

perspectives and criticisms on Xu Kunlin's anti-monopoly interview with *Oriental Outlook* 透视与批评—瞭望东方周刊《许昆林：亲历重大反垄断案》一文中的若干细节与问题

21 Jun 2015 LIU Xu 刘旭 Zhihu

Xu Kunlin's 许昆林 recent interview defending his anti-monopoly record drew fire from his long-term critic Liu Xu 刘旭 Tongji University. Sentence by sentence, Liu demolishes Xu's grounds for avoiding due process, instead converting the case into a media spectacle.



中华人民共和国国家发展和改革委员会
National Development and Reform Commission



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有人说中国已成为继欧盟、美国之后的反垄断第三专区。质疑者说我们外行，但真正的内行从来不这么认为。

China has, it is said, become the third anti-monopoly 'special region' [zhuangu] after the EU and US. Sceptics say we are amateurs, but real experts disagree.

简言之，在竞争法范畴下，中国大陆地区、美国、欧盟是三个法域。在英文中，也不严谨的说法，称之为三个“区域”。但“专区”这样表述在中文语境下不是法学术语，会引起歧义，翻译成英文，也同样会引起歧义。

Simply put, mainland China, the US and the EU are three separate jurisdictions in terms of competition law. In English, they are called three *quyu* [regions] which is not very precise either. But *zhuangu* is not a legal term in Chinese. It can cause misunderstanding both in Chinese and when translated into English.

不是法学科班出身，对相关术语掌握不好，很正常。但是，作为天天和法律打交道，和反垄断法打交道了4年多的反垄断执法机构负责人仍旧连基本术语的使用也有问题，那么被其他懂法律的“外行”批评为“外行”则也是情有可原的。如果连基本术语还有问题，都表述不严谨，缺乏专业精神和敏感性，那么是否还应当自诩为内行，则同样是值得审慎考虑的问题。

It is fine that Xu Kunlin is not trained in the legal profession and has not mastered legal terminology. However, Xu is the [former] director of an anti-monopoly agency that dealt with law, especially the *Anti-Monopoly Law*, every day for over four years. If even he still has trouble handling basic terms, it is no wonder that 'amateurs' well-versed in the law will call Xu out as an amateur. If he still has problems using these basic terms accurately, it shows lack of professionalism and sensitivity. His deeming himself a professional would be called into question by the same token.

对美国高通公司的60亿元人民币罚款，是许昆林在国家发改委反垄断局局长任上开出的最后一张罚单，也是中国反垄断机关迄今开出的最大一笔罚款。

[*Oriental Outlook*]: Xu's fining Qualcomm's C¥6 billion was the last such act of his when holding the directorship of the NDRC Price Supervision and Anti-Monopoly Bureau. It was the largest imposed by Chinese anti-monopoly authorities so far.

但笔者更倾向于应从根本上理解为决策者通过高通案及欧美的激烈反应，看到了不仅许局长，而是整个三大反垄断执法系统、司法系统在《反垄断法》运行中存在的严重问题，所以不仅要求发改委系统，其他执法、司法系统也都更加慎重。换言之，即便批评尤其集中在许局长及高通案身上，问题是系统性的，不是调离或查办某一位官员就能解决的。

The decision makers, I tend to think, have realised, based on the Qualcomm case and fierce Western backlash, that serious flaws exist. This is not just with Xu, but the three agencies and judiciary in their enforcement of the law. More discretion is now demanded from the NDRC, other enforcement agencies, and the judiciary. In other words, criticism has concentrated on Xu and the Qualcomm case, but the problems are systemic. They cannot be solved by transferring or removing a certain individual.

2015年2月第一周，高通公司宣布，已同意支付 60.88 亿元人民币 (约合 9.75 亿美元) 罚款，为期 14 个月的反垄断调查至此结束。该公司声明称，不会挑战这一决定，不会进一步上诉，并将加大在华投资。

Qualcomm agreed, after a 14-month investigation, to pay the C¥6 billion fine in the first week of February 2015. It will not challenge or appeal the decision and will increase investment in China.

这是高通公司在全球真正认账的第一张反垄断罚单。

This is the first anti-monopoly fine for which Qualcomm has ever accepted liability.

综上，2014年底，甚至2015年1月12日前，高通都没有“放弃抵抗”，主动认罚，而是在国家发改委提交给国务院的高通案处理方案被后者修改或否定后，确保高通能够维持案整机价格收取专利费的基本原则获得认可后，才愿意缴纳罚款，同时放弃挑战执法机构的处罚决定。

Qualcomm had yet to throw in the towel and accept the fine by end 2014, or even by 12 January 2015. Rather, it was only willing to pay the fine and forfeit the right to challenge the decision after the NDRC's Qualcomm proposal was either amended or rejected by the State Council, so as to guarantee the company could continue to charge licensing fees based on handset value.

.....这个案子调查一年多，我们占有时间上的主动。对于企业来讲，前景不稳定会影响投资者的信心，并且我们调查到一定阶段就可以直接下结论。

... With investigations lasting over a year, we had time on our side. For the firms concerned, shaky prospects may affect investor confidence; however, at a given point of our investigation, we could directly hand down a finding [involving liability].

急躁会导致执法中出现一系列严重的问题，更何况反垄断执法本身是非常复杂的，无论是实体法的适用与调查取证，还是程序法上的质证、申辩、听证等等。

Hastiness can lead to serious law enforcement problems. Anti-monopoly enforcement is especially complex, from the application of law and collection of evidence, down to due process including cross-examination, defence, and hearing.

另一方面，由于高通案广受关注，且经历了一系列可能谈及该案的重大会议、事件节点，许局长任内对高通案的调查实际上处于极大的时间压力之下，所以才会反复透过媒体攻势来宣传。

Director Xu had a tough deadline given the Qualcomm case's high profile and the number of major meetings and events that took place during the investigation. Hence he repeatedly rallied the media for support.

.....

由于高通案直接影响着中电信、中联通布局下游FDD手机市场生态，间接影响国内FDD牌照发放的时间安排，波及了中美关系，更加剧了外国投资者对我国投资环境的担忧，所以执法者角度非常迫切地希望能够尽早结束高通案，不仅在7月24日高通财报前后，动员央视、央广及学者、专家、律师轮番造势围剿，甚至不惜使出先借媒体放谣再借媒体辟谣，来造势向国务院“逼宫”、向高通逼宫，迫使后者批准其2014年底对高通案的处理结论。

...

Given the impact on China Telecom and China Unicom's downstream FDD (4G) market interests, FDD licence approval procedures (from MIIT), relations with the US, and deepening foreign investor concerns about China's business environment, NDRC was eager to quickly wrap up the case. Around the time Qualcomm released its earnings 24 July [2014], [Xu rallied] CCTV, CNR, experts and lawyers to target Qualcomm via media campaigns, even releasing rumours and then refuting them. Xu tried to force the State Council to approve NDRC's Qualcomm proposal by pushing it and Qualcomm into a corner.

.....

实际上，上述四方面并非是高通案一个案件中存在的问题，而是反垄断法运行中的系统性问题，且在许局长任内已经多次出现，并进一步迫使后者更倾向于，或者说更依赖于舆论造势的造势执法，“速战速决”的闪电战——并坚持为其执法透明度极低找出各种理由，以最大限度地规避社会监督，维持其巨大的恣意裁量空间。

...

These four issues [Xu's personal agenda, Qualcomm's huge lobbying power, widespread NDRC disregard for legal procedure, and weak criticism in China's legal community] are not confined to the Qualcomm case; they are systemic issues in anti-monopoly enforcement. Constantly occurring under Xu's watch, they prompted him to be more inclined, or more reliant, on media strategies and blitz tactics. To preserve its huge latitude for arbitrary discretion, the NDRC draws on all kinds of pretexts to defend its poor enforcement transparency and freedom from civil oversight.

.....高通总裁对我们也是口服心服。

... Qualcomm's CEO is convinced we are in the right, in word and in deed.

上述表态是许局长对媒体的一面之词

This is a one-sided statement from director Xu

事实上，高通案是一出——以闹剧为开端，闹剧为结尾，闹剧贯穿始终的——闹剧。

The Qualcomm case was a total farce from beginning to end.

.....

为什么高通在美、欧、日、韩等法域被竞争法执法机构调查都能够坚持申辩或诉讼，而在中国，在遇到许局长自己也承认“缺乏经验、缺乏人才”的反垄断执法团队时，就突然一下子口服、心服地认罚了？

...

Why would Qualcomm, who have persisted in defence and litigation against US, EU, Japanese, and Korean authorities, suddenly agree to pay the fine when up against Xu's 'inexperienced and amateur' team?

脱离法治轨道的反垄断执法才是该案的实质性问题。

The core issue here is anti-monopoly enforcement's deviance from rule of law.

面对这样的情况，高通除了通过认罚来保住其认为正确的专利费收取模式，恐怕没有什么其他的选择了。

Given such a situation, to preserve its patent fee model, which it deems correct, Qualcomm likely had no other option than to pay the fine.

技术难度还好。我们查处案件都会借助外脑、广泛听取各方面的意见，会请顶级专家来咨询。譬如高通案件，我们请的专家包括法律、经济、技术等各方面的，这样能力就能放大十倍、百倍。

Technical difficulties were not an issue. We drew on external expertise, listened to a wide range of opinions, and invited top counsel in investigations. During the Qualcomm case, we invited experts in legal, economic, technical and other fields, increasing our capacity by ten- or even a hundred-fold.

但是，没有任何公开的报道提及许局长任内在反垄断执法领域里召开过听证会，并就相关证据、整改建议接受质询。而且已经公布处罚决定全文的个案中，也缺少对所谓“各方面意见”、“顶级专家”咨询的披露。甚至已知的，被许局长批评的张昕竹研究员与其他两位学者、或咨询公司工作人员为高通公司写的专家也没有在国家发改委对高通案的处罚决定全文中提及、作为附件公布或引用。这是过于自信的表现，还是过于不自信的表现呢？如果过于不自信，还要借助媒体造势执法、裹挟舆论，岂不是太可怕了吗？

No public report has ever mentioned a hearing on anti-monopoly enforcement under Xu, or the NDRC being questioned regarding evidence, or on proposals for improvement [of its procedures]. For cases where the penalty decision has been publicly released, there is no mention of Xu listening to a 'wide-range of opinions' or seeking counsel from 'top experts'. The Qualcomm decision failed even to mention, quote, or release in an attachment the well-known researcher Zhang Xinzhu (who was criticised by Xu) or the two other scholars or consultancy staffers (who defended Qualcomm). Is this a sign of overconfidence or lack thereof? If full of self-doubt, was not Xu's reliance on media tactics to hijack public opinion reprehensible?

那么，从2014年8月13日到2014年11月28日，国家发改委反垄断执法者做了哪些改变，又该如何评价这些改变呢？

From 13 August 2014 to 28 November 2014 [facing increasing foreign pressure at Davos, APEC, and the G20], what changes did the NDRC make, and how should they be evaluated?

Out of the blue the NDRC suddenly:

(1) “急”字当头，突然象征性地履践对当事人申辩权利的保障

1. paid token respect to the right to defence of interested parties

.....

(2) “急”字当头，以查处止于个别省份换取奥迪、克莱斯勒认罚

...

2. limited Audi and Chrysler investigations to a few provinces in exchange for their agreeing to fines

.....

(3) “急”字当头，发改委系统突击披露对中资企业的处罚决定

...

3. suddenly publicised punishments incurred by Chinese companies

.....

(4) “急”字当头，发改委系统破天荒地开始公布处罚决定全文

...

4. for the first time publicised the whole penalty decision text

所谓粗暴就是指我们的突袭调查.....

Our so-called rough practices refer to unannounced raids...

事实上这种突袭调查，也是我们和美方交流的时候，美方教我们的.....如果不突袭，证据很容易丢失、毁灭，美国的反垄断执法部门也是这么做的。

We learned these tactics during exchanges with our US colleagues. ... Without these raids, evidence can easily be lost or destroyed. US authorities do the same thing.

对于发改委系统反垄断执法粗暴的指责，应该并非空穴来风，也并不是像许局长那样偷换概念式地限缩在突击调查方面。

These accusations of brutality are not groundless and nor have these tactics been limited to raids, as Xu misleads.

.....

其实，国内媒体已经借发改委反垄断执法机构的口，直接给出了真实的答案。

...

Domestic media have already quoted NDRC [on the use of scare tactics], giving us the real answer:

.....

“记者昨天（2014年8月5日）从‘权威人士’处确认，发改委确实正在对奔驰进行调查，原因是奔驰为配合反垄断调查而进行的降价措施‘没达到发改委期望的幅度’”。

...

‘An authoritative person confirmed for me yesterday that NDRC was continuing its investigation into Mercedes because its price reduction, as part of the ongoing case, did not meet NDRC requirements’. [*Beijing Daily* 6 August 2014 Liu Leitao 刘磊涛]

.....

‘.....如果有的企业死打都不认账、不整改，这样的企业，在调查结束后，处罚肯定只会更加严厉一些，会从重处罚。’”

...

NDRC official: ‘... If some companies refuse under any circumstances to admit liability and undergo corrective measures, penalties incurred after investigations close will definitely be stricter and heavier’. [*Economic Observer* 9 August 2014 Liu Xiaolin 刘晓林, Zhang Xiangdong 张向东]

.....

.....上述被国内媒体采访的“国家发改委相关司局官员”，并没有像许局长回应记者有关“粗暴执法”问题时——在偷换概念上——展现出的驾轻就熟。

...

... The quoted officials above lacked Xu’s skill at distorting the truth when answering questions on ‘brutal enforcement’ tactics.

当时是有实名举报，按规定我们必须立案。但中国反垄断法2008年8月才正式施行，企业不熟悉，调查了半年还没有重视，所以就在中央电视台曝光了。

At that time (2011) someone reported [China Telecom and China Unicom] using a real name, so we had to undergo investigations. However the *Anti-Monopoly Law* had only just come into effect in August 2008. The two firms were unfamiliar with it and failed to take the investigation seriously, even after six months. We had to publicise the case on CCTV.

如果当初是因为许局长及其团队还不熟悉《反垄断法》，对法治缺乏应有理解，那么为什么到2014年，无论是高通、奔驰或其他汽车业都高度重视反垄断执法调查时，其仍旧大量肆无忌惮地借助大众媒体对个案做出先入为主、一边倒的报道，纵容各路不具名的消息人散布个案调查与处罚咨询？

If back then Xu and his team justified their lawlessness by unfamiliarity with the *Anti-Monopoly Law*, why then in 2014, when Qualcomm, Mercedes or other auto makers were all taking the law very seriously, did he still unscrupulously use mass media to produce prejudiced and subjective coverage of these cases, as well as condone all kinds of nameless sources spreading information about the investigation and punishment?

source text