construction or the corporate governance. Currently, if the AML enforcement agency in one Province implemented the AML aggressively, it will grab the branch companies of domestic insurance firms in its jurisdiction and punish them, but the insurance group company has not been punished yet and the insurance group company’s other subsidiary’s similar business practices and monopoly offences are not touched.

China’s AML only punishes the corporate entity but not its employees. Corporates are legal fictions that can commit offences only through the acts of individual employees, officers, and directors. The reward to anti-monopoly compliance in the AML enforcement may distinguish between companies whose top management team was involved in or directed unlawful behavior, and law-abiding companies that nevertheless found themselves in trouble because of the behavior of one or a few rogue employees. Therefore, the competition policy should encourage and reward the company’s efforts in education, prevention, detection, punishment, and timely reporting of monopoly offence. If the anti-monopoly compliance is irrelevant to the setting of the punishment, the companies will lost the incentive to make investment in building and strengthening anti-trust infrastructure, which in the end will lead to more monopoly offences.

29. The NDRC’s Explanation on Six Issues related to the Zhejiang Insurance Industry Case, Sep. 2nd, 2014
Therefore, it’s necessary for the State Council’s AMC to develop a policy to distinguish between companies that intentionally engage in monopoly conduct and those that become involved in monopoly conduct as the result of the actions of rogue employee, and list this as a factor in setting the amount of fine.

Section 3: Similar Cases but Different Results

“We always adhere to the principle of fairness and equity in the law enforcement, and treat all types of market participants equally... The AML enforcement targets the monopoly conduct. Whatever the identity of the market participants, we will investigate and punish them equally if there is any price-related monopoly offence.”

Does the NDRC’s enforcement practice really follow the principle of equal treatment? The NDRC only published full text of four monopoly cases’ decisions on its official website, i.e., Case A7 (Zhejiang insurance industry), Case A11 (Japanese auto parts bid-rig), Case A12 (Japanese auto gears), and Case C3 (Qualcomm’s abuse of dominant market position). Taking into consideration of the other cases under Appendix I and Appendix II, it can be observed that the enforcement agency failed to treat same or similar case equally. Either there is too much leniency granted to big State Owned Enterprises (SOEs), or there is too rigorous enforcement for foreign brands, the consequent penalties inflicted on similar circumstances differs substantially. Although comparable situations are treated differently or different situations are treated in the same way, the NDRC and local DRCs did not provide detailed rationale to support their treatment and thus convince the undertakings and the public that such a difference had been objectively justified.

Leniency

Under the leniency program, the second informer may receive reduced fine. There is different treatment for the second informer who reported the existence of monopoly agreements and provided important evidence. In Case A11 (Japanese auto parts bid-rig), Denso was imposed a fine of RMB

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150,560,000, which is 4% of its sales revenue, in Case A12 (Japanese auto gear), NSK was punished to pay RMB 174,920,000, which is also 4% of its sales revenue. In Case A7 (Zhejiang insurance industry), however, the fine to a SOE -China Life Property Insurance Zhejiang Branch Company is RMB 1,112,700, which is only 0.1% of the branch company’s sale revenue (the NDRC first granted a 1% fine since the undertaking was not a leader in the case, then cut 90% from the fine because the branch company came the second in the line to report intelligence concerning the monopoly agreements and provide important evidences). Compared with the fine on two Japanese companies, the final fine to China Life’s subsidiary is 40 times less (0.1% v. 4%). It is 4 times less even comparing with the 1% benchmark fine (1% v. 4%).

Resale Price Maintenance

For domestic companies’ the fine in resale price maintenance cases are 1% of concerned products in last year. Among them, Maotai and Wuliangye’s offence lasted longer than 5 years, and the price cartel of Shanghai gold and platinum ornament industry existed for more than 10 years, neither of them ever committed to reduce the product price, but all received the lightest punishment. In Case B4 (baby formula milk powder), the challenged conduct lasted less than 5 year, six foreign brand milk companies committed to cut 15% price off, but all faced fine at 3% of each’s full product sales revenue in the preceding year (a Chinese private company, Guangzhou Biostime received highest fine in that case for other reasons).

Leaders in a Cartel

In Case A13 (Shanghai Chrysler auto dealers), Shanghai Price Bureau imposed a fine at the level of 6% of last years’ sales on Yueye, a company taking a leading role in the cartel. In Case A15 (Hubei FAW-Volkswagen auto dealers), Hubei Price Authority only fined the leading cartel member 2% of its last year’s revenue. Same offence, same industry, but the results are 3 times less.

Horizontal Price Cartel in an Upstream Industry and Downstream Industry
In Case 15 (Hubei Faw-Volkswagen auto dealers) and Case B6 (Hubei Faw-Volkswagen resale price maintenance), both the auto producer and dealers were punished. The punishment is understandable as the enforcement agency has valid legal basis and sufficient proof to support its fine decision. The auto company and its dealers’ conduct of fixing the maximum auto repairs expenses which lasted for less than one year, and more importantly, was a countermeasure to insurance companies’ price conspiracy, which was organized by the insurance industry association and has lasted for more than 10 years, to fix the amount of reimbursed new automobile’s repair expense. The insurance companies in question cover all major SOE insurance companies’ Hubei subsidiaries.\(^{31}\) **Hubei Price Authority did not punish flagrant offence committed by the insurance companies, but chose to investigate and impose a heavy penalty on the auto companies and its dealers’ lighter offence.**

**Disclosure of Anti-Monopoly Investigation and Punishment Information**

The NDRC’s AMB and its precedent, Department of Price Supervision and Check n, started in 2005 and thereafter continuously, published a chronology of enforcement events on its internal journal --- *China’s Price Supervision and Check*. Based on the excerpt of the chronology under Appendix II, the NDRC actually conducted anti-monopoly investigations against several SOEs but did not disclose these to the public and media. Some cases were of high interest to the consumers and investors, such as domestic airline companies’ conduct of fixing air ticket price, book publishers’ conduct of setting minimum price discount, Wonder Sun milk company’s discriminatory pricing practice, the securities companies’ conspiracy on fixing security trading commission fees, three SOE oil companies’ price cartel in Guangdong Province, Zhengzhou Post Bureau’s price monopoly related to delivering college admission notice, etc.. Guizhou Price Bureau published the decision of imposing a fine against Maotai

Liquor at an unnoticeable corner on its website, then quickly removed the decision and news from its website.  

If information such as these were publicly available, the affected consumers or other undertakings may use it as prima facie proof to bring a private litigation against those lawbreakers. Existence of private suits would then serve as a deterrent to these undertakings from committing further monopoly offences. But the AMB chose not to publicly disclose or confirm the investigation information of these public companies. The NDRC’s officials provided the following explanation: “.... to facilitate those companies’ request not to put this kind of information into public exposure,” so that its image of corporate citizen and commercial reputation would not be undermined by the monopoly offence.  

Such consideration, however, has not been equally considered when foreign company’s reputations are in the stake. On the one hand, the NDRC facilitated the SOEs’ request not to publicly report the illegal activities, on the other hand, NDRC’s officials frequently appeared on China Central Television (CCTV) and other public media to challenge and criticize foreign companies’ suspected business practices even before those cases have been developed into a final decision. In addition to that, there are four cases that have been publicized on the NDRC’s official website, three of them are concerned with foreign companies, only Case A7 (Zhejiang insurance industry) is committed fully by domestic companies, including big SOE insurance companies. The partial disclosure of the AML cases may leave the website’s visitors a wrong impression that foreign companies are more inclined to violate the AML, while the reality is on the contrary.  

Section 4: Four Possible Ways to Tame Discretionary Power  

Because of the inherent defect of written law, the AML was enacted with a lot of uncertain legal terms and this left a broad space for the enforcement agency to exercise discretionary power. The AML 

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32. A lawyer from Dabang LLP found the original text of Maotai fine decision from the search engine’s snapshot. [http://www.legalservice.cn/%E5%8F%91%E6%94%B9%E5%A7%94%E5%AF%B9%E8%8C%85%E5%8F%B0%E4%BA%94%E7%B2%A E%E6%B6%B2%E7%BA%A]  
33. Xu Kunlin, Truth on Anti-Monopoly, Feb. 15th, 2015, Dialogue Program, CCTV-1
enforcement agencies, especially the NDRC and local DRCS, have not exercised their power in a fair, equal, and transparent way.

There are many ways to restrict the exercise of discretionary power of these agencies, such as to check from the court through judicial review of the administrative decision, the internal control by the administration, the public’s monitor and supervision, and the defense rights conferred on the target company. Courts in EU and US have important influence on ensuring the administrative decision in line with the rule of law, while in China, the court’s function in this regard is still very limited. For example, in EU, around three to four appeals are brought against every cartel decision. But in China, there has been no reported case brought before the Court against the AML enforcement agency’s punishment decision yet. In the following part of this paper, the focus will be limited to the control mechanism that exists in China before the court steps in.

**Fine Guideline**

Although Article 49 requires the AML enforcement agency to set the amount of fine after taking into consideration the nature, severity, duration, and other factors of the monopoly offence, it still leaves broad discretion to the enforcement agency. To control the free exercise of discretionary power, both the SAIC and the NDRC issued some guidelines in this regard. In 2012, the SAIC issued *Guiding Opinions on the Exercise of the Discretionary Power in Administrative Penalty*. The NDRC issued *Several Stipulations Concerning the Exercise of Price Administrative Penalty Power* in 2014. Both rules defined the applicable circumstances and the range of the amount of fine for immunity, reduced penalty, lighter penalty, ordinary penalty, and heavier penalty, imposed obligations on enforcement agency to provide reasons why the specific amount of fine has been selected. Both the SAIC and the NDRC rules stipulate that applicable circumstances where an immunity from punishment, a reduced penalty, a lighter penalty, or a heavier penalty shall be imposed. But, just like Article 49 of the AML, the applicable circumstances

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have been described with a very abstract or undefined terms. And both rules lack measurable, objective, and predictable factors which could be used to guide setting of a reasonable fine. It is very difficult for a company to predict the rough fine it could receive should it violate the AML. Thus, an aggressive undertaking may commit more monopoly conduct as it underestimates the amount of the fine; on the contrary, a cautious undertaking may be constrained from carrying out some beneficial business practice as it overestimates the amount of the fine. Both situation are the situations that the AML is purposed to avoid.

From cases discussed in previous three Sections, it’s obvious that this is a significant issue of inconsistent, unequal treatment in the NDRC and local DRCs’ enforcement practice. The similar problem which existed in AICs’ decisions is not so material, but AICs seem too weak to deter the monopoly offence, as most of time they impose a fine at the floor level of 1%. To ensure that the AML is faithfully and fairly implemented, there should be a Fine Guideline to standardize and unify the administrative penalty.

To narrow the gap, the State Council’s AMC needs to conduct research on what factors are relevant, and how different factors shall be weighted in the AML enforcement decision making process in order to develop a unified Fine Guideline so that the SAIC and the NDRC may enforce the AML legally, reasonably, and consistently.

The Guideline may set out a four-step methodology for the setting of fines: (i) Firstly, to determine the base fine for the monopoly offence, like [6-7] % for hard-core cartel activities, a lower fine, like [4-5] %, for other monopoly activities. The basic amount will be set as certain percentage of the undertaking’s sales in last year; (ii) Secondly, appropriate upward or downward departures to reflect circumstances, like ringleader or instigator, recidivism, and lasting period of the offence, anti-monopoly compliance program, affected market size, etc.; (iii) Thirdly, the enforcement agency may consider the application of leniency program; and (iv) The particularities of a given case or the need to achieve deterrence in a particular case may justify departing from amounts calculated with the aforementioned
methodology. The enforcement agency would be required to provide detailed analysis and sufficient proof to support the conclusion why it should depart from the methodology prescribed by the Guidelines.

Most importantly, those factors and how those factors are weighted in would determine the amount the fine should be clearly, measurably, and proportionately to the nature and seriousness of the monopoly offence. Issuing such Guidelines would make it easier for the enforcement agency to follow a consistent fining policy, and to resist pressure for unjustified special treatment in individual cases.

Transparency

To sustain the public confidence on the AML enforcement agency, the result of the enforcement activity should be publicized, as should the enforcement process, unless there are prevailing legitimate interests to be exempted from disclosure.

The SAIC did better than the NDRC in this regard. Beginning on July 26th, 2013, the SAIC has published all AML enforcement decisions on its official website. By March 15, 2015, the SAIC published all administrative decisions in 21 cases it imposed fine with an additional one decision in a case to terminate the investigation. The shortest period between the time of making decision and the time of uploading to the internet is only 20 calendar days. For those cases in the process of investigation, where it has received substantial publicity, the SAIC also publicly confirmed the fact of the investigation and provided updated status information. For example, the SAIC provided four updates after it launched the anti-monopoly probe against Microsoft.

As to the NDRC, it did hold several press conferences where it completed some high profile cases, but up to now it only publicized full text of four cases’ penalty decisions. Even now, the public is still unable to know the exactly number of cases the NDRC and local DRCs have done. In Case C3 (Qualcomm’s abuse of dominant market position), the NDRC issued the decision of imposing a RMB 6,088,000,000 fine on Feb. 9th, 2015. Qualcomm paid the fine on Feb. 13, but full text of the fine decision was not published on the website until March 2, 2015. For those decisions publicized on the
internet, the NDRC is very careful to protect the business privacy. The NDRC usually removes the information concerning the address of the undertaking, the quantity of sales order, the name of buyers, and other sensitive information.

According to Article 44 of the AML, the AML enforcement agency may, but not be required to publicize the enforcement decision to the public. This provision is weak and narrow.

To echo the public’s expectation on government transparency, the State Council’s AMC may stipulate that the AML enforcement agency’s decision shall be publicized in one week since the decision was made. The publicized decision should cover fine decisions, exemption decisions, settlement decisions, and other decisions to close cases for various reasons. The public version of a decision may not disclose legitimate confidential information, but it should include all evidences supporting the decision and information of the enforcement process, including the hearing notice, market analysis data, experts’ testimony, proposed draft decisions and comments received thereafter.

**Right of Defense**

The Administrative Penalty Law protects the right of defense to the person who is subject to administrative penalty. Article 41 stipulates that,“If, before making a decision on administrative penalty, an administrative agency or its official, … refuses to hear the party's statement and self-defense, the decision on administrative penalty shall be invalid, except that the party relinquishes the right to make a statement or to defend himself.” Article 42 further requires the enforcement agency, before making a decision of imposing a comparatively large amount of fine, to notify the party the right to hearing, and organize the hearing where the party raised such request. The hearing should be presided over by a person other than the investigator of the case designated by the enforcement agency.

**The AIC Practice**

The SAIC and local AICs did a good job in respecting the party’s self-defense right and hearing right. Since the AML implemented, among all the 21 cases where a fine was imposed, the AICs notified
the party of its self-defense right and hearing right in 18 cases. In other 3 cases, there is no description in
the penalty decision whether the AICs ever notified the party its rights. But, according to media report, at
least in one of those 3 cases, i.e., Case E12 (Yunnan Xishuangbanna travel industry), Yunnan Province
AIC actually notified the right to the party. After receiving the notice, 9 companies raised hearing request
in 4 cases, but 4 companies in 3 cases immediately draw back the hearing application. Only in 2 cases did
the AICs hold hearing per to the party’s request: in Case E4 (Liaoning cement), the administrative
penalty decision stated that the Liaoning Province AIC held the hearing for 4 companies; in Case E12
(Yunnan Xishuangbanna travel industry), the Yunnan Province AIC issued public notice on hearing and
invited journalists to report the hearing. 35 Those hearings were held at least 10 days earlier than the day
AICs made the final decision. There was no further disclosure in the decision or on the media on the
identity of person who presided the hearing and the running process of the hearing.

For Case F2 (Shank Sports) and Case E10 (Zhejiang Cixi construction engineering test industry),
no hearing was ever provided because there’s no fine was imposed. For other cases such as the
investigation of Tetra Pak and Microsoft, there was no hearing as the instigation was still in the process
and no penalty decision was ever made yet.

**The DRCs Practice**

Different from the AIC practice, among cases dealt by the NDRC and local DRCs, except for
Case A7 (Zhejiang insurance industry), the administrative decisions in other cases did not specify
whether the DRCs ever notified the parties of the right of self-defense, the right of hearing, and whether
the party requested or waived the hearing. It seems that those rights have been notified to the parties from
the AMB official’s following remarks, “We have very smooth communication with all companies under
investigation, and adequately protected their rights of presentation and self-defense”. 36 There is no
statement on whether any hearing had been provided by the NDRC and local DRCs in penalty decision

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and public notice on the punishment. The AMB official did mention that, “Qualcomm made a hearing request, but it returned back its request at the last minute before the hearing was held.”

Media reported that there are cases where both Chinese companies and foreign companies have exercised self-defense rights. In Case A11 (Japanese auto parts bid-rig), Sumitomo challenged the NDRC’s calculation method on its sales revenue, the NDRC accepted and finally reduce RMB 50,000,000 fine in final decision; In Case A3 (Sodium hyposulfite), Guanghui Chemical defended itself, the NDRC accepted its argument and reduced the amount of fine from RMB 100,000 to RMB 50,000. But, the NDRC did not provide feedback on the party’s defend in Case C3 (Qualcomm’s abuse of dominant market position). In that case, Qualcomm submitted a report, authored by Chinese economist Zhang Xinzhu who is also a member the AMC’s expert panel, arguing that its patent practice did not constitute monopoly offence. Nevertheless, in the final decision, the NDRC neither stated whether it has reviewed the Qualcomm’s report nor the reason why Qualcomm expert’s view has not been adopted.

**Attorney Representation**

There is no mention of the attorney’s engagement in the publicized AML enforcement decisions, regardless of whether it’s a decision rendered by local AICs or made by NDRC and local DRCs. In the enforcement practice, there were cases where the target company engaged a law firm as its legal agent to participate in the process. From the media report, there were lawyers who have represented clients in the LED price cartel case (although the punishment under that case was made pursuant to the Price Law), represented Maotai in Case B1 (Maotai fixing resale price), and represented Wyeth in Case B4 (Baby formula milk powder). According to government official’s statement, Microsoft engaged two law firms and Microsoft’s attorneys were there to witness on the site during the SAIC’s dawn raid.

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37. Xu Kunlin, Feb. 10th, 2015, *New Release on the Qualcomm Case*
38. *Beijing Youth Daily*, Aug. 21st, 2014,
attorney attended the seven meetings between the AMB and the Qualcomm, both Microsoft and Qualcomm did not publicly confirm the information. It’s also worthwhile to mention that, not only the target companies, but also the AML enforcement agency engaged law firms as their consultants in the Microsoft and Qualcomm case.

To what extent the attorney should participate in the process was decided by communications among the target company, its lawyers, and the AML enforcement agency. There is also a complaint that the NDRC imposed hidden restriction on the lawyer’s representation. As discussed in Section 2, there’s conflict between the exercise of target company’s defense rights and the enforcement agency’s requirement of cooperation in the AML probe. If a lawyer was boycotted by the enforcement agency, s/he will find it very hard to sell herself/himself to the client. To be acceptable by the enforcement agency, the attorney may be forced to facilitate the enforcement agency’s improper request, which is contrary to the client’s interest.

Another issue is that attorney-client privilege has not been recognized by any law in China. For a US company, there is a risk that communication between outside lawyers, headquarters’ in-house lawyers and the legal department, business department in Mainland China is discoverable and could be collected as evidence by the AML enforcement agency. China’s Lawyers’ Law excludes the foreign nationality from taking bar examination. This puts US lawyers into an awkward situation: they are more knowledgeable and skillful than their Chinese peers in the area of competition law, but they cannot provide legal advice in the identity of a lawyer in China. The Chinese Government’s commitment, which was made at the 25th U.S.--China JCCT meeting on Dec. 29th, 2014, opened the door a little bit for foreign lawyers to attend the meeting between its customer and the AML enforcement agency. It’s yet to see how the commitment will be honored in practice.

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41. Xu Kunlin, Sep.11th, 2014, *the State Council’s Press Conference on the AML Enforcement*
42. EU Chamber of Commerce in China report
Policy Proposal

To ensure that the right of self-defense and right of hearing effective and meaningful, the AML enforcement agency should have more obligations imposed on it: (i) Before making a decision to impose a large amount of fine (1,000,000 RMB or other appropriate figure as the threshold), a decision to exempt, settle, or terminate a case, the AML enforcement agency should hold hearing regardless of whether the target company has requested one. The hearing participants should be expanded from the target company to other stakeholders who can show sufficient legitimate interest in the disposition of the case; (ii) Improve and ensure the independence of the person who preside the hearing. To prevent the hearing meeting from turning into a window show, in addition to the Administrative Penalty Law’s requirement that the person president the hearing should be a person other than the investigation team, other requirements should be imposed to sustain the hearing official’s independence, such as ex parte rules requiring that any officials who performs investigative functions be prohibited from any ex parte communication with hearing officials or other officials involved in decisional process. In the future, after the government allocated sufficient resources to the enforcement agency, the official who presides over the hearing could be a dedicated person, or a Hearing Office could be created to be independent from other functions of the enforcement agency; (iii) The administrative decision should be recorded whether the parties’ defense rights have been notified and exercised; and (iv) The AML enforcement agency should make a final decision based on the proofs raised and examined at the hearing, and the period between the hearing and final decision should be at least 1 month or longer.

The achievement of meaningful legal representation rights will rely on the advancement of China’s judicial reform and legal infrastructure construction. At this stage, what the AML enforcement agency can do better are as follows: (i) where an attorney participates in the administrative procedure on behalf of a client, the relevant administrative decision should disclose the legal representation information. So that the public can monitor whether the target company’s right to get lawyer’s assistance has been respected and secured; (ii) As to the client-attorney communication and internal legal
communication between in-house lawyers and company employees, the AML enforcement agency shall provide utmost protection as the level of protection provided on business secrets. The target company and its attorney should be given at least 10 calendar days’ notice before aforementioned information was disclosed, so that it can convince the enforcement agency not to disclose or to seek an appropriate protective order from the court.

Provision of Reason

The Importance of Providing Reasons when an Enforcement Agency Issues a Decision

The development of competition law has been much influenced by anti-trust economics. This has increasingly been the case as modern economic analysis has shown that many practices once considered anticompetitive—such as tying, exclusive dealing, bundling, aggressive price discounting, vertical contractual restraints, and various forms of competitor collaboration – may have substantial efficiency justifications. Some monopolistic conducts determined by the NDRC and the SAIC could be considered beneficial to competition instead of anti-competitive if it’s decided by US court or EU Commission. Thus, apart from inherent administrative costs, the enforcement could also have undesirable side-effects from a wrong judgment. For instance, errors or the risk of errors in the imposition of sanctions could lead to lawful and economically desirable conduct being deterred. Such an approach would chill procompetitive behavior, since potential defendants would not want to risk crossing the line lightly.

Furthermore, the punishment imposed on the monopoly offence, in addition to its deterrent effect, also has the function of education. Firstly, it may serve to educate the parties allowing them to understand the illegality of the challenged commercial practice or business behavior. Secondly, it may educate the society. Through the adjudication in a case, the AML enforcement agency pass on its understanding of the uncertainty legal terminology to the society, cut across the line between legal conduct and illegal behavior, and also call for social support.
For the aforementioned reasons, it’s very important for the AML enforcement agency to give a detailed analysis on why the challenged business practice is illegal, and what’s the legal ground and factual basis for it to make the decision. These are also the legal requirements set forth by the *Administrative Penalty Law*.

**The Practice of Insufficient Statement of Reason in AML Enforcement**

The SAIC review and delegated on a case by case basis to local AICs to investigate and punish a competition offence. It also standardizes the structure and content of the administrative decision. The decisions made by the AICs usually provide analysis on the challenged conduct and its impact on competition, list the catalogue of evidences supporting the penalty decision, illustrate reasons for the immunity, reduced, lighter or heavier punishment. When the AICs conducted competition analysis, they applied the *Guidelines on the Definition of Relevant Market* issued by the State Council’s AMC in 2009. Even though AICs’ punishment is relatively gentle than the NDRC, mostly 1% of the target company’s sales revenue in last year, the AICs’ punishment usually give fair amount of reasons in penalty decision. The length of the AICs’ penalty decision is usually around 15 to 20 A4 pages.

For the case which is still under investigation, the SAIC’s handling is also very professional. It used various investigation tools to collect sufficient proofs. In the investigation of Petra Tek’s suspected abuse of dominant market position, the SAIC conducted an industry survey, issued and collected questionnaire, and interviewed companies in four product markets which are relevant to current case: liquid food market, package equipment market, package material market and package raw material market. The SAIC also engaged legal consultation team, economist consultation team, and relevant industry experts’ team to help them to conduct professional analysis.  

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43. SAIC CLEB Director, Sept.11th, 2014, *the State Council’s Press Conference on the AML Enforcement*
Comparing with the SAIC, the NDRC and local DRCs’ administrative decisions are much more concise, short of evaluation on competition effect, provided barely enough analysis or evidence on why the offence should be exempted from punishment or should be imposed a heavier, lighter, reduced fine.

(i) In Case A7 (Zhejiang insurance industry), although the sum of fine in that case is over RMB 100,000,000, the penalty decision is only 8- A4 pages. Among them, 3 pages have been used to analysis the definition of undertaking, the fixing of price, and only less than 120 Chinese characters have been spent to describe why corresponding amount of fine has been decided. As to the decision to exempt punishment for PICC Zhejiang Branch Company, the decision only takes 2 pages. In another case, Case A11 (Japanese auto parts bid-rig), each participating company has been imposed a fine at the level of higher than RMB100,000,000, yet the administrative decisions, whether they were penalty decisions or exemption decisions, were all only 2 pages in length.

(ii) In Case A11 (Japanese auto parts bid-rig), there were even two different reasons provided for a same penalty decision. In that case, NDRC made the penalty decision on August 15th, 2014. The reasons for setting the amount of fine was described as such in the public notice on August 20th, 2014, “thirdly, since Yazaki, Furukawa and Sumitomo only participated in the monopoly agreements on one product, they shall be imposed a fine at the level 6% of sales at last year’s revenue, and the figures are RMB 241,080,000, RMB 34,560,000, and RMB 290,400,000 respectively. Fourthly, since Asian-ind, Mitsubishi and Mitsuba participated monopoly agreements on two or more products, they are imposed fine at the level of 8% of sales revenue in last year, and the figure are RMB 29,970,000, 44,880,000, and 40,720,000 respectively.” It appears that the NDRC takes the participation of cartel in one product as the benchmark, and then put an aggregated punishment on companies concluded cartel agreements on two or more products. When the NDRC published the full text of the same penalty decisions against Asian-ind, Mitsubishi and Mitsuba on Sept. 18th, 2014, for various reasons, the rationale for setting the same amount of fine changed! It stated in this way: “The company has concluded and executed the price-related monopoly agreements for several times, the offence have existed for a long time, the meeting of secret
monopoly negotiation was frequently held, and the offence are flagrant, therefore the company should receive a fine at the level of 10% of the concerned products’ sales revenue in Mainland China in 2013.

Having this said, since the company voluntarily reported the information concerning the conclusion of the monopoly agreement, provided important evidence, and terminated the illegal conducts, … we decided to reduce 20% from the fine, i.e., impose a fine at the level of 8% of the of the concerned products’ sales revenue in Mainland China in 2013.” This disposal actually goes first with a heavier punishment, and then reduce the fine amount after considering mitigating factors. It is totally different from description for same fine decision under the public notice. Once a decision has been adopted by the NDRC and served to the target company, it cannot be altered saved for spelling, grammar and syntax. Why there are two different reasons for the same fine decision? The NDRC did not provide any further explanation.

Additionally, neither the punishment decision nor the public notice mentioned the reduction of RMB 50,000,000 fine to Sumitomo after the NDRC accepted Sumitomo’s argument that the calculation formula of its revenue in a joint venture should be adjusted. The NDRC’s Several Opinions on Regulating the Price Administrative Penalty clearly stated in Article 13 that,” Where the Price Authority makes a decision to increase or reduce a fine or cut down a fine, reasons shall be provided in the administrative penalty decision.” The NDRC did not follow rules enacted by itself.

(iii) In Case C3 (Qualcomm’s abuse of dominant market position), the NDRC made a decision of imposing a fine at RMB 6,088,000,000 against Qualcomm, but the substantial content of the fine decision was only 13 A4 pages and comprised less than 10,000 Chinese characters. Among them, 5 pages have been used for analyzing the dominant market position, 6 pages used for analyzing the abusive conduct and stating no valid reasons. The decision listed the catalogue of the evidence to support the penalty but the content of major evidence was not publicized. Only 14 Chinese Characters (“性质严重, 程继较深, 持续时间较长.. [the offence is] of serious nature, affecting the market with deep influence, and lasting for a long period”) are used to describe why the final penalty is 8% of Qualcomm’s revenue. It’s astonishing to see that there is no detailed analysis on the causal relationship
between the nature and severity of Qualcomm’s offence and the figure of 8%. This is a decision of RMB 6,088,000,000, change of 1% could be RMB 60,000,000 less or more. The NDRC provided no detailed analysis on why it picked the exact figure of 8% but not the other numbers between 1% and 10%.

*The current practice of providing reason in the AML enforcement is far from being sufficient.*

*The provision of reasons at least should cover the following aspects:* (i) The State Council’s AMC may leverage the SAIC’s practice and enact guidelines to clarify the required content which should be incorporated into the AML enforcement decision; (ii) The State Council’s AMC needs, in addition to current 2009 *Guidelines on the Definition of Relevant Market*, enact *Guidelines on the Framework of Competition Impact Analysis*, to impose an obligation on the AML enforcement agency to illustrate the economic theory it adopted in the decision, listing detailed and reliable data to support the competition effect analysis, and stipulating key elements to conduct the competition effect evaluation; (iii) Reasons should be provided on why the AML enforcement agency to makes an exemption, heavier punishment, reduced punishment, lighter punishment, and why the agency accept or reject the target company’s defense; (iv) The AML enforcement agency should deliver the draft administrative fine decision, including all evidence in the agency’s file with appropriate measures taken to protect legitimate confidential information, to the target company when it serves the notice in advance on the administrative fine or the hearing rights notice for administrative fine.

**Conclusions and Policy Suggestions**

Due to the existence of overbroad discretionary powers and lack of effective and sufficient control mechanism, the exercise of administrative penalty power in China leads to inconsistent decisions and obvious unfair results. Those defects existed in jurisdiction, meaning of key terminology, setting of the amount of fines, different results out of similar cases, poor procedural protection, and very limited publicly disclosure of decisions, etc. To ensure the AML be implemented fairly, equally and transparently, the State Council’s AMC need issue rules to clarify and unify the definition of key legal terms, publish and enforce an objective, measurable and workable fine guideline. Furthermore, the AML
enforcement agencies should provide sufficient reasons and detailed competition impact analysis in the enforcement decisions, safeguard the party’s defense rights, and facilitate public’s expectation on transparent administration.
## Appendix I

### Monopolistic Cases, Penalty Decisions, and Relevant Factors Considered

#### I. Price-related Monopoly Cases

##### A. Horizontal Price-related Monopoly Agreement cases [15 Cases (Industry Associations Involved in 6 Cases), 172 Parties Under Penalty (12 Foreign brands)]

<table>
<thead>
<tr>
<th>Cases</th>
<th>Parties</th>
<th>Lasting Period</th>
<th>Penalty</th>
<th>Relevant Factors</th>
</tr>
</thead>
</table>
| A1. Guangdong Sea Sand Price Cartel /2012 | Dongguan Jianghai | 2 years | 10% (134,500) | + leader  
+ affecting the state’s key construction project (HK-GD-MC bridge),  
Province Governor’s mandate to investigate and heavy punish |
| | Shenzhen Donghai | | 10% (40.94 7j) | + take major profits  
+ affecting the state’s key construction project (HK-GD-MC bridge),  
Province Governor’s mandate to investigate and heavy punish |
| | Guangdong Baohai | | 5% (14.53 7j) | - voluntarily provided part of important evidence |
| | ? (20 Companies) | | | Remind & Warning |
| A2. Hunan Loudi Insurance Price Cartel /2012 | Loudi Insurance Industry Association | 5 years | 200,000 | |
| | PICC Loudi Branch company | | 980,000 | |
| | Pin’an Property Insurance Loudi Branch Company | | 340,000 | |
| | Tianan Insurance Loudi Branch company | | 280,000 | |
| | Pacific Property Insurance Loudi Branch Company | | 140,000 | |
| | China United Property Insurance Loudi Branch Company | | 170,000 | |
| | Dubang Property Insurance Loudi Branch Company | | 80,000 | |
| | Anban/Sunshine/China Life/Bohai/Dadi Insurance’s Loudi Branch Company | | 0 | - Lower market share, providing key evidence |
| | Hunan Ruite Insurance Brokerage | | Forward to other agency | |
| A3. National Sodium Hyposulfite Price Conspiracy /2012 | ? | 0 | | - the first informer |
| | ? (3 Companies) | | ? (fine is cut to 60% ) | - the second informer |
| | Hubei Yichang Chemical Group | | 10,200,000 | |

44 Under the column of “Parties”, those indicated in red color are foreign brands. Under the column of “Relevant Factors”, “+” stands for aggregating factor, “-” stands for actuating factor.
<p>| | | |</p>
<table>
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<tbody>
<tr>
<td><strong>A1. Guangxi Chemical Group Shandong Shouguang Co., Ltd.</strong></td>
<td><strong>50,000</strong> (cut from 100,000)</td>
<td>— did not know that the meeting is to conclude a price monopoly agreement</td>
</tr>
<tr>
<td><strong>A2. Xinjiang Insurance Industry Association and 15 branch companies of national property insurance group companies</strong></td>
<td><strong>6,511,400</strong></td>
<td>Punished 6 insurance companies; unclear whether other 9 companies have been punished or not <a href="http://news.iyaxin.com/content/2013-07/03/content_4077612.htm">http://news.iyaxin.com/content/2013-07/03/content_4077612.htm</a></td>
</tr>
<tr>
<td><strong>A3. Xinjiang Insurance Industry Horizontal Agreement /2013</strong></td>
<td><strong>5,000,000</strong></td>
<td>—</td>
</tr>
<tr>
<td><strong>A4. Xinjiang Insurance Industry Association Travel Agency Comm. Lijiang C-trip Travel Agency, etc. 8 travel agencies</strong></td>
<td><strong>500,000</strong></td>
<td>+ leader</td>
</tr>
<tr>
<td><strong>A5. Yunnan Lijiang Travel Industry Association Travel Agency Comm.</strong></td>
<td><strong>2 years</strong></td>
<td>+ distributed income of 229,000,000 in 2 years per to agreement</td>
</tr>
<tr>
<td><strong>A6. Nanking Concrete Industry Association and 37 member companies monopoly agreement /2013</strong></td>
<td><strong>39,000,000</strong></td>
<td>—</td>
</tr>
<tr>
<td><strong>A7. Zhejiang Province Insurance Industry Association</strong></td>
<td><strong>5 years</strong></td>
<td>+ originator, organizer and major forces</td>
</tr>
<tr>
<td><strong>PICC Zhejiang Branch Company</strong></td>
<td><strong>0%</strong></td>
<td>- firs informer</td>
</tr>
<tr>
<td><strong>China Life Property Insurance Company Zhejiang Branch Company</strong></td>
<td><strong>0.1% * concerned product (1,127,000)</strong></td>
<td>- cooperation in the probe, not originator, organizer, or major forces (1%)</td>
</tr>
<tr>
<td><strong>China Pacific Insurance Company Zhejiang Branch Company</strong></td>
<td><strong>0.55% * concerned product (15,994,000)</strong></td>
<td>- cooperation in the probe, not originator, organizer, or major forces (1%)</td>
</tr>
<tr>
<td><strong>China United Property Insurance Company Zhejiang Branch Company</strong></td>
<td><strong>1% * concerned product (10,290,000)</strong></td>
<td>- cooperation in the probe, not originator, organizer, or major forces</td>
</tr>
<tr>
<td><strong>Tianpin Auto Insurance Company Zhejiang Branch Company</strong></td>
<td><strong>1% * concerned product (2,870,000)</strong></td>
<td>- cooperation in the probe, not originator, organizer, or major forces</td>
</tr>
<tr>
<td><strong>Sunshine Property Insurance Company Zhejiang Branch Company</strong></td>
<td><strong>1% * concerned product (9,700,000)</strong></td>
<td>- cooperation in the probe, not originator, organizer, or major forces</td>
</tr>
<tr>
<td><strong>Yong’an Property Insurance Company Zhejiang Branch Company</strong></td>
<td><strong>1% * concerned product (4,040,000)</strong></td>
<td>- cooperation in the probe, not originator, organizer, or major forces</td>
</tr>
<tr>
<td><strong>Yongcheng Property Insurance Company Zhejiang Branch Company</strong></td>
<td><strong>1% * concerned product (2,430,000)</strong></td>
<td>- cooperation in the probe, not originator, organizer, or major forces</td>
</tr>
<tr>
<td><strong>Dazhong Insurance Company Zhejiang Branch Company</strong></td>
<td><strong>1% * concerned product (5,050,000)</strong></td>
<td>- cooperation in the probe, not originator, organizer, or major forces</td>
</tr>
<tr>
<td>Company Name</td>
<td>Concerned Product</td>
<td>Duration</td>
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</tr>
<tr>
<td>Jilin Yatai Group Company</td>
<td>1% * concerned product</td>
<td>2 years</td>
</tr>
<tr>
<td>North Cement Company</td>
<td>1%</td>
<td>(40,970,000)</td>
</tr>
<tr>
<td>Jidong Cement Jilin Co. Ltd.</td>
<td>2%</td>
<td>(13,380,000)</td>
</tr>
<tr>
<td>Shanghai Gold Ornament Industry Association</td>
<td>10 years</td>
<td>500,000</td>
</tr>
<tr>
<td>Agreement Type</td>
<td>Company Name</td>
<td>Cooperation Period</td>
</tr>
<tr>
<td>---------------</td>
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</tr>
</tbody>
</table>
| Gold and Platinum Horizontal Price Agreement /2013 | Lao Feng Xiang  
Laomiao Gold  
Yayi Jewelry  
Chenghuang Jewelry  
Tiaobao Longfeng | - cooperation in the probe and committed to rectify |
| A10. Hainan Sanya Crystal Horizontal Price Monopoly /2013 | Haishi Crystal Shopping Center  
Cangyuan Crystal Shopping Center  
Dijia Crystal Shopping Center | - originator  
- informer |
Denso  
Aisan-ind  
Mitsubishi Moto  
Mitsuba  
Yazaki  
Furukawa Electronic  
Sumitomo Electronic | + long lasting period, frequently meeting, serious offence circumstance  
- first informer  
- second informer  
- provide information  
- provide information  
- provide information  
- provide information  
- provide information  
- provide information  
- provide information |
NSK  
NTN  
JTECKT | + directly negotiation to improve price, many times’ monopoly agreements, lasting for 10 years, serious circumstance  
- first informer  
- second informer  
- provided information, and exited from the cartel alliance in 2006 and stopped the offence in 2011 |
| A13. | Yueye  
Mingchuang | +leader |
### B. Vertical Price-Related Monopolistic Cases [6 Cases, 21 Companies Punished (17 Foreign Brands)]

<table>
<thead>
<tr>
<th>Cases</th>
<th>Parties</th>
<th>Lasting Period</th>
<th>Penalty</th>
<th>Relevant Factors</th>
</tr>
</thead>
<tbody>
<tr>
<td>B1. Guizhou Maotai Resale Price Maintenance Case /2013</td>
<td>Maotai Liquor Sales Company</td>
<td>1 year</td>
<td>1% * concerned product (247,000,000)</td>
<td>- cooperation in the probe, voluntarily returned back the dealers’ security bond</td>
</tr>
<tr>
<td>B2. Sichuan Wuliangye Resale Price Maintenance /2013</td>
<td>Yibing Wuliangye Sales Company</td>
<td>5 years</td>
<td>1% * concerned product (202,000,000)</td>
<td>- cooperation in the probe, voluntarily returned back the dealers’ security bond</td>
</tr>
<tr>
<td>B3. National Imported Eyeglasses and Contact Lens Case /2014</td>
<td>Carl Zeiss AG(Guangzhou)</td>
<td>5 years</td>
<td>1% (1,766,000)</td>
<td>- cooperation in the probe</td>
</tr>
<tr>
<td></td>
<td>Bausch Lomb (Beijing)</td>
<td></td>
<td>1%* contact lens revenue (3,690,000)</td>
<td>- cooperation in the probe</td>
</tr>
<tr>
<td></td>
<td>Johnson Vision Care (Shanghai ) Ltd.</td>
<td></td>
<td>1% (3,643,700)</td>
<td>- cooperation in the probe</td>
</tr>
<tr>
<td></td>
<td>Vision(Shanghai)</td>
<td></td>
<td>2%</td>
<td>- strong capability of controlling price, but actively rectified illegal conducts</td>
</tr>
<tr>
<td></td>
<td>Nikon (Beijing)</td>
<td></td>
<td>2% (1,684,800)</td>
<td>- not cooperative in the probe, but actively rectified illegal conducts</td>
</tr>
<tr>
<td></td>
<td>Hoya (shanghai)</td>
<td></td>
<td>0</td>
<td>- provided important proof and actively rectified illegal conducts</td>
</tr>
<tr>
<td></td>
<td>Shanghai Weicon</td>
<td></td>
<td>0</td>
<td>- provided important proof and actively rectified illegal conducts</td>
</tr>
<tr>
<td>B4. National Imported Baby Formula Milk Powder /2014</td>
<td>Dumex Baby Food</td>
<td>5 years</td>
<td>3%</td>
<td>- cooperation in the probe</td>
</tr>
<tr>
<td></td>
<td>Abbott Trading (Shanghai)</td>
<td></td>
<td>3%</td>
<td>- cooperation in the probe</td>
</tr>
<tr>
<td></td>
<td>Frisobaby Food Trading (Shanghai)</td>
<td></td>
<td>3%</td>
<td>- cooperation in the probe</td>
</tr>
<tr>
<td>Cases</td>
<td>Parties</td>
<td>Abusive Conducts</td>
<td>Penalties</td>
<td>Relevant Factors</td>
</tr>
<tr>
<td>-------</td>
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</tr>
<tr>
<td>C1. Guangdong River Sand Monopolistic Excessive High Price /2013</td>
<td>Minghua Sand Pit, Linyuan Co.Ltd.</td>
<td>Excessive high price</td>
<td>2% (altogether 527,950)</td>
<td>- cooperation in the probe, actively rectified the illegal conducts, and committed to secure the quantity and price</td>
</tr>
<tr>
<td>C2. IDC Suspected Price Monopoly Case /2014/5/12</td>
<td>IDC</td>
<td>Unreasonable patent royalty, tied-in sale, require for free reverse licensing</td>
<td>(Investigation ceased)</td>
<td>- commitment of rectifying the illegal conducts</td>
</tr>
<tr>
<td>C3. Qualcomm’s Abuse of DMP /2013</td>
<td>Qualcomm Corporate</td>
<td>Tied-in sale, unreasonable excessive price ( charge royalty on expired license, require licensee to grant free reverse licensing), impose unreasonable terms in base chip sales</td>
<td>8% (6,088,000,000)</td>
<td>+ offence is of serious nature, deep extent, and long lasting period - cooperation in the probe, voluntarily submitted a package of rectification measures ( the rectification commitment was mentioned in public notice of penalty, but not mentioned in the penalty decision )</td>
</tr>
</tbody>
</table>

**D. Abuse Administrative Power to Restrict Competition** (1 Case, 1 Party, 0 Foreign Brand)

<table>
<thead>
<tr>
<th>Case</th>
<th>Party</th>
<th>Lasting Period</th>
<th>Disposition</th>
</tr>
</thead>
<tbody>
<tr>
<td>D1. Preferential Administrative Fee to Shuttle Buses Run by Citizen or Companies Registered in Hebei Province/2014</td>
<td>Transportation Department of Hebei People’s Government</td>
<td>1 year</td>
<td>Suggestion sent to Hebei People’s Government to rectify</td>
</tr>
</tbody>
</table>
## II. Non Price-Related Monopoly Cases

### E. Horizontal Monopoly Agreements [15 Cases (Industry Associations Involved In 11 Cases), 70 Companies Punished (0 Foreign Brand)]

<table>
<thead>
<tr>
<th>Cases</th>
<th>Parties</th>
<th>Lasting Period</th>
<th>Penalties</th>
<th>Relevant Factors</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Liangyungang Xindian Concrete Corp.</td>
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<td></td>
<td>Liangyungang Sujing Concrete Product Corp.</td>
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<td></td>
<td>Liangyungang Dongsheng Commercial Concrete Corp.</td>
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<td></td>
<td>Liangyungang Concrete Corp.</td>
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<tr>
<td></td>
<td>Liangyungang Runfeng Concrete Corp.</td>
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<tr>
<td><strong>E2. Jiangxi Taihe LPG Monopoly Agreement Conduct/2010</strong></td>
<td>Taihe County Huawei Liquefied Petroleum Gas Storage and Service Center</td>
<td>3 years</td>
<td>1. confiscation of illegal gains; 2. fine of 130,200 (1%)</td>
<td>- reason unspecified</td>
</tr>
<tr>
<td><strong>E3. Henan An’yan Used Car Undertakings Monopoly Agreement Case /2011</strong></td>
<td>An’yan Municipal Used Car Transaction Market Co. Ltd.</td>
<td>3 years</td>
<td>1. confiscation of illegal gains; 2. fine of 23,500 (2%* transaction expenses)</td>
<td><strong>The total service fee collected from auto sellers and buyers is divided into 12 portions, An’yan Municipal Used Car Transaction Market Co. Ltd. take 2/12, the other cartel participating companies each take 1/12[ but the fine is in proportion with this share] no proof of last year’s sale revenue</strong></td>
</tr>
<tr>
<td></td>
<td>Anyan Used Car Transaction Market</td>
<td></td>
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<tr>
<td></td>
<td>Linzhou City Yubei Used Car Transaction Market Co. Ltd.</td>
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<tr>
<td></td>
<td>An’yan Eastern Used Car Transaction Co. Ltd.</td>
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<td></td>
<td>Linzhou City New Dragon Used Car Transaction Market Co. Ltd.</td>
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<tr>
<td></td>
<td>An’yan Municipal Zhongzhou Used Car Transaction Market Co. Ltd.</td>
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<tr>
<td></td>
<td>An’yan Municipal Dazhong Auto Transaction Market Co. Ltd.</td>
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<td></td>
<td>Hua County Xingxing Used Car Transaction Market Co. Ltd.</td>
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<td></td>
<td>An’yan Municipal Shunda Used Car Transaction Market Co. Ltd.</td>
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</tr>
</tbody>
</table>
### An’an Municipal Tiantian Used Car Transaction Market Co. Ltd.
- 1. confiscation of illegal gains;
- 2. fine of 30,000 (5%)

### An’an Municipal Zhongyuan Auto Transaction Market Co. Ltd.
- 1. confiscation of illegal gains;
- 2. fine of 19,400 (3.3%)

### Liaoyang Jidong Cement Co. Ltd.
- 1. confiscation of illegal gains;
- 2. fine of 10,000 (1%)  
  - According to Liaoning AIC’s Fine Rules, cooperation in the probe - non-profitable in last year

### Liaoyang Ping’an Property Insurance Yongzhou Sub-Branch Company
- 1. confiscation of illegal gains;
- 2. fine of 2,540,000 (1%)

### Liaoning Province Construction Material Industry Association Monopoly Agreements /2011
#### Liaoning Province Construction Material Industry Association
- 1,000,000

#### Liaoyan Jidong Cement Co. Ltd.
- 1,670,000 (1%)
- According to Liaoning AIC’s Fine Rules, cooperation in the probe - with SAIC’s approval

#### Anshan Jidong Cement Co.Ltd.
- 1,170,000 (1%)
- According to Liaoning AIC’s Fine Rules, cooperation in the probe - with SAIC’s approval - non-profitable in last year

#### East Liaoning Cement Group Shanghe Cement Co. Ltd.
- 1,020,000 (1%)
- According to Liaoning AIC’s Fine Rules, cooperation in the probe - with SAIC’s approval

#### Liaoning Jiaotong Cement Co. Ltd.
- 2,010,000 (1%)
- According to Liaoning AIC’s Fine Rules, cooperation in the probe - with SAIC’s approval

#### Liaoning Cangjing Cement Co. Ltd.
- 1,700,000 (1%)
- According to Liaoning AIC’s Fine Rules, cooperation in the probe - with SAIC’s approval

### Liaoning Yinheng Cement Co. Ltd.
- 1,010,000 (1%)
- According to Liaoning AIC’s Fine Rules, cooperation in the probe - with SAIC’s approval

### Liaoning Henwei Cement Group Co. Ltd.
- 1,200,000 (1%)
- According to Liaoning AIC’s Fine Rules, cooperation in the probe - with SAIC’s approval - non-profitable in last year

### Liaoyan Tianrui Cement Co. Ltd.
- 1,950,000 (1%)
- According to Liaoning AIC’s Fine Rules, cooperation in the probe - with SAIC’s approval

### Liaoning Zhongbei Cement Co. Ltd.
- 500,000
- - did not follow the requirement of ceasing production; cooperation in the probe

### Liaoning Shanshui Gongyuan Cement Co. Ltd.
- 500,000
- - did not follow the requirement of ceasing production and cutting sales quantity - cooperation in the probe

### Liaoning Shangshui Cement Group Company
- 500,000
- - did not follow the requirement of ceasing production and cutting sales quantity - cooperation in the probe

### E5. Hunan Yongzhou City Insurance Industry Association Monopoly Agreements /2012
#### Yongzhou City Insurance Industry Association
- ½ year

#### PICC Yongzhou Branch Company
- 400,000
- 1% * new auto insurance policy sales revenue (418,100)
- - the lasting period of the offence is short - cooperation in the probe

#### Ping’an Property Insurance Yongzhou Sub-Branch Company
- 1% (190,100)

#### China United Property Insurance Yongzhou Sub-Branch Company
- 1% (84,100)

#### Pacific Property Insurance Yongzhou Sub-Branch Company
- 1% (118,900)

#### China Life Property Insurance Yongzhou Sub-Branch Company
- 1% (99,100)

#### China Dadi Property Insurance Yongzhou Sub-Branch Company
- 1% (23,900)

#### Yanguang Property Insurance Yongzhou Sub-Branch Company
- 1% (23,400)

*request for ceasing the probe rejected
- - the lasting period of the offence is short - cooperation in the probe

---

7
<table>
<thead>
<tr>
<th>Case</th>
<th>Insurance Company</th>
<th>Monopoly Agreement Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>E6.</td>
<td>Tian’an Property Insurance Yongzhou Sub-Branch Company</td>
<td>1% (14,400)</td>
</tr>
<tr>
<td></td>
<td>Anban Property Insurance Yongzhou Sub-Branch Company</td>
<td>1% (1,800)</td>
</tr>
<tr>
<td></td>
<td>Hua’an Property Insurance Yongzhou Sub-Branch Company</td>
<td>1% (9,000)</td>
</tr>
<tr>
<td>E7.</td>
<td>Zhangji Jia City Insurance Industry Association</td>
<td>400,000 - the lasting period of the offence is short</td>
</tr>
<tr>
<td></td>
<td>Chenzhou City Insurance Industry Association</td>
<td>450,000 + leading role in the cartel, serious circumstance</td>
</tr>
<tr>
<td>E8.</td>
<td>Chang’de Municipal Insurance Industry Association</td>
<td>&gt;4years 450,000 + leading role in the cartel, serious circumstance</td>
</tr>
<tr>
<td>E9.</td>
<td>Jiangshang Tiger Concrete Co. Ltd.</td>
<td>2 years 471,600[1.5%] - overall consideration of the lasting period, impaction, and damage effect - SAIC’s approval</td>
</tr>
<tr>
<td></td>
<td>Yongcheng Concrete Co. Ltd.</td>
<td>258,400[1.5%]</td>
</tr>
<tr>
<td></td>
<td>Hengjiang Concrete</td>
<td>453,600[1.5%]</td>
</tr>
<tr>
<td>E10.</td>
<td>Cixi City Construction Project Detecting Association</td>
<td>¾ year 0 - terminated monopoly agreement, commitment of rectification - serviced company was not substantially affected by the offence - minor effect of excluding other competitors</td>
</tr>
<tr>
<td></td>
<td>Ningbo Kaiyuan Engineering Detecting Technology Co. Ltd.</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Zhejiang Zhonghao Engineering Detecting Co. Ltd. Cixi Branch Company</td>
<td>0</td>
</tr>
<tr>
<td>Monopoly Agreements /2011</td>
<td>Zhejiang New Century Engineering Detecting Co. Ltd. Cixi Development Zone Branch Company</td>
<td>0</td>
</tr>
<tr>
<td>--------------------------</td>
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</tr>
<tr>
<td>E11. Sichuang Yibing Municipal Brick and Tile Association Organized Members to Conclude Monopoly Agreements /2012</td>
<td>Gao County Fuxi Brick Factory</td>
<td>120,000[3%]</td>
</tr>
<tr>
<td></td>
<td>Yibing Municipal Brick and Tile Association</td>
<td>500,000</td>
</tr>
<tr>
<td></td>
<td>Gao County Shengtian Town Xinhe Brick Factory</td>
<td>3%</td>
</tr>
<tr>
<td></td>
<td>Yibing County Fengdong Brick Factory</td>
<td>3%</td>
</tr>
<tr>
<td></td>
<td>Yibing Municipal Cuiping District Chuanshi Brick Co. Ltd.</td>
<td>2%</td>
</tr>
<tr>
<td></td>
<td>Fubing [Leased a brick factory and operated]</td>
<td>2.1%</td>
</tr>
<tr>
<td></td>
<td>E12. Yunnan Xishuangbanna Prefecture Tourism Association, Travel Agency Association Organized Industry Members to Conclude Monopoly Agreement /2012</td>
<td>Yun’nan Dai Autonomous Prefecture of Xishuangbanna Tourism Association</td>
</tr>
<tr>
<td></td>
<td>Yun’nan Dai Autonomous Prefecture of Xishuangbanna Travel Agency Association</td>
<td>400,000</td>
</tr>
<tr>
<td></td>
<td>E13. Inner Mongolia Chifeng Downtown Firework Wholesaler’s Suspected Wholesale Market Division Case/2014</td>
<td>Zhong’an Firework Co. Ltd.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Cai’an Firework Co. Ltd</td>
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<td></td>
<td>Ji’an Firework Co. Ltd</td>
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<td></td>
<td></td>
<td>Bai Zhong Firework Wholesale Co. Ltd</td>
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<td>Qingdian Firework Co. Ltd</td>
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<td></td>
<td></td>
<td>Feng’an Civil Explosive Product Co. Ltd</td>
</tr>
<tr>
<td></td>
<td>E14. Chongqing Wuxi County 4 Stone Pits’Suspected Monopoly Conduct/2012</td>
<td>Zhang Xiaobo</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Wen Aiyuan</td>
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<tr>
<td></td>
<td></td>
<td>Wen Xianxue</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Wu Gongzheng</td>
</tr>
<tr>
<td></td>
<td>E15. Zhejiang Shangyu City Commercial Concrete Association and Member Companies’ Suspected Monopoly Agreements on Allocating Market Share Case</td>
<td>Shangyu City Commercial Concrete Association</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Shangyu City Yong’gu Concrete Co. Ltd.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Shaoxing Municipal Yangli Concrete Co. Ltd.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Shaoxing Municipal Hengda Tubular Pile Co. Ltd.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Shangyu City Pioneer Concrete Co. Ltd.</td>
</tr>
<tr>
<td>Date</td>
<td>Company Name</td>
<td>Amount</td>
</tr>
<tr>
<td>------------</td>
<td>--------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>/2011</td>
<td>Shangyu City Wanfeng Commercial Concrete Co. Ltd.</td>
<td>250,000</td>
</tr>
<tr>
<td></td>
<td>Zhejiang Juding Tubular Pile Co. Ltd.</td>
<td>150,000</td>
</tr>
<tr>
<td></td>
<td>Shangyu City Puyin Cement Product Co. Ltd</td>
<td>150,000</td>
</tr>
<tr>
<td></td>
<td>Shangyu City Yonglei Construcion Material Co. Ltd.</td>
<td>10,000</td>
</tr>
</tbody>
</table>
F. Dominant Market Position [8 Cases, 8 Companies Probed and Punished (2 Foreign Brands)]

<table>
<thead>
<tr>
<th>F1. Guangdong Huizhou Municipal Dayawang Yiyuan Water Co. Ltd.’s Suspected Abuse of DMP Conduct/2013</th>
<th>Huizhou Municipal Dayawang Yiyuan Water Co. Ltd.</th>
<th>3 years</th>
<th>1. confiscation of illegal gains 2. fine at 2.2%</th>
<th>- cooperation in the probe, took rectification measures to avoid the expansion of the offence’s damage effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>F2. Brazil World Soccer Cup Greater China Area Exclusive Agent’s Tied in Sale of Combining Travel Products into Soccer Ticket/2014</td>
<td>Beijing Shankai Sports and Cultural Co. Ltd.</td>
<td>-</td>
<td>- cooperation in the probe, the commitment measures were able to illuminate and redeem the impact from its conducts, achieved the AML enforcement goa [it provided two options for consumers to choose]</td>
<td></td>
</tr>
<tr>
<td>F3. Inner Mongolia Chifeng Municipal Tobacco Company’s Suspected Abuse of DMP Conduct/2014</td>
<td>Chifeng Municipal Tobacco Company</td>
<td>1%</td>
<td>- cooperation in the probe, and took rectification measures</td>
<td></td>
</tr>
<tr>
<td>F4. Jiangsu Xuzhou Tobacco Peizhou Branch Company’s Suspected Abuse of DMP Conduct/2014</td>
<td></td>
<td>1% * high end products’ revenue</td>
<td>- the quantity and price of distributed tobacco are pre-decided by the state plan, the monopoly offence did not add extra income, so no confiscation in the case - cooperation in the probe, took rectification measures, revised the KA Clients Management Rules</td>
<td></td>
</tr>
<tr>
<td>F5. Chongqing Gas Group Corporate’s Suspected Abuse of DMP Conduct/2011</td>
<td>Chongqing Gas Group Corporation Ltd.</td>
<td>1% * (sales revenue in 2010)</td>
<td>- satisfied the circumstance prescribed by Article 27 of the Administrative Penalty Law - not too much customers affected - quickly rectified the offence in 2011</td>
<td></td>
</tr>
<tr>
<td>F6. Hainan Province Dongfan City Water Company’s Suspected Monopoly Conducts/2014</td>
<td>Dongfan City Water Company</td>
<td>1. return back to the user security bond 2. confiscation of illegal gains 3. fine at 2%</td>
<td>- cooperation in the probe, took rectification measures to avoid the expansion of the offence’s damage effect - cut penalty according to Article 2(5)(i) of the SAIC’s Administrative Penalty Discretionary Power Rules</td>
<td></td>
</tr>
<tr>
<td>F7. Tetra Pek’s Suspected Abuse of DMP/2013</td>
<td>Tetra Pek (China) Ltd.</td>
<td>(In the process of investigation)</td>
<td></td>
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</tr>
<tr>
<td>F8. Microsoft Suspected Abuse of DMP/2013</td>
<td>Microsoft (China)</td>
<td>(In the process of investigation)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Appendix II

**Monopoly Offences Investigated by the NDRC But Not Disclosed On NDRC Website**

(There was a series of reports titled Price Supervision and Check Department (PSCD) Enforcement Events on *China Price Supervision and Check* from 2009 to 2013. *China Price Supervision and Check* renamed as *Pricing Supervision and Anti-Monopoly in China* in January 2014, but there is no further disclosure on AMB’s enforcement events in 2014.)

<table>
<thead>
<tr>
<th>Target</th>
<th>Time</th>
<th>NDRC Activities</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>SOE airline companies</td>
<td>Aug.18-19, 2009</td>
<td>Talked with senior managers of domestic airline companies, announced the investigation conclusion on the civil aviation ticket case and imposed the requirement of rectification and supervision.</td>
<td>11 China Price Supervision and Check 2009</td>
</tr>
<tr>
<td>China Xinhua Bookstore, Book Publisher Association, etc.</td>
<td>July 22,2010</td>
<td>Department General Xu Kunlin met with officials from National Bureau of Press and Publication, leaders from Publishers Association of China, the Books and Periodicals Distribution Association of China, and China Xinhua Bookstore Association, exchanged views on the Book Fair Trading Rules’ suspected violation of the AML.</td>
<td></td>
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<td></td>
<td>Sep 14 ,2010</td>
<td>PSCD submitted a report to State Councilor Ma Kai titled <em>the NDRC’s Report on Issues concerning the Book Fair Trading Rules’ Suspected Price-Related Monopoly Offence.</em></td>
<td>10 China Price Supervision and Check 2010</td>
</tr>
<tr>
<td>Hunan Telecommunication</td>
<td>Sep.6 ,2010</td>
<td>PSCD held meeting to coordinate the work of <em>telecommunication fee investigation</em>, where Department General Xu Kunlin and Deputy Department General Dong Zhiming gave specific direct on the issues identified in the inspection of communication fees in Hunan Province.</td>
<td></td>
</tr>
<tr>
<td>Paper Package Industry Associations</td>
<td>Dec.21-22 ,2010</td>
<td>PSCD issued <em>Notice on Carrying Out Investigation Against Price-Related Monopoly Conducts by Paper Package Industry Associations in Some Provinces</em> to Price Supervision and Inspection Bureaus/Institutes in Tianjin, Liaoning, Shanghai, Zhejiang, and Chongqing, organized the investigation on the monopoly case concerning paper package industry associations in some provinces.</td>
<td>4 China Price Supervision and Check 2011</td>
</tr>
<tr>
<td></td>
<td>Jan. 13, 2011</td>
<td>PSCD held a conference to discuss the case handlers issues in the cases related to China Package Association, and transferred the cases involved with Package Industry Association in Tianjin, Shanghai, Zhejiang, Chongqing, and Dalian to relevant provincial level price authority to dispose.</td>
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</tr>
<tr>
<td></td>
<td>Apr. 25,2011</td>
<td>PSCD served administrative penalty decision to China Packaging Federation Paper Products Committee.</td>
<td>7 China Price Supervision and Check 2011</td>
</tr>
<tr>
<td>Wondersun Milk</td>
<td>May 2 ,2011</td>
<td>AMB issued <em>A Letter to Required Heilongjiang Province PSID to Handle the Price-Related Monopoly Case concerning Wondersun Milk Corporation</em>, urged to investigate and punish Wondersun’s abuse of DMP to conduct discriminative pricing when buy raw milk.</td>
<td>3 China Price Supervision and Check 2013</td>
</tr>
<tr>
<td>CNOOC/Petro China/SINOPEC</td>
<td>July 27-28,2012</td>
<td>Deputy Department General Lu Yanchun led a team to conduct anti-monopoly investigation against SINOPEC Guangdong Company, Petro China Guangdong Company, CNOOC Guangdong Company, and SINOPEC and Petro China’s branch companies in Guangzhou, Shenzhen, Shantou, Maoming, Huizhou, and Meizhou cities, ad some gas stations owned by CNOOC.</td>
<td></td>
</tr>
<tr>
<td>Event Category</td>
<td>Date</td>
<td>Description</td>
<td></td>
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<td>----------------------------------------</td>
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<tr>
<td>Zhengzhou Post Bureau</td>
<td>Oct. 15, 2012</td>
<td>Deputy Department General Li Qing went to Henan Province to guide Henan Province Price Bureau to handle the price monopoly case concerning Zhengzhou Municipal Post Bureau’s delivery of college admission notice.</td>
<td></td>
</tr>
<tr>
<td>Shipping Agent</td>
<td>Nov. 19-30, 2012</td>
<td>AMB dispatched officials to Tianjin Port and Shenzhen Port to carry out investigation against shipping agent’s suspected price monopoly.</td>
<td></td>
</tr>
<tr>
<td>Cement Industry</td>
<td>March 12, 2013</td>
<td>AMB organized 20 investigation panels to concurrently carry out anti price monopoly investigation to cement companies in Beijing, Chongqing, Jilin, Hunan Hubei, Jiangxi provinces.</td>
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<td>May 2, 2013</td>
<td>Deputy Department General Lu Yanchun met with managers from China Construction Material Group and North Cement Company and received their oral report on the overcapacity and parallel behavior of limiting the production in the cement industry.</td>
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<td>2 Medical Companies</td>
<td>May 21, 2013</td>
<td>AMB urged Henan Province Development and Reform Commission to investigate and punish the price conspiracy committed by Zhengzhou Renkang Medicine Co. Ltd. and Zumadian Linsheng Medicine Co. Ltd. concerning the medicine of Tetracaine Hydrochloride.</td>
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<td>Securities Industry</td>
<td>July 9, 2013</td>
<td>AMB organized team to carry out investigation on securities companies’ suspected price monopoly conducts.</td>
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<td>Dec. 23, 2013</td>
<td>AMB held meeting with China Security Regulatory Commission’s Legal Department and Institute Department, communicated the monopoly case concerning brokerage business in securities industry.</td>
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<td>Airline Companies’ Alliance</td>
<td>Dec. 20, 2013</td>
<td>AMB held conference and exchanged views with China Civil Aviation Administration officials on the exemption from the AML concerning the Joint Operation Agreement among China Southern Airline Co. Ltd, Air France and KLM.</td>
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5 China Price Supervision and Check 2013
10 China Price Supervision and Check 2013
4 Pricing Supervision and Anti-Monopoly in China 2014