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Antimonopoly law in China

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Introduction*

Since the Antimonopoly Law of 30 August 2007[1] came into force on 1 August 2008, China has quickly emerged as an important competition law jurisdiction both for domestic companies and for international businesses with activities in China.

Largely following the model of EU and German competition law, the Antimonopoly Law comprises three broad sets of rules:

- conduct rules prohibiting restrictive agreements and the abuse of a dominant market position (Chapters II and III of the Law)
- merger rules to control large M&A activity and prevent mergers that restrict competition (Chapter IV of the Law)
- rules prohibiting the abuse of administrative power that leads to restrictions of competition (Chapter V of the Law).

The Antimonopoly Law has a very broad scope of application. It applies to all "undertakings", defined in the Law as any natural or legal person, or any other organisation, that produces or deals in goods or provides services. Article 7 of the Antimonopoly Law contains somewhat ambiguous language concerning the Law's application to state-owned enterprises (SOEs), but the majority view is that the Antimonopoly Law applies equally to all undertakings, irrespective of whether they are privately owned or owned by the State. The three enforcement agencies (NDRC, SAIC and MOFCOM) have all stated that they would not afford any preferential treatment to SOEs in the application of the Antimonopoly Law. Some of the early cases they investigated involve SOEs.[2] The only economic sector that is expressly excluded from the scope of the Law is agriculture and the activities of rural economic organisations.[3]

* Author's note: The guide reflects the state of law as of 31 January 2012.

1 Antimonopoly Law of the People's Republic of China of 30 August 2007, Presidential Order No 68.

2 For example, in its decision of 15 November 2010 in case *Wuchang Salt*, the NDRC's local Hubei bureau took action against state-owned salt companies for their violation of the Antimonopoly Law's Article 17 (prohibition on abuse of dominance) and Article 7 (which prevents SOEs from using their exclusive operation rights to jeopardise consumers' interests). More recently in November 2011, the NDRC announced that it was investigating state-owned China Telecom and China Unicom for suspected abuse of dominance in the broadband inter-connection market by way of setting discriminatory prices. In the same month, MOFCOM also imposed restrictive conditions on the state-owned Shenhua Group in its decision of 10 November 2011 (see Public Announcement No. 74 [2011] of MOFCOM in relation to its decision of 11 November 2011 in case *General Electric/China Shenhua*).

3 Article 56 of the Antimonopoly Law. The wording of Article 55 of the Law, which explains how the law should apply to the exercise of intellectual property rights, is somewhat ambiguous. The scope of any exclusion under this provision appears to be limited. In its judgment of October 2009 in case *Sursen v Shanda and Xuanting*, the Shanghai No.1 Intermediate People's Court ruled on a dispute involving intellectual property rights. From what is known about the case, parties did not challenge the court's jurisdiction based on Article 55 of the Law.

The Law also has broad geographical scope. If conduct eliminates or restricts competition within the territory of the People's Republic of China (Hong Kong, Macau and Taiwan are excluded), it can amount to an infringement under the Antimonopoly Law even if that conduct actually took place outside the territory of People's Republic of China. It follows that undertakings with sales or other commercial activities in China, where they make decisions on pricing and commercial terms, must act in accordance with the Antimonopoly Law regardless of whether they have a formal presence in mainland China.

Infringements of the Antimonopoly Law may result in serious adverse consequences. In respect of restrictive agreements and abuse of dominance, the financial sanctions under the Antimonopoly Law are potentially more severe than in many other jurisdictions as undertakings face both fines and the possibility of having their illegal gains confiscated.

The Antimonopoly Law is one of three statutes of general application that protect competition on the Chinese markets. The other two are the Price Law of 1998 and the Anti-Unfair Competition Law of 1993. The Chinese competition authorities and the Chinese courts will often rely on several of these statutes, leading to a broad approach to competition law enforcement that goes beyond addressing purely antitrust concerns.

The institutions

A distinctive feature of the Chinese competition law regime is that its administration and enforcement are shared among different authorities:

- The Antimonopoly Commission is primarily responsible for formulating competition policy and ensuring the overall coordination of enforcement. The Antimonopoly Commission reports directly to the State Council.

- The Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission (NDRC) enforces the conduct rules and the prohibition on the abuse of administrative power in price related matters.

- The Antimonopoly and Unfair Competition Enforcement Bureau of the State Administration for Industry and Commerce (SAIC) enforces the conduct rules and the prohibition on the abuse of administrative power in relation to any other non-price related matters.

- The Antimonopoly Bureau of the Ministry of Commerce (MOFCOM) administers and enforces the merger control rules, as it already did under the previous merger control regime.

While the jurisdiction of MOFCOM's Antimonopoly Bureau is clear, the lines of demarcation between the SAIC and NDRC's respective enforcement bureaus are less obvious. Indeed, the distinction between price and non-price related violations may be difficult to apply in practice, as the same conduct will often have price and non-price aspects. In the *Wuchang Salt Company* case, for example, the NDRC found that the defendant had violated the Antimonopoly Law by contractually tying the wholesale of table salt – for which it enjoyed monopoly rights in the district – with detergent washing powder. As the case was apparently not related to a pricing practice, one might have expected it to fall within the exclusive remit of the SAIC. Yet it was the NDRC's Hubei bureau that decided on the case.[4]

Another feature of the competition law regime in China is that the NDRC and the SAIC have retained their enforcement responsibilities, respectively, under the Price Law and the Anti-Unfair Competition Law. Both laws include provisions prohibiting anticompetitive conduct (such as prohibitions on price fixing, bid-rigging, or predatory pricing) which overlap with some of the provisions in the Antimonopoly Law. In practice both authorities will often investigate and sanction anticompetitive conduct under these rules alone or in conjunction with the Antimonopoly Law.

The Antimonopoly Law also provides for a private enforcement regime. The adjudication of antimonopoly cases falls under the jurisdiction of the intermediate people's courts. Given the complexity of the antimonopoly law analysis, cases are handled by the courts' intellectual property divisions.

4 NDRC's announcement of 15 November 2010 in relation to the Hubei Price Bureau's decision in the *Wuchang Salt Company* case.

Antimonopoly Enforcement Authorities

Antimonopoly Commission	MOFCOM
Responsibilities: coordinates enforcement of competition rules, formulates competition policy and conducts market investigations.	**Relevant enforcement bureau:** Antimonopoly Bureau.
Composition: 19 members, mainly Minister-level or Director-level officials from various ministries with responsibility for commerce or industrial policy.	**Responsibilities:** enforces merger control rules.
	Composition: around 30 officials.

NDRC	SAIC
Relevant enforcement bureaus: Price Supervision and Antimonopoly Bureau and provincial bureaus.	**Relevant enforcement bureaus:** Antimonopoly and Unfair Competition Enforcement Bureau and provincial bureaus.
Responsibilities: enforces the conduct rules and the prohibition on the abuse of administrative power in relation to price-related matters.	**Responsibilities:** enforces the conduct rules and the prohibition on the abuse of administrative power in relation to non price-related matters.
Composition: around 20 officials.	**Composition:** around 10 officials.

The conduct rules

The prohibition on monopoly agreements

Principles

Subject to the possibility of exemption, Articles 13 and 14 of the Antimonopoly Law prohibit "monopoly agreements" – defined as any agreement, decision or concerted practice that eliminates or restricts competition. They are prohibited regardless of whether the restrictive agreement is "horizontal" (ie, between competitors) or "vertical" (ie, between a supplier and a customer). Sanctions can be imposed even where the agreement has not been implemented.

The Law applies to formal agreements as well as informal arrangements or understandings (concerted practices). This is consistent with international practice. Similarly, the Antimonopoly Law is in line with international practice in prohibiting industry associations from inducing their member undertakings to engage in prohibited conduct. There have been no reported cases involving concerted practices, but in their guidance both the NDRC and the SAIC appear to adopt a very broad interpretation of the notion. For example pricing parallelism and the exchange of information about pricing intentions are circumstances that may lead to the establishment of an illegal concerted practice.[5]

Particular guidance on the types of agreement that are prohibited is provided in Articles 13 and 14 of the Law. The enforcement agencies have also issued implementing regulations in which additional guidance is provided: the NDRC's *Regulation on Monopolistic Pricing Practices* of 29 December 2010 and the SAIC's *Regulation on the Prohibition of Monopolistic Agreements* of 31 December 2010.

Horizontal agreements

So-called "horizontal agreements" involve undertakings that are active at the same level of trade and compete with one another. Article 13 of the Law provides an illustrative list of horizontal monopoly agreements that are prohibited:

Agreements to fix prices

The prohibition is of broad application and applies to any agreement on price or price determinants, including price levels, price ranges, price variations, discount levels, administrative fees, and other pricing formulas.[6]

Price fixing agreements are by far the most common types of infringements sanctioned by the NDRC. Most decisions made public to date involve price cartels in regional or local markets: rice noodle cartel in Guangxi;[7] explosives cartel in Liaoning; coffee and tea leaves cartels in Jiangsu;

5 Article 6 of the NDRC's *Regulation on Monopolistic Pricing Practices*. See also Article 3 of the SAIC's *Regulation on the Prohibition of Monopolistic Agreements*.

6 Article 7 of the NDRC's *Regulation on Monopolistic Pricing Practices*.

7 NDRC's announcement of 30 March 2010 in the *Guangxi rice noodle cartel* case.

tableware detergent cartel in Fujian; raw milk procurement cartel in Xinjiang;[8] cartonboard cartel in Zhejiang;[9] and pest control cartel in Shenzhen.[10] In many instances the statutory basis for the NDRC's decisions is not mentioned in the official announcements, and it often remains unclear whether these cartels were sanctioned under the Price Law or the Antimonopoly Law.

Agreements to limit supply
Examples provided by the SAIC in its implementing regulation include agreements to stop production of a given product, to refuse to supply, or to fix the level of production.[11]

Agreements to divide (downstream) sales markets or (upstream) raw materials procurement markets
In its guidance, the SAIC not only explains that the prohibition applies to agreements or concerted practices by which competitors allocate among themselves sales by territories, customers or product types or quantities, but also that it applies to the allocation of purchases of raw materials or other inputs, ie, joint purchasing agreements may also fall within the scope of Article 13(3) of the Law.[12]

A good example of a prohibited market allocation is the agreement concluded under the auspices of the industry association of concrete producers in the city of Lianyungang. In a decision of January 2011, the provincial bureau of the SAIC in Jiangsu imposed fines on both the association and its members for concluding a market sharing agreement under which association members were assigned specific market shares for the supply of concrete and where they agreed to supply customers only in designated areas.[13]

Agreements to limit the purchase or development of new technology or equipment
This provision applies to restrictions on the purchase or use of new technology or new equipment, as well as the refusal to use new technology or to adopt new technical standards as examples of infringements under this heading.[14]

Joint boycott agreements
Prohibited conduct includes jointly refusing to supply or to sell products to specific undertakings; jointly refusing to purchase from or sell the products of specific undertakings; and jointly preventing specific undertakings from dealing with their competitors.[15]

8 NDRC's announcement of 6 December 2010.

9 NDRC's announcement of 4 January 2011 in relation to its decision in the *Zhejiang paper board cartel* case.

10 See the announcement of 29 September 2011 issued by the Guangdong price bureau.

11 Article 4 of the SAIC's *Regulation on the Prohibition of Monopolistic Agreements*.

12 Article 5 of the SAIC's *Regulation on the Prohibition of Monopolistic Agreements*.

13 SAIC's announcement of 26 January 2011 in relation to its decision in the *Jiangsu cement cartel* case.

14 Article 6 of the SAIC's *Regulation on the Prohibition of Monopolistic Agreements*.

15 Article 7 of the SAIC's *Regulation on the Prohibition of Monopolistic Agreements*.

Other monopoly agreements

In addition to the above listed horizontal practices, Article 13 contains a "catch-all" provision: other monopoly agreements as determined by the relevant antimonopoly enforcement authorities are also prohibited. Neither the NDRC nor the SAIC elaborates in its guidance on what these other practices may be.

Vertical agreements

Under Article 14 of the Law, two types of vertical monopoly agreements – ie, agreements between undertakings active at different levels of the supply chain – are prohibited: (i) agreements that fix resale prices; and (ii) agreements that fix minimum resale prices. Again there is a "catch-all" provision, which prohibits (iii) other agreements as determined by the relevant antimonopoly enforcement authorities.

In contrast with horizontal agreements, there is very limited discussion of vertical restrictions in the implementing regulations released by the enforcement agencies. The NDRC's *Regulation on Monopolistic Pricing Practices* merely repeats the two types of vertical pricing restrictions contained in the text of the Law. The SAIC in its regulation makes no reference to any specific form of non-price vertical monopoly agreements (such as for example geographical and other exclusivity arrangements) and merely restates the "catch-all" provision contained in the Law. Accordingly, vertical restrictions do not appear to be an enforcement priority for the agencies, at least beyond resale price maintenance which is expressly prohibited in the Law or those vertical practices which fall within the scope of the abuse of dominance provisions.

Exemptions

Article 15 of the Law provides for an exemption regime whereby monopoly agreements with certain specific redeeming benefits are nevertheless permissible.

The conditions that need to be fulfilled to benefit from such an exemption vary depending on the type of benefit resulting from the agreement:

- Provided that the undertaking can demonstrate that the agreement will not seriously restrict competition in the relevant market and consumers will share in the resulting benefits, any of the following beneficial purposes is sufficient: (i) improving technology or researching and developing a new product; (ii) improving product quality, reducing costs and increasing efficiency, unifying product specifications or standards, or implementing a specialised division of work; (iii) improving the operational efficiency or enhancing the competitiveness of SMEs; (iv) achieving societal or public benefits such as energy conservation, environmental protection, provision of disaster relief among others; or (v) mitigating a serious decline in sales or marked overproduction in an economic downturn.

- Regardless of whether the undertaking can demonstrate that the agreement will not seriously restrict competition and consumers will share in the resulting benefits, either of the following would suffice:

(vi) "securing legitimate interests in foreign trade and foreign economic cooperation"; or (vii) such other circumstances as might be provided in law or by the State Council.

A similar exemption regime exists in other competition law regimes. Two specificities of the Chinese regime should however be highlighted in relation to the causes for exemption and to the exemption procedure.

A first specificity relates to the causes for exemption. Competition law regimes elsewhere do not generally allow for the possibility of exemption where particularly serious anticompetitive horizontal conduct is concerned. Such serious anticompetitive horizontal conduct generally (which would not normally enjoy exemption under competition laws elsewhere) includes undertakings agreeing – or reaching an understanding – to fix prices, to limit output or sales or to allocate markets or customers between them (including bid-rigging). In so far as China's Antimonopoly Law would allow for the possible exemption of "naked" monopoly agreements of this type it would seem inconsistent with international practice. In particular the scope of the exemption in Article 15(6) ("securing legitimate interests in foreign trade...") would seem to allow for the possible exemption of hard core conduct where other industrial policy considerations are in play and might be seen as a specific expression of the general intention to promote the healthy development of the Chinese economy. Similarly, the exemption of "crisis cartels" by Article 15(5) ("...for the purpose of mitigating a serious decline in sales or... overproduction in an economic downturn") is not always permitted elsewhere.

The SAIC and the NDRC in their implementing regulations do not provide any guidance on the way Article 15 will be enforced in practice. In its draft *Regulation on Issues Concerning the Application of the Law in Civil Disputes involving Monopolistic Conduct* published on 25 April 2011, the Supreme People's Court suggests that the seven types of monopoly agreement listed under Articles 13 and 14 of the Antimonopoly Law are presumed to have an anticompetitive effect unless proved otherwise by the undertakings involved. While the presumption of anticompetitive effect does not displace possible claims for an Article 15 exemption, it strengthens – at least in relation to civil disputes – the prohibition of the seven types of monopoly agreements listed in Articles 13 and 14 by shifting the burden of proof as to economic effects to the defendant.

A second specificity is that Article 15 organises more an exception regime than an exemption regime. The Antimonopoly Law does not provide for the possibility for parties to apply for an exemption. Parties can rely directly on the exemption grounds set out in Article 15, without having to apply to a court or an antimonopoly enforcement authority. This is similar to the way Article 101(3) of the Treaty on the Functioning of the European Union functions, except that the Chinese enforcement authorities have not adopted procedures allowing parties to seek guidance under Article 15 of the Law.

Prohibition on monopoly agreements
Principles
The prohibition applies to any written or oral agreements, decisions or understandings, even tacit understandings, that eliminate or restrict competition.
What is prohibited
• price fixing • restriction of output or sales • division of sales or raw material markets • restriction on the purchase or development of new technology or equipment • collective boycotts • fixed or minimum resale prices in distribution contracts • other practices as may be determined by the agencies
Exemptions
Exemptions may be available where the agreement was concluded for a particular beneficial purpose (eg, improving technology or researching and developing a new product, etc)

The prohibition on the abuse of dominance

The notion of dominance

The Law prohibits conduct involving an undertaking which both (i) is dominant on the relevant market and (ii) abuses its position of dominance. Simply having a dominant position, or market power, will not itself amount to an infringement under the Antimonopoly Law.

Article 17 of the Antimonopoly Law defines a dominant market position as “a market position where an undertaking has the ability to control the price or quantity of goods or other trading conditions in the relevant market or to prevent or affect entry of other undertakings on the relevant market”. The NDRC’s *Regulation on Monopolistic Pricing Practices* explains that the “other trading conditions” referred to in the text of the Law are factors other than price and quantity that may substantially affect arms-length transactions, including product quality, terms of payment, delivery method, after-sale services, trading options, or restrictive conditions on technology.[16]

Relevant factors for determining dominance

Article 18 of the Antimonopoly Law identifies several factors which are relevant for determining a dominant market position. These factors include (i) the market share and competitive conditions in the relevant market; (ii) the ability to control the (downstream) sales market or (upstream) raw materials

16 Article 17 of the NDRC’s *Regulation on Monopolistic Pricing Practices*.

procurement market; (iii) available financial and technological resources; (iv) the degree of reliance of other undertakings on the allegedly dominant undertaking; (v) the degree of difficulty that other undertakings have in accessing the relevant market (barriers to entry); and (vi) other factors indicating dominance. The SAIC provides further guidance on these factors in its *Regulation on the Prohibition on the Abuse of Dominant Market Position* of 31 December 2010, including on how to calculate market shares, the criteria to assess competition conditions in a relevant market, and the various legal and factual requirements that constitute entry barriers. This guidance appears to be broadly in line with international standards.

Rebuttable presumption of dominance

There is in addition a rebuttable presumption of dominance in Article 19 of the Law if certain market share thresholds are met:

- A single undertaking is presumed dominant if its market share amounts to at least half of the relevant market.
- Two undertakings are presumed jointly dominant if their combined market share amounts to at least two-thirds of the relevant market.
- Three undertakings are presumed jointly dominant if their combined market share amounts to at least three-quarters of the relevant market.

This presumption can be rebutted where an undertaking puts forward evidence to show that it does not have market power by pointing to such factors – or the absence of them – as those discussed above. Further, as an exception to the second and third presumptions, where one of the two or three relevant undertakings has a market share not exceeding 10 per cent, such an undertaking will not be presumed dominant. For example, where X has 33.5 per cent, Y has 32.5 per cent and Z has 9 per cent market share, Z is not to be presumed dominant under the third presumption – which seems to entail that the relevant enforcement authority will positively have to prove the relevant factors to establish undertaking Z's individual dominance, or to show sufficient nexus among X, Y and Z to establish their collective dominance, before it can find Z's abusive conduct and penalise it. That said, going on the EU experience, collective dominance cases tend in any event to be rare.

Market share is not the only presumption available to help establish dominance. In the draft *Regulation on Issues Concerning the Application of the Law in Civil Disputes involving Monopolistic Conduct*, the Supreme People's Court suggests that a defendant in civil litigation may be presumed dominant when it is a public utility company, or when it has been conferred with exclusive operation rights by law or administrative rules, or where the defendant's trade counterparts are highly reliant on its goods due to a lack of effective competition in the relevant market. If the Regulation is adopted without changes, these rebuttable presumptions would facilitate the task for plaintiffs in civil litigation. These presumptions may also influence the practice of the enforcement agencies. Prior to the publication of the draft Regulation, the NDRC relied on a similar presumption in a specific abuse of dominance case: the Hubei Price Bureau relied on the Wuchang Salt Company's designation by the local salt administrative bureau as exclusive salt wholesaler to find the existence of dominance.[17]

Abusive conduct

The Antimonopoly Law identifies, in Article 17, six types of abusive conduct that dominant undertakings are prohibited from engaging in – specifically:

Selling or buying goods at unfairly high or low prices

In its *Regulation on Monopolistic Pricing Practices* of 29 December 2010, the NDRC explains that, in its determination of whether prices are unfairly low or unfairly high, it will rely on several factors including whether the prices charged by the dominant company are significantly different from "market prices" and whether changes in price levels reflect changes in the dominant company's production costs.[18]

Selling goods at a price below cost without valid reasons

In its guidance the NDRC explains that a dominant company could justify selling below costs when for example conducting a sale to clear existing inventory or conducting a promotion at the time a new product is introduced.[19] There is, however, no guidance on the standard of costs which the NDRC proposes to use when assessing predatory pricing under Article 17(2) of the Law, nor on whether the possibility of recoupment of losses is a requirement for there to be an infringement.

Refusing to trade with another party without valid reasons

Again this conduct could be justified, according to the NDRC's Regulation, when the prospective buyer has a poor credit history or is in a precarious operational condition.[20] The SAIC in its implementing regulation does not discuss reasons that justify a refusal to trade. However it offers useful guidance on how it intends to apply Article 17(3) of the Law in cases involving access to facilities. The SAIC's regulation lists as an example of illegal refusal to trade "refusing trade counterparties access to facilities necessary to their production or operational activities on reasonable terms". It adds, however, that, in determining the existence of any illegal refusal to grant access, "comprehensive consideration shall be given to factors such as: the feasibility of investing in or carrying out the construction of equivalent facilities; the degree of reliance of the trade counterparties on these facilities for their production or operational activities; the possibility for the undertaking to provide access to these facilities and any impact this would have on its own production and operational activities, etc." [21]

17 NDRC's announcement of 15 November 2010 in relation to the Hubei Price Bureau's decision in the *Wuchang Salt Company* case.

18 Article 11 of the NDRC's *Regulation on Monopolistic Pricing Practices.*

19 Article 12 of the *NDRC's Regulation on Monopolistic Pricing Practices.*

20 Article 13 of the NDRC's *Regulation on Monopolistic Pricing Practices.*

21 Article 4(5) of the SAIC's *Regulation on the Prohibition on the Abuse of Dominant Market Position.*

Restricting another party to a transaction to dealing exclusively with it, or only with designated undertakings, without valid reasons
While the NDRC only issued a very short press release concerning the case, it appears that the prohibition on dominant companies abusing their market power through exclusive dealings – set out in Article 17(4) of the Law - was the legal basis for the NDRC's decision to sanction two pharmaceutical distributors who had entered into exclusive supply agreements. In its decision, the authority explained that the distributors had been involved in the "illegal control" of a pharmaceutical ingredient and in "profiteering". They had secured exclusive supply rights from the producers of the ingredient and had then applied a substantial price increase. Several pharmaceutical companies using the ingredient decided to stop buying it, which led to supply shortages of a popular antihypertensive drug. The NDRC imposed fines totalling RMB7 million on the two companies.[22]

The press release in the pharmaceuticals distribution case does not explain whether the parties invoked any reasons to justify their conduct. According to the NDRC's *Regulation on Monopolistic Pricing Practices*, dominant companies can conclude exclusive contracts when the exclusivity is justified to maintain product quality, brand image or service standards.

The prohibition on abusive exclusive dealings in Article 17(4) was also invoked in a litigation between two publishers of online novels. In its suit brought against Shanda Interactive, Sursen claimed that Shanda had abused its dominant position by pressuring two authors to decline an offer received from Sursen to write a sequel to a novel originally published by the defendant. The Court held that Sursen failed to provide sufficient evidence that Shanda was dominant. It also found that the challenged practices were justified in view of Shanda's intellectual property rights.[23]

Tying products without a valid reason, or imposing other unreasonable conditions of trade
In its implementing regulation the NDRC does not provide any guidance on tying practices. However, the SAIC explains that it will consider tying practices to be illegal when the bundling occurs "in contravention of trading practice or consumption habits or disregarding the functions of the products".[24] The *Wuchang Salt Company* case (mentioned above) provides a classic example of an illegal tying practice. The NDRC found that the defendant had violated the Antimonopoly Law by contractually tying the wholesale of table salt – for which it enjoyed monopoly rights in the district – with detergent washing powder.[25]

22 NDRC's announcement of 14 November 2011 in relation to its decision in the *Shandong Weifang Shuntong Pharmaceutical and Weifang Huaxin Pharmaceutical Trading* case.

23 Judgment of the Shanghai No.1 Intermediate People's Court of October 2009 in case *Sursen v Shanda and Xuanting*.

24 Article 6 of the SAIC's *Regulation on the Prohibition on the Abuse of Dominant Market Position*.

25 NDRC's announcement of 15 November 2010 in relation to the Hubei Price Bureau's decision in the *Wuchang Salt Company* case.

The second type of abusive conduct mentioned in Article 17(5) of the Law is less straightforward to interpret. Both the NDRC and the SAIC offer little guidance on what makes conditions of trade "unreasonable". The SAIC notes however that trade conditions that are "unrelated to the subject-matter of the transaction" will be considered unreasonable.[26]

Applying different prices or transaction terms to equivalent trading parties without valid reasons
Transaction terms cited as examples by the SAIC in its implementing regulation include different volumes, types, qualities, volume discounts, payment terms, delivery methods, after-sales service conditions and warranties.[27]

The NDRC for its part does not provide any detailed guidance on its interpretation of Article 17(6) of the Antimonopoly Law. This should however not be seen as a sign that price discrimination is of lesser priority in the NDRC's enforcement policy. In its investigation of practices of China Telecom and China Unicom, the agency is reviewing alleged discriminatory pricing practices in the domestic broadband interconnection market. The two companies together account for two-thirds of domestic broadband connections, and have as such been described as "dominant" by NDRC officials who spoke to the press about the case.[28] The investigation is still ongoing at the time of writing.

Another case involving discriminatory practices is *Tangshan Renren v Baidu*. Renren, a pharmaceuticals company, claimed that the leading Chinese search engine Baidu had abused its dominant position in the market for online search services by causing the Renren website to appear lower in search result listings. Baidu was alleged to have acted in retaliation over Renren's decision to reduce the amount it spent on Baidu's paid-for listings. While Renren apparently based its claim on Article 17(4) of the Law (which prohibits abusive exclusive dealings), the facts of the case may have lent themselves better to a discrimination claim under Article 17(6). Beijing's No.1 Intermediate People's Court considered that Baidu's dominance had not been established, and that in any event its conduct of lowering Renren's rank in search results due to the presence of spam links was non-discriminatory, transparent, and legitimate in view of Baidu's goal of providing search engine users with reliable and relevant results. [29]

Other abuses

In addition to the abusive practices listed above, Article 17 contains a "catch-all" provision: other abusive conduct as might be recognised by the relevant antimonopoly enforcement authorities is also prohibited. Neither the NDRC nor the SAIC elaborate in their guidance on what this other conduct may be.

The above discussion shows that the NDRC in its guidance provides specific examples of legitimate reasons justifying various types of conduct which would otherwise be caught under one of the Article 17 prohibitions. The SAIC's approach in its *Regulation on the Prohibition on the Abuse of a Dominant Market Position.* is different. Instead of providing specific examples of justifications, the SAIC provides two broad considerations for assessing the existence of valid reasons, namely, whether the conduct in question is adopted pursuant to the party's normal business practice and for its "normal" interests, and whether the conduct has any effect on economic efficiency, public interest, and economic development.[30]

26 Article 6 of the SAIC's *Regulation on the Prohibition on the Abuse of Dominant Market Position.*

27 Article 7 of the SAIC's *Regulation on the Prohibition on the Abuse of Dominant Market Position.*

28 The statements, which were made on public television, were reported in Legal Daily on 10 November 2011.

29 Judgment of the Beijing No.1 Intermediate People's Court of 18 December 2009 in case *Tangshan Renren v Baidu.*

30 Article 8 of the SAIC's *Regulation on the Prohibition on the Abuse of Dominant Market Position.*

Prohibition on the abuse of dominance
Principles
Only the abuse of dominance is prohibited. Dominance may be presumed if certain market share thresholds are met.
What is prohibited
• unfairly high or low prices • below-cost pricing • refusal to deal • exclusive dealing • tying • discriminatory practices • other conduct as may be determined by the agencies
Justifications
Certain practices may be justified where there is a valid reason (eg, trade practices, public interest, economic circumstances, etc)

Relevance of the conduct rules for common business practices	
Agreement or practice	**Common issues under the Antimonopoly Law**
Distribution agreements	• Fixing of resale price or minimum resale price • Territorial exclusivity • Product exclusivity • Non-compete covenants
Pricing policy	• If the company is dominant, below-cost predatory pricing • If the company is dominant, excessively high prices • If the company is dominant, price discrimination
Marketing and sales	• If the company is dominant, refusal to supply or to grant access to its facilities • If the company is dominant, bundled or tied sales
Relevance of the conduct rules for common business practices	

Agreement or practice	Common issues under the Antimonopoly Law
Joint research and development	• Restrictions on the use or on the price of the technology or products • Restrictions on the customers to which the technology or products can be sold to • Price information exchanges • Other information exchanges of strategic information • Non-compete covenants
Joint marketing	• Market sharing • Price information exchanges • Other information exchanges of strategic information • Non-compete covenants
Joint purchasing	• Price information exchanges • Other information exchanges of strategic information • Supply exclusivity • Non-compete covenants
Trade and professional associations	• Price information exchanges • Surveys and benchmarking activities • Price cartels • Gentlemen's agreements, "recommendations" or "guidelines" on prices or other conditions of supply or purchase • Informal or formal agreements on who to trade with • Collective boycotts • Market sharing
Technology licensing	• Restrictions on the use or on the price of the technology or products • Restrictions on the customers to which the technology or products can be sold to • Territorial exclusivity • Product exclusivity • Non-compete covenants

Procedure and sanctions for the conduct rules

Public enforcement

Investigations

The NDRC and the SAIC may carry out investigations following a complaint, a case transfer from another authority or by acting on their own initiative. They may also delegate enforcement functions to relevant departments at the provincial, autonomous region and municipal level where, for example, the conduct occurs within a particular administrative region. To date, most of the enforcement action has taken place at the local level.

The key features of the investigatory regime are:

- Wide-ranging investigatory powers. In common with jurisdictions elsewhere, the authorities have wide-ranging powers to investigate suspected prohibited conduct. These powers include: (i) entering the business premises or other relevant premises of the undertaking concerned to carry out inspection; (ii) making inquiries of – and requiring explanations from – the undertaking concerned, interested parties and other relevant individuals or organisations; (iii) reviewing and copying documents (including electronic data); (iv) sealing and seizing relevant evidence; and (v) making inquiries relating to the bank accounts of the undertaking concerned.[31]

- Obligation to cooperate. During the investigation, undertakings are under a duty to cooperate. Any conduct which impedes an investigation – such as providing false information, or refusing to provide, hiding, or destroying relevant information – can result in fines: (i) for individuals of up to RMB20,000 or, if serious, up to RMB100,000; and (ii) for organisations of up to RMB200,000 or, if serious, up to RMB1 million. Criminal liability may also ensue if the impeding conduct amounts to a crime.[32]

- Commitments. The relevant agency may decide to suspend its investigation if an undertaking gives a commitment to take specific measures to eliminate the consequences of the conduct within an acceptable period of time. The agency will then monitor the situation and terminate the investigation if the undertaking abides by its commitment, or resume it if: (i) the undertaking does not comply with the commitments within the prescribed timeframe; (ii) there has been a material change in the relevant facts; or (iii) the suspension decision was based on incomplete or untrue information provided by the undertaking.[33]

31 Article 39 of the Antimonopoly Law, the SAIC's *Procedural Regulation on Enforcing the Prohibition on Monopoly Agreements and Abuses of Dominance* of 26 May 2009 and the NDRC's *Procedural Regulation on the Administrative Enforcement of the Prohibition on Monopolistic Pricing Practices* of 29 December 2010.

32 Article 52 of the Antimonopoly Law.

33 Article 15 of the SAIC's *Procedural Regulation on Enforcing the Prohibition on Monopoly Agreements and Abuses of Dominance* of 26 May 2009 and Article 16 of the NDRC's *Procedural Regulation on the Administrative Enforcement of the Prohibition on Monopolistic Pricing Practices* of 29 December 2010.

- Uncertain procedural rights. Article 43 of the Antimonopoly Law provides that parties subject to an investigation have the right to state their views. However the Law and the implementing regulations adopted by the enforcement authorities are silent on whether the opportunity to state views is (i) a formal stage in the investigation or (ii) a written or oral procedure; and on whether such a right entails a requirement for the agency first to send the parties a document (typically called a Statement of Objections in the EU context) setting out and explaining the NDRC's or the SAIC's preliminary findings.

Appeals
Pursuant to Article 53 of the Antimonopoly Law, any undertaking that wishes to challenge a decision made by the competition authorities, may choose whether to launch an administrative appeal or seek judicial redress.

Limitation period
In the absence of specific rules on the statute of limitation, the principles set out in China's Law on Administrative Penalty are likely to apply.[34] Under this law, where an illegal act is not discovered within two years of its commission, administrative penalty shall no longer be imposed, except as otherwise prescribed by law. The limitation period shall be counted from the date the illegal act is committed; if the act is continuous in nature, it shall be counted from the date the act is terminated.[35]

Types of sanctions
Under the Antimonopoly Law, where an undertaking enters into a prohibited monopoly agreement or abuses its dominant position, the relevant agency may order it to cease and desist, confiscate any illegal earnings and impose a fine of 1 to 10 per cent (depending on the nature, degree and duration of the violation) of the undertaking's turnover in the preceding year. It is unclear whether this turnover-based fine relates to worldwide turnover, turnover in China, or turnover in the relevant market. Where an arrangement has been agreed but not implemented, a fine of up to RMB500,000 may be imposed.[36]

Industry associations for their part, where they organise undertakings to enter into a monopoly agreement, may face fines of up to RMB500,000. Where the infringement is serious, the industry association may also have its registration cancelled.

The lack of publication requirements for decisions adopted by the NDRC or the SAIC under the Antimonopoly Law does not allow a comprehensive review of the authorities' sanctioning practice. Based on the few announcements which were published, a total of RMB11 million in fines and confiscated profits have been imposed since the entry into force of the Law in August 2008, although the statutory basis for the fines is not always clear – some of these sanctions may have been imposed under the Price Law.

34 Article 24 of the NDRC's *Procedural Regulation on the Administrative Enforcement of the Prohibition of Monopolistic Pricing practices* of 29 December 2010 and Article 26 of the SAIC *Procedural Regulation on Enforcing the Prohibition on Monopoly Agreements and Abuses of Dominance* of 26 May 2009.

35 Article 29 of the *Law on Administrative Penalty* of 17 March 1996.

36 Articles 46 and 47 of the Antimonopoly Law.

While most fines have been imposed in cartel cases, the highest fine imposed under the Antimonopoly Law to date relates to an abuse of dominance case in the pharmaceutical industry. In November 2011, the NDRC imposed a fine of approximately RMB7 million on two (apparently related) pharmaceutical trading companies for having entered into exclusive distribution agreements with the only two domestic producers of a raw material used in the production of a popular antihypertensive drug. The companies then increased the price by more than five-fold, leading to several manufacturers discontinuing the production of the drug, causing shortages on the market.[37]

Published fines imposed by the Chinese competition authorities under the Antimonopoly Law
(as at 31 December 2011)

	2008	2009	2010	2011
Fines (in RMB)	0	0	1,890,000	8,730,723
Number of cases	0	0	1	4

Leniency
In line with many other competition law jurisdictions, the Antimonopoly Law allows for the establishment of a "leniency" program.[38]

The NDRC and the SAIC have both put in place an embryonic leniency regime. Both regimes only apply to violations of the prohibition on monopoly agreements (leniency is not available for violations of the prohibition on the abuse of dominance). Both offer undertakings which have participated in monopoly agreements the possibility to report that conduct in return for some sort of leniency benefit and possibly complete immunity. The first party to report a monopoly agreement and to provide significant evidence may obtain full immunity (ie, a 100 per cent reduction from the fine) from either the NDRC or the SAIC or both.

The two agencies' respective leniency regimes are not entirely consistent:

- Where the practices involve price-related conduct and thus fall within the jurisdiction of the NDRC, the second undertaking to self-report may receive a reduction of at least 50 per cent, and all subsequent undertakings may receive a reduction of up to 50 per cent.[39]

37 NDRC's announcement of 14 November 2011 in relation to its decision in the *Shandong Weifang Shuntong Pharmaceutical and Weifang Huaxin Pharmaceutical Trading* case.

38 Article 46 of the Antimonopoly Law.

39 Article 14 of the NDRC's *Procedural Regulation on the Administrative Enforcement of the Prohibition of Monopolistic Pricing Practices* of 29 December 2010.

- In relation to other (ie, non price-related) practices, the SAIC does not provide guidance on the level of reduction for subsequent applicants.[40] In addition, under the SAIC's regime, leniency cannot be granted to the initiator of a monopolistic agreement.[41]

In practice, the Chinese competition agencies do not appear to follow the above rules strictly. In the *Jiangsu cement market sharing* case for example, the local SAIC bureau imposed total fines of RMB530,723 on five cement producers and a fine of RMB200,000 on their trade association, while other producers received immunity on account of their cooperation with the investigation.[42] This decision contrasts with the SAIC's leniency program, which provides for full immunity only for the first undertaking to report an infringement. While the official announcement about the case does not say, the local bureau of the SAIC may have used its discretionary power to reduce or waive penalties for undertakings which voluntarily terminate the infringing conduct.[43]

Private enforcement

Article 50 of the Antimonopoly Law provides that, where an undertaking causes other parties to suffer loss as a result of abusing its dominant position or entering into a monopoly agreement, it may face civil liability in the courts. The civil courts' jurisdiction does not appear to be limited to the award of damages: consistent with general principles of civil and contractual law, courts may also declare agreements that breach the Antimonopoly Law to be invalid and may grant injunctions and cease-and-desist orders.[44]

Private litigation has been a feature of antimonopoly law enforcement since its entry into force in August 2008. While only few plaintiffs have been successful to date, there have been reports of lawsuits involving online services,[45] railway ticketing services,[46] car repair services,[47] and telecommunications.[48]

40 Article 12 of the SAIC's *Regulation on the Prohibition of Monopolistic Agreements* of 31 December 2010.

41 Article 20 of the SAIC's *Procedural Regulation on Enforcing the Prohibition on Monopoly Agreements and Abuses of Dominance* of 26 May 2009.

42 SAIC's announcement of 26 January 2011 in relation to Jiangsu bureau's decision in the *Jiangsu cement cartel* case.

43 Article 10 of the SAIC's *Regulation on the Prohibition of Monopolistic Agreements* of 31 December 2010 and Article 14 of the SAIC's *Regulation on the Prohibition on the Abuse of Dominant Market Position* of 31 December 2010.

44 Articles 17 and 18 of the Supreme People's Court draft *Regulation on Issues Concerning the Application of the Law in Civil Disputes Involving Monopolistic Conduct* of 25 April 2011.

45 Judgment of the Shanghai No.1 Intermediate People's Court of October 2009 in case *Sursen v Shanda and Xuanting* (the decision was upheld by the Shanghai Higher People's Court in December 2009) and judgment of the Beijing No.1 Intermediate People's Court of 18 December 2009 in case *Tangshan Renren v Baidu.*

46 On 13 September 2011, the Taiyuan Xinghualing District People's Court accepted to consider the claim brought by Shanxi Joint Transport Group against the Taiyuan Railway Bureau for alleged administrative monopoly and abuse of dominance.

47 Judgment of the Chashang Intermediate People's Court of 15 December 2011 in case *Liu Dahua v Dongfeng Nissan Passenger Vehicle Company.*

48 Judgment of the Beijing No.2 Intermediate People's Court of October 2009 regarding a complaint against China Mobile.

Before the Law entered into force, the Supreme People's Court issued a notice instructing judges to "carefully study" the Antimonopoly Law and decided that cases under the Law should be adjudicated by the intellectual property chambers of the Chinese courts.[49] In April 2011 the Supreme People's Court issued a consultation draft of a proposed *Regulation on Issues Concerning the Application of the Law in Civil Disputes Involving Monopolistic Conduct*. Read together with the few court judgments which have been made public, the notice and the proposed Regulation make it possible to identify the following trends and principles in private enforcement.

Jurisdiction

Antimonopoly Law claims are reviewed in first instance by the intellectual property chambers of the intermediate people's courts. Where the alleged conduct has already been investigated by a competition agency and has not been found to constitute a monopolistic conduct, the people's court must still conduct a thorough investigation of the parties' claims and adopt its own decision. However, once a decision adopted by an antimonopoly law enforcement agency has become definitive, plaintiffs in any follow-on action no longer need to prove the facts confirmed to exist in the decision. Some of the early cases were brought by plaintiffs who had also made parallel complaints with the antimonopoly law enforcement agencies.[50] Under the Supreme People's Court's proposed Regulation, when administrative enforcement and civil litigation run in parallel, the court may decide on whether or not to suspend the trial.

Standing

The proposed Regulation confirms the existence of both follow-on and stand-alone rights of action: any person or entity may commence a private action, regardless of whether an infringement has already been established in a decision of an administrative agency. Any harmed party may file claims, irrespective of whether the losses were suffered directly or indirectly. There does not appear to be any limitation on indirect purchasers bringing action, as long as they can establish they suffered harm.

Where several individuals suffer loss due to breaches of competition law, they may choose to institute the action separately or jointly.[51]

49 Supreme People's Court's *Notice on carefully studying and implementing the Antimonopoly Law* of 28 July 2008.

50 See for example the Judgment of the Beijing No.1 Intermediate People's Court of 18 December 2009 in case *Tangshan Renren v Baidu*.

51 Article 5 of the Supreme People's Court draft *Regulation on Issues Concerning the Application of the Law in Civil Disputes Involving Monopolistic Conduct* of 25 April 2011.

Burden and standard of proof
The burden is upon plaintiffs to establish the existence of the alleged infringements, their losses and the causal link between the alleged conduct and such losses.[52]

Most lawsuits have so far failed due to the plaintiff's inability to meet the requisite standard of proof. For example in its *Tangshan Renren v Baidu* judgment, the Beijing No.1 Intermediate People's Court held that Renren had failed to adduce cogent evidence of market dominance.[53] The Court considered that Article 19 of the Antimonopoly Law, which establishes a presumption of dominance above certain market share thresholds, may be relied on only where a plaintiff can substantiate the market data it puts forward in evidence and justify its method for calculating market share figures. In that particular case, Renren had merely relied on two press articles referring to Baidu's alleged dominance without providing any detail as regards relevant market share calculation methodologies or underlying market data.

The adoption by the Supreme People's Court of its proposed Regulation may make the plaintiffs' task easier, as it introduces several rebuttable presumptions.

First, concerning the definition of the relevant market and the existence of a dominant position, it allows plaintiffs to rely on statements made by companies in their regulatory filings (including for example offering memoranda in IPOs) as *prima facie* evidence of their market power. The draft Regulation goes even further by reversing the burden of proof for public utilities (water, electricity, heating, gas, etc) and other operators providing their services under an exclusive licence. When facing claims in the civil courts, it will be incumbent on these companies to adduce evidence to the effect that they are not dominant on the market.[54]

As regards restrictive agreements and practices, the proposed Regulation confirms that the plaintiff will bear the burden of establishing that the alleged violation has the effect of eliminating or restricting competition. However, adverse effects on competition will be presumed where the alleged conduct involves any of the types of conduct expressly listed in Articles 13 and 14 of the Antimonopoly Law.

Finally, plaintiffs will be able to rely on findings of fact made by an administrative agency or a court.[55]

52 Article 7 of the Supreme People's Court draft *Regulation on Issues Concerning the Application of the Law in Civil Disputes Involving Monopolistic Conduct* of 25 April 2011.

53 Judgment of the Beijing No.1 Intermediate People's Court of 18 December 2009 in case *Tangshan Renren v Baidu*.

54 Article 9 of the Supreme People's Court draft *Regulation on Issues Concerning the Application of the Law in Civil Disputes Involving Monopolistic Conduct* of 25 April 2011.

55 Article 11 of the Supreme People's Court draft *Regulation on Issues Concerning the Application of the Law in Civil Disputes Involving Monopolistic Conduct* of 25 April 2011.

Discovery and disclosure of evidence

China operates a civil law system with limited availability of what is known as “discovery” under common law regimes. The Supreme People’s Court’s draft Regulation aims to facilitate the gathering of relevant evidence by organising a disclosure mechanism, where the courts will be empowered to order disclosure if certain specific conditions are met.

Limitation period

The Antimonopoly Law does not provide for specific limitation periods. The standard two-year statute of limitations set forth in Article 135 of the Civil Law therefore applies to civil claims brought under the Antimonopoly Law. The Supreme People’s Court’s draft Regulation confirms this principle and provides additional detail on the computation of the period as well as on causes for suspension and interruption (notably, the period is interrupted until the adoption of a decision by an administrative enforcement agency).

Effects of a leniency application

Under the Regulation proposed by the Supreme People’s Court, where an undertaking voluntarily reports the relevant information of a monopoly agreement to a competition agency and provides significant evidence, the people’s court may take protection measures (including holding non-public hearings, restricting or prohibiting the reproduction of evidence, limiting the exhibition of evidence to legal representatives only, and mandating the execution of confidentiality commitments, etc) with regard to evidence which has not been made public and is subject to cross-examination.

Merger control

Chapter IV of the Antimonopoly Law – together with the State Council's *Regulation on Notification Thresholds for Concentrations of Undertakings* adopted on 1 August 2008 – provides the ground rules for the current Chinese merger control regime. Under this regime, "business concentrations" meeting specified turnover thresholds must be notified and cleared by MOFCOM before they can be implemented.

Since the enactment of the Antimonopoly Law, MOFCOM has received hundreds of merger notifications and reviewed close to 400 transactions. According to publicly available data, MOFCOM reviewed 17 cases in 2008, 80 cases in 2009, 117 cases 2010, and 168 in 2011. Most transactions were cleared unconditionally. MOFCOM prohibited only one transaction – the proposed acquisition of Huiyan, a fruit juice producer, by Coca-Cola – and attached conditions to its approval in ten cases.

MOFCOM has been keen to promote legal certainty by adopting a series of guidelines and measures setting out its enforcement policy in more detail. China's merger control regime has now become a major regime that parties to international transactions cannot ignore.

Merger control enforcement statistics

	2008	2009	2010	2011
Decisions	17	80	117	168
Conditional clearances	1	4	1	4
Prohibitions	0	1	0	0

Concentrations

The merger control provisions only apply to business transactions that qualify as "concentrations" as defined in Article 20 of the Antimonopoly Law. Concentrations include:

- mergers
- acquisitions of control of other undertakings by means of equity or asset purchase
- acquisitions of control or decisive influence on other undertakings by contract or any other means.

The notion of "control or decisive influence" is not defined in the Antimonopoly Law or in any MOFCOM guidelines or implementing measures. The lack of formal guidance on this point has given rise to uncertainties in relation to what extent and under what circumstances acquisitions of joint control and minority share acquisitions may qualify as concentrations.

With regard to joint ventures, MOFCOM's *Measures on the Notification of Proposed Concentrations* adopted on 21 November 2009 refer to the notion of "join control" when discussing the relevant turnover calculation rules. It is clear that MOFCOM considers that at least certain types of joint venture transactions constitute concentrations within the meaning of the Law: one of the decisions published by MOFCOM (in the *General Electric/China Shenhua* case) involves the establishment of a joint venture. In practice, many joint venture transactions are notified and MOFCOM does not appear to treat "full-function" joint ventures – ie, those performing on a lasting basis all the functions of an autonomous economic entity – differently from "partial-function" joint ventures. With regard to minority share acquisitions, an early draft of the *Measures on the Notification of Proposed Concentrations* mentioned that decisive influence could be achieved through control rights over important decisions even absent 50 per cent of the voting rights. Without speculating on why such language was not retained in the final draft, this might indicate that MOFCOM is not averse to a finding of control even where less than 50 per cent of the voting rights are being acquired.

In the absence of any clear precedent and in line with the EU regime on which the Chinese rules are modelled, the prudent option would be to seek clearance where a minority shareholder acquires veto rights likely to confer it with decisive influence over the commercial and strategic conduct of the target, and to do so both for full-function and partial-function joint ventures.

Notification thresholds

If a transaction qualifies as a concentration, it must be notified to MOFCOM if any of the following turnover thresholds are met:

- in the last financial year: (i) the combined total worldwide turnover of the undertakings participating in the concentration exceeded RMB10 billion; and (ii) at least two of these undertakings each had a turnover of more than RMB400 million within China ; or

- in the last financial year: (i) the combined total turnover within China of the undertakings participating in the concentration exceeded RMB2 billion; (ii) and at least two of these undertakings each had a turnover of more than RMB400 million within China.

The above rules do not apply to intra-group re-organisations[56] and higher turnover thresholds apply for financial institutions.[57] MOFCOM's Notification Measures provide useful guidance on how the above notification thresholds apply in practice. For example, they clarify that the relevant turnover figures should include the total consolidated group turnover figures of each undertaking participating in the concentration in the preceding financial year, after deduction of all taxes and surcharges. Further, in case of an acquisition, only the turnover allocated to the undertaking being acquired is relevant to determine the seller's turnover figures – ie, the seller's sales from other activities are not included when calculating the relevant turnover.

Reportable concentrations		
• mergers • acquisitions of control by means of equity or asset purchase • acquisitions of control or decisive influence by contract or other means	+	• combined worldwide turnover of all undertakings exceeds RMB10 billion and China-wide turnover of each of at least two undertakings exceeds RMB400 million or • combined China-wide turnover of all undertakings exceeds RMB2 billion and China-wide turnover of each of at least two undertakings exceeds RMB400 million

Compulsory notification

Timing of notification:
prior to the implementation of the transaction

Standstill obligation:
the transaction cannot be implemented until it has been cleared by MOFCOM, or, in the absence of a decision, by expiry of the statutory deadline

Failure to notify:
MOFCOM can impose a fine up to RMB500,000 as well as an order to stop or unwind the implementation of the transaction or take any measure to restore pre-existing market conditions

56 Pursuant to Article 22 of the Antimonopoly Law, merger control does not apply where one party to the concentration holds at least 50 per cent of the voting shares or assets of all other parties, or, where 50 per cent or more of the voting shares or assets of all parties involved in the concentration are held by a same third-party undertaking.

57 Pursuant to *Measures on Calculating the Turnover of Financial Institutions for Merger Control Purposes* jointly adopted by MOFCOM, the People's Bank of China, the China Banking Regulatory Commission, the China Securities Regulatory Commission and the China Insurance Regulatory Commission of 15 July 2009, for banking institutions, securities companies, fund management companies and insurance companies, only 10 per cent of the relevant turnover figures will be taken into account for the purposes of calculating whether the turnover thresholds are met.

In practice, these rules sometimes require the notification of transactions that bear little or no connection with China. This is a frequent issue with extraterritorial joint venture transactions, where the controlling shareholders – considered as undertakings participating in the concentration – may meet the above notification thresholds even though the joint venture itself is not or will not likely become active in China. For instance the establishment of a joint venture to exploit a port terminal in Africa may be subject to a notification requirement in China if the joint venture partners meet the Chinese notification thresholds based on their respective turnover achieved with unrelated business activities. Similar issues arise under the EU's merger control rules. So far – in the absence of a clear response under international public law principles – many parties choose to seek approval in relation to these wholly extraterritorial joint ventures.

MOFCOM also retains the discretion to require notification of any transaction which it considers may have the effect of excluding or limiting competition, even if the above thresholds are not met. According to the *Draft Interim Measures on the Investigation of Concentrations not Reaching the Notification Thresholds but Suspected of Anticompetitive Effects* issued in February 2009, if MOFCOM decides on its own initiative to review a transaction, the parties may undertake to suspend its implementation during an ad hoc review period agreed with MOFCOM. In that case, the transaction may not be implemented before expiry of the review period.

Under Article 31 of the Antimonopoly Law, where a foreign investor participates in a concentration involving a domestic undertaking and a matter of state security is involved, an additional state security review may be conducted. The security review regime is further set out in the State Council *Notice on the Establishment of a Security Review System for Foreign Acquisitions of Domestic Enterprises* adopted on 3 February 2011, and in MOFCOM's *Regulation on the Implementation of the Security Review System for the Acquisitions of Domestic Enterprises by Foreign Investors* adopted on 25 August 2011.

Common types of transactions subject to merger control in China

- merger
- acquisition of all the shares of another company
- majority share acquisition
- minority share acquisition with control rights
- greenfield joint venture
- acquisition of a business through the purchase of its assets

Review procedure and timing

Transactions subject to a notification requirement must be notified to MOFCOM and may not be implemented before clearance has been obtained from MOFCOM. The procedural notification and review rules are further detailed in the Notification Measures and in MOFCOM's *Measures on the Review of Notified Concentrations* of 24 November 2009.[58] In case of a merger, the notification obligation rests on all the merging parties. For other types of concentrations, notification must be made by the undertaking acquiring control or decisive influence. However, if one party fails to notify, the other parties may notify the transaction.

A detailed notification form must be completed. This notification form requires the submission of extensive information, explanations and data about the transaction and the business activities of the parties. The procedure is more data-intensive than in most other jurisdictions and often leads to delays. With a view to expedite the process, MOFCOM announced in December 2011 that it was contemplating amendments to the template notification form and considering the introduction of a simplified process for transactions which are unlikely to raise significant competition issues.

To assess a notified transaction, MOFCOM will not only rely on information provided by the notification parties but it will also collect relevant information from customers, competitors and other relevant stakeholders. Such third-party information may have a significant impact on the assessment of a transaction and may sometimes contribute to slowing down the review process. MOFCOM also increasingly relies on detailed economic data for its analysis. For instance, in the *Seagate/Samsung case*,[59] MOFCOM conducted a detailed review of a wide range of economic analysis presented by Seagate's economic advisors and asked numerous and detailed questions about the data, methodology and conclusions.

MOFCOM has 30 days to conduct a preliminary examination of the concentration ("first phase review") and to decide whether to proceed to an in-depth review of the proposed transaction. If an in-depth review ("second phase review") is required, MOFCOM has an additional 90 days - which can be extended to 150 days in certain circumstances – to review the transaction. If MOFCOM fails to adopt a decision before the expiry of this review period, the transaction is deemed cleared and the parties may implement their transaction.[60]

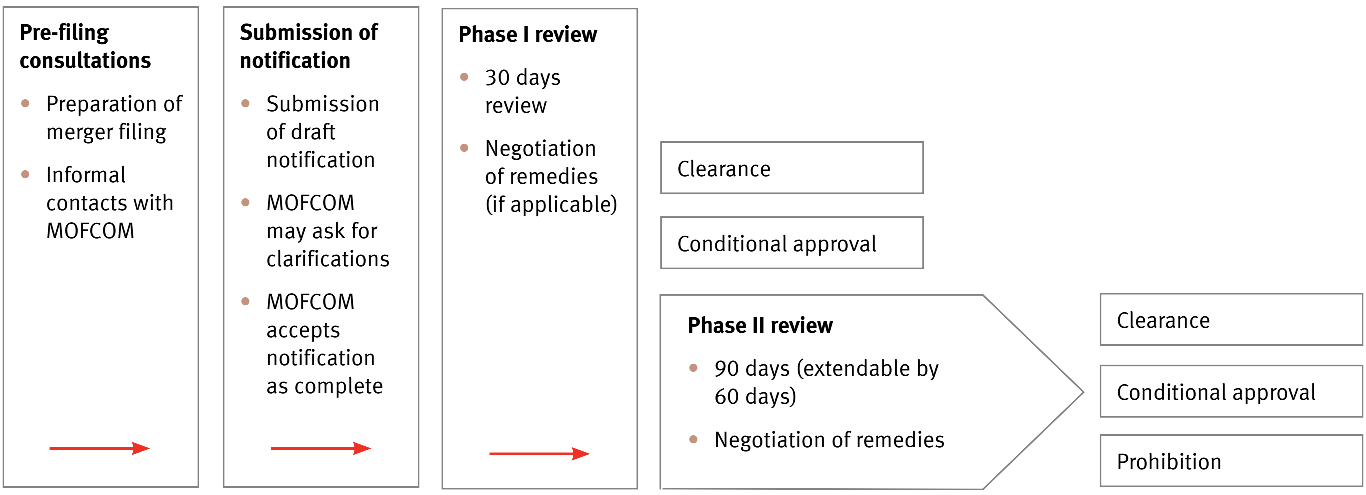
58 See also MOFCOM's *Guidelines on Procedures for Merger Review* of 3 March 2010; *MOFCOM's Guiding Opinions on Merger Notification Procedures* of 5 January 2009; MOFCOM's *Guiding Opinions on Materials to be Submitted when Notifying a Merger* of 7 January 2009; and MOFCOM's *Interpretation of the Measures on the Notification of Proposed Concentrations and the Measures on the Review of Notified Concentrations* of 12 January 2010.

59 Public Announcement No 90 [2011] of MOFCOM in relation to its decision of 12 March 2011 in case *Seagate/Samsung*.

60 It remains unclear whether the review periods provided for in the Antimonopoly Law are calendar days or business days but in the *Seagate/Samsung* case, MOFCOM stated that it has the right to extend the review period until the next working day when the review period lapses on a Saturday.

In practice, merger clearance may often take much longer than 30 days, even in simple cases. This is in part due to the fact that the 30-day period only starts running when MOFCOM is satisfied that it has received all the relevant information it deems necessary to review a transaction. It often takes several weeks before MOFCOM confirms that a notification is complete. Sometimes MOFCOM decides to open the 90-day second phase review ahead of expiry of the 30-day first phase review, with the second phase starting to run immediately, and not after the end of the first phase as would be the case in other jurisdictions.

Merger review timetable



Substantive assessment

The test for compatibility is whether the proposed concentration has or could have the effect of eliminating or restricting competition. If the parties can successfully demonstrate either that the proposed transaction has redeeming benefits outweighing its restrictive effects or that it is in the public interest, MOFCOM may nevertheless approve the transaction.

Pursuant to Article 27 of the Antimonopoly Law, MOFCOM will consider the following factors:

- the market share of the undertakings involved and their ability to control the relevant market
- the degree of concentration in the relevant market
- the effect of the concentration on market entry and technological progress
- the effect of the concentration consumers and other undertakings
- the effect of the concentration on the development of the national economy
- other elements relevant for the competitive analysis.

In August 2011, MOFCOM issued an *Interim Regulation on the Assessment of the Competitive Effects of Concentrations of Undertakings,* which provides more detail on the Article 27 substantive review criteria. The Regulation refers to concepts which are familiar in established competition law jurisdictions (market share analysis, assessment of the degree of market concentration by reference to the Herfindahl-Hirschman Index and the Concentration Ratio, reference to the likelihood, timeliness and sufficiency of market entry to assess the importance of barriers to entry, etc). The Regulation also indicates which benefits resulting from a concentration will be considered as part of its overall competitive assessment. Unlike most other jurisdictions, these benefits include not only economic efficiencies (such as economies of scale and scope, cost reductions, increased product variety, technological advancements) but also public interest considerations. There is also a reference to the fact that MOFCOM will consider the existence of a failing firm among the merging parties without however specifying the specific criteria to meet for the failing firm defence to succeed.

This Regulation fails to provide much guidance on MOFCOM's enforcement policies and priorities. For instance, MOFCOM does not provide any indication as to the levels of concentration or market share thresholds above which a transaction may raise concerns. There is also no specific guidance on MOFCOM's enforcement approach with regard to different types of transactions (such as horizontal, vertical or conglomerate mergers). Non-horizontal mergers traditionally raise fewer issues.

In the absence of such formal guidance, parties have to rely on precedents to understand MOFCOM's enforcement policy. Unfortunately, to date, most merger decisions are not publicly available. MOFCOM's policy – in line with its obligations under the Antimonopoly Law – has so far been to only publish prohibition or conditional clearance decisions. The few public announcements made in relation to merger decisions are short and contain relatively little information about MOFCOM's underlying merger analysis.

On the basis of the public announcements made to date, MOFCOM appears to rely heavily in its competitive assessment on market share and on the degree of concentration in the relevant markets affected by the transaction:

- For horizontal concentrations, MOFCOM tends to consider high combined market shares as a strong indication of potential competition concerns – either in the form of unilateral or coordinated restrictive effects.[61] In the early *Mitsubishi/Lucite* case, MOFCOM relied almost exclusively on the fact that the combined market share of the parties would reach 64 per cent to consider that the transaction was capable of restricting competition. In subsequent decisions, MOFCOM considered high market shares together with other factors – such as the presence of barriers to entry[62] or limited countervailing buying power.[63] In the *Seagate/Samsung* case,[64] MOFCOM considered a wide range of factors (including product homogeneity, market transparency, lack of incentives of large customers to exercise countervailing buying power, prevailing procurement methodologies and capacity constraints on the relevant market, barriers to entry in the form of intellectual property, know-how and scale efficiencies) before concluding that Seagate's proposed acquisition of Samsung's competing hard disk drive business was likely to raise horizontal competition issues.

- Similarly, for non-horizontal concentrations – such as vertical or conglomerate mergers – the size or market share of the parties will be a key element. Where transaction parties have sizeable activities in related, upstream or downstream markets, potential foreclosure or leverage issues will be important considerations in MOFCOM's substantive assessment. To date, MOFCOM has identified vertical foreclosure issues in three cases,[65] and MOFCOM relied on possible leverage risks to prohibit Coca-Cola's proposed acquisition of Chinese juice producer Huiyan.[66] In contrast with the practice elsewhere, in these cases MOFCOM seems not to have

61 For the first application by MOFCOM of the horizontal coordination risk theory, see Public Announcement No 53 [2010] of MOFCOM in relation to its decision of 13 August 2010 in case *Novartis/Alcon*.

62 Public Announcement No 77 [2009] of MOFCOM in relation to its decision of 29 September 2009 in case *Pfizer/Wyeth*.

63 Public Announcement No 82 [2009] of MOFCOM in relation to its decision of 30 October 2009 in case *Panasonic/Sanyo*.

64 Public Announcement No 90 [2011] of MOFCOM in relation to its decision of 12 March 2011 in case *Seagate/Samsung*.

65 Public Announcement No 28 [2009] of MOFCOM in relation to its decision of 24 April 2009 in case *Mitsubishi Rayon/ Lucite International*; Public Announcement No 76 [2009] of MOFCOM in relation to its decision of 28 September 2009 in case *GM/Delphi;* Public Announcement No 74 [2011] of MOFCOM in relation to its decision of 11 November 2011 in case *General Electric/China Shenhua*.

66 Public Announcement No 22 [2009] of MOFCOM in relation to its decision of 18 March 2009 in case *Coca-Cola/Huiyuan*.

proceeded to any detailed analysis of the economic incentives of the parties to engage in anticompetitive foreclosure or leverage strategies.[67] For instance in the *GM/Delphi case*,[68] MOFCOM considered that GM's proposed acquisition of Delphi, a leading car parts supplier in China, could hinder Chinese car makers' continued access to automotive parts without however discussing GM's incentives and ability to restrict these supplies.

MOFCOM's competitive analysis is sometimes controversial. Its rationale for prohibiting Coca-Cola's proposed acquisition of Huiyan – namely that Coca-Cola would have leveraged its dominant position in the carbonated beverages market into the neighbouring juice market – relies on a theory of harm that is not universally accepted. Another example is the conditional approval of *Alcon/Novartis*.[69] In that transaction, the combination of Novartis' one per cent market share with Alcon's 60 per cent was identified as a competition concern. A *de minimis* increase of this nature would not usually give rise to concerns elsewhere. Finally, although the discrepancy in the analysis may result from procedural issues involving a parallel merger in the same industry, MOFCOM approved the *Seagate/Samsung* transaction subject to conditions,[70] whereas the same transaction was unconditionally approved by a number of other competition law jurisdictions including the EU and the United States, as well as other Asian countries.

As MOFCOM is gradually stepping up its international cooperation efforts, such differences in approach might diminish over time. In July 2011, the Chinese and US antitrust enforcement agencies signed a *Memorandum of Understanding on Antitrust and Antimonopoly Cooperation*.[71] The memorandum sets out a broad framework of cooperation that consists of a senior-level joint dialogue and a one-on-one communication and cooperation mechanism between individual US and Chinese agencies. Later in November, MOFCOM and the US antitrust agencies developed further guidance for cooperation in specific merger cases.[72] The guidance provides that where appropriate and subject to any applicable confidentiality restrictions, the agencies may exchange information regarding a transaction they are both investigating. This information may concern the timing of their respective investigations and technical aspects of cases, such as definition of relevant markets, evaluation of competitive effects, theories of competitive harm, economic analysis and remedies.

67 Public Announcement No 76 [2009] of MOFCOM in relation to its decision of 28 September 2009 in case *GM/Delphi*.

68 Public Announcement No 76 [2009] of MOFCOM in relation to its decision of 28 September 2009 in case *GM/Delphi*.

69 Public Announcement No 53 [2010] of MOFCOM in relation to its decision of 13 August 2010 in case *Novartis/Alcon*.

70 Public Announcement No 90 [2011] of MOFCOM in relation to its decision of 12 March 2011 in case *Seagate/Samsung*.

71 *Memorandum of Understanding on Antitrust and Antimonopoly Cooperation between the United States Department of Justice and the Federal Trade Commission, on the one hand, and the People's Republic of China National Development and Reform Commission, Ministry of Commerce, and State Administration for Industry and Commerce, on the other hand*, dated 27 July 2011.

72 *Guidance for Case Cooperation between the Ministry of Commerce and the Department of Justice and Federal Trade Commission on Concentration of Undertakings (Merger) Cases*, dated 29 November 2011.

Remedies

When a concentration raises competition issues, both the parties and MOFCOM may propose remedies to reduce its harmful effects and obtain clearance for the deal. Those remedies may be structural (eg, the divestiture of assets) and behavioural (eg, an agreement to sell below a certain price). On 5 July 2010 MOFCOM issued *Interim Measures concerning the Divestiture of Assets or Businesses when Implementing Concentrations of Undertakings* setting out in more detail the procedural aspects of business divestiture remedies. In December 2011, MOFCOM announced that, with a view to improving transparency, it would soon publish a *Regulation on the Imposition of Restrictive Conditions on Concentrations of Undertakings* which would provide further detail on the substantive aspects of remedies.

To date, MOFCOM has imposed remedies in ten cases. In these cases, MOFCOM has adopted a very pragmatic approach. Unlike in other jurisdictions, MOFCOM does not seem to favour structural remedies over behavioural remedies. Structural remedies were for the first time imposed in the *Mitsubishi/Lucite* case in April 2009 and since then MOFCOM has imposed structural remedies – in the form of business divestitures – on three other occasions.[73] In all cases, business divestures were imposed to address horizontal competition issues. No such structural remedies have to date been imposed to address vertical concerns.

Behavioural remedies are tailored to the specific situation, and they vary significantly from one case to another. The main behavioural remedies imposed to date include the following: refrain from acquiring or increasing stakes in Chinese competitors or suppliers;[74] refrain from building new production facilities in China;[75] maintain current sales levels;[76] continue to supply the Chinese markets;[77] terminate existing distribution agreements with Chinese competitors;[78] exit the Chinese market for a certain period of time;[79] maintain or expand production or investments in China.[80] Some of these behavioural remedies are limited in time while others are open-ended. For instance, in the *Novartis/Alcon* case, Novartis' commitment to stop selling eye-care products in China was limited to a five-year period, whereas in the *Uralkali/Silvinit* case, the merged entity committed to maintain

73 Public Announcement No 77 [2009] of MOFCOM in relation to its decision of 29 September 2009 in *Pfizer/Wyeth;* Public Announcement No 82 [2009] of MOFCOM in relation to its decision of 30 October 2009 in case *Panasonic/Sanyo;* Public Announcement No 73 [2011] of MOFCOM in relation to its decision of 31 October 2011 in case *Alpha/Savio.*

74 Public Announcement No 95 [2008] of MOFCOM in relation to its decision of 18 November 2008 in case Inbev/Anheuser-Bush.

75 Public Announcement No 28 [2009] of MOFCOM in relation to its decision of 24 April 2009 in case *Mitsubishi Rayon/Lucite International.*

76 Public Announcement No 33 [2011] of MOFCOM in relation to its decision of 2 June 2011 in case *Uralkali/Silvinit.*

77 Public Announcement No 76 [2009] of MOFCOM in relation to its decision of 28 September 2009 in case *GM/Delphi.*

78 Public Announcement No 53 [2010] of MOFCOM in relation to its decision of 13 August 2010 in case *Novartis/Alcon.*

79 Public Announcement No 53 [2010] of MOFCOM in relation to its decision of 13 August 2010 in case *Novartis/Alcon.*

80 Public Announcement No 90 [2011] of MOFCOM in relation to its decision of 12 March 2011 in case *Seagate/Samsung.*

current sales levels in China for an unlimited period of time. Open-ended commitments are difficult and expensive to monitor. As a result, MOFCOM is increasingly relying on third-party monitoring trustees to verify the implementation of these remedies.[81]

Sanctions for failure to notify

Under Article 48 of the Antimonopoly Law, failure to notify a reportable concentration may lead to the imposition of fines of up to RMB500,000 as well as an order to stop the implementation of the transaction, to dispose of shares or assets, to transfer the business or take any other measure to restore pre-existing market conditions.

On 30 December 2011, MOFCOM adopted *Interim Measures on the Investigation of Concentrations not Notified*. These Measures – which took effect on 1 February 2012 – set out the procedural framework under which MOFCOM will investigate and sanction reportable transactions implemented prior to seeking merger control clearance. MOFCOM will launch an investigation if there is *prima facie* evidence of a failure to notify. In such a case, the relevant parties have 30 days to provide MOFCOM with relevant information and MOFCOM then has 60 days to determine whether the transaction was subject to a notification requirement. If MOFCOM determines that the transaction should have been notified, the parties must submit a notification within 30 days and implementation of the transaction must be suspended. MOFCOM then has 180 days to evaluate whether the transaction raises any substantive issues and decide whether to impose fines or order reversal of the transaction. MOFCOM's decision will depend on a number of factors including the nature, the severity and the duration of the infringement as well as on the extent to which the relevant transaction raises any substantive competition concerns.

The Antimonopoly Law does not provide for specific limitation periods. In the absence of specific rules, the principles set out in China's Law on Administrative Penalty are likely to apply. This Law provides for a two-year limitation period from the date of the infringement, or, in the case of continuous infringements, from the date the infringement ceased. It remains to be seen what MOFCOM's enforcement approach will be on this point and in particular whether it might consider that non-compliance with the merger rules is a continuous infringement and therefore that its power to investigate and sanction failures to notify is not limited in time.

81 Public Announcement No 33 [2011] of MOFCOM in relation to its decision of 2 June 2011 in case *Uralkali/Silvinit*.

Administrative and judicial review

Pursuant to Article 53 of the Antimonopoly Law, any undertaking that wishes to challenge a decision by MOFCOM to prohibit a transaction or impose remedies must first apply for administrative review. If it is dissatisfied with the outcome of the administrative review, the undertaking may further institute a judicial review before the Chinese Courts. The same rules apply with regard to MOFCOM's decisions to fine or to order reversal of a transaction implemented in violation of the merger notification rules. It remains unclear at this stage whether such possibility of administrative or judicial review only exists for final decisions or also covers procedural or provisional determinations made by MOFCOM during the merger review process.

The prohibition on the abuse of administrative power

Chapter V of the Antimonopoly Law, dealing with the abuse of administrative power, contains a variety of provisions dealing with matters that are familiar in the EU context – concerning the free movement of goods and services, freedom of establishment for business operators and rules relating to public procurement.

In particular, the Antimonopoly Law provides that administrative authorities or organisations authorised by law or regulation with the administration of public affairs may not abuse their powers to (i) require undertakings or individuals to deal in, purchase or use only goods supplied by undertakings they designate; (ii) impede the circulation of goods between regions – such as by imposing discriminatory charges or technical standards on goods originating from other regions, or setting up checkpoints to block the supply of goods between regions; or (iii) adopt discriminatory measures which would restrict the participation of undertakings from other regions in local tenders, or prevent such undertakings from establishing a branch office, or otherwise investing, in their region. In addition, administrative authorities and organisations may not abuse their administrative powers by compelling undertakings to pursue monopoly conduct, or (in the case of administrative authorities) by introducing legal provisions which eliminate or restrict competition.

The above rules are not without consequence for private parties. Although the issue remains to be tested before the courts and the administrative agencies, private parties which are involved in breaches of the Antimonopoly Law following administrative rules or pursuant to an administrative authorisation that are found to constitute an abuse of administrative power, will not be able to invoke State compulsion as a defence.[82]

Given the overtly political object of these rules, it will not come as a surprise that the Antimonopoly Law provides for the enforcement of them in specifically political terms. Article 51 states that where an administrative authority or organisation abuses its power, the authority immediately superior to the infringing authority will make an order to the latter requiring rectification. In such a situation the relevant antimonopoly enforcement authority may make recommendations to the superior authority concerned.

Despite the comparatively weaker enforcement regime, the Antimonopoly Law's prohibition on the abuse of administrative power has not been left unenforced. In July 2011, the SAIC reported on the first abuse of administrative power case under the Law, which was conducted by the Guangdong Administration of Industry and Commerce. The case had its root in a 2009 provincial stipulation which required GPS devices to be

82 Article 5 of the SAIC's *Regulation on the Prohibition of Anticompetitive Abuse of Administrative Power* of 31 December 2010.

installed on certain types of dangerous freight vehicles. In January 2010, the Heyuan Government designated the monitoring platform developed by a local GPS operator, Xinshikong, as the sole municipal monitoring platform, without apparently organising any public tender or other transparent selection process. All other GPS service providers were required to upload their GPS data onto Xinshikong's platform against a monthly data upload service fee. Based on these facts, the Guangdong AIC concluded that the Heyuan Government had inadequately disrupted competition in the local automobile GPS services market by artificially creating a monopolistic upstream market in violation of Articles 8 and 32 of the Antimonopoly Law. With the SAIC's help, the Guangdong AIC made an official recommendation to the provincial government that the challenged municipal acts be rectified. That recommendation was eventually adopted and implemented by the Guangdong provincial Government.[83]

The Antimonopoly Law makes no provision for damages actions in the case of abuse of administrative power, although such damages actions should be possible under other Chinese public law rules. The question, however, is whether any such action – on whatever basis – would be successful. In that context, it is noteworthy that a district court in Taiyuan city accepted in September 2011 to consider the claims brought by Shanxi Joint Transport Group against the Taiyuan Railway Bureau for alleged administrative inertia in processing its application for the opening of new ticket sales outlets since 2007. Although public information about the legal arguments brought forward by the plaintiff are scarce, under Article 37 of the Antimonopoly Law, administrative authorities are prohibited from formulating any rules that eliminate or restrict competition; and, under Article 17(3), dominant market players are prohibited from refusing to deal with trade counterparts without legitimate justifications.[84]

83 SAIC's announcement of 27 July 2011 in relation to the Guangdong AIC decision in the *Heyuan GPS* case.

84 On 13 September 2011, the Taiyuan Xinghualing District People's Court accepted to consider the claim brought by Shanxi Joint Transport Group against the Taiyuan Railway Bureau for alleged administrative monopoly and abuse of dominance.

Appendix

Law, implementing regulations and guidelines

General

中华人民共和国反垄断法
Antimonopoly Law of the People's Republic of China (30 August 2007)

商务部反垄断局关于相关市场界定的指南
Antimonopoly Commission Guidelines on Defining the Relevant Market (24 May 2009)

Conduct rules

国家发展和改革委员会关于反价格垄断规定
NDRC Regulation on Monopolistic Pricing Practices (29 December 2010)

国家发展和改革委员会关于反价格垄断行政执法程序规定
NDRC Procedural Regulation on the Administrative Enforcement of the Prohibition of Monopolistic Pricing Practices (29 December 2010)

国家工商行政管理总局关于禁止垄断协议行为的规定
SAIC Regulation on the Prohibition of Monopolistic Agreements (31 December 2010)

国家工商行政管理总局关于禁止滥用市场支配地位行为的规定
SAIC Regulation on the Prohibition on the Abuse of a Dominant Market Position (31 December 2010)

国家工商行政管理总局关于查处垄断协议、滥用市场支配地位案件程序规定
SAIC Procedural Regulation on Enforcing the Prohibition on Monopoly Agreements and the Abuse of Dominance (26 May 2009)

Merger control

国务院关于经营者集中申报标准的规定
State Council Regulation on Notification Thresholds for Proposed Concentrations of Business Undertakings (1 August 2008)

商务部关于金融业经营者集中申报营业额计算办法
MOFCOM Measures on Calculating the Turnover of Financial Institutions for Merger Control Purposes (15 July 2009)

商务部关于经营者集中申报办法
MOFCOM Measures on the Notification of Proposed Concentrations (21 November 2009)

商务部关于经营者集中审查办法
MOFCOM Measures on the Review of Notified Concentrations (24 November 2009)

商务部关于评估经营者集中竞争影响的暂行规定
MOFCOM Interim Regulation on the Assessment of the Competitive Effects of Concentrations of Undertakings (29 August 2011)

商务部关于实施经营者集中资产或业务剥离的暂行规定
MOFCOM Interim Measures concerning the Divestiture of Assets or Businesses when Implementing Concentrations of Undertakings (5 July 2010)

商务部关于对未依法申报的经营者集中调查处理的暂行办法
MOFCOM Interim Measures on the Investigation of Concentrations not Notified (5 January 2012)

商务部关于对未达申报标准涉嫌垄断的经营者集中调查处理的暂行办法（草案）
Draft MOFCOM Interim Measures on the Investigation of Concentrations not Reaching the Notification Thresholds but Suspected of Anticompetitive Effects (6 February 2009)

商务部关于对未达申报标准涉嫌垄断的经营者集中证据收集的暂行办法（草案）
Draft MOFCOM Interim Measures on Evidence Collection in relation to Concentrations not Reaching the Notification Thresholds but Suspected of Anticompetitive Effects (19 January 2009)

商务部关于经营者集中反垄断审查办事指南
MOFCOM Guidelines on Procedures for Merger Review (3 March 2010)

商务部关于经营者集中申报的指导意见
MOFCOM Guiding Opinions on Merger Notification Procedures (5 January 2009)

商务部关于经营者集中申报文件资料的指导意见
MOFCOM Guiding Opinions on Materials to be Submitted when Notifying a Merger (7 January 2009)

商务部反垄断局关于《经营者集中申报办法》和《经营者集中审查办法》的解读
MOFCOM's interpretation of the Measures on the Notification of Proposed Concentrations and of the Measures on the Review of Notified Concentrations (12 January 2010)

国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知
State Council Notice on the Establishment of a Security Review System for Foreign Acquisitions of Domestic Enterprises (3 February 2011)

商务部关于实施外国投资者并购境内企业安全审查制度的规定
MOFCOM Regulation on the Implementation of the Security Review System for the Acquisitions of Domestic Enterprises by Foreign Investors (25 August 2011)

Abuse of administrative power

国家发展和改革委员会关于反价格垄断规定
NDRC Regulation on Monopolistic Pricing Practices (29 December 2010)

国家发展和改革委员会关于反价格垄断行政执法程序规定
NDRC Procedural Regulation on Administrative Enforcement of the Prohibition of Monopolistic Pricing Practices (29 December 2010)

国家工商行政管理总局制止滥用行政权力排除、限制竞争行为的规定
SAIC Regulation on the Prohibition of the Anticompetitive Abuse of Administrative Power (31 December 2010)

国家工商行政管理总局制止滥用行政权力排除、限制竞争行为程序规定
SAIC Procedural Regulation on Enforcing the Prohibition on the Anticompetitive Abuse of Administrative Power (26 May 2009)

Private enforcement

最高人民法院关于认真学习和贯彻《中华人民共和国反垄断法》的通知
Supreme People's Court Notice on carefully studying and implementing the Antimonopoly Law (28 July 2008)

最高人民法院关于审理垄断民事纠纷案件适用法律若干问题的规定（草案）
Draft Supreme People's Court Regulation on issues concerning the application of the law in civil disputes involving monopolistic conduct (25 April 2011)

International cooperation

中欧竞争政策对话框架性文件
Declaration on the Start of a Dialogue on Competition by the EU and China (6 May 2004)

英国公平交易局和国家发展和改革委员会的合作谅解备忘录
Memorandum of Understanding on Cooperation between the Office of Fair Trading of the UK and the NDRC of China (10 January 2011)

英国公平交易局和国家工商行政管理总局的合作谅解备忘录
Memorandum of Understanding on Cooperation between the Office of Fair Trading of the UK and the SAIC of China (21 March 2011)

美国司法部及联邦贸易委员会和国家发展和改革委员会，商务部及国家工商行政管理总局关于反垄断和反托拉斯合作的谅解备忘录
Memorandum of Understanding on Antitrust and Antimonopoly Cooperation between the Department of Justice and Federal Trade Commission of the US and NDRC, MOFCOM and SAIC of China (27 July 2011)

中国商务部与美国司法部和联邦贸易委员会关于经营者集中案件合作指引
Guidance for Case Cooperation between the Ministry of Commerce and the Department of Justice and Federal Trade Commission on Concentration of Undertakings (Merger) Cases (29 November 2011)

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