

# Antitrust Dawn Raids in China: On the Tenth Anniversary of Chinese Antitrust Enforcement

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*This is the tenth anniversary of Chinese antitrust enforcement, which began on August 1, 2008, when the Antimonopoly Law of People's Republic of China ("AML") became effective.<sup>1</sup> During these 10 years, the Chinese antitrust agencies have conducted many high-profile enforcement actions. Given that most targets of antitrust investigations are major corporations, the discovery process is generally more complex than for other general administrative investigations. Dawn raids are becoming more and more prevalent in antitrust investigations. Therefore, it is important for foreign companies present in China to understand PRC antitrust law and dawn raid practices.*

*This article will provide an overview of China antitrust enforcement and dawn raids over the past 10 years and will discuss the main characteristics of China's antitrust dawn raids, including the origins, processes followed, authority, raid strategies, and possible penalties. The article identifies "best practices" for dealing with dawn raids and provides guidance for obtaining leniency. We expect that these best practices and guidance will be directly relevant to investigations by the State Administration for Market Regulation ("SAMR"), the establishment of which is discussed at the end of this article.*

## 1. OVERVIEW OF ANTITRUST ENFORCEMENT AND DAWN RAIDS IN CHINA

### 1.1 OVERVIEW OF ANTITRUST ENFORCEMENT IN CHINA

Over the past 10 years, Chinese antitrust agencies have become increasingly aggressive. According to the statistics: from August 1, 2008 to January 11, 2018, (a) the National Development and Reform Commission and its local provincial counterparts ("**NDRC**"), which are responsible for investigating pricing-related monopolistic conduct, have investi-

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<sup>1</sup> Fanlongduan Fa (反垄断法) [The Antimonopoly Law] (promulgated by the Standing Committee of the National People's Congress, 30 August 2007, effective 1 August 2008), [http://www.gov.cn/jrzq/2007-08/30/content\\_732001.htm](http://www.gov.cn/jrzq/2007-08/30/content_732001.htm). Translation available at <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml>.

gated more than 210 antitrust cases in total;<sup>2</sup> and (b) the State Administration for Industry and Commerce and its local provincial counterparts (“SAIC”), which are responsible for investigating non-pricing related conduct, have investigated 91 antitrust cases in total, and 51 cases have already been closed.<sup>3</sup> The investigated sectors have included the medical, automotive, telecom, insurance, gas, oil, electricity, software, chemical and other industries. Enforcement has been strict.<sup>4</sup> Take the medical industry, including pharma and medical devices, for example: during these ten years (from August 2008 to February 2018), 16 companies were punished and a total of over RMB135 million in fines was imposed. From August 2014 to December 2016, Chinese antitrust agencies investigated at least 46 companies in the automotive industry and imposed more than RMB2 billion in fines.<sup>5</sup> The punishment of wireless technology giant Qualcomm was a dramatic example: after nearly two years of investigation, Qualcomm was punished by the NDRC for abuse of market dominance; the penalties included a fine of RMB6.088 billion.<sup>6</sup>

## 1.2 ANTITRUST DAWN RAIDS IN CHINA

As in many other jurisdictions around the world, dawn raids have become quite prevalent in Chinese antitrust agencies’ investigations, as they are an efficient way to prevent the target companies from transferring or destroying relevant evidence. The key purposes of a dawn raid are to collect documentary evidence and interview the relevant personnel so as to verify or refute the allegations and, if appropriate, to determine the amount of the fines. Over the past ten years, Chinese antitrust agencies,<sup>7</sup> including the NDRC and the SAIC, have initiated several dawn raids on companies across several industries. Some recent high-profile dawn raids by Chinese antitrust agencies include:

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<sup>2</sup> According to statistics provided by the NDRC and SAIC in the Annual Conference of China Competition Laws and Policies sponsored by the PCCPL of the China Society for World Trade Organization Studies, held on January 11, 2018. Cited from a meeting summary prepared by the Antitrust Team of Dentons, <http://zggpjz.com/keji/shuma/3000.html>.

<sup>3</sup> See, *supra* note 2.

<sup>4</sup> See, Press Release, SAIC, SAIC Investigated 82 Antitrust Cases Since the Antimonopoly Law Came into Effect (7 September 2017), [http://www.saic.gov.cn/xw/zyxw/201709/t20170907\\_268944.html](http://www.saic.gov.cn/xw/zyxw/201709/t20170907_268944.html).

<sup>5</sup> See, Press Release, Xinhua, Shanghai General Motors was Fined RMB 201 Million due to Price Fixing and Auto Enterprises Decreased Prices (26 December 2016, 7:46 AM), [http://www.xinhuanet.com/legal/2016-12/26/c\\_1120184844.htm](http://www.xinhuanet.com/legal/2016-12/26/c_1120184844.htm).

<sup>6</sup> See, Administrative Penalty Decision of the National Development and Reform Commission (2015) No. 1, (9 February 2015), [http://www.ndrc.gov.cn/gzdt/201503/t20150302\\_666209.html](http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html).

<sup>7</sup> The Ministry of Commerce (“MOFCOM”) is another antitrust agency and it is responsible for merger control filings. MOFCOM investigated several companies due to their failure to make merger control filings with MOFCOM before completing certain transactions; however, MOFCOM did not carry out any dawn raids, so we do not include MOFCOM in our discussion.

**Summary Chart of Selected Antitrust Dawn Raid Cases in China**

No.	Company raided	Industry	Anti-trust Agency	Year	Allegations	Penalty
1	Qualcomm	Telecom	NDRC	2013	<ul style="list-style-type: none"> <li>• Unfairly high license fees</li> <li>• Unreasonable tying of patent licenses</li> <li>• Attaching unreasonable conditions</li> </ul>	In February 2015, Qualcomm was fined RMB6.088 billion for its abuse of dominance by the NDRC. <sup>8</sup>
2	Tetra Pak	Food Packaging	SAIC	2013	<ul style="list-style-type: none"> <li>• Illegal tying or the imposition of unreasonable trading conditions</li> <li>• Attaching illegitimate exclusivity restrictions</li> <li>• Loyalty discounts</li> </ul>	In November 2016, Tetra Pak was fined RMB 667 million for its abuse of dominance by the SAIC. <sup>9</sup>
3	Microsoft <sup>10</sup>	IT	SAIC	2014	<ul style="list-style-type: none"> <li>• Compatibility problems and tying due to incomplete information disclosure of Windows and Office software</li> </ul>	According to the SAIC, the investigation of Microsoft is still ongoing. <sup>11</sup>

<sup>8</sup> See, *supra* note 6.

<sup>9</sup> See, Administrative Penalty Decision of State Administration for Industry and Commerce (2016) No. 1, (9 November 2016), [http://www.saic.gov.cn/fldyfbzdzjz/jzzfzg/201703/t20170309\\_232289.html](http://www.saic.gov.cn/fldyfbzdzjz/jzzfzg/201703/t20170309_232289.html).

<sup>10</sup> See, Press Release, SAIC, SAIC Special Task Force Inquired and Inspected Microsoft about Antimonopoly Issues (5 January 2016), [http://www.saic.gov.cn/fldyfbzdzjz/gzdt/201601/t20160105\\_205359.html](http://www.saic.gov.cn/fldyfbzdzjz/gzdt/201601/t20160105_205359.html).

<sup>11</sup> See, Press Release, SAIC, Livelihood-Oriented—Antitrust Enforcement Forges Ahead for Five Years (20 November 2017), [http://www.saic.gov.cn/fldyfbzdzjz/gzdt/201711/t20171120\\_270467.html](http://www.saic.gov.cn/fldyfbzdzjz/gzdt/201711/t20171120_270467.html).

No.	Company raided	Industry	Anti-trust Agency	Year	Allegations	Penalty
4	Mercedes-Benz	Automobile	NDRC	2015	<ul style="list-style-type: none"> <li>Executing monopoly agreements with its distributors to limit minimum resale prices</li> </ul>	In May 2015, Mercedes-Benz was fined RMB 350 million for its monopoly agreements by the Jiangsu Price Bureau, which obtained authorization from the NDRC. <sup>12</sup>
5	Medtronic	Medical device	NDRC	2016	<ul style="list-style-type: none"> <li>Executing price monopoly agreements with its distributors</li> </ul>	In December 2016, Medtronic was fined RMB118 million for its monopoly agreements by the NDRC. <sup>13</sup>
6	DowDuPont	Chemical	NDRC	2017	<ul style="list-style-type: none"> <li>Price-related matters</li> </ul>	According to news sources, the investigation of DowDuPont is still ongoing. <sup>14</sup>
7	Micron, Samsung Electronics, and SK Hynix	DRAM	NDRC & SAMR	2017	<ul style="list-style-type: none"> <li>Price collusion</li> </ul>	This investigation was started by the NDRC in December 2017 but dawn raids were conducted by the SAMR on May 31, 2018. The investigation is still ongoing. <sup>15</sup>

Given such active enforcement, it is important for multinational corporations doing business in China to have a response procedure in place in the event of a dawn raid. If a company has a response procedure in place, it could help ensure that it fulfills its legal

<sup>12</sup> See, Press Release, NDRC, Mercedes-Benz was Fined 350 Million in Jiangsu for Price Fixing, [http://fgs.ndrc.gov.cn/wqfxx/201504/t20150427\\_689405.html](http://fgs.ndrc.gov.cn/wqfxx/201504/t20150427_689405.html) (last visited 8 March 2018).

<sup>13</sup> See, Administrative Penalty Decision of the National Development and Reform Commission (2016) No. 8 (5 December 2016), [http://www.ndrc.gov.cn/gzdt/201612/t20161209\\_829720.html](http://www.ndrc.gov.cn/gzdt/201612/t20161209_829720.html).

<sup>14</sup> See, Press Release, Sohu, China's NDRC Launched Antimonopoly Investigation against DowDuPont (23 December 2017), [https://www.sohu.com/a/212326545\\_332403](https://www.sohu.com/a/212326545_332403).

<sup>15</sup> See, Press Release, Sina, SK Hynix, Micron, and Samsung Electronics confirmed cooperating with Chinese antitrust investigation (6 June 2018), <http://t.cj.sina.com.cn/articles/view/6372825920/17bd99b4000100kr79>.

obligations while preserving its legal rights and could help minimize the effects of a dawn raid on a company's day-to-day business operations and reputation. Noncooperation or confrontation are poor responses to the dawn raids of Chinese agencies because: (i) there are statutory punishments under PRC law for failure to cooperate with the antitrust agencies' enforcement activities;<sup>16</sup> (ii) the antitrust agencies could continue to raid the companies until they achieve their goals; and (iii) noncooperation could damage a company's reputation, government relationships, and future business in China.

## 2. CHARACTERISTICS OF DAWN RAIDS IN CHINA

Based on precedents and our experience, dawn raids conducted by Chinese antitrust agencies have common characteristics with respect to origins, processes followed, authority, multi-raid strategy, high-tech equipment, persistence, and consequences for noncooperation.

### 2.1 ORIGINS

According to the SAIC, most antitrust investigations and dawn raids originate from whistleblower complaints by competitors, distributors, and suppliers.<sup>17</sup> Before raiding target companies, antitrust agencies are usually well prepared and have obtained leads or evidence for the allegations from various sources.

### 2.2 PROCESSES FOLLOWED

In China, antitrust agencies do not need a court warrant; instead, an investigation notice issued by the competent NDRC or SAIC, together with the investigators' working licenses, is all that is necessary under PRC law.<sup>18</sup> The investigation notice is a routine instrument that is not difficult to obtain.

### 2.3 AUTHORITY

Chinese antitrust agencies have broad enforcement powers; they may: (a) enter and inspect the business premises of the target companies as well as their affiliates, distributors and suppliers; (b) review and make copies of any document or digital data relevant to the investigation, no matter in what form; (c) seize and retain evidence; (d) inspect transaction records and bank account records; and (e) interview any persons of the target companies as

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<sup>16</sup> See, Article 52 of *Antimonopoly Law*.

<sup>17</sup> See, Press Release, Antimonopoly and Anti-unfair Competition Enforcement Bureau of SAIC, Investigation of Abuse of Dominant Market Position (March 2015), [http://www.euchinacomp.org/attachments/article/465/CN/ZHAO\\_a.pdf](http://www.euchinacomp.org/attachments/article/465/CN/ZHAO_a.pdf).

<sup>18</sup> See, Article 39 of *Antimonopoly Law* and Article 6 of the *Provisions on the Antimonopoly Enforcement against Price Fixing*. Fanjiage Longduan Xingzheng Zhifa Guiding (反价格垄断行政执法程序规定) [the Provisions on the Antimonopoly Enforcement against Price Fixing] (promulgated by NDRC, December 29, 2010, effective February 1, 2011), [http://www.gov.cn/flfg/2011-01/04/content\\_1777998.htm](http://www.gov.cn/flfg/2011-01/04/content_1777998.htm).

well as their affiliates, distributors, and suppliers, from ordinary salesmen to the most senior executives.<sup>19</sup>

Because antitrust fines are based on a target company's sales revenues for the previous year,<sup>20</sup> Chinese antitrust agencies also usually demand access to a target company's accounting books in addition to documents that could support the allegations, such as agreements with competitors, distributors or suppliers, sales and procurement policies, business plans, and minutes of meetings.

## 2.4 MULTI-RAID STRATEGY

Often simultaneously, Chinese antitrust agencies carry out dawn raids on several offices of one target company, or on the target company and its distributors or suppliers; more to put those investigated at a disadvantage and also to prevent them from destroying evidence or acting in collusion. For example, in Microsoft's case, the SAIC assembled a group of nearly 100 investigators and conducted simultaneous dawn raids on the headquarters of Microsoft China and its branch companies in Shanghai, Guangzhou and Chengdu.<sup>21</sup> Furthermore, the SAIC also conducted a dawn raid on the office of Microsoft's outsourced financial provider Accenture Information Technology (Dalian) Co., Ltd. to collect more financial evidence.<sup>22</sup>

## 2.5 HIGH-TECH EQUIPMENT

Chinese antitrust agencies are equipped with high-tech equipment and technology. For example, they usually bring cameras and high-speed portable document scanners to make copies of documents quickly; they are also able to restore e-documents and emails that have been deleted. Therefore, it is not useful for target companies to delete electronic documents from their computers before or during dawn raids. In the first investigation into Tetra Pak, the SAIC seized more than 30,000 emails and stacks of contracts and financial documents and recovered important evidence from deleted e-mails.<sup>23</sup>

## 2.6 AGENCIES' PERSISTENCE

Chinese antitrust agencies are persistent. For example, during the NDRC's dawn raid of Medtronic, they waited for six hours before they were given access.<sup>24</sup> In the SAIC's dawn

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<sup>19</sup> See, *supra* note 17

<sup>20</sup> See, Articles 46 and 47 of *Antimonopoly Law*.

<sup>21</sup> See, Press Release, SAIC, SAIC Conducted Antimonopoly Investigation against Microsoft (29 July 2014), [http://www.saic.gov.cn/xw/yw/zj/201407/t20140729\\_210025.html](http://www.saic.gov.cn/xw/yw/zj/201407/t20140729_210025.html).

<sup>22</sup> See, Press Release, Sina Finance, Microsoft's Outsourcing Supplier Accenture Cooperates with the Investigation (6 August 2014, 3:42 PM), <http://finance.sina.com.cn/chanjing/gsnews/20140808/154219956036.shtml>.

<sup>23</sup> See, Press Release, MLex, Chinese regulators expand dawn raids into abuse of dominance and RPM cases (12 August 2012, 9:24 AM), <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=576289&siteid=202&rdir=1>.

<sup>24</sup> The head of the Antimonopoly Bureau of NDRC told public media that their 40-member investigation team was "trapped" and was not allowed to proceed as planned by Medtronic Shanghai for 6 hours, from 9 a.m. to 4 p.m. See, Press Release, Xinhua, Story About the Antitrust Punishment of Medtronic: Non-cooperation with

raid of Microsoft, the agencies were informed that the company's senior officers were out of the office and thus were not able to fully cooperate with the dawn raid.<sup>25</sup> The agencies later officially warned Microsoft not to obstruct the investigation, and required that it strictly comply with PRC law; Microsoft's senior executives, including its corporate vice president and deputy general counsel, were ordered to submit to interviews.<sup>26</sup> Also, if a target company does not cooperate during a dawn raid, the agencies could raid the company again at any time.

## 2.7 PENALTIES

PRC law expressly provides penalties for companies or individuals who fail to cooperate in antitrust dawn raids. Article 42 of the Antimonopoly Law provides that all interested parties, including the target company under investigation and relevant interested entities or individuals, must cooperate with the antitrust agencies and cannot refuse to provide information and hinder the investigation. Article 52 further provides that for any parties that fail to provide required information or that hinder the investigation, the antitrust agencies may order them to correct their behavior, and may impose a fine of up to RMB20,000 upon an individual, and up to RMB200,000 upon an entity; if the case is serious, the fine could be up to RMB100,000 upon an individual and RMB1,000,000 upon an entity; and if the violation constitutes a crime, the parties may also be subject to criminal liability. For example, in 2013, the NDRC conducted an investigation into the tourism sector in Hainan, and the NDRC fined two retailers a total of RMB189,000 because they transferred, concealed and destroyed financial data and evidence and failed to provide relevant materials demanded by the investigator.<sup>27</sup>

In addition to the legal liability, obstruction could damage a company's relationship with the Chinese government and harm the company's business. Further damage also sometimes results when the agencies publish the results of their investigations. Such publication could cause substantial negative publicity that has the potential to harm publicly-listed companies in particular.

Chinese antitrust agencies have punished many companies for their failure to cooperate fully with the investigators. The following cases illustrate this point:

- Sunyard's failure to submit required documents in time: On February 5, 2015, the AIC in Anhui Province conducted an investigation of Sunyard System Engineering Co., Ltd. ("Sunyard"). The Anhui AIC issued a written investigation notice to Sunyard requesting that Sunyard submit documents and materials in relation to the investigation. However, Sunyard did not submit any of the relevant materials within the required timeline. On September 18, 2015, the Anhui AIC fined Sunyard RMB

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the Investigation and More Than 40 NDRC Staff Trapped for Six Hours (9 December 2016, 11:32 PM) [http://www.xinhuanet.com/fortune/2016-12/09/c\\_129397642.htm](http://www.xinhuanet.com/fortune/2016-12/09/c_129397642.htm).

<sup>25</sup> See, *supra* note 21.

<sup>26</sup> See, Press Release, SAIC, SAIC Warned Microsoft to Strictly Comply with PRC Laws (4 August 2014), [http://www.saic.gov.cn/xw/yw/zj/201408/t20140804\\_210031.html](http://www.saic.gov.cn/xw/yw/zj/201408/t20140804_210031.html).

<sup>27</sup> See, Press Release, NDRC, Two Tourism Retailers were Fined for Refusing to Cooperate with Price Inspection in Sanya, [http://jjs.ndrc.gov.cn/gzdt/201304/t20130410\\_536469.html](http://jjs.ndrc.gov.cn/gzdt/201304/t20130410_536469.html) (last visited 8 March 2018).



200,000 as a result of its failure to cooperate with the antitrust investigation and ordered the immediate rectification of the behavior in question.<sup>28</sup>

- Long Shun He's aggressive confrontation during a dawn raid: On August 10, 2016, the NDRC and Shandong Provincial Price Bureau, a local counterpart of the NDRC in Shandong Province, established a joint investigation team and initiated dawn raids against Weifang Long Shun He Pharmaceutical Co., Ltd. ("**Long Shun He**") for alleged monopolistic pricing behavior. In the course of the investigation, a manager of the company threw a USB flash disk containing evidence collected by investigators out the door and prevented the investigators from retrieving it. Despite being warned about the illegality of his behavior, the manager continued his obstructive behavior and refused to cooperate with the investigation. On January 11, 2017, the Shandong Provincial Price Bureau issued an order against Long Shun He, holding Long Shun He liable for the serious violations committed by its employee and ordering it to pay a fine of RMB120,000 for obstructing an antimonopoly investigation.<sup>29</sup>

### 3. BEST PRACTICES FOR HANDLING A DAWN RAID IN CHINA

In light of the above examples, better understanding of antitrust dawn raids and good preparation in advance is critical to multinational companies. We therefore provide some guidelines as best practices.

#### 3.1 DOS

##### 3.1.1 Before Dawn Raids:

- (a) Conduct a thorough self-evaluation of compliance with PRC law, and rectify the issues identified without delay.
- (b) Create an antitrust compliance manual based on PRC law, and conduct internal antitrust training to ensure compliance.
- (c) Formulate internal guidelines to respond to dawn raids by government agencies.
- (d) Conduct internal rehearsals on how to respond to dawn raids by government agencies to ensure smooth operation of the company in the event of such a raid.

##### 3.1.2 During Dawn Raids:

- (a) Every employee, from the receptionists to the most senior executives, should remain calm, polite, and cooperative.
- (b) Notify the most senior management and the on-site legal department. A response team should be organized immediately. Contact the company's outside counsel to

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<sup>28</sup> See, Administrative Penalty Decision of Anhui Province Administration of Industry and Commerce (2015) No. 2 (18 September 2015), [http://www.saic.gov.cn/fldyfbzdzjz/jzzfzg/201703/t20170309\\_232274.html](http://www.saic.gov.cn/fldyfbzdzjz/jzzfzg/201703/t20170309_232274.html).

<sup>29</sup> See, Press Release, NDRC, Shandong Price Bureau Imposed 120 Thousand RMB Fine on Long Shun He Corporation for Obstructing Antimonopoly Enforcement Investigation, [http://www.ndrc.gov.cn/xwzx/xwfb/201702/t20170213\\_837620.html](http://www.ndrc.gov.cn/xwzx/xwfb/201702/t20170213_837620.html) (last visited 8 March 2018).



arrange legal assistance if needed.

- (c) Request and review the following documents: (a) the working license of each investigator who participates in the investigation; (b) the written investigation notice issued by an antitrust agency (it is similar to a search warrant under US law but is issued by an antitrust agency rather than a court). If possible, make a copy of each document mentioned above; if not, record the name and organization of each investigator. Ensure that the search is limited to the scope and the items specified in the investigation notice. If any request from any investigator is beyond the scope of the investigation notice, the company may reject the request. As a general rule, the company should not consent to a search of any area, review of any document, or the seizure of any property, that is not described in the investigation notice.
- (d) Make one or more empty meeting rooms available for the investigators, ideally not where employees and documentation are gathered (materials and personnel can be brought to the investigators as needed). Do not allow the investigators to wander around. Arrange for a trusted employee to “shadow” any investigator who leaves the conference room and keep a record of the investigator’s activities.
- (e) Ensure that no one in the company destroys documents or deletes emails. As mentioned above, Chinese antitrust agencies have the ability to restore many deleted emails and other digital data.
- (f) Under PRC law, confidential documents are not exempt from searches and seizures, but we recommend that the target companies inform the lead investigator in writing if any of the requested documents are confidential or otherwise classified.
- (g) Instruct employees not to discuss the investigation with anyone outside of the office.
- (h) Keep a record of the investigation process, including notes of questions and answers, lists of employees being interviewed, and an inventory of documents and properties seized. We also recommend that target companies keep their own record of any information or documents provided to the agencies. Companies are entitled to an inventory of documents and properties that were seized, and this inventory should be signed or chopped by the investigators before they leave; if the company also keeps its own records, it could help in the preparation of its defense.

### 3.1.3 After Dawn Raids:

- (a) Organize an internal discussion immediately after an on-site investigation in order to better prepare a defense or respond to further investigations in the future.
- (b) Prepare a precise and complete record of what happened, note any questions asked by the investigators, and whether any documents were shown to employees.

## 3.2 DON'TS

- (a) Don't be impolite or act aggressively toward the investigators; don't refuse them entry or detain them in the company if they present proper working licenses and the

investigation notice.

- (b) Don't intentionally impede the investigation by confronting the investigators or encouraging employees not to cooperate with them.
- (c) Don't allow any investigator to wander around the company, interview people at random, or exceed the scope of the investigation as stated in the written investigation notice.
- (d) Don't withhold, conceal, or destroy any documents or digital data.
- (e) Don't make false statements or provide misleading information during interviews.
- (f) Don't speculate, give personal views or opinions, or volunteer information or documents. If you do not know the answer to a question, say that you do not know.
- (g) Without the company's authorization, any individual must not inform the media or anyone outside of the company of the investigation. If the company has PR or communications personnel, the company may inform them so that they could make a decision whether or how to effectively communicate the situation within the company or externally if necessary.

Individuals or companies that resist or obstruct an antitrust agency during the course of an investigation are guilty of an offense. Under PRC law, refusing to provide relevant information, providing false information, or concealing, destroying or transferring evidence or taking part in other misconduct to resist or obstruct the investigation is subject to a fine of (i) no more than RMB 100,000 for an individual and (ii) no more than RMB 1,000,000 for an entity.<sup>30</sup> Criminal liability will apply if the resistance constitutes a crime under PRC criminal law.

### 3.3 ATTEMPTS TO SUSPEND DAWN RAIDS OR MITIGATE PENALTIES

#### 3.3.1 Suspension of an Investigation

Under PRC antitrust laws, if the company in question admits to the wrongdoing and voluntarily ceases the illegal behavior within a timeline designated by the antitrust agencies, the agencies may decide to suspend their investigation.<sup>31</sup> This is something like plea bargaining under American law. In order to be eligible for such a suspension, the target company must submit a written application stating: (a) the conduct that is suspected of being monopolistic; (b) the measures it has taken to eliminate the purported monopoly conduct; (c) the timeline for the completion of the remedial efforts; and (d) any other measures required by the agencies.<sup>32</sup> The application is usually submitted at the early or middle stage of the investigation. If the application is accepted, the company must make routine updates to the agencies in writing regarding the fulfillment of its commitments.<sup>33</sup> The antitrust agencies

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<sup>30</sup> See, *supra* note 15.

<sup>31</sup> See, Article 45 of *Antimonopoly Law*.

<sup>32</sup> See, Article 15 of the *Provisions on the Antimonopoly Enforcement against Price Fixing*.

<sup>33</sup> See, Article 17 of the *Provisions on the Antimonopoly Enforcement against Price Fixing*.

have the authority to resume the investigation if: (i) they deem the company has not performed its commitments; (ii) the company has used false, incomplete, or misleading information in the application for suspension; or (iii) there is a change to the underlying reason why the investigation was suspended.<sup>34</sup>

### 3.3.2 Leniency Program

In addition, PRC antitrust law provides a leniency program to encourage companies to proactively report monopoly agreements: the first self-reporter could be 100% exempt from fines; the second self-reporter could be exempt from 50% or more of the fines; and other self-reporters could be exempt from a portion of the fines; provided that the self-reporters: (i) voluntarily report the existence of a monopoly agreement, (ii) provide key evidence, and (iii) fully cooperate with the investigation.<sup>35</sup> Chinese antitrust agencies have granted leniency to some companies. For example, during the NDRC's investigation and punishment of eight international shipping enterprises in 2015 for their price-fixing agreements, a Japanese company, Nippon Yusen Kabushiki Kaisha, was exempted from administrative punishment because it was the first enterprise that self-reported the monopoly agreement and ceased the violation.<sup>36</sup> Another two Japanese companies—Kawasaki Kisen Kaisha, Ltd.<sup>37</sup> and Mitsui O.S.K. Lines<sup>38</sup>—were exempted from 60% and 30% of fines, respectively, as they were the second and the third self-reporters. That being said, whether or not the antitrust agencies will consider that the evidence is in fact “key evidence,” and therefore worthy of an exemption, is at the discretion of the agencies.

Unlike an applicant for the suspension of an investigation, companies that intend to seek leniency generally have to self-report their offence before the antitrust agencies discover the specific violation, rather than during the agency's investigation of this specific case. If an offence and key evidence have already been discovered by the agencies, the self-reporter would be not eligible for leniency, but it may enjoy a lesser penalty under the PRC Administrative Punishment Law.<sup>39</sup> For example, in 2016, a Chinese company, Shandong Xinyi Pharmaceutical Co., Ltd., was investigated by the NDRC for its price-fixing monopoly. Although this company self-reported its offence and fully cooperated with NDRC's investigation, its self-reporting was conducted after the NDRC had found key evidence; the company was therefore not eligible for leniency, but due to its cooperation, it was exempted from a portion of fines.

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<sup>34</sup> See, Article 46 paragraph 2 of *Antimonopoly Law* and Article 14 of the *Provisions on the Antimonopoly Enforcement against Price Fixing*.

<sup>35</sup> See, Article 46 paragraph 2 of *Antimonopoly Law* and Article 14 of the *Provisions on the Antimonopoly Enforcement against Price Fixing*.

<sup>36</sup> See, Administrative Penalty Decision of the National Development and Reform Commission (2015) No. 1 (15 December 2015), [http://www.ndrc.gov.cn/fzgggz/jgjdylfd/fjgld/201512/t20151231\\_770042.html](http://www.ndrc.gov.cn/fzgggz/jgjdylfd/fjgld/201512/t20151231_770042.html).

<sup>37</sup> See, Administrative Penalty Decision of the National Development and Reform Commission (2015) No. 2 (15 December 2015), [http://www.ndrc.gov.cn/fzgggz/jgjdylfd/fjgld/201512/t20151231\\_770043.html](http://www.ndrc.gov.cn/fzgggz/jgjdylfd/fjgld/201512/t20151231_770043.html).

<sup>38</sup> See, Administrative Penalty Decision of the National Development and Reform Commission (2015) No. 3 (15 December 2015), [http://www.ndrc.gov.cn/fzgggz/jgjdylfd/fjgld/201512/t20151231\\_770044.html](http://www.ndrc.gov.cn/fzgggz/jgjdylfd/fjgld/201512/t20151231_770044.html).

<sup>39</sup> See, Administrative Penalty Decision of the National Development and Reform Commission (2016) No. 6 (22 July 2016), [http://www.ndrc.gov.cn/gzdt/201607/t20160727\\_812595.html](http://www.ndrc.gov.cn/gzdt/201607/t20160727_812595.html).

The principle of having to self-report an offence before the antitrust agencies discover the violation is case-specific. If an investigation is already underway with respect to one suspected violation (Case Y), a company that self-reports its offence in an unconnected monopoly agreement (Case X) may be still granted leniency for Case X if the agency was not aware of the existence of Case X. For example, in 2014, Hitachi China was dawn-raided by the NDRC for an antitrust case; after the dawn raid, Hitachi self-reported the existence of another monopoly agreement between it and other companies and submitted important evidence. Hitachi was therefore exempted from punishment by the NDRC as it was the first self-reporter for this new monopoly agreement case.<sup>40</sup>

## 4. FORWARD-LOOKING

On March 17, 2018, the Chinese State Council published an institutional reform plan, which involved restructure of a wide range of Chinese governmental agencies. According to this plan, the current three antitrust agencies—(a) the Price Supervision and Antimonopoly Bureau of the NDRC, (b) the Antimonopoly and Anti-unfair Competition Bureau of the SAIC, and (c) the Antimonopoly Bureau of MOFCOM—has been reorganized into a single new department under the State Administration for Market Regulation (“**SAMR**”) on March 21, 2018. The estimated deadline for completion of the restructuring at the state level is the end of 2018, while the deadline for local agency restructuring is the end of March 2019.<sup>41</sup>

Prior to the restructure, an antitrust dawn raid usually focuses on either pricing-related issues or non-pricing related issues, depending on which agency—the NDRC, which is responsible for pricing-related antitrust cases only, or the SAIC, which is responsible for non-pricing antitrust cases only—conducts the investigation. The newly established SAMR will consolidate the personnel of the three originally separated antitrust agencies to conduct comprehensive dawn raids and investigations for both pricing-related and non-pricing related cases. While the restructuring details, like the leader of the combined antitrust agency and the internal division of specific functions, have not yet been published, it is expected that antitrust enforcement will be strengthened as a result. The SAMR’s recent dawn raids on DRAM price collusion case indicate that the ongoing antitrust enforcement will not be delayed due to the restructure and investigators in the original antitrust agencies may continue to handle cases in accordance with their original responsibilities during the transition.

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<sup>40</sup> See, Administrative Penalty Decision of the National Development and Reform Commission (2014) No. 2, 15 August 2014, available at [http://www.ndrc.gov.cn/gzdt/201409/t20140918\\_626087.html](http://www.ndrc.gov.cn/gzdt/201409/t20140918_626087.html).

<sup>41</sup> Available at <http://samr.saic.gov.cn/jg/zjzz/> (visited July 16, 2018). Upon completion of restructuring, SAMR will become a super-regulatory agency under the State Council. In addition to the consolidated internal department of antitrust enforcement, SAMR is also responsible for comprehensive market regulation and supervision, administration and supervision of food and drug, and management of product examination issues.