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环球反垄断法律专递（第一期）

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目录

立法及修法建议

环球律师事务所对《经营者集中审查办法（修订草案征求意见稿）》的建议

作者：环球律师事务所反垄断团队

《经营者集中审查办法》和《经营者集中申报办法》自 2010 年施行以来已近八年时间，迄今商务部审查的经营者集中申报案件数量已超过 2000 件。为了进一步规范和完善经营者集中审查执法程序，商务部决定修订《经营者集中审查办法》，并于 2017 年 9 月 8 日公布了《经营者集中审查办法（修订草案征求意见稿）》，公开征求意见。该征求意见稿不仅是对现行《经营者集中审查办法》进行修订、完善，而且拟并入现行《经营者集中申报办法》的内容（后者将被废止）。该征求意见稿的通过与实施将会对未来经营者集中申报工作产生重要影响。有鉴于此，环球律师事务所反垄断团队在近年来处理经营者集中申报案件所积累的经验基础上，结合我们对经营者集中问题的长期关注与研究，向商务部提交了我们对该征求意见稿的一些立法建议，以供商务部在进一步完善修订草案时参考。

建议 1：

第六条　确定经营者取得对其他经营者的控制权或者能够对其他经营者施加决定性影响，应当考虑经营者持有其他经营者的表决权或类似权益的情况，以及对其他经营者高级管理人员任免、财务预算、经营计划等经营决策和管理的影响。

两个以上经营者均拥有对其他经营者的控制权或者能够对其他经营者施加决定性影响，构成对其他经营者的共同控制。

修改建议：

建议增加一款作为第三款，规定：经营者对其他经营者的章程修改、注册资本增加或减少以及合并、分立、解散或者变更公司形式拥有否决权的，不视为对其他经营者拥有控制权。

前述事项是《公司法》规定的须经代表三分之二以上表决权的股东通过的事项，也是《中外合资经营企业法实施条例》规定的由出席董事会会议的董事一致通过方可作出决议的事项。经营者拥有这些事项的否决权一方面来自于法律规定，另一方面也是为了保护股东尤其是小股东基本权利的必要，不会构成对其他经营者的控制。尽管如此，实践中对于此类否决权是否会被认定为拥有控制权的表现仍然存在争议。为增强确定性，建议在本办法中予以明确。

建议 2：

第八条　相同经营者通过多个交易同时或连续取得一个或多个经营者的控制权或者能够施加决定性影响，相关交易在法律或事实上互为条件的，应当视为一个集中。

修改建议：

建议像第十五条一样，明确规定本条所指情形下的集中时间如何确定。

建议 3：

第九条　本办法所称参与集中的经营者主要包括以下情形：

（一）经营者合并的，合并各方为参与集中的经营者；

（二）经营者取得对其他经营者的单独控制，或者对其他经营者由共同控制转变为单独控制的，取得单独控制的经营者和目标经营者为参与集中的经营者；

（三）经营者取得对其他经营者组成部分的单独控制的，取得单独控制的经营者和其他经营者的组成部分为参与集中的经营者。

（四）经营者新设合营企业的，共同控制新设合营企业的经营者为参与集中的经营者，新设合营企业不是参与集中的经营者。

（五）**经营者取得对其他既存经营者的共同控制的，交易完成后共同控制既存经营者的所有经营者和既存经营者均为参与集中的经营者。**但既存经营者原由另外的经营者单独控制，交易完成后此经营者对既存经营者由单独控制转变为共同控制的，交易完成后共同控制既存经营者的所有经营者为参与集中的经营者，既存经营者不是参与集中的经营者。

修改建议：

对于两个以上经营者联合或分别收购目标企业并取得控制权，目标企业原来的控制方不再拥有控制权的情形，第（五）项的第一句是完全合理的。但对于目标企业原由两个以上经营者共同控制，在交易完成后原控制方继续拥有控制权，而新取得共同控制权的经营者的营业额很小的情形，则不太合理，因为这可能导致本来不会达到申报门槛的集中轻易地达到申报门槛。建议对后一情形中的参与集中的经营者另行作出规定。

建议 4：

第十二条　参与集中的经营者的营业额应当为下列经营者的营业额总和：

（一）该单个经营者；

（二）第（一）项所指经营者直接或间接控制的其他经营者；

（三）直接或间接控制第（一）项所指经营者的其他经营者；

（四）第（三）项所指经营者直接或间接控制的其他经营者；

（五）第（一）至（四）项所指经营者中两个以上经营者共同控制的其他经营者。

参与集中的经营者本身的营业额不包括上述（一）至（五）项所列经营者之间发生的营业额。

经营者的营业额包括在申报时具有控制权或者能够施加决定性影响的其他经营者的营业额，不包括在申报时不再具有控制权或者不能施加决定性影响的其他经营者的营业额。

修改建议：

建议增加一款，规定：两个以上的其他经营者共同控制第一款第（一）项所指经营者的，这些其他经营者的营业额均应计算在内。

关于目前的第三款，有两个问题需要考虑。目前的规定以“申报时”作为时点，实际上是假定一项集中已达到申报门槛，只是考虑营业额的量变；而真正容易产生的争议的是“质变”，即是否纳入某个经营者的营业额会影响集中是否达到申报门槛的情形。对于后一情形，假如经营者未进行申报，商务部在调查是否构成未依法申报时应采取哪个时点来计算营业额，更具实务价值。为增强法律上的确定性，便于经营者判断是否需要申

报，建议规定为以签订集中协议时为准。此外，第三款中的“具有控制权”和“不再具有控制权”按通常理解，似应以交割为标准，即已经实际取得控制权或者已经实际失去控制权(如股权变更已办理工商登记)。但对于在签订集中协议之时，已另行签有协议，虽未履行该后一协议但确定地负有出售某资产或子公司的义务且履行该义务构成实施集中协议的条件的，是否可以例外地规定为该资产或子公司的营业额也不计算在内，请考虑。

建议 5：

第十三条　参与集中的单个经营者之间有共同控制的其他经营者，则参与集中的所有经营者的合计营业额不应包括被共同控制的经营者与任何一个共同控制他的参与集中的经营者，或与后者有控制关系的经营者相互之间发生的营业额。

参与集中的单个经营者之间有共同控制的其他经营者，则被共同控制的经营者营业额应在参与集中的单个经营者之间平均分配。

修改建议：

建议在第一款末尾增加一句：“第十二条第（一）至（五）中的经营者与第三方有共同控制的其他经营者，则该经营者的营业额不应包括被共同控制的经营者与该共同控制他的参与集中的经营者，或与后者有控制关系的经营者相互之间发生的营业额。”理由是，若参与集中的经营者与第三方有共同控制的其他经营者，因该其他经营者的营业额也需按本《经营者集中审查办法》第 14 条计算在内，为避免重复计算，建议增加前述一句话。

建议在第二款末尾增加一句话：“参与集中的单个经营者与第三方有共同控制的其他经营者，则该参与集中的单个经营者的营业额应包括被共同控制的经营者的营业额在对其有控制权的所有经营者之间平均分配的份额。”理由：为合理计算参与集中的经营者的营业额，有必要明确规定参与集中的经营者与第三方有共同控制的其他经营者的情形，且此处的分配原则可参照参与集中的单个经营者之间有共同控制的其他经营者的情形。欧盟竞争法有关营业额计算的相关指南对此有较明确的说明。为增加实务操作的明确性，建议明确规定。

建议增加一款，作为第三款：“对于合营企业而言，若交易完成后控制权从共同控制转变为其中某一股东单独控制，则在计算收购方营业额时，应扣除该合营企业的营业额，在计算该合营企业营业额时，也应扣除收购方营业额。”理由：增加本款的目的是避免重复计算。欧盟竞争法有关营业额计算的相关指南对此也有较明确的说明。为增加实务操作明确性，建议予以规定。

建议 6：

第十七条　经营者集中达到《规定》第三条规定的申报标准的，经营者应当事先向商务部申报，未申报的不得实施集中。

修改建议：

为增强对实务操作的指导性，建议明确“不得实施集中”的具体含义，例如除了不得交割外，也不得有参与被收购方的经营决策、不得交流敏感信息等其他“抢跑”行为；如果属于分步骤的集中，则不得实施集中的第一步等。

建议 7：

第十八条　通过合并方式实施的经营者集中，由合并各方申报。通过其他方式实施的经营者集中，由取得控制权或者能够施加决定性影响的经营者申报，其他经营者应予以配合。

同一项经营者集中有多个申报义务人的，可以委托一个申报义务人申报。被委托的申报义务人未申报的，其他申报义务人不能免除申报义务。申报义务人未申报的，其他参与集中的经营者可以提出申报。

申报义务人可以自行申报，也可以依法委托他人代理申报。

修改建议：

关于第一款，其中的“取得控制权或者能够施加决定性影响的经营者”按字面理解似乎指的是新取得控制权的经营者，但实务中也存在将其理解为交易完成后拥有控制权的所有经营者的观点，建议在本款中予以明确。

关于第二款中规定的“同一项经营者集中有多个申报义务人的，可以委托一个申报义务人申报”这一情形，建议明确是否需要提交委托书。如需要，建议在第二十二条第（一）项中增加该要求。

建议 8：

第二十八条　申报后经营者集中发生重大变化的，申报人应当及时通知商务部，并书面说明变化情况，发生实质性变化的，应当撤回并重新申报。

修改建议：

实践中还会出现经营者集中在商务部批准之后发生重大变化甚至实质性变化的情形，建议在本办法适当位置对此作出规定，明确何种情况下需要书面通知商务部，何种情况下需要重新申报等。

建议 9：

第三十一条　经营者集中符合商务部《关于经营者集中简易案件适用标准的暂行规定》规定的简易案件标准的，申报人可以申请作为简易案件申报。申报人申请简易案件申报的，应当按照商务部公布的简易案件申报文件、资料相关要求提交申报文件、资料。

经营者集中符合简易案件标准，申报人未申请作为简易案件申报的，应按照本办法第二十二条规定提交申报文件、资料。

修改建议：

鉴于《关于经营者集中简易案件适用标准的暂行规定》系公告而非部令，效力等级较低，且实质性条款只有三条，其第四条已经被纳入本办法作为了第三十四条，建议将该《暂行规定》中的第二、三条也纳入本办法，同时废止该《暂行规定》。此外，根据《暂行规定》第二条的规定，在跨行业并购的情况下，如果参与集中的经营者（尤其是

被收购方）在某个相关市场的份额超过 25%，则不能作为简易案件申报。鉴于不存在横向、纵向和互补关系，此类并购通常不会造成排除、限制竞争的影响，可以作为简易案件申报。欧盟竞争法对此有明确规定。建议借鉴欧盟立法，对此予以修改。

建议 10：

第四十七条 限制性条件为剥离的，但剥离存在较大困难或剥离前维持剥离业务的竞争性和可销售性存在较大风险的，参与集中的经营者可以提出向特定买方剥离的建议。经评估，相关建议能够减少集中对竞争的不利影响的，商务部可以采取以下方式附条件批准经营者集中：

（一）在作出审查决定前要求参与集中的经营者与特定买方签订剥离业务出售协议，并按照协议内容附加限制性条件批准经营者集中。

（二）在附条件批准的审查决定中要求剥离义务人在确定剥离业务买方、签订出售协议并经商务部审核批准前，不得实施交易。

修改建议：

为明确起见，建议在“以下方式”之后增加“之一”。

反垄断法专论

CHINA: Ten years of Anti-Monopoly Law - Its review and prospect

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ABSTRACT: China AML was promulgated ten years ago. The prospective of China AML appeared limited but steady progress in competition policy, legal system, enforcement, international cooperation and so on. This essay looked back past decade of China AML and provided some predictions and expectations.

Promulgated on August 30, 2007, the Anti-Monopoly Law (AML) of the People's Republic of China went into effect one year later. This paper intends to provide a concise overview of issues around its implementation in the past decade, and then makes some comments on its implementation and predictions and expectation about its future developments are made.

I. Overview and comments

1. Competition policy in initial phase with its effectiveness yet to be seen

The Chinese government has been working to promote a new round of economic reforms oriented to "*give the full play of the basic role of the market in resource allocation*" since 2013. The Communist Party of China and the central government later issued a series of guiding documents, hammering at the role played by competition policy. In a public speech made in September 2013, Xu Kunlin, the then general director of the Price Supervision and Anti-Monopoly Bureau (PSAMB) of the National Development and Reform Commission (NDRC), clearly put forward the idea for the first time that "*the fundamental status of competition policy shall be gradually established*." Zhang Mao, the minister of the State Administration for Industry & Commerce (SAIC), also has stressed the significance of speeding up the establishment of the basic role played by competition policy on several occasions since 2014. On June 14, 2016, the State Council officially

issued Opinions on the Establishment of Fair Competition Review System in the Building of Market System ([2016] No. 34, Document of State Council), the principles, philosophy and specific content of the Fair Competition Review system established in which have already reflected the core content of China's competition policy. However, it remains to be seen whether China's competition policy can really play a decisive role in the government's economic policies and whether relevant systems can be implemented effectively.

2. More comprehensive anti-monopoly legal system with key elements missing

The Guidelines on the Definition of Relevant Market issued by the Anti-Monopoly Commission under the State Council (AMC) is one of the earliest supporting norms released after the promulgation of the AML. Since 2010, NDRC, the Ministry of Commerce (MOFCOM), and SAIC have been issuing a series of departmental regulations on the enforcement of the AML which have reached dozens in total. The Supreme Court also issued a judicial interpretation on civil litigation cases involving monopolistic conducts in 2012. The administrative regulation for the implementation of the AML, the most important supporting regulation, however, is not yet in sight. It is the biggest shortcoming ever of anti-monopoly legislation. Some representatives of the National People's Congress in China have begun to call for the revision of the AML while the AML enforcement agencies have undertaken related preparatory work with experts and scholars after 2015. In China, administrative departments of the government are playing the leading role in the formulation and revision of laws, and it is rather challenging currently to coordinate the three agencies in the consolidated effort to promote the formation of anti-monopoly administrative regulations and the revision of the AML. The AMC has been actively coordinating the draft of a series of anti-monopoly guidelines—six of which have reached the final draft and shall be released in the near future, including the draft on the anti-monopoly guideline for IP rights.

3. Limited but steady progress of anti-monopoly enforcement system under way, with practical dilemmas

Six months into the promulgation of the AML, the new Chinese government cabinet was formed. NDRC, MOFCOM and SAIC all specified their enforcement duties of the AML, internal functional divisions and staffing respectively in accordance with the law. Over the past decade, despite the absence of revolutionary changes in the AML enforcement system, the progress has been made in many aspects of varying degrees, making small but quick and steady progress:

– First, the responsibility of the AMC and its affiliated Advisory Group has been clarified. Their working mechanism and regulations have been established and improved, with some necessary adjustments made with respect to their affiliated members;

– Second, functional divisions of the three enforcement agencies have been strengthened in different degrees—the Price Supervision and Inspection Department under NDRC was renamed as the Price Supervision and Anti-Monopoly Bureau (PSAMB), whose anti-monopoly offices and full-time personnel almost doubled, while 150 full-time personnel of price-related anti-monopoly were recruited nationwide; more offices in charge of the case handling were set up and an office was created for supporting the AMC within the Anti-Monopoly Bureau of MOFCOM; the size of the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau under SAIC has also been expanded and the number of staffs designated to anti-monopoly issues has doubled.

In addition, the transparency of China's AML enforcement has also been greatly improved. SAIC has taken the lead in giving full disclosure of its written final decisions on its official website since 2013. A year later, NDRC followed its lead. The full-text decisions of conditional approval or prohibition of cases have been released and profiles of cases applicable to simplified procedure have been made known to the public at regular intervals by MOFCOM after the introduction of the simplified procedure of handling cases.

However, there is no denying that the progress made is not enough to completely solve the dilemma faced by the current anti-monopoly system in China. Enjoying the high administrative status, the AMC was created for coordination through consultation, with

no direct enforcement power granted. A lot of its members are industry departments and regulators, which will inevitably affect the formulation and implementation of competition policy. In terms of administrative enforcement, the anti-monopoly enforcement power has been shared among different agencies, resulting in the overlapping of power thus the failure to form a consolidated force. Lower administrative rank of actual administrative enforcement departments and the shortage of manpower constrain their organizational capabilities in guaranteeing the authority and potency of the anti-monopoly enforcement.

4. International cooperation unfolding in AML enforcement

China has virtually integrated into the international competition community, maintaining regular meetings and exchange mechanism with the United States, the European Union, the BRIC countries and East Asian countries. Chinese government's AML officials have been regularly attending big events in the international field, the ABA section of Antitrust Law spring meeting, for instance. The Advisory Group affiliated to the AMC stages a forum on China competition policy annually, inviting domestic and foreign antitrust officials and specialists in the discussion of anti-monopoly issues in China. Regrettably, as an observer of the OECD Competition Committee, China can only attend the OECD Global Forum on Competition once a year. It is rare to see the presence of Chinese representatives in ICN, a global anti-monopoly cooperative organization. A more active participation in international anti-monopoly governance shall be achieved, with China's involvement in the drafting and developing of international rules of anti-monopoly, thus enhancing China's status in international competition community.

II. The implementation of China's AML

1. The overall implementation of the AML

As of the end of 2016, price-related monopoly cases that had been investigated and penalized by NDRC were 127 in number, the amount of financial penalties of which reached more than 10 billion RMB. The financial penalties of 14 out of the 127 cases were over 100 million RMB each; a total of 75 monopoly cases had been under investigation

initiated by the SAIC system, 48 of which were closed and 2 of which reached compromise. A large number of administrative monopoly cases, meanwhile, were handled; the declaration of more than 1,700 merger cases had been reviewed by MOFCOM, 2 of which were prohibited, 29 of which were approved with conditions. Among those cases, those applicable to simplified procedure were basically closed within 30 days while those that had not been declared in accordance with the law were investigated and penalized, whose number gradually increased[1]. In the matter of anti-monopoly civil litigation cases, as of October 2015, cases of trial of the first instance and second instance tried by courts in China were 415 and 348 in number respectively, out of which 141 and 98 cases were tried respectively in the first ten months of 2015 alone. These figures stood at only ten and six respectively in 2009[2].

NDRC undoubtedly played a stronger role in law enforcement in recent years while the number and quality of cases handled by SAIC were substantially improved in the past three years. Issues about the overlapping of responsibilities prescribed to the two agencies in some cases arose. The professional competence of MOFCOM was steadily enhancing, and its engagement in international cooperation was the most active in the three agencies. In judicial field, despite the substantial increase in the number of anti-monopoly litigation cases, the number of related civil cases as a whole was still very small, due to the lack of compensation incentives, while the administrative litigation cases involving anti-monopoly penalties were very few.

2. Visions of competition regulation reflected from decade's implementation

Based on the anti-monopoly practice in the past decade, China's competition regulation presents the following tendencies:

– Firstly, the association of undertakings played a leading role in most of the cases relating to horizontal cooperation agreements that were investigated and penalized

[1] https://po.baidu.com/feed/share?context={%22nid%22:%22news_3456932728691558532%22}, accessed on 15 May 2017.

[2] *See* CPI(winter 2016), Interview with Judge Chuang Wang, Presiding Judge of Intellectual Tribunal, https://www.competitionpolicyinternational.com/interview-with-judge-chuang-wang-presiding-judge-of-intellectual-tribunal-supreme-peoples-court-of-p-r-china, accessed on 18 Feburary 2016.

in China. These associations generally emerged from the industry administrative departments, or functioned as subsidiaries of industry regulators. Many horizontal agreements dominated by these associations were colored by the administration of the government. Many cases, therefore, were often connected with administrative monopoly. Under the intense pressure exerted by AML enforcement agencies, explicit horizontally cooperation tended to decrease, which transformed into a variety of tacit collusions or concerted conducts in recent years. The regulatory review imposed by enforcement agencies over these concerted conducts was not very radical, attaching more importance to the initiative factors behind the conspiracy when illegal conducts were identified. Besides, the loopholes in the AML were exploited, resulting in the enforcement agencies' failure to discipline the core participants in hub-and-spoke cartel.

– Secondly, AML enforcement agencies in China gradually formed their strategy in reviewing vertical agreements, namely "prohibition in principle plus exemption for exceptions," based on the experience gained from the white liquor cases, milk powder cases, automobile cases, glasses cases. The determination of behavior elements of vertical agreements was strictly based on Article 14 of the AML, and the attitude towards vertical price control was different from the one in the United States—giving increasing weight to the competition analysis of individual cases—and the one in the European Union—emphasizing mutual consent of agreements. In their regulatory practice, those upstream undertakings with advantageous positions were usually punished to regulate the transaction price, by doing what the vertical price-control conducts was substantially regarded as the abuse of the superior rather than dominant market position. On the other hand, from a series of cases relating to vertical agreements that were tried by courts in China, including Johnson & Johnson's case, it seemed that Chinese judiciaries believed that the illegality of the vertical agreements was based on whether agreements were designed to "eliminate or restrict competition." This distinguished themselves from AML enforcement agencies, but the shared problem was that neither party valued the "mutual agreement" of vertical price control. The absence of administrative litigation cases relating to the law enforcement of vertical agreements, for the time being, avoids direct collisions between AML enforcement agencies and judiciaries over this issue.

– Thirdly, the proportion of cases involving abuse of dominant market positions to all cases was not high. The main types of conducts investigated and penalized included excessive prices (by NDRC), tie-in or adding unreasonable conditions (by SAIC). There were similar prohibitive provisions in the Price Law and Unfair Competition Law, therefore NDRC and SAIC were more experienced in investigating and handling such acts. However, evaluated from penalty decisions that had been published, the AML enforcement agencies gave more weight to the behavior elements than the analysis of competition effects, which actually was reflected in cases relating to monopoly agreements, too.

– Fourthly, the Chinese courts set out their views on issues such as the illegality of vertical agreements, two-sided markets, and the abuse of standard-essential patent (SEP). The number of litigation cases in China, including administrative and civil litigations, was pathetically less than that in the United States or in the European Union. The status of judicial organs in the entire anti-monopoly implementation system, as a result, was reduced to the one that was lower than that enjoyed by their counterparts in the United States and in the European Union.

– Fifthly, agencies or courts in China adopted a relatively positive attitude towards the AML enforcement involving IP rights. They were highly alert about the abusive conducts of IP rights—the abuse of SEP in particular. Their protection of willing licensees from the injunction imposed by SEP holders was undisguised.

The restraint imposed by China's review of the concentration of undertakings was not great for most mergers in the market, and the reviewing conclusions for most of the cases were in line with that in the United States and in the European Union. For those cases with conditional approvals, the Chinese AML enforcement agency (MOFCOM) favored behavioral remedies over structural remedies, which granted greater possibility of compromise but demanded more costly supervision. On the other hand, undeclared concentration cases were mounting, partly due to the unduly low cost of violating the law as prescribed in the AML, and partly due to efforts made by MOFCOM in cracking down on such acts.

3. Controversies over the implementation of China's AML in the past decade

The domestic and international review on China's AML and its implementation is generally favorable. The strong enforcement improves and promotes China's economic reforms. The criticism received mainly focuses on three aspects—namely, transparency, independence and neutrality. Over the past decade, with the accumulated experience and boosted confidence, the transparency of the AML enforcement in China has been experiencing substantial progress, both in procedure and in substance. The three agencies virtually make the full text of written final decisions public; for units under investigation, the right to communicate their cases is basically guaranteed in the law enforcement process; and the final decisions indicate that analysis of concerned cases are increasingly comprehensive and thorough. Although room for improvement remains, the AML enforcement agencies in China today have achieved pretty impressive results in terms of transparency, even compared with standards in the European Union and in the United States.

Some foreign chambers of commerce publicly voiced their criticism in 2014, claiming that the AML enforcement conducted by the Chinese government was overshadowed by industry sections and foreign-funded enterprises were subject to disproportionately stringent enforcement compared with domestically funded enterprises. In fact, the AML enforcement agencies in China have been pursuing the neutrality and independence as devotedly as their counterparts in the world. In recent years, the Chinese government raised competition policy to the forefront of government's economic policy system. Efforts made by AML enforcement agencies, together with the appeal made by the public and enterprises, have greatly promoted the independence of the AML enforcement in China. Admittedly, as with problems faced by all countries in the world, the independence of law enforcement of competition issues is always guaranteed in relative terms.

4. Some milestone cases (merger and anticompetitive conduct) in the decade

Coca-Cola/Huiyuan. In March 2009, MOFCOM rejected the Coca-Cola's application for the acquisition of Huiyuan Juice, which for the first time made the world aware of the existence of China's AML.

China Telecom & China Unicom case. The year 2011 witnessed the investigation initiated by NDRC on China Telecom's and China Unicom's monopolistic conducts in the broadband access market. It was the first time an anti-monopoly investigation was launched against the giants in state-owned industry in China. It was followed by NDRC's investigation into two state-owned enterprises (SOEs) in white liquor industry and three in cement industry which, as a consequence, faced severe penalties. The law enforcement activities of this kind greatly alleviated people's concern on Article 7 of the AML in China.

Qihoo 360 v. Tencent. Qihoo filed a complaint against Tencent with Guangdong province High Court in 2011, alleging that Tencent had a dominant position and abused its market dominance in the provision of IM services in China. In 2013 the case was heard in front of the Supreme Court. China's Supreme Court took its basic stance on the definition of relevant market, the recognition of the dominant market position and related monopolistic conducts in this case (not confined to the Internet field) in 2014.

Qualcomm Inc. case. Qualcomm was fined by NDRC nearly one billion US dollars over its abuse of dominant market position in February 2015, hitting a number of records of administrative penalties imposed by the Chinese government. It also made the anti-monopoly agency in China, for the first time, the pioneer in global competition law community. Since then, anti-monopoly agencies in South Korea, the European Union and other countries and regions have launched anti-monopoly investigation into Qualcomm in succession.

III. Predictions about the future

1. Revision of the AML

International experience shows that the competition law shall be revised every three to five years. After years of implementation, it is necessary and feasible to revise China's

AML. It is understood that the Chinese government has included the revision of the AML in its work plan, although it is still ranked as a minorly urgent project.

2. Reforms of anti-monopoly enforcement system

The year 2018 will see the reshuffle of the government, which is believed to bring a large-scale reorganization and transformation of the government departments. In recent years, the appeal for AML enforcement reforms in China has been voiced by all concerned parties and the demand for an independent and unified anti-monopoly authority continues. In the view of the current situation, the author reckons it as a high-probability event, too. As it should be, the reform of the enforcement system of the AML is closely linked with the revision of the AML as the two are reciprocally enhancing.

3. Focus of AML enforcement in the near future

In recent years, the following fields have been among the priorities of AML enforcement in China—namely, the special manufacturing industry (cement, chemicals, packaging, white liquor and milk powder), shipping industry (shipping agents, ro-ro ship transportation and ports), financial industry (insurance and securities), pharmaceutical industry (pharmaceutical raw materials and medical equipment), electronic communications (LCD panels, communication technology and broadband), urban infrastructure (water supply, gas supply and power supply) and automobiles industry (vehicles, spare parts and tires). Aiming at maintaining and promoting market competition, the focus of AML enforcement might shift to key industries in the coming years where reforms are implemented by the central government, tightening the supervision of the pharmaceutical industry as an effort to enhance the medical reform and strengthening the regulation of the abusive conducts of SEP to balance policies on IP rights. The monopoly industries that retain much of the concern of ordinary people, like urban infrastructure, oil and gas, telecommunications, etc., shall be the main concern of the AML enforcement, too. In terms of types of illegal conducts, although cases relating to monopoly agreements were in the majority of anti-monopoly cases in the past decade and the market also got a good lesson of strong law enforcement, the number of explicit anti-monopoly agreements is expected to decline, while law enforcement against the abusive acts of large enterprises will gradually

intensify in the future. In addition, some emerging fields, such as the Internet, two-sided and multi-sided markets, cloud computing, blockchain technology, will be main concern of AML enforcement agencies.

IV. Some expectations

First of all, we hope that the Fair Competition Review system can be implemented truthfully, serving as voluntary standards for economic policies introduced by different economic sectors in China. That is how competition policy in China can play a fundamental role in economic reforms. Secondly, we advocate major reforms of the AML enforcement system in China with the formation of joint forces of the AML enforcement as the ultimate goal of the institutional reform. Thirdly, the AML, which is largely consistent with international standards and prevailing practices, shall be under necessary revisions. After years of enforcement and judicial practice, it has been tested and proved to be the one that can be well implemented. There are, however, still some defects in both its legality and policy orientation. As an example of the first concern, dominant undertakings in the hub-and-spoke cartel cases are immunized from the penalty prescribed in the AML. For the latter concern, Article 7 provokes the doubt about its application to SOEs; the logical relationship between Articles 13, 14 and 15 is not sufficiently clear, including the definition of monopoly agreements, the main body of vertical agreements and the analysis path of monopoly agreement exemption; design defects in legal liability system cannot be overlooked. Among the punishment of monopolistic conducts, the confiscation of unlawful gains is the sword over the authority for enforcement of the AML. Fuzzy standards to be observed in the calculation of economic penalties lead to confusing interpretation of the standards in practice. The cost of undeclared illegal acts is unduly low. These all make the AML worthy of revision. Finally, we hope that China shall keep up its efforts in the AML enforcement, as it had done in the past three years, improving its professional competence and defensibility, while maintaining or even enhancing the neutrality and independence of law enforcement.

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Anti-Monopoly Litigation in China: A Review for the Year of 2016

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ABSTRACT: The year of 2016 has witnessed the conclusion of 14 cases of abuse of dominant market position and 5 cases of monopoly agreement in all levels of courts in China. This article comprehensively reviews the key points embodied in the judgments of those cases, and provides comments on certain important issues such as the legality of RPM, the probative value of administrative enforcement decisions before courts and the arbitrability of monopoly disputes.

I. Introduction

2016 has seemed to be a relatively insipid year for anti-monopoly litigations in China. It is first reflected in the small number of cases. Chinese courts have adjudicated on 18 monopoly disputes nationwide, rendering 20 judgements or rulings.[3] It is also reflected in the lack of landmark cases like *Huawei v. IDC* and *360 v. Tencent* in previous years. Nevertheless, the adjudicated cases in 2016 have certain features, and some of them are either of important referential value or have provoked heated discussion or even criticism.

In the **procedural aspect**, the Supreme People's Court concluded 2 retrial cases, which signals its determination to reinforce judicial supervision and its efforts towards more judicial consistency. With respect to **regional difference**, Guangdong Province and Beijing Municipality have adjudicated the largest numbers of cases with 5 and 4 cases respectively, while around 20 provinces/municipalities have heard no case at all. The **cause of action** is diversified. 14 cases concern abuse of dominant market position, where specific monopoly behaviors involved include unfairly high prices, exclusive dealing, tie-in sales and refusal to trade. 5 cases concern monopoly agreements, of which 3 are vertical and 2 are horizontal. In one case the plaintiff even accused the defendant to have violated provisions of Article 20 of the *Anti- Monopoly Law* regarding concentration of undertakings. As to the **results, there is only 1 case where the plaintiff prevailed ultimately**, i.e. *Wu Xiaoqin v. Shaanxi Broadcasting Media*. It is also

[3] Statistics by the author according to information published by the Website of China Judgements and Rulings (http://wenshu.court.gov.cn).

worthy to note that **objections to jurisdiction have been frequently raised** (6 cases), and the ratio of **withdrawal of claims** is surprisingly high (6 cases, accounting one third of the total).

Below we will review the monopoly cases in 2016 and provide comments from the aspect of abuse of dominant market position, monopoly agreement, objections to jurisdiction and the relationship between monopoly disputes and other type of disputes in turn.

II. Abuse of Dominant Market Position

1. Determination of Dominant Market Position

In ***Changsha Zhenshanmei Ltd. v. Ningbo Bull Electric***[4], the Supreme People's Court held that the relevant market cannot be defined as, as Plaintiff alleged, the Bull brand switch market in the Changsha city. To start with, experience from daily life suggests that there exist other competing and closely substitutable switch products against the Bull brand switch. Given that the Plaintiff cannot substantiate its claim of relevant product market, there would be no need to determine the relevant geographic market. Even assuming that the relevant market is the switch market in Changsha, the Plaintiff has failed to provide with sufficient evidence about the defendant's market share to prove its dominant position in the relevant market.

In ***Yang Zhiyong v. China Mobile***[5], Shanghai Intellectual Property Court ruled that Plaintiff did not prove China Mobile has dominant position in the relevant market. In the area of mobile communication service, there are other domestic operators such as China Unicom, China Telecom. In addition, China Mobile, the Defendant, also provides various packages of service for consumers to choose from. Therefore, the Defendant does not possess the capability to manipulate price and gain monopoly profits in the relevant market.

In ***Wu Xiaoqin v. Shaanxi Broadcasting Media***, the Supreme People's Court determined without hesitation that the Defendant held dominant position in the cable TV transmission market, given that the Defendant is the only legally permitted operator of cable TV transmission service in the Shaanxi Province.

[4] Supreme People's Court (2015) Civ. Retrial Civil Ruling No. 3569, made on March 4th 2016.

[5] Shanghai Intellectual Property Court (2015) SH IP Civ. F.I. Civil Judgement No. 508, made on April 25th 2016.

2. Determination of Tie-In Sales

In ***Wu Xiaoqin v. Shaanxi Broadcasting Media***[6], having confirmed the Defendant's tie-in sale practice of selling basic TV programs and other programs requiring extra payment as a package, the Supreme People's Court ruled that the Defendant has conducted tie-in sales without justifiable reasons because the two type of programs are independent from each other and the Defendant has not proven that it is trade practice to do so or to charge the two types of programs separately would result in detriment to the performance or use value of the two.

3. Determination of the Unfairly High Price

In ***Yang Zhiyong v. China Mobile***, the Plaintiff alleged that the Defendant China Mobile's 4 types of practices, namely charge of monthly fee, charge of roaming service, billing method that approximates second to minute and pricing at 0.39 yuan per minute, constitute "selling commodities at unfairly high prices" prohibited by *Anti-Monopoly Law*.[7]Shanghai Intellectual Property Court decided that the Plaintiff did not provide evidence to prove its claim.

Regarding the 0.39 yuan per minute call charges, the Court considered that, the Defendant provides various packages of service for consumers to choose from, where the price varies from 0.1 yuan to 0.39 yuan. The Plaintiff is free to opt for other packages.

In terms of whether the monthly fee and domestic roaming charge is overly high and whether it is reasonable in relation to its operating costs, the Court considered that the Plaintiff should have submitted evidence to establish the Defendant's operating costs and profitability and what would be the reasonable level of profit.

As to the billing method that approximates second to minute, the Court held that this method is recognized by the competent authority and that the Plaintiff provided no proof regarding whether charging by minute or by second is more economic and efficient and whether the current charging method imposes a negative effect on competition.

[6] Supreme People's Court (2016) Civ. Retrial Civil Judgement No. 98, made on May 31st 2016.

[7] In this case the Plaintiff also claimed that the Defendant's prohibition on number portability amounts to an exclusivity agreement, which was rejected by the Court.

4. Brief Comments

An impression the above cases have left us is that, burden of proof is one of the key factors in winning a case of abuse of dominant market position. Article 7 of *Provisions of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes arising from Monopolistic Practices* (hereinafter, as *Provisions for Monopoly Case*) allocates the burden of proof as follows: *Plaintiff bears the burden to prove Defendant's dominant market position in the relevant market, and its abuse and Defendant shall bear the burden to prove its behaviors are justifiable in defense.*

The above cases seem to suggest that plaintiffs bear a relatively heavier burden of proof. Particularly in the case of ***Yang Zhiyong***, in order to prove that the monthly fee and the roaming service charge are unfairly high, the Plaintiff was expected to provide evidence proving the Defendant's operational costs, profitability and its reasonable level of profit, which might be an impossible task for an individual consumer.

It is also worthy to note that, except for the evidence submitted by the parties, the Court may take into consideration "common sense" and attach importance to documents issued by competent authorities.

III. Monopoly Agreements

1. RPM Is Not a Monopoly Agreement *Per Se*

In ***Dongguan Guochang Electrical Appliance Shop v. Dongguan Shengshi Ltd. and Dongguang Heshi Ltd.***[8], Guangzhou Intellectual Property Court held, although it contains provisions that restrict the minimum resale price (RPM), the agreement concerned does not constitute a monopoly agreement as prohibited under the *Anti-Monopoly Law*.

First of all, the common sense suggests that there are various comparable domestic brands and foreign brands that compete with Gree in the air conditioner market in the Dongguan city.

[8] Guangzhou Intellectual Property Court (2015) GD IP Comm. Civ. Civil Judgement No. 33, made on 30th August 2016; High People's Court of the Guangdong Province (2016) GD Civ. Jurisd. Final Civil Ruling No. 273.

Evidence submitted by the Defendant regarding Gree's participation in promotions also establishes the sufficiency of competition in the air conditioner market in Dongguan and that Gree does not possess dominant market position. Even though Gree restricts resale prices, consumers are fully free to opt for other similar brands. In addition, no evidence suggests that competition in the other industries related to air conditioners has been affected by Gree's RPM practice. Therefore, the agreement concerned does not have the effect of eliminating or restricting competition.

Furthermore, although the Defendant's RPM practice may have affected the intra-brand price competition among distributors, the Plaintiff and other distributors can still compete among one another in terms of pre-sale marketing, sale promotions and after-sale services.

2. The Probative Value of Administrative Penalty Decisions in Anti-Monopoly Litigations

In ***Tian Junwei v. Carrefour Shuangjing Branch and Abbott Ltd***.[9], the Plaintiff mainly relied on the Decision on Penalty made by NDRC against Abbott in September 2013. According to that Decision, Abbott has fixed resale prices through contract arrangements since 2011, and thus constituting vertical monopoly agreements.

The Beijing High Court rejected the Plaintiff's appeal. Acknowledging that the Decision may, *prima facie,* establish Abbott's vertical monopoly agreements with downstream undertakings, the Court considered that given the Decision fails to identify the counterparty of the monopoly agreements, it cannot serve to prove the existence of a vertical monopoly agreement between Carrefour Shuangjing Branch and Abbott.

3. Brief Comments

The Judgement of ***Dongguan Guochang Electrical Appliance Shop*** again **highlights the once- existing (probably still exists) inconsistency between courts and administrative agencies as to the legality of RPM**. Following the case *Beijing Ruibangyonghe v. Johnson and Johnson China*[10], this judgment adopts the rule of reason doctrine, which means that RPM only

[9] High People's Court of the Beijing Municipality (2016) BJ Civ. Final Civil Judgement No. 214, made on 22nd August 2016.
[10] High People's Court of the Shanghai Municipality (2012) SH HC Civ. 3 (IP) Final Civil Judgement No. 63, made on 1st

constitutes vertical monopoly agreement when it eliminates or restricts competition in the relevant market. In this case, the Court, on the basis that the air conditioner market in Dongguan is a market with full competition and Gree does not possess dominant market position therein, held that the RPM agreement does not constitute a monopoly agreement because it neither restrains inter-brand competition, nor eliminates intra-brand competition other than price competition.

Administrative law enforcement prior to 2016 seems to have adopted the rule of illegal *per se* with respect to RPM. For example, in Shanghai Municipal Price Bureau's penalty decisions on 3 distributors of Haier Electronics[11] and SAIC-GM[12], the law enforcement agency concluded that the parties under investigations violated the anti-monopoly law immediately following its findings that they entered into and implemented RPM agreements. However, certain law enforcement decisions in 2016 have appeared to switch to the rule of reason to some extent. One example is Shanghai Price Bureau's penalty decision on Smith & Nephew[13], where analysis was made as to the price-restricting agreement's effect of eliminating and restricting intra-brand competition. A more noteworthy case is NDRC's penalty decision on Medtronic[14]. This Decision analyzed more in detail how the RPM concerned had eliminated or restricted both the intra-brand and inter-brand competition. That said, it remains to be seen whether convergency is emerging between the administrative agencies and the courts in determining the legality of RPM.

The focus of *Tian Junwei* is whether a plaintiff may discharge his burden of proof by relying on NDRC's decisions on penalty. Notwithstanding administrative decision is not a prerequisite to file a case before the court, facts recorded in instruments prepared by State organs within their competence shall be presumed to be true in court proceedings[15], which means administrative decisions might help a plaintiff to establish certain facts and result in an enhanced chance to prevail.

August 2013.

[11] Administrative Decision on Penalty No.2520160009, Shanghai Municipal Price Bureau, made on 8th August 2016.

[12] Administrative Decision on Penalty No.2520160027, Shanghai Municipal Price Bureau, made on 19th December 2016.

[13] Administrative Decision on Penalty No.2520160028, Shanghai Municipal Price Bureau, made on 29th December 2016.

[14] National Development and Reform Commission [2016] Administrative Penalty Decision No. 8, December 2016.

[15] See Article 14 of Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China.

The problem is that, as revealed by this case, administrative decisions normally do not disclose the identification of the counterparties of the monopoly agreements. A plaintiff thus cannot rely on such a decision to establish that a particular distributor who sold products to the plaintiff had participated in fixing resale prices, but has to do so by himself. **Questions that follow would be: Is a plaintiff entitled to, or does a court have the power to, request the relevant anti-monopoly law enforcement agency to disclose relevant information?**

IV. Objections to Jurisdiction

Objections to jurisdiction can be divided into 2 categories: (1) objections in relation to hierarchy jurisdiction and territorial jurisdiction of courts; and (2) the arbitrability of civil monopoly disputes.

1. Hierarchy Jurisdiction of Courts

The *Provisions for Monopoly Case* in its Article 3 provides: First-instance Monopoly Civil Disputes shall be under the jurisdiction of intermediate people's courts in municipalities where the people's governments of provinces, autonomous regions and municipalities directly under the Central Government are located or municipalities separately designated in the State plan, or intermediate people's courts otherwise designated by the Supreme People's Court. Furthermore, according to Article 3 of *Notice on Intellectual Property Courts Jurisdictional Matters* issued by Supreme People's Court, Beijing Intellectual Property Court, Shanghai Intellectual Property Court and Guangzhou Intellectual Property Court shall exercise jurisdiction on first instance cases of anti-monopoly civil disputes within the Beijing municipality, Shanghai municipality and the province of Guangdong (except for Shenzhen).

In ***Dongguan Guochang Electrical Appliance Shop v. Dongguan Shengshi Ltd. And Dongguang Heshi Ltd***.[16], High Court of the Guangdong province confirmed that because the dispute at hand is a monopoly civil dispute and 2 defendants' domiciles are in the city of Dongguan, Guangzhou Intellectual Property Court had jurisdiction to hear the case. In ***Huazhou Chen Yawang Farming Cooperative v. Huazhou Food Ltd., Huazhou Bayberry***

[16] Guangzhou Intellectual Property Court (2015) GD IP Comm. Civ. F.I. Civil Judgement No. 33, made on 30th August 2016; High People's Court of the Guangdong Province (2016) GD Civ. Jurisd. Final Civil Ruling No. 273.

Food Ltd.[17], Maoming Intermediate Court held that the dispute concerns abuse of dominant market position over which the Court did not have jurisdiction, and thus declined to hear the case. In the subsequent appeal, High Court of the Guangdong province upheld that decision.[18]In ***Yulong Telecom Ltd. v. Ericsson Ltd***.[19], in response to jurisdictional objections raised by Ericsson, Intermediate Court of the Shenzhen municipality held, as "an intermediate people's court of a municipality separately designated in the State plan", it has jurisdiction over the dispute. In ***Corporation X v. Corporation Y***[20], the Plaintiff filed the case before People's Court of Qufu County, and the case was then transferred to Beijing Intellectual Property Court.

2. Territorial Jurisdiction of the Court

The *Provisions for Monopoly Case* in its Article 4 provides: *The territorial jurisdiction over Monopoly Civil Disputes shall be determined pursuant to the provisions on jurisdiction over tort disputes and contract disputes as prescribed in the Civil Procedure Law and relevant judicial interpretations, and in light of the specific circumstances of the cases*. Regarding provisions on jurisdiction relating to tort, Article 28 of *Civil Procedural Law* stipulates: *Dispute of torts shall be under the jurisdiction of the people's court of the place where the tort is committed or where the defendant has his domicile.*

In ***Shenzhen Daotong Ltd., et al. v. General Motors China Ltd., et al.*** (4 parties)[21], 2 of the defendants including General Motors China protested that Intermediate Court of Shenzhen does not has jurisdiction over the case. Their reasons were, despite that Shenzhen Tangren Car Area and Baoyilai are domiciled in Shenzhen, these two defendants are irrelevant to the tort actions alleged by the Plaintiffs and the Court should not exercise jurisdiction by establishing a connecting point that does not exist.

[17] High People's Court of the Guangdong Province (2016) GD Civ. Final Civil Ruling No. 1978, made on 23rd December 2016.
[18] It is open to discussion whether the trial court should transfer the case to Guangzhou Intellectual Property Court, instead of refusing to hear the case.
[19] Intermediate People's Court of Shenzhen, Guangdong (2015), SZ INTMD IP Civ. F.I. Civil Ruling No. 1089, made on 1st April 2016

[20] People's Court of the Qufu County, Shandong (2016) SD0881 Civ. F.I. Civil Ruling No. 1800, made on 14th July 2016.
[21] High People's Court of the Guangdong Province (2016) GD Civ. Jurisd. Final Civil Rulings No. 162 and 163, made on 26th April 2016

High Court of Guangdong held that part of the plaintiffs' claims and the facts therein are based on joint torts of the 4 defendants. Given that the 2 defendants including Tangren Park Area are domiciled in Shenzen, Intermediate Court of Shenzhen has jurisdiction over the dispute.

Whether these 2 defendants conducted the torts is a substantive matter that should be decided in the subsequent trial procedure and need not be decided at the stage of jurisdiction.

3. Arbitrability of Monopoly Civil Disputes

There have been 2 cases in 2016 that involve arbitrability of monopoly civil disputes. They both receive negative answers from the courts.

The judgement of ***Nanjing Songxu Ltd. v. Samsung China Ltd***.[22], is a more representative one.[23] In this case, the Plaintiff filed a lawsuit in Intermediate Court of Nanjing against Samsung over its unfairly high price, compulsive tie-in sale and other monopolistic acts. Samsung raised objection to jurisdiction on the ground that both parties have concluded an arbitration clause that covers "any disputes" between them. The Intermediate Court of Nanjing held that monopoly disputes are arbitrable under the Arbitration Law, but the arbitration agreement was void because it did not designate one and only arbitration institution.

In the second instance, High Court of Jiangsu held that monopoly civil disputes are not arbitrable. The reasons are:

(1) Anti-monopoly law enforcement in China is currently accomplished mainly through administrative agencies. Supreme People's Court's *Provisions for Monopoly Case* only provides civil litigations as a mean of private enforcement of anti-monopoly law and even makes special restrictions on jurisdiction.

(2) Anti-monopoly law is of a strong "public policy" character. In China, it was not long ago when anti-monopoly law came into force, and not many experiences have been accumulated in

[22] High People's Court of the Jiangsu Province (2015) JS IP Civ. Jurisd. Final Civil Ruling No. 00072, made on 29th August 2016

[23] The other case is Yulong Telecom v. Sony Ericsson, Intermediate People's Court of Shenzhen, Guangdong (2015), SZ INTMD IP Civ. F.I. Civil Ruling No. 1089, made on 1st April 2016.

administrative and judicial enforcement of anti-monopoly law. Under these circumstances, the "public policy" character is of considerable importance. Currently, there is no explicit provision in law that allows private remedies of monopoly disputes through arbitration and so far there has been no relevant practice of arbitrating monopoly disputes.

(3) The case involves public interests, such as the sale relationships between Samsung and all its distributors, and also directly affects the benefits of the consumers of Samsung products. The arbitration clause concluded by the parties applies only to their contractual disputes. It cannot be the basis to arbitrate a monopoly dispute.

4. Brief Comments

The Supreme People's Court's interpretation regarding hierarchy jurisdiction and territorial jurisdiction in monopoly civil dispute cases is clear. The ratio of objections is expected to decline in the future. The so called "**circumvention of jurisdiction**" that appeared in *Shenzhen Daotong Ltd., et al. v. General Motors China Ltd., et al.*, is a general issue in civil procedures and not of much relevance to anti-monopoly law. What merits a further discussion is whether monopoly civil disputes are arbitrable. Below are some of our thoughts.

First, the *Arbitration Law* of China allows parties to submit monopoly civil disputes to arbitration. Article 2 of *Arbitration Law* stipulates: *Contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organizations that are equal parties are arbitrable*. Also, Article 3 provides, *the following disputes may not be arbitrated: (1). marital, adoption, guardianship, support and succession disputes; (2). administrative disputes within the competence of administrative agencies as prescribed by law.* Monopoly dispute cases are monetary claims between equal parties. Neither are they family law disputes nor do they pertain to administrative disputes within the competence of administrative agencies. They are, consequently, arbitrable under *Arbitration Law*.

Further, *Anti-Monopoly Law* and relevant judicial opinions do not contain provisions forbidding monopoly civil disputes to be submitted to arbitration. Article 55 of *Anti-Monopoly Law* provides: *Where the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liabilities according to law*. It does not exclude arbitration

from the means of private enforcement. Neither does *Provisions for Monopoly Case* deny the arbitrability of monopoly disputes. Its Article 2 provides, *a people's court shall accept a civil lawsuit directly filed by a plaintiff, or filed by a plaintiff after the decision affirming the relevant act as constituting a monopolistic act by the anti-monopoly law enforcement agency concerned has become legally effective, as long as such lawsuit satisfies other case acceptance conditions prescribed by law*. This provision prescribes the procedure to initiate a legal action in courts, with the emphasis that administrative decision is not a prerequisite to file a monopoly suit;[24] it does not imply that a court shall hear the dispute as long as the plaintiff initiates an action, regardless of the existence of an arbitration clause.

Third, given that *Arbitration Law*, *Anti-Monopoly Law* and relevant judicial opinions do not exclude monopoly civil disputes from being arbitrable, **it might not be appropriate for a particular court to deny the arbitrability of monopoly civil disputes in a particular case on the basis that anti-monopoly law involves public policy or third-party interests.** First, it is within the competence of legislative body to decide the arbitrability of a certain type of disputes on grounds of public policy. Next, monopolistic conduct may harm the interests of various distributors or consumers, but arbitral awards are only binding on the parties and do not affect third parties such as other distributors or consumers, and may in no way prevent the administrative enforcement agencies from investigating and punishing the monopolistic behaviors. Therefore, resolving monopoly disputes through arbitration would not prejudice public interests. In any event, a competent court has the power to set aside an arbitral award under Article 58 Paragraph 2 of *Arbitration Law* when it finds that the award violates the public policy. It is not necessary to reject the arbitrability of monopoly disputes at the very beginning.

V. Relationship Between Monopoly Disputes and Other Disputes

1. Monopoly Claims Shall Be Made Separately from Contractual and Other Claims

In various cases of 2016, the courts required the plaintiffs to split monopoly claims from others such as contractual claims or tort claims, and declined to hear other claims in deciding a monopoly case. For example, in ***Changsha Zhenshanmei Ltd. v. Ningbo Bull Electric***[25], the

[24] See, http://www.law-lib.com/fzdt/newshtml/yjdt/20120508152415.htm on 5th January 2017.
[25] Supreme People's Court (2015) Civ. Retrial Civil Ruling No. 3569, made on 4th March 2016.

Supreme People's Court held in its judgement that the case is an monopoly dispute that concerns abuse of dominant market position, which is distinct from other issues proclaimed by the plaintiff, e.g. breach of contract and torts relating to right to reputation. It upheld the decisions of the courts of the first and second instance to tell the plaintiff to initiate separate lawsuits.

In ***Wu Xiaoqin v. Shaanxi Broadcasting Media***[26], the Supreme People's Court explained how to distinguish monopoly disputes from other disputes. It stressed that courts should consider the specific claims that plaintiff puts forward, the defendant's defending opinions and the evidence they have submitted in ascertaining the nature of the dispute. It decided that in the case at hand, Wu Xiaoqin specified clearly in its complaint that Shaanxi Broadcasting Media violated anti-monopoly law by conducting tie-in sales. Wu did not seek damages under consumer protection. Therefore, it is not inappropriate to apply anti-monopoly law to this case.

2. Correlated Monopoly Suits and IP Suits

The relationship between exercise of intellectual property rights and abuse of dominant market position has been a hot topic. In 2016, 2 monopoly disputes are related to exercise or abuse of patent or trademark rights respectively. In ***ZTE v. Vringo, et al.***[27], ZTE filed a lawsuit at Intermediate Court of Shenzhen in 2014 against Vringo alleging the latter abused its patent rights. The factual background was that, Vringo concluded a patent purchase agreement with Nokia in August 2012, through which the former obtained more than 500 patents in areas of 2G, 3G and 4G, and since then it initiated patent litigations against ZTE in UK and other jurisdictions all over the world. In December 2015, Vringo and ZTE reached global settlement and ZTE withdrew its claim from Intermediate Court of Shenzhen. Another case ***Hubei Deyu Ltd. v. Haining Ltd., Jinlian Ltd***.[28] concerns monopoly dispute arising out of trade mark rights.

In addition to *ZTE v. Vringo, et al.*, in 2016 there have been another 5 cases that ended up with withdrawals of the claims. Signs show that withdrawals of claims do not necessarily mean that

[26] Supreme People's Court (2016) Civ. Retrial Civil Judgment No. 98, made on 31st May 2016.
[27] Intermediate People's Court of Shenzhen, Guangdong (2014) SZ INTMD IP Civ. F.I. Civil Ruling No. 167-2, made on 19th January 2016.
[28] Intermediate People's Court of Wuhan (2015) HB WH INTMD IP F.I. Civil Ruling No. 02615, made on 26th April 2016; Court of Haining (2015) JX HN IP F.I. Civil Judgment No. 44, made on 7th March 2016.

the plaintiffs gain nothing. Rather, they are usually accompanied by concessions made by the defendants. For a defendant, monopoly lawsuit tends to impose a spillover effect or domino effect, which makes the defendant inclined to settle outside the court even the likelihood to lose the case is not high. To this extent, to force a defendant to settle may have been one of the driving factors for a plaintiff's decision to sue

VI. Conclusion

With the increasing awareness about the anti-monopoly law, and especially with the increasing number of administrative enforcement cases, victims of monopoly practices, including down-stream distributors, other types of undertakings or consumers, will gain more willingness and confidence to take legal actions. In January 2017 Apple Inc. filed a suit over Qualcomm's abuse of dominant market position in Beijing Intellectual Property Court, which probably heralds 2017 will be a "bumper year" of anti-monopoly civil litigations.

To make anti-monopoly private enforcement as strong as administrative enforcement, joint efforts from the anti-monopoly community are needed. In addition to plaintiffs who have the courage to stand up and safeguard their rights, more qualified anti-monopoly lawyers are needed, and courts and administrative enforcement agencies are encouraged to adopt appropriate measures to ease the heavy burden of proof of plaintiffs.

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欧盟外资安全审查草案之简介及对中国企业的影响

作者：高梁

2017 年 9 月 13 日，欧盟委员会发布了欧盟境外直接投资审查框架条例的立法建议(Proposal for a Regulation establishing a framework for screening foreign direct investment in the European Union)（以下简称“条例草案”），若该条例草案最终被欧盟议会及欧盟理事会通过，则该条例对于在欧盟境内的外国投资者，尤其是来自中国的投资者将产生较大的影响，最直接的表现为因该条例草案授予了欧盟委员会和所有欧盟成员国调查外资并购交易的权力，从而增加了政府监管的流程，延长了政府监管周期。与美国、中国不同时的是，到目前为止，欧盟未制定在欧盟层面针对境外投资的国家安全审查程序，就外资在欧盟境内的并购活动而言，欧盟层面的监管行为更多的体现在反垄断审查方面，随着近年来欧盟境内外资并购活动越来越多，欧盟委员会日益认识到建立欧盟层面国家安全审查机制的必要性。

（一）背景介绍

到目前为止，在欧盟在 28 个成员国之中，仅 12 个成员国有正式的针对境外投资的国家安全审查[1]。因缺乏欧盟层面的国家安全审查，从而使可能存在影响多个成员国利益或整体欧盟利益的外资并购交易难以得到欧盟层面的审查。随着近年来外资，尤其是中国企业收购欧盟企业的交易越来越多，例如美的集团收购德国机器人巨头—库卡的交易在欧盟内部引起强烈的讨论，欧盟委员会逐渐认识到有必要建立欧盟层面的安全审查机制，在今年 2 月份欧盟核心成员国—法国、德国和意大利的联合倡议之下，欧盟委员会正式公布了该条例草案，并提交欧盟理事会和欧盟议会审查。从某种程度上说，该条例草案的提出是对中国企业近年来在欧盟境内的密集收购行为的一个回应。

（二）适用范围

根据该条例草案第 4 条，欧盟成员国和欧盟委员会可基于安全及公共秩序(security and public order)的考虑对涉及下述内容的境外投资行为予以审查：

[1] 参见：http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505305081643&uri=SWD:2017:297:FIN

1，核心基础设施：包括能源、交通、电信、数据存储、空间或金融基建和敏感设施；
2，核心技术：包括人工智能、机器人、半导体、潜在军民双用技术、网络安全、空间或核技术；
3，核心投入品(critical inputs)之安全供应；
4，对敏感信息之获取或控制敏感信息之能力。

此外，在对上述内容进行审查时，成员国及欧盟委员会可考虑该境外投资人是否被第三国政府所控制的因素。

从字面意思上解读，该适用范围存在很大程度的模糊空间，例如，何谓“核心投入品”，何谓“敏感信息”，又多大程度上会被认定为有能力控制敏感信息，在实际操作中，这会给成员国和欧盟委员会很大的操作空间，这也增加了外资并购活动在欧盟境内的不确定性。若本条例草案最终成为有约束力的法律，则对于中国的投资者而言，在收购欧盟企业过程中，有必要自我评估目标公司的业务是否涉及上述适用范围，并为潜在的欧盟安全审查程序提前做好准备。

（三）何谓“境外直接投资”(“foreign direct investment”)

根据该条例草案第 2 条，境外直接投资是指一个境外投资者的任何一种为了在境外投资者和被提供资金的企业家或经营者之间确立或维持持续性且有直接联系的投资行为，且其目的在于在某一成员国境内继续一项经济活动，包括能够有效参与一家进行某一经济活动的公司的经营管理和控制的投资行为。(“’foreign direct investment’ means investments of any kind by a foreign investor aiming to establish or maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity.”)

根据上述针对“境外直接投资”概念的解释，境外直接投资的范畴非常广泛，其涉及所有确立或维持持续性且有直接联系的境外投资行为，笔者理解，即使外资对欧盟境内企业的收购行为不会产生公司法或反垄断法意义上的控制权，该收购也可能满足该条例草

案中规定的境外直接投资的要件，满足“持续性且有直接联系的”的要件要比满足产生“控制权”的条件要低得多。相比较而言，美国外国投资委员会(CFIUS)审查某一交易的前提为该交易会导致美国境内企业的控制权转移至境外个人或实体[2]。

（四）审查内容

根据该条例草案第 10 条，欧盟委员会及有关成员国有权要求境外投资计划发生地或完成地的成员国提供本次交易的相关信息，该信息主要包括：

1，境外投资者和与境外投资有关的经营者的所有权结构，包括最终控制人的信息；

2，境外投资的价值；

3，境外投资者和与境外投资有关的经营者的产品、服务和商业运营情况；

4，在哪些成员国内，境外投资者和与境外投资有关的经营者从事商业运营？

5，投资资金的来源。

（五）欧盟委员会的角色

根据该条例草案，若欧盟委员会认为某项境外投资可能影响安全或公共秩序，则其有权向相关成员国发出与该交易有关的“意见”(“opinion”)，该成员国应充分考虑欧盟委员会的“意见”，若其不同意欧盟委员会的“意见”，则该成员国应向欧盟委员会说明理由。而与此同时，其他成员国也可以发表对本次交易的观点，若其认为该交易可能影响其国家安全或公共秩序的话。但无论是欧盟委员会的“意见”还是其他成员国表达的观点都无法律约束力，最终是由外国投资计划发生地或完成地的成员国对该项投资是否予以审批作出终局决定。由此，即使对于欧盟层面的安全审查而言，对于一项外资审查的最终决定权在于欧盟成员国而非欧盟委员会，欧盟委员会在安全审查中的角色更多属于建议咨询性质。

（六）展望

[2] 参见：http://www.trade.gov/mas/ian/cfius/index.asp

如上所示，该条例草案需经欧盟理事会和欧盟议会批准后方可生效，笔者会时刻关注该条例草案的立法动向。若本条例草案最终生效并产生法律约束力，则对于中国企业而言，在收购欧盟境内的企业过程中，则可能需考虑该有关安全审查的条例草案在程序上所带来的负担，特别是当欧盟成员国对涉及中国资本的收购交易未予进行安全审查，而欧盟委员会提出“意见”而要求该成员国予以审查时，该交易预定完成的时间表很可能不得不做相应地延迟。

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环球反垄断动态

环球在上海成功举办 2017 反垄断实务峰会

2017 年 6 月 30 日，环球律师事务所联合 LCOUNCIL 于上海举办的 2017 反垄断实务峰会圆满落幕。环球律师事务所反垄断团队与百余位同行、专家以及企业法务同仁进行现场对话，剖析我国近期反垄断发展趋势，并对未来行业发展和执法重点进行了推测。环球合伙人分别就反垄断法颁布十周年的回顾与展望、反垄断法与知识产权的热点问题、反垄断民事诉讼问题、经营者集中申报和商务部调查应对等问题、企业反垄断合规内控体系建设和应对反垄断调查与现场法务同行进行了实务探讨。

环球在深圳成功举办反垄断合规研讨会

2017 年 9 月 22 日，环球律师事务所与 LCOUNCIL 在深圳威尼斯睿途酒店共同举办反垄断及合规研讨会。讨论的议题包括“新经济背景下的反垄断问题”、“为 SEP 许可谈判构建标准化的 FRAND 流程”、“经营者集中反垄断申报的关键问题和最新趋势”、“企业刑事责任风险规避及刑事保护手段的运用”等。

环球合伙人万江应邀参加 2017 年中国经济法学研究会年会

2017 年 9 月 16-17 日，环球律师事务所合伙人万江博士应邀参加中国法学会经济法学研究会 2017 年年会暨第二十五届全国经济法理论研讨会。万江博士作为大会唯一邀请参加并发言的来自实务界的代表，向大会提交了论文《大数据与反垄断》，并在市场规制法讨论分会场发言。

环球合伙人任清律师当选《亚洲法律杂志》2017 年“中国律师新星”

在《亚洲法律杂志》（Asian Legal Business）最新公布的 2017 年“中国律师新星”评选结果中，环球律师事务所合伙人任清律师荣登榜单。

环球合伙人万江发表专著《中国反垄断法：理论、实践与国际比较》（第二版）

环球律师事务所合伙人万江博士的专著《中国反垄断法：理论、实践与国际比较》（第二版），于 2017 年 6 月由中国法制出版社出版。

环球律师事务所&LexisNexis“经营者集中反垄断申报”研讨会在京成功举办

2017 年 5 月 17 日，环球律师事务所&LexisNexis “经营者集中反垄断申报：老话题和新趋势”研讨会在京成功举办。此次会议由环球律师事务所合伙人任清、律师高梁主讲，共有近百家知名企业/机构的代表出席或收看线上直播。

环球助力美年大健康收购慈铭体检通过商务部反垄断审查

2017 年 5 月 9 日，美年大健康产业控股股份有限公司发布公告称：其子公司美年大健康产业（集团）有限公司（简称"美年大健康"）已收到商务部关于美年大健康及其关联企业收购慈铭体检公司股权涉嫌未依法申报经营者集中的最终处理决定，商务部认定该项经营者集中不具有排除、限制竞争的效果；公司已于日前向中国证监会申请恢复对公司发行股份购买慈铭体检 72.22%股权并募集配套资金暨关联交易的审查，待中国证监会核准后将尽快推进本次重大资产重组事项。

环球律师事务所就本案为美年大健康提供了全程法律服务，涵盖是否属于未依法申报经营者集中的初步调查阶段、评估竞争影响的进一步调查阶段以及行政处罚阶段。环球的项目团队由北京办公室合伙人任清律师牵头，团队成员还包括上海办公室合伙人周磊律师、北京办公室律师助理潘静怡等。

环球反垄断招募信息

环球反垄断团队近期拟招募以下人员：

1、实习生

要求：国内外知名大学法学院竞争法方向研二、研三年级硕士研究生，通过司法考试，英文流利者优先，要求每周至少保证三天以上工作时间。

2、初级律师

要求：国内外知名大学法学院研究生毕业，通过司法考试或已经取得律师执业资格，具有 1-2 年反垄断法律实务工作经验，英文流利，30 岁以下，男女不限。

3、高级律师

要求：国内外知名大学法学院研究生毕业，从事反垄断法律实务工作 3 年以上，具有中国律师执业资格，可以英文为工作语言，男女不限。

有志加入环球反垄断团队者，可将个人电子简历等资料投递到环球人力资源部电子邮箱：hr@glo.com.cn，并注明“反垄断业务申请”。

环球简介

环球律师事务所（“我们”）是一家在中国处于领先地位的综合性律师事务所，为中国及外国客户 就各类跨境及境内交易以及争议解决提供高质量的法律服务。

历史. 作为中国改革开放后成立的第一家律师事务所，我们成立于 1984 年，前身为 1979 年设立的中国国际贸易促进委员会法律顾问处。

荣誉. 作为公认领先的中国律师事务所之一，我们连续多年获得由国际著名的法律评级机构 评选的奖项，如《亚太法律 500 强》（The Legal 500 Asia Pacific）、《钱伯斯杂志》（Chambers & Partners）、《亚洲法律杂志》（Asian Legal Business）等评选的奖项。

规模. 我们在北京、上海、深圳三地办公室总计拥有近 300 名的法律专业人才。我们的律师 均毕业于中国一流的法学院，其中绝大多数律师拥有法学硕士以上的学历，多数律师还曾学习或工作 于北美、欧洲、澳洲和亚洲等地一流的法学院和国际性律师事务所，多数合伙人还拥有美国、英国、德 国、瑞士和澳大利亚等地的律师执业资格。

专业. 我们能够将精湛的法律知识和丰富的执业经验结合起来，采用务实和建设性的方法解决法律问题。我们还拥有领先的专业创新能力，善于创造性地设计交易结构和细节。在过去的三十多年里，我们凭借对法律的深刻理解和运用，创造性地完成了许多堪称“中国第一例”的项目和案件。

服务. 我们秉承服务质量至上和客户满意至上的理念，致力于为客户提供个性化、细致入微 和全方位的专业服务。在专业质量、合伙人参与程度、客户满意度方面，我们在中国同行中名列前茅。在《钱伯斯杂志》举办的“客户服务”这个类别的评比中，我们名列中国律师事务所首位。

环球反垄断团队介绍

环球反垄断团队由十余名合伙人和律师组成，其中一些合伙人和律师既有实务操作经验也有丰富的执法经验，已为医药、互联网、汽车、电器、IT、食品、化工、航运、零售等行业的众多境内外客户提供一站式反垄断专业服务，服务范围包括经营者集中申报、反垄断调查、反垄断诉讼、反垄断风险防范与合规等。我们对中国反垄断法律法规及其实践具有深刻认识和专业理解。

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联系我们. 如您欲进一步了解本报告所涉及的内容，您可以通过下列联系方式联系我们。

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