

pricing activities. These include collusion to control market price, selling products below-cost in order to eliminate competitors or monopolize the market, offering the same products or services at discriminatory prices, and seeking excessive profits.³⁷

20. In 2003, a merger control regime was introduced as part of the *Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (hereinafter 'Interim M&A Rules').³⁸ The *Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors 2006* (amended 2009) (hereinafter 'M&A Rules') were issued in 2006 and replaced the Interim M&A Rules.³⁹ Before the 2009 amendment, the M&A Rules provided a basic regulatory framework for mergers and acquisitions of domestic enterprises by foreign investors and included a chapter that contained four articles devoted to anti-monopoly review, under which the Ministry of Commerce (MOFCOM) and the State Administration for Industry and Commerce (SAIC) were jointly responsible for accepting, reviewing, and approving mergers and acquisitions.⁴⁰

21. Nevertheless, the gradual and piecemeal competition-legislation regime resulted in fragmented and discriminatory provisions, ill-designed procedures and remedies, and insufficient enforcement power. For example, the AUCL prohibits designated transactions by public utilities or any other business operators occupying statutory monopoly status, but also prohibits below-cost sales and tying arrangements without considering whether dominance should be a threshold.⁴¹ The M&A Rules only regulate mergers and acquisitions of domestic enterprises by foreign investors and thus raises concerns of discrimination against foreign investors. As regards sanctions and remedies, for example, the maximum administrative fine for abusive behaviour by public utilities is only CNY 200,000, which does not provide

37. See Price Law, Art. 14 (1), (2), (5) & (7). The Price Law was promulgated by the Standing Committee of the NPC on 29 Dec. 1997 and effective on 1 May 1998, English translation available at <www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=50956>.

38. The Interim M&A Rules were jointly issued by the former Ministry of Foreign Trade and Economic Cooperation (MOFTEC), the State Administration of Taxation (SAT), the State Administration for Industry and Commerce (SAIC), and the State Administration of Foreign Exchange (SAFE) on 7 Mar. 2003 and effective on 12 Apr. 2003, English translation available at <www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51173>. The MOFTEC was subsequently reorganized to integrate the former State Economy and Trade Commission (SETC) and renamed the Ministry of Commerce (MOFCOM) on 25 Mar. 2003.

39. The M&A Rules were jointly issued by the MOFCOM, the SASAC, the SAT, the SAIC, the China Securities Regulatory Commission (CSRC) and the SAFE on 8 Aug. 2006 and effective on 8 Sep. 2006, English translation available at <www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=66925>.

40. To be consistent with the AML, the M&A Rules were amended on 22 Jun. 2009 by the MOFCOM. The 2009 amendment repealed the anti-monopoly review provisions, expressly referred the anti-monopoly review of mergers to the AML, and transformed the M&A Rules to a pure instrument of investment law governing takeovers of domestic enterprises by foreign companies. English translation of the amended M&A Rules is available at <www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=108906>.

41. See AUCL, Arts 6 and 23 regarding designated transactions by public utilities, Art. 11 regarding below-cost sales, and Art. 12 regarding tying.

the AUCL with effective and sufficient deterrent force.⁴² In addition, without a centralized and independent competition authority, a number of agencies and their corresponding local bureaus have shared enforcement powers and the situation has caused fragmented and unaccountable enforcement activities.⁴³

22. Following the promulgation of the AUCL in 1993, the drafting of the AML bill started in 1994 and the AML, envisaged as a principal pillar of Chinese competition law, was placed on the legislative agendas of the Eighth, the Ninth and the Tenth NPC. As noted by a Chinese official, the AML is perhaps the law with the longest drafting time in China.⁴⁴ The legislative history of the AML had witnessed intense debates on the necessity and suitability of the law, fighting between agencies to gain enforcement powers, warnings about the potential damage the law on the State-owned economy and foreign investment, and complaints of foreign control and anticompetitive behaviour, real or perceived, of multinational corporations in the Chinese market. Globalization and China's accession to the WTO have been two of the main driving forces behind the enactment of the AML.⁴⁵ In 2004, the MOFCOM, as the agency responsible for drafting the AML, submitted a bill to the Legislative Affairs Office of the State Council. After another two years of consideration and consultation, the State Council submitted a bill to the Standing Committee of the Tenth NPC in June 2006. The bill was then reviewed and revised three times in June 2006, June 2007, and August 2007. The AML was finally enacted on 30 August 2007 at the Twenty-Ninth Session of the Standing Committee of the Tenth NPC and became effective on 1 August 2008.

23. Similar to other major competition law regimes, the AML covers three main areas: anticompetitive agreements, abuse of dominance and merger control. The AML also covers a fourth area, which is the abuse of administrative powers to eliminate or restrict competition, widely referred to as 'administrative monopoly'. Most AML provisions broadly conform to international norms and are comparable to competition laws in the European Union (EU), the US and elsewhere, although some of the provisions have notable Chinese characteristics. Focusing on business operators' competitive behaviour in the marketplace and based on the rationale that competition delivers lower prices, better quality and more choices, the AML is expected to improve consumer and social welfare in China. Furthermore, the AML affects government agencies at all levels through the prohibition of administrative monopoly. Therefore, as a milestone in China's legal history, the promulgation of the AML reflects the immense success of three decades of economic and political

42. AUCL, Art. 23.

43. Bruce M. Owen, Su Sun & Wentong Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 *Antitrust L. J.* 233-236 (2008).

44. Wu Zhengu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 *Antitrust L. J.* 76 (2008).

45. For comments on how globalization and the World Trade Organization accession have driven China's competition law development, see David Gerber, *Global Competition: Law, Markets, and Globalization*, 223-227 (Oxford: Oxford University Press, 2010).

- (6) *Criminal Law 1997* (amended 1999, 2001, 2002, 2005, 2006, 2009, and 2011) (hereinafter 'Criminal Law').⁵⁸
- (7) *Foreign Trade Law 1994* (amended 2004) (hereinafter 'Foreign Trade Law').⁵⁹
- (8) *Patent Law 1984* (amended 1992, 2000, and 2008) (hereinafter 'Patent Law').⁶⁰
- (9) *Regulations on the Administration of Technology Import and Export 2001* (hereinafter 'Technology Import and Export Regulations').⁶¹
- (10) *Administrative Measures on Fair Trading between Retailers and Suppliers 2006* (hereinafter 'Retailers and Suppliers Measures');⁶² and
- (11) *Provisions on the Prohibition of Regional Blockades in Market Economy Activities 2001* (hereinafter 'Provisions on Regional Blockades').⁶³

31. The sector-specific legislation that contains competition-related provisions primarily include:

- (1) *Postal Law 1986* (amended 2009 and 2012) (hereinafter 'Postal Law').⁶⁴

on 1 Jan. 2005, official Chinese text available at <<http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=chl&gid=56393>>, English translation available by subscription at <www.lawinfochina.com>.

58. See Criminal Law, Art. 223 on the bid rigging offence. The Criminal Law was promulgated by the NPC on 4 Mar. 1997, effective on 1 Oct. 1997 and amended in 1999, 2001 (twice), 2002, 2005, 2006, 2009 and 2011, English translation available at <www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm>. English translation of the Amendments I, II, III, VI, V, and VI of the Criminal Law is available at <www.npc.gov.cn/englishnpc/Law/FrameSet-page6.html>; English translation of the Amendments VII and VIII of the Criminal Law is available by subscription at <www.lawinfochina.com>.
59. See Foreign Trade Law, Arts 30, 32-33. The Foreign Trade Law was promulgated by the Standing Committee of the NPC on 12 May 1994, effective on 1 Jul. 1994 and amended in 2004. English translation available at <www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=39900>.
60. See Patent Law, Art. 48. The Patent Law was promulgated by the Standing Committee of the NPC on 12 Mar. 1984, effective on 1 Apr. 1985 and amended in 1992, 2000 and 2008. English translation available at <www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=125096>.
61. See Technology Import and Export Regulations, Art. 29. The Technology Import and Export Regulations were promulgated by the State Council on 30 Oct. 2001 and effective on 1 Jan. 2002. English translation available at <www.wipo.int/clea/docs/new/pdf/en/cn/cn125en.pdf>.
62. See Retailers and Suppliers Measures, Arts 4, 7 and 18. The Retailers and Suppliers Measures were promulgated by the MOFCOM, the NDRC, the Ministry of Public Security, the SAT and the SAIC on 12 Oct. 2006 and effective on 15 Nov. 2006. English translation available at <www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=74959>.
63. The Measures on Regional Blockades were promulgated by the State Council on 21 Apr. 2001 and effective on the same day, official Chinese text of the Provisions on Regional Blockades available at <www.gov.cn/gongbao/content/2001/content_60843.htm>, English translation available by subscription at <www.lawinfochina.com>.
64. See the Postal Law, Arts 4 and 18. The Postal Law was promulgated by the Standing Committee of the NPC on 2 Dec. 1986, effective on 1 Jan. 1987 and amended in 2009 and 2012. English translation available by subscription at <www.lawinfochina.com>.

- (2) *Commercial Banking Law 1995* (amended 2003) (hereinafter 'Commercial Banking Law').⁶⁵
- (3) *Telecommunications Regulations 2000* (hereinafter 'Telecom Regulations').⁶⁶
- (4) *Insurance Law 1995* (amended 2002 and 2009) (hereinafter 'Insurance Law').⁶⁷
- (5) *Regulations of International Ocean Shipping 2001* (amended 2013) (hereinafter 'International Shipping Regulations').⁶⁸
- (6) *Regulation on the Administration of Domestic Water Transport 2012* (hereinafter 'Domestic Shipping Regulations').⁶⁹

§2. INTERNATIONAL SOURCES

32. To date, China has not reached any multilateral or bilateral cooperation agreements in relation to competition law. Thus, international sources of competition law currently do not exist in China. However, China's accession to WTO in December 2001 is relevant in this context. It is noted that competition law could manifest China's willingness to take its WTO obligations to reduce trade barriers and support market principles, although WTO membership does not create an obligation on members to enact a competition law.⁷⁰ The drafting of the AML had been accelerated after China became the 143rd member of the WTO and China's legislature noted that the enactment of a WTO-consistent AML would be necessary for China to implement its WTO commitments.⁷¹

33. In the soft law area, China is not yet a member of the International Competition Network (ICN). It should be noted that China has been increasingly

65. See Commercial Banking Law, Art. 9. The Commercial Banking Law was promulgated by the Standing Committee of the NPC on 10 May 1995, effective on 1 Jul. 1995 and amended in 2003. English translation available at <www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383716.htm>.
66. See Telecom Regulations, Arts 4, 7, 8, 12, 17-22, 31, 41-42 and further discussion at para. 61 below. The Telecom Regulations were promulgated by the State Council on 25 Sep. 2000 and effective on the same day. English translation available at <www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=87900>.
67. See Insurance Law, Arts 67 and 115. The Insurance Law was promulgated by the Standing Committee of the NPC on 30 Jun. 1995, effective on 1 Oct. 1995 and amended in 2002 and 2009, official Chinese text available at <www.gov.cn/flfg/2009-02/28/content_1246444.htm>, English translation available by subscription at <www.lawinfochina.com>.
68. See International Shipping Regulations, Arts 3, 27(1), (3), (4), 35-41. The International Shipping Regulations were promulgated by the State Council on 11 Dec. 2001, effective on 1 Jan. 2002, and amended in 18 Jul. 2013. English translation available by subscription at <www.lawinfochina.com>.
69. See Domestic Shipping Regulations, Art. 3. The Domestic Shipping Regulations were promulgated by the State Council on 13 Oct. 2012 and effective on 1 Jan. 2013. English translation available by subscription at <www.lawinfochina.com>.
70. David Gerber, *Global Competition: Law, Market, and Globalization*, 226-227 (Oxford: Oxford University Press, 2010).
71. See 'Spokesperson Zeng Jianhui Answers Questions at the First Press Conference of the 5th Session of the 9th NPC', Chinese version of the script available at <<http://news.eastday.com/epublish/gb/paper200/1/class020000001/hwz612380.htm>>, 4 Mar. 2002. Legal documents of China's accession to the WTO (in Chinese and English) are available at <www.mofcom.gov.cn/aarticle/zhongyts/ar/200207/20020700032358.html>.

- (2) NDRC *Provisions on the Prohibition of Below-Cost Dumping Conduct 1999*.¹⁰³
- (3) SAIC *Provisions on the Prohibition of Restrictive Conduct of Public Utilities 1993* (hereinafter 'Provisions on Public Utilities').¹⁰⁴
- (4) SAIC *Interim Provisions on the Prohibition of Bid Rigging 1998*.¹⁰⁵
- (5) *Implementing Regulations of the Bidding Law* (hereinafter 'Bidding Law Implementing Regulations').¹⁰⁶

II. Guidelines

44. To provide administrative guidance to interested parties, the AMC has issued the *Guidelines on the Definition of the Relevant Market 2009* (hereinafter 'Market Definition Guidelines').¹⁰⁷ The contents of the Market Definition Guidelines are outlined in paragraphs 118-126 below.

45. In addition to the Market Definition Guidelines, the AMC has entrusted the SAIC to draft the *Guidelines on Anti-Monopoly Enforcement in Relation to Intellectual Property Rights* (the 5th draft) (hereinafter 'Draft Intellectual Property Guidelines'). The SAIC has invited comments from a small circle of experts and has further revised the Draft Intellectual Property Guidelines, which to date have not been made publicly available.¹⁰⁸

46. In the merger control area, the MOFCOM issued a series of guidance in January 2009 that provided details on the information a notifying party is required to submit and clarified key procedural issues regarding how the MOFCOM will conduct merger control reviews under the AML, including:

103. The Provisions on the Prohibition of Below-Cost Dumping Conduct 1999 were promulgated by the former National Development and Planning Commission on 3 Aug. 1999 and effective on the same day, official Chinese text available at <www.ndrc.gov.cn/zcfb/zcfbl/zcfbl2003pro/t20050707_27844.htm>.
104. The Provisions on Public Utilities were promulgated by the SAIC on 24 Dec. 1993 and effective on the same day, official Chinese text available at <www.saic.gov.cn/fldyfb/dj/zcfg/200705/t20070523_57730.html>, English translation available by subscription at <www.lawinfochina.com>.
105. The Interim Provisions on the Prohibition of Bid Rigging 1998 were promulgated by the SAIC on 6 Jan. 1998 and effective on the same day, official Chinese text available at <www.saic.gov.cn/fldyfbzdz/zcfg/200705/t20070523_58208.html>.
106. The Bidding Law Implementing Regulations were promulgated by the State Council on 20 Dec. 2011 effective on 1 Feb. 2012, English translation available by subscription at <www.lawinfochina.com>. The Bidding Law Implementing Regulations at Arts 39, 40 and 41 detail the situations where collusion between bidders and between bid-inviter and bidders is deemed as bid rigging. See discussion on the Bidding Law Implementing Regulation at para. 247 below.
107. The Market Definition Guidelines were issued by the AMC on 24 May 2009, official Chinese text available at <<http://fldj.mofcom.gov.cn/aarticle/j/200907/20090706384131.html>>, English translation available by subscription at <www.lawinfochina.com>.
108. Wang Xianlin, *On the Enforcement of China's Antimonopoly Law in the Field of Intellectual Property* (in Chinese), 17 J. of Shanghai Jiaotong U. (Philosophy and Social Sciences) 13, 22 (2009); SAIC Competition Enforcement Bureau, *Early Efforts on the Regulation of Abuse of IPRs to Eliminate or Restrict Competition* (in Chinese), Biweekly of Administration for Industry & Com. 33-35 (2013). A copy of the Draft Intellectual Property Guidelines is on file with the authors.

- (1) *Guidance for Notification of Concentrations of Undertakings 2009*.¹⁰⁹
- (2) *Guidance for Notification Documents and Materials for Concentrations of Undertakings 2009* (hereinafter 'Information Requirement Guidance'), including a sample Notification Form and a flowchart outlining the merger control review process of the MOFCOM.¹¹⁰
- (3) *Working Guidance on Anti-Monopoly Review of Concentrations of Undertakings 2009 (amended 2010)*.¹¹¹

47. On 6 June 2012, the MOFCOM issued a revised sample Notification Form (hereinafter 'Notification Form 2012') and instructions for completing the form pursuant to the AML and the relevant AML implementing regulations. The Notification Form 2012, replacing the previous sample form that had been used since January 2009 following the issue of the Information Requirement Guidance, should be used for notifications of mergers and acquisitions on or after 7 July 2012. The Information Requirement Guidance continues to be effective. If there are conflicts between the Information Requirement Guidance and the Notification Form 2012 together with the accompanying instructions, the latter should prevail.¹¹²

§4. SOURCES' RELATION AND HIERARCHY

48. The AML overlaps with some competition-related provisions in other legislation such as the AUCL and the Price Law. In addition, sectors such as telecommunications and banking are subject both to sector-specific legislation and the AML. The AML does not explicitly repeal competition-related provisions existing in other laws and regulations and, therefore, co-exists with many pertinent provisions in other legislation. It should be noted that the M&A Rules were amended in 2009 to be consistent with the AML, and the SAIC is responsible for drafting the amendments of the AUCL to align the AUCL with the AML.

49. Based on the hierarchy of laws pursuant to the Legislation Law, in the case of contradictions, laws prevail over regulations and new laws prevail over old laws.¹¹³ Therefore, in case of conflict, the AML, as the more recent general legislation, should take precedence over previous general laws and regulations. To the extent that they do not contradict the AML, prior legislation also applies.

109. The Guidance for Notification of Concentrations of Undertakings was issued by the MOFCOM in January 2009, official Chinese text available at <<http://fldj.mofcom.gov.cn/aarticle/xgz/200901/20090105993824.html>>, English translation available by subscription at <www.lawinfochina.com>.
110. The Information Requirement Guidance was issued by the MOFCOM in January 2009, official Chinese text available at <<http://fldj.mofcom.gov.cn/aarticle/xgz/200901/20090105993841.html>>, English translation available by subscription at <www.lawinfochina.com>.
111. The Working Guidance was issued by the MOFCOM in January 2009 and revised in March 2010, official Chinese text available at <<http://fldj.mofcom.gov.cn/aarticle/xgz/200902/20090206034057.html>>.
112. The revised sample Notification Form and instructions were issued by the MOFCOM on 6 Jun. 2012 and effective on 7 Jul. 2012, official Chinese text available at <<http://fldj.mofcom.gov.cn/article/zcfb/201206/20120608166903.shtml>>.
113. See Legislation Law, Arts 79 & 83.

insurance regulatory body under the State Council (i.e., the China Insurance Regulatory Commission) is required, when examining an application for the establishment of an insurance company, to consider the needs of development of the insurance sector and fair competition.¹⁴⁴

64. *Shipping.* The Domestic Shipping Regulations stipulate that the State shall encourage and protect fair competition of the water transport market and prohibit monopoly and unfair competition.¹⁴⁵ Moreover, the International Shipping Regulations prohibit the use of advantageous positions by international shipping service providers to impose prejudicial pricing or other restrictive conditions to harm transaction counterparties.¹⁴⁶ The Implementation Rules of the International Shipping Regulations prohibit international shippers or their agents, warehouse storage service providers for international shipping, and international shipping containers and storage providers from providing services at abnormal and unreasonable rates and thus impeding fair competition as well as abusing advantageous positions to restrict the right of the transaction counterparties to freely select providers of ancillary services to international shipping, and from using their dominant positions in the relevant industries to entice parties to enter the transaction and thus harming competition in the industry.¹⁴⁷

65. The prospect of convergence and harmonization between the AML and the sector-specific laws and regulations is questionable because the issue of which law or regulation will prevail in event of conflict has not yet been resolved. Thus, conflicts in statutory hierarchy may happen in practice and may cause legal uncertainty.¹⁴⁸

§3. STATE-OWNED ENTERPRISES AND PUBLIC UTILITIES

66. Since the beginning of China's economic reforms in 1978 and especially since 1997, China has privatized a large number of State-owned Enterprises (SOEs) but SOEs remain significant in public utilities, including telecommunications, post, water, energy, and railroads, as well as other sectors such as banking and aviation. It has been noted that the most dominant SOEs in China are those in the public

144. *Ibid.*, Art. 67.

145. *Domestic Shipping Regulations*, Art. 3.

146. *International Shipping Regulations*, Art. 27(3).

147. See Implementation Rules of the International Shipping Regulations (promulgated by the Ministry of Transport in 2003 and amended in 2013), Art. 37, English translation available by subscription at <www.lawinfochina.com>.

148. See a discussion on sources' relation and hierarchy at paras 48-50 above. For a detail analysis on the relationship between the AML and the regulated industries and statutory monopoly, see Yong Huang, *Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75 *Antitrust L. J.* 126-128 (2008).

utilities and other strategic sectors that remain under the close supervision and tight control of the government.¹⁴⁹

67. As a piece of economy-wide legislation, the AML, by providing a broad definition of undertaking, in principle applies to all undertakings irrespective of their ownership or sector. However, Article 7 of the AML provides that the State shall protect the legitimate operating activities of industries dominated by the State-owned economy that are vital to the Chinese national economy or national security or both.¹⁵⁰ The legislative language of Article 7 is vague. This article has led some to believe that, with respect to the operation of the AML, special treatment will be given to large SOEs that operate effectively as monopolies in industries such as telecommunications and energy.¹⁵¹

68. It is noteworthy that Article 7 is in fact consistent with the Constitution, which provides that 'the state-owned economy, that is, the socialist economy under the ownership of the whole people, is the leading force in the national economy. The State ensures the strength and development of the state-owned economy'.¹⁵² In addition, the AML provides that 'the State formulates and implements competition rules compatible with the socialist economy, improves macro regulation and control, and strengthens a unified, open, competitive and orderly market system'.¹⁵³

69. *Merger review as an example.* Currently many of China's largest companies are SOEs whose merger and acquisition transactions are likely to qualify for merger review under the AML. Although Article 7 of the AML may be read to allow special treatment to SOEs operating in key industrial sectors, the MOFCOM has indicated that this will not be the case with respect to the AML merger control regime.¹⁵⁴ However, whether or not these SOEs will actually be subject to the AML merger control regime is doubtful, as some SOEs appear to be reluctant to comply

149. Eleanor Fox, *An Anti-Monopoly Law for China - Scaling the Walls of Government Restraints*, *Antitrust L. J.* 173 (2008).

150. Article 7 of the AML states: Undertakings in industries controlled by the state-owned economy and relied upon by national economy and national security, as well as industries that conduct exclusive and monopolistic sales in accordance with law shall be protected by the state to conduct their legitimate business activities. The state shall implement supervision, adjustment and control of business operations and pricing activities of these undertakings in accordance with law, and safeguard legitimate interests of consumers and promote technological progress. The undertakings mentioned in the preceding paragraph shall conduct their business in accordance with law in an honest and trustworthy manner, impose strict self-discipline, and accept supervision from the public. These undertakings shall not harm the interests of consumers by taking advantage of their controlling or exclusive position.

151. Bruce M Owen, Su Sun & Wentong Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 *Antitrust L. J.* 231, 244-247 (2008).

152. Constitution, Art. 7.

153. AML, Art. 4.

154. People's Daily, *Four Main Points of the Anti-Monopoly Law: An Interview with Shang Ming* (in Chinese), <http://news.xinhuanet.com/politics/2007-08/31/content_6635548.htm>, 31 Aug. 2007.

Penalties for infringement include orders to cease the conduct, confiscations of illegal gains and fines of between 1%–10% of annual turnover in the preceding accounting year.¹⁸³ In addition, offenders are liable for damages to those injured by the abusive behaviour.¹⁸⁴ Unsatisfied parties may apply for administrative reconsideration of decisions made by the AMEAs, and then bring administrative litigation to challenge the result of the administrative reconsideration. Parties are also allowed to bring administrative litigation without seeking administrative reconsideration in the first instance.¹⁸⁵

87. *Prohibition of dominant undertakings' abusive behaviour by other laws and regulations.* The AUCL prohibits public utilities and other undertakings with statutory monopolies from forcing others to buy goods from designated business operators so as to exclude other operators from fair competition.¹⁸⁶ An infringing undertaking will be ordered to make a rectification and may be imposed a fine between CNY 50,000 and CNY 200,000.¹⁸⁷

88. In addition, the Retailers and Suppliers Measures provide that retailers with an advantageous position are prohibited from: (1) refusing to accept goods from suppliers (unless due to the suppliers' fault or as otherwise agreed) after signing contracts with those suppliers; (2) demanding that suppliers take losses from damaged goods without prior agreement; (3) taking suppliers' goods from the shelves without prior agreement (unless as required by relevant laws, regulations or administrative orders); (4) forcing suppliers to participate in sales rebate programmes unconditionally or, having previously set a certain sales target as the condition of a sales rebate, forcing suppliers give sales rebates even if those sales targets have not been met; and (5) forcing suppliers to purchase designated goods or designated services.¹⁸⁸ The Retailers and Suppliers Measures do not clarify what would constitute an advantageous position. Thus, it remains to be seen how the Retailers and Suppliers Measures will interact with the AML.

89. *Prohibition of abusive behaviour regardless of the presence of a dominant position by other laws and regulations.* Except for the prohibitions on designated transactions by public utilities and statutory monopolists and on administrative monopoly, the AUCL prohibitions on two other types of abusive conduct apply to undertakings in general, without attempting to draw a distinction between dominant and non-dominant undertakings. These include below-cost sales (with a few exceptions) for the purpose of forcing out competitors, and tying or imposing other unreasonable conditions against the purchaser's wishes.¹⁸⁹ The AUCL does not provide for administrative liabilities for below-cost sales and tying or imposing other

183. *Ibid.*, Art. 47.

184. *Ibid.*, Art. 50.

185. *Ibid.*, Art. 53, para. 1.

186. AUCL, Art. 6.

187. *Ibid.*, Art. 23.

188. Retailers and Suppliers Measures, Art. 6.

189. AUCL, Arts 11 & 12.

unreasonable conditions. However, infringing undertakings are liable to injured parties for civil liabilities.¹⁹⁰

90. The Price Law prohibits the sale of goods at a price below-cost to drive competitors out of the market or to monopolize the market, price discrimination, and obtaining excessive profits in violation of the laws and regulations, and these prohibitions apply regardless of the existence of dominance.¹⁹¹ An infringing undertaking will be ordered to rectify the conduct and be confiscated of the illegal gains, and it may also be subject to a fine of less than five times the illegal gains. Warnings will be given and fines may be imposed if there are no illegal gains. Where the circumstances are serious, the infringing undertaking will be ordered to suspend business operations or have its business license revoked.¹⁹²

§3. CONCENTRATIONS

91. The AML merger control rules and the relevant implementing regulations set out the jurisdictional, procedural and substantive rules on notifiable transactions under the AML. This introduced a new merger control regime and replaced the merger control regime under the M&A Rules.¹⁹³ Whereas the M&A Rules applied only to foreign companies, the AML merger control regime applies equally to domestic Chinese companies and foreign companies. This section reviews the basic AML merger control rules, and the relevant implementing regulations are discussed in later chapters.

92. The AML provides that, as a basic principle, 'undertakings may implement concentrations in accordance with the law through fair competition and voluntary combination to expand business scope and enhance market competitiveness'.¹⁹⁴ The main provisions of the merger control regime are set out in Chapter IV of the AML.¹⁹⁵ A concentration of undertakings is defined as: (1) a merger of undertakings; (2) an acquisition of control of another undertaking through the purchase of shares or assets; or (3) an acquisition of control of another undertaking, or of the ability to exercise decisive influence on another undertaking, through contract or other means.¹⁹⁶

93. The AML does not define the terms acquisition of control and decisive influence, nor does it specify any notification thresholds.¹⁹⁷ An earlier draft of the

190. *Ibid.*, Art. 20.

191. Price Law, Art. 14 (2), (5) & (7).

192. *Ibid.*, Art. 40.

193. See para. 20 above for the development of China's merger control regime and paras 41–47 above for the relevant AML implementing regulations in relation to merger control.

194. AML, Art. 5.

195. *Ibid.*, Arts 20–31.

196. *Ibid.*, Art. 20.

197. The Notification Thresholds Rules prescribe the relevant thresholds. See discussion at para. 406 below.

119. *The role of the market definition.*²³⁰ The Market Definition Guidelines provide that defining the relevant market is a starting point for analysing competitive behaviour and is an important step in AML enforcement. The Market Definition Guidelines recognize that all competitive activities occur within specific market boundaries and that the market definition exercise is for the purpose of identifying the scope of the market in which undertakings compete against each other. Market definition has a significant impact on important issues such as identifying competitors and potential competitors, assessing the market share of the undertakings and market concentration levels, as well as determining the market positions of the undertakings.

120. *The relevant product and geographic market.* According to the Market Definition Guidelines, the relevant product market and the relevant geographic market should be defined for the purpose of AML enforcement.²³¹ A ‘relevant product market’ refers to a market that comprises a group or type of products considered to be close substitutes for each other on the demand side due to factors such as product characteristics, intended use, and price. As such products demonstrate a strong competitive relationship with each other, they may be deemed as the product scope within which the undertakings compete against each other.²³² A ‘relevant geographic market’ refers to the geographic scope within which the demand side obtains relatively close substitutes. Because such geographic regions demonstrate a strong competitive relationship, they may be deemed as the geographic scope within which undertakings compete against each other.²³³

121. The Market Definition Guidelines also emphasize that the temporal aspect of the relevant market should be considered if the products are clearly characterized by features such as the production cycle, expiration period, seasonality, prevalence and fashion, and the protection period of intellectual property rights.²³⁴ In addition, the Market Definition Guidelines provide that the definition of the relevant technology market may be necessary and factors such as intellectual property rights and innovation will be considered in cases involving technology transfer and licensing agreements.²³⁵

122. *Fundamental basis for defining the relevant market: analysis of substitutability.* The Market Definition Guidelines provide that the size of the relevant market is largely dependent on the extent of substitutability between products or geographic regions. In market competition, the existence of products considered to be close substitutes or the geographic regions where such products can be offered are the immediate and effective competitive constraints on an undertaking’s behaviour. Thus, defining the relevant market mainly involves demand-side substitution analysis. Supply-side substitution may also be considered if the competitive

230. Market Definition Guidelines, Art. 2.

231. Market Definition Guidelines, Art. 3, para. 1.

232. *Ibid.*, Art. 3, para. 2.

233. *Ibid.*, Art. 3, para. 3.

234. Market Definition Guidelines, Art. 3, para. 4.

235. *Ibid.*, Art. 3, para. 5.

constraints on an undertaking’s behaviour arising from the supply side are similar to those competitive constraints on the demand side.²³⁶

123. Demand-side substitution refers to the determination of substitutability among different products based on factors such as demand-side requirements for functionality, quality recognition and price acceptance, and accessibility of products.²³⁷ Supply-side substitution refers to the assessment of the extent of substitutability among different products from the perspective of the supply side, by taking into account factors such as the investment required by other undertakings to convert production facilities, risk factors and time required to enter into the target market.²³⁸

124. *Methodologies for defining the relevant market.* The Market Definition Guidelines emphasize that there is more than one method to define the relevant market. In addition to a substitution analysis from the demand side and the supply side, the ‘hypothetical monopolist test’ may apply where the market scope is unclear or difficult to define. The Market Definition Guidelines also encourage the use of economic analysis based on objective and accurate data and emphasize that whatever methods are used to define the relevant market, the basic attributes of the products, that is meeting consumers’ needs, should always be the focus and serve as the basis to adjust any obvious deviations that arise during the definition of the relevant market.²³⁹

125. The Market Definition Guidelines list a series of illustrative factors to be considered when defining the relevant product market and the relevant geographic market, based on analysing demand-side substitution and supply-side substitution. These factors include evidence of switching between products or services, product characteristics, intended use, price differences, sales channels, transport costs, regional trade barriers of the products as well as consumer preference and dependence on the products.²⁴⁰

126. *The SSNIP test.* The Market Definition Guidelines adopt the hypothetical monopolist test, that is the ‘Small but Significant and Non-transitory Increase in Price’ test (hereinafter ‘SSNIP test’), to determine the relevant market. This reflects that the AMC has adopted a more economic approach to market definition. The Market Definition Guidelines provide detailed steps for applying the SSNIP test and recognize that practical problems may arise from using the SSNIP test, including the ‘cellophane fallacy’ and the oft-forgotten impact of differences between consumer groups and geographic regions.²⁴¹ For example, with respect to the cellophane fallacy, the Market Definition Guidelines state that, in principle, when applying the SSNIP test, the benchmark price should be the prevailing price in a

236. Market Definition Guidelines, Art. 4.

237. Market Definition Guidelines, Art. 5.

238. *Ibid.*, Art. 6.

239. Market Definition Guidelines, Art. 7.

240. Market Definition Guidelines, Arts 8–9.

241. Market Definition Guidelines, Arts 10–11.

Chapter 5. Consequences of Violations and Enforcement

§1. ADMINISTRATIVE ENFORCEMENT

I. The Antitrust Authorities

A. Formation, Composition

145. Pursuant to the AML, the AMC was established in 2008 as a consultative and coordinating organ and the MOFCOM, the SAIC and the NDRC, all of which are AMEAs, were designated with powers to enforce the AML.²⁷²

146. *The AMC.* The AMC is a consultative and coordinating organization and its authorities and responsibilities include: (1) formulating competition policy; (2) organizing the investigation and assessment of the overall competition conditions and generating evaluation reports; (3) formulating and publishing anti-monopoly guidelines; (4) coordinating the enforcement work by the AMEAs; and, (5) other responsibilities as stipulated by the State Council.²⁷³

147. The day-to-day work of the AMC has been assigned to the MOFCOM. Until March 2013, the AMC had been chaired by China's former Vice Premier Wang Qishan. It had four vice chairmen (the heads of the MOFCOM, the NDRC, the SAIC and a deputy secretary-general of the State Council) and consists of fourteen commissioners (the incumbent deputy heads of fourteen ministries and institutions under the State Council). These ministries and institutions include: (1) the NDRC; (2) the SAIC; (3) the MOFCOM; (4) the SASAC; (5) the MIIT; (6) the Ministry of Transport; (7) the Ministry of Finance; (8) the Ministry of Supervision; (9) the State Intellectual Property Office (SIPO); (10) the CBRC; (11) the CSRC; (12) the CIRC; (13) the State Electricity Regulatory Commission (SERC); and (14) the Legislative Affairs Office of the State Council.²⁷⁴ The First Session of the 12th NPC in March 2013 approved the Plan of Reform and Transformation of Functions of the Institutions under the State Council.²⁷⁵ New heads of the relevant ministries and commissions were announced following the annual session of the NPC. However, whether and how the composition of the AMC will be updated is unknown by end of September 2013.

272. AML, Arts 9-10; See the *Reform Plan of the Institutions under the State Council*, approved at the First Session of the 11th NPC in March 2008 and the *Circular Concerning Organizational Structure of the State Council* (Guo Fa [2008] No. 11).

273. AML, Art. 9.

274. See the *Circular of the General Office of the State Council on the Main Responsibilities and Commissioner Appointment of the Anti-Monopoly Commission* (Guo Ban Fa [2008] No. 104).

275. See the *Plan of Reform and Transformation of Functions of the Institutions under the State Council*, issued by the State Council on 10 Mar. 2013, official Chinese text available at <http://www.gov.cn/2013lh/content_2354443.htm>, English translation available by subscription at <www.lawinfochina.com>.

148. *The NDRC.* The NDRC is one of China's three AMEAs and is responsible for price-related infringements of the AML in the areas of restrictive agreements, abuse of dominance, and administrative monopoly. The responsible unit within the NDRC is the Price Supervision and Anti-Monopoly Bureau, which also has other regulatory roles pursuant to the Price Law. There are nine divisions under the Price Supervision and Anti-Monopoly Bureau, including: (1) the Comprehensive Division; (2) the Legislative Affairs Division; (3) the Supervision and Guidance Division; (4) the Price Investigation Division; (5) the Fee Investigation Division; (6) the Market Price Supervision Division; (7) the Anti-Price Monopoly Investigation Division I; (8) the Anti-Price Monopoly Investigation Division II; and (9) the Competition Policy and International Cooperation Division. The Anti-Price Monopoly Investigation Division I, the Anti-Price Monopoly Investigation Division II, and the Competition Policy and International Cooperation Division are the working units responsible for the NDRC's role in AML enforcement and international cooperation.²⁷⁶

149. *The SAIC.* The SAIC is one of China's three AMEAs and is responsible for non-price related infringements of the AML in the areas of restrictive agreements, abuse of dominance, and administrative monopoly. The responsible unit within the SAIC is the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau (hereinafter 'Competition Enforcement Bureau'). The Competition Enforcement Bureau has five divisions, including: (1) the Comprehensive Division; (2) the Anti-Monopoly Enforcement Division; (3) the Anti-Monopoly Legislative Affairs Division; (4) the Anti-Unfair Competition Division; and (5) the Case Supervision and Coordination Division. The Anti-Monopoly Enforcement Division and the Anti-Monopoly Legislative Affairs Division are the working units responsible for the SAIC's role in AML enforcement.²⁷⁷

150. *The MOFCOM.* The MOFCOM is one of China's three AMEAs and is solely responsible for enforcing the merger control regime under the AML and coordinating the work of the AMC.²⁷⁸ The responsible unit within the MOFCOM is the Anti-Monopoly Bureau, which has seven divisions, including: (1) the General Office; (2) the Competition Policy Division; (3) the Consultation Division; (4) the Legislative Affairs Division; (5) the Economy Division; (6) the Supervision and Enforcement Division; and (7) the AMC Coordination Division.²⁷⁹

276. See Main Functions of the NDRC Price Supervision and Anti-Monopoly Bureau (in Chinese) at <<http://jjs.ndrc.gov.cn/jgsz/default.html>>.

277. See Composition of the SAIC Competition Enforcement Bureau (in Chinese) at <www.saic.gov.cn/fldyfbzdjz/jgsz/>.

278. The MOFCOM and the SAIC were jointly responsible for merger review pursuant to the M&A Rules. The SAIC ceased to be responsible for merger review after the AML took effect in 2008 and the subsequently amendment of the M&A Rules in 2009.

279. See Composition of the MOFCOM Anti-Monopoly Bureau (in Chinese) at <<http://fdj.mofcom.gov.cn/article/gwym/200811/20081105868495.shtml>>.

178. In cases where industry associations organize undertakings to reach monopoly agreements and the circumstances are serious, the industry associations concerned may be deregistered by the competent registration authorities.³⁰⁶

179. *Penalties for implementing anticompetitive concentrations: cease-and-desist orders and other remedies.* For implementing anticompetitive concentrations in violation of the AML merger control rules, apart from imposing fines, the MOFCOM may order that the undertaking in question cease the implementation of the concentration, dispose of the shares or assets, transfer the business within a given time limit or to take other necessary measures to restore the market to its state prior to the concentration.³⁰⁷

180. *Penalties for administrative monopoly: correction orders and disciplinary sanctions.* Under the AML, the superior authority of the public authority engaging in administrative monopoly shall order the latter to rectify its conduct. The persons directly in charge and others who are directly responsible for the administrative monopoly are subject to disciplinary sanctions. The AMEAs may make proposals to the relevant superior authority on the handling of the case.³⁰⁸

VI. Interim Measures

181. The AML and its implementing regulations to date do not expressly provide the AMEAs with powers to take interim measures in relation to a possible infringement of the AML that may result in irreparable damage. There are no reported cases to date that establish that the AMEAs have such powers.

182. It should be noted that, pursuant to the AUCL, the enforcement agencies have the power to impose interim measures by ordering that the undertakings under investigation provide information on the source and quantity of products, suspend sales, and wait for the investigation. The undertakings under investigation cannot remove, conceal or destroy the property in question.³⁰⁹ In addition, under the Price Law, enforcement agencies may order the undertakings under investigation to suspend sales and may register and preserve evidence if it might be destroyed or difficult to obtain later on.³¹⁰ To the authors' knowledge, to date there are no reported cases where interim measures have been imposed pursuant to the AUCL and the Price Law.

306. AML, Art. 46, para. 3.

307. AML, Art. 48.

308. AML, Art. 51.

309. AUCL, Art. 17(3); also see para. 389 below.

310. Price Law, Art. 34 (3) & (4); also see para. 390 below.

§2. CIVIL ENFORCEMENT

183. Prior to the enactment of the AML, enterprises in China were actively seeking a legal basis in the existing framework, for example, by relying on the AUCL and the Contract Law, to challenge their competitors' alleged monopoly conduct. High-profile cases included *Sichuan Dexian v. Shanghai Sony Guangdong Electronics* (hereinafter '*Dexian v. Song*'), on leveraging and bundling of consumables in an aftermarket, and *Dongjin v. Intel*, on bundling and intellectual property rights disputes.³¹¹ At the same time, Chinese judges tried cases involving monopoly disputes based on broad principles in existing statutes.³¹² In *Dexian v. Sony*, the court held that the plaintiff failed to proffer convincing evidence that Sony applied digital recognition code on Sony digital cameras and camcorders as well as the bundled batteries and, by doing so, abused its intellectual property rights so as to restrict competition from non-Sony batteries. In *Dongjin v. Intel*, the parties reached a settlement and the plaintiff withdrew the complaint.³¹³

184. Under the AML and other competition-related laws, undertakings shall be responsible for civil liabilities if they infringe the relevant provisions and their conduct causes damages to others.³¹⁴ This means that civil enforcement of the AML and other competition-related laws is allowed and private parties can bring actions in the courts to challenge the alleged conduct and to claim damages. However, the AML and other competition-related laws themselves do not prescribe, for example, any procedures for seeking damages, evidentiary rules or guidelines for determining compensation. Instead, civil liabilities and litigation procedures are generally governed by the *General Principles of Civil Law 1986* (hereinafter '*Civil Law Principles*') and the *Civil Procedure Law 1991* (amended 2007 and 2012) (hereinafter '*Civil Procedure Law*').³¹⁵ Therefore, the Civil Law Principles and the Civil Procedure Law also govern private competition litigation. On 8 May 2012, the Supreme People's Court published the *Provisions on Several Issues Concerning the Application of Law in the Trail of Civil Dispute Cases Arising from Monopoly Conduct*.³¹⁶

311. Zhihong Hou, *Sichuan Dexian Sued Sony in Shanghai for Monopolizing Behaviour* (in Chinese), *China Securities Daily* (30 Jun. 2006); People's Daily Online, *Review: Causes and Consequences of Dongjin's Counterclaim against Intel* (in Chinese), <<http://fit.people.com.cn/GB/8219/68399/68409/4621379.html>>, 24 Jul. 2006.

312. Kong Xiangjun & He Zhonglin, *Establishing China's Anti-Monopoly Civil Litigation Regime* (in Chinese), in *Report on Competition Law and Policy of China 2010*, 24-25 (China Society for World Trade Organization Studies ed., Beijing: Law Press 2010).

313. See *Ibid.*, at 24-25 and 28-29.

314. AML, Art. 50; AUCL, Art. 20; Price Law, Art. 41; Bidding Law, Art. 53.

315. The Civil Law Principles were promulgated by the NPC on 12 Apr. 1986, effective on 1 Jan. 1987 and amended in 2009, English translation available at <www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm>. The Civil Procedure Law was promulgated by the NPC on 9 Apr. 1991, effective on the same day and amended in 2007 and 2012, English translation available at <www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383880.htm> and <www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471601.htm>.

316. Official Chinese text of the Supreme People's Court Provisions on Several Issues Concerning the Application of Law in the Trail of Civil Dispute Cases Arising from Monopoly Conduct (hereinafter '*AML Judicial Interpretations*') is available at <http://www.court.gov.cn/xwzx/xwfbh/twzb/201205/t20120508_176702.htm>.

(i.e., Beijing, Shanghai, Tianjin and Chongqing), or should be heard by other intermediate people's courts designated by the Supreme People's Court. Upon approval by the Supreme People's Court, basic courts may have first-instance jurisdiction over civil anti-monopoly litigation.³⁵⁸

207. *Territorial jurisdiction.* As a general rule, civil proceedings in China should be brought to the courts in the judicial districts where the defendants are located.³⁵⁹ If an action involves multiple defendants located in different judicial districts, any of the appropriate courts can hear the case.³⁶⁰ Special territorial jurisdiction rules apply where the general territorial jurisdiction is difficult to determine or where it is more appropriate to apply other rules of jurisdiction.³⁶¹ For example, contract dispute claims can be brought to the courts in the place where the contracts are performed.³⁶² For tort claims, actions can be brought to the courts where the defendants are located or where the alleged conduct occurred or is occurring.³⁶³ The AML Judicial Interpretations confirm that territorial jurisdiction over civil anti-monopoly litigation shall be determined according to the specific facts of the case and the relevant provisions of the Civil Procedure Law and judicial interpretations on jurisdiction over tortious and contractual disputes.³⁶⁴

208. *Appeal.* Dissatisfied parties can appeal to the court at the next higher level within fifteen days after the date on which a judgment is served or within ten days after an order is served.³⁶⁵ The Civil Procedure Law does not limit the grounds of appeal; therefore, appeal is available on both on questions of fact and questions of law. The enforcement of the first-instance judgment is automatically stayed upon the filing of an appeal within the prescribed time limits. Judgments rendered by the appellate court are final and enforceable.³⁶⁶

209. *Time limits for adjudication.* A first instance trial generally concludes within six months after the case is filed. Under special circumstances, a six-month extension may be allowed upon approval from the president of the court. Any further extensions, if needed, shall be approved by the court at a higher level.³⁶⁷ For expedited summary procedures, adjudication shall be made within three months after the case is filed and no extension of time is available.³⁶⁸ An appellate court shall complete the hearing within three months after the appeal application is

accepted. Further extensions, if needed, shall be approved by the president of the appellate court.³⁶⁹

210. *Trial supervision.* Trial supervision procedure, also known as a retrial procedure, is available for dissatisfied parties to challenge a final and enforceable judgment by approaching the court at the next higher level within six months after the effective date of the judgment.³⁷⁰ Parties may apply for a trial supervision procedure on grounds such as insufficiency of evidence, error of law or deficiency of procedure.³⁷¹ The president of the court that rendered the judgment or a people's court and a people's procuratorate at a higher level may also invoke a trial supervision procedure.³⁷² Unlike an appeal, the initiation of a trial supervision procedure by dissatisfied parties does not operate as an automatic stay of judgment unless otherwise ordered by the court.³⁷³

II. Sanctions

211. Pursuant to the Civil Law Principles, the court may impose any one or a combination of the following civil liabilities on an unsuccessful defendant: (1) cease infringements; (2) remove obstacles; (3) eliminate dangers; (4) return property; (5) restore the original conditions; (6) repair, rework or replace; (7) compensate for losses; (8) damages for breach of contract; (9) eliminate the ill effects and rehabilitate reputation; and (10) issue an apology.³⁷⁴ It was expected that orders to cease the infringement, compensate for losses and eliminate ill effects and dangers would be proper remedies for monopoly disputes brought before the courts.³⁷⁵ The AML Judicial Interpretations confirm that if the defendant's monopoly conduct caused losses to the plaintiff, the court may order the defendant to cease the infringing conduct, pay damages or bear other civil liabilities based on the plaintiff's claims and the proven facts.³⁷⁶

A. Nullity

212. The AML and the Price Law do not specifically provide that agreements or other acts will be invalidated as a result of an infringement of the relevant

369. *Ibid.*, Art. 176.

370. Civil Procedure Law, Arts 199 & 205.

371. *Ibid.*, Art. 200.

372. *Ibid.*, Arts 198 & 208.

373. *Ibid.*, Arts 199 & 206.

374. Civil Law Principles, Art. 134.

375. See He Zhonglin & Zhu Li, *Principal Questions of Civil Anti-Monopoly Litigation: Report of the Consultation Meeting of Civil Anti-Monopoly Litigation and Judicial Interpretation* (in Chinese), People's Court Daily, 6, available at <<http://rmfyb.chinacourt.org/public/detail.php?id=130778>>, 6 Aug. 2009.

376. AML Judicial Interpretations, Art. 14.

358. AML Judicial Interpretations, Art. 3.

359. Civil Procedure Law, Art. 21, paras 1-2.

360. *Ibid.*, Art. 21, para. 3.

361. *Ibid.*, Arts 23-32.

362. *Ibid.*, Art. 23.

363. *Ibid.*, Art. 28.

364. AML Judicial Interpretations, Art. 4.

365. Civil Procedure Law, Art. 164.

366. *Ibid.*, Art. 175.

367. Civil Procedure Law, Art. 149.

368. *Ibid.*, Art. 161.

231. The Measures on the Prohibition of Price Monopoly detail the circumstances in which horizontal price fixing agreements are prohibited under the AML. Competing undertakings are prohibited from: (1) fixing or changing prices; (2) fixing or changing the range of price changes; (3) fixing or changing commissions, discounts or other fees that affect prices; (4) using an agreed price as a benchmark for negotiating with third parties; (5) setting a standard formula for pricing; (6) agreeing that prices may not be changed without other undertakings' consent; (7) fixing or changing prices through other means; and (8) other price fixing agreements as determined by the NDRC.⁴⁰⁵

232. Cartel activities, especially price fixing, have been widely reported in China over the years and appear to be commonplace, even after the enactment of the AML. As the enforcement authority responsible for price-related infringements under the AML and for the Price Law, the NDRC and its local bureaus have taken actions tackling a number of price fixing cartels since the AML entered into force in 2008.

233. *The Rice Noodle Cartel.* In March 2010, the NDRC's local price bureau in the Guangxi province punished a number of local rice noodle producers for colluding to increase and fix prices for rice noodles. The local bureau found that the cartel leaders held meetings to discuss pricing, coerced other producers to join the cartel, and eventually reached an agreement to collectively increase prices and to share the profits derived from the price cartel. The local bureau relied on the AML and the Price Law and fined three leading producers of rice noodles CNY 100,000 each, and other eighteen producers of rice noodles between CNY 30,000 and CNY 80,000 each. Twelve producers of rice noodles received leniency in return for cooperation with the investigation.⁴⁰⁶

234. *The Green Bean and Garlic Cartel.* In July 2010, the NDRC Price Supervision Department, together with the MOFCOM Department of Market Supervision and the SAIC Department of Market Regulation, announced that three decisions had been made by local price authorities in Inner Mongolia, Shandong, Henan and Guangdong in relation to collusion and manipulation of prices of green beans and garlic. It was alleged that the Jilin Corn Centre Wholesale Company led and cooperated with other companies, through meetings and other means, to fabricate and disseminate information on price increases and to collude to increase the price of green beans. It received a fine of CNY 1 million, which has been the most serious penalty to date since the enactment of the AML. Several cooperating companies received fines of CNY 500,000, and warnings were issued to 109 agricultural trading companies alleged to have joined the cartel. The trade associations and trading companies in the Henan and Shandong provinces who were alleged to have

405. Measures on the Prohibition of Price Monopoly, Art. 7.

406. NDRC, *Rice Noodle Producers in Nanning and Liuzhou Investigated and Penalized for Colluding in Price Increases* (in Chinese), <http://jjs.ndrc.gov.cn/fjgld/t20100331_338262.htm>, 31 Mar. 2010.

colluded to increase the price of garlic were fined between CNY 80,000 and CNY 100,000 each.⁴⁰⁷

235. *LCD producers panelized for price cartel.*⁴⁰⁸ In January 2013, the NDRC announced that it had investigated and penalized six LCD panel manufacturers from Korea (Samsung and LG) and Taiwan (AU Optronics, Chunghwa, Linolux and HannStar) for fixing the price of LCD panels in China. This was the first time that the NDRC imposed penalties on an international cartel.

236. The NDRC began its investigations in December 2006. It found that, from 2001 to 2006, the six LCD panel manufacturers had held fifty-three 'crystal conferences' in Korea and Taiwan. These meetings were held almost on a monthly basis and used to exchange information about the LCD panel market and negotiate the price of LCD panels. The LCD panels sold into Mainland China by the six manufacturers were priced according to the negotiated prices or exchanged information. The NDRC estimated that, from 2001 to 2006, LCD panels accounted for 70%-80% of the manufacturing cost of televisions. It found that the six manufacturers had sold over 5 million LCD panels into Mainland China during this period and made illegal gains of CNY 208 million. It found that the manufacturers had manipulated market prices and harmed the legitimate interests of other business operators and consumers, breaching Article 14(1) of the Price Law.

237. Pursuant to Articles 40 and 41 of the Price Law, the NDRC imposed aggregate penalties of CNY 353 million. It ordered the repayment of CNY 172 million to Chinese television manufacturers (nine in total), confiscated CNY 36.75 million, and imposed fines of CNY 144 million. The highest individual penalties were imposed on Samsung (CNY 101 million), LG (CNY 118 million), and Linolux (CNY 94.41 million). The NDRC stated it had reduced the penalties as the LCD panel manufacturers had voluntarily provided relevant information.

238. The six manufacturers also committed to strictly abide by China's laws, consciously maintain market competition order, and protect the legitimate interests of other business operators and consumers; use their best efforts to fairly supply China's television manufacturers and provide all customers the same opportunities to purchase high-end and high-tech products; and extend the warranty period on LCD panels sold in China from eighteen months to thirty-six months. It is estimated that the extension of warranty will save Chinese television manufacturers CNY 395 million in repair and maintenance costs. As the price fixing conduct occurred from 2001 to 2006, which was prior to the AML coming into effect in

407. NDRC, *NDRC, MOFCOM and SAIC Announced the Investigation against and Penalties Imposed on Hoarding and Price Collusion of Agricultural Products* (in Chinese) <http://jjs.ndrc.gov.cn/gzdt/t20100702_358457.htm>, 2 Jul. 2010.

408. NDRC, *Six Foreign Enterprises Panelized for Monopolizing LCD Panel Prices* (in Chinese), <http://jjs.ndrc.gov.cn/gzdt/t20130117_523203.htm>, 17 Jan. 2013; NDRC, *Answers to the Press regarding the LCD Cartel Case* (in Chinese), <http://jjs.ndrc.gov.cn/gzdt/t20130117_523205.htm>, 17 Jan. 2013.

to recognize that vertical agreements might be pro-competitive in certain circumstances, particularly where there is sufficient inter-brand competition.⁴⁵⁰

277. The Provisions on Regional Blockades aim to curb the barriers to entry into regional markets that are erected by local governments and public authorities. The Provisions on Regional Blockades prohibit any entity or individual from restricting the flow of products and services originating in other regions within China to the relevant local market.⁴⁵¹ However, it is difficult to assess the exact scope and the effectiveness of this prohibition because reported cases were seldom dealt with pursuant to the Provisions on Regional Blockades.

A. Exclusive Distributorship

278. The AML vertical agreement rules do not contain provisions on exclusive distributorships but provide a sweeping clause to prohibit other vertical monopoly agreements as determined by the AMEAs.⁴⁵² However, it should be noted that the AML prohibits dominant undertakings from refusing to deal and from imposing unreasonable transaction conditions on their counterparties without justification.⁴⁵³ Such prohibitions may be interpreted to cover exclusive distributorship arrangements.

279. To date, there have been no reported cases concerning competition issues in exclusive distributorship arrangements and it remains to be seen how exclusive distributorships will be assessed and treated under the AML.

B. Exclusive Dealing

280. The AML vertical agreement rules do not contain provisions on exclusive dealing but provide a sweeping clause to prohibit other vertical monopoly agreements as determined by the AMEAs.⁴⁵⁴ However, it should be noted that the AML prohibits dominant undertakings from requiring, without justification, that parties enter into exclusive dealing agreements with them or designated undertakings.⁴⁵⁵

281. Notably, the Judicial Interpretations on Technology Contracts and the Technology Import and Export Regulations prohibit technology contracts or technology import-export contracts from containing clauses that restrict either the ability of the

450. AML, Art. 17(4) & (5); see Global Competition Review, *China Issues Draft Dominance Guidelines*, <www.globalcompetitionreview.com/news/article/28504/china-issues-draft-dominance-guidelines/>, 27 May 2010.

451. See the Provisions on Regional Blockades.

452. AML, Art. 14.

453. *Ibid.*, Art. 17(5).

454. AML, Art. 14.

455. *Ibid.*, Art. 17(4).

technology recipient to obtain the supplier's products from alternative sources or the freedom of the technology recipient to purchase competing technology.⁴⁵⁶

282. Furthermore, the Retailers and Suppliers Measures prohibit suppliers from restricting retailers' freedom to purchase products, including the supplier's own products, from other sources and prohibit retailers from restricting its supplier from selling its products or services to other retailers.⁴⁵⁷

C. Selective Distribution

283. To date, there are no rules in the AML, the AML implementing regulations or other laws or regulations that specifically address selective distribution.

D. Franchising

284. In principle, the AML prohibits vertical agreements that fix resale prices or restrict minimum resale prices and other vertical agreements that are determined by the AMEAs as having the effect of eliminating or restricting competition. The AML also provides an exemption mechanism. To date, there have been no AML implementing regulations or enforcement actions concerning franchising-related competition issues.

285. However, reference should be made to the State Council *Regulations on the Administration of Commercial Franchising 2007* (hereinafter 'Franchising Regulations'),⁴⁵⁸ which replaced the MOFCOM *Administrative Measures on Commercial Franchising 2004* (hereinafter 'Franchising Measures').⁴⁵⁹ Under the Franchising Regulations, a commercial franchise refers to a business activity where the franchisor licenses to the franchisee the right to use the franchisor's operational resources such as registered trademarks, enterprise logos, patents, and know-how, and the franchisee conducts the business under the unified business format agreed to in the franchise agreement and pays the franchisor franchise fees in return.⁴⁶⁰

286. It is noteworthy that, under the Franchising Measures, franchisors were prohibited from creating a market monopoly or impeding fair competition through

456. Judicial Interpretations on Technology Contracts, Art. 10(5); Technology Import and Export Regulations; Art. 29(5).

457. Retailers and Suppliers Measures, Arts 18(2) & 7(2).

458. The Franchising Regulations were promulgated by the State Council on 31 Jan. 2007 and effective on 1 May 2007, official Chinese text available at <www.gov.cn/zwjk/2007-02/14/content_527207.htm>.

459. The Franchising Measures were promulgated by the MOFCOM on 31 Dec. 2004 and effective on 1 Feb. 2005, official Chinese text available at <www.chinacourt.org/flwk/show1.php?file_id=98686>.

460. The Franchising Regulations, Art. 3.

323. In *Coca-Cola/Huiyuan*, the MOFCOM found that Coca-Cola had a 60.60% market share in the carbonated drinks market in China.⁵¹⁷ In *Mitsubishi Rayon/Lucite*, the MOFCOM found that Mitsubishi would obtain a post-transaction market share of 64% in the Chinese methyl methacrylate (MMA) market.⁵¹⁸ In *Panasonic/Sanyo*, the MOFCOM found that Panasonic would hold a post-transaction market share of 61.60% in the Chinese button-battery market.⁵¹⁹ In *Novartis/Alcon*, the MOFCOM found that the parties would have a combined global market share of over 60% for ophthalmological anti-infection products, although Novartis accounted for less than 1% of that market share. In addition, with respect to the market for contact lens care products in China, the MOFCOM found that the parties' combined market share would reach 20% and the merged entity would become the number two player in the market.⁵²⁰ In *Pfizer/Wyeth*, in addition to market share, the MOFCOM considered the impact of the transaction on the Herfindal-Hirschman Index (HHI), which is a measure of economic concentration in the market. The MOFCOM found that the merged entity would acquire a market share of 49.4% and a post-merger HHI of 2,182, resulting in an HHI increase of 336, and decided that the transaction would have the effect of eliminating or restricting competition.⁵²¹ However, the MOFCOM decisions to date have been brief and have failed to describe how the MOFCOM assessed the market share and concentration levels, and commentators have asserted that this lack of transparency creates legal uncertainty.⁵²²

324. *Non-competition considerations.* Industrial policy and other non-competition considerations may play a role in the AML merger control regime. First, the AML provides that, as a general principle, the State shall protect the legitimate operation of industries dominated by the State-owned economy that are vital to the national economy and national security.⁵²³ The AML also provides that, as a general principle, undertakings may implement concentrations through fair competition and voluntary combination in accordance with the law to expand business scale and increase market competitiveness.⁵²⁴ These provisions reflect China's

517. See MOFCOM Announcement [2009] No. 22 Regarding the Decision of Prohibition of Coca-Cola's Acquisition of Huiyuan, official Chinese text available at <<http://fdj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html>>.

518. See MOFCOM Announcement [2009] No. 28 Regarding Conditional Clearance of Mitsubishi Rayon's Acquisition of Lucite, official Chinese text available at <<http://fdj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html>>.

519. See MOFCOM Announcement [2009] No. 82 Regarding Conditional Clearance of Panasonic's Acquisition of Sanyo, official Chinese text available at <<http://fdj.mofcom.gov.cn/aarticle/ztxx/200910/20091006593175.html>>.

520. See MOFCOM Announcement [2010] No. 53 Regarding Conditional Clearance of Novartis' Acquisition of Alcon, official Chinese text available at <<http://fdj.mofcom.gov.cn/aarticle/ztxx/201008/20100807080639.html>>.

521. See MOFCOM Announcement [2009] No. 77 Regarding Conditional Clearance of Pfizer's Acquisition of Wyeth, official Chinese text available at <<http://fdj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html>>.

522. Mark Furse, *Merger Control in China: The First Year of Enforcement*, 31 Eur. Competition L. Rev. 98 et seq (2010).

523. AML, Art. 7.

524. *Ibid.*, Art. 5.

industrial policy that emphasizes the role of SOEs and encourages the consolidation of domestic companies.

325. In addition to the 'restriction of competition' test, the AML merger control regime provides a public interest test that allows a concentration with competition concerns to be otherwise cleared if the parties can prove that the concentration is in the public interest.⁵²⁵ The AML also requires that the MOFCOM consider the impact of a proposed concentration on the national economy.⁵²⁶

326. Furthermore, the Information Requirement Guidance issued by the MOFCOM provides that specific explanations should be given in the notification materials if the concentration is related to national security, industrial policy, state-owned assets or well-known brands.⁵²⁷ The Review Measures further provide that, during the review process, the MOFCOM may solicit opinions on the proposed concentration from the relevant government agencies.⁵²⁸

327. *National security review.* It should be noted that the AML provides that, if mergers and acquisitions of domestic enterprises by foreign investors or other forms of concentrations involving foreign investors concern national security, apart from the AML review, the transactions shall be examined in accordance with the relevant provisions of the State for national security review.⁵²⁹ The AML does not clarify what the relevant provisions of the State are and does not provide further guidance on the implementation of the national security review.

328. In addition, the national security provisions of the M&A Rules require a notification to the MOFCOM where a transaction will result in a foreign investor obtaining a controlling equity interest in a domestic Chinese enterprise and the transaction involves a key industry, factors which may impact on State economic security or the possession of a well-known trademark or historical Chinese brand.⁵³⁰

329. On 3 February 2011, the General Office of the State Council promulgated the *Circular on Establishing a Mechanism of Security Review of Mergers and Acquisitions of Domestic Enterprises by Foreign Investors 2011* (hereinafter 'Circular on National Security Review'), which took effect on 6 March 2011.⁵³¹ The Circular on National Security Review sets out the scope, content, review mechanism and procedures of the national security review. An Inter-Ministerial Joint Committee (hereinafter 'Joint Committee') is established under the State Council to

525. AML, Art. 28.

526. *Ibid.*, Art. 27(5).

527. Information Requirement Guidance, Art. 18.

528. Review Measures, Art. 6.

529. AML, Art. 31.

530. M&A Rules, Art. 12.

531. Official Chinese text of the Circular on National Security Review is available at <www.gov.cn/zwgk/2011-02/12/content_1802467.htm>; English translation is available at <www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=130963>.

349. To remedy the identified competition concerns, the parties were required to implement the following measures: (1) Sanyo shall completely divest the rechargeable button lithium batteries business of one of its plants in Japan to an independent third party; (2) Sanyo shall divest either: (a) its consumer nickel-metal hydride battery business in Japan to an independent third party and supply its Sub-CD type batteries produced in China to such purchaser; or (b) its consumer nickel-metal hydride battery business in China to an independent third party; (3) Panasonic shall divest its nickel-metal hydride batteries business in Japan to an independent third party; and (4) Panasonic shall, with respect to Panasonic Ev Energy Co. Ltd., a joint venture between Panasonic and Toyota, reduce its capital contribution percentage from 40%–19.5%, and relinquish its voting rights, right to appoint directors, and veto rights relating to the vehicle nickel-metal hydride battery business, and Panasonic Ev Energy Co. Ltd. shall change its name to exclude 'Panasonic'.

350. The Panasonic/Sanyo decision highlights the active role that the MOFCOM is willing to play in international transactions where there appears to be a competition concern in China. The MOFCOM demonstrated that it had conducted thorough investigations before reaching its decision. The decision also demonstrates that the MOFCOM will require remedies to be applied outside of China in order to mitigate the adverse effect on competition in China.

351. *The Novartis/Alcon Decision*.⁵⁵² On 13 August 2010, the MOFCOM announced that it had approved the proposed acquisition of Alcon by Novartis, both global pharmaceutical companies headquartered in Switzerland. The approval was conditional on the fulfilment of Novartis' commitments with respect to ophthalmological pharmaceuticals and contact lens care products in China.

352. During the review, the MOFCOM found that competition concerns arose in the markets for ophthalmological anti-inflammatory/anti-infective combinations and contact lens care products in China because of the parties' high combined market shares and the position of the parties' close competitors in those markets. The parties would have a combined global market share of over 60% for ophthalmological anti-infection products. In the market for contact lens care products in China, the parties' combined market share would reach 20% and the merged entity would become the number two player in the market.

353. To address the identified competition concerns, Novartis was required to: (1) completely cease its sales of 'Infectoflam', Novartis' branded ophthalmological anti-inflammatory/anti-infective combinations product, in China by the end of 2010; (2) not relaunch Infectoflam products or similar products with a new brand in the Chinese market within five years of the effective date of the MOFCOM's decision; (3) not sell ophthalmic anti-inflammatory/anti-infection combination products it owns before the completion of the transaction or sell such products from other countries into China; and (4) report, on a yearly basis, the performance of these undertakings to the MOFCOM within such five-year period.

552. See the *Novartis/Alcon Decision*, para. 323 above, n. 4.

354. Furthermore, within twelve months of the effective date of the MOFCOM's decision, Novartis was required to terminate an exclusive distribution agreement between Shanghai Ciba Vision, Novartis' wholly-owned subsidiary, and Hydron Contact Lens Co., Ltd. (hereinafter 'Hydron'), the top contact lens care product manufacturer in China which holds over 30% of the market, and Shanghai Ciba Vision's sole distributor in China. The MOFCOM's concern was that the distribution agreement might enable coordination between the merged entity and Hydron in terms of price, production volume and sales regions, thereby eliminating or restricting competition. Novartis was required to provide the MOFCOM with reports on its performance of the undertakings within one week of the termination of the distribution agreement. Novartis was also required to entrust a trustee to supervise its performance of the imposed conditions in accordance with the MOFCOM's Divestiture Measures.

355. *The Seagate/Samsung Decision*.⁵⁵³ On 12 December 2011, the MOFCOM published its conditional clearance decision on the acquisition of the hard disk drive (HDD) business of Samsung by Seagate Technology (hereinafter 'Seagate'). The MOFCOM defined the relevant product market as the HDD market and the relevant geographic market as global. It conducted market investigations and undertook competition analysis, examining issues such as market conditions, procurement patterns, capacity utilization, product innovation, buyer power, market entry, prior transactions in the HDD market, price changes during specific time periods, and the impact of the transaction on consumers and competition in the HDD market.

356. The MOFCOM found that the HDD market is highly concentrated and that the level of concentration has increased over the past two decades. The five HDD manufacturers (Seagate, Western Digital, Hitachi Storage, Toshiba and Samsung) held 33%, 29%, 18%, 10%, and 10% share in the global HDD market, respectively, and held similar market shares in the Chinese market. The MOFCOM also found that HDD are homogeneous products and that the HDD market is highly transparent. The key customers of HDD products are large personal computer (PC) manufacturers and it is easy and not costly for PC manufacturers to switch suppliers. The MOFCOM also found that large PC manufacturers use closed bids to procure HDD products and negotiate bilaterally with multiple HDD manufacturers on a quarterly basis to obtain and maintain competitive prices. To ensure a continuous and steady supply, large PC manufacturers allocate their demand among two to four HDD manufacturers based on prices and other factors. Thus, the MOFCOM considered that it is important to continue the existing procurement patterns in order to maintain competition in the HDD market.

357. Furthermore, the MOFCOM found that innovation plays a key role in the HDD market and IPRs and know-how are important for HDD manufacturers. Non-IP intellectual assets and economies of scale create barriers to entry and there have

553. See MOFCOM Announcement [2011] No. 90 Regarding Conditional Clearance of Seagate's Acquisition of Samsung Hard Disk Drive Business, official Chinese text available at <<http://fdj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml>>.

369. The MOFCOM's *Google/Motorola Mobility* decision indicates that one should not take it for granted that the approaches and outcomes of the MOFCOM's merger analysis will be convergent with those taken by the EU and US authorities. China is a nascent antitrust jurisdiction. The MOFCOM is facing enforcement capacity constraints and pressures on balancing the objectives of the AML to protect competition, on the one hand, and to promote the healthy development of the socialist market economy, on the other hand. Drawing the fine line between efficiencies and China's policy to promote indigenous innovations and protect domestic industries tests the MOFCOM's wisdom and courage.

§3. MARKET/PRODUCT EXTENSION MERGERS

370. At the time of writing, there are no clear rules under the AML on market/product extension mergers.

§4. PURE CONGLOMERATE MERGERS

371. At the time of writing, there are no clear rules on pure conglomerate mergers. However, the *Coca-Cola/Huiyuan* decision, as discussed in paragraphs 333–339 above, provides information on the MOFCOM's approach to the conglomerate aspect of merger analysis.

§5. JOINT VENTURES

372. Only transactions that constitute concentrations of undertakings are potentially subject to the AML merger notification requirement. The AML and its implementing rules are silent on whether joint ventures are subject to the AML merger notification requirement. The MOFCOM, in its Draft Notification Measures, stated that the creation of full-function joint ventures would be subject to AML merger control and thus notifiable provided that the other criteria, such as the change of control and the notification thresholds, were satisfied. However, the final Notification Measures did not include this provision on the notifiability of joint ventures.⁵⁵⁹ However, it should be noted that the Notification Form 2012 lists joint ventures, regardless of they are full-function or not, as a type of notifiable transactions. To date, the MOFCOM has cleared the transactions conditionally in three cases involving the setting up of joint ventures, including GE/Shenhua, Henkel/Tiande, and ARM/Giesecke & Devrient/Gemalto.⁵⁶⁰

559. Also see discussion on joint ventures at paras 143–144 above.

560. Official Chinese text of the relevant decisions are available at <<http://fdj.mofcom.gov.cn/article/ztxx/>>.

373. *The ARM/Giesecke & Devrient/Gemalto Decision*.⁵⁶¹ On 6 December 2012, the MOFCOM announced that it had conditionally approved the proposed joint venture between ARM Holdings (ARM), Giesecke & Devrient (G&D), and Gemalto. ARM is a semiconductor intellectual property supplier based in the UK. G&D, headquartered in Germany, is active in banknote production and processing, security documents and identification systems security solutions. Gemalto is a provider of digital security solutions headquartered in the Netherlands.

374. The relevant market was defined as 'trusted execution environment' (TEE), a type of security solution that protects trusted sources and data through setting up an independent execution environment surrounding the operation system. The joint venture will research, develop and market TEE. The MOFCOM found that ARM's application processors for household electronic products business is vertically related to the joint venture's proposed activities. As a leading licensor of IPRs of application processors for household electronic products, ARM holds a strong market position. The joint venture's activity in the downstream market of researching, developing and integrating TEE depends on ARM's TrustZone technology, which is part of ARM's IPRs of application processors for household electronic products. Post-transaction, ARM could exercise its market power in the IPRs of application processors for household electronic products market to discriminate against other TEE developers or lower the performance of other TEE by specifically designing its IPRs to do so. The MOFCOM also found that it would be very difficult to enter the market for application processors because potential entrants need to have significant capability and experience in research and development and possess the relevant IPRs. Thus, the MOFCOM considered that the proposed joint venture is likely to have the effect of eliminating or restricting competition in the market for TEE.

375. In order to address the identified competition concerns, the MOFCOM imposed two conditions on ARM. First, post-transaction, ARM shall provide, on a non-discriminatory basis, security monitoring codes and other relevant information about TrustZone that is necessary for the development of TEE based on the TrustZone technology. Second, ARM shall not design its IPRs in a way that would lower the performance of competing TEE. The commitments remain in force for eight years.

561. See MOFCOM Announcement [2012] No. 87 Regarding Conditional Clearance of the Establishment of a Joint Venture between ARM Holdings, Giesecke & Devrient and Gemalto, official Chinese text available at <<http://fdj.mofcom.gov.cn/article/ztxx/201205/20120508134324.shtml>>.

included when calculating turnover for financial institutions is provided. The turnover of banking institutions shall include net interest earnings, handling fees and net commission earnings, income from changes in fair market value, income from currency exchange, and other operating income.⁶¹⁴ The turnover of securities trading companies includes handling fees and net commission earnings (including earnings from brokerage, asset management, underwriting and sponsoring, and financial advisory), net interest earnings, investment income, income from currency exchange, and other operating income.⁶¹⁵ The turnover of futures companies shall include handling fees and net commission earnings and net interest earnings from bank deposits.⁶¹⁶ The turnover of fund management companies shall include earnings from management fees and handling fee earnings.⁶¹⁷ The turnover of insurance companies shall include insurance premiums of the original insurance contracts plus reinsurance premiums received less ceded premiums.⁶¹⁸

III. Market Share Calculation

412. The AML merger control regime does not apply a market share test to determine notifiability. The current notification thresholds, based on objective turnover criteria, are purely monetary.

IV. Other Relevant Notions

413. *Definition of control or decisive influence.* The AML and the AML implementing regulations to date do not provide a definition of control or decisive influence. Therefore, whether there is an acquisition of control or ability to exercise decisive influence will be assessed on a case-by-case basis.

414. An early draft of the Notification Measures provided some help in determining when minority investments could give rise to control. The basic rules were that, in the absence of an acquisition of over 50% of the voting rights or assets of another undertaking, if the acquirer obtains the ability to decide the appointment of one or more board members and key management members, budget, operations and sales, pricing, substantial investments or other important management and operational strategies, an acquisition of control exists that can be caught by the notification requirements.⁶¹⁹ However, these rules were removed from the final version of Notification Measures, and there is no longer any definition of control relating to minority stake acquisitions. Accordingly, the issue of whether an acquisition of minority equity or assets leads to an acquisition of control or decisive influence by one undertaking over another undertaking will need to be determined on a case-by-case basis and in consultation with the MOFCOM during the pre-notification

614. Turnover Calculation Measures for Financial Institutions, Art. 3.

615. *Ibid.*, Art. 4.

616. *Ibid.*, Art. 5.

617. *Ibid.*, Art. 6.

618. *Ibid.*, Art. 8.

619. Draft Notification Measures (March 2009 version), Art. 3(2).

consultation process. Practitioners have indicated that the MOFCOM tends to follow the European approach and often deems a transaction resulting in a joint control or a negative control as a concentration of undertakings.⁶²⁰

415. *Joint ventures.* The AML does not specifically address the circumstances in which joint ventures should be analysed as concentrations as opposed to potential monopoly agreements. An early draft of the Notification Measures provided that 'the establishment of a new continuously and independently operating enterprise by two or more undertakings fall into the scope of concentrations of undertakings as provided in Article 20 of the AML'.⁶²¹ This provision was deleted from the final Notification Measures, which no longer address the treatment of joint ventures. However, as noted in paragraphs 143-144 above, joint ventures, regardless of whether they are full-function or not, are deemed as a type of notifiable transactions under the AML merger control regime.

416. *The notifying party and filing fee.* Pursuant to the Notification Measures, the notification of a concentration effected by way of merger shall be made by all undertakings involved in the merger. For a concentration effected by other means, the undertaking acquiring control or exert decisive influence shall make the notification, with the assistance of the other undertakings to the concentration.⁶²² In practice, a target company may be involved as a joint filing party. Filing fees have not been introduced at the time of writing.

§2. STRUCTURE OF PROCEEDINGS

I. Preliminary Assessment and Full Investigation

417. The AML contemplates a two-phase review process. The Notification Measures and the Review Measures detail a number of key procedural issues regarding the hearing and issuance of statement of objections.

418. *Investigations.* The MOFCOM may investigate a notified concentration by requesting information and documents from the parties, customers, suppliers, competitors and other relevant entities or government agencies.⁶²³ The MOFCOM's recent practice indicates that the MOFCOM has actively solicited the views of trade associations, market participants, and government authorities and conducted on-site investigations when it deems necessary.⁶²⁴

419. *Hearing.* The Review Measures provide that the MOFCOM may convene a hearing upon its own initiative or at the request of the relevant parties. The

620. Nicholas French & Michael Han, *China*, in *Getting the Deal Through: Merger Control 2011*, 93 (Global Competition Review ed., London: Law Business Research, 2010).

621. Draft Notification Measures (March 2009 version), Art. 3, para. 2.

622. Notification Measures, Art. 9.

623. Notification Measures, Art. 13; Review Measures, Arts 4-5.

624. See a discussion on the *Coca-Cola/Huiyuan* Decision at paras 333-339 above.