

A Brief Overview on the Anti-Monopoly Law Enforcement against Collective Boycott in China

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Introduction

In around ten years of China's Anti-Monopoly Law ("AML") enforcement history, there have seen a number of public enforcement cases associated with collective boycott among competitors (see Table 1).¹ Both the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) and/or their competent subsidiaries investigated collective boycott among competitors and issued infringement decisions, and in one case, a commitment decision.

The most recent case concerning collective boycott is the home decor shopping malls in Jinan City of Shandong Province.

The Home Decor Shopping Malls in Jinan (2018)²

On March 21, 2018, the Shandong subsidiary of the SAIC (SAIC Shandong) issued a decision finding six companies which operates home decoration and furniture shopping malls to have violated Article 13(1)(v) of the AML governing collective boycott among competitors. Each of the six companies were fined for just CNY 100,000 (approx. US\$ 16,000) because they were found to have only reached, however not yet implemented, the restrictive agreement.

¹ Based on the information published by the NDRC and SAIC and their relevant subsidiaries on their respective official websites.

² SAIC's Competition Enforcement Announcement No. (2018) 6, accessible at http://home.saic.gov.cn/fldyfbzdjz/jzzfgg/201804/t20180403_273501.html (in Chinese)

Back in 2016, the six companies jointly executed a letter to all tenants of the shopping malls (which are home decoration and furniture retailers) requesting all the tenants to refrain from participating in sales activities organized by various media, websites, and third party sales platforms. The restriction is essentially an exclusive dealing request, forbidding the retailers from dealing with parties other than the shopping malls run by the six companies.

SAIC Shandong considered the business scope of the six companies and found they all cover the wholesale and retail of furniture, building and decoration materials, lamps, arts and crafts, and rental of space in the same geographic area. Therefore, SAIC Shandong held that the six companies compete with each other directly. It then went on to consider the business scope of the parties being boycotted, i.e. various media, websites, and third party sales platforms, and held that many of the media, websites, and third party sales platforms have overlapping business scopes with the six companies. Therefore, those media, websites, and third party sales platforms having business overlaps were competitors with the six companies.

In its decision, SAIC Shandong described the six companies' boycott of their competitors as causing impediments to business dealings between the tenants and the boycotted media, websites, and third party sales platforms, and at the same time, restricting the rights of the tenants to choose their trading counter-parties.

The Legal Basis and Analytical Framework of Collective Boycott

The legal basis for impugning collective boycott among competitors in China can be found in Article 13(1)(v) AML, which prohibits competitors from reaching agreements that collectively boycott business dealings. This provision is supplemented by the *Provisions of the Administration for Industry and Commerce on the Prohibition of Monopoly Agreements*, which in its Article 7 enumerates three types of prohibited collective boycott agreements entered into by firms in competitive relationships pursuant to the Article 13(1)(v) AML:

- (a) collectively refusing to supply or sell commodities to specific undertakings;
- (b) collectively refusing to purchase or sell the commodities of specific undertakings;
- (c) collectively restricting specific undertakings from business dealings with other undertakings in a competitive relationship with them.

Therefore, collective boycott under the AML essentially refers to agreements or concerted practice among two or more competitors agreeing not to deal with trading counter-parties (usually distributors or suppliers) to exclude or restrict competition on the markets in which they are active.

Worth noting is that in the context of intellectual property rights licensing, illegal collective boycott behaviors potentially can appear in the form of cross-licensing and standard setting whereby a group of competing intellectual property rights holders enter into exclusive agreements to exclude others from being licensed the relevant intellectual property rights.

In accordance with Article 13(1)(v) AML, collective boycott agreements entered into by competitors are presumed to violate the AML. However, such presumption can be rebutted subject to Article 15 AML if the firms being challenged can prove, for instance, that such behaviour has efficiencies, will not severely restrict competition on the relevant market, and enhances consumer welfare. Therefore, the analytical framework of collective boycott among competitors under the AML are analogous to “by object” offenses in the EU competition law. Noteworthy is that to date, there has been no published public enforcement records showing that Article 15 AML was successfully asserted as a defense where the presumption is established.

Is Market Power a Factor in the Assessment?

A review of the decisions as set out in Table 1 suggests that market power is not a determining factor in the assessment of collective boycott by the AML enforcement agencies, therefore firms does not need to have market power in order to be impugned for collective boycott behaviours. Despite this, the NDRC, in its infringement decisions issued to three Estazolam active pharmaceutical ingredients (“API”) manufacturers in 2016,³ nevertheless discussed in its infringement decisions that the relevant markets involved are Estazolam API and tablets and the three companies impugned are active on both markets. It continued to find that since the three Estazolam API manufacturers are the only actual competitors on the market of Estazolam API, the collective boycott agreement among them not to supply Estazolam API to Estazolam tablets manufacturers has the object of excluding their

³ NDRC Administrative Penalty Decisions No. (2016) 5-7, accessible at http://jjs.ndrc.gov.cn/fjgld/201607/t20160727_812583.html, http://jjs.ndrc.gov.cn/fjgld/201607/t20160727_812579.html, http://jjs.ndrc.gov.cn/fjgld/201607/t20160727_812587.html (in Chinese)

competitors from the downstream Estazolam tablets market by depriving the tablets manufacturers of essential inputs. In this case, market power assisted the assessment, however it is not a constituent factor in the finding of the prohibited collective boycott.

It should also be pointed out that Article 17 AML prohibiting abuse of dominance potentially can also be applied to collective boycott agreements among competitors where the firms exercising the boycott are collectively dominant on the relevant market and abused their dominance. This doctrine of “collective dominance” has indeed been applied once by the NDRC in its infringements decisions in 2017 against two firms found to have collectively abused their dominance on the market for Isoniazid API in China by charging excessive prices.⁴ One of the firms impugned in the case had a market share of no less than 10%, however when joined with the market share of the other firm impugned, the combined market share is over two thirds of the relevant market based on which dominance were presumed (arguably together with other factors).

Comments

The public enforcement efforts as set out in Table 1 show that the AML enforcement agencies have accumulated experience in investigating and finding fault with collective boycott among competitors. Collective boycott can either constitute an independent violation of the AML or be used to implement illegal price-fixing agreements among competitors whereby a few conducts could be identified to constitute violation (under which case there may be an impact on the setting of fines). Since the presumption of illegality for collective boycott among competitors sets a high requirement of compliance, businesses should be aware that whilst independent decision of a firm on not to deal with its distributors or suppliers may not raise AML concerns, an agreement among competitors not to deal with distributors or suppliers with the purpose of excluding competitors or achieving an agreed-upon price can raise AML concerns.

⁴ NDRC Administrative Penalty Decisions No. (2017) 1-2, accessible at http://jjs.ndrc.gov.cn/fjgld/201708/t20170815_857737.html, http://jjs.ndrc.gov.cn/fjgld/201708/t20170815_857735.html (in Chinese)

Table 1: Public Enforcement Involving Collective Boycott Behaviours

	Year of Decision	Enforcement Agency	Firms Impugned	Type of Decision
1	2012	NDRC's Hunan Provincial subsidiary	Insurance Industry Association of Loudi City 11 property insurance companies	Infringement decision (however it is unclear whether collective boycott was identified as an independent violation since there was no decision published for this case)
2	Dec 2012	SAIC's Hunan Provincial subsidiary	Insurance Industry Association of Changde City	Infringement decision (in the decision output restriction and market sharing were identified as violations, however collective boycott was not identified as a separate violation)
3	Apr 2013	SAIC's Yunnan Provincial subsidiary	XiShuangBanNa Tourism Association XiShuangBanNa Association of Travel Agencies	Infringement decision (collective boycott and price-fixing were arguably identified as violations)
4	Jul 2015	SAIC's Guangdong Provincial subsidiary	Guangzhou Panyu Animation & Game Association (GAGA)	Infringement decision (collective boycott was the only identified violation)
5	Jul 2016	NDRC	Huazhong Pharmaceutical Co., Ltd. Shandong Xinyi Pharmaceutical Co., Ltd. Changzhou Siyao Pharmaceuticals Co., Ltd.	Infringement decision (collective boycott and price-fixing were identified as violations)
6	Dec 2017	SAIC's Anhui Provincial subsidiary	Huainan City Freight Chamber of Commerce	Infringement decision (collective boycott was the only identified violation)
7	Jan 2018	NDRC's Shanghai subsidiary	Shanghai Health Affairs Service Center	Suspension of investigation subject to commitments

Table 1: Public Enforcement Involving Collective Boycott Behaviours

			Shanghai Medicine and Health Development Foundation	(collective boycott was the only identified behaviour)
8	Mar 2018	SAIC's Shandong Provincial subsidiary	6 home decor shopping malls in Jinan City, Shandong Province	Infringement decision (collective boycott was the only identified violation)