



NEWSLETTER

LIFANG & PARTNERS **立方观评**

No.65

2018.05

A dramatic landscape photograph of a glacier canyon. The canyon walls are made of jagged, white ice, and the floor is a narrow path of snow. Several hikers with backpacks are visible in the distance, walking along the path. The sky is overcast with soft light.

立方竞争法周报

Weekly Competition Law News

| 目录 | CONTENTS |

执法机构 | AUTHORITIES

1、反垄断执法新目标——知识产权滥用

The New Target of Anti-Monopoly Law Enforcement - Abuse of IPR

2、国家市场监督管理总局：关于2018年继续深入开展整治公用企业限制竞争和垄断

行为突出问题专项执法行动的通知

SAMR: Notice on Continuing to Carry Out a Special Enforcement Action against Anti-Competitive Conduct by Public Enterprises in 2018

行政执法 | PUBLIC ENFORCEMENT

3、腾讯音乐面临来自竞争对手有关滥用市场支配地位的指控

Tencent Music is Facing Abuse of Dominant Position in China Following Complaints from Competitor

经营者集中 | MERGER CONTROL

4、东芝存储器可能因无法通过商务部审查而取消出售

If MOFCOM Approval Is Not Obtained, the Sale of TMC May Be Cancelled

海外动态 | OVERSEAS NEWS

5、欧盟对苹果收购 Shazam 交易展开反垄断调查

Apple's Shazam Acquisition Sparks EU Antitrust Investigation

6、德国联邦卡特尔局：Facebook数据收集问题涉嫌滥用市场支配地位

German Cartel Regulator Investigated Facebook on Its Data Collection--an Abuse of Dominant Position

1、反垄断执法新目标——知识产权滥用

国家知识产权局局长申长雨近日对媒体表示，我国要进一步加大知识产权保护的力度，加快形成涵盖授权确权、行政执法、司法保护、仲裁调解、行业自律等各个环节的知识产权保护体系，为创新主体和市场主体提供更加有力的法治保障。同时以专利法修改为契机，加快建立知识产权的侵权惩罚性赔偿制度，显著提升违法成本。

申长雨透露，下一步将加大知识产权保护力度，建设知识产权保护体系，推动知识产权领域反垄断执法指南尽快出台。

有专家表示，保护知识产权和规制知识产权滥用行为并行不悖，最终目标都是为了鼓励创新，促进竞争。但如果知识产权权利人凭借知识产权形成和维持市场的支配地位，并以此实施垄断行为追求高利润，反而会阻碍技术创新和技术进步，破坏公平竞争。“制定一部专业的指南，对于提高反垄断执法的透明度，引导企业经营者正当行使知识产权，具有重要意义。”【1】

The New Target of Anti-Monopoly Law Enforcement - Abuse of IPR

Shen Changyu, director of the State Intellectual Property Office ("SIPO"), recently told the media that China will better protect intellectual property rights ("IPR"), forming an intellectual property protection system including rights authorization, administrative enforcement, judicial protection, arbitration, and industrial self-regulation, to provide more powerful legal protection for innovative entities and market players. At the same time, taking the revision of Patent Law as an opportunity, China will speed up the establishment of the punitive compensation system for IPR infringements, which will significantly increase the illegal cost.

Shen Changyu revealed that the next step will be to strengthen the protection of IPR, building an intellectual property protection system, and promote the introduction of Antitrust Guidelines for the Abuse of Intellectual Property Rights as soon as possible.

Some experts expressed that the protection of IPR and the regulation of abuse of IPR run parallel and the ultimate goal is to encourage innovation and promote competition. However, if IPR holders rely on IPR to form and maintain their dominant position in the market, and implement monopolistic behaviors to pursue high profits, they will impede technological innovation and technological progress and undermine fair competition. "The formulation of a professional guideline is of great significance in enhancing the transparency of anti-monopoly law enforcement and guiding enterprise operators to exercise IPR properly.

【1】 http://www.legaldaily.com.cn/index/content/2018-04/26/content_7530538.htm

2、国家市场监督管理总局：关于2018年继续深入开展整治公用企业限制竞争和垄断行为突出问题专项执法行动的通知

国家市场监督管理总局今天对外发布“关于2018年继续深入开展整治公用企业限制竞争和垄断行为突出问题专项执法行动的通知”，要求各地监管部门，在前期公用企业整治工作的基础上，把其他公共服务行业的经营者一并纳入整治范围，将整治工作与贯彻实施公平竞争审查制度的要求相结合；认真研究《反不正当竞争法》修订后公共服务行业整治工作面临的新形势、新情况和新问题；依据《反垄断法》以及相关地方性法规，依法查处和纠正公共服务行业经营者及共用企业的限制竞争行为，并在今年4月-11月期间持续集中开展专项执法行动。【2】

SAMR: Notice on Continuing to Carry Out a Special Enforcement Action against Anti-Competitive Conduct by Public Enterprises in 2018

The State Administration for Market Regulation (“SAMR”) issued a “Notice on Continuing to Carry Out a Special Enforcement Action against Anti-Competitive Conduct by Public Enterprises in 2018”. It requires local authorities to incorporate the operators of public service industries into the scope of rectification on the basis of previous public enterprises rectification, and combine the rectification work with the requirements for implementing a fair competition review system; After the revision of the Competition Law, new situation and new problems faced by the rectification work should be studied thoroughly; in accordance with the Anti-monopoly Law and related local regulations, anti-competitive conducts of public enterprises and public service industries shall be investigated and corrected. And the SAMR will continue to carry out special law enforcement actions during the period from April to November in this year.

3、腾讯音乐面临来自竞争对手有关滥用市场支配地位的指控

据悉，腾讯音乐娱乐集团（“TME”）面临来自竞争对手网易云音乐有关滥用市场支配地位的指控。网易指控腾讯音乐向该公司收取高于市场价格的独家授权费用。

消息称国家发改委首先发起了这项调查，紧随其后的是国家工商总局，后者向腾讯发送了一份调查问卷。一家公司同时被两家执法机构调查，这种情况非常罕见。

消息来源证实，这些调查并非正式调查，并指出没有独立数据支持腾讯音乐占中国的市场份额。《环球时报》中国版报道，2017年腾讯音乐占中国流媒体音乐市场的78%左右。新成立的国家市场监督管理总局是否会进行正式调查还有待观察。《华尔街日报》本月报道，腾讯音乐正在考虑今年下半年在美国上市，估值超过250亿美元。

腾讯和网易都没有对调查事宜进行回应。

【2】 http://home.saic.gov.cn/fldyfbzdjz/gzdt/201804/t20180424_273901.html

TME is Facing Abuse of Dominant Position in China Following Complaints from Competitor

Tencent Music Entertainment Group (TME) is facing abuse of dominant position in China following complaints from competitor NetEase Cloud Music.. NetEase has alleged that Tencent Music charges the company a higher-than-market rate to license its exclusive music content.

A source said NDRC launched the probe first and SAIC followed soon after, with the latter sending a questionnaire to Tencent. It is very rare for a company to be investigated by two authorities simultaneously.

The source confirmed the probes were not formal investigations and noted there is no independent data on Tencent Music's market share in China. The state-owned Global Times reported that in 2017 Tencent Music accounted for around 78% of China's streaming music market.

Whether a formal investigation will be launched by the new SAMR remains to be seen. The Wall Street Journal reported this month that Tencent Music is considering an IPO in the US later this year with a valuation exceeding USD 25bn.

Both Tencent and NetEase did not respond to requests seeking comment. 【3】

4、如未获中国反垄断批准 东芝考虑不再出售半导体业务

日本东芝集团4月23日在一份声明中表示，公司仍然致力于完成其存储器芯片业务的交易。声明于媒体报道之后公布，报道称如果该交易在5月28日未能获得中国商务部的批准，东芝就可能取消贝恩资本主导的财团以186亿美元收购东芝存储芯片部门（TMC）的交易。

日本经济新闻报道称，如果该公司未获得商务部的批准，将考虑三种方案，包括取消交易。如果在截止日期前获得商务部批准，该交易将按计划进行，收购进程将加快。报告补充说，如果没有获得商务部批准，东芝可能会修改销售计划并重新提交批准申请。

从7月份开始，贝恩资本有权在支付罚款后退出185亿美元的交易。然而，如果双方同意重新谈判，由于智能手机市场疲软，贝恩可能会寻求更低的价格。该报告称，重新谈判过程中的另一个争议点可能是韩国SK海力士在联盟中的存在，并补充说，贝恩可能被迫改变财团的组成，以便中国监管机构更快批准交易。

日本经济新闻报道称，如果没有获得商务部的批准，第三种选择是放弃交易并让TMC上市，以确保资金满足资本要求。东芝公司现在可以选择该方案，因为该公司在接受海外投资者的第三方股票投资6000亿日元的注资后，财务状况有所改善。

报告中指出，上市的问题之一是时间安排，东芝的一位官员曾表示，由于审查程序，TMC最早可能会在2019年上市。

【3】 <https://app.parr-global.com/intelligence/view/prime-2627195>

If MOFCOM Approval Is Not Obtained, the Sale of TMC May Be Cancelled

Japanese conglomerate Toshiba said in a statement today (23 April) that it still aiming to complete the sale of its memory chip unit. The company issued the statement after media reports claimed that it could cancel the USD 18.6bn sale of Toshiba Memory Corp (TMC) to a Bain Capital-led consortium if it failed to get approval from China's Ministry of Commerce (MOFCOM) by 28 May.

A report in Nihon Keizai Shimbun said the company was considering three scenarios, including cancelling the deal, if the company did not get MOFCOM approval. If MOFCOM approval is obtained by the deadline, the deal will move forward as planned and the acquisition process will be accelerated, the Nihon Keizai report said. If MOFCOM approval is not obtained, Toshiba could revise the sale plan and resubmit the deal for approval, the report added.

From July, Bain Capital has the right to step away from the USD 18.5bn deal after paying a penalty. However, if the parties agree on renegotiation, Bain may seek a lower price due to the projected weakness in the smartphone market. Another point of contention during renegotiation could be the presence of South Korea's SK Hynix in the consortium, the report said, adding that Bain could be pressured to change the composition of the consortium in order to make it easier for the Chinese regulators to approve the deal.

If MOFCOM approval is not obtained, a third option would be to abandon the deal and list TMC to help secure funds for the unit's capital requirements, the Nihon Keizai report said. The option is now available to Toshiba as the company's financial position has improved after receiving a JPY 600bn capital injection from a third-party share placement from overseas investors.

One of the problems with listing is the time frame, the report said, noting that an official from Toshiba has said that the earliest TMC could be floated would be in 2019, due to examination procedures. 【4】

5、欧盟对苹果收购Shazam交易展开反垄断调查

Shazam是一款音乐识别软件，它利用手机或电脑的麦克风来识别周围环境中的音乐，并提供用户可以听到这首歌的音乐平台链接。而收购Shazam是苹果公司最大的收购交易之一，据消息人士透露该交易涉及金额高达4亿美元。

不过，4月24日凌晨消息，苹果公司收购Shazam的交易面临来自欧盟的反垄断调查，欧盟担心苹果会将Shazam的数据用于诱导消费者使用其自家音乐服务Apple Music。

欧盟宣布，将在今年9月4日前，调查清楚苹果公司是否将可能以不公平的方式利用 Shazam 获取到音乐服务竞争对手的商业敏感信息。同时欧盟还将确认苹果如果下线Shazam 服务，此举是否会对Apple Music的竞争对手们造成负面影响。 【5】

【4】 <https://app.parr-global.com/intelligence/view/prime-2625374>

【5】 <http://tech.sina.com.cn/it/2018-04-24/doc-ifzqvvsal992342.shtml>

Apple's Shazam Acquisition Sparks EU Antitrust Investigation

Shazam is a music recognition software that uses a cellphone or computer's microphone to identify music in the surrounding environment and provides a music platform link where the user can hear the song. The acquisition of Shazam is one of Apple's largest acquisitions. According to sources, the transaction covered up to US\$400 million.

However, on the morning of April 24, Apple's acquisition of Shazam faced antitrust investigation from EU. EU is concerned that Apple will use Shazam's data to induce consumers to use its own music service--Apple Music.

EU announced that it will investigate whether Apple will use Shazam to obtain commercially sensitive information from its music service rivals in an unfair way before September 4th this year. At the same time, EU will also confirm whether Apple's removal of Shazam's service will adversely affect Apple Music's competitors.

6、德国联邦卡特尔局：Facebook数据收集问题涉嫌滥用市场支配地位

德国反垄断机构“联邦卡特尔局”(Federal Cartel Office)主席安德烈亚斯·蒙特特(Andreas Mundt)表示 Facebook对用户数据的收集方式是有问题的，可能涉嫌滥用市场支配地位。

Facebook数千万用户的个人数据被泄露事件引发了政界的担忧，但德国最高反垄断机构对 Facebook获取的庞大数据量提出了质疑。

蒙特特表示正在等待Facebook回应他12月份发布的调查结果，即Facebook滥用市场支配地位，未经同意收集用户的个人信息，包括利用嵌入式“喜欢”或“分享”按钮来追踪用户的网站访问记录，以及在即使没有明显的社交网络标志的网页，观察访问的用户。

蒙特特在接受采访时告诉路透社：“Facebook收集用户数据是一个不争的事实，用户知道这一点，也有心理准备”，“问题是，Facebook收集哪些数据，以及何时收集，用户并不知情。”

Facebook CEO马克·扎克伯格 (Mark Zuckerberg) 之前在回答美国议员提问时曾表示，无论访问者是否拥有Facebook账号，Facebook都会追踪他们。

蒙特特的案例基于他的分析，他认为Facebook在德国社交媒体市场份额超过90%——它的唯一直接竞争对手是Google——它属于反托拉斯条款中规定的占市场支配地位，而不是像Facebook所认为的仅仅是受欢迎。

蒙特特说道：“如果Facebook占市场支配地位，那么用户同意Facebook收集和使用其数据就不属于自愿的，” “因为用户别无选择，如果他想使用社交网络，他只能选择Facebook。”

在全球拥有超过20亿用户的Facebook对此表示，蒙德特的观点是“不准确的”，但表示将配合联邦卡特尔局的调查。此次调查不会导致罚款，但一些行为可能会被禁止。

German Cartel Regulator Investigated Facebook on Its Data Collection--an Abuse of Dominant Position

BONN, Germany (Reuters) - BONN, Germany (Reuters) - Andreas Mundt, president of the Federal Cartel Office, indicates that Facebook's data collection may be an abuse of its market dominance.

That the personal data of tens of millions of Facebook users fell into the wrong hands is troubling politicians, but Germany's top competition regulator is questioning the sheer volume of information that the social network harvests.

Andreas Mundt is awaiting Facebook's response to his findings, published in December, that it abuses its market dominance by gathering data on people without their proper consent. That includes tracking visitors to websites with an embedded Facebook 'like' or share button - and pages where it observes people even though there is no obvious sign the social network is present.

"For Facebook to collect data when I as a user am on Facebook, that's clear. The user knows this and has to expect it," "What is problematic is the collection of data in places and moments where the user can't realistically expect that data is collected by Facebook." Mundt told Reuters in an interview.

CEO Mark Zuckerberg, in testimony before the U.S. Congress, said Facebook tracked people whether they have accounts or not.

Mundt's case rests on his analysis that Facebook has a market share of social media in Germany of over 90 percent - he sees its only direct competitor as Google - making it dominant in anti-trust terms and not, as Facebook argues, merely popular.

"If Facebook has a dominant market position, then the consent that the user gives for his data to be used is no longer voluntary," "That's because he has no alternative. He has to use Facebook if he wants to use a social network." said Mundt.

Facebook, which has more than 2 billion users worldwide, describes Mundt's view as "inaccurate" but has said it will cooperate with the investigation, which would not result in fines but could lead to some practices being banned. 【6】

【6】 <https://www.usnews.com/news/technology/articles/2018-04-23/facebooks-hidden-data-haul-troubles-german-cartel-regulator>



IMPORTANT INFORMATION

This Newsletter has been prepared for clients and professional associates of Lifang & Partners. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

For more information, please visit our website at www.lifanglaw.com. If you have any questions, please contact us at info@lifanglaw.com or

Beijing Office

Add: 11 Floor, Tower A, Nan Xin Cang International Building, No.A22, Dongsishitiao Street, Dongcheng District, Beijing, China 100007

Tel: 8610-64096099

Fax: 8610-64096260,64096261

Shanghai Office

Add: Room 2805, China Insurance Building, No.166 Lujiazui East Road, Pudong New Area, Shanghai, China

Tel: 8621-58501696

Fax: 8621-68380006

Guangzhou Office

Add: Room 3806, Building G, G.T.Land Plaza, No. 16, Zhujiang East Road, Zhujiang New Town, Tianhe District, Guangzhou China

Tel: 8620-85561566, 85561660, 38898535

Fax: 8620-38690070

Wuhan Office

Add: Room 1002, Tower C, Han Street Headquarter International, No.171 Zhongbei Road, Wuchang Dist, Wuhan, Hubei, China

Tel: 8627-87301677

Fax: 8627-86652877

Seoul Office

Add: Guanghuamun Officia Building 1416, Saemunan-ro 92, Jongno-gu, Seoul Republic of Korea

Tel: 0082 02 69590780

