



中华人民共和国国家工商行政管理总局

State Administration for Industry & Commerce of the People's Republic of China



Practice on Abuse of Dominance Investigations

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Out l i n e

- 1,Investigation purpose**
- 2,Investigation characteristic**
- 3,Investigation basis**
- 4,Investigation procedure**
- 5,Investigation practice**

(The views expressed herein do not reflect those of SAIC)

1, Investigations purpose (1-1)

- The law did not prohibit a dominant position, but abuse of a dominant position.
- EC Guidance: It is not in itself illegal for an undertaking to be in a dominant position. However, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.

1, Investigations purpose (1-2)

- Define the conduct of abuse of dominance position based on Rule of Reason.
- China AML: There are conditions such as “unfair” or “lack of justifications” attached to the six specific abusive conducts.
- EC Guidance: Tying and bundling are common practices. It can harm consumers through foreclosing tied market and, indirectly, the tying market.

1, Investigations purpose (1–3)

- Protect competition not competitor
- The provisions about the legislative purpose of AML.
- EC: The emphasis of the commission's enforcement activity is on safeguarding the competitive process in the internal market. Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors.

2, Investigations characteristics

- Enforcement against special entity
- Rule of Reason and Application of economic analysis
- Centralized enforcement and authorized law enforcement
- Enforcement mechanisms, ways and methods

2, Investigations characteristic (2-1)

(1) Enforcement against special entity

- When investigating an case, we must first determine whether the undertaking has a dominant market position, which is the prerequisite and foundation.
- EC : The assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of Article 82.

2, Investigations characteristic (2-2)

(2) Rule of Reason

- Collect more evidence and master various information and materials.
- Listen to undertakings representations and stakeholders comments.
- Emphasis on economic analysis
- Adhering to the professional prudence
- Give full play to experts, scholars and professionals.

2, Investigations characteristic (2–3)

(3) Central powers and Authorized law enforcement

- Central powers : The anti-monopoly law enforcement agency designated by the State Council shall be responsible for the anti-monopoly law enforcement work.
- Authorized law enforcement: The Anti-monopoly Law Enforcement Agency under the State Council may, as required by the work, empower corresponding agencies in the people's governments of the provinces, autonomous regions and municipalities directly under the Central Government to be responsible for the anti-monopoly law enforcement work according to this Law.

2, Investigations characteristic (2-4)

(4) Enforcement mechanisms, ways and methods

- Integration of law enforcement resources, the organization of professional investigators team.
- Take advantage of the whole system, to mobilize the enthusiasm of local agencies.
- With the support of expert team.
- The use of modern technology such as electronic evidence extraction.

3, Investigations basis

- China AML
- Procedural regulations: Provisions on the Procedures for the Administrative Departments for Industry and Commerce to Investigate and Handle Cases of Monopolization Agreements and Abuse of Dominant Market Position (Order No.42 of SAIC)
- Substantive regulations: Provisions for the Industry and Commerce Administrations on the Prohibition of Abuse of Dominant Market Position (Order No.54 of SAIC)
- Others

3, Investigations basis (3-1)

(1) China AML

- Determination of the dominant market position (Article 18)
- Presumption of the dominant market position (Article 19)
- Market share is important, but not exclusive or absolute standard
- Conducts of abusing the dominant market position (Article 17)
- Legal Liability (Article 47)

3, Investigations basis (3-2)

(2) Substantive regulations

- The concept of dominant market position
- The determination, presumption and disproof
- Conducts of abusing the dominant market position
- The determination of justifiable causes
- Catch-all provision

3, Investigations basis (3-3)

(3) Procedural regulations

- Acceptance, Verification
- Official acceptance, Authorization
- Investigation, Confidentiality
- Reports, Filing
- Decision, Announcement

4, Investigations procedure (4-1)

(1) Start the Investigation procedure

- Take the initiative to investigate based on its own power
- Investigate upon receipt of complaints

4, Investigations procedure (4-2)

(2) Acceptance of Complaints

- Accepting authority: SAIC and Provincial Administration for Industry and Commerce
- If the administrative department for industry and commerce below the provincial level receives reporting materials, it shall, within five working days, submit the relevant reporting materials to the provincial administration for industry and commerce.

4, Investigations procedure (4-3)

(3) Verification

- An important enforcement work before accepting the case
- Limited authority unlike formal investigation

4, Investigations procedure (4-4)

(4) Authorization

- Authorization by authority and authorization by application
- Authorization on a case-by-case basis and no authorization to lower level is allowed

4, Investigations procedure (4-5)

(5) Jurisdiction

- SAIC investigated case : (1) the monopolistic behaviors have significant impacts across the country; or (2) the monopolistic behaviors are believed by the SAIC as falling with its jurisdiction.
- Be authorized investigated case : (1) they occur within its administrative region; (2) they occur across two or more provinces, autonomous regions, or municipalities directly under the Central Government, but the main place where the behavior occurs is within its administrative region; or (3) the SAIC believes that it may delegate jurisdiction to the provincial administration for industry and commerce.

4, Investigations procedure (4-6)

(6) Investigative measures

- Own investigation、 entrusted investigation
- When investigating a case, there shall be no less than two law enforcement officers of the administrative department for industry and commerce, who shall show their law enforcement certificates.
- Investigative measures : (1) entering the business site; (2) interrogating the business operator; (3) consulting and copying the relevant documents; (4) sealing up or seizing relevant evidence; or(5) checking the bank accounts of the business operators in question.

4, Investigations procedure (4-7)

(7) Preparation before Investigations

- Prepare detailed work plan
- Focus on use of electronic forensics

4, Investigations procedure (4-8)

(8) Liability for failure of cooperating with the investigation

- Investigated party : The operators, interested parties and other relevant units and individuals under investigation.
- For the investigated who does not cooperate with the investigation : Impose a fine of less than 20,000 yuan on individuals, and a fine of less than 200,000 yuan on entities; and where the circumstances are serious, the Anti-monopoly Law Enforcement Agency may impose a fine of 20,000 yuan or up to 100,000 yuan on an individual, and a fine of 200,000 yuan or up to one million yuan on an entity; where a crime is constituted, the relevant business operators shall be investigated for the criminal liabilities.

4, Investigations procedure (4-9)

(9) Suspend the investigation

- Commitment rules can be found in competition laws in most countries.
- China AML and supporting regulations have provision for commitments mechanism.
- Whether to make a decision to suspend the investigation is decided by the authorities.

4, Investigations procedure (4-10)

(10) Confidentiality discipline

- Trade secrets learned in the course of the investigation should be kept confidential, or legal liabilities will arise.
- Confidentiality agreements shall be signed with personnel who have access to the case and the case materials.

4, Investigations procedure (4-11)

(11) Time limits

- No provision in China AML and supporting regulations.
- The time limits for normal cases are not applicable. For example, in a normal case, the authorities are required to verify and decide whether to officially open an investigation within 7 working days upon receipt of the complaint materials; and the time limit may be extended to fifteen working days under special cases.

5, Investigation practice (5.1)

(1) Before Enactment of AML

- Investigation of public utility enterprises and other monopoly industries operators based on the "Anti-Unfair Competition Law", which has been going on.
- Did research on market competition status and published the report on the competition status of multinationals doing business in China (2003).
- Regulate the business behavior of large supermarkets and other retailers according to law.

5, Investigations practice (5.2)

(2) After Enactment of AML

- Received many complaints; limited number of cases
- Complicated cases, pre-verification is a heavy task.
- Only one case is officially accepted by the State-level SAIC. Of the 28 cases delegated to provincial authorities, only six cases relate to the abuse of a dominant market position.



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Thank you!