DECLARATORIA SULLA TESI DI DOTTORATO

Il/la sottoscritto/a

COGNOME Sperindeo

NOME Stefano

Matricola di iscrizione al dottorato 1466523

Titolo della Tesi:

Anti-Monopoly Laws: The New Chinese Perspective. Unveiling anticompetitive conducts and impacts on foreign firms

Dottorato di ricerca in Diritto dell'Impresa

Ciclo XXV

Tutor del dottorando Ghezzi Federico

Anno di discussione 2013

DICHIARA

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Data ____20.1.2013_____

COGNOME	Sperindeo	NOME	Stefano

A Sergio e Rosaria

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Introduction

China has made substantial changes to its economic landscape in the last decades (1980-2010). Under the vision of its paramount leader, Deng Xiaoping, the country has moved from a centralized economy to a market driven economy, alluring foreign firms and investors and fueling a formidable growth. China – as a *latecomer country* – is attracting international firms and capitals to complete its "*catching-up"* strategy; foreign firms bring in fact technologies, IPRs, competencies and employment, essential factors to ensure the country's growth in the long run. Chinese marketplace needs now foreign capitals and firms like flowers need bees, a symbiotic relationship. But foreign investors do require also a modern competition system that shields them from abuses of State which traditionally played an important role in controlling the economy as well as an effective and independent judicial system.

The adoption of the Anti-Monopoly Law (which took effect on 1 August 2008) was thus a crucial step towards an effective competition system; it's like a milestone that should highlight the passage from a centralized system to a market oriented economy. However this step is very sensitive and although the efforts made are appreciable many doubts still remain. The amendments to its antitrust laws have shuffled the Chinese's competition regime leaving foreign businesses and, to a greater degree, the entire global system in a haze of uncertainty. The international business community has fears that the ghosts inherited from the past – like the significant role of

the State into the economy, the risk of arbitrary decisions taken according to a political rather than an efficient review, a schizophrenic enforcement and the lack of competencies of the judicial system – might be not over. These issues are a pain in the neck for international firms.

No doubts, China is crossing crucial times. But we believe that Chinese authorities have now the opportunity to demonstrate, with the adoption of the AML, the future country's growth will be achieved from market-driven forces, less inefficiencies, more competition and a reduced State's intervention. Howsoever foreign investors are warned: this does not mean that Chinese competition regime will resemble exactly the U.S. and EU ones. Rather China will be shaping a regime accordingly to its unique social context. This will be probably the result of an equilibrium given that the political forces are trying on one side to open its market to foreign economic players and on the other to maintain a strategic control over the economy.

In this work thus we'll try to shape the most important challenges after the adoption of the AML for foreign firms. The AML is in fact an important piece of legislation but alone it does not clear all the questions and problems that international firms face in China. The work is divided in three Chapters. In the first Chapter we address the particular context of the Chinese economy and legal system where international firms are required to deal with. The second Chapter is dedicated to the new anti-monopoly laws and its main provisions. The third Chapter addresses the consequences for international investors and the enforcement issues as well.

Chapter 1 - The Dragon's Rise

1 - An Unpredictable Success

Researchers and economists in western countries schools are still astonished about how a socialist – or post-communist – country has been able to fuel such a huge economic expansion that has been capable to alter the world assets and influences. Many economic schools are shocked by from the impressive data of the Chinese GDP's growth and we need to admit that the Chinese performance has gone beyond also the most optimistic outlooks released in the late '90s. Probably with a population well above 1 billion, China was naturally expected to hold again the title of largest world economy, a title lost in the eighteen century when the British ventured the first industrial revolution. But nobody expected the timetable of the Dragon's rise which is absolutely amazing: in less than 35 years China has transformed its economy deeply and is predicted to account for one fourth of the world domestic product. Such growth traditionally began in the 1978 rounds of reforms when China enacted an important transition from a centralized to a market-oriented economy. The rounds have increased the privatization of farmlands raising the responsibility of individuals and eventually the number of small-enterprises which drove the Chinese extraordinary expansion. This resulted in a growth of the gross domestic product (GDP) at an average annual rate of 9.4 percent[1]

[1] Data of CIA World Economy and FMI Economical Statistics, December 2010 available at https://www.cia.gov/library/publications/the-world-factbook/China

and in the surpassing of Japan and Germany's GDPs.[2] At this rate China's GDP is expected to overtake also the U.S. by 2035 becoming the world's largest economy. Despite of these important achievements, China has many undeveloped areas that contrast with the new cities' skyline and the GDP *pro capite* remains still very low.[3]

To understand this impressive change it's helpful to take a look at the economic and social context that triggered the development in the last two decades and the controversial issues of this expansion. China has assumed a worldwide leadership but has kept its political (and social) retrospective which still leads every aspect of the Social Republic's life. China's economic, political and social circumstances colored and designed also the antimonopoly law as well as many other policies.

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[2] *Id.* previous note.

[3] TheEconomist, The World Data Book 2011.

The 1978-1992 periods

When the round of reforms began in 1978, China's economy was driven by the state and private companies had only a reduced role. The state run entirely the game on competition (這就形成).[4] The competition was considered a synonym of capitalist dominance and strongly condemned, while the government supported a labor competition among people and producers to spread the communist doctrine (競爭)[5]. The Chinese Communist Party was engaged - together with Russia - in a global challenge against capitalist countries; cold war was dividing the world into two different spheres of influence. In this context the Communist Party used competition just to strive its policy magnifying the Stakhanovism myth to force farmers and people to produce higher outputs. They used these examples to spur industrial production (工業生產) and to raise the wealth. However the Communist crisis in the late 1980s raised many doubts in China about the sustainability of the political doctrine. As Hu Ping noted 'the limit of communism lies in the inevitable level of underdevelopment, in higher unemployment rates and

[4] At that time there was no need for policy or law regulating market competition and State-Owned Enterprises (SOEs) dominated the market with few private enterprises surviving. The communist party controlled the business environment drawing the requested output, providing the rules and appointing directors and officers of corporations. SOEs had neither independence nor responsibility to bear losses.

[5] See for example the intense debate inside the Communist Party at the beginning of the '70s.

finally in poverty. Communist Party was aware of the fact that it had to turn into something different."[6] In those years protests were spreading all around the communist regimes and some changes were inevitable. Russia and Eastern European dictatorships soon collapsed and many other communist friendly countries faced turmoil. China decided that was time to reform the system before being surpassed by events. The Communist Party started moving gradually towards a complex system of economic reforms.

The new perspective was enacted by the intuit of its paramount leader, Deng Xiaoping (鄧小平). In 1992, the 14th Congress of the Chinese Communist Party officially declared that the main target of China's policy was to create a "socialist market economy."[7] In the following years many reform were undertaken to enhance the China's economy in the private sector. Private enterprises were supported in many ways and they grew rapidly also thanks to the large amounts of foreign investments.

Although the raising of the private role in China's economy, private companies still remained small-sized. Over 95 percent of the companies were small or medium sized and SOEs remained the largest enterprises in China, controlling crucial sectors like electricity-supply, oil, transportation, telecom and insurance-banking. These sectors were still strategic for the Chinese government.

China also transformed its regulatory ground, embracing crucial changes in the structure, and putting

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[6] Hu Ping - "The ideological doctrine" – Journal of Politics – January 1989, n°37, p 62-67. 共產主義是不可避免的不發達較高的失業率水平的限制，終於在貧窮

[7] Called also as "擁抱關鍵結構的變"

many efforts to make the country compatible with the requirements of a market economy. The change was impressive also in this field. China moved from a system modeled on former Soviet Union to an open market economy (so called 開放的). In the past, every major industry was controlled and managed by a corresponding ministry that coordinated the production for the industry. The government "regulation" was missing as each company was managed by the state. Regulation was unknown in China because the state was both the owner and the supervisor of almost every economic sector. With the need of a more opened economy, China passed gradually many acts to reduce the government's role.

The first government intervention was focused to reduce the presence of the State in non-essential industrial sectors as machinery, electronics, chemicals, and textiles. As one can imagine the choice was strategically driven as these industries did not constitute conditions of "natural monopoly," were not related with national security and public goods, and could be easily dismissed by the government. With many interventions, China gradually removed the controlling ministries supervising the non-strategic industries and replaced them with "chambers of commerce" or "industrial associations", organizations just with the right to represent and coordinate their interests.

The Chinese intervention was double-faced. China followed a different approach with the key industries for the government's national interest and economic development, such as electricity, petroleum, banking, insurance, railroads, and aviation. In respect of them the Chinese government played a different game retaining and

even strengthening its dominant role. No controlling right was transferred and the dominant firms remained mostly state-owned. Even if some shares were given away they were just a minority stake of the company with no risks for government. For these industries, the government continued playing two roles being both the owner of the major companies and the referee (the regulator of the market). This situation was the result of the fact that Chinese authorities were worried to lose the control over multibillion dollar business and eventually their political power.[8]

Also Chinese legal system moved accordingly to the changes and the new political priorities. China's lawmaker attention focused on economic laws, contract law, bankruptcy law, corporate law, foreign investment law, securities law and eventually China also passed some partial regulation on competition law. However the legal background was very problematic for many reasons. In particular the structure of enforcement was still driven by the state and there were many risks of government interferences; the legal system lacked of preparation and expertise and, no jurisprudence was available to help litigants and judges in solving cases. [9]

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[8] See Jordan Stuart & Fenzh – Some controversial issues in Greater China: Are we enough developed to build the new millennium Chinese Society? Journal of Policies and Folk. 2010 II, 223. The Authors suggested to establish a separate agency for the most strategic industries and to diminish the shares of the government as well: "with a lower self-interest in those sectors and with an independent agency, the Chinese government could ensure a better development of the Chinese economy".

[9] See Emch & Hao, The New Chinese Anti-monopoly Law, an Overview; Electronic Distribution Press 2007 35. The Author stressed that the critical points in the first Chinese Reforms lied in the enforcement of the new rules as the Chinese courts and agencies had

The restructure of China legal system by the end of 1992 brought many government agencies to life and charged them with enforcement of the economic statutes and regulations. However, many researches raised concerns about the effective enforcement by those administrative agencies: "In China we have many cases where is not transparent or predictable the activity of [administrative agencies] as the appointment process of the members is opaque and the government may easily nominate people pursuing the government interest and not independent."[10] A confirmation came also from the rule making processes of the administrative agencies: they were not subject to a transparent and uniform standard since they did not have a procedure clarifying the process they need to follow before adopting regulations.[11]

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not much experience in the legal field. Original statement "在那些年裡，中國的法律制度的重構給生活帶來經濟的法規和規章的執行，並囑咐他們有很多的政府機構。然而，許多研究問題的有效實施提出了關於這些機構的管理："在中國，我們有很多情況下，是不是透明的，可預見的活動[行政機構成員的任命程序，是不透明的，並可以很容易地命名為政府追求政府利益，而不是獨立的人"

[10]See Wha Cao Ming – Empowering the new Chinese Era – Shao Law Edition 2009 at 56："在那些年裡，中國的法律制度的重構給生活帶來經濟的法規和規章的執行，並囑咐他們有很多的政府機構。然而，許多研究問題的有效實施提出了關於這些機構的管 "在中國，我們有很多情況下，是不是透明的，可預見的活動[行政機構成員的任命程序，是不透明的，並可以很容易地命名為政府追求政府利益，而不是獨立的人

[11] See also Bruce M. Owen, Su Sun and Wentong Zheng, China's Competition Policy Reforms: The Antimonopoly Law and Beyond, SIEPR Discussion Paper No. 06-32 (2007) at 9; and Nathan Bush, The

Additionally China's judges did not have an high qualification and did not experience a legal training since they were hired directly from military apical directors. At the beginning of the 90s China's government thus ensured a proper legal trainee and career for judges. However there was the strong belief that many of them were absolutely unable to handle difficult cases that rather required high specialized courts and professionals experts. The special courses were considered insufficient and inconsistent by the international community because they were not enough to prepare qualified and professional individuals able to deal with the new and complex regulations.

The implementation of antitrust law in China was quite unknown in this period as well.[12] Until the late 1970s,

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PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead. Additionally, Su Sun notes that "the actions by administrative agencies are now subject to judicial review by the People's Courts, a low quality litigation review criticized for its narrow scope and opaque procedures of the process; and not mention to the continuous verdicts in favor of government agencies." With the raise of the judicial reviews fostered by the China's burgeoning economy, the issue of enforcing the regulations without any undue influence may explode and show the seriousness of the political branch hooked in the judicial system. As Su Sun said " Chinese Constitution stresses the People's Courts must exercise the judicial power independently, but still practically no guarantee of judicial independence is ensured in China".

[12] By comparison, certain countries in the Western world have antitrust statutes that are more than one hundred years old. Canada, for instance, had anti-cartel legislation as early as 1889, with the Sherman Act following in the United States one year later. *See* Jim Dinning & Mark Katz, *Canada: Cartel Enforcement*, ASIA-PAC. ANTITRUST REV. 2011, 40, 40 (2011).

China maintained the economy[13] under the authoritarian leader Mao Zedong (毛澤東), and the "price was determined by administrative fiats and not by the interaction of market supply and demand."[14] During this time, "prices were often set in accordance with the government's artificial preferences for certain sectors or population groups, resulting in serious distortions in the economy."[15] Under this system, there was no capacity for competition in the Chinese economy; thus, there were no

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[13] The shift towards a market economy began with a series of economic reforms starting in 1978 with the Reform and Opening-Up Policy. Shang Ming, *Antitrust in China—A Constantly Evolving Subject*, 5 COMPETITION L. INT'L 4, 4 (2009); *see also China Overview*, WORLD BANK, http://www.world bank.org/en/country/china/overview (last visited June 22, 2011) (outlining the modern history of the Chinese economy).

[14] Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT'L L. 643, 652 (2011). "價格是由行政菲亞特，而不是由市場的供給和需求的相互作用價格是由行政菲亞特，而不是由市場的供給和需求的相互作用"

[15] See supra note: 價格是由行政菲亞特，而不是由市場的供給和需求的相互作用價格是由行政菲亞特，而不是由市場的供給和需求的相互作用價格是由行政菲亞特，而不是由市場的供給和需求的相互作用價格是由行政菲亞特，而不是由市場的供給和需求的相互作用價格是由行政菲亞特，而不是由市場的供給和需求的相互作用價格是由行政菲亞特，而不是由市場的供給和需求的相互作用價格是由行政菲亞特，而不是由市場的供給和需求的相互作用

need for antitrust laws in China in this period. In other words "the term antitrust (而不是互作) was unknown"[16]

With the launch of the Reform and Opening-Up Policy (相互) in 1978, China began to shift away from the communist economy and entered into a new economic phase. It followed a planned market economy (有計劃的市場經濟) that allowed for limited competition in the country. Therefore after first administratively readjusting the relative prices of key sectors for addressing some structural problems, Chinese government inflated market forces into its economy from the early 1980s with the dual-pricing system (雙重定價制度), which allowed firms to sell their goods volumes in excess of government-set targets at market prices (定價制). At beginning the dual pricing was introduced only in the petroleum sector in 1981, but it was later extended to all sectors of the Chinese economy. Although the difference in pricing between government-priced goods and market goods was very high in the initial phases of the program, the differential decreased dramatically by the early 1990s, allowing greater price liberalization and better competition in the Chinese markets.

The 1992-20012 periods

The 1990s brought additional economic reforms to China, continuing the progressive trend of the previous decade. The most important and pervasive fiscal reforms during this era came in 1992 under the 14th National Congress of the Chinese Communist Party (CCP) (中國共

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[16] See for details Mark Wang Li Hao; Law was driven by Mao, Beijing University Library, 1987, at 56 where the author says "定價在石油部門介紹，僅在年，它延伸到各行業的定價在石油部門介紹，定價在石油部門介紹延伸到各"

產黨全國代表大會). The Party sustained the drive to transform China into a socialist market economy (黨全國代表大會),[17] accompanying the country into a new economic phase and far away from its roots of a command economy.[18] In 1992, the Chinese government completely abolished price controls with the Price Regulation Act of 1992[19] for the vast majority of products in many key sectors as raw materials, transportation, agricultural, food, and light industry goods.

The changes were dramatic. "Among the 737 raw materials and transportation prices that were controlled by the central government at the end of 1991, 648 were fully liberalized in 1992. Furthermore, 1992 saw liberalization of fifty out of sixty agricultural prices and of all consumer goods prices except those of salt and certain medicines. Food prices in 844 counties and cities were also liberalized. In subsequent years, price liberalization

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[17] Efforts to regulate competition prior to the 1990s were isolated and rare. Ming, The Chinese Efforts: competition is winning? At 445 2008. Two examples of such efforts are the Provisional Regulation on the Development and Protection of Socialist Competition in 1980, which pointed to "the need to curb monopolies, in particular administrative monopolies," and the Regulation on the Administration of Advertisement in the People's Republic of China, which specifically prohibited monopolies and unfair competition in the advertising sector.

[18] *See Ming Shang infra at note 34.* "During [the years following 1992], many laws, regulations, administrative rules and regulatory documents relating to competition [were] passed.").

[19] Namely " 某些關鍵部門，如原材料，交通運輸，農業，食品，輕工商品的價格管制"

spread to additional industries, including steel, the majority of machinery products, onshore crude oil, and coal. These practices followed China into the new millennium; by the end of 2001, over ninety percent of Chinese industry had a market-determined price."[20]

With the new millennium, China continued to enact additional measures to spur competition and growth. In this period the most important achievement was the admission to the WTO which has provided many other opportunities to the country. Additionally in 2000, the State Council adopted the Telecommunications Regulation of the People's Republic of China, which enforced competitive principles in that area and threatened to break up monopolies in the communications sector. In

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[20] See Whu Zheng "Antitrust in China: Regulation and Enforcement 2008, available at www.ssrn.com/120828/id=98&abstract65. The original statement "其中737原材料和運輸價格在1991年年底，由中央政府控制，有648人是在1992年全面開放。此外，1992年開放，50，60農產品價格和消費品價格的上漲，除了鹽和某些藥物。在844個縣和城市的食品價格也放開了。在隨後的幾年中，蔓延到其他行業，包括鋼鐵，機械產品的大部分，陸上原油，煤炭價格放開。這些做法，遵守中國進入新千年，到2005年底，超過90%的中國工業由市場決定的價格其中737原材料和運輸價格在1991年年底，由中央政府控制，有648人是在1992年全面開放。此外，1992年開放，50，60農產品價格和消費品價格的上漲，除了鹽和某些藥物。在844個縣和城市的食品價格也放開了。在隨後的幾年中，蔓延到其他行業，包括鋼鐵，機械產品的大部分，陸上原油，煤炭價格放開。這些做法，遵守中國進入新千年，到2005年底，超過的中國工業由市場決定的價格. 其中737原材料和運輸價格在1991年年底，由中央政府控制，有648人是在1992年全面開放。此外，年開放，50，60農產品價格和消費品價格的上漲，除了鹽和某些藥物。在個縣和城市的食品價格也放開了。在隨後的幾年中，蔓延到其他行業，包括鋼鐵，機械產品的大部分，陸上原油，煤炭價格放開。這些做法，遵守中國進入新千年，到2005年底，超過90%的中國工業由市場決定的價格

2001, the State Council issued both the Regulation on the Prohibition of Regional Blockades in Market Economy Activities (法規關於禁止在市場經濟活動中) and the Decisions on Rectifying and Standardizing the Market Economic Order (的地區規範市場經濟秩序的決), both of which were designed to reduce anticompetitive practices. In the years leading up to the enforcement of the AML in 2008, a number of other regulations and laws were passed all with the objective of increasing competition and perfecting the socialist market economy. The main purposes of these laws and administrative regulations were generally four-fold: (1) to deter and eliminate cartels, (2) to curb abusive practices such as predatory pricing and tying, (3) to control mergers, and (4) to prevent regional boycotts and industry monopoly.

Currently, we can see the results: Chinese economy has experienced crucial changes with the remarkable effort to reduce the power of the State Owned Enterprises, ("SOEs"; "擁抱關鍵結構的變") - the state leading instrument to drive the economy during the communist time. The decline of the importance of the SOEs allowed the raise of the country's private sector. According to some national statistics on the composition of China's economic structures completed in 2010, among nearly four million running companies, SOEs and enterprises held by the State accounted for 52.2 percent of the entire capitalization and amounted at 44.6 percent if we consider the total annual revenue.[21] The liberal reforms in

[21] The government data shows that by the end of 2012, China's small and medium sized enterprises will consist of 55.6 percent of the country's GDP, 77.7 percent of industrial production value added, 69.9

China have lowered the share of SOEs in the economy to less than one-third. This is an impressive evidence of the important changes from 1978, when nearly all enterprises were owned directly or indirectly by the State.

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percent of retail sales, 48.2 percent of tax revenues and 72.3 percent of exports.

2 – The Open Door Policy

By the end of the 80s the Communist Party was well aware that to support the growth China needed to shift from high-labor sectors - as the manufacturer industry where the competitive advantage are not sustainable in the long run because of the raise of labor costs – to high-capital sectors (tech, utilities, defense etc..) and that this movement was to be supported by the State. This intent was made clear with the congress of Communist Party of 1992 which declared that aim of China was the development of a *social market economy* through the systematic attraction of foreign investments to fuel a "*catching up"* process. Foreign companies, enemies till 1978, were thus welcomed in China since the beginning of the 1990s. China stipulated many bilateral agreements with Germany and the US - which were the first countries admitted to enter Chinese market followed by Japan and other western countries. Consequently all the legislation to do business in China was amended to open the country to foreign corporations and to make easier to transfer capitals towards Beijing. This era goes traditionally under the name of "*Open Door Policy"* (門戸開放政策), a policy inspired to open China to international relations and economic reforms in order to overcome the deep social and economic crisis caused by the Maoist regime.

Thus during the 1990s – 2010s China experienced an impressive increase of the number and value of M&A transactions with international partners.

Foreign Private Equity Investors entered in several Chinese companies whose capital was wholly state-owned ("SOE" State Owned Enterprises; 國有企業) or privately owned ("POE" Private Owned Enterprises; 民營企業) throughout new corporate instruments like the Equity Joint Venture (indicated by the acronym "EJV";中外合資經營企業), or the Wholly Owned Foreign Enterprises ("WOFE";外商獨資企業). The EJV and WOFE, along with other corporate vehicles typed by Chinese law, fall within the broader category of company under Chinese law to foreign capital (better known as "FIE" acronym for Foreign Invested Enterprises; 外商投資企業外商投資企業) which were subject to the special legal framework of the "*law for foreign investments*."

The natural continuation of this policy was tedious and raised many international issues but was achieved with success only with the China's accession into the World Trade Organization (WTO) formalized in 2004. This moment strengthened the historical and impetuous economic development (for fifteen years China's GDP grows steadily to average values of about 9.5%) projecting the country in the spotlight of a leading role, together with Japan.[22] The policy of the *Open Door* has created the basis for a modern Chinese law and allowed international businesses to invest in the country. The unifying factor that linked heterogeneous regulatory interventions consisted, mainly, by the need of the Chinese government to give legitimacy, both substantive and formal, to its intense and innovative action, and the desire to create a more and more attractive country to foreign investors.

The provisions to attract foreign firms

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[22] The Chinese progression has been impressive. Just after seven years the admission into the WTO China has the capacity of invest abroad as in Europe and Africa.

In this context, over the past decades, China has experienced an exponential increase of the value of foreign direct investment ("FID", 外國直接投資), especially those performed by Private Equity and M&A. Initially these kind of operations were performed with prevalence in the SOE but soon foreign investment reached also the POE and FIE, to the detriment of other traditional investments. That was a tangible sign that the economic system changed and the Chinese legal system began to be more appropriate to conduct such operations. In this respect, it must be recognized that in 2003, China has become the beneficiary country of the 10 per cent of the global FID and in 2004 this flow accounted for 15 per cent of global FID. [23]

Foreign investors initially (1990-2000) were focused on venture capital operations, mainly carried out in the most advanced urban areas and involved companies active in intense-work sectors (goods, raw-materials, oil, cotton), but from 2000s they definitely geared towards all kind of sectorial activities (IT, telecommunications, internet, renewable energy, aerospace, defense industry, radar, navy etc..).

Private Equity now play an important role with a high number of private equity funds active in China: in 2005 they

[23] As mentioned above the growth in China in the field of M&A operations by foreign investors and Chinese is confirmed by impressive data: in 2005-2010 the M&A in China has grown at an average of 30% per year. Consider also that in 1990, there were only four completed operations of M&A with a value greater than one million U.S. dollars, whereas in 2004 the number of such operations reached 1373.

reached the investment of four billion dollars, a significant goal taking into consideration the impressive presence of the SOEs generally active in sectors of activities considered "mature". Consider that in 2006 over 80 new venture capital funds and private equity have been registered in China; they collectively raised approximately $ 18 billion with 15 billion $ invested in about 450 operations of venture capital. [24]

The arrival of foreign firms and capitals made the Chinese capital market more active. From 2006 the divesting options became available also to foreign investments with instruments already known and well diffused in the Western economies - like the admission to listing on stock markets (the IPOs; 首次公開發售), the sale to industrial investors, or the ability to resell shares into secondary markets.[25] Just in 2006 were completed one hundred divestment operations from foreign investors: about 45% were conducted through IPO; 35% with industrial reselling and 20% on secondary markets reselling. Facilitating divestiture plans was strategic for foreign investors and let Chinese market become more competitive and attractive for international firms. Before 2006 Chinese legislation did not allow foreign firms to sell shares in the market (together with many other limitations) without consent of the Court or a special authorization of the local authorities. The 2006

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[24] Investor active in Venture Capital and Private Equity act in China through a significant number of Chinese and foreign investment funds, the latter act either directly or indirectly through mere representative offices. Even if only recently *business angels* (天使投資人) have begun to operate making investments in early stage start-ups in a value comprised between 40,000 and 350,000 €.

[25] See the Note and the Circular 75 on the foreign capital attraction (關於往返) issued by the SAFE in late 2005. The instrument was given in order to reduce uncertainty for investors and to attract foreign firms.

interventions also eliminated many restrictions and limitations to corporate governance for foreign investors as "the right of veto of members in relation to statutory changes, the unanimity of consent in certain circumstances, the investment restrictions on certain sectors; the restricted access to various forms of debt and the limitations for foreign investors to repatriate the funds invested and the gains obtained from Chinese companies".[26]

Generally the Open Door Policy lessened the sturdy central control over the economy with power that was gradually transferred from the central bureaucrat communist party to foreign firms (especially the *big businesses*) that were free to invest or divest in many industrial sectors.[27]

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[26] See Professor Ling Lu Pin, Investment in China after the WTO's admission, Oxford Press, 2009 II Edition. In the original language: 否決權的成員在有關法定的變化，一致同意在某些情況下，某些行業的投資限制，因此銷售的百分比在某些領域的活動的權利;限制出入各種形式的債務的可能性和局限性對外國投資者的資金調回境內投資獲得的利益否決權的成員在有關法定的變化，一致同意在某些情況下，某些行業的投資限制，因此銷售的百分比在某些領域的活動的權利;限制出入各種形式的債務的可能性和局限性對外國投資者的資金調回境內投資獲得的利益否決權的成員在有關法定的變化.

Additionally, to ensure the effective possibility of divestment the Circular 75 deemed lawful the use of contractual provisions similar to those known in Europe or in the US (for example *put and call agreements* - 將沿], *drag-along* and *tag-along* clauses, and other similar divesting agreements).

[27] Surely the control of the central government was and is still very strong but it's incomparably lower than ten years ago. For example is remarkable that the liquidation of a FIE is not yet an automatic

Thus, the considerable success of the Chinese policies may be reconnected to the following factors:

- The enormous economic growth that China joined. The growth is significant also in the cultural and political role of the country: the middle class is raising and analysts predict that Chinese economy will continue growing steadily in the next decades. Admittedly China is getting a country "economically mature" as the U.S. and EU;
- The increasing weight (growing exponentially in these years) of China's role in the production, distribution and consumption of goods and services worldwide. This was due also to the intense economic integration with other countries (notably ASEAN -東盟 - the acronym for Association of South East Asian Nations including the states of Brunei, Cambodia, Indonesia, Laos, Myanmar, Malaysia, Philippines, Singapore, Thailand and Viet Nam), Japan, the U.S. and the European Union;
- The globalization of the production and the distribution of goods and services and the growing interest shown by the *big businesses* towards China and its market;
- The gradual and controlled opening of certain sectors of production activities or services China, previously restricted (if not prohibited) to foreign investors;
- The signing by China of numerous international treaties or bilateral multilateral agreements (eg. regarding the intellectual property protection or the procedures for the recognition of arbitration decisions); the crucial admission into the WTO after long and difficult negotiations.
- The monumental vast and complex reorganization and privatization by the Chinese government of thousands of SOEs managed under the SASAC,(國務院國有資會) - the State Assets Supervision and Administration Commission. These reforms have also led the transformation of SOEs into joint-stock companies. In this field the Government moved

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process as it is subject to the approval of MOFCOM with some uncertainties in the timing and execution.

in two directions: 1) SOEs operating in industrial, financial and strategic sectors for the country have been restructured and consolidated with other SOEs (mainly through mergers and acquisitions) or enlarged throughout the purchase of POE competitors. Government sought to create a strong national groups able to compete globally with foreign firms and thus to expand into foreign markets. In this regard Commentators have proved that government is trying to replicate what South Korea did in the 70s[28]; 2) SOEs operating in non-strategic or vital sectors for the country have been renovated and - in order reduce or concentrate state ownership - these companies were sold to Chinese entrepreneurs or to foreign tycoons to create efficient conditions for Chinese economy;

- The boom of impetuous Chinese private enterprises (born for example in high technology and Internet sectors). These firms created many small businesses generally with lower market capitalization, high opportunities, lower bureaucracy and fixed costs; these undertakings are capable of expressing a higher efficiency compared to the SOEs. This is the result of a very good knowledge of the market in which they operate (in fact in some areas POEs compete and dominate also with respect of the SOEs competitors;[29]
- The increased sensitivity of legal Courts and Chinese society towards a codified law with less arbitrary powers and more administrative rules. This should produce a more effective, although still embryonic, academic, professional

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[28] See for example F. AMATORI, A. COLLI, *Storia d'impresa: complessità e comparazioni*, Milano, Bruno Mondadori, 2011.

[29] The growth of small businesses will surely create an important market for foreign firms, Private Equity and M&A in China, although we should admit that to date there is no record of Chinese Private Investors willing to give away the majority of the shares.

and cultural bodies and authorities for the protection and the practical application of the law and IPRs as well as it should revitalize the fight against bribery.

3 – The Foreign Investment Vehicles

For the purposes of a thorough understanding of the relevant legislation for international firms operating in China it should be noted that the Chinese company Law - and in particular the part of law commonly referred to as Foreign Investment Law - provided the obligation by a foreign investor (also the citizens residing in Hong Kong and Taiwan are considered foreign) to invest and operate in China only through traditional investment vehicles, called "FIE" (acronym for Foreign Invested Enterprise or 外商投資企業), each subjected to its own specific legal framework. As mentioned foreign investors use mostly these following FIEs to operate in China:

1. EJV (*Foreign Equity Joint Venture*);[30]
2. WOFE (*Wholly foreign-owned enterprises*);[31]
3. Foreign investment enterprises limited by shares[32]

The table below shows the instrument currently employed to create a FIE.

[30] Called also "中外合資經營企業"

[31] Called also "外商獨資企業"

[32] Called also "外商投資企業股份有限"

<table>
<tr><td colspan="3">JV
joint venture
Company with mixed capital: both foreign and domestic</td><td rowspan="3">WFOE
Wbolly foreign owned enterpríse
(1986)

Capital belong to the foreign investor</td></tr>
<tr><td rowspan="2">EYV
Equity joint venture (1979)</td><td colspan="2">CJV
Contractual joint venture (1988)</td></tr>
<tr><td>*Pure CJV*
Pure contractual joint venture</td><td>*Impure CJV*
Impure contractual joint venture or *cooperative joint venture*</td></tr>
</table>

These special vehicles were the only way to invest in China until the early 90s, because the Chinese legal system, including the law of contract and the corporate law, was structured according to the principle of the *double track* (雙軌): the relations between Chinese citizens (or legal entities as corporations) were governed by different laws than those applicable to contractual relationships with foreigners.

In a sense China faced the division between domestic law and foreign law. In civil and commercial matters the division was represented by the PRC General Principles of Civil Law in

1986, which at that time regulated the pieces of legislation applicable with respect of nationality.[33]

However the absence of a common legal platform risked to slow foreign direct investment and damaging the Open Door Policy. Thus, since September 30, 1999, at the end of a training process lasted at least four years, the PRC passed the Uniform Contract Law (統一合同法) ("UCL") where it has been clarified that the provisions regarding subjects (ie. natural or legal persons) entering into a contract in China are enforced without any difference based on nationality.[34]

Something similar occurred in the field of commercial law: until the first half of the 90s corporate structure were regulated by some specific provisions (*ad hoc provisions*) depending on the structure and the legal nature (eg collective enterprise, SOEs, FIEs, etc..). Foreign Corporations have to comply with a complex set of rules and administrative acts as well as the Company Law of the 1993 for subsidiarity provisions.

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33 There was different law according to people who worked in China. Foreign corporation were considered "not working" in China and thus were subjected to different law. The Article 23 of the General Principles provided: " 在中國工作的人有不同的法律。外國公司被認為是"不工作", 從而在中國受到不同的法律。在中國工作的人有不同的法律。外國公司被認為是"不工作", 從而在中國受到不同的法律"

34 The UCL consists of 428 articles, divided into eight chapters, conventionally grouped into two parts: the first, dedicated to the general principles of the law. The second part is related to contracts (ie sales, financing contracts, transport ...).

Today, Chinese commercial and corporate laws are more uniform and have coagulated into three main types: the corporation, the limited company (Ltd), and the LLC. These forms if operated by foreign firms (all types of FIE) are still regulated by some specific laws but is palpable the tendency towards a single corporate system. Is useful to remind that foreign investors often does not form new legal entities but they prefer acquiring the capital shares of Chinese companies also through existing foreign holdings.[35]

With the economic reforms and the vast privatization phenomenon the Chinese government has issued numerous legislative measures related or expressly regulating the M&A and Private Equity transactions involving foreign investors in Chinese companies' shares. These provisions regulate investment in SOEs, in POEs or in companies with mixed capital (eg. Companies with Chinese capital but also partially invested by foreign investors such as the EJV or WOFE). In this context, we can resume the main texts of reference are as follows:

- The PRC Company Law of 29 December 1993;
- The Equity Change Regulations of 1997;
- The Using Foreign Investment to Reorganize State Owned Enterprises Provisions issued in November 2002;
- The Regulations for the Administration of Venture Capital Enterprises with Foreign Investment approved in 2003;
- The Provisions on the Merger and Division of Foreign Investment Enterprises, promulgated in 2003;
- The Acquisition of Domestic Enterprises by Foreign Investors Provisions approved on March 7, 2003;
- The PRC Security Law adopted on 27 October 2005;

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[35] It should also be noted that under Article. 126 of the UCL, contracts of joint ventures (Both equity and cooperatives), as well as those relating to the performance of activities the search for new natural resources are mandatorily subject to Chinese law.

- The Provisional Measures for the Administration of Venture Capital Enterprises of November 15, 2005;
- The Regulations Regarding the Acquisition of Domestic Enterprises by Foreign Investors issued on August 8, 2006;
- The Measure for the Administration of the Takeover Listed Companies;
- The Measures for the Administration of Strategic Investment in Listed Companies by Foreign Investors;
- The Measures for the Administration of Initial Public Offering and Listing of Stocks, issued on May 17, 2006.

Strategies for international firms

In general foreign firms are much more interested in acquiring a target company in China – or in creating a joint venture with a Chinese partner - than setting up a business in the country (*Greenfield*). The process to set up a business may be in fact time consuming and may expose international firms to the significant risks of a complex unknown environment. Not counting that international firms are additionally interested in acquiring the *guaxi* – it means the relationships – which the Chinese partner may have with the Chinese bureaucrats, a circumstance that may be obtained only through a partnership or other forms of direct investments on businesses already operating.

So far the most successful techniques for entering China are the M&A operations or related assets acquisitions. In the past foreign firms used mainly the joint ventures vehicles but now this form of investment is becoming residual since it offers less control over the business and exposes investors into relational problem

with the Chinese partner. The availability of modern corporate governance models also in China has furthermore reduced the needs for JVs and thus foreign investors may generally use the same operational techniques available in western countries. In particular the investor may: a) purchase a part or all of the share capital of the target company; b) purchase of business assets; c) choose a M&A transaction. We can now just point out these operations remembering that the choice depends on numerous factors including for example: (i) the financial condition of the company being invested, (ii) the corporate governance model; (iii) the need for consent of third parties to the transaction, (iv) the transferability of corporate assets, (v) the potential tax consequences of the transaction, and (vi) the timing and market knowledge.

The next table shows the operations involving foreign firms between 1990 and 2004 in China. These were finalized by at least 75% with the purchase of business assets, 10% with the acquisition of a minority interests while the merger represented about 5 percent of that market.

Technique	Value (million USD $	%	Number of Operations
Purchase of business assets	132.740	65	2959
Mergers	20,174	10	210
Acquisition of majority	17.360	9	430
Partial Acquisitions	29.956	15	692
Acquisitions of minority	3.155	1	196

With regards to the first technique, the Chinese legal framework provides an opportunity for investors foreign

to structure their investments through a process similar to an *asset-based takeover*. The result is the creation of a FIE with some specific assets but no capital shares or liabilities. In other words foreign investors pay directly the company owner (SOE, POE or other FIEs) to acquire a targeted asset (for example terrains, patents, divisions) without entering the company capital shares and thus, not assuming any additional obligation or liabilities.

This operation (widely used in the past) although it requires longer timeline is, however, interesting because - than if the investor proceed to the direct acquisition of the share capital – it protects more effectively the potential foreign investor abroad from the risk of any hidden detrimental liabilities such as fiscal, financial and labor constraints. These considerations are still relevant today, as it continues to be extremely difficult to identify in a complete and analytical passive voice the total liabilities of a Chinese company. Although this transaction is "safer" for international firms it could be deemed unlawful if creditors' or third parties' rights are impaired (for example because the disposal has been carried out at not market conditions). In this case the transaction is void.[36]

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[36] This can be avoided following three modes: a) acquisitioning and subsequent transferring the assets in a new FIE: in this case international firms should regulate accurately the asset's transfer during the FIE's constitution. In particular the investor should condition the transfer of ownership of the asset to the circumstance that the new FIE must possess such assets for the time being; b) creating a EJV with a Chinese partner, in which the Chinese partner confer the assets; c) establishing a FIE and then giving subsequent acquisition by the FIE of the same business unit with some limitations of controls and authorizations.

The parties (foreign and Chinese partner) may decide to conclude an M&A operation. In this case, as mentioned, the Provisions on the Merger and Division of Foreign Investment Enterprises (外商投資企定) regulate mergers between FIEs, SOEs and POEs. It's helpful to illustrate that the main hypothesis of fusion covered by Chinese law are two: the merger in which the acquiring company acquires the assets and liabilities of the merged company, and the merger leading to the establishment of a new company with the assets company of the two merged entities.

To complete the merger parties have to meet some specific requirements: the agreement among the involved parties must include specific clauses (for example, the treatment of post-merger employees must be governed), the registered capital of the company must be fully subscribed, the company's creditors must be informed of the operation and they may ask to be paid for the remaining liabilities or they may ask for any appropriate guarantees. Additionally the foreign investor must hold at least 25% of the registered capital in the post-merger company so that the same may qualify as a FIE, and enjoy benefits resulting from tax and labor provisions.[37] The merger is also subject to an approval process divided into several phases (multi-step approval process), typically "*time consuming*". To complete the merger it is necessary

[37] The merger review is a quite complex process and is divided into more tasks. The preliminary stage (where parties formalize the confidential agreements and the exclusivity in the negotiations providing and fixing liability and compensation for damages resulting from a break of these clauses); the due diligence phase (perhaps the most complex for the Foreign investor because of the scarcity of information available); the investment agreement (or equity transfer agreement) which regulate the shares to be purchased (the majority or the minority); the equity joint venture agreement or other shareholders' agreements of different nature that regulate the status of the object of investment.

to obtain prior approval by governmental authorities as well as a final consent of the competent Chinese authority supervising the merged company. In fact it's important to remember that negotiations in China do not take place only between parties but require the intervention of government authorities to which the law attaches meaningful (and sometimes invasive) powers of monitoring and verification. The merger review maintains a pregnant and invasive intervention of the competent authorities.

Although the strong control of central authorities, China is undergoing the most common procedures related to M&A and Private Equity. For our purposes it is sufficient to mention that in China, whatever is the merger chosen, the process tries to adapt with international practice.

Consider, by way of example, the power of MOFCOM to unilaterally alter the terms of the contract deemed unsuitable for the Chinese side: if the foreign investor does not accept the changes imposed by the authority, MOFOCM will not issue the certificate of approval and the deal may end. Even the phase of divestment (which represents the conclusion of a normal operation of Private Equity and Venture Capital) is under the strict control of government authorities.

To overcome these difficulties, foreign investors often conclude pacts with controversial effectiveness in China or create a holding company abroad (consider that even the special administrative regions of Hong-Kong and Macao are considered abroad under Chinese law), putting the resolution of these disputes to foreign jurisdictions.

Lastly the foreign investor may agree to acquire a stake in the capital of a SOE, POE or FIE. In this case the operation may take place: a) by increasing the "registered capital" of the company being invested (in this case occurs a re-allocation of shares and the participation between the original owners and the new participants or; b) through the purchase and transfer of such participation to the foreign investor.

Also in this case the intervention of government is quite significant. Such transaction is in any case subject to the granting of two permissions: the first is issued by MOFCOM, which must be also registered with the SAIC (the registration is a typical veto right of the Chinese Authorities, the second is issued by the competent corporate bodies such as, for example, members. Once the authorizations are provided, the original POE or SOE must be transformed into the appropriate legal forms allowing the participation of foreign investors into the capital shares (FIEs). Thus, the company must submit documentation to obtain the essential business license.[38]

This type of operation may be also divided into indirect or direct acquisition whether respectively the acquiring vehicle is a Chinese holding company – that act on behalf of the foreign person - or not. The *indirect acquisition* (間接收購) occurs where the acquisition is formally made without any direct intervention of the foreign shareholder in the targeted company. This method normally does not require approval by the MOFCOM and the filings with the SAIC are quite speedy. The indirect acquisition, is in fact considered a *friendly operation* (友好的操作) formally conducted by a Chinese

[38] The conversion procedure involves various authorities and must adapt the requirements dictated by the catalog in terms of performance of the business.

holding company that will hold the shares on behalf of the foreign party (for example the Chinese holder may be appointed under a trust).

Direct acquisition (直接收購) is whenever the foreign investor purchases directly without using foreign intermediate holding company, a stake in the share capital of a SOE, POE or a FIE (in the latter case the acquisition is made buying the foreign shareholder shares). Alternatively the operation can be done versing new registered capital with and thus increasing the company's shares capital. Direct acquisition necessarily requires the evaluation and authorization of the government authorities that have jurisdiction over such operations (for example a specific jurisdiction is prescribed in the new Anti-Monopoly Law). The revision is significant especially in the case of investment in capital of a SOE: the investment will be judged by a team of experts appointed by the State Asset Administration Bureau - SAAB. It follows that the margins of the discussion between the Foreign Investor and the Chinese seller are much more limited: the price will be in fact estimated by the Authorities and possible deviations are considerably reduced.[39]

Thus the evaluation of a Chinese company or business is a complex process for international firms. In addition to the common problems that such operations *per se* involve, international firms face issues related to the unique Chinese environment such as the social context and the strong bureaucracy. This is the reason why in China, only

[39] If the transaction is carried out by a FIE, the evaluation and authorization will necessarily be issued by the same authorities who had previously authorized the establishment of the FIE in China.

one of five operations continues beyond the stage of due diligence (compared to the ratio of ½ in western markets).

For example there are few comparable operations and there are also few companies listed that could be used as a reference value for understanding the effects of a potential merger deal. To a potential investor who does not want to run into a distorted analysis is asked to consider different scenarios of potential developments in the sector that could affect the acquisition plan because there is no secure comparative analysis to be employed in the economic modeling."[40]

Furthermore for several Chinese companies is quite difficult to demonstrate the ownership of its assets because documentation is insufficient, not reliable or very difficult to understand also for experts and lawyers. Thus, potential foreign investors shall scrupulously verify the properties of real estates and have to investigate each possible transaction occurred in the past to be sure assets' ownership will not be questioned by collateral parties.

There are also many other constraints and limitation foreign firms shall take into consideration before entering China. For example:

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[40] In that cases "An ideal method is to use different evaluation criteria, which ensure a sufficient degree flexibility, as well as to verify the possible consequences of each choice in perspective future, without over-estimating the potential growth of the Chinese market . The original statement: "**理想的方法是使用不同的評價標準，確保有足**夠程度的靈活性，以及可能產生的後果，每一個選擇在未來的角度來驗證，但估計在中國市場的增長潛力" Professor Li Ling Ping, *Conference about the opportunities for Foreign Investors in China*, Beijing University 2009,

Business license. Generally a company under Chinese law is allowed to use a social object specific to the performance of particular activities, as determined in the bylaws and in the business license. In other words to carry out certain tasks, Chinese Law requires some specific authorization by the government; these authorizations are not automatically transferred to the new entity but need an additional approval from administrative bodies.

Concept of Corporate Control. In China, is prohibited to foreign investors to acquire a majority in a SOE, POE or in a FIE if the above mentioned company operates in one of Catalogue sectors considered strategic for the country. These sectors have been reduced significantly in the last decades but strong limits still occur in than 20 areas of activity, including: banking, insurance, telecommunications, defense, and industry automotive).

In such cases the prohibition for the foreign investor to acquire a majority stake lead to the building of other corporate instruments which indirectly allow such control, or at least the attribution of negative veto powers in the management of the company being invested. One of these instruments is to structure the investment transaction so that to the Foreign Investor is given adequate representation in the Board of Directors or have the right to occupy key management positions (for example CFO, CTO).

Land Property Rights. An additional issue for international investors is the regulation of land property rights. The recent reform on private property, adopted on March 16, 2007 by the National People's Congress pursues the goal of providing greater protection to state-owned lands and implements the contemporary legal recognition of three forms of ownership: state ownership, the collective and private individual ownership.

In China, land is state-owned, this means that foreign firms intending to relocate and work in China shall first buy a special right to use the land (特的土地使用權). Thus the ownership of a property is no important as in western jurisdictions: the crucial question is about whom owns the right of use the land on which – for example - a building was built. It follows that if the Chinese partner made a transfer of asset, it is necessary for the Foreign Investor to understand whether this provision includes the right to use the land or not.

Tax liabilities. Foreign investors should also be aware about the risk of hidden corporate liabilities and tax that could result after the acquisition. They should be protected with a special side agreement that assigns to the sellers an obligation to pay compensation / assumption if, after completion of the transaction emerge prior liabilities of the company. Besides foreign firms have to evaluate the various tax and financial and benefits granted by the local or central government to the target company (grants depend on the type of the target company and the area of its business). These incentives often are non-transferable. So if the company changes corporate type - and as we've seen in the case of acquisition by foreign investor, this event is quite common as the corporation passes under the FIE which is regulated differently than the SOE and POE – the incentives could be lost.

Social Context. Concluding extraordinary operations is tricky due also to cultural and social differences with Western Countries. Ignoring the values and principles that permeate Chinese culture may result in wasting time and resources (both financial and human). Potential investors should be aware of some basic principles otherwise they will not understand why the lengthy negotiations did not give the desired results. The most notably cultural aspects that must be properly weighted by the Investor are the following:

1. Hierarchical relationships. According to Confucius, the Chinese society is unequal and is divided into five classes (symbolized by the five stars of the national flag). Each class has a corresponding value: in every class there are those who gives

the orders (the father, the husband, the emperor ...) and those who must obey (the son, the wife, the subject ...). If each one behaves according to the rules his class, there is no need for recurring to the law;

2. The Chinese society is based on the group. The famous cogito ergo sum principle would have sounded different in China: "We are what the group thinks we are." The roles within a group should be carefully respected especially in interpersonal relationships. For example in business every person has to speak only with his peers. For this reason it is good to know in advance the roles and tasks of the Chinese group with foreign investors are going to discuss the deal;

3. The guanxi ("關係"). This is another fundamental concept in Chinese culture. It indicates the mutually beneficial relationship that binds two individuals, creating mutual respect and esteem. If anyone makes one pleasure to another, they do not seek to return as soon as possible (as it happens according to the western stereotypes) but, on the contrary, the beneficiary will wait a greater favor to return.

4. Reputation (Mianzi) (面子). Reputation is an essential concept in China and is a direct consequence of collectivism. To offend other people's reputations in front of the group they belong will preclude any possibility of future relationship with the individual offended. Obviously there is no need for an offense in the strict sense: it's just enough to embarrass the party.

5. In the Chinese culture it is preferable not to provide direct and immediate answers and above all, never answer "no" (just to not offend the counterparts). People use instead vague phrases, a good connoisseur, will understand whether the answer is negative or positive. Additionally the showing of motions or gestures during a conversation is considered a sign of weakness and, as such, is not appreciated;

6. The protection of intellectual property is difficult task in China since the Confucian religion imposed to share with the

group what each individual produced. Nevertheless, one of the oldest "brand" in the world was established just in China (in 320 BC from the Liu family to distinguish their goods from other manufacturers with a symbol representing a white rabbit). Anyway in the protection of IPRs field, China is undergoing important steps towards international standards with the approval of new provisions on trademarks and patents during 2001-2005 periods.

Chapter 2 - The Antitrust Law in China

4 – The Competition Framework

As mentioned, the movement of China towards competition followed the reforms started in the late 1970s. Accordingly to the new policy of Deng Xiaoping, in 1980, China passed many sets of provisional regulations to remove the obstacles to an open market economy. Remarkably the State Council approved the "Provisional Regulations on Promoting Economic Coalition"[41] (促進經濟聯盟的暫行規定) in 1980 which ensured the right to handle enterprises' own affairs without any interference from administrative bodies, and the "Provisional Regulations on Developing and Protecting Socialist Competition"[42] (的暫行規定促進經濟聯盟) which banned monopolistic behavior, especially against administrative monopolies. The two regulations also ensured the removal of all the trade barriers and facilitated the interstate commerce.

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[41] The Provisional Regulations on Promoting Economic Coalition established for the first time that any individual may start a private business without any limit of dimensions and without industry limitations. Although the rules also affirmed many interesting principles regarding the private ownerships and the ability to own large stakes also in public corporations, the rules contained complex wording and were opaque in the rights that individuals could exercise to defend their interests.

[42] With this act the Communist Party formally abandoned the state-planned economy and tried to establish a new market economy. The act itself did not contain any crucial provision for the economy but was a strong political address that drove Chinese economy.

Few years later, in 1992, the 14th National Congress of the Communist Party of China, began discussing – with the framework on "Some Issues of Establishing a Socialist Market Economic System"[43] – (建立社會主義市場經濟題的) the new rationale that will turn China into an "socialist market economy" triggering the extraordinary expansion of the country. With this framework, China abandoned the planned economy system definitively and opened to foreign investments. From 1993 to 2000, the National Congress of the Communist Party approved many important provisions dealing with competition like the Law Against Unfair Competition (建立社會主建立市場經濟體), the Price Law (建立社濟體制若干問題的) and the Bidding Law (建立社會主義體題的). Those years welcomed also the earlier cases on competition and made clear the need for a modern regulation that pushed into the approval of the Anti-Monopoly Law (AML) in 2007 after long discussions and meetings.

Since the AML framework has been influenced from the previous regulations, cases and proceedings and the existing rules and institutions have greatly impacted the AML's structure and enforcement, we need to give them just a glance.

The Law Against Unfair Competition (反不正當競爭法) ("LAUC") has been the first law dealing with competition issues.[44] Although the LAUC regulates consumer

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[43]China State Statistics Bureau, China Statistics Yearbook, Table 14-5 (2007).

[44] See Chunman Li, "The LAUC: the first law understanding the exigencies of a modern market". Beijing Press (2000) at 21.了解現代市場的迫切需要"的第一部法律。北京出版社（2000年)

protection it was important for having established some important public bodies as the "Administration for Industry and Commerce"[45] ("AIC") (反不正當競) responsible of the enforcement duties; and the "State Administration for Industry & Commerce"[46] (國家工商行政管理局) ("SAIC").[47] These bureaus are currently employed for the enforcement of the AML and many other issues regarding the industry and commerce in China.

Additionally the LAUC was helpful since it described many acts of unfair competition, including passing off, misleading advertising, infringement of trade secrets, improper sales with attached prizes, and damage to

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[45] The AIC was charged with the responsibility of control and regulate the Industry and Commerce. For example it handles and administers the registration of all kinds of enterprises (including foreign-invested enterprises), organizations or individuals that are engaged in business activities as well as resident representative offices of foreign companies. See also the comments of Whe Zabao, VicePresident of the Communist Party in 1998. 被指控的責任，控制和規範工商。例如，它可以處理和管理各種企業（包括外商投資企業），組織或個人，以及從事經營活動的外國企業常駐代表機構登記。

[46]The SAIC is the highest office of the AIC and has the crucial role of issuing rules and regulations to interpret, clarify and enhance the LAUC.

[47] See also When Gao in "Assessing the Extent of China's Marketization" Journal of Business Economics, June 2008 36-40 and Wenjun Lui & Jing Zhang "Company Law and Corporate Governance" International Business Law, April 2009 55.

goodwill.[48] Other sections dealt with acts usually subject to antitrust law, such as abuse of dominant position (濫用市場支配地位) by public utility enterprises. Although it was the first regulation on competition, the LAUC remained obscure for long time as no regulation was provided and the public bodies charged with the enforcement could not operate. The Law has been unveiled just recently when an important summary of the judicial interpretation has been published in January 2007 by the Supreme People's Court (最高人民法院) ("SPC")[49]; the report contained many principles to define and explain some provisions of the LAUC.

Few years later, in 1998, the Price Law[50] was promulgated. The law represented an important evolution since it regulates behaviors that limit price competition and "improper pricing behaviors" including price fixing, predatory pricing and price discrimination. This law was the first attempts to avoid price fixing conducts in China

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[48] 冒充行為，誤導性的廣告，侵犯商業秘密，不正當的銷售與附加的獎品，以及損害商譽冒充行為，誤導性的廣告，侵犯商業秘密，不正當的銷售與附加的獎品，以及損害商譽冒充行為，誤導性的廣告，侵犯商業秘密，不正當的銷售與附加的獎品，以及損害商譽冒充行為，誤導性的廣告，侵犯商業秘密，不正當的銷售與附加的獎品，以及損害商譽冒充行為，誤導性的廣告，侵犯商業秘密，不正當的銷售與附加的獎品，以及損害商譽冒充行為，誤導性的廣告，侵犯商業秘密，不正當的銷售與附加的獎品，以及損害商譽冒充行為，誤導性的廣告，侵犯商業秘密，不正當的銷售與附加的獎品，以及損害商譽

[49] The Supreme People's Court is the highest level of judicial trial and act as Court of Cassation within the China borders.

[50] The Pricing Law of Socialist Republic of China is available on http://www.chinacourt.org/flwk/show1.php?file_id=29493&str1=%BC%DB%B8%F1%B7%A8 .

and is still employed, together with the AML, to fine many form of collusions between firms[51]. In 1999, few months after the Price Law, China passed the Bidding Law. The Bidding Law regulates anticompetitive activities in public bidding and has been discovered just recently after the buildings corruptions that followed the Szechuan earthquake in 2008.

But in China, competition issues were not regulated only by laws: the government traditionally played an important role too. In fact many issues were developed under the administrative provisions and regulations with the scope of addressing a quick response especially in those areas not covered by the law. The administrative rules (禁為暫) became also a very helpful instrument to provide detailed interpretations of previously promulgated laws. Most notably, the National Development and Reform Commission (國家發展和改革委員會) (NDRC) passed the "Tentative Provision on

[51] For example and most notably, in July 2007 the National Development and Reform Commission ("NDRC") investigated a trade association (the World Instant Noodle Association) under the Price Law for a suspected collusion in fixing the price of instant noodles. The NDRC firstly noticed that the Association and the relevant members met many times to coordinate the price of instant noodles from late 2006 to mid-2007. The NRDC ensured that the Association had violated the Pricing Law. The Court Said that " 國家發展和改革委員會首先注意到，該協會和有關成員召開多次協調方便麵的價格從2006年底到2007年年中。自然資源保護委員會保證，該協會違反了"價格法"

Prohibition of Acts of Price Monopolization"[52] (禁止價格壟斷行為暫行規定) in 2004. These rules were the first full regulation addressing the abuse of "market dominance," and provided some important explanation of the relevant market definition. The regulations explained also many forms of price coordination, supply restriction, bid rigging, vertical price restraint, below-cost pricing and price discrimination, as expression of abuses of dominance (and they helped much in the interpretation of the LAUC and the Price law). [53]

Another useful administrative regulation was the "Regulation on Merger and Acquisitions of Domestic Enterprises by Foreign Investors"[54] (合併和收購國內企業的外國投資者條例) issued in 2006. The regulation fixed the requirements and the characters of an antitrust review for pending mergers; it set also the conditions that required a pre-merger notification (商務部) to China's Ministry of Commerce ("MOFCOM") (中國商務部) and to

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[52] For a brief discussion about the effects of these acts see Su Sun, Antitrust Review in China's New Regulations, Economists Ink, Winter 2009, 33.

[53] See Ming Shang, China's Competition Policy and Legislation in Development, April 22, 2005, http://tfs.mofcom.gov.cn/aarticle/dzgg/f/200504/20050400081489.html.

[54] The Regulation on Merger and Acquisitions of Domestic Enterprises by Foreign Investors was the first step to address issues regarding the acquisition of Chinese firms by foreigner investors and played an important role in the promulgation of the AML since many rules were taken just from this Regulation. Although many criticized it as contained some limitation to foreign investments, we notice that it made clear a procedure foreign investors had to comply with and allowed, for the first time, the takeover of Chinese firms.

the SAIC.[55] We cite these two administrative rules as they played an important role in development of the AML.

The Chinese enforcement system is quite complex and resemble the civil law tradition since was (relatively) not influenced by Britain in the past. Beginning from the apical body, the Constitution of the People's Republic of China (中華人民共和國憲法) states that the State Council is the highest organ. The National People's Congress (人大) (NPC), composed of a political body called the "Standing Committee of the National People's Congress" (全國人民代表大會常務委員會) is considered to be at the head of the hierarchy and it governs the country. The Standing Committee have pushed for a huge amount of regulations and also keeps under its control the central ministries and commissions, as well as provincial and local people's congresses and governments.

As seen the government's action into the economy has been strong also in the competition field. Considering that the judicial system was poor of expertise, the number of administrative bodies charged to control competition grew. This eventually resulted in many agencies with some problems of coordination, for example there are three agencies sharing responsibility for enforcing China's current antitrust rules.

The first agency responsible is SAIC, as authorized by the LAUC and the AML, and is engaged in the management of market activities, as the business and trademark registration as well as market regulation. SAIC keeps branches in virtually every major city in China. At the

[55] *See* supra at note 34.

central government level, SAIC is responsible for the fair trade. The second main antitrust enforcement agency in China is NDRC, which has the authority to enforce the Provision Rules and the Price Law rules as well. The third antitrust agency is MOFCOM as created after the 1998 reform that combined the former Ministry of Foreign Economic and Trade, the Ministry of Domestic Commerce, and some departments of the State Economic and Trade Commission.[56]

Before the AML, which reformed the NDRC, the SAIC and MOFCOM were the two most important government agencies enforcing antitrust rules in China. SAIC regulated the competition field while the MOFCOM established the Antimonopoly Investigation Office (反壟斷調查辦公室), charged with the investigation of antitrust behaviors (反壟斷辦公室). Maybe interesting to underline that despite the State Council asked them to jointly draft an antimonopoly law, they were unable to reach an agreement about how to share the power between them and eventually they ended up the work. [57]

At the judiciary level, the enforcement system is ensured by three courts level responsible for the trial. In China, the courts are divided into Courts of General Jurisdiction and Courts of Special Jurisdiction (普通管轄法院的特別管轄權的法院). Under the Courts of General

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[56] See Yingqiu Liu, The General Trends and Problems of China's Private Economic Sectors, Journal of Chinese Academy of Social Sciences, June, 2006, http://www.cpes.cass.cn/viewInfo.asp?id=351.

[57] Leiming Wang, Lutao Shen & Sheng Zou, Five Comprehensive Government Restructures 1982- 2003, Xinhua News Agency (Mar. 6, 2003), http://www.people.com.cn/GB/shizheng/252/10434/10435/20030306/937651.html.

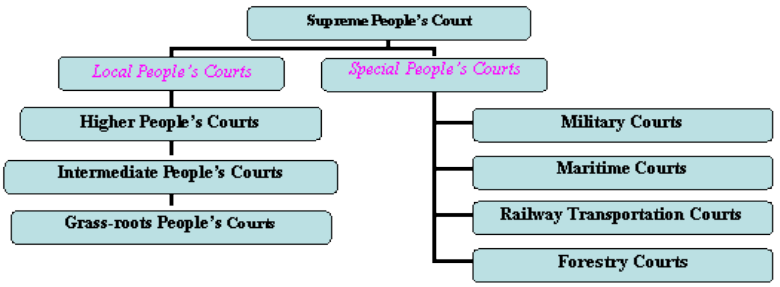
Jurisdiction is the Supreme People's Court and the Local People's Courts. Furthermore in the Local People's Courts there are three courts dealing with provincial level issues: a) The First People's Court. This is the lowest local court with competencies of cases of "first instance" (called also 普通管轄法院和特別管轄權的法院一審); b) the Intermediate People's Court (中級人民法院). It acts as the court of first instance just for local cases and is the Court of Appeal for cases raised from the First People's Court; and c) the High People's Court (高級人民法院). This is the highest local court and reports to the People's Congresses at provincial level.

The Supreme People's Court deals with national matters (so called 國家事務 cases) and is the highest court in China. The court system is completed by complex hierarchy of prosecutors, the *People's Procuratorates* (人民檢察院), and many Prosecutor Offices (人察院) for each level. Remarkably, at the Supreme Office (察院) there is the *Supreme People's Procuratorate* (人民檢察院) an organ that theorically should act independently but it's subordinated to the NPC. As one can imagine this office is crucial as it provides a large numbers of "interpretations" (詮釋) which supplement the Chinese Legislation and is relevant for the Court's case (詮釋詮釋) review.[58]

[58] For more details on China's judicial court systems, see Chris X. Lin, The Chinese Courts Revolution: An Overview of China's Judicial System, 4 Asian-Pacific Law & Policy Journal 9 (June 2003) at 39. See also the scheme below.

China is a Civil law country (so called " 大陸法系國家") with three trials, the last may occur only to trial the procedure. According to the civil procedure law, each case could be appealed and litigants can challenge the judgment in the second trial. Once the appeal is filed, the next higher court must try the case again. Generally, the judgment of the second trial is final although the parties can trial the Procedure (通常情況第二次開庭的判斷是最終的，但當事人可以審判程序). In this case, the parties involved may require a final decision or the effective decision through the trial supervision procedure (審判監督程序).

Lastly we would like to point out the external influences that helped in the shaping of the new Chinese competition policy. Although the efforts of the early 2000s to create an open market, Chinese competition tradition differed yet considerably from that of the other advanced economies. In 2001, the commercial laws and regulations were under construction with many external forces making pressure to comply with international standards. For example, although private ownership (私人所有權) was gradually introduced since the 1980s, it was explicitly allowed in the country only in 2004 when the Chinese National People's Congress amended the Constitution to



protect private ownership of property, businesses and wealth (保護私人所有權的財產，企業和財富).[59]

Remarkable in the 2000s two additional factors played an important role in aligning China towards higher standards: The admission into the WTO and the several meetings with the EU and US authorities on competition law.[60] No doubts: the movement towards a modern competition framework was speeded with the Chinese's access into the WTO in 2001. This crucial step secured China to meet many global trade rules and helped China to innovate its economic structure. China was forced to adopt many regulations, the most important regarded:

1) "the non-discriminatory treatment to all foreign individuals and enterprises, including those not (yet) invested or registered in China with respect to the right to trade";

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[59] See Article 23 of PRC's Constitution and the message of the Premier When Ja Bao on April 2004. "日，包括保證私有財產"公民的合法獲得的私有財產不得侵犯，"人權"憲法"進行了修訂（"國家尊重和保障人權"。）辯稱，這是政府是中國的民主和進步的一個標誌中國共產黨，他們認識到變革的必要性，因為中國經濟的蓬勃發展創造了一類新的富裕和中產階層，誰想要保護自己的財產". For references see also Constitution Edited in China, Economic Reference Newspaper, July 31, 2005, http://chanye.finance.sina.com.cn/sp/2005-07-13/256435.shtml.

[60] See also Ge Ling, Competition Starting in Chinese Industries, People's Daily Online, http://homea.people.com.cn/GB/41394/3379837.html.

2) "the elimination of dual pricing practices as well as differences in treatment accorded to the location of final consumption"; and

3) "the use price controls" (which would no longer afford protection to domestic industries or services providers)[61].

First of all the *WTO Agreement* (WTO 協定) required uniform regulations and the revision of the existing domestic laws to comply with the new standards. The economic implication of China's WTO[62] membership was that barriers to foreign goods disappeared and international trade rose up to 1.6 trillion USD $ in nearly ten years [*see the table below*]. Additionally foreign retail firms could set up wholly owned companies (全資擁有的公司) and sell goods that were not produced in China.

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[61] Declaration of the Chinese Department of Commerce after the Chinese admission into the WTO. Official Declaration: " 因此外國企業進入中國的數量有所增加，但進入的外國公司都面臨著一個事實，即中國企業的行為（如上述）不是由成文法。利用行政權力，以獎勵當地產業創造危險的尋租機會。看好的企業和行業發展相當舒適與本地和地區的官員的關係因此外國企業進入中國的數量有所增加，但進入的外國公司都面臨著一個事實，即中國企業的行為（如上述）不是由成文法。"

[62] For a study of the implication and impact of WTO's admission on China, see Long Yongtu "WTO impacting on rural China: opportunity concerns", http://finance.anhuinews.com/system/2005/06/13/001282695.shtml. "因此外國企業進入中國的因此外國企業進入中國的".

As a consequence the number of foreign firms entering China increased, and with them came out also many compatibility problems with the rules that governed domestic firms. In fact the use of administrative power to reward local industry created dangerous opportunities for rent seeking against foreign firms. Domestic firms and industries were able to develop and maintain quite cozy relationships with local officials. Corruption was very high and dangerous. Thus, with the WTO's accession, China was forced to adopt new rules to reduce these risks for foreign investors and firms. The WTO's admission practically was a strong incentive into the adoption of a modern anti-monopoly regulation.[63]

The need for additional regulations made clear also that China should act coordinately with the international antitrust practice, especially with European Union and the U.S. statutes. In a country where competition "was an

[63]See Rebecca Buchman, China Hurries Antitrust Law, Wall Street Journal, June 11, 2009, page A7.

unfamiliar concept"[64], Chinese authorities looked at Western economies and held meetings with EU and U.S. for guidance in designing its competition policies and institutions.

On May 2004 the Ministry of Commerce of China (中國商務部) and the Directorate General for Competition of European Commission reached an agreement on a structured dialogue on competition. China formulated various competition-related policies, laws and regulations and asked for a review with the EU partner as on its side, the EU had a relatively complete set of competition legislation. This provided a basis for a dialogue between both parties on legislation and enforcement. The primary objective was to establish a permanent forum of consultation and transparency, and to enhance the EU's technical and capacity-building assistance to China in the area of competition policy.

Interestingly, the European experience was welcomed by Chinese Authorities. In fact EU antitrust law shared some similarities with the Chinese conditions. At the beginning of the European competition policy, the competition rules were different on each country and inconsistent with the common perspective as based on different principles. Just for example, some countries deployed the "*Abuse Principle"* that legally allowed cartel activities unless these cartels did 'proven harm' to the economy. Also the size, independence and competence of the institutions that supervised markets differed greatly across Europe and only after the Europe 1992's initiative - aimed at the completion of the European internal market – competition policy "was harmonized and the EU

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[64] See Na Liu, "China: a market oriented economy. Or not? Schedule for Review"; The Economic Observer 2007 II Chapter 5 345 http://info.finance.hc360.com/2006/06/25102650097.shtml .

Commission became a powerful supervisor".[65] The situation was similar to China that had to develop a new complete regulation considering the municipalities and local authorities which traditionally had an important stake in the law enforcement. The need for a harmonization recalled the European efforts when the EU treaty was approved.

China shared with the EU countries the civil law system. That's why the majorities of the AML's fifty-seven articles are quite similar to the regulation of European antitrust laws and tried to resemble the European market-oriented economies. [66] On the other hand, the European experience has also proved how an articulated judiciary system may be required to enforce the antitrust law effectively and the Chinese authorities had to understand that the European Union Competition policy is built over each state antitrust rules and this may not be good for China.

The antitrust field in China has an additional issue than the above discussed problems: it should create and establish its own characters and rules since each country has its unique view and own features. For example Europe and many developing countries as Latin America, India,

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[65] See Xiaodong Xie, Anti-Administrative Monopolies Chapter Deleted from Antimonopoly Law, People's Daily Online, January 11, 2006, http://www.people.com.cn/GB/54816/54822/4016799.html.

[66] In fact, the provisions aim at the prohibition of price fixing, monopolization, and mergers that significantly concentrate industries within China. No doubts that while drafting the AML, China built on the experiences of Western Countries.

Taiwan and Korea created an antitrust law for the same scope of regulating the competition among businesses. However each system had different results. Differences may arise from the way the nations intend to use antitrust law to improve competition and R&D activities. In other words they could use different schemes to achieve higher consumer welfare.

We can say that there is not a preferred path or regime that should be enacted as the best regulatory model depends on the country features and system. Although each competition law may differ from other and China may mature an antitrust doctrine like each country did in the past, there is surely a minimum requirement needed to get some good results in the competition law. We refer to the need for ensuring a proper enforcement regime without any inferences and intervention of the government in the field, and to provide competent Courts (和限), judges and rules.[67] If we look into these aspects, China may face some problems in establishing its own antitrust doctrine since the Dragon lacks of a legal

[67] Chinese legal system lacks of *stare decisis* principle (最後) – as it belongs to the civil law family - and this could threat the effectiveness of the interpretation of the new regulations. Clearly, in a civil law country, the Supreme Court has only the power to interpret the (single) case submitted to its review and it is not binding for future interpretation nor could it be used to decide an analogue case. In other words no precedent function is secured. Many European civil law countries experience this issue but in China the situation is a little bit riskier as no historical jurisprudence is available. States like Italy and Spain, although they do not have a *stare decisis* principle, provide with a huge amount of doctrine and historical cases that help litigants to address their expectations from a (potential) trial. China lacks of judicial cases law and this contribute to make things unclear. The potential litigants cannot have expectations of what courts will decide on similar circumstances. And there is no well-formed doctrine in China: judges generally do not provide detailed opinions and so no expectations about the behavior of courts could be anticipated.

doctrine (和限制) and competent courts (濟和).[68] However it's remarkable that the new AML tries to control and limit the huge power of the State into the economy and regulate it to sustain the economic growth.[69]

Ultimately we should stress that China has no experience about competition and this concept is quite unfamiliar. There is not a competition culture.[70] Chinese companies and people ignore the importance of some rules regarding the anticompetitive forbidden behaviors and they get confused if asked what rights they have in the context of price-setting, cartels and many other practices. In other words "they are astonished when contracting with foreign states and when informed about how risky could be a dumping and price-fixing practice in the commerce".[71] "They seem to not understand the claims

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[68] See for example Justin Yifun Lin & Fang Cai & Zhou Li, China's SOE enterprise reform, Pacific Antitrust Review, June 2007.

[69] See Bruce Owen, Su Sun & Wentong Zheng, Antitrust in China: The Problem of Incentive Compatibility 6 (Stanford Law Sch. John M. Olin Program in Law & Econ. Working Paper No. 295, 2006). "Additionally, China should also push on creating the new bases for judicial and political reform: as the government's role in the economy – although has been limited in the past decade – still remains relevant, China's reforms should press for its withdrawal. Commentators show that this process is crucial as it's drawn on historical experience which clearly exhibits the risks of government's control over production and sale from many comparative examples taken from other countries in Asia".

[70] See Mark Williams, Competition Policy and Law in China, Hong Kong and Taiwan Edition Press 2005, 989.

[71] See F. Whao Jabao & Li Mao Ming, IMF Working Paper—China: International Trade with China , available at

brought against them for anticompetitive practices involving international commerce".[72]

Thus the new antitrust approach of China should also inform people of the rights they have and how useful a modern competition law may result for them. Although the issues are crucial, probably a friction between the old legal regime and new enforcement rules is quite ordinary and surely a new competition doctrine could ensure a great prosperity both for consumers and for businesses welfare.

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http://www.imf.org/external/pubs/ft/wp/2004.pdf; Office of the United States Trade Representative, 2004 Report to Congress on China's International Relations 34-36.

[72] See Sue Yang, Reform of China Antitrust Law: Are we ready to international common practice? Pacific Antitrust Review July 2008 11-12.

5 - The new Anti-Monopoly Law

When considering all of these laws and regulations that prepare the arrival of the AML, it is quite clear that the pre-AML antitrust regime had a number of problems. For example the most troublesome characteristic of this early antitrust regime was that "the antitrust rules were scattered through all types of law, at various levels, including laws, regulations, administrative rules and regulatory documents." In other words, China did not have a "unified and complete anti-monopoly law and system."[73]

Not mentioned that the existing laws were written in general terms (so called "根據這些後果"), making them very hard to understand. These problems, with also the lack of respect for the authority and the problem that the penalties were largely insufficient made the Chinese antitrust system quite paralyzed by its own structural inefficiencies. Thus, in these hard conditions the AML (反壟斷法) was introduced by the National People's Congress in August 2007.

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[73] See Shang, "The importance of the AML for China"; China University Press 2010 at 56. Where the author states that" . 的反壟斷規則分散在所有類型的法律，在各個層面，包括法律，法規，行政規章和規範性文件。"換句話說，中國並沒有一個統一和完整的反壟斷的法律和制度。" 的反壟斷規則分散在所有類型的法律，在各個層面，包括法律，法規，行政規章和規範性文件。"換句話說，中國並沒有一個統一和完整的反壟斷的法律和制度。" 的反壟斷規則分散在所有類型的法律，在各個層面，包括法律，法規，行政規章和規範性文件。"換句話說，中國並沒有一個統一和完整的反壟斷的法律和制度。"。"

The creators of the AML surely made an important task for China. The project of shaping a comprehensive and strong piece of antitrust legislation had been on the political agenda for many years, though no success had yet been reached. The new law had to address not only antitrust and competition concerns, but also a deep understanding of what was crucial for building and developing the *socialist market economy* (社會主義市場經濟).[74]

The drafters were also faced with the problematic question of how much they should take from foreign provisions to create and shape their own comprehensive antitrust law. While it was obvious that the AML should takes into considerations the Chinese intrinsic characteristics and should be able to adapt these into the political arena and situation of Chinese economy, it was also crucial that the new legislation reflect some prevailing western practice and borrow from international experiences and successful practices of foreign anti-monopoly legislation and adjust them to suit the Chinese situation.

To be successful the AML would need to address these diverse considerations. The definitive version of the AML approved by the Standing Committee of the Chinese National People's Congress (中國全國人大常委) in August 2007 was fifty-seven articles long and dealt with many of international concerns. The legislation "*includes the principal contents generally included in the . . . prohibition of monopoly agreements, the prohibition of abuses of dominant market positions, and the control of operator concentrations*, *as well as an exemption scheme that reflects common international practices. to eliminate or restrict*

[74] See Id.

competition, designed to curb abusive practices by businesses that have been empowered by the government's interference in the market." [75] These rules enacted by the drafters seem to reiterate the government's commitment to let China advance towards a market-based economic model.

Thus, after a 13-year of maturations, China passed the Anti-Monopoly Law (AML) in 2007. The Law became effective just a year later on August 1, 2008. The AML was intended to address many issues that we have briefly mentioned in the previous paragraphs. Mainly the AML scope was: a) to reduce the state intervention and its powers into the economy; b) to cover the anti-monopolistic conducts not regulated by the Price Law and Bidding Law; c) to protect market competition; d) to promote efficiency; e) to safeguard the interests of consumers and public welfare, and; d) to promote the development of the socialist market economy.[76]

The AML is thus structured in seven chapters. The first chapter addresses some general characteristics as the range of application of the law and the legal definition of terms. The second chapter contains provisions concerning the monopoly agreements; the third concerns the abuse of market dominance; the fourth is about concentrations; the fifth concerns the abuse of administrative powers; the

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[75] See Id

[76] See also Su Sun "The Limitation of the AML in the new Chinese Competition Practice", Pacific Antitrust Law Review II 2009 – 123.

sixth addresses the investigations and the seventh recalls the legal liabilities.

The AML applies to conducts with restrictive effects on competition within Chinese economy. This includes both conducts within China and conduct outside China which may have a restrictive effect in China. Mainly this extension of jurisdiction is in line with international practice. However, while the U.S. and EU laws require that the anticompetitive conduct must have a *direct effect* on these markets (namely a direct, substantial and reasonably foreseeable effect) to fall under U.S. or EU jurisdiction, conversely the AML states that the Dragon can exercise jurisdiction if there is an eliminative or restrictive impact on competition in China's domestic market without any further qualification. Authors[77] believe that future regulations or guidelines should ensure that the jurisdictional reach of Chinese law complies with international principles.

In terms of sectors, the AML range of application (的應用範圍) is quite extensive: the AML is in fact only excluded explicitly (but also partially) in the agricultural sector;[78] in terms of territory range, the AML is restricted to mainland

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[77] See Adrian Emch: Concentration of Business operators in China – the New AML of PRC – Law & Order 2008.

[78] In previous drafts of the AML, there was a provision stating that anticompetitive conduct would be regulated and investigated under sectorial legislation where such legislation existed. This provision has not been retained in the adopted AML. Article 7 appears to contain some sectorial exceptions to full application of the AML. Nonetheless, strictly speaking, this provision applies to undertakings in certain industries, not to the industries directly.

China: Macao and Honk Kong, as special jurisdictions, remain under their local antitrust statutes.[79]

Under the AML, concentrations have to be notified to MOFCOM if specific thresholds are met. As accepted by a common practice we can say that a concentration occurs in these circumstances:

1) Two or more independent undertakings are merged into one entity;

2) An undertaking acquires the control of other undertakings through an acquisition of shares or assets;

3) A firm takes the control of other undertaking by acquiring the ability of exercising decisive influence by a specific contract or other means;

4) Two or more firms create a joint venture which appears to fall within the definition of a "concentration". [80]

Additionally to fall under the AML either of the two thresholds below should be met. In this case the merger must be notified and filed with the Ministry of Commerce (usually referred to as "MOFCOM") otherwise the concentration is banned. The limits are the following: a) "the total worldwide turnover in the previous accounting year of all undertakings involved in the concentration must exceed RMB 10 billion[81], and at least two of each the

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[79] For details over these jurisdiction see Ping Lhio "Antitrust litigation in Greater China" ; Available at www.ssrn.com/1909287 "嗚喇叭香港和澳門特別司法，留在當地的反托拉斯法規

[80] Additionally we should note that concentrations of firms outside China that restrict or eliminate competition within China will fall under the AML as well.

[81] Approximately US$.1.4 billion or Euro 933 million or £739 million.

undertakings must have a turnover of more than RMB 400 million[82] within Chinese domestic market in the previous accounting year; or b) The total turnover in China in the previous accounting year of all undertakings involved in the concentration must exceed RMB 2 billion[83], and at least two of such undertakings each has a turnover of more than RMB 400 million[84] within China in the previous accounting year."

MOFCOM will have 30 days to address a *preliminary review*. At the end of this time, MOFCOM can choose to conduct a further review or decide that no further review is needed; if MOFCOM makes no decision, the parties are allowed to implement the operation. In the case MOFCOM choose to conduct a further review, it shall have 90 days to run it out. In some specific circumstances, MOFOCM may also notify the review period will be extended up to an additional 60 days.[85] At the end of this supplement time for the further review, MOFCOM may ban the operation or may attach conditions for implementing the merger. Again, if no decision is assumed at the expiry of the period of further review, the parties are free to implement the merger.

In making its decision, MOFCOM will take into consideration to a number of broad economic factors, for example the market shares of the participating firms in the relevant market, the degree of market concentration,

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[82] Approximately $ 59 million or Euro 37 million or £29 million.

[83]Approximately US$ 293 million or Euro 187 million or £147 million.

[84] Approximately $ 59 million or Euro 37 million or £29 million.

[85] See Ming Shang supra at note 34

the foreclosure expectations, the effects on technological progress, the consequences on consumer welfare and other market participants, the consequences on the development of the Chinese *social economy* and possibly other issues that may potentially affect competition in the market. A merger may be banned where it may have the effect of reduce or eliminating competition. But MOFCOM, as the common international practice, may approve the operation if satisfied by the positive effects of the merger.

We stress also that even where the turnover thresholds are not reached, if MOFCOM takes into consideration that operation may result in the elimination or restriction of competition in the Chinese domestic market, it has may decide to investigate the operation. Thus, MOFCOM will monitor on a systematic basis also mergers that are not notified to control if any of them deserves investigation.[86] The filing guidelines employed under the old law will continue to be employed for filings under the AML. It remains to be understood whether MOFCOM will issue modification in next years in the light of experience acquired with the enforcement of the Law.

In the case of the acquisition of Chinese enterprises by a foreign investors or the participation of foreign capital in a concentration, where an issue of Chinese "*national security"* is involved, MOFCOM will conduct further review at the same time as the merger assessment. The meaning of "national security" is not defined and remains unclear in the AML. The AML also explicitly provides that it applies to monopoly agreements concluded outside the PRC

[86] See Id.

which have the effect of "eliminating or restricting competition" in the domestic market of the PRC. Therefore for example, agreements concluded between foreign companies in Europe or the USA to divide up world markets could infringe the AML. Similarly, concentrations between companies outside China could also fall within the scope of the AML if the effect of the concentration were to eliminate or restrict competition in the Chinese domestic market.[87]

AML deems unlawful certain types of *horizontal agreements* (or agreements between competitors), notably: a) Price fixing; b) Output or sales restrictions; c) Market sharing; d) Restrictions on purchase of new technology or new facilities or on development of new technology or new products; e) Collective boycotts. This list can be extended by administrative decisions. However, a violation is only committed when such an agreement "eliminates or restricts competition"; there are no "*per se"* violations.[88]

The AML follows the international common practice to exempt some horizontal or vertical monopoly agreements. Such agreements may for example be exempted if any one of the following are met: "a) Improving technology or research or for new product development; b) Cost reduction, improving efficiency and product quality, implementing specialization and product standardization; c) Enhancing the competitiveness of small and medium sized enterprises; d) Serving public interests, like environmental protection, energy conservation, etc.; e) Mitigating a glut on the market in times of economic

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[87] *See Anti-Administrative Monopolies Chapter Deleted in Entirety from the AML*, PEOPLE'S DAILY ONLINE, January 11, 2006,

[88] *See Id.*

recession; or f) Protecting the legitimate interests of foreign trade and foreign economic cooperation."[89]

In all these cases with the except the last one, the firm seeking an exemption on the above mentioned grounds will also have to demonstrate that the agreement meets two additional requirements: "1) The agreement will not seriously restrict competition in the relevant market; and 2) Consumers will be able to share in the benefits derived from the agreement."

The third chapter addresses the abuse of market dominance. Article 17 of the AML repeats, similar to the EU law, that a business operator shall not abuse its dominant market position to:

"(1) sell commodities at unfairly high prices or buy commodities at unfairly low prices;

(2) sell products at prices below cost without any justifiable cause;

(3) refuse to trade with a trading party without any justifiable cause;

(4) require a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause;

(5) tie products or impose unreasonable trading conditions at the time of trading without any justifiable cause;

(6) apply dissimilar prices or other transaction terms to counterparties with equal standing;

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[89] See supra note 73

(7) other conducts determined as abuse of a dominant position by the Anti-monopoly Authority under the State Council"

Of great importance in this field, the AML provides some helpful instruments to determine whether a business lies in a dominant market position. The AML states that Authorities should look at:

a) the market share of the business operator in the relevant market and the competition situation of the relevant market;

b) the capacity of a business operator to control the sales markets or the raw material procurement market;

c) the financial and technical conditions of the business operator; [90]

d) the degree of dependence of other business operators upon of the business operator in transactions;

e) the degree of difficulty for other business operators to enter the relevant market, and;

f) other factors related to determine a dominant market position of the business operator.[91]

Additionally the AML provides some circumstances to presume that an undertaking is in a dominant market position. [92] In particular a firm is considered in a dominant position if "the relevant market share of a business operator accounts for 1/2 or above in the relevant market, or the joint relevant market share of two business operators accounts for 2/3 or above, or the joint relevant market share of three business operators

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[90] *See Id.*

[91] See Article 18 of the AML

[92] *See Id.*

accounts for 3/4 or above". [93] Although the rebuttable presumptions attached in the AML, the existence of dominance situation remains a very complex subject which goes well beyond the definition of market shares.

The fifth chapter of the AML regulates explicitly the abuse of administrative powers. The AML states that any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to restrict or impede entities and individuals to operate in the market or to limit their rights. The AML lists some administrative unlawful conducts[94] and deems unlawful the dangerous

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[93] Article 19 of the AML. "此外，"反壟斷法"提供了某些情況下，假設一個承諾是在市場支配地位。特別是公司中的主導地位，如果"被認為是企業經營者佔1/2或以上的相關市場，或聯合相關的兩個經營者佔2/3以上的市場份額，相關市場的份額三個業務運營商或聯合相關市場的份額佔3/4以上"

[94] The conducts prohibited are: "(1) imposing discriminative charge items, discriminative charge standards or discriminative prices upon commodities from outside the locality; (2) imposing such technical requirements and inspection standards upon commodities from outside the locality as different from those upon local commodities of the same classification, or taking such discriminative technical measures as repeated inspections or repeated certifications to commodities from outside the locality, so as to restrict them to enter local market; (3) exerting administrative licensing specially on commodities from outside the locality so as to restrict them to enter local market; (4) setting barriers or taking other measures so as to hamper commodities from outside the locality from entering the local market or local commodities from moving outside the local region, or (5) other conducts for the purpose of hampering commodities from free circulation between regions".

practices (still quite diffused in China) of "rejecting or restricting business operators from outside the locality to participate in local tendering and bidding activities or to invest or set up branches in the locality by imposing unequal treatment thereupon compared upon local operators".

Article 55 of the AML takes into consideration the complex matter of IPRs. The AML is not applicable the exercise of intellectual property rights (IPRs), but this can be enforced if the holder of the IPR abuses his rights "to eliminate or restrict competition". This rather dubious provision seems to mean that a refusal to license an IPR right may, in specific circumstances, be an *abuse of market position* where it can be demonstrated that such refusal is done with the intention of eliminating or restricting competition.[95]

The AML addresses the abuse of government administrative powers. State Owned Enterprises or enterprises controlled by State Owned Enterprises are banned from using their dominant position or exclusive dealing position to harm consumers' welfare.

Lastly, taking a glance on the enforcement rules the Anti-Monopoly Commission is responsible for organizing, coordinating and guiding anti-monopoly legislation. Its duties cover the researching and drafting policies and guidelines, organizing investigations and defining the competition framework in China.

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[95] *See, e.g.*, Ya Jie, *Antimonopoly Law shall Address IPRs*, China Industrial & Business Times 2007

Under the AML, there are three different enforcement agencies, each responsible for a different area of enforcement:

1) The Ministry of Commerce ("MOFCOM") (國家工商行政管理總局工商) in charge for Merger Control;

2) The National Development and Reform Commission ("NDRC") (國家工商行政管理工商) in charge with price-related Monopoly Agreements and price-related Abuses of Dominant Position; and

3) The State Administration for Industry and Commerce ("SAIC") (國家工商行政管理總局工商) in charge for the non-price related Monopoly Agreements and non-price Abuses of Dominant Market Position.

The Enforcement Authorities have been assigned with wide ranging powers to investigate, assign liability and impose penalties on anticompetitive conducts. Authorities have the right to force a person to give information or documents as well as the right to force attendance (國家局工商) and to search solutions. Additionally, the Enforcement Authority may delegate its rights and powers to the relevant provincial governments' bodies, autonomous regions and municipalities for a better enforcement of the legislation.[96]

The Infringement of the AML can lead to severe penalties. The maximum fines could reach the 10% of total turnover during the last (fiscal) year. Article 46 of the Law also provides that violations may result in the confiscation

[96] *See, e.g.*, Ya Jie, *Antimonopoly Law Must Address Administrative Monopolies*, China Industrial & Business Times, 2009 II at 22

of any illegal gains. Not only: under the AML may also be criminal liability. "Individuals and companies who refuse to provide relevant materials or information, or who provide false or misleading information, destroy evidence or obstruct the investigation"[97], may in fact be liable to criminal sanctions.

The AML provides some provisions to discover monopoly agreements and anti-competitive conducts. In particular under the AML where a party "voluntarily reports relevant information concerning monopoly agreements and provides important evidence, the Enforcement Authority is empowered to mitigate or exempt the punishment of such a party involved in the agreement". It is crucial, therefore, that companies implement and run an effective compliance measures, to be able to detect potential infringements as soon as possible.[98]

The AML also addresses the status of: a) SOEs that are considered important for the Chinese *national economy* and *national security,* as telecommunications, energy and banking; b) firms having exclusive sales arrangements under Chinese law, as oil, chemical and tobacco. These undertakings pay special obligations under the Law, they are defined as *safe harbors* because they benefit of specific rules subjected to the public supervision. The AML just states that these industries should act in good faith and they shall not harm consumer welfare by abusing their dominant position or exclusive sales position.

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[97] See Article 40 of the AML.

[98] For details see also Yingqiu Liu, *The General Trends and Problems of China's Private Economic Sectors*, Journal Of Chinese Academy Of Social Sciences, June, 2006.

Another safe harbor is provided for the agricultural sector. Here the AML is not applicable to joint or concerted action of agricultural producers or agricultural organizations relating to agricultural products.

As mentioned, one of the most crucial issues was the definition and the regulation of the state influence over the economy: the AML was approved also to address this problem and especially to limit the SOEs' power, the vehicles of the state criticized of altering the market-open system. On this point the AML contains complex wording, probably as a result of difficult negotiations within the Communist Party, the government bodies and legislature during the drafting process. Anyway with the adoption of the *further regulations and guidelines* (the NDRC and SAIC Rules, published in January 2011) the AML has been excluded from application (at least partially) to state-owned enterprises ("SOEs") in three different categories of industries: (a) industries crucial to the national economy, (b) industries crucial to national security and (c) industries subjected to exclusive operations and sales according to some specific laws.[99]

To tell the truth these exceptions are not entirely new in Chinese law. For example, the Regulations on Mergers and Acquisitions of domestic Enterprises by Foreign Investors (外國投資者併購國內企業的規定) ask for a separate notification to MOFCOM if the merger with a domestic company involves an "*important industry*" (外國投資) or is likely to have a strong impact on "*national*

[99] See id.

economic security." Surely the wording of "exclusive operations and sales according to the law" is not new and has been also used in many other contexts within the AML. It should be noted that with this provision the government is able to maintain an important stake in the AML shape since it may further qualify the anticompetitive conducts.[100]

In general this rule is a risk as it shows the potential consequence to provide the government with a system to exclude entire sectors from the application of the AML; furthermore it could lessen the efforts to reduce the state political view from the Chinese economy. Anyway there are many arguments[101] suggesting that these exclusions should only be partial. In particular, the Article 7 of the AML states that undertakings in the above-mentioned industries "shall not use their controlling position or exclusive position to the detriment of consumer welfare." Admittedly, the provision employs the word "use," not "abuse" so many authors[102] believe that, although there

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[100] See article 7 of the AML

[101] See also Su Sun "The Limits of the AML in the new Chinese Competition Practice", Pacific Antitrust Law Review II 2009 – at 452.

[102]See the discussion of Professor Ping Li at the University of Shanghai held on 4, April 2010 where he stated that: 例如，中國電信歷來履行公共服務義務的國家的電話供應商。據報導，中國電信已經過去，新的電話線安裝條件後，購買它的手機。這可以被認為是搭售和5月，在某些情況下，第17條第相抵觸的下降。此外，如果行業，屬於第七條的定義相對狹窄，在國外事業的影響可能較為有限。在許多行業，關係到國家安全等重點行業，外商投資企業實際上無權執行活動，或只在有限的程度。例如，中國電信歷來履行公共服務義務的國家的電話供應商。據報導，中國電信已經過去，新的電話線安裝條件後，購買它的手機。這可以被認為是搭售和5月，在某些情況下，第條第相抵觸的下降。此外，如果行業，屬於第七條的定義相對狹窄，在國外事業的影響可能較為有限。在許多行業，關係到國家安全等重點行業，外商投資企業實際上無權執行活

are many exceptions, these cannot be used to harm consumers and reduce the AML's scope.[103]

Additionally the AML contains some dubious rules for developing a perfect *socialist market economy*[104] (社會主

動，或只在有限的程度。例如，中國電信歷來履行公共服務義務的國家的電話供應商。據報導，中國電信已經過去，新的電話線安裝條件後，購買它的手機。這可以被認為是搭售和5月，在某些情況下，第條第相抵觸的下降。此外，如果行業，屬於第七條的定義相對狹窄，在國外事業的影響可能較為有限。在許多行業，"

[103] See for example the article of Janet Orly on le Figaro of 2, May 2010 page 34 entitled "*Le Chinese New AML: un risque pour les entreprises francaise*": *«A l'inverse, la portée des AML vis-à-vis des autres règles de concurrence dans le droit chinois (par exemple, la loi sur la concurrence déloyale, la loi sur les prix et le Règlement sur les fusions et acquisitions d'entreprises nationales par des investisseurs étrangers) n'est pas claire.*

La majorité des dispositions de la LBA ressemblent aux exigences typiques des lois antitrust typiques des économies de marché. Des études menées au cours de l'AML rédactionnelle a appuyé la conclusion que la concentration accrue de l'industrie à devenir un problème en Chine. Pour résoudre ce problème, la rédaction de l'AML s'est appuyée sur une étude approfondie de l'expérience des autres, en particulier aux États-Unis et de l'UE. Les dispositions qui en résultent visent à l'interdiction de la fixation des prix, la monopolisation, et les fusions qui se concentrent de manière significative l'industrie. En effet, l'influence du droit de la concurrence américaine et européenne peut être vu dans l'incorporation des rédacteurs chinois de clémence envers les contrevenants coopératifs et pour ceux qui se conforment aux demandes administratives de cesser les pratiques anticoncurrentielles ».

[104] Notably, this scope is a big issue: government also seeks to shape action in the market so as to promote the rapid development of a healthy, sustainable socialist market system and this may be difficult with respect of market competition.

義市場經濟) while encourage a better allocation of resources (welfare allocation), and strengthen the growth of a legal system (legal structure). Besides the AML's substantive provision and practical enforcement, these additional rules and scope currently shows many obstacles for the international business community. Commentators have worries that this opaque issue has been introduced to reduce the real commitment to antitrust policies in China. For instance, they mention that "it may not be sufficient that authorities support the AML's enforcement if the principle of socialist market economy could justify strong divergences from a competition culture". [105] "Judges and agencies may lessen the competition if they are required to appreciate abstract interests such as socialist market, the national security and development".[106]

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[105]See Jianjun Wang, Special Interests the Greatest Obstacle to Market Development, Liaowang News Weekly, http://news.sohu.com/20061213/n247014585_1.shtml. stating that: "它可能不足夠，當局支持"反壟斷法"的執法，如果社會主義市場經濟的原則，可以證明存在巨大的分歧，從競爭文化它可能不足夠，當局支持"反壟斷法"的執法，如果社會主義市場經濟的原則，可以證明存在巨大的分歧，從競爭文化"

[106] See Professor Lin Ping , "China: the new Dragon", Pacific Antitrust Review 2008 II at 33: " 法官和機構可能會減少競爭，如果他們需要理解抽象的社會主義市場時，國家安全和發展利益，如法官和機構可能會減少競爭，如果他們需要理解抽象的社會主義市場時，國家安全和發展利益，如法官和機構可能會減少競爭，如果他們需要理解抽象的社會主義市場時，國家安全和發展利益，如法官和機構可能會減少競爭，如果他們需要理解抽象的社會主義市場時，國家安全和發展利益，如如果他們需要理解抽象的社會主義市場時，國家安全和發展利益如果他們需要理解抽象的社會主義市場時，國家安全和發展利益如果他們需要理解抽象的社會主義市場時，國家安全和發展利益如果他們需要理解抽象的社會主義市場時，國

Even if these problems may become important impediments, we believe that the AML deserves more optimism. Surely there is some controversial wording and measures but we need to consider the typical, unique, background of China. It's too early to anticipate a failure of the antimonopoly law; we'll need to see how the agencies, the authorities and the Courts will interpret these controversial issues.

家安全和發展利益如果他們需要理解抽象的社會主義市場時，國家安全和發展利益"

See also Justin Federich, "Chinese Policies in the new Millennium" Texas Law Review 2009 where the author stresses that "*China has about 189,400 judges in basic people's courts, intermediate people's courts, high people's courts, and about 1000 judges of the Supreme People's Court in 2007. Such judges are relatively new to dealing with commercial and business cases; competition law is largely uncharted territory for them. Similarly, lawyers in China also lack experience with antitrust law. This concern can be alleviated, but not fully resolved, with training and guidelines. Thus, traditional antitrust law enforcement through either public or private means will likely face serious legal infrastructural challenges*".

6 – Monopoly Agreements: *Quid Novi?*

Chapter II of the Antimonopoly Law addresses the monopoly agreements among firms and businesses.[107] As a common practice it begins sorting the anticompetitive conducts forbidden and then lists some exceptions to the antitrust law. The section is clearly inspired by the Article 101 of the European treaty repeating many provisions and confirming the strong influence of the European vision on antitrust law.[108] Specifically monopoly agreements are regulated by Articles 13-16 of the AML which take into consideration horizontal and vertical agreements.[109] Article 13 of the AML prohibits monopoly agreements among the competing business operators that:

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[107] For a discussion about the shaping of the monopoly agreements in China, and how the Chapter II of the AML has been arranged see Kim Hu Lui, An overview of monopoly agreements worldwide, Journal of Business Law, 2009, at 22.

[108] See also the debate around The Antimonopoly Law and European Antitrust Law, SIEPR Discussion Paper No.06-32 (2007) at 9; and Nathan Bush, The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead, The Antitrust Source (2007), at 1. The authors stated that "*Since 2003, MOFCOM has participated in more than 30 international conferences on the European law and has held seminars or meetings with experts and enterprise representatives as well as organized over 10 trips to Europe aimed to fully import the European codified law and principles in antitrust practice*". See Ma Xiuhong, Vice-Minister of the Ministry of Commerce ("MOFCOM"), Speech at the Seminar on the PRC Anti-Monopoly Law, September 10, 2007, Xiamen, China.

[109] For details see H. Stephen Harris, The Making of An Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China, 7 Chi. J. Int. 169, 183 (2006); Bruce M. Owen, Su Sun and Wentong Zheng, China's Competition Policy Reforms.

"(1) fix or change prices of commodities;
(2) limit the output or sales of commodities;
(3) divide the sales market or the raw material procurement market;
(4) restrict the purchase of new technology or new facilities or the development of new technology or new products;
(5) make boycott transactions; or
(6) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council."

Additionally the article 14 of AML prohibits vertical agreements among businesses that:

"(1) fix the price of commodities for resale to a third party;
(2) restrict the minimum price of commodities for resale to a third party; or
(3) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council."

The AML makes clear that "monopoly agreements" refer to agreements, decisions or other concerted actions which eliminate or restrict competition."[110]

The influence of western antitrust practice in the shaping of the AML is important. China has imported the U.S. statutes and EU legislation, having cleared the differences between the two models. U.S statutes and

[110] Article 13 of the AML

practices are more focused on constraining activities shown to harm competition, in the belief that, left unencumbered, competition is in the public interest. The European Union, in contrast, also considers its goal of integrating the separate national economies. Note, however, that Chinese authorities have customized the foreign antitrust law to China internal needs and the changes made are important especially with respect of administrative power (that forced the shaping of the Chapter V) and the national sector.

What is a monopoly agreement?

Monopoly agreements are well studied in the United States, the European Union, and many other jurisdictions but not in China as the AML is an innovative piece of legislation; however there are some common concepts that could be pointed out. Monopoly agreements are unlawful because firms must act independently in the market to ensure consumer welfare. In other words firms are expected to compete, conferring the benefits of competition on consumers and on society as a whole.

Accordingly if their conduct is the result of an agreement the consumer benefit will be hurt. For example under Sherman Act is deemed illegal "every contract, combination […], or conspiracy, in restraint of trade." This rule is found also in the EU law as well as in China's AML thus, the legal question is whether firms' pricing or conduct is a result of an (illegal) agreement (協議). Clearly if not, there is no violation of antitrust statutes. If so, undertakings involved shall have to pay fines and damages for having constraining consumer welfare.

Executives can also can be subjected to criminal penalties and be convicted for price-fixing activities. [111]

In this context is crucial to understand what an agreement is and when it is deemed unlawful according to antitrust laws. Surely, there are some school cases. For instance if executives of more competing undertakings meet in the classic smoke-filled room, arrange a detailed agreement, sign it, and execute it, this will be considered unlawful. But importantly the agreement shall be proved in a legal proceeding and this is not easy. On the other hand no violation of antitrust statutes will be found due to the simple consideration that undertakings' prices are equal or that they moved in the same direction (this may occur when there are shocks to input prices).[112]

Anyway most difficult situations fall inside these two different points because the anti-competitive agreements are not easy to detect and, in particular, to prove before a Court. The following example may help addressing the situation. Imagine that just two undertakings, Alpha and Beta, provide a specific product. Imagine the monopoly price is 100€ and a competitive price is around 40€. Let's imagine additionally that the retail price remains high at a level of 100€, with anti-competitive gains thus divided equally between the two undertakings. This conduct is not *per se* illegal: the retail price may be not the result of a

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[111] For details see also Zi Tiao Li [*Tentative Provision on Prohibition of Acts of Price Monopolization*], *available at* http://www.competitionlaw.cn/show.aspx?id=399&cid=32 (last visited May 26, 2012).

[112] See Id.

collusive behavior but may be the consequence of free market forces. An infringement of antitrust law may be found if the retail price is the result of an agreement between undertakings.

In this case, if a written agreement, arranged and implemented by the two providers is produced as evidence, a violation will be found. But as noted fight against cartels is not easy. Imagine that the agreement actually exists but no proof of such agreement is directly taken as evidence in tribunal (*secret agreement*). Could these agreements be sued in front of a court? The answer is positive but the case gets more complicated because is not clear about what sort of evidence would be needed to make this inference. In this case "the answer depends importantly on the competing hypotheses—and on which alternative explanations are likewise deemed to involve agreements and hence would also constitute violations".[113] The main question is about what kind of interactions is required in a meeting and in the behavior of competitive firms to predict a collusive agreement. For instance is a meeting enough? Or is required also some kind of conference call or an e-mail exchange? And what is the position of other forms of communication as verbal of informal meetings?[114]

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[113] F.B Dalla Costa, Competition framework in the US, Antitrust Law Review, 2008 at page 44

[114] For details see also Haley Ming, *Competition rules*, Easterbook Edition 1988 at page 334 stating that " *we can be certain that agreements may be deemed to exist when something well short of the formal meeting and written cartel document exists. But it is not clear how much less will give rise to liability, or, put in the affirmative, just what is (are) the core underlying element(s) of an agreement. The extent to which these approaches diverge depends importantly on the legal concept of agreement*".

Generally western countries have codified a common definition for cartels and monopolistic agreements: an agreement means "harmony of opinion or action".[115] With this understanding the collusion may be deemed unlawful but this is a wrong assumption and true only in a dictionary definition. Western legal tribunals, opinions and antitrust authorities comments have shown that the law's significance of antitrust agreement is different and a little bit narrower.[116]

Thus the discussion moves to the importance of communication because if actions are concerted the communication between competitors is crucial. Back to common notions, communication is a "process by which information is exchanged between individuals through a

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[115] See M.K. Webber, Antitrust, the New era, Oxford Press 1966 at 44

[116] *See, e.g.,* F. B Arnault, *Politique de la concurrence pour l'Europe,* 3 Wash. U. Global Stud. L. Rev. 277, 284 (2004) where the author states that: "*Néanmoins, il est resté un peu mystérieux exactement ce que plus est nécessaire. Retour à l'exemple précédent d'un accord incontestable: la réunion secrète dans une pièce remplie de fumée entreprises concurrentes suggèrent les prix à l'autre, s'installer sur un prix particulier, et a indiqué Leur consentement à adhérer à ce prix. Supposons que nous évacuer la fumée de la chambre, puis la salle elle-même, par exemple, les entreprises pourraient utiliser une conférence téléphonique ou e-mail. Maintenant, nous allons passer de la confidentialité: peut-être les entreprises peuvent parler les uns aux autres par le biais de conférences de presse successives. A l'issue de cette séquence, nous avons un type de comportement qui est souvent observée et est généralement considérée comme légale (c'est-à ne pas constituer un accord.»*

common system of symbols, signs, or behavior".[117] Consider thus this example. In a remote area only two retail oil stations are situated. Each station has its price shown with huge signs readily visible from each other. Imagine additionally that the fully competitive oil price is €2.00 and a monopolistic anticompetitive price is €3.00. By a simply *game theory* approach we can reasonably predict that if one gasoline station decreases the price the other will do the same adjusting its price to the new level. Nobody of two stations will benefits from the action and would raise profits but both of them will experience lower profits margin. Consumer welfare will be advantaged, in theory of course because the owners of gasoline stations are well aware of this risk and probably nobody of them will be trying to lower the oil price engaging a battle on the margins.

This practice may be not unlawful if the two owners have not "agreed" to maintain price at €3.00. In other words no collusion is there if they acted independently. In this case the role of communication is crucial but this does not mean that they have reached an agreement. In fact the two owners did not speak to each other; they have only saw the other behavior and decided to act consequently. It's a price behavior or betters a *parallel action* but not an agreement. Examples like these seem to say there are many cases where the anticompetitive conducts are not so simple to detect and to fight: "surely the law requires more than a simple collusion to fight against a cartel. Law requires more evidence of agreement, usually through more evidence of communications".[118]

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[117] See supra at note 105

[118] Mark Williams, *The Role of Communication in Cartel: A Tale of Two Systems*, 3(2) Competition L. Rev. 251, 258 (2007)

This case let us also distinguish between “express” agreements and “tacit” agreements. Tacit agreements means that the communication is not provided using words or speech. Back to the previous example the gasoline station owners, using signs, have enacted not express agreements but at least tacit agreements.

Kind of Arrangements	Characters	Independence	Lawfulness
Express agreements	Competitive firms consciously are engaged in an anticompetitive conduct	No, the action of the firms is the result of the agreement	Strictly Forbidden
Tacit Agreements	Competitive firms consciously are engaged in an anticompetitive conduct	Although no express agreements is found the conduct is a result of a concerted action	Forbidden in theory but very hard to prove
Parallelism action	The anticompetitive conduct is not the result of conscious action.	Yes, the conduct is a result of an independent decision of each competitors.	Yes

As noted in the table above the distinction between tacit agreements and parallelism action is narrow and

official sentences are not so helpful either. For example U.S. Supreme Court opinions report crucial statements such as the following: "*Conscious parallelism has not yet read conspiracy out of the Sherman Act entirely*."[119] Back to our example this simple replicate what we've already said: a purely independent behavior, as the two gasoline stations owners that have raised prices in parallel, is not an agreement. Take also the following decision: "*The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words. . . . A conspiracy may be found where the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.*"[120]

Additionally, the US Supreme Court has said that evidence taken before a court '*should prove that the alleged conspirators acted not independently. It means that the inference of conspiracy is reasonable whenever the plaintiff demonstrate the absence of an independent decision.*"[121] Thus the difference between tacit agreement and parallelism turn around meaning of "independent." Yet another pronouncement established that "*tacit collusion, sometimes called conscious parallelism as well is in itself unlawful*..[…] *what really matters is that the parties have somehow reached an agreement and thus deduced they are acting coordinately.*"[122]

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[119] See *Bell Atlantic Corp. V. Twombly* (No. 05-1126) 425 F. 3d 99, reversed and remanded.

[120] See *United States v. Chemical Oil Group* Court 9th District; 1989.

[121] *United States v. Microsoft Corp*., 253 F. 3d. 34 (D.C. Cir. 2001).

[122] *United States v. Louisiana Ferries Corp.* 221 F. 3d. 31 (D.C. Cir. 1989)

In sum international antitrust practice have shown how much difficult may be to prove a tacit collusion agreements in front of a trial. "Parties should demonstrate that the result of the anticompetitive behavior has been concerted so that firms have not acted independently. This proof can be inaccessible for many antitrust cases".[123]

The Chinese AML's provisions

One of the first issues regarding the application of the AML concerns the subjects that must comply with. Especially the international antitrust doctrine questioned itself whether the businesses should be independent or not. For example in the international antitrust practice an anticompetitive conduct (such as monopoly agreement) requires two or more independent companies or businesses that compete in a relevant market. In the *Insurance Association case* [NDRC 23/2010 decision] the NDRC has defined the monopolistic agreement as "an agreement occurred by two or more uncorrelated and independent business operators with no controlling rights that agreed, directly or indirectly, to initiate an anticompetitive conduct as described in the Article 13 of the AML". [124]

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[123] See for details Mark Williamson – Monopoly Agreement in Antitrust Law Review; 2001; p 189.

[124] See also for further detail the comments of Jared A. Berry, "Anti-Monopoly Law in China: The agreements amongst controlled businesses and holding companies" - Antitrust Regime, International Law & Management Review 129 (2010), at 149-150; and Maher M. Dabbah, The Development of Sound Competition Law and Policy in China: An (Im)possible Dream?, World Competition 341, 356 (2010).

Chinese authorities did not have a chance to address one and for all the anticompetitive conducts that took place under two controlled businesses. We refer to those companies that are independent just apparently; companies controlled by the same organization such the case of holding companies owning a large stake in businesses that acted anticompetitively. In this case the Chinese authorities have moved out of line with two different line of reasoning. Under the Chinese decisions is not clear when controlled businesses that reached such agreements are exempted from the AML and when they are not. With the *Zhenjing Farther* decision [NDRC 12/2009 decision] the NDRC stated that controlled businesses 'must comply with the AML rules even if they are subjected to a controlling shareholder' while, with the *Insurance Association* decision it held that 'the reached agreements under the same group of companies are exempted from the AML if the businesses are completely controlled by the same owner as their conducts are the results of an unique scheme endorsed by the owner'.[125] We believe that although the Chinese authorities have not regulate a specific case on this matter yet, the latter decision is fair and shows also a first step to comply with the international standard. [126]

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[125] See also the National Development and Reform Commission's official speech of Cao Kangtai (Chairman of the Legislative Affairs Office of NDRC). Explanation of the agreements occurred in holding companies [曹康泰, 关于《中华人民共和国 反垄断法(草案)的说明].

[126] See also the Hu Yong, Study on international monopoly agreements: the Chinese perspective. Anti-Monopoly Law Journal, (2010, II) at 345, paper presented at the ABA Antitrust Law meeting on April 20, 2010.

The AML could be enforced only to conducts that are able to restrict or eliminate the competition within the Chinese market. While the AML provides some specifications for the abuse of market dominance (with a definition of the relevant market), no thresholds are given for monopolistic agreements. However it seems that anticompetitive agreements that do not stress competition are fully legal. This is a common and fair international practice that allows small businesses to jointly fix prices and other similar conducts if such behavior may be required to stay in the game and raise profits.[127] Article 5 of the AML expressly contemplates this possibility but some problems may arise for the calculation of the minimum threshold. While European Commission has somehow stated that businesses controlling over 10% of the relevant market (but often it's lowered to 5%) must comply with the antimonopoly law on the agreements, Chinese authorities have not provided any important suggestion for interpreters yet.[128] In the *Concrete Committee* decision [NDRC 45/2010] the NDRC stated that the thresholds are not met if the agreement is irrelevant and does not lessen competition in the Chinese market. However this is redundant. Chinese authorities

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[127] For further review see NPC Legal Committee, Report on Deliberation of the Second Reading Draft of PRC Antimonopoly Law, [全国人大法律委员会关于《中华人民共和国反垄断法草案二次 审议稿)》审议结果的报告] where it is provided an explanation of reasons that led to the formulation of the Article 13 of the AML.

[128] See the Guidelines of "agreements not determining restrictions to competition in the European union" updated 2008 at http://www.europe.com/legislation/updated=2008-07-09=bin?

are expected to publish further regulations and guidelines to set the *de minimis* threshold as we have doubts in the estimation of the agreement effects. Further guidelines may be required also for other issues. For example commentators find difficult to understand the agreement among businesses that are not competing directly at the time the agreement is signed. Is not clear if also agreements involving businesses that may potentially compete should be taken into consideration. Other authors are showing perplexity for the understanding of effects of vertical agreements that restrict the distribution.[129]

The *Zhejiang Fuyang Paper Association* [NDRC 6/2010 decision] has offered a chance to understand the extent of the restriction to the competition in the market. The NDRC decision was supported by the evidence that the association played 'a crucial role in distribution and selling of paper' and that 'the association is able to restrict the competition as it controls a share of at least the 25% of

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[129] See for an historical review the minimum threshold draft and comments released on the PRC Anti-Unfair Competition Law, [1993] Presidential Order No. 10, Article 6 [中华人民共和国反不正当竞争法, [1993] 主席令第10 号, 第6 条]; or Reply on the Determination of Other Undertakings Subject to Exclusive Operations according to the Law, [2000] SAIC Order No. 48 [关于如何认定其他依法具有独立地位经营者问题的答复, [2000] 工商公字第 48 号]. For public utility companies, see, for example, PRC Electric Power Law, [1995] Presidential Order No. 60, Articles 35 to 43 [中华人民共和国电力法, [1995] 主席令 (八届第60 号), 第35-43 条]; or Measures for Price Administration of Water Supply of Water Engineering, [1998] Planning Commission No. 1810, Article 5 [城市供水价格管理办法, [1998] 计价格 1810 号, 第5 条]. For commercial monopolies, see, for example, PRC Law on the Tobacco Monopoly, [1991] Presidential Order No. 46, Article 3 [中华人民共和国烟草专卖法, [1991] 主席令 (七届第46 号), 第3 条].

the paper market locally'. Although the authority did not provide any detailed data we can assume that Chinese authorities will be moving towards the definition and the calculation of a *de minimis* threshold under which antimonopoly agreements are fully possible. This approach is well established in the European Union that has already published rules regarding "*Agreements not Determining Restrictions to Competition in the European Union".*[130]

Many meetings and important discussions have been held in China to define the businesses that should comply with the competition law. The pre-AML Chinese antitrust laws prohibited only a small number anticompetitive conducts between business competitors (under the Price Law, the LAUC and the Bidding Law). However it remained unclear the terms 'business' or 'business operator' (經營者) since different definitions were provided. For example although the Chinese practice adopted a restricted approach defining the business as 'the single entities that is engaged in the production of commodities or services'[131] this term was unknown in the Price Law which referred just to operators intended as 'the legal persons, other organizations or individuals

[130] See Reg. 34/2006 n. 445. See also Hu When Hao "UE and China: Closer Partners, Growing Responsibilities – A Policy Paper on EU-China trade and investment: Competition and Partnership available at Ssrn.com/abstract=124592.

[131] NDRC Official Interpretation Document n. 34/2008 at line 22. 從事生產的商品或服務的單一實體從事生產的商品或服務的單一實體，從事生產的商品或服務的單一實體，

engaging in the production and management of commodities or provision of paid services'. [132]

The situation has been cleared under the Article 12 of the AML which restricted the application of the antimonopoly law only to business operators and defined them as 'a natural person, legal person, or any other organization that is in the engagement of commodities production or operation or service provision'[133].

Thus, any organization that is engaged in the production of commodities or services may be subjected to the AML. Surely also State Owned Enterprise must comply with the AML – although we need to consider some special exemptions - as all the other state organization with the same requirements. Also is not clear whether lawyers, certified public accountants and other high qualified service providers must comply with the AML. We can stress that definition of business operator is analogue to what the EU antitrust law says and China seems aligned with the international practice. However Commentators[134] have doubts whether no-profit sector, foundations and other kind of associations, are subjected to the AML and the enforcement regime. This matter has been also discussed under the EU antitrust law with different positions and conclusions.[135] We believe that the

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[132] See Price Law Article 11.

[133] See Article 12 of the AML: "自然人，法人或者其他組織的，是在商品生產，經營或者提供服務的參與自然人，法人或者其他組織的，是在商品生產，經營或者提供服務的參與"

[134] Su Sun and Hu Fu Liu " The Dragon Raise: a new perspective on competition law?" Harvard Business Law Journal 2008.

[135] For a complete coverage of the discussion occurred in the European Union see the sentence Keck & Mithouard 1993 [ECR I-6097].

no-profit sector in China should comply with the AML but there are some exemptions that are emerging from the NDRC practice especially for insurances companies that cover health and safety risks for retired workers and farmers. In fact, NDRC stated in *Insurance Association* decision [NDRC 23/2010 decision] that this is not a "business activity as this kind of insurance is based on supporting retirement and health pension and it is not lucrative".[136]

Every competition law has some problems in identifying the most common anticompetitive practice: the monopoly agreement. Since it is not easy to detect an agreement, especially in case the agreement is not written [*see supra*], we see many different positions worldwide. However the AML seems to resemble quite well the definition of monopoly agreement. The Article 13 of the AML defines a monopoly agreement as 'agreements, decisions or other concerted actions which eliminate or restrict competition'. Chinese authorities had several chances to define the interpretation of agreement and concerted action during the first years of enforcement. In the *Rice Noodles Case* [NDRC 45/2010 decision] and in *Concrete Committee Case* [NDRC 45/2010] we notice that the NDRC has fined the cartels according to a unbinding agreement reached informally or consisting in a tacit agreement. Is not required that the agreement is binding according to the Chinese law nor that the agreement is

[136] See also Williams and Merdok note on NDRC 2010 regulations on Antitrust Pacific Review of December 2010 at 56. 支持退休和醫療養老保險，這種保險是基於業務活動，這是不賺錢的

expressly signed. This is consisting with the international practice that bans any kind of agreement; as matter of fact European law already does not require any clear acceptance from parties [*Trefileurope*, case T-141/89; *ACF Chemiafarmia*, case 41/69] and the European Court has banned tacit agreements [*AEG* , case 107/82] even if not binding according to the national law [*Sandoz*, case 277/87]. [137]

The AML has also specifically taken into consideration the concerted actions. No specific cases have been held on the interpretation of this term yet but in the AML draft was made clear to embrace the principle that businesses should act independently and with autonomy in the market. In other words concerted actions require that businesses, also without reaching a formal or informal agreement, are involved in coordination such that they do not play autonomously. Thus, concerted actions require that firms lose their self- government. However businesses can react smartly and fairly to competitors policies deciding, just for example, to follow them. Businesses following the price of their competitors will operate under the 'parallelism' rationale which is fully legal as it keeps the businesses independent. The international practice has addressed the parallelism of behaviors demanding – to deem it unlawful - that businesses meet each other to define their policies and to reveal and establish a concerted action [*Suiker Unie* case 40/73; *Zucher* case 172/80].[138] Otherwise their policy

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[137] See, for example, Case C-333/94 P, Tetra Pak International v. Commission, [1996] ECR I-05951, paragraph 37; or Case T-201/04, Microsoft v. Commission, [2007] not yet reported, paragraph 860. 36 AML, Article 14.

[138] Other rules of Chinese competition law also contain a per se specification concerted actions. See Administrative Measures for Fair Transactions between Retailers and Suppliers, [2006] Order No. 17 of

cannot be considered a concerted action. But interestingly, Chinese authorities stated in the *Insurance Decision* [NDRC 23/2010 decision] that also the parallelism of behavior is considered in contrast with the AML and deemed it unlawful no matter of the absence of meetings among businesses involved. If this strictly position will be held, this could be a dangerous divergence from international practice. China should require something more to deem illegal the parallelism: in many western jurisdictions, this is not enough to signal an anticompetitive agreement among firms. Authorities should demonstrate that firms have held meetings or reserved information exchange in order to organize a concerted action.[139]

An important point we would like to stress is about trade associations. Article 16 of the AML regulates the decisions taken by trade association stating that 'trade association may not organize the business operators in its own industry to implement the monopolistic conducts as prohibited by the AML'. As China has many trade associations this provision is likely to be repeatedly enforced. In fact trade association may recommend or

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MOFCOM, NRDC, Ministry of Public Security, State Administration of Taxation and SAIC, Article 18 [零 售商供应商公平交易管理办法, [2006] 五部委第 17 号令, 第18 条].

[139] See for example Imperial Chemical Industrial case 45/89. See also Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of concerted actions and concerted practices, [1999] OJ L 336, p. 21, Article 4(a); and Commission Notice - Guidelines on Vertical Restraints, [2000] OJ C 291, p. 1.

compel members to act anticompetitively, in both cases trade associations are acting unlawfully. The Chinese position is consistent with the international practice.

In the *Zhejiang Fuyang Paper Association* [NDRC 6/2010 decision] the NDRC has stated that for business association is intended ‘ any association, not regulated by the law, that formally or informally gathers firms or individuals insisting in a specific line of business in the market’. This decision is very similar to the international practice but seems to leave offside the association formed and regulated according to the law. Scholars have suspected that associations not promoted and created by private agreements may be exempted from the AML.

Additionally, in the same case, the NDRC has correctly noticed that a business association decision may involve an antimonopoly agreement also if this decision is not compulsory for the associates. Thus, it seems that a recommendation for the associates may involve an antimonopoly agreements as well; this conclusion is also supported by the European practice (*van Landewyck* case 78/80).[140]

Lastly, for Chinese authorities, monopolistic conducts should eliminate or restrict competition within the market (*threat to competition*). According to the Chinese jurisprudence, operators must consider the effects of

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[140] See also Leegin Creative Leather Products, Inc. v. PSKS, Inc., DBA Kay’s Klose Kay’s Shoes, 551 U.S. (2007). In this respect, the U.S. approach has obviously been noted by the Chinese authorities. See Shang Ming, Anti-Monopoly Law: Law and Practice in Major Countries and International Organizations (2005), at 46-49 (“Shang Ming, Major Countries and International Organizations”) [尚明主编,《反垄断－主要国家与国际组织反垄断法 律实践》, 中国商务出版社2005 年版]; and Wang Xiaoye, Competition Law (2007), at 243 [王晓晔,《竞争法学》, 中国社会科学文献出版社2007 年版].

agreements and find out whether they restrict or impede the competition. This underlines that operators should not evaluate just the agreements itself, but should enlarge the study to embrace the effects of that agreement. This review, also welcomed in western jurisdictions [*Grunding* case 1966; *Societè Tecnique Miniere* case 56/65], involves specific competencies and expertise that currently may be lacking. As a matter of fact, interpreters should be aware to scrutinize deeply the agreements and to find out the outcome if they were not signed.[141]

A controversial point is also in definition of "effect". While the international practice requires just a potential competition threat [*Volk* case 5/69; *Bagnasco* case 216/96], Chinese authorities consider only agreements 'proved to have restricted competition within the market' [*Insurance Decision*]. If confirmed, it may be an important waive.

[141] This approach differs from the rule of reason approach under US law where the positive and negative effects of threat to competition of an agreement are examined in a deeply analysis.

7 - The NDRC and SAIC Rules

As mentioned the AML itself does not contain any detailed rules for the antimonopoly enforcement. This is the reason why many Commentators have argued that 'the game will begin with the publishing of the enforcement guidelines'.[142] After nearly three years of discussions and drafts, the guidelines have been eventually published by the Chinese Authorities in December 2010.

On 29 and 31 December 2010, the National Development and Reform Commission (NDRC) and the State Administration of Industry and Commerce (SAIC) respectively promulgated the guidelines, which provided some crucial assistance for understanding of the AML. The NDRC and SAIC are two of the important regulators in charge for enforcing the AML. The NDRC shares its role in fighting against monopoly agreements and abuses of market dominance with the SAIC. The NDRC promulgated *Regulations on Anti-Price Monopoly* (反價格壟斷規定) and *Procedural Regulations on Administrative Enforcement of Anti-Price Monopoly* (反價格壟斷規定反價格壟斷規). On the other hand the SAIC published three Notes, one concerning the rules on the monopoly agreements, the *Regulations on Prohibiting Monopoly Agreements* (壟斷規定反價格壟斷規定) and the other concerning the abuse of market dominance and the abuse of administrative power

[142] Xinzhu Zhang and Vanessa Yanhua Zhang, The Antimonopoly Law in China: Where Do We Stand?, Competition Policy International, Vol. 3 N. 2 Autumn 2007, 33.

(the *Regulations on Prohibiting an Abuse of a Dominant Market Position*[143] and *Regulations on Prohibiting an Abuse of Administrative Power*[144]).

The new NDRC and SAIC regulations were studied just in the earlier consultation drafts and took effect from the first February 2011 providing regulation in particular for monopoly agreements, one the most significant area of the AML. As mentioned, the NDRC and the SAIC have different jurisdictions (在下一章中，壟斷協議的原因。) for banning monopoly agreements: the former has jurisdiction to govern and enforce antitrust rules against price-related monopoly agreements, the latter takes jurisdiction for investigating and banning non-price-related conducts. Thus, these two sets of new rules expand and provide further material and provision that observers will check. [145]

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[143] SAIC Dominance Regulations: 反價格壟斷規定反價格壟斷規定反價格壟斷規定反價格壟斷規定反價格壟斷規定

[144] SAIC Administrative Abuse Regulations: 尤其是在濫用市場支配地位和濫用行政權力，但複雜的規則堅持“壟斷協議”區域。這是現在我們需要檢查這個領域在解決之前，在下一章中，壟斷協議的原因。

[145] See for example Prof. Ling Ping in the discussion held at the Beijing University on 23 April 2011: “Surely the NDRC and SAIC rules have provided much material to deal with also in the abuse of dominance and abuse of administrative power but the complexity of the rules insists especially in the monopoly agreements area”. The original speech: 當然，國家發改委和國家工商行政管理總局規定提供了大量的材料處理濫用市場支配地位和濫用行政權力，但規則的複雜性，特別是在堅持“壟斷協議”區域當然，國家發改委和國家工商行政管理總局規定提供了大量的材料處理濫用市場支配地位和濫用行政權力，但規則的複雜性，特別是在堅持“壟斷協議”區域當然，國家發改委和國家工商行政管理總局規定提供了大量的材料處理濫用市場支配地位和濫用行政權力，但規則的複雜性，特別是在堅持“壟斷協議”區域”

At this stage we can say that these two kind of rules may be problematic for the interpreters and for the business operators as they prescribe two different standards for the monopoly agreements. With two authorities and two set of rules, businesses may incur in further costs to comply with.

The NDRC provisions have confirmed that monopolistic agreements may consist of written or oral agreements or decisions, or collaborative acts. In determining whether an action has been concerted, the authorities must take into consideration whether the business operators' pricing acts are concerted, and whether they have engaged in communication. Thus, the NDRC provisions determine several types of horizontal monopolistic agreements in relation to price fixing activities that are more specific than the provision contained into the AML. The Rules offer additional examples of prohibited conducts, including some types of horizontal agreements. In particular the NDRC rules ban behaviors that:

"1) fix or change the prices of products and services;

2) fix or change the range of price changes;

3) fix or change fees, discounts or other charges that affect price;

4) set an agreed price as the basis for negotiating with third parties;

5) adopt a formula for calculating price;

6) change price of items without consent of the other parties;

7) fix of change price in disguised form by other means".

In determining whether the price behavior is the result of concerted conduct, the NDRC may takes into consideration "the consistency of the relevant firms' pricing behavior, communications between the firms, and conditions in the relevant market". We notice that it is not strictly required for the NDRC to establish that prices increased as a result of any concerted behavior or prove intent to raise output prices. Furthermore, the NDRC rules again stresses that trade associations are prohibited from adopting rules or decisions that may exclude or reduce competition on output prices.

On the other hand the SAIC rules add that agreements can be either written or verbal and that, in order to discover a concerted action, the SAIC shall take into consideration also other situations than those enunciated by the NDRC Rules: "whether the firms have exchanged information; whether they can provide a reasonable explanation; the competitive status of the market; and the situation of the industry".[146]

The differences outlined between the two set of rules could be underlined in the table 1.1. The first question (A) is related to the definition of "concerted act". The second and third questions (B and C) regard the understanding of which horizontal and vertical agreements are prohibited.[147]

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[146]See article 32 of the SAIC Rules: "的公司是否有交換信息，他們是否能提供一個合理的解釋;在市場上的競爭地位和行業的情況的公司是否有交換信息，他們是否能提供一個合理的解釋;在市場上的競爭地位和行業的情況

[147] See for details Xinzhu Zhang and Vanessa Yanhua Zhang, The Antimonopoly Law in China: Where Do We Stand?, Competition Policy International, Vol. 3 N. 2 Autumn 2007, 36.

	Under NDRC Anti-price Monopoly Rules	Under SAIC Monopoly Agreement Rules
A. Definition of "concerted act"	Interpreters should consider whether: 1) there has been consistency between business operators in relation to their pricing conduct; 2) there is communication of intention between business operators; 3) the structure of the market and any changes to the structure of the market should be analyzed.	Interpreters should consider whether: 1) there has been consistency between business operators in relation to their market conduct; 2) there is communication of intention or information exchange between business operators; 3) business operators can justify their consistent conduct; 4) the structure of the market, competition on the market, any changes to the structure of the market and the industry concerned

		should be analyzed.
B. Prohibited horizontal conducts	Competing business operators are prohibited from eight types of price fixing conducts, such as fixing or altering the price level of commodities or services; fixing or altering a commission, discount or other charges; and agreeing to apply a standard formula as a basis to calculate prices.	Competing business operators are prohibited from non-price related conducts, such as restricting output and sales, dividing markets, restricting innovation and joint boycotts.
C. Prohibited vertical conducts	Business operators and their trading partners are prohibited from fixing resale price or the minimum resale price.	No definition provided

We can see that communication of intention between business operators is the crucial point to detect a "concerted act" under the NDRC rules; while under the

SAIC provisions, this consideration seems not be required.[148] Importantly, the definitive rules eliminated the definition of "consistency" in the exchange of information between undertakings as formulated in the 2009 Tentative Rules (暫行規則), thus providing the NDRC with much more powers and discretion. Additionally although the NDRC provisions have brought transparence to the monopolistic agreements, it's not clear the new prohibition on "fixing or changing price in disguised form by other means." Commentators have worries that this rule may give the NDRC the ability to create other types of price monopoly conducts that violate the Law: "if true, we may see a growth in anticompetitive conducts from the NDRC".[149] Anyway from the implementation of the AML on 1 August 2008, administrative actions by the NDCR or by the SAIC enforcing the AML prohibitions against anticompetitive conducts have remained sparse probably because of lack of detailed guidance and rules. "Currently, with the promulgation of these rules we are willing to see how they will be enforced. Surely these rules provided additional guidance on the approaches of these agencies and may mark the beginning of more vigorous antitrust enforcement in China". [150]

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[148] See also Shang Ming, Comments on the NDRC and SAIC rules, 2011 Chinese Business Law at 14.

[149] *Idem* previous note.

[150] Hu Liu and Meng Zhen Yeh, Competition Law of the Asian Community, 2005, in particular at 452.

As already discussed above the AML provisions on monopoly agreements are integrated by some administrative Rules. The SAIC Monopoly Agreement Regulations further explain the definition of "monopoly agreement", describe the general categories of monopoly agreements provided under the AML and provide details of its leniency regime. Hereafter is outlined a complete definition of "monopoly agreement" according to the AML and the SAIC Rules:

Under AMP	Under SAIC
Article 17(1): Selling or purchasing at an unfairly high or low price	None provided, presumably on the basis that pricing behavior is subject to the separate NDRC Rules
Article 17(2): Selling below cost without justification	None provided, presumably on the basis that pricing behavior is subject to the separate NDRC Rules
Article 17(3): Refusal to deal without justification	• reducing the number of current trading deals or delaying or ceasing the current trade with counterparties; • refusing to enter into a new deal with counterparties; • imposing restrictive conditions to block counterparties; or • prohibiting counterparties from accessing its essential facilities/network that are necessary for others' operation on reasonable terms and conditions
Article 17(4): Exclusive dealing without justification	• restricting counterparties to trade exclusively with itself or a designated undertaking; or • restricting counterparties from trading with its competitors
Article 17(5):	• bundling or packaging sales that

Tying or bundling without justification	inconsistent with trade practices; • imposing unreasonable restriction on trade terms such as payment method or term of contract; • imposing unreasonable restrictions on sales region; sales target or post sales services etc..; or • imposing conditions that are irrelevant to the transaction
Article 17(6): Applying discriminatory treatments without justification	• setting different trading volumes, variety, quality or grade; • applying preferential terms differently; • applying different payment or delivery methods; or • implementing post-sales services differently.

We should note that the SAIC Monopoly Agreement Regulations outlines that a monopoly agreement may be confined only to express agreements. Rather, they are expanded to involve "concerted acts" or a collusion behavior between parties. Thus, in understanding whether undertakings have enacted a "concerted action", the SAIC shall take into consideration the specific industry conditions.[151] Probably remains unclear whether these additional situations to be considered by the agencies will result in a less stringent analysis than the NDRC's approach for price behaviors.[152] Thus, the prohibition of

[151] See id.

[152] See ming Shang supra at note 34

anti-competitive horizontal agreements between competitors undertakings is the main aim under the SAIC rules as banned vertical agreements regard pricing problematic and is collocated out of the SAIC's jurisdiction.[153] A catch-all rule also is provided to enable the SAIC to entail investigations into any suspected non-price related conduct. [154]

The following table offers a summary of the monopolistic agreements unlawful under the Chinese law and the relative government agencies in charge.

Category	**Conducts**	**Authority in charge**
Price fixing	• Fixing or changing price level of products. • Fixing or changing the magnitude of price changes. • Fixing or changing fees or discounts that influence the price. • Applying an appointed price as the basis for transacting with a third party. • Agreeing to apply a standard formula as a basis to calculate prices. • Agreeing that a price	NDRC

[153] See Xianlin Wang, *Research on Equal Application of China's AML, 2009 at 34*

[154] *See* Xianlin Wang, , *Research on Equal Application of China's AML*, 2010, Beijing University Press at p.31.

	shall not be changed without consent of competitors.	
Production and Sales restriction	• Restricting the production volume of products, or restricting the production volume of specific kinds or types of products by means such as limiting, fixing production volume, stopping production, etc. • Restricting the sales volume of products or restricting the sales volume of specific kinds or types of products by means such as refusing to supply, limiting the launch volume of products, etc.	SAIC
Market division	• Dividing the sales regions, sales targets or categories and volume of products. • Dividing the procurement regions, categories and volume of raw materials such as	SAIC

	(basic) raw materials, semi-finished goods, parts and components and related equipment, etc. • Dividing the suppliers of raw materials such as the (basic) raw materials, semi-finished goods, parts and components and related equipment, etc.	
Restriction on New Technology	• Restricting the purchase or use of new technologies or new process. • Restricting the purchase, lease or use of new equipments; • Restricting the investment in, the R&D of new technologies, new process or new products; • Refusing to use new technologies, new process or new equipments; • Refusing to adopt new technical standards.	SAIC
Jointly Boycott	• Jointly refusing to supply or sell products to particular undertakings; • Jointly refusing to procure or sell the products of particular undertakings; • Jointly restricting particular undertakings to conduct business with undertakings competing against them.	SAIC

8 - The New Merger Control Regime

As discussed in Chapter I the preferred operation for foreigners to enter Chinese market is the M&A. The new AML thus plays an important role as it hosts a new merger review process foreign investors must comply with. Despite the lack of detailed implementing rules, the new merger control regime has been operational since AML's effective date on August 1, 2008; and just by mid-April 2009, approximately fifty transactions involving international firms have been notified to MOFCOM. Only in one transaction, MOFCOM prohibited the operation completely. The merger regime is quite complex and there are many controversial points not yet cleared by administrative bodies of PRC. First of all there's the complex enforcement structure with its new notification process. Thus, as seen the MOFCOM is primarily responsible for applying the AML's merger control regime and has spread its responsibility with the Anti-Monopoly Bureau (反壟斷局) (AMB) which is composed of six additional antitrust divisions.[155]

Actually there are two departments in charge of merger control in China: a) the Ministry of Commerce with the antitrust Bureau which are responsible for receiving and reviewing the M&A operations, and; b) the Anti-Monopoly Committee (together with the subordinate departments of the State Council) which is charged with the formulation and

[155] AMB is divided into General Affairs Division, Antitrust Policy Division, Investigation Division I, Investigation Division II, Supervision and Law Enforcement Division, and Economic Analysis Division

promulgation of the M&A Rules and guidelines as well as other antitrust provisions. The Committee actually governs the competencies of the Ministry of Commerce, the National Development and Reform Commission and the SAIC.

The AML is a basic legal norms for merger control since the August 2008 and is implemented by a many regulations and guidelines effective since 2009. These rules are: a) the Definition of Relevant Market Guidelines (issued in 2009); b) the method of calculation of the turnover (July 15, 2009); c) the Concentration of Undertakings Guide (released on January 5, 2009); d) the Guidance and Documentation for Business Concentration (released on January 5, 2009); e) the Concentration of Business Operators (November 21, 2009, January 1, 2010) and; f) The Rules for the Centralized Review (November 24, 2009, January 1, 2010).

Chinese law – in line with the international practice – requires that if a certain percentage of sales of the merging operators is met, undertaking involved must file the operation with the Ministry of Commerce accepting the antitrust review. According to the Guidelines of Merger and Acquisition the submission of the relevant documents is mandatory when: a) all operators involved in the concentration of the previous fiscal year in worldwide exceed the total turnover of 10 billion Yuan, with at least two operators of the previous fiscal year exceeding the turnover of 400 million Yuan; b) all operators involved in the concentration fiscal year exceed total turnover of over 2 billion Yuan in China, and in which at least two operators of the previous fiscal year exceed turnover of 400 million Yuan.

Parties that meet the above thresholds are thus required to notify the transaction to MOFOCM and to obtain its approval. If they will not report it MOFOCM has the right to start an investigation over the transaction if it suspects that the operation may have a negative impact on competition in the

relevant market. Additionally any third party may report the merger (*whist blower*). Thus parties should carefully calculate the market share before and after the transaction and its effect on competition in mainland China (for these concepts see the two tables below).

Concentration Notifications Procedure		
Notification "Positive" (in most cases):	The operation is in the scope of mandatory reporting, or one or more parties to the transaction to notify MOFCOM.	
Notification "Negative" (exception):	The operation is in the scope of mandatory reporting, but the parties fail to notify the transaction. MOFCOM then has the right an inquiry and require the parties to comply with the obligation to notification.	The transaction is not in the scope of the notification mandatory. MOFCOM may initiate an investigation and ask parties to notify the transaction if it suspects that the transaction may have a negative impact on competition in the relevant market.
Exemption	When one party holds	

from notification	at least 50% of the voting rights or assets of each of the actors, or where 50% of the voting rights or assets of each party are held by a third party operator concentration.	

Element	Importance	Definition
Relevant market	**The definition of the relevant market is essential to determine the impact of a concentration on competition.**	The "relevant product market" is defined as the market composed of a group or category of products that are considered as substitutes by consumers according to their characters, uses and prices; The "relevant geographic market" is defined as the area Geographical wherein buyers acquire substitutable products.
Parties involved in the acquisition are generally trying to define the relevant market as wide as possible to minimize the impact concentration.		

According to the Provisional Procedure of Merger issued in 2009 the Merger Review process is divided into two stages. The first stage declares the operation; the second stage develops the review.

The notifying stage

The Rules provide a 30-day waiting period that notifying parties must observe before closing an operation. This period does not start until MOFCOM has accepted notification as complete. Operators must firstly

disclosure some information (*declaration stage*) submitting them to the Ministry of Commerce which is the official body in charge for deciding the case. If application materials are not complete the MOFOCM has the right to require the operators to provide relevant evidence and, if necessary, MOFOCM may additionally ask for further supplementary information. Generally the prior declaration stage has a timeline of 2-6 weeks with also many exceptions.[156] Complex cases such as *Coca-Cola/ Huiyuan* or *Mitsubishi/Lucite* required to MOFOCM up to two to three months. Once completed the submission of information MOFOCM opens the formal review process.

The Formal review stage

According to the provisions of the Anti-Monopoly Law, the formal review stage can be subdivided into a first review process and a further review time (that may be extended for an additional period). The first round lasts 30 days. During this time the Commerce Department will review the documents and information submitted by the operators and will make a decision whether or not to implement a further review. If the situation is clear the MOFOCM will publish its decision within the 30 days period while generally a further review stage of 90 days (*second phase*) is necessary when the operations is quite

[156] For example in the *Inbev/Anheuser-Busch* and *Coca-Cola/Huiyuan* cases, MOFCOM did not accept notification until about six weeks and two months, respectively, after formal filing. In *BHP Billiton/Rio Tinto* operation—later aborted by parties—MOFCOM took over five months to accept filing. Instead in *Mitsubishi Rayon/Lucite International*, MOFCOM declared filing complete one month after parties' initial submission. Thus, MOFCOM may establish the length of waiting period through its power to determine whether a notification is "complete" or requires submission of additional information. This power may disadvantage hostile takeovers to the Chinese government

complex. In this case the Ministry of Commerce may extend the review period but parties should be notified timely of the further review. Under some specific circumstances, the Ministry of Commerce may extend the review to a further period of 60 days (*third phase*). This extension is exceptional and may occur if: a) operators agree to extend the time limit; b) parties submitted inaccurate documents and information which must be verified by MOFOCM and; c) parties report significant change of circumstances. The following table lists the duration and likely outcome of each review stage (through conditions attached by veto):

Stage	Deadline	Likely result		Approval
The first stage (preliminary examination)	30 days	No further review of the decision		Pending
		Further review of the decision	Additional restrictive conditions	Conditional by
			No additional restrictive conditions	May be approved
		Not to make any decision		May be approved
The second stage (for further review)	90 days (which may be extended for a	Prohibition decision		Did not pass
		Not prohibited by the	Additional restrictive conditions	Conditional by

	further 60 days)	decision	No additional restrictive conditions	May be approved
		Overdue decision		May be approved

Since for reporting parties' time is very sensitive, they hope that the merger review cycle and procedures can be very fast and convenient. Thus, in order to assist in the rapid and efficient review of the information submitted, the Ministry of Commerce recommended notifying parties should take the following approach: firstly, clearly show why time is running out; secondly ensure that the submitted documents and information (in accordance with the requirements of the Ministry of Commerce) are complete and correct; finally, submit to the Commerce Department any additional information requested as soon as possible.[157]

Generally third parties have no right to participate in the early stage of the merger review, nor have any right to prevent the merger; however, the Ministry of Commerce may listen to the opinions of government agencies, industry associations, or other competitor operators to pick up their views and opinions.[158] The need for other government agencies

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[157] See the MOFOCM official release of 10.4.2009 Section 1: "第三方沒有，集中匯報檢討，也沒有任何權利進行合併，以防止參與權，然而，商務部將聽取第三方的意見，在併購審查過程中的法律，包括政府機構，行業協會或者其他經營者合併在一定程度上表達自己的觀點和看法，這樣的諮詢，這些第三方。
此外，根據商務部的經營者集中審查辦法第，在財政部，商務部在審查過程中可以採取主動召開聽證會，第三方可能被出版聽到一個人的自己的見解"

[158] According to the Commerce Department rule 4.5: " the Ministry of Commerce in the review process can take the initiative to convene a hearing with a third party. Hearing participants include: reporting

consultation may slow the review process significantly.[159] Additionally according to the provisions of section 53 of the anti-monopoly law (AML), parties involved in the merger process may bring an administrative reconsideration (*administrative remedies*) and/or may also bring an administrative lawsuit to the people's court (*judicial relief*).

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review of the business, competitors, upstream industry and downstream industry operators (and other operators), representatives of industry associations, representatives of government departments and consumers”. Original language: 例如，在檢討廣播業合併的情況下，向國家工商總局廣播電影電視總局，商務部的建議。諮詢過程將花費大量的時間，誰也集中申報運營商需要考慮的一個因素。如果商務部正在等待相關政府機構的反饋，認為對方的意見非常重要，很可能會進行進一步的審查作出決定例如，在檢討廣播業合併的情況下，向國家工商總局廣播電影電視總局，商務部的建議。諮詢過程將花費大量的時間，誰也集中申報運營商需要考慮的一個因素。如果商務部正在等待相關政府機構的反饋，認為對方的意見非常重要，很可能會進行進一步的審查作出決定例如，在檢討廣播業合併的情況下，向國家工商總局廣播電影電視總局，商務部的建議。諮詢過程將花費大量的時間，誰也集中申報運營商需要考慮的一個因素。如果商務部正在等待相關政府機構的反饋，認為對方的意見非常重要，很可能會進行進一步的審查作出決定例如，在檢討廣播業合併的情

[159] For example, in a review of the broadcasting industry merger cases, the Ministry of Commerce for advice to the State Administration of Radio Film and Television Administration. The consultation process will take a lot of time, who is also a centralized declaration operators need to consider a factor. If the Commerce Department is waiting for feedback of relevant government agencies considered very important to each other's views, is likely to make a decision for further review

This kind of functionality has not been yet experienced by any parties involved in a merger review.[160]

In the review stage the provisions of section 29 of the Anti-Monopoly Law, attributes the right to the Commerce Department to determine any additional measure to reduce the adverse effect on competition. The rights conferred upon the Ministry of Commerce may entail different types of restrictive conditions by case basis, including the structural conditions, behavioral conditions, or a combination of both conditions.[161]

In these first years of implementing regulation of the Law, MOFOCM has been helped by the antitrust authorities of western countries (U.S. and EU notably)

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[160] There are many concerns that the judicial or the administrative review are not independent and thus they are likely to uphold the MOFCOM decision. Anti-monopoly law and its supporting regulations nor the interests of the minority owners of specific provisions, the interests of minority owner of the acquisition of another business transaction is, however, the case for reporting to the Ministry of Commerce (mainly depending on whether the target company formation control as well as the Ministry of Commerce of whether to accept the declaration of the review.)

[161] See also Jianzhong Shi, Distinctiveness, obviousness and deficiency of China's AML, published on Jurist, No.1, 2010. "根據反壟斷法第條的規定，商務部有權確定集中對競爭產生不利影響的限制性條件。偉大的權利賦予商務部，商務部附加限制性條件的不同類型的情況下按個別情況，包括結構性條件，行為條件，或兩者的結合條件。商務部"經營者 集中 審議條例草案第 條還規定：任何一方均有權參加集中匯報檢討附加限制性條件。根據反壟斷的法律"（第章）第條的規定，經營者，商務部做出任何決合併控制不滿意，他可以提起行政复議（行政補救措施）。根據規定，行政复議的法律部，商務部是負責的，如果法系國家商務部的決定感到滿意，也可以提起行政訴訟，人民法院司法救濟。運營商拒絕接受的理由，商務部決定將行政复議錯誤的基礎上的應用程序的法律（包括違反行政程序的法律），行政部門或者濫用自由裁量權審查不公"

seeking an international coordination in the M&A principles. The Ministry of Commerce and the antitrust authorities of other jurisdictions thus signed in 2008 a cooperation agreement to share information and assist each other. MOFOCOM often draws its decision basing on the experience of the United States and the European Union antitrust divisions and often they provide technical support and advice for the establishment of the Ministry of Commerce's anti-monopoly system. [162]

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[162] See also about the financial difficulties of foreign investors in a M&A process the debate held by the Professor Yuan Ling Ping at the University of Beijing on April 28, 201 titled: 我們不知道是否財政部，商務部和其他司法管轄區的反壟斷機構簽署了合作協議，共享信息和相.

MOFCOM's Merger Review Timeline		
Phase I	**Within 30 days after receiving the dossier, the MOFCOM conducts a preliminary examination.**	In practice, the starting point of the period of 30 days is not the date of receipt documents by MOFCOM but when MOFCOM confirms that information provided is sufficient.
Phase II	Before the end of the preliminary examination MOFCOM may decide to make Further investigations and extend the review process for a period of additional 90 days.[163]	

[163] Ministry of Commerce will be also extensively listening to the advisory opinion of the stakeholders, including government regulators, industry associations, the upstream industry and downstream industries competitive enterprises. The Commerce Department will use questionnaires, telephone interviews, or face-to-face visit collected.

Prorogation	**In addition, MOFCOM may decide to extend the Phase II review for 60 days when:** players agree to extend the review period; b) documents and information provided by the operators are inaccurate, requiring further investigation, or c) a significant change in circumstances occurs after the filing.	

Exam Result MOFCOM		
Authorization	Express permission: MOFCOM issues a written or oral authorization	Tacit authorization: If MOFCOM does not take a decision before the deadline, the transaction is deemed approved.
Prohibition	The Coca-Cola Company is the only case of rejection by the MOFCOM far.	
Conditional approval	Structural condition (participants are invited to give some of their activities, branches, assets, etc.). **Behavioral** conditions (any additional conditions to reduce the impact negative impact on competition,	

	ie the prohibition on acquiring another actor in the same sector in the future); Combination of structural and behavioral requirements.	

Published Merger Decisions: Review Stages			
	Preliminary Review	Second-phase Review	Extended Review
Inbev-AB	√		
KO-Huiyuan	√	√	
Mitsubishi Rayon- Lucite	√	√	
GM-Delphi	√		
Pfizer-Weyth	√	√	
PS-Sanyo	√	√	√
Novartis- Alcon	√	√	
Uralkali- Silvinit	√	√	
Alpha V – Savio	√	√	
GE- Shenhua	√	√	√
Seagate-Samsung	√	√	√
Henkel –Tiande Offshore JV	√	√	√
Western Digital – Hitachi	√ √	√ √	√
Google - Motorola	√	√	√

The table above shows the MOFCOM's phases for reviewing the proposed M&A involving international firms from 2009 to 2012. Only two reviews have been concluded within the first phase. (Note that in the Western Digital/Hitachi case, the applicant withdrew the initial notification before the expiration of the maximum statutory review period on the grounds of a material change of relevant facts, and re-filed immediately afterwards; MOFCOM cleared the transaction during Phase II of the restarted review period.)

9 - The Abuse of Dominant Market Position

The new Chinese Anti-Monopoly Law addresses also the crucial situation of dominant positions. Moving in line with the international practice the AML forbids not the dominant position itself, which is considered lawful but rather the abuse of this position. In other words penalties will be enacted whenever the dominant firm is found to lessen the competition benefiting unlawfully from its position. The abuse of dominance position will in fact result in raising barriers to the entry for potential firms' competitors or may be used to damage them or to force them out of the marketplace. This conducts are unlawful because the dominant firm benefits at the expense of the collectivity (potential competitors and consumers).

Article 6 of the AML generally follows the international definition of abuse of dominant positions stating that - "Any business with a dominant position may not abuse that dominant position to eliminate, or restrict competition".

Therefore the Article 17 lists the particular actions that are prohibited:

"A business operator with a dominant market position shall not abuse its dominant market position to conduct the following acts:

(1) selling commodities at unfairly high prices or buying commodities at unfairly low prices;

(2) selling products at prices below cost without any justifiable cause;

(3) refusing to trade with a trading party without any justifiable cause;

(4) requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause;

(5) tying products or imposing unreasonable trading conditions at the time of trading without any justifiable cause;

(6) applying dissimilar prices or other transaction terms to counterparties with equal standing;

(7) other conduct determined as abuse of a dominant position by the Anti-monopoly Authority under the State Council".

Thus the AML specifies that a "dominant market position" is a market position held by an undertaking having the "capacity to control the price, quantity or other trading conditions of commodities in the relevant market, or to hinder or affect any other business operator to enter the relevant market". Furthermore the Articles 18 and 19 of the AML provide the features identifying the presence of a DMP (dominant market position).

Article 18 "The dominant market position status shall be determined according to the following factors:

(1) the market share of a business operator in the relevant market, and the competition conditions in the relevant market;

(2) the capacity of a business operator to control the sales market or the raw material procurement market;

(3) the financial resources and technical capabilities of the business operator;

(4) the degree of dependence of other business operators on the business operator in transactions;

(5) the level of difficulty for other business operators to enter the relevant market; and

(6) other factors relating to the determination whether the subject business operator has a dominant market position".

Article 19 "Where a business operator exhibits any of the following circumstances, it may be assumed to have a dominant market position:

(1) the relevant market share of a business operator accounts for 1/2 or more in the relevant market;

(2) the joint relevant market share of two business operators accounts for 2/3 or more; or (3) the joint relevant market share of three business operators accounts for 3/4 or more.

A business operator with a market share of less than 1/10 shall not be presumed as having a dominant market position even if it falls within the scope of the second or third item.

If a business operator who has been presumed to have a dominant market position can present evidence showing otherwise, it shall not be determined as having a dominant market position".

We can easily see that the AML is quite well aligned with the western jurisdiction taking the "two-step approach" in identifying the abuse of dominance violations: the first step is to verify the occurrence of a DMP including also the joint market dominance as expressed in Article 19; the second step is checking whether violations have taken place.

With respect of the abuse of DMP the AML thus applies the *rule-of-reason* doctrine rather than employing the single list approach. The AML in fact does not only lists the violations case by case but also inserts a catch-all provision, that will allow the anti-monopoly authorities to deem unlawful any "other conduct determined as abuse of a dominant position".

Surely this approach provides with more flexibility in antitrust enforcement, but on the other hand, confers a huge discretionary power for administrative authorities. It

means that they should possess a much greater ability in understanding of economics principles.

Although many previous regulations in the Chinese landscape already addressed the abuse of market powers before the Anti-Monopoly Law, this has the benefit of giving a more complete and effective environment on prosecuting an abuse DMP.

For example we may note that while the Article 6 of the Anti-Unfair Competition Law banned public utilities and other undertakings from engaging in exclusive dealing that operated in a legal monopoly status, the Article 17 of the AML bans the exclusive dealing with regards to all firms with significant market power. Again the Article 11 of the AUC deemed unlawful predatory pricing conducts not for every firms in a dominant position (such as now the AML states) but only to four possible situations. Similar conditions can be pointed out for tying cases as well as price fixing, predatory pricing and price discriminations. In other words the AML's treatment of abuse of DMP is more effective and flexible than the previous rules.

The wording of the AML is quite in line with the international practice and is able to take into consideration all the anticompetitive behavior regarding the abuse of DMP. The other factor we'd like to stress is that the AML's rules are further integrated, as discussed, by SAIC and NDRC regulations. In December 2010, the SAIC released the *Regulation on Prohibiting Abuse of Dominant Market Positions.* The regulation gave more specific guidelines on the abuse of DMP under the AML. For instance the Article 4 of the regulation provides with different type of specific refusals to deal behavior by dominant undertakings. Additionally Articles 5 to 7 detail what are the abusive practices of dominant undertakings with regards of exclusive dealing; tying or restrictive sales; and discriminatory trading. The Rules also offers

more explanations about understating dominant positions in relevant markets, enforcement and liabilities.

Also in December 2010, the NDRC released the *Regulation on Anti Price Monopoly*, which offered guidance on enforcing the AML's provisions with regards to the anticompetitive pricing conducts. For the abuse of market dominance, Articles 11 to 19 of the Regulation specify violations of Article 17 of the AML as well as they explain the dubious "justifiable" situations contained in the Article 17 of the AML. Additionally the Article 17 of the *Regulation* defines a dominant market position highlighting the dominant firm's ability "to control and influence the relevant market conditions". Generally these additional rules make the AML's provisions clearer and helpful for courts and public enforcement agencies that are required to address specific lawsuits or violations.

With regards to enforcement also the DMP's investigation are divided between SAIC and NDRC offices as we have discussed for monopoly agreements. SAIC is responsible for investigating and prosecuting the abuse of DMP non-price behaviors; NDRC is in charge for abuse of DMP behavior price related. Again this division of authority may lead to overlapping, and therefore disputes, between the two enforcement bodies. This because many non-price violations can result in price-related effects and the division between the two authorities will not be so clear.

Since the promulgation of the AML Chinese courts have held many antitrust actions relating to alleged abuse of market dominance and we may observe that so far the private enforcement has been very encouraging and quite aligned with international practice. The AML gives a more

effective legal framework than previous legislation allowing a clearer antitrust private litigation process as well as more deterrence to avoid the abuse of DMP. One of the first factor we note is that after the promulgation of the AML even individual consumers (for example *Li vs. Beijing Netcom* and *Zhu vs. China Mobile Telecom*) are challenging the most powerful state-owned enterprises (SOEs) taking advantage of the disposition to protect their interests.

On August 1 2008, a Chinese lawyer, Li Fangping, sued Beijing Telecom Corporation for alleged discriminatory conducts against non-Beijing clients, preventing them from signing special discount offers and pricing unless they gave a special guarantee or paid in advance. Such restrictions were not requested for Beijing based customers. Li suspected that Beijing Netcom Corporation, was: 1) a dominant mobile company in Beijing, and; 2) that the company abused its market dominance position with a discriminatory conduct against non-Beijing resident customers. Beijing No.2 Intermediate People's Court denied plaintiff's requests in December 2009 under these circumstances: (1) the plaintiff did not satisfy the burden of proof demonstrating that Beijing Netcom occupied a market dominance position in telecom market; (2) the defendant's behavior was justifiable to handle potential credit risks arising from non-Beijing customers. Fangping eventually appealed, but on June 9 2010 Beijing Higher People's Court upheld the judgment.

Another crucial decision which involved an individual user suing a state-owned undertaking was *Zhou vs. China Mobile*. In March 2009, a Beijing lawyer, Zhou Ze, sued China Mobile alleging that the company was engaging in unlawful price discrimination. Zhou suspected that China Mobile charged him a fee, a "monthly rental fee", which was not requested to other customers. The plaintiff asked for damages and for a cease injunction order to stop the discriminatory behavior. Soon the parties reached a settlement: Zhou was allowed to change its monthly plan without paying the fee and additionally Zhou's

was rewarded RMB 1,000. The case was important because it was the first one under the AML ending with a settlement and a compensation plan. Additionally this was the first case concerning a lawsuit brought by an individual against a SOE.

Although the judicial system has little or no experience of ruling under the new anti-monopoly law, we note that it's ruling well and its enforcing the law consistent with the international line of reasoning with respect to abuse of dominance cases. For example the burden of proof is correctly applied and reasonable. In this regard plaintiffs have to prove throughout objective and accurate economic analysis the DMP for their claims; they cannot use inaccurate anecdotal evidence as the *Sursen vs. Shanda and Xuanting,* and *Renren vs. Baidu*, decisions have demonstrated.

Sursen vs. Shanda and Xuanting was the first case ruled under the AML. Shanda Interactive Entertainment Ltd. (Shanda) (盛大互動娛樂有限公司) and Shanghai Xuanting Entertainment Co. Ltd (Xuanting) (上海玄霆娛樂有限公司) both owned a Chinese online literature website: China Qidian Net (Qidian, www.qidian.com) (中國汽電網). Qidian issued one of the most exciting online Chinese novels series, "Star Change". Later, the competitor Reading Bar Net (www.du8.com) operated by Beijing Sursen Electronic Technology Co. Ltd (Sursen), published a similar novel series "Star Change Sequel", which soon gained a significant popularity over the internet as well. Thus Shanda and Xuanting sued Sursen for alleged violations of their intellectual property rights since the Sursen's novel series were too similar. Soon the Reading Bar Net stopped publishing its sequel.

Few months later, Sursen sued Shanda and Xuanting for an alleged abuse of dominant position in the Chinese online

literature market. Sursen's claims were based on the circumstances that Shanda's requests to prevent from publishing the novel "Star Change Sequel" on Sursen's website should be considered exclusive dealing, and thus forbidden under the provision of the Article 17(4) of the AML. Sursen tried to demonstrate the DMP of Shanda and Xuanting's in the Chinese online literature market, bringing in front of the court several news articles including one on Shanda's own website claiming that it had a market share over 60% of the Chinese online literature market. The Shanghai No.1 Intermediate People's Court heard the case in October 2009 and refused the Sursen's claims. In the decision the Court denied importance to the evidences (mainly news articles) as being sufficient to establish a Shanda's DMP in the relevant market. In other words the court found that "that the news article on Qidian's own website touting its dominant market share is more of a marketing or promotional effort rather than a scientific study.[…] Even though Shanda may have a dominant position in China's online gaming business, this court does not find that Shanda and Xuanting has a dominant position in the "online literature market", as the plaintiff has not proven the relationship between the respondent's online literature market and its online gaming business". Secondly, the court also considered lawful the defendant's claim of protecting its intellectual property rights against Sursen's sequel since it was written by the same author of the original series and thus was misleading. Sursen eventually appealed the decision, but the Shanghai Higher People's Court dismissed the appeal and upheld the first instance court in December 2009.

The case was welcomed by the international community as the decision's was in line with the international practice and was well motivated by both the courts. The case reaffirmed that the AML does not prohibit dominance, but only abuse of dominance.

Renren vs. Baidu was probably the most important case addressed so far by the Chinese private litigation system about DMP. Tangshan Renren Information Service Co. Ltd (Renren) sued in April 2009 before the Beijing No.1 Intermediate

People's Court, the Chinese search market engine Baidu Netcom Science and Technology Co. Ltd (Baidu) for alleged abuse of its dominant market position resulted in the violation of Article 17(4) of the AML (exclusive dealing). On December 18 2009 the Court dismissed Renren's claims for failure to satisfy the burden of proof. The decision was upheld by the High Court of Appeal on July 2010.

Tangshan Renren Information (Renren) operated an online platform providing pharmaceuticals-dealing information. Similar to many companies with an internet presence in China, Renren used Baidu in order to have its website displayed near the top of Baidu's bidding search results. In 2007, Renren decided to reduce its investment in Baidu's bidding search. Shortly, Renren found that its website was no longer displayed as high as it used to be in Baidu's natural search. This resulted in a significant loss of visitors and money for Renren's. Renren suspected that Baidu reduced website's natural search ranking as a direct retaliation to its spending cut decision on the bidding search and thus that it had violated the Article 17.1(4) of the AML, which prohibits a "dominant party from restricting a third party to deal with itself or with selected parties exclusively without valid justification".

To prove Baidu's market dominance status, Renren used two news articles from the media, both stressing the Baidu's significant market share in China's search engine market. On the other side Baidu did not deny that it had reduced the rank of Renren's website, but said that it did so because Renren's website was full of junk links that reduced the user's experience. Thus, according to Baidu the Renren's spending cut was absolutely irrelevant.

The Beijing No.1 Intermediate People's Court and then the Higher Court dismissed Renren's lawsuit on the ground that the plaintiff did not satisfy the burden of proof of demonstrating the defendant's market dominance. The Courts did not find enough the two media articles submitted by Renren as they

"not clearly define a relevant market, and fail to specify the estimation methodology and underlying data in the computation of Baidu's market share". Furthermore Courts found that Baidu's conduct of banning junk links on websites to increase the reliability and accuracy of search information was transparent, and again "no evidence has been provided to show that this policy was discriminatory against Renren".

This case was important for several reasons and although much debated it's perfectly in line the international standards. First of all the Courts explicitly required that plaintiff must meet the burden of proof and demonstrate the DMP for their claims. The evidence to bring before a Court must be reliable and cannot be based on media articles (the decision was in line with the previous *Renren vs. Baidu* decision). Second, the Courts explicitly said that a dominant market position *per se* do not violate the AML. The plaintiff must additionally prove that the DMP has been abused and in this case there was no such proof.

In other words to support their claims parties must rely on competent and professional litigation consulting services fully adapted to Chinese businesses. The task of identifying relevant markets is ungenerous and very hard especially for judges that have much less experience in antitrust law.

This approach on the burden of proof has been adopted by the *QQ vs. 360 and Li vs. QQ* cases. "QQ", belonged to the Tencent Corp. and was the most popular instant messaging software in China. "360" was a security software provided by Beijing Qihoo Technology Ltd. On 18 April 2012, the High People's Court of Guangdong Province held a public hearing for a claim brought by Qihoo 360 Technology Co., Ltd. against Tencent for Tencent's alleged abuse of dominance behavior. The problems between Qihoo 360 and Tencent started in September 2010 when Tencent asked its users to substitute "360" antivirus software with a Tencent's antivirus version because "360" caused malfunctions to the Tecent's instant message platform.

Qihoo 360 sued Tecent for alleged exclusive dealing and bundling. According to Qihoo Tecent was abusing its dominance position and thus was violating the AML. Qihoo's claims were based on the assumption that the relevant product market coincided with the instant messaging software market and that the relevant geographic market was China. For proof of QQ's market dominance, Qihoo issued a official study report by F.C. Consulting Group showing that QQ's market share in the instant messaging software market was approximately 76.2%. Additionally Qihoo 360 claimed damages of RMB 150 million.

Tencent denied the claim and said that the market definition proposed by Qihoo 360 was absolutely too narrow and incorrect. Tencent stressed the fact that that the relevant product market should have considered also instant messaging services and mass instant communication tools, such as microblog, emails, and other. Additionally it argued that the relevant geographic market should be global. Although at the time of the writing the case has not been decided, interestingly, Qihoo supplied proof of QQ's market dominance that was clearly more objective than what was provided by the plaintiffs in the *Renren vs. Baidu's* decision. This could lead into a further area regarding the definition of DMP that today has not been yet explored in China.

If private litigation is well testing the limit of lawful conducts, also administrative bodies have been quite active in fighting against abuse of DMP. Although fewer cases have been conducted by the AML authorities (SAIC and NDRC) there have been significant effects on alleged illegal behaviors. This situation is quite positive since the same agencies should play a significant role in the public prosecution of abuse of DMP.

For instance and of great significance the NDRC applied fines of nearly 1.1 million USD on November 14, 2011 against two private pharmaceutical undertakings in Shandong Province. The two companies have been found guilty of many abuses of dominant market position (mainly resulting in refusals to deal and exclusive dealing). In particular companies were found to have unlawfully increased the price of promethazine hydrochloride, a crucial element for a cheaply-priced hypotensor called Compound Reserpine Tablets. The fines were notable for being the highest amounts imposed by NDRC (or any other antitrust enforcement agency) under the AML and were the first imposed for anticompetitive conduct including abuse of dominant position. Recently NDRC is investigating on other claims against Baidu, the leading Chinese internet search engine, for alleged abuse of market dominance presented by its competitor Hudong.

Remarkably, the NDRC fought also against SOEs. In November 2011, the authority announced that it was investigating China Telecom and China Unicom, two of the country's largest telecommunications companies, for alleged price discrimination in the broadband internet market. NDRC indicated that the two operators were employing their dominant market position (together they accounted for a 90 percent of the broadband market) to price discriminate competitors from non-competitors. This case was particularly welcomed by the international community because it expressed the willing of Chinese antitrust regulators to enforce the AML also against Chinese state-owned enterprises. The NDRC's announce was enough to advise the two companies to change their plans. In December, China Telecom and China Unicom announced that they would raise their broadband speeds and would reduce broadband service charges substantially (that is, by 35 percent) over the next 5 years. SOEs have been also the targets of other AML cases in the past. In 2010, a tying case involved the local SOE Hubei Salt Company, the case ended with an official order by the Hubei Provincial DRC to cease abusing its legal monopoly position in salt to harm consumer interests, apparently through activities including tying.

Lastly it's notable that the Article 47 of the AML states that "upon confirmation of the violation, the anti-monopoly authority shall confiscate the violating firm's illegal gains and impose a penalty of 1 percent up to 10 percent of the sales revenue in the previous year". Thus, in terms of penalties the AML embraces the European approach of a fine expressed in percentage, instead of the American one of imposing a determined amount.

The provision on the DMP have not currently many effects on foreign enterprises since the vast majority of Foreign Owned enterprises in China do not rely in a dominant market position in their respective markets. Thus we have the suspect that the DMP provisions will not constitute the major concern for international firms. Rather, they could be concerned about whether the enforcement of the AML would be more favorable for SOEs of a controversial merger regime.

10 – IPRs and AML: An Understandable Dilemma

A controversial issue regarding the application of the AML with respect of the abuse of dominance position is the friction that the antitrust law set against the IPRs protection. Generally we know that a strong IPRs protection is indispensable to strengthen innovation incentives but on the other hand IPRs essentially grant innovators more monopolistic powers, which strongly

reduce consumer welfare and lessen the competition itself. The conflict between antitrust concerns and IPRs protection is thus a dilemma that it's involving practically every country in the world and it is expected to raise over time.

These difficulties in find the equilibrium between these two poles may be seen also in the western jurisdictions which show different approaches to the same problem. In brief, EU antitrust authorities are generally more interested in the safeguard of consumer welfare and thus more inclined to place restrictions on dominant firms and more likely to ask dominant undertakings to license or disclose their IPRs to rivals (see for example the *Microsoft* case). U.S. antitrust authority shows a more conservative approach and is less comfortable in imposing a mandatory disclosure of the IP held by dominant undertakings.

This friction is exacerbated from the fact that both the IP laws and Antitrust Laws seek to promote dynamic market efficiency *per se* and thus they have in common the goal of promoting innovation and enhancing consumer welfare. But they try to do this with different means: antitrust laws aim to maintain opportunities for undertakings raising the competition among them, IP laws try to spur innovation by granting a monopoly allowing IPRs holders to prevent others from commercializing products or services protected by IP. This conflict determines tensions in enforcement of the laws and is not easy to track a boundary between these two legal regimes.

Also China's AML has taken into account this dilemma although it's too early to understand how it will be enforced. Article 55 of the AML provides that "*This law is not applicable to undertakings who exercise their intellectual property rights in accordance with the laws and administrative regulations on intellectual property rights. However, this Law shall be applicable to the undertakings*

that eliminate or restrict market competition by abusing their intellectual property rights."

Article 55 tells us that the AML does not apply to lawful conducts by undertakings that exercise their IPRs in accordance with Chinese IP laws and regulations. This means that a dominant firm will be not subject to the AML if it makes use of IPRs in the market. The disposition is however tempered by the specific that the AML is applicable to behaviors that constitute an "abuse of IPRs" and have the scope of reducing or eliminating the competition in China. Obviously the current legislation do not provide any definition of what can be determined an abuse of IPR. This assumption is an risks for firms that holds IPRs, especially those with dominant market positions.

In addition, Article 55 makes not clear if to escape liability from abuse of IPRs is sufficient to demonstrate that the firm is not in a DMP. If so, the "test of (non) dominant position" will not be enough to confer protection for IP undertakings accused of IPRs abuses.

In summary, the AML has not explained what behaviors can be defined an "abuse of IPRs"; neither useful indications have been provided from the Regulations nor from judicial interpretations on this complex relation between AML and IP Laws. Surely this is one of the most important flaws in the enforcement of the AML as it can affect the firms' ability to innovate.

Defining an abuse of IPRs is a complex task as it is not a real scientific concept. Generally as expressed in EU law [*Mantra* case] the term refers "to the fact that an IPR has

been used exceeding its authorization or otherwise inappropriately".[164] To briefly set the border of this definition we can point out that surely there are some abuses that are irrelevant for the AML (for example abuses of IPRs that does not lessen the competition), and there are some abuse of DMP that are not an abuse of IPRs. Please pay attention to the fact that [although we're discussing about it just after the abuse of market dominance] the word "abuse (of IPRs)" does not only refer to the "abuse" of market dominance as stated in Chapter 3 of the AML. It refers rather to every kind of monopolistic conduct that may lessen competition in mainland China (for example also monopoly agreements or concentration may integrate – although less frequently - an abuse of IPRs). Also, note that even if an IP right is a legal "monopoly" the owning of it alone is not forbidden by the article 55 of the AML.

Second, the AML takes into consideration whether the IPRs abusive conduct has caused damage or threat to normal market competition, thereby lowering market efficiency and impairing the benefits to consumers. Thus, the standards to understand what constitute an abuse of IPRs should be found in the AML and in the judicial application of it, rather than in Chinese IP laws. In other words any violation of the IP laws is not an abuse of IPRs, as it will not be an abuse under the AML.

To be prosecuted under the wording of the Article 55 of the AML the abuse of the IPRs should have "exclusionary or restrictive conduct" to competition. This is sufficient to understand that the abuse of IPRs is a "new area of

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[164] LI Guo-hai. (2011). The Shaping of Anti-monopoly Law. Chinese Founder Press,p.62.

competition law that moves away from the traditional antitrust analyses."[165] Thus, to determine "where a conduct entails an abuse of IPRs having exclusionary or restrictive effects will depends on a complicated and detailed analysis on a case-by-case basis".[166] In this field thus is indispensable understand how Courts and administrative authorities will act in future and if they will take an European approach, more interested in safeguarding consumer welfare, or the more conservative U.S. approach.

The differences between U.S and EU antitrust authorities are well summarized in the Microsoft case. The EU Commission ruled that Microsoft had abused its IPRs rights in the market of client PC Windows OS by refusing to supply interoperability information between the Windows OS software and non-Microsoft server OS. Eventually Microsoft was obliged to give licensing arrangements to its competitors to let them build interoperability facilities. By opening the market in this way, EU consumers benefit by having more providers and more products available.

The same case was decided before the US Court of Appeals as well. The U.S. Court reversed the finding that Microsoft had monopolized the market and found the company solutions was "a sign of an efficient, pro-consumer innovation rather than anti-competitive behavior". The case shows that the same behavior was legal under the U.S laws (as in pro-consumer innovation), and unlawful under the EU laws. The case implies that the field of abusing IPRs is quite complex and not coordinated globally and China will have to add its consideration in the matter.

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[165] See Id

[166] See Id

To date surely is too early to understand the Chinese position over the abuse of IPRs. The only publicly known case that lies in the vicinity of an IPRs abuse in China was *Dong vs. Microsoft*. In 2008, Zhengwei Dong, a Chinese activist lawyer, asked SAIC and NDRC authorities to investigate Microsoft's behaviors alleging that the U.S company was using its dominant market position to unlawfully fix software prices in China. Microsoft's lawyers in response to the allegation claimed that U.S company first had never occupied a dominant market position in China because "genuine Microsoft products have a very low market share in China due to widespread piracies". At the time of the writing the investigation has not been completed.

Another previous case decided by the Chinese authorities before the AML was *TSUM vs. Sony* decision. In 2004 the leading producer of batteries in China, TSUM, claimed that Sony made its popular cameras incompatible with TSUM's batteries and thus sued Sony under the Anti-Unfair Competition Law. Sony rejected the TSUM's charges by claiming that it required specific batteries with a digital key developed and patent protected by Sony for safety reasons. Sony argued that according to its patent's rights it was able to use its battery technology without abusing the IPRs (and thus facing no antitrust liabilities). In December 2007, Shanghai No.1 Intermediate People's Court ruled in favor of Sony because, first, Sony demonstrated that the installation of the digital key for which Sony had a patent protection was necessary to ensure safety, and, second, there was insufficient evidence demonstrating that Sony used the digital key just to reduce competition.

Thus we believe that the great uncertainty around Article 55 needs to be cleared by more guidelines or regulations in the next years. China will need to set an effective regulations and operational instructions for this issue. We believe that this operation will take time since China should import and carefully integrate the

experiences and regulations of EU and U.S and suit them to local environment.

The questions related with the applicability of the article 55 of the AML also need to coordinated with IP Laws and the Contract Law and several legislative texts prior to the AML that contain antitrust regulations in the IPR field. For instance, the Contract Law (art. 329) states that: "*a technology contract which illegally monopolizes technology, restricts technological improvements or infringes on the technology of a third party is invalid*."[167] The Implementing Rules[168] have set out some practices that may constitute monopolization of technology under the art. 329. For example, these Rules prohibit the technology owner from restricting the recipient to procuring technology from other sources; restricting the sales volume, sales channels or price of the recipient's products; or restricting the recipient to challenge the IPR at issue in the technology contract. These situations may be covered now by the abusing of IPRs principle and may also help commentators in understanding what kind of conducts may integrate the disposition of the Article 55 of the AML. For example in the *Dongjin Xinda Technologies vs. Intel* case a purchaser of Intel software complained that it was obliged, under the software license, to use the software only together with Intel hardware. Ultimately, this case was settled, and the Court did not rule on the merits of the case. In *WuQi v Beijing Silugao High-Tech Development*, by contrast, the judges decided on the merits. In that decision, the plaintiff accused the respondent of breach of contract suspecting that the defendant had purchased SIM

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[167] Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 Antitrust L.J. 73 (2008); Donald C. Clarke, China: Creating A Legal System For A Market Economy (2007).

[168] See the Judicial Interpretation of the Contract Law.

cards from sources other than the plaintiff. The defendant argued that the contractual clause was contrary to art.329 of the Contract Law and the Judicial Interpretations. The Beijing Intermediate Court rejected the plaintiff's claims and supported the defendant's thesis finding the clause to be an unlawful monopolization of technology.[169]

All these cases remind us that another for a better understating about the limits of the article 55 of the AML China has also to align its IPR protection with international standards. The Chinese laws on trademarks and patents in fact has been traditionally very weak due to cultural traditions and even if today many parts of the Trademark and Patent Laws have been amended to comply with modern standards and international conventions[170] this field is still a pain in the neck for international firms. The issue is probably to be identified in the absence of a concept corresponding to that of "intellectual property" in the Chinese cultural tradition, even if today it has been recognized formally in the constitution as well as defined as a fundamental civil right in the General Principles of Civil Law in 1986.

Yet it is in China that the protection of intellectual property rights is more urgent: the country is being affected by the relocation of production by many international firms (clothing,

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[169] This is in accord with a recent Supreme Court decision. *See,* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006). Although the case concerned a tying arrangement and not a monopoly, the issue presented was whether market power should be presumed when a product is patented. The Court rejected the presumption of power and held that proof of power was required.

[170] In particular many interventions occurred with the accession to the World Trade Organization (WTO), on 11 December 2001, and with the signing of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement).

equipment, food, etc.) which are very worried about the counterfeiting and imitation. China should thus offer a modern and effective piece of legislation to let international firms to expand their sphere of activity in China safeguarding their intellectual property rights.

In sum the Intellectual property rights has been so far a very crucial matter for China. The Chinese legislation is a mixed of laws, uses and traditions that pushed away for a long time Chinese IPR's protection from international accepted standards. Culture and ideological beliefs make the Chinese IPR environment a real risk for international firms entering Chinese market since local trademark and patent laws generally offered a very limited protection for firms.

Think for example that the actual use of the trademark was not considered by the Chinese law as a prerequisite to invoke the protection of the civil rights of the intellectual property rights. For this reason, many undertakings interested in starting their own business in China carefully recorded their brand in the country, even if it did not give actual course the commercial use of the mark, in the belief that, in the event of violations, they could invoke the courts. Recently, however, Chinese courts have embraced the common international procedure requiring also that there was an actual use of the trademark. This orientation is quite new as the leading case was *Red River vs. Shuaz* decided in 2008 by the Supreme Court.

Although things are now changing under the pressure of international bodies and countries today the IPR protection is still a big questioning point for businesses in China. Lot of rules is different in respect to those in western countries and foreign enterprises face many risks

for complying both with trademark and patent Chinese laws.

Chapter 3 – Risks for Foreign Firms

11 – A Schizophrenic Enforcement

From the late 1970s to 2000s, China did not experience many antitrust cases. Although China was passing the new regulations, there was still a great silent on competition and few cases were taken in front of a court. Furthermore, since the judicial system lacked of expertise and the agencies had a an important role in the field, many cases were decided and regulated by administrative agencies and bureaus. From the 2000s, when the Dragon opened definitively to foreign investments, the number of cases dealing with competition grew exponentially and magnified the problems for competition. We'll discuss hereafter the main cases occurred that have demonstrated the limits of Chinese antitrust law and have also solved some important issues for interpreters about how the Authorities work and the relevance of some complex issues.

The *Intel v. Donjing* case has been famous in the international business community as it represents the most dramatic "nightmare" for foreign firms doing business in China. Dongjin was one of the first companies in the computer technology integration filed founded in 1993 in China. Dongjin soon became the second largest CTI supplier in Greater China (behind Dialogic), and eventually ranked third worldwide. In 2000, Intel entered the Chinese market with an aggressive plan of acquisition that led the U.S. based company to control Dialogic after pouring into it around $800 million. Dongjin turned immediately in a direct Intel's rival and the competition skirmishes started. Thus in December 2004 Intel sued Dongjin claiming the company had infringed its software copyright and asked for nearly $ 8 million damages. The

import was huge. The case was taken in front of the Shenzhen Court and was originally set on IP protection. However, Dongjin responded to Intel's claims alleging an own petition for antitrust violation. According to Dongjin, Intel was abusing of its dominance position and building technological barriers to block competitors.

The case quickly magnetized the media attention on Intel behaviors implying that Intel was creating a technology monopoly. Soon all the masses were scrutinizing and accusing Intel of "entrapment" and the foreign company was put under pressure. Intel practically was forced to settle an out-of-court arrangement with Dongjin that was completed on May 14, 2007. The case was not decided in the Court but also the judicial system made pressure on Intel to find an agreement out of the courts due to their lack of experience to deal with private litigation.

In November 2004, Sichuan TSUM Power Company sued Sony for a battery case.[171] Sichuan was a high-tech company and a producer of batteries for digital cameras and video cameras. TSUM batteries were used in many products, such as Panasonic, Samsung and JVC, but could not be employed in Sony's digital camcorders and cameras. TSUM alleged that Sony was abusing its dominant market position and this resulted in a bundle or tie-in sale for consumers. TSUM also alleged that Sony

[171] This case was also discussed by Lawrence Lau in "The problems of competition in Asia: Reforms coming?" Beijing Magazine 2007 where it explained that the position of Sony was not defendable.

behavior was detriment to the competition and to the Chinese consumer welfare.

At that time the case was covered by the LAUC and Sony was accused of violating the Article 2 of the LAUC (which rules that "Managers shall abide by the principle of voluntariness, equality, impartiality, honesty and good faith, and also adhere to public commercial moral in their business transactions" And identifies the unfair competition as "activities made by managers who damage the others' legal rights and interests, disturb the order of social economy").[172] Additionally, TSUM also alleged the violation of the Article 12 of the LAUC stating that "Manager shall not sell commodity attached with unreasonable condition or force the consumers to unwillingly purchase any additional commodity that come together with the product that the consumer buys". TSUM alleged that Sony acted anticompetitively tying Sony digital cameras with Sony batteries ensuring that other batteries were not compatible with Sony digital cameras. By this way Sony "locked out" competing businesses and reduced competition.

Sony explained that it had to install a certain *"digital key"* in Sony's cameras (which rendered other batteries incompatible with Sony digital cameras) for safety considerations.[173] Sony's digital key was also patent

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[172] See Article 2 of the Lauc: "它的規則是"管理者應當遵守自願，平等，公平，誠實和誠信的原則，也堅持公共商業道德在商業交易"，並確定了不公平競爭"的活動由經理誰破壞別人的的合法權利和利益，擾亂經濟社會秩序它的規則是"管理者應當遵守自願，平等，公平，誠實和誠信的原則，也堅持公共商業道德在商業交易"，並確定了不公平競爭"的活動由經理誰破壞別人的的合法權利和利益，擾亂經濟社會秩序

[173] The company actually proved that when other brands of batteries were being used in Sony digital cameras, there were reports

protected – and the company claimed that it had the right to exercise its intellectual property rights using the own digital key, without having to worry about antitrust. TSUM alleged that Sony's behavior was unreasonable and harmful to consumers as companies like TSUM had to spend a lot of money to decipher how to ensure their batteries are compatible with Sony's digital cameras and that this would result in higher prices (in relation to batteries) for consumers.

On 20 December 2007, the Shanghai No. 1 Intermediate People's Court (上海市第一中級人民法院裁定) ruled in favor of Sony and denied TSUM's claims. The court held that "Sony's digital key was necessary in Sony cameras to ensure that there was necessary communication between the battery and the camera". The court also held that there "was insufficient evidence to show that Sony made use of its digital key to lock out competition in the battery industry".[174]

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of "smoke, explosions and burning" – resulting in users and property being damaged.

[174] The court held that "TSUM has not proved that Sony acted to prevent competition as Sony's digital key are necessary in the cameras to ensure a proper and indispensable form of communication between the battery and the camera. Even if Sony could have acted in a different manner TSUM has not met the burden of proof that the Sony's conducts have impeded and restricted the competition effectively in the market." Original decision: "法院認為，"TSUM並沒有證明，索尼採取行動，以防止競爭，索尼的數字鍵是必要的，攝像機的電池和相機之間的溝通，以確保適當的和不可缺少的形式。即使索尼可能採取行動以不同的方式TSUM已經不能滿足，索尼的行為已經在市場上有效地阻礙和限制競爭的舉證責任。"法院認為，"TSUM並沒有證明，索尼採取行動，以防止競爭，索尼的數字鍵是必

Price-Fixing

On 4 January 2011, the NDRC fined the *Zhejiang Fuyang Paper Making Industry Association*[175] for breaching of both

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[175] NDRC's decision n. 12, January 2011 against Zhejiang Fuyang Paper Making Industry Association. Here the official decision: “第條禁止壟斷協議，包括“協調一致的行動，以消除或限制競爭的行為。”術語“一致行動”的定義包括“實際上存在一致行動的承諾，即使有沒有明確的結論的書面或口頭的協議或決定。“第條規定必須找到這些聯合行動的相關因素。各方之間的溝通，他們的行動，並存在或不存在的業務理由列出這些因素之間的一致性。不過，文章並沒有特別需要一個實際的協議，明示或暗示的保證。美國最高法院指出，超過50年前，“意識的並行尚未閱讀的陰謀”謝爾曼法“完全”。劇院耳鼻喉科，派拉蒙電影公司訴區。公司，美國）（指出：“本法院從來沒有認為，平行的業務行為的證據確鑿建立協議，措辭不同，這樣的行為本身就構成了”謝爾曼法“罪行”），州際巡迴上訴法院。 訴美國，美國發現的各種因素，包括建議傳達給各方的協議，對個人的自我利益的行動，但有益的，如果在演唱會，並未能解釋的情況下，“時反駁得了沒有更多的解釋.....有理由推斷，分銷商一致行動，共同協議“）。第2條禁止壟斷協議，包括“協調一致的行動，以消除或限制競爭的行為。”術語“一致行動”的定義包括“實際上存在一致行動的承諾，即使有沒有明確的結論的書面或口頭的協議或決定。“第3條規定必須找到這些聯合行動的相關因素。各方之間的溝通，他們的行動，並存在或不存在的業務理由列出這些因素之間的一致性。不過，文章並沒有特別需要一個實際的協議，明示或暗示的保證。美國最高法院指出，超過年前，“意識的並行尚未閱讀的陰謀”謝爾曼法“完全”。劇院耳鼻喉科，派拉蒙電影公司訴區。公司，美國指出：“本法院從來沒有認為，平行的業務行為的證據確鑿建立協議，措辭不同，這樣的行為本身就構成了”謝爾曼法“罪行”），州際巡迴上訴法院。 訴美國，美國發現的各種因素，包括建議傳達給各方的協議，對個人的自我利益的行動，但有益的，如果在演唱會，並未能解釋的情況下，“時反駁得了沒有更多的解釋.....有理由推斷，分銷商一致行動，共同協議“

the Anti-Monopoly Law and the Price Law. The case is double interesting as it has involved also the role and definition, according to the AML, of 'association' well as the price fixing agreements. As mentioned, trade associations are expressly prohibited under the Article 16 of the AML from organizing businesses to 'implement monopolistic conducts'.[176] According to the Chinese Authorities, the Zhejiang Fuyang Paper Making Industry Association was found to hold at least 5 meetings between the Association's members with the objective of coordinating prices in respect of paper products. In particular members agreed: "1) to fix prices in relation to paper products (thus subsequently, members increased their prices for the paperboard by 10%); 2) to maintain the price stable for a specified time; 3) to negotiate the price for the future". These agreements were found to violate also the Price Law since it prohibits industry corporative association from "coordinating and manipulating market prices" (Article 17, PL).[177]

The NDRC found that the Association was in breach of both the Statutes and thus fined the Association a total of

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[176] See also the definition of association contained in the environment code of China refers to businesses or individuals that organize businesses activities together and prohibit them to impede competition according to the AML: the definition provided is less precise than in Article 16 of the AML.

[177] Regulations on the Prohibitions of Actions Involving Monopoly Agreements by Industrial & Commercial Administrative Authorities (Draft for comments) (promulgated by the SAIC, May 25, 2010) unofficial translation by Freshfields Bruckhaus Deringer LLP (on file with author).

500,000 RMB (about 50,000 €). Remarkable this was the highest fine for industry associations pursuant the antitrust legislation in China as well the case allowed NDRC to state that "any association, not regulated by the law, that formally or informally gathers the business insisting in a specific line of business, is subjected to the Anti-Monopoly Law and the Price Law". Although this decision is very similar to the international practice, we notice that it left offside the associations formed and regulated according to the law. We suspect that associations not promoted and created by private agreements may be exempted.[178] Additionally, the NDRC confirmed the opinion that an association's decision may involve an antimonopoly agreement also if this decision is not compulsory for the associates. For example it seems that a recommendation for the associates may involve antimonopoly agreements as well and this is consistent with the international practice.

A previous important intervention occurred in 2010 against eight oil companies[179] based on a violation of the AML, the PL and on the Rules for the Administration of Oil Products (的油產品管理規則) promulgated by the NDRC. These rules specified the maximum wholesale and retail

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[178] See also Owen, Sun and Zheng "Antitrust Law in China: The illegal agreements under the AML" Journal of Competition Law and Economics 123 (2010) at 66.

[179] The companies involved were: (a) Shaanxi Petroleum Chemistry Industry Trade Company; (b) Shaanxi Yanchang New Resources Co., Ltd; (c) Shanxi Yanlian Petroleum Chemistry Co., Ltd Xi'an Supply Store; (d) Shandong Jincheng Petroleum Chemistry Group Company; (e) Jiangsu Province Lianyungang PetroChina Sales Co., Ltd; (f) Sinopec Wuhan branch company; (g) Sinopec Luoyang branch company; (h) PetroChina Wuhan branch Company.

prices of diesel, gasoline and gas products for all provinces and central cities in China and they prohibited supplier of oil products from selling above the maximum determined price. [180] In November 2010 the National Development and Reform Commission began an investigation against the oil corporations for selling gasoline above the maximum prices set by the authorities. The NDRC has found that the companies sold gasoline at prices which surpassed the maximum wholesale diesel prices as well as they met at least four times to determine the price of gasoline. The NDRC stated that the agreement approved by the companies "*although not legally binding and not even consisting of a written agreement' may consist 'of a tacit agreement, or a concerted action, or an invitation to the parties to act in certain manner*". The NDRC further ordered, invoking Article 39 of the Price Law, to rectify the operation and to surrender the corporations' illegal gains. Surely Chinese bodies moved rapidly against price fixing activities since the Government had fears for a raise of inflation and consequences of social protest that may be strengthened.[181]

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[180] See, also the discussion of Joy K. Fuyuno, Yukiko Masuda and Leo Tian, Antitrust and Oil industry in China, paper presented at the ABA Antitrust Law meeting on March 08, 2009, available at http://www.abanet.org/antitrust/at-committees/at-ic/spring/09/03-08-09.shtml.

[181] See Joy K. Fuyuno in "Incentives to China Antitrust Law" Bejiing Press, 2008, 223 where he said that 'the higher inflation rate will be forcing the Chinese government to strongly intervene against the monopolistic agreements'.

On this field a new important intervention against price fixing agreements was secured in October 2010 when some Chinese airlines[182] communicated that they would raise passenger taxes (the *fuel surcharges*) on both domestic and international flights. Although no antitrust allegations were made against the airlines, the NDRC and other Chinese authorities were much impressed by a (presumed) concerted action taken by the airlines cartel to raise the fares and thus opened an investigation. The airlines decisions were in fact taken after the NDRC had published a notice explaining that the price of kerosene for the aviation industry was to be increased. The NDRC was in fact the body charged with the power of setting, adjusting and reducing the prices of many commodities, including the price for the aviation industry as well as the discount prices for companies in that industry. Interestingly, the fuel surcharge increase was well over the maximum increase decided by the NDRC. Not counting that the hike was identical for all the companies involved in the cartel as was observed by the Civil Aviation Administration of China (CAAC; 中國民用航空總局). In deeming unlawful such conducts, the NDRC decision on 12 May 2012 has taken the opportunity to clarify the 'parallelism theory' saying that 'price fixing is unlawful just when business operators establish a conscious collaboration among them being otherwise irrelevant the fact that one – autonomously – adjusts its prices to meet competitors policies'.[183] This clarification was helpful as in

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[182] The involved airlines were Air China, China Eastern Airlines, Shandong Airlines, Xiamen Airlines, Hainan Airlines, Capital Airlines and Shenzhen Airlines.

[183] See also, for the European Law the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition of Articles 81 and 82 of the Treaty, [2003].

other cases (for example in the *Insurance decision*) the NDRC has stated the contrary.

Another similar case which led into a formal NDRC investigation is related to commercial banks fees and charge's increase. In August 2010 the National Development and Reform Commission received some reports that commercial banks used a price-fixing conduct to raise their profit margins. China daily reported that "several commercial banks have come together and agreed to raise various fees and charges to similar amounts. A suspected violation of competition is found from the Committee [the NDRC, editor's note]".[184] The NDRC suspected that an anticompetitive conduct involved also the China Banking Association (中國銀行業協會) since between 2005 and 2010 almost ten meeting were hosted by the CBA.

Formally the NDRC has launched an investigation into this issue without any allegations and soon the investigation has stopped. But remarkably the case led to the approval of the "Rules of Commercial Bank Fees" (商業銀行業務收費規則商業銀行業務收費規則) (the Rules regulating the service fees for commercial banks).[185] The rules contained an important provision regarding the definition – or the interpretation – of the meaning of 'actions that eliminate or restrict the competition' under Article 13 of the AML. The Rules have clarified that the

[184] Edition of 12 August 2010

[185] It is not clear whether the service fees will apply also to investment banking services.

“fixing prices agreements are deemed unlawful even if the restriction of competition has not occurred yet in the market and the businesses engaged in the price fixing could potentially alter market prices for the future”.[186] Although this provision is not contained in the NDRC general rules, many believe that this interpretation could be extended as a general principle.

Another important case was the agreement between two Chinese internet based companies. On April 24, 2012, TV.SOHU.COM, v.QQ.COM, and iQIYI.COM (a sort of local “Youtube” managed from Baidu.com) established a strategic partnership in the video sector called "Video Content Cooperation" (VCC) for video copyright joint acquisition. The operation was completed to jointly acquiring copyrights of videos to be reproduced in their websites. TV.SOHU.COM, v.QQ.COM, and iQIYI.COM were competitors and thus the agreement may have produced some competition problems in that market. According to the AML these kinds of agreements are not specifically addressed so there were many doubts about the possibility of Chinese authorities to block the agreement. Article 13 of the AML clearly addresses only five types of horizontal cartelist activities between undertakings without taking into consideration the joint purchasing as one of the horizontal forbidden conduct. However, it was possible that undertakings may have used the joint purchasing to fix a specific price to be paid to their producers.

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[186] See also the risks as discussed in the European union with the Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C 210, p. 2. And the discussion analyzed by Ghen Luo at the Hong Kong University on 12 May 2010 available at http://www.hkg.hk/provision/AMP/Chinese=98123

The question in this field was that price fixing generally concerns undertakings in the upstream market that adjust their selling prices. Under the AML it is not defined whether fixing the acquisition price by the competitors in the downstream market could be deemed unlawful. Joint purchasing agreements generally seek the creation of much more power for buyers against the sellers to obtain raw materials at lower price. Surely of this practice the final consumer may also be advantaged with the decrease of the final product's price, but generally the benefits achieved are not transferred to consumers and remains into the buyers "pay desk". [187] At the time of writing of this work no decision has been taken by the Chinese authorities thus we are not sure whether under the AML these kinds of agreements may be deemed unlawful as a conclusion of horizontal monopoly agreement.

Lastly we should also mention the *China Publisher Association* case. As already discussed supra, on January 2010 three associations, the China Publishers Association, the China Book Distribution Industry Association and the China Xinhua Bookstore Association, jointly promulgated

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[187] The EU rules may bring some light in this field. The Guidelines on the horizontal co-operation agreements clearly took into consideration joint purchasing agreements. Under the EU competition rules, to understand whether a joint purchasing arrangement is banned under the Article 101(1), parties should assess whether it would give rise to antitrust concerns. To do this, two markets, the relevant purchase market and the selling market, should be checked.

the "Book Fair Trade Rules" (圖書公平交易規則) charged with the aim of regulating the discount policies and how the members should act in respect of distributors, individuals and retailers. At the center of the controversy was the content of the agreement that banned any discount for books within first year of publication and reduced the discount rate to a maximum of 15 percent. Furthermore, all resellers were asked for seeking supply only from licensed suppliers and completely abstain from placing orders to, among others, retailers and individuals. The publishers' agreements were thus suspected to violate the Article 16 of the AML and thus the NDRC opened an issue in November 2011. The Association reported that it did not force an agreement and that the members, individually, enforced a rule that was not binding. The position of the Association was to discharge its responsibilities saying that 'even if some members acted anticompetitively, they acted in concert individually with no participation of the Association. Thus the BFTR rules cannot be considered void as they do not constitute the anti-monopoly agreement.

The NDRC most notably, noticed in March 2011 that 'the Association has held the meetings and was the only responsible for the BTFR rules together with the members' and that '*also a recommendation to members may be anticompetitive if it fixes prices in violation of the AML*' Additionally NDRC clarified that "*the agreements occurred among competitors business operators should be considered void ex tunc accordingly to the National Development and Reform Commission Rule 12 on Anti-Price Monopoly. […] But in this case [Publisher Association], as a concerted action may be invoked, the Commission should evaluate, with respect of third parties rights, whether the concerted action could be deemed voidable*".[188] This issues

[188] NDRC decision n. 231 of March 2011.

rose from the NDRC confirmed some difficulties in understanding the nature and the extent of a concerted action. We believe that these actions cannot be deemed void as they lack of a formal agreements among firms. However at the time of writing the NDRC is investigating further and if the Three Associations will be found to violate AML, they will be fined.

In March 2010, the NDRC announced the violation of the AML for the behavior of several Chinese producers of rice noodles in the Guangxi area. Producers were found to have entered into price-fixing agreements and thus violating the *Antimonopoly Law*. According to the NDRC, the producers created a cartel through a series of exclusive dealings among competitors in the neighboring towns of Nanning and Liuzhou which at least led to the signing of many agreements in the related business to increase prices and raise profits. Following these meetings and negotiations the eighteen meeting participants jointly decided to raise prices; this decision was soon took also by all the non-participants in the nearby. The hiking of price provoked immediately heavy protests by local consumers which caught immediately the attention of the local authorities as well as the government that was very concerned about the problem of inflation in China.[189] The NDRC's intervention was vigorous and rapid: the local

[189] Protests culminated with in the Shanghai's port on May 20, 2010 with 200 people arrested. For a complete coverage of the matter see Thomas Ellison, CNN report, Guangxi Rice Noodles arrives in Shanghai, http://www.cnn.com/RiceNoodles/1209762/en/23

bureaus ordered the operators to block illegal price increase and to restore pre-cartel pricing according to the *Price Law* and the *Regulations on Administrative Penalties for Price Related Violations*. Accordingly to the Article 46 of the AML,[190] the promoters of the cartel were also fined as well as the companies which received fines in accordance with the seriousness of their respective situations.[191]

Market division Schemes

Chinese Authorities had also to chance to investigate in market divisions' agreements (or market division scheme) with the *Chinese Insurance Association* case. As known market divisions schemes may be defined as arrangements in which competing undertakings divide markets among themselves. In these situations, competing undertakings decide to divide specific customers or types of customers, products, zones, functionalities among themselves. Some other legal arrangements add other limitations and features: for example undertakings may

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[190] See also the intense debate around this problem in Xinzhu Zhang and Vanessa Yanhua Zhang, The Antimonopoly Law in China: Where Do We Stand?, Competition Policy International, Vol. 3 N. 2 Autumn 2007, 36.

[191] The case received much attention also from the discussed aspect of the arrest of one cartel participant accused, under the criminal law, "for illegal disruption of the market order". Commentators have worries about the possibility of expand criminal offences with the AML even if the AML expressly provides that "where any conduct constitutes a criminal offense, the relevant individual or organization shall be prosecuted for criminal liability in accordance with the law." Legal scholars are worried that Chinese prosecutors may be emboldened to treat AML violations as predicates for criminal charges under Article 225.

agree to sell only to clients that are within a specified geographic zone or apply intentionally higher prices to customers in other geographic zones.[192]

But the Chinese Insurance Association was an important decision that clarified also many points of the

[192] See also the comment of Professor Li Ping: "Market division schemes are addressed in Article 13 of the AML. At first sight, this reference could be interpreted as regional allocating schemes, and therefore the implementation, on agreements that are provincial could be allowable. However, the predominant view among Chinese scholars seems to be that this article is absolute in banning also the regional and provincial character, and does not refer only to regional market divisions. Additionally, it seems that this article was added to the draft AML submitted for the second reading of the NPC in June 2007 to alleviate the widespread concerns outside the legal community that the AML would become an obstacle to legitimate enterprise expansion." Original language: 市場部計劃在"反壟斷法"第13條解決。乍一看，這個參考可以理解為區域分配方案，因此在執行上，是省級的協議，可以允許。然而，中國學者的主要觀點似乎是，這篇文章是絕對禁止區域和省級，並不只是指區域市場部門。另外，似乎這篇文章是添加到AML提交的草案進行二讀的全國人民代表大會在2007年6月，以減輕法律界的廣泛關注外，"反壟斷法"將成為合法的企業擴張的障礙，市場部計劃在"反壟斷法"第13條解決。乍一看，這個參考可以理解為區域分配方案，因此在執行上，是省級的協議，可以允許。然而，中國學者的主要觀點似乎是，這篇文章是絕對禁止區域和省級，並不只是指區域市場部門。另外，似乎這篇文章是添加到AML提交的草案進行二讀的全國人民代表大會在2007年6月，以減輕法律界的廣泛關注外，"反壟斷法"將成為合法的企業擴張的障礙市場部計劃在"反壟斷法"第13條解決。乍一看，這個參考可以理解為區域分配方案，因此在執行上，是省級的協議，可以允許。然而，中國學者的主要觀點似乎是，這篇文章是絕對禁止區域和省級，並不只是指區域市場部門。另外，似乎這篇文章是添加到AML提交的草案進行二讀的全國人民代表大會在2007年6月，以減輕法律界的廣泛關注外，"反壟斷法"將成為合法的企業擴張的障"

Chinese antitrust law. Chinese Insurance Association (中國保險行業協會) was a guild of 29 local insurance undertakings focused especially in Southern China and in the Chenzhou Province. The CIA has been challenged twice in 2008 and 2009 for an agreement for dividing the market of vehicles insurance and in the 2011 the NDRC began a new investigation for price fixing. In the 2008 and 2009 allegations, the association was accused of cooperation for dividing or assigning the market shares to company insurances, restricting the competition amongst the property insurance undertakings and keeping a higher price for users. NDRC noticed that Article 13 of AML[193] expressly prohibits the competitors from engaging in monopoly agreement on dividing the selling market or purchasing market of raw materials and therefore the associations should be strictly banned from facilitating the formation of such agreements. Eventually on February 2011 the NDRC fined CIA and deemed illegal the market division agreements. It may be helpful to see the CIA considerations before the NDRC investigations.

CIA supported its conducts with three line of reasoning:

- ✓ The insurance industry should be exempted from antitrust law in consideration of the special nature of insurance industry on managing risks and promoting public welfare. In sum CIA was asking for an exemption from Article 15 of the AML.
- ✓ The compulsory character of China Insurance Association, that is an association required by the law and not promoted by insurances, would justify an exemption from antitrust law.

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[193] The NDRC seems interpreting extensively the Article 13 of the AML. An expansive interpretation of that provision may be justified to contain the inflation rate that is currently very high in China.

✓ The relevant market of the CIA is small and the association does not affect the competition in the economy substantially. [194]

In other words, China Insurance Association and its local offices argued that some of their anti-competition conducts should have been justified by the goal. NDRC did not approve the CIA arguments and we found that its conclusions are in tune with the international practice. Firstly the NDRC noted that '*an association requested by the law does not entail an exemption itself as the compulsory character [of the association] is not relevant according to the AML*.' Additionally '*the CIA did not provide any consistent information proving that its conducts were enabling and promoting the consumer welfare as the division agreements have been stipulated just for enriching the participants. This is supported by the fact that the agreements do not provide for any investments or other activities to enhance the operational efficiency of the members of the cartel*'. Lastly '*the relevant market of the association, although concentrated in the Shenzen Province, if considered all the association's members,*

[194] See the CIA Consideration in the official transcript in front of the NDRC: "考慮的特殊性質，保險業的風險管理，促進公共福利，保險業應獲豁免反托拉斯法。總之，中央情報局要求從"反壟斷法"第15條的豁免。強制字符，這是一個協會，按法律規定，而不是促進了保險，中國保險行業協會反托拉斯法的豁免的理由。相關市場的中情局是小的，該協會並沒有大幅影響經濟中的競爭。考慮的特殊性質，保險業的風險管理，促進公共福利，保險業應獲豁免反托拉斯法。總之，中央情報局要求從"反壟斷法"第15條的豁免。強制字符，這是一個協會，按法律規定，而不是促進了保險，中國保險行業協會反托拉斯法的豁免的理由。相關市場的中情局是小的，該協會並沒有大幅影響經濟中的競爭。

accounts for the 65% of the market share'. [195] Thus the NDRC fined the Association.

Another notably case in the market division agreements occurred in December 2009 when the Jiangsu Administration for Industry & Commerce (江蘇省工商行政管理局or Jiangsu AIC) applied some sanctions against the Concrete Committee of the Construction Materials and Construction Machinery Industry Association of Lianyungang City (混凝土的建築材料和建築機械行業協會連雲港市委員會) and other sixteen concrete producers for a breach of the AML. Importantly this decision was much awaited as the first publicly released enforcement decision taken by a Chinese administrative body under the Anti-Monopoly Law.[196] As discussed above, the SAIC maintains jurisdiction over the non-price anticompetitive behavior under the AML.[197]
In March 2009, the Association was found to facilitate the coordination of the 16 participants (mainly producers of premixed concrete) by the signing of a "Self-disciplinary Agreement" (自律協議) as well as the "Supervision and Punishment Rules" (協議).

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[195] See also for a different position Bruce M. Owen, Insurance companies in China: Opportunities? Chinese Journal of Business Economics 123, 147 (2011), at 36.

[196] See also the comments of Bruce M. Owen, Su Sun and Wentong Zheng, Antitrust in China: The Problem of Incentive Compatibility, Journal of Competition Law and Economics 198 (2009), at 12.

[197] See also the comments of Chaowu Jin and Wei Luo, Competition Law in China, Beijing Press, 2010, 216 where he addresses the delegation of power to the provincial level.

In particular the agreement was taken to: a) divide the market shares of the 16 members according to their capabilities; b) divide the market share in Lianyungang City; c) require the producers to record each sales arrangements with the Association (with the specification that any failure in doing so would result in a special procedure to be concluded with a sort of punishment by the Association); d) fine every producers that do not cooperate with the Association and its members.

According to the SAIC, all the arrangements took effect by April 2009 and the Association began soon inspecting each member's behaviors. Members found not cooperating with the Association where fined for violating the "Self-disciplinary Agreement".[198]

Some months later, in June 2009, a construction undertaking reported a complaint against the Concrete Association, alleging that many buildings projects had to be aborted because there wasn't enough availability of premixed concrete. The reporting party denounced that the Association was banning its members from entering into contracts with other companies, without the approval of Association's representatives.

The SAIC detected a possibly infringement of AML's regulations having the effect of restricting competition in China. Therein SAIC authorized the Jiangsu local AIC to start a formal investigation over the case. Actually the

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[198] See also Xinhua News, SAIC adopts the first anti-monopoly decision, 2011, available at http://news.xinhuanet.com/english/2011-01/30/content_6634232.htm and Xinhua News, Legislature: SAIC's anti-monopoly enforcement may affect foreign investment, December 4, 2010,

local authority found that the Association was enacting an anticompetitive conducts in violation of the AML by imposing concrete producers to bid themselves with the provisions contained into the Self-disciplinary Agreement. The Local SAIC established that the conduct was restricting competition in the premixed concrete industry in Lianyungang City and was in breach of Article 16 of the AML as well as of the Article 13(3) of the AML (having divided sales regions). Since the Association actively cooperated with the investigation, the SAIC published just an injunction and ordered an immediate stop of such conduct. A reduced fine was also recognized.

We should note that in this case the agency imposed fines on both the Association as well as its participants acting differently with respect of the decision of *Zhejiang Fuyang Paper Making Industry Association* , where just the association faced liabilities, rather than its members, for a breach of the AML. The Jiangsu AIC determined that *"[the five participants] to the cartel have been enforcing the decision of the Association and went also beyond the strictly agreements undertaking additional divisions and fixing prices in their respective spheres of influence. Additionally [they] have acted as facilitators for reaching a market division agreement within the Association and have played unfairly in the market lessening the competition and violating the AML*". This assumption makes definitely clear that in China both "facilitators" and "implementers" of monopoly arrangements may be punished under the AML. [199]

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[199] For similar cases under the European Law the case C-185/91, Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff, [1993] ECR I-5801; Case C-299/96, Corsica Ferries II, [1998] ECR I-3949, mainly paragraph 49; Case C-35/96, Commission v Italy, [1998] ECR I-3851, mainly paragraph 53; Case C-35/99, Arduino, [2002] ECR I-1529, paragraphs 34-35; or Joined Cases C-94/04 and C-202/04, Cipolla, [2006] ECR I-11421, mainly paragraph 47.

Resale Price Maintenance

Some other interventions of the Chinese Authorities have been held on the Resale Price Maintenance (RPM). RPM are common vertical restraints (for example vertical contracts or agreements amongst producers and distributors) very diffused in China. Prohibited under the Article 14 of the Anti-Monopoly Law (AML) if they intend to regulate resale prices (and in particular minimum resale prices) to third parties,[200] the principle is a little bit tempered by the various exceptions listed in the Article 15 of the Law. We know, in fact that some *vertical co-operative arrangements* between big businesses are justified to maintain the supply chain efficient and competitive.

Let's think to the vertical agreements that may improve economic efficiency by empowering a better coordination between the member's companies. For example this may result in a strong reduction of transaction and distribution costs and/or an raise of their sales, R&D activities and investments capabilities.

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[200] RPM are strictly prohibited also in Australia and Europe. See for example the comment of J. Dukley: "*In Europe, there is no express prohibition against RPM between entities in a vertical relationship within the European competition law. However, Article 101(1)(a) of the European competition law prohibits price-fixing between entities. Article 101(1)(a) may be applied to entities in a horizontal (i.e. competing entities) or vertical relationship (i.e. entities in a supply chain relationship). In this regard, agreements amounting to RPM may be caught by Article 101(1)(a). Further, RPM is listed as a "hardcore" prohibition pursuant to the European Commission's Vertical Restraints Block Exemption (the most recent version of the Block Exemption and its accompanying Guidelines came into effect on 1 June 2010 and will stay in force till 31 May 2022. It is, thus, likely that conduct amounting to RPM will breach Article 101 of the European competition law".*

The first RPM remarkable case in China was taken in front of the authorities in 2011. In April 2011 the China Automobile Dealers Association (CADA) (中國汽車流通協會) reported that the Japanese leader motor company, Toyota Motors, has been enforcing unreasonable restraints on its distributors, including the fixing of a minimum threshold price and a territory allocation as well. The CADA thus filed the report accusing the Japanese manufacturer for breach of the Anti-Monopoly Law (AML) as it fixed the prices (including minimum resale prices) of distributors, imposed vertical restraints on distributors and eventually impeded competition in the relevant market. Toyota Motors invoked the application of the Article 15 of the AML waiving the competition law for public benefit type considerations. Although the NDRC has not concluded the investigation yet, it offered some useful clarifications noting that the Toyota conducts was in contrast with the antimonopoly law. The NDRC noted that "*the manufacturer has entrapped itself in several exclusive agreements in the distribution of car reserving the right to select each dealer and impeding other retailer from the distribution*." This "*seems in contrast with the aim of an open market and with the AML*". However the NDRC continued observing that '*these kind of agreements may be justified by the necessity of reinforcing the competitiveness of medium enterprises, and this authority should determine some relevant factors to understand the benefits of reducing the competition with the RPM agreements and should deem unlawful those arrangements aimed in maintaining and strengthening the positions of large corporations at the*

detriment of competitors".[201] Practically the NDRC has postponed its review asking for further regulation on the RPM agreements. In particular we notice that, the NDRC and – generally – the Chinese competition law may be waiting for a list of block exemptions in relation to certain categories of vertical agreements in specified sectors as in the automotive industry. China may need to follow what the European Commission did with the provisions regarding the block exempted industries.[202] Although the NDRC announced in January 2011 that it was looking into the possibility on granting exemptions in respect of certain heavy industries it did not provide any details into whether individual exemptions or block exemptions will be contemplated or the breadth or scope of these exemptions. The NDRC also did not disclose a timeline in which the NDRC anticipated setting up such an exemption regime. We believe that a detailed block exemption list is strongly required in China and it will help to address such cases.

Recently a Shanghai court addressed the first case involving vertical cartelist activities (授权区域证明书) since the introduction of the China's Anti-Monopoly Law (AML). The case concerned the resale price maintenance. In particular the tribunal stated that "resale price

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[201] NDRC investigated the motor manufacturer also under the Regulations on Penalties to Officials, [2007] State Council Order No. 495 [行政机关公务员处分条例, [2007] 国务院令第495 号]; and PRC Law on Administrative Supervision, [1997] Presidential Order No. 85 [中华人民共和国行政监察法, [1997] 主席令第 85 号].

[202] See Commission Regulation 461/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector.

maintenance by itself does not constitute a monopoly agreement, however, given that other courts and AML enforcement authorities can impose fines for illegal resale price maintenance, market players should not assume the practice is legal in China."[203]

On 18 May 2012, the Chinese division of Johnson & Johnson, the Johnson & Johnson Medical Equipment Co won the lawsuit undertook by a Chinese local distributor, the Beijing Rainbow Medical Equipment Technology & Trading (北京虹醫療設備技術及貿易). The case was crucial as it represented the first anti-monopoly situation regarding vertical monopoly agreements since the introduction of the AML in China. The case offered a definition about what is the minimum price at which a local distributor could resell the products provided by the supplier, Johnson & Johnson (*resale price maintenance* or 貿易).

In January 2008, Johnson & Johnson signed a distribution arrangement with Rainbow that strictly prohibited the distributor from selling the products outside its designated zone (*designated area* or 权区域证明) and from selling below a minimum price set by the supplier, Johnson & Johnson. In March 2008, Rainbow violated the agreement and bid for a plan which was located outside the designated area as well as was bidding at a lower price than the minimum fixed price agreed with J&J. As a result the supplier terminated Rainbow's distribution grants for the original area and thus blocked

[203] Shanghai intermediate Court n.2, *Johnson & Johnson Medical Equipment Co v Beijing Rainbow Medical Equipment Technology & Trading Co. Ltd* [2012] Yi Zhong Min Chu Zi No.2876.

the supply to the distributor accusing that Rainbow has broken the contract.[204] Rainbow's reaction was the filing of a lawsuit against J&J in which the plaintiff alleged that the supplier had created resale price maintenance with the aim of reducing competition in China citing an alleged violation of the Article 14.2 of the AML.

The court held that "*Rainbow provided no evidence proving the market share of the product in the relevant market, of the level of competition in the relevant market, or of the supply situation and price changes in the relevant market [...] thus the plaintiff failed to meet its burden of proof [...]. Furthermore, this Court notes that Rainbow's damages mainly resulted from the contract dispute between the parties, which had no direct relationship with the resale price maintenance clause in the contract*". [205] Based on this line of reasoning, the Court rejected Rainbow's claims. From this trial we can see that the Court holds the view that a resale price maintenance is a *per se* a vertical monopoly agreement, thus it is not banned under the AML. In other words in certain situations it can be lawful. To be banned something else is required. In this case must

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[204] Additionally J&J also confiscated a performance bond that Rainbow deposited with Johnson & Johnson.

[205] 彩虹沒有提供證據證明該產品在相關市場的市場份額，在相關市場的競爭，或在相關市場的供應情況和價格變動的水平[...]因此，的原告未能滿足其負擔[證明]。此外，法院指出，彩虹的損害賠償主要是由於合同當事人之間的糾紛，沒有直接的關係，轉售價格維持在合同條款。"彩虹沒有提供證據證明該產品在相關市場的市場份額，在相關市場的競爭，或在相關市場的供應情況和價格變動的水平[...]因此，的原告未能滿足其負擔[證明]。此外，法院指出，彩虹的損害賠償主要是由於合同當事人之間的糾紛，沒有直接的關係，轉售價格維持在合同條款。

be shown that the agreement restricts, reduces or eliminates competition. [206]

In another earlier case, in September 2010, the NDRC requested the *Publishers Association of China* (新華書店), the Books and Periodicals Distribution Association of China (國新店), and China Xinhua Bookstore Association (中國新華書店) to modify a rule that banned internet retailers sites from selling new books at more than 15 per cent discount off the cover based price and traditional book sellers from discounting new books published within a year timeline. Both these cases prove instead the position of the NDRC is broader and not aligned with international common practice.[207]

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[206] It is interesting to note also the comment of Judge Lin to the sentence that has been released just few days after the decision: "*Unlike horizontal agreements between competitors, this Interpretation did not provide any guidance on how to try a case related to vertical agreements, such as distribution agreements. [...] For disputes concerning a horizontal monopoly agreement between competitors (such as an agreement involving price fixing, market-sharing or collective boycotts), the Interpretation shifts the burden of proof to the defendant to prove the agreement does not have any effect of eliminating or restricting competition. Whether this Interpretation might influence a court in a subsequent case involving resale price maintenance remains to be seen*." " 與橫向競爭者之間的協議不同的是，這個解釋沒有提供任何指導如何嘗試相關的縱向協議，如分銷協議的情況下。 [...]關於一個競爭對手（如協議涉及價格壟斷，瓜分市場或集體抵制）之間的橫向壟斷協議的糾紛，"解釋"的舉證責任轉移到被告的證據的協議沒有任何影響的消除限制競爭。這個解釋是否可能影響法院涉及後繼維持轉售價格的情況下，仍有待觀察"

[207] In this regards we note that in China there is an absence of detailed guidelines by China's enforcement authorities on many issues

of vertical agreements. Even if the AML is very similar to EU antitrust law, and the EU Commission has, except in rare circumstances, considered resale price maintenance as a "*hardcore restriction"* of competition (see for example para. 11 of EU Commission *De Minimus* Notice 2001/C368/07). In our opinion the conclusion that retail price maintenance is acceptable in China except when it is proven that the resale price maintenance may restrict competition could be a serious flaw for the AML' s scope.

Bid Rigging

Lastly, the Chinese Authorities have also investigated the bid rigging schemes. Bid rigging are diffused and harmful agreements that lessen the competition and may cause heavy losses for the government agencies and authorities involved in a bid project.[208] With bid rigging schemes undertakings may effectively raise prices for federal, state, or local governments for acquiring goods or services. Essentially, competitors' undertakings agree in advance who will submit the winning bid on soliciting bid operation so that the government disbursement will be higher than a fully competitive bid. The higher profits will be shared from the winning bidder with the other bidding participants. The NDRC has studied the bid rigging schemes that followed the promulgation of the Bidding Law of 1999, and eventually published "The National Development Reform Commission Guidelines on Bid Rigging' in May 2010" (國家發展和改革委員會串通投標指引") to establish which actions will fall under the inspection of the antitrust enforcement authorities.

The NDRC work was pushed by the great exposure of the *Szechuan Zhixin City School* case. The earthquake in the Szechuan area in 2008 has proved that many buildings collapsed for the low quality of the materials employed. Courts

[208] To a certain extent bid rigging is one of the reminiscent issues also in other jurisdictions like EU and U.S. See for example Keck & Mithouard where the EU court applied clearly the anti-monopoly agreements provisions to the notion of bid rigging. Joined Cases C-267/91 and C-268/91, Keck and Mithouard, [1993] ECR I-6097.

have demonstrated that, although the bid processes were apparently fair, builders and manufacturer entered into bid rigging schemes to raise the price and to divide the earnings jointly. The Szechuan Intermediate Court held that "*contractors in the [Zhixin] area have engaged in unlawful subcontracting agreeing not to bid or to submit a losing bid in exchange of subcontracts for supply and fragmented works granted from the bid winner. [...] This resulted in an higher price for the agent, the Zhixin municipality, and in a lower quality of materials and commodities used that determined the corruption and eventually the collapse of the school building*". Prosecutions have also proved the same operating scheme behind the collapse of an electrical power distribution center in Jiangxin Island, a hospital and other school buildings in Guangzhou city.

Currently the NDRC Rules takes seriously into consideration bid rigging schemes. The Rules covers all possible conducts and divided them into one or more of the following categories in line with the international practice: Bid suppression (Article 12 of the Rules), complementary bidding (Article 14), bid rotation (Article 15) and unlawful subcontracting (Article 17).

We note that in bid suppression schemes, the Rules deem unlawful arrangements to impede from bidding or withdraw a previously submitted offer to let the designated bidder to win the project.[209] A complementary bidding is the result of more unattractive bids that clearly cannot be accepted from the government body. Complementary bidding operations are the most frequently unlawful activities around the world as is relatively simple to implement as well as difficult to detect for antitrust authorities. Finally, as mentioned, the rules prohibit bid rotation schemes and subcontracting arrangements. In bid rotation schemes, undertakings submit bids in more bid

[209] In a certain sense, see Owen, Sun and Zheng, Bid rigging in China: The Bid Suppression Schemes are illegal, Journal of Antitrust Law – China section 451 II, 2010.

projects but agree to take the turn being the most competitive one and thus securing the success,[210] while in subcontracting, some competitors agree to submit a losing bid but they will get in exchange the subcontract or other advantages from the bid winner. Although this scheme may be difficult to prove as subcontracting is not unlawful generally, it may hide an agreements amongst businesses to defeat competition.

A rule of reason

These cases mentioned above and the formulation of the AML reminds us that also China will be implementing the *rule of reason* doctrine. As known, in the United States, the "rule of reason" has been introduced a century ago, in the famous *Standard Oil* case.[211] This doctrine has been

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[210] See also for bid rotation schemes Shang Ming, The Anti-Monopoly Law of China: Interpretation and application (2007), at 1 [尚明主编,《中华人民共和国反垄断法 理解与适用》法律出版社2007年版]; and Mark Williams, Competition Policy and Law in China, Hong Kong and Taiwan (2007), at 172 et seq.; and Youngjin Jung & Qian Hao, The New Economic Constitution in China: What about Bid Rigging Schemes?, 24 International Business Law Review. 107-108 (2010).

[211] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). The Court stated: "*Union Tank Line Company, one of the subsidiary corporations, the owner practically of all the tank cars in use by the combination. If no possibility existed of agreements for the distribution of these cars among the subsidiary corporations, the most serious detriment to the public interest might result. Conceding the merit, abstractly considered, of these contentions, they are irrelevant. We so think, since we construe the sixth paragraph of the decree not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever,*

developed under the US jurisprudence during the 80s[212] and was used to tune unlawful anticompetitive agreements deeming illegal only the agreements that may harm effectively the competition.

In the *Chicago Board of Trade* the Court held for example that: "*The true test of legality is to understand where the restraint imposed is merely regulating and perhaps [...]*

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recreating directly or indirectly the illegal combination which the decree dissolved. In other words, we construe the sixth paragraph of the decree not as depriving the stockholders or corporations of the right to live under the law of the land, but as compelling obedience to that law. As therefore the sixth paragraph, as thus construed, is not amenable to the criticism directed against it, and cannot produce the harmful results which the arguments suggest it was obviously right. We think that, in view of the magnitude of the interests involved and their complexity, that the delay of thirty days allowed for executing the decree was too short, and should be extended so as to embrace a period of at least six months. So also, in view of the possible serious injury to result to the public from an absolute cessation of interstate commerce in petroleum and its products by such vast agencies as are embraced in the combination, a result which might arise from that portion of the decree which enjoined carrying on of interstate commerce not only by the New Jersey corporation, but by all the subsidiary companies until the dissolution of the combination by the transfer of the stocks in accordance with the decree, the injunction provided for in § 7 thereof should not have been awarded.

Our conclusion is that the decree below was right, and should be affirmed except as to the minor matters concerning which we have indicated the decree should be modified. Our order will therefore be one of affirmance, with directions, however, to modify the decree in accordance with this opinion. The court below to retain jurisdiction to the extent necessary to compel compliance in every respect with its decree."

[212] See *id*.

promoting competition or [...] whether it is suppressing or even destroying competition."[213]

This old doctrine asks Courts to take into consideration the nature of agreements and their effects in the markets: only harmful agreements will be banned. After these decisions at the begging of the XX century the rule of reason is used practically in every jurisdiction and is codified in antitrust statutes around the world.

For instance in the US, Courts have proved unlawful several times arrangements that were not reasonable. In *National Society of Professional Engineers*[214]*,* case the association banned engineers from defining the price of the work unless they had been officially selected for a project. The justification reported from the association was curious and was that otherwise clients may be forced to exclusively consider the price of services instead of the quality and safety. The US Supreme Court found a violation of the antitrust rules: "*Safety is not deemed unimportant, but rather something that ultimately was for customers to decide. They could employ the society's approach if they wished, but the society could not impose this choice on all customers. Competition meant free and open choice, not one side of the market dictating terms to the other*".

In China there is not jurisprudence on the rule of reason as the competition field is a recent arena for antitrust courts and rules. However the AML, similar to

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[213] *National Collegiate Athletic association vs US.,* 509 U.S. 209, 210 (1983).

[214] United States v. *National Society of Professional Engineers 12, F. 56 3.d (9th Circ) 1988*

what happens in EU and Australia, sets a list of lawful anticompetitive agreements capable to raise consumer welfare and inserts a catch-all clause that allows Courts and administrative agencies to deem lawful antimonopoly conducts for other justifiable interests. As Professor F. Liaoping noted "the rules of reason is contained in the AML that sets the proper conditions where a concerted act is lawful or unlawful. The main question is now to understand how judges will enact the provisions". "The AML rules are quite broad so there is a sense in which this flexibility may be problematic."[215]

Thus the AML does not prohibit the monopolistic agreements completely. Article 15 of the AML contains some exemptions that are applicable to a single agreement or an entire group of agreements among firms. Agreements may be exempted from the application of the AML if firms can prove to be in one of these circumstances:

"(1) for the purpose of improving technologies, researching and developing new products;

(2) for the purpose of upgrading product quality, reducing cost, improving efficiency, unifying product specifications or standards, or carrying out professional labor division;

(3) for the purpose of enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators;

(4) for the purpose of achieving public interests such as conserving energy, protecting the environment and relieving the victims of a disaster and so on;

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[215] F. Ping Liaoping – "Speeches on competition rules" - Congress held on 24th May 2011 at the Beijing University.

(5) for the purpose of mitigating serious decrease in sales volume or obviously excessive production during economic recessions;

(6) for the purpose of safeguarding the justifiable interests in the foreign trade or foreign economic cooperation; or

(7) other circumstances as stipulated by laws and the State Council."[216]

Is not clear how firms should ask for the exemption. According to some authors undertakings may ask the NDRC for the exemptions before contracting and reaching agreements, other commentators believe that, in the monopoly agreements, firms should demonstrate to be eligible for an exemption after the investigation has begun. We support the latter rationale as confirmed also by the NDRC draft Rules on Anti-monopoly agreements. Additionally, according to the Article 15 of the AML, businesses are required also to prove that: 1) the agreement can enable consumers to share interest derived from the (monopolist agreement) and that; 2) the agreement will not severely restrict the competition in the relevant market. The burden of proof relies on firms engaged in the agreement.

Accordingly to the Article 15(1) and (2) of the AML, the purpose of improving technologies, researching and developing new products or quality and improving products efficiency may be fulfilled when firms

[216] This disposition has been suggested also by many commentators to let the government update the rules. See Liu Hu Den Comment to Article 15 of the AML. Journal of Antitrust Law [2010] OJ C 210, p. 2.

demonstrate clearly that a sufficient level of competition will remain in the market and that the higher profits are properly utilized for the progress of technologies.[217] Also if the AML requires that the benefits shall be poured into the market contributing for the consumer welfare and although the Article is clearly inspired to the Article 101(3) of the EC treaty,[218] we notice that there is no provision ensuring the adequateness of the agreement. In other words firms may engage in a monopolistic agreement even if a different solution is available as the AML does not require the agreement's indispensableness for reaching the development of new technologies.

Although some commentators underlined this aspect and found differences between the EU laws, we have a different opinion. It's true that the AML does not provide a specific provision for that but the NDRC rules request such implicit parameter. The EU antitrust law is clearer on this point requiring that the restriction is indispensable and therefore opening also an analysis on the adequateness of the agreement.

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[217] See the interesting intervention of Attorney Harris Den Tao, Allen & Overy LLP, commenting in the Journal of Antitrust Law (2010, at 65) that this exemption is fully acceptable to spin the economic progress.

[218] The Article 101 of the EU Treaty states that: '"any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

As a matter of fact, if the competition restriction is not required to achieve a certain goal, the agreement is not legal [*Matra Hachette* case 17/93]. [219]

As mentioned the AML is a recent piece of legislation and currently there no cases helping the interpreters about how these exemptions will be enforced. The only case been published is the *Paper Association case* that provided the NDRC a chance to understand the exemptions from the Anti-Monopoly Law for monopoly agreements that may bring technologies improvement. The NDRC stated that the advantages of the agreement should be counted objectively and should properly compensate the loss of consumer welfare in the economic market. The balance should be clearly positive and without such proof, any agreement should be considered illegal.
In *Paper Association* case this proof was missing: "*although the association's efforts were taken onto the demonstration of the compensation of the loss, the association did not adequately convince that agreement was improving the production*". [220]

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[219] Another condition for exemption is where an agreement alleviates decreases in sales or cuts production overcapacity in periods of economic downturn. The European Commission has exceptionally exempted similar agreements (so-called "crisis cartels"). However, such exemptions were granted infrequently and are of dubious efficacy. If this condition is interpreted too broadly in China, the necessary restructuring of inefficient sectors (particularly concerning SOEs) may be hindered.

[220] See NDRC 12.2.2009 Decision number129.

Additionally the NDRC noted that the agreement should not restrict the competition severely in the relevant market. In the *Paper association* case, the NDRC stated that "when conducting the investigation to find out whether the agreement leaves enough competition in the market, the authority should look for the relevant market of businesses". Notable a relevant market threshold is met when the undertakings together reach at least the 25% of market share. A severely restriction is found when the effect of monopoly agreement involve at least the 10% of market share. Thus if these two conditions are met, agreement may not be exempted from the AML.[221]

Probably one of the most dubious provision concerns the monopolistic conducts "stipulated for safeguarding the justifiable interests in the foreign trade or foreign economic cooperation" (Article 15(6) of the AML) or "for other circumstances stipulated by the laws and the State Council" (Article 15(7) of the AML). In such cases undertakings are not asked to demonstrate that the agreement enables consumers to share interest derived

[221] For a comparison with the EU antitrust law see M. Mallard, *L'approche Chinoise,* Pacific Antitrust review 2009 at 22 : « *Les trois premières conditions suivons l'approche de l'UE conformément à l'article 101 (3) CE. Dans la mesure où les accords améliorer la technologie ou la qualité des produits ou à améliorer la compétitivité des petites et moyennes entreprises, tels accords sont exemptés de l'interdiction des articles 13 et 14. En revanche, les trois autres conditions ne semblent pas avoir d'équivalents claires dans la législation européenne. La condition (iv) Permet accords d'être exemptés de l'interdiction des articles 13 et 14 si elles «doivent sociaux intérêts publics», tels que les économies d'énergie, protection de l'environnement et les secours en cas de catastrophe. Ce sont des objectifs louables en outre d'une intervention publique dans l'UE, ils seraient déployés principalement par des moyens autres que la politique de concurrence. La loi chinoise, elle aussi, permet l'intervention publique dans ces domaines sur la base d'autres lois et règlements.»*

from the cartel agreement and that it will not severely reduce the competition in the relevant market.
Thus some 'justifiable' interests may allow monopoly agreements that eliminate or restrict the competition definitely even in the case of disrupting the consumer welfare. Commentators have doubts on these two exemptions as they could be used as safe harbors to escape from the AML, a real threat for consumers.[222]

We have a different opinion. These provisions may be risky, but it will depend on how they will be enforced by the Chinese authorities; there are reasons – internationally accepted - to provide complete exemptions for firms as emerged in the AML drafts. The exemption contained in the Article 15(7) has been introduced for the necessity of consider further regulation that may arise in the future under the enforcement of the AML (especially in the guidelines). On the other hand detractors suspect that the exemption is contained just to carry out the specific unfair needs of SOEs [223] but, we notice, that no cases have been criticized so far.
Also the exemption contained in the Article 15(6) has a rational explanation. Generally such kinds of provisions are needed – and the draft made it clear – to save the occurrence of international treaty regarding foreign cooperation, WTO and other international circumstances. Consequently we do not believe these exemptions from the traditional antitrust analysis constitute a real danger in the enforcement of the AML. We will

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[222] See for example Leiming Wang, Lutao Shen & Sheng Zou, *Five Comprehensive Reason to fear the AML in China*, Xinhua Press, 2009 at 65

[223] See Id.

need to see how the Chinese authorities will act in the future.[224]

Thus, like Article 81(3) of the EC Treaty, these exemptions are limited to monopolistic agreements that may raise the consumer welfare; such agreements should "reverse the economic advantages to consumers thus enabling them to share fairly the benefits of the agreement, without materially restricting competition in the relevant market".[225] The dangerous provision is that while under the EU law a further element is required – In the EC practice the restraints imposed must be "indispensable" – in the Chinese AML the term "necessary" or "indispensable" is missing—making the exemptions for crisis cartels, export cartels, and unspecified "public interests" an important risk for consumer welfare.

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[224] See also Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PACIFIC LAW & POLICY JOURNAL

[225] *See Breaking Up Monopolies Key to the Restructuring of SOEs*, LIAOWANG, December 13, 2006

12 - Is there a Protectionism Risk?

Since 2009 and till September 2012, the MOFOCM has received a total of more than 103 M&A operations and has conducted the review for at least 87 cases in accordance with the AML and its guidelines. 80 cases have been approved unconditionally and just one was rejected. Although these numbers seem to welcome international investors we should notice that many of the mergers involving foreigners have been questioned.

In 2009 Coca-Cola Company sought the acquisition of China Huiyuan Juice Group Limited.[226] Huiyuan's share of the beverage market in China reached 10.3% of Coca-Cola in the same market share of 9.7%. Therefore, after the acquisition of the economic entity's market share would be less than 20%. This was the result of lower market share after the merger and commenters believed that the project would be approved by the Ministry of Commerce.

Then, the Commerce Department did not approve the case, the main reason was: if the acquisition were granted, Coca-Cola would have the ability of its dominant position in the carbonated drinks industry conduction to the juice industry, thereby squeezing the living space of the domestic small and medium enterprises, with the inhibition of other domestic enterprises to participate in the juice market competition, and ultimately harm the interests of consumers.

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[226] See MOFOCM's announcement of March 18, 2009. For details see *infra*.

Many other cases have been approved under specific conditions that international firms had to satisfy.

For example one of the first cases was the *Japan's Mitsubishi acquisition of Lucite*.[227] Mitsubishi Company was mainly engaged in the production and manufacture of monomeric and multimeric polymer, a leading position in the polymer production industry. The company was the result of the merge with Japan's Mitsubishi Kasei Corporation and Mitsubishi Petrochemical Co.. The company was seeking the acquisition of Ltd.. Lucite, the world's leading MMA (methyl methacrylate) manufacturers in the global monomer acrylic acid production with market share as high as 24%. After the merger of the two companies, Mitsubishi Rayon production of MMA (methyl methacrylate) market share in China would have reached 64% of this. The Ministry of Commerce specified multiple approval conditions, including some requirements for the next five years. In particular Mitsubishi Rayon should have gradually stripped Lucite and part of its assets in China, and limit its further expansion in the Chinese market.

Another conditional approval was the acquisition of *Delphi from General Motor (GM).*[228] Delphi was a company principally

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[227] See MOFOCM's announcement of 24 April 2009. For details see *infra*

[228] *General Motors/Delphi* see MOFOCM's announcement of 28 September 2009, the original decision: 德爾福公司主要從事汽車零部件的生產和製造的，而通用汽車公司是世界領先的汽車製造商。本次交易涉及收購上游企業和下游企業的德爾福及其附屬德爾富從通用汽車公司在中國市場有一些重要的影響。在這種情況下，商務部建立了企業那的2公司德爾 - 豐富和Deplhi - 共同承辦收購完成後， - 應繼續以提供汽車零部件和其他產品的汽車製造商在中國和應該永遠不會有差別待遇。商務部施加一些額外的德爾福公司主要從事汽車零部件的生產和製造的，而通用汽車公司是世界領先的汽車製造商。本次交易涉及收購上游企業和下游企業的德爾福及其附屬德爾富從通用汽車公司在中國市場有一些重要的影響。在這種情況下，商務部建立了企業那的2公司德爾 - 豐富和Deplhi - 共同承辦收購完成

engaged in the production and manufacture of automotive components, while General Motors was the world's leading car manufacturers. This transaction involved the acquisition of upstream enterprises and downstream enterprises of Delphi and its subsidiary Del-Rich from GM with some important effect over the Chinese market. In this case the Ministry of Commerce established that the two companies Del-Rich and Deplhi - jointly undertaken after the completion of the acquisition - should have continued to supply auto parts and other products to the automobile manufacturers in China and should never have the differential treatment. Ministry of Commerce also imposed some additional restrictions aim to limit and eliminate any acts of unfair competition that may arise in the Chinese auto parts and auto manufacturing industry.

A third case was the proposed merger of *Pfizer with Wyeth*,[229] one of two major pharmaceutical companies. The

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後， - 應繼續以提供汽車零部件和其他產品的汽車製造商在中國和應該永遠不會有差別待遇。商務部施加一些額外的德爾福公司主要從事汽車零部件的生產和製造的，而通用汽車公司是世界領先的汽車製造商。本次交易涉及收購上游企業和下游企業的德爾福及其附屬德爾富從通用汽車公司在中國市場有一些重要的影響。在這種情況下，商務部建立了企業那的2公司德爾 - 豐富和Deplhi - 共同承辦收購完成後， - 應繼續以提供汽車零部件和其他產品的汽車製造商在中國和應該永遠不會有差別待遇。商務部施加一些額外的

[229] *Pfizer/ Wyeth*. See MOFOCM's announcement of 29 September 2009. The original decision: "务部收到谷歌收购摩托罗拉移动的经营者集中申报。经审核，商务部认为该申报文件、材料不完备，要求申报方予以补充。，商务部确认经补充的申报文件、资料符合《反垄断法》第二十三条的要求，对该项经营者集中申报予以立案并开始初步审查。务部收到谷歌收购摩托罗拉移动的经营者集中申报。经审核，商务部认为该申报文件、材料不完备，要求申报方予以补充。，商务部确认经补充的申报文件、资料符合《反垄断法》第二

companies were principally engaged in the development and production of health products and animal medicine. The Ministry of Commerce approved the merger but imposed that Pfizer's should have divested its swine mycoplasma pneumonia vaccine business in China's.

Also the proposed merger between *Panasonic and Sanyo*[230] was approved under specific conditions. In this case – involving two comprehensive, diversified developments of large-scale Japanese enterprises - the Ministry of Commerce said that Panasonic and Sanyo had to divest their related businesses in these three following product markets: (1) coin-type lithium secondary batteries (2) civil nickel-metal hydride batteries (3) cars nickel-metal hydride batteries.

Cases involving International Firms

十三条的要求，对该项经营者集中申报予以立案并开始初步审查。务部收到谷歌收购摩托罗拉移动的经营者集中申报。经审核，商务部认为该申报文件、材料不完备，要求申报方予以补充。，商务部确认经补充的申报文件、资料符合《反垄断法》第二十三条的要求，对该项经营者集中申报予以立案并开始初步审查”

[230] *Panasonic/Sanyo*. See MOFOCM's announcement of 30 October 2009 The original decision: “在特定條件下的批准。在這種情況下 - 涉及兩個綜合性，多元化發展的大型日本企業 - 商務部表示，松下和三洋剝離及其相關業務在這三個產品市場：（1）硬幣型鋰二次電池 (2) 民用鎳氫電池（3）汽車的鎳金屬氫化物電池在特定條件下的批准。在這種情況下 - 涉及兩個綜合性，多元化發展的大型日本企業 - 商務部表示，松下和三洋剝離及其相關業務在這三個產品市場：硬幣型鋰二次電池民用鎳氫電池汽車的鎳金屬氫化物電池在特定條件下的批准。在這種情況下 - 涉及兩個綜合性，多元化發展的大型日本企業 - 商務部表示，松下和三洋剝離及其相關業務在這三個產品市場硬幣型鋰二次電池民用鎳氫電池汽車的鎳金屬氫化物電池”

Case # 1: InBev / Anheuser-Busch Acquisition of Anheuser-Busch Inc. (AB) from the Belgian Inbev to create the largest brewer in the world. AB had a 27% stake in Tsingtao Beer and Inbev had a 28.56% stake in Zhujiang Brewery Group.	Approval of the merger InBev / Anheuser-Busch has been given by public notice in November 18, 2008, and has been subjected to the following four conditions: - In-Bev shall not increase its stake in Tsingtao; - AB shall not increase its stake in Zhujiang Brewery Group; - In-Bev and AB cannot acquire shares of CR Snow brewery or Beijing Yanjing Brewery; - MOFCOM approval is required before any change of control in InBev.
Case # 2: Coca Cola / Huiyuan Coca-Cola intended to acquire all shares and convertible bonds of Huiyuan Hong Kong listed company operating in the field of fruit juice.	MOFCOM asked Coca-Cola to provide a plan to reduce the potential adverse effects on competition, but MOFCOM has not been satisfied. Thus on March 18, 2009, MOFCOM rejected the plan of Coca Cola by the following legal grounds: The fruit juice market

This was the first case rejected by MOFCOM	has been considered as the relevant market where Coca-Cola held a dominant position in the soft drinks market. "Effect of conductivity" if the concentration is achieved. Coca-Cola will be able transfer its dominant position on the market for soft drinks fruit juice market (through sales or sales related with an exclusive). "Effect of brand": a key factor affecting competition on the beverage market was the resulted transaction control for Coca-Cola's of the two major Chinese fruit juice brands with the increase of barriers to entry for competitors.
Case # 3: Mitsubishi / Lucite Mitsubishi sought the acquisition of Lucite International Group Limited in late 2009.	On April 24, 2009, MOFCOM issued its decision approving the acquisition, but accompanied by structural and behavioral conditions. *Structural condition* Reduced capacity - Lucite must sell 50% of its capacity annual production to one or more non-related

	parties within 5 years. *Behavioral conditions* Without the prior approval of MOFCOM, Mitsubishi may not acquire other businesses or build new plants for a period of 5 years.

Surely the publishing of the AML and its guidelines have limited the Chinese blocking powers that worried so much the international business community at the beginning of 2005. At that time the MOFCOM's line of reasoning in the first M&A involving *Carlyle/XCMG* was much more controversial.

Carlyle/XCMG was probably the first foreign M&A involving *big businesses* in China. In October 2005, US Carlyle Group became the first foreign firm to purchase an important Chinese firm, the Xuzhou Construction Machinery Group (徐州工程機械集團) (XCMG), China's biggest machinery engineering manufacturer. According to the signed stock plan purchase and joint-venture agreements, the Carlyle Group would give about 375 million dollars to acquire an 85 percent stake in XCM, a special subsidiary enterprise of Xuzhou Construction Group. As mentioned XCMG was a state-owned enterprise (SOE) [231] under the supervision of the 資產監督管理委員會徐州 (the State-

[231] For details of the XCMG see also Xinzhu Zhang and Vanessa Yanhua Zhang, The Antimonopoly Law in China: Where Do We Stand?, Competition Policy International, Vol. 3 N. 2 Autumn 2007, 36.

owned Assets Supervision and Administration Commission of the Xuzhou), in the Jiangsu province. The tentative acquisition plan was firstly approved both by the local government authorities and from the NDRC. However the acquisition also required MOFCOM's approval because it was a foreign investment project.[232] When taken in front of MOFCOM, the Chinese authority raised many concerns asking for detailed and full explanations from both the undertakings. MOFCOM asked for an *antitrust report* in order to demonstrate that Carlyle's acquisition of China's biggest machinery manufacturer would not have developed a market monopoly dangerous for domestic undertakings.[233] With this deep scrutiny the international business community saw the MOFCOM's desire to not lose an crucial industry of China and was acting to keep it under its control. In fact the report provided was unconvincing and MOFCOM ordered to lower the stake of the foreign investment into the XMCG. When the acquisition plan was completely revised Carlyle's stake was reduced to 50 percent to respect the MOFCOM's order; finally the buyout program was completed by

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[232] The procedure as discussed in first Chapter was regulated by the "Provisional Regulations on the Merger and Acquisition of Domestic Enterprises" passed in 2003 by MOFCOM's predecessor, the Ministry of Foreign Trade and Economic Cooperation. "In the examining and approving the local authority shall, within 30 days upon receiving the complete set of documents requested, decide whether or not to approve the it". And if the agencies believe that "the acquisition might lead to over-concentration, the hindering of fair competition and harm consumer benefits", they shall within 90 days call a hearing with the related government agencies, businesses and other interested parties, and decide whether or not to approve the application".

[233] M.F. Jaoping, China's decision on Carlyle Group, Pacific Antitrust Review 2010, at 56 states that: "*Stakes were high for XCMG, who tried to secure its future development through the introduction of a foreign owner. The giant machinery group had put three years of negotiations into the acquisition, and faced the burden of a total of 9,000 retired and laid-off workers. All these reasons have been taken before the MOFCOM in the hope of a fast approval of the acquisition.*"

MOFCOM in March 2007 and Carlyle's stake had reduced to 45 percent.[234]

By reducing Carlyle's investment in XCMG, MOFCOM maintained the state's presence in XCMG above the 50 percent, an indispensable condition to let the XCMG be subjected to the "state-owned" enterprises discipline. The case was questioned internationally: "While MOFCOM may have expressed concerns about the antitrust issues the merger would create, it seems that MOFCOM was mainly interested in maintaining the state's position as a majority stakeholder".[235] "Despite its role as an antitrust enforcer, MOFCOM acted more out of concern for state control than for competition".[236] These problems and lack of independence raised the pressing over Chinese authorities to approve a complete piece of legislation on antitrust.

Another controversial case before the AML was the merger between *Supor and SEB*. Supor, was the largest cookware industry in China while SEB was one of the world's largest industry for small appliances (the company is mother of famous brand as Krups, Moulinex, Rowenta, and Tefal). The two companies in August 2006 signed an agreement where Supor decided to sell a 61 percent of its shares to the European enterprise, SEB, from its side, would provide and management with expertise to Supor. As Supor was the leader firm in China's cookware appliances markets (assume that it accounted for

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[234] Thus, the MOFCOM decision was not welcomed by the international business community which accused the Chinese government of protectionism and that it was acting unfairly.

[235] B. Meredith Junker, Carlyle and XMCG. The aftermath, Texas Law Review, 2009, II at 44

[236] Ling Liaoping, Antitrust regimes: the risks for China, Beijing University Review 2009 II at 11

almost 50 percent of the market share at that time), domestic competitors became worried and seeking an intervention of the Chinese authorities. In particular they urged MOFCOM to forbid the merger, concerned that the operation would have monopolized the Chinese market of cookware products.[237] Disproving the fears of the international business community that believed the operation would have been banned by MOFOCM; its intervention arrived in August 2006, just after the sign of the agreement. The agency conducted antitrust investigation in October 2006 and eventually approved the operation on April 11, 2007. But also this decision was controversial. In fact absolutely no explanation of why this operation was approved was provided by MOFOCM raising suspects that the administrative body acted arbitrarily without investigating the goals of merger operation.

These decisions can be seen as a strong intervention of the Ministry of Commerce in the market. MOFOCM did not hesitate to impose additional approval conditions (structural or behavioral or both) and also a veto. Commentators are in fact concerned that these decisions did not reflect the economic and competition analysis (as the same analysis has been abandoned by other jurisdictions) but political questions with a higher risk of arbitrary decisions.[238] What is emerging from these early years of enforcement is that any alliance that may involve Chinese interests will have to go under the gauntlet of the Chinese anti-monopoly authorities.

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[237] See the comments of Hu Jin Thao to the competitors claims [2005]3, February 25, 2009, available at http://www.china.org.cn/chinese/PI-c/795128.htm.

[238] See for example the debate raised from Adrian Emch in the article "China's new Anti-Monopoly Law", Sidley LLP 2009

MOFOCM may have already started to sharpen weapons to make life difficult beyond the Great Wall also in the new case of *Rio Tinto/BHP-Billiton*, the mineral Australian group that tried to secure its position into the Chinese Market. The discussed threats of retaliation against Rio Tinto-BHP Billiton launched by the Communist Party as well as the risks emerged from the Coca/cola Case led in fact the Australian Firm to retire from the project.[239]
In brief the merger control regime and new AML raise the disturbing question: in the future, China could use the new anti-monopoly law, to protect its market from any unwanted but legitimate foreign aggression instead of economic efficiency? Judging from decisions taken by MOFCOM since the entry into force of the legislation, there some risk is there and in the next pages we'll see in details the most crucial cases for international firms.

[239] See the article of Francis Mayer on the China Business Daily "Rio Tinto abandons its expansion's plan in China" 28 August 2009.

The InBev/Anheuser Busch Case

China's beer industry had been characterized in the 1990-2010 years by an important growth driven by increasing income and changing lifestyle that resembled the western countries. At that time the four largest beer companies in China were China Resources Snow Breweries, Tsingtao Breweries, Beijing Yanjing Brewery, and Zhujiang Brewery. One report estimated that these four companies accounted for around 41 percent of the entire industry revenue.[240] Concentration among beer producers were increasing due to mergers and acquisitions of foreign investors and share of largest undertakings increased from 37 percent of total industry revenue in 2001 to 61 percent in 2005.[241]

The US based AB industry entered into China's beer market since 1984 and secured 33 breweries in China, mainly in the Southeast. AB had additionally made huge investment in China and its total investment in China reached nearly 1.92 billion USD dollars in 2007. Also the Belgian InBev made huge equity investments in large, China-based breweries. Thus, at the time of the proposed merger Anheuser-Busch had a 27 percent stake in Tsingtao Brewery,[242] and InBev had a 29 percent stake in Zhujiang Brewery.[243] When two foreign firms reached the

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[240] S*ee R. Stuart-Spencer :*The beer market in China and east Asia Report, 1999.

[241] Farber & Hudec, *supra* n.89, at 1405.

[242] *See* Williams, *supra* n.6 at 183 (describing China's government as "nondemocratic").

[243] Joost Paulewyn, *The Transformation of World Trade,* 104 MICH. L. REV. 1, 5
(2005).

merger agreement in August 2008 the strong equity positions of merging parties in the market attracted the special attention of the Chinese Body. MOFCOM eventually approved the operation but at some specific conditions.

The official announcement of MOFCOM, released on November 18, 2008 stated:

"ANNOUNCEMENT NO. 95 (2008) OF THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA - NOVEMBER 18, 2008

The Ministry of Commerce of the People's Republic of China ("MOFCOM") has received the anti-monopoly filing materials submitted by InBev N.V./S.A ("INBEV") relating to its acquisition of ANHEUSER-BUSCH COMPANIES INC ("AB"). Following review of said materials, MOFCOM hereby decides as follows:

I. Review Procedure: INBEV submitted its anti-monopoly filing materials to MOFCOM on September 10, 2008. INBEV made supplements to said materials on October 17 and October 23, respectively. MOFCOM initiated the review process and issued a Case Establishment Notice on October 27, 2008.

II. Decision: Following establishment of the case file, MOFCOM has reviewed the materials submitted, consulted with relevant government agencies, and solicited opinions from relevant beer industry associations, principal domestic manufacturers of beer and raw materials, and distributors of beer products. Based upon Article 28 of the Anti-Monopoly Law, MOFCOM has decided not to prohibit this merger transaction.

III. Attached Restrictive Conditions: Given that this merger is very large in scale, and that the new combined enterprise will have a relatively large market share and its competitive strength will be significantly enhanced, in order to reduce the possible anti-competitive impact on China's beer market in the future, MOFCOM has decided to attach restrictive conditions to said

decision and, accordingly, requires INBEV to observe the following obligations:

1. INBEV shall not increase AB's current shareholding of 27% of the equity of Tsingtao Brewery Co., Ltd.;

2. INBEV shall promptly notify MOFCOM if the controlling shareholders of INBEV or the shareholders of said controlling shareholders shall change;

3. INBEV shall not increase its current shareholding of 28.56% of the equity of Guangzhou Zhujiang Brewery Group Co., Ltd.; and

4. INBEV shall not seek to hold any shares of China Resources Snow Breweries Co., Ltd. or Beijing Yanjing Brewery Co., Ltd.

In the event of any intended contravention of any of the above covenants, INBEV shall promptly report the matter in question to MOFCOM in advance and shall not implement any such action absent MOFCOM's prior approval.

This decision shall become effective on the date of its publication."[244]

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[244]**公佈**二○○八年十一月十八號 人民共和國的中國（"商務部"）商務部部已收到的反壟斷申報材料提交英博NV / SA（"英博"）有關其收購安海斯 - 布希公司INC（"AB"）。在審查上述材料，商務部茲決定如下：

一，審查程序：2008年9月10日，英博商務部提交了反壟斷申報材料。 INBEV進行了補充，說材料，分別於10月17日和10月23日。商務部啟動了審查程序，2008年10月27日發出案件立案公告。

II。以下決定：建立的情況下文件，商務部審查提交的材料，與相關政府機構協商，並徵求有關啤酒行業協會，國內主要啤酒製造商和原材料，以及啤酒產品的分銷商的意見。根據反壟斷法"第28條，商務部決定不禁止這一併購交易。

III。附加限制性條款：鑑於，這次合併是非常大的規模，並認為在新的聯合企業將有一個比較大的市場份額和其競技實力，將可以顯著提高，為了減少的可能的反競爭影響中國的啤酒市場在未來，商務部決定附加限制性條件決定，因此，要求英博遵守下列義務：

1。英博不得增加AB公司的股權的青島啤酒有限公司27％的股權;

2。 INBEV應及時通知商務部，如果英博控股股東或控股股東的股東不得改變;

3。英博不得增加其目前的股權，廣州珠江啤酒集團有限公司28.56％的股權;

The statement of MOFCOM over the InBev/Anheuser-Busch case was very important as it was the first implementation of the AML over an international merger acquisition. The decision was much awaited by the international business community although was not very helpful: "the announcement was too scarce and inconsistent with international practice"[245]. In particular there was no evidence on how *relevant market* definition has been addressed in the MOFCOM's reasoning. Especially no definition of the geographic dimension of relevant market had been addressed while this point was crucial for the discussion of this case.[246]

4。英博不得尋求持有任何股份，華潤雪花啤酒有限公司，有限公司或北京燕京啤酒有限公司
INBEV在任何打算違反任何上述公約的情況下，應及時將此事報告中的問題事先向商務部和不得實施任何此類行動的缺席商務部事先批准。
本決定自其刊發日期起生效。
商務部對中

[245] See Adrian Emch "China's merger review begins today" Sidely LLP 2009, available at www.sidley.com

[246] Beer is sold to consumers in regional geographic markets through a special distribution system in which breweries sell beer to distributors, which, in turn, sell to retailers. Often distributors' contracts contain many territorial limits and prohibit distributors from selling beer outside their respective territories. Because distributors cannot sell a brewer's products outside their territories without violating their contracts with brewer, brewers can charge different prices in different regions for same package and brand of beer; an individual distributors (as well as the retailers) cannot defeat such price differences effectively. In other words, due to such contractual arrangements, relevant geographic beer market should be

Generally the case was expected to be reviewed on a detailed merger analysis based on the substantive competitive impacts of the operations. In this case, however, MOFCOM stepped outside this common framework.

In fact firstly it imposed a conditional approval when the operation did not, of itself, appear to raise antitrust concerns (observers estimated that the parties' combined market share in China was much lower, around 13%). MOFCOM did not define the relevant market effectively and if the combined market shares around 10-15% probably there were not such significant grounds on competition. Secondly, the conditions imposed by MOFCOM were established to reduce the merged entity's capacity to enter into future operations. Under normal circumstances, antitrust agencies will analyze future competition risks and operation separately and independently, when such transactions will take place.

In this field the MOFCOM's approach is much different with that taken by the UK's Office of Fair Trading, which – naturally - also scrutinized the same operation for effects that may occur in the UK. Even if the merger led to very high market shares in the UK - the two merged entities would have reached up to 50% in some segments and this circumstance is normally enough to ring regulatory alarm bells - the OFT, however, announced that "competition between the two parties prior to the merger had not been particularly intense", meaning that the effect of the operation on the market was relatively limited. Accordingly the Office of Fair Trade cleared the operation unconditionally.

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defined as regional. But in this case no definition was provided by MOFCOM.

In sum the InBev/Anheuser-Busch case did not reveal any information about competitive impact assessment of case either. In fact, even though MOFCOM noticed increasing market share and competition strength of merger party in the case, it did not find immediate competition concerns and believed that current structural factors will ensure effective competition in Chinese beer market even though merged party holds significant stakes in its rivals.

But as a matter of principle, economic analysis should be conducted to show to what extent ownership connection between InBev-Anheuser Busch and its rivals may reduce competition and whether entry conditions such as efficient scale of production and brand effect would function as barriers. MOFCOM's decision raised concerns that the conditions imposed were to shield the interests of the local Chinese breweries rather to stress competition concerns

The Coca-Cola Case

As seen, in the *InBev/Anheuser Busch* case there was no clear evidence on how economic analysis was applied on market definition. This situation became additionally more complicated with the *Coca-Cola/Huiyuan* case, where the market definition was dubiously addressed and consequently the merger was rejected by MOFCOM.

On September 3, 2008, the US based Coca-Cola made an offer to acquire all the shares of the Chinese fruit juice producer Huiyuan. The offer amounted of about 2.3 billion U.S. dollars. In order to complete the deal, Coca-Cola filed with MOFCOM for anti-trust review. On March 18, 2009, MOFCOM rejected the proposed operation, announcing the deal would give Coca-Cola a dominant position in the fruit juice market, boosting Coca-Cola's share of China's juice market to more than 20 percent. Additionally MOFCOM stated the transaction would prevent potential competitors from entering the juice market and consequently hinder any innovation in the market.

The MOFOCOM stated that:

"On September 18, 2008, the Ministry of Commerce received the anti-monopoly notification materials for a concentration of business operators, Coca-Cola Co.'s acquisition of China Huiyuan Co. After additional materials were submitted to meet the requirements of Article 23 of the Antimonopoly Law, the Ministry of Commerce opened its review of this concentration on November 20 and, based on this preliminary review, on December 20 decided to conduct a further examination.

In accordance with the relevant provisions of the Antimonopoly Law, the Ministry of Commerce reviewed various aspects of this concentration including: market share and market control, the degree of market concentration, the impact on

market access and technological progress, the impact on consumers and other business operators, and the impact of brands on market competition in the juice market. The review was in strict compliance with relevant laws and regulations. The views of parties concerned were fully aired during the review process.

Through its review, the Ministry of Commerce found that this concentration will have an adverse impact on competition. After the concentration is completed, Coca-Cola could use its market dominance in carbonated soft drinks to limit competition in the market for juice through tying, bundling or other exclusive transactions, resulting in consumers being forced to accept higher prices and reduced variety. At the same time, because brands can restrict entry to the market, it would be hard for the threat of potential competition to remove the restrictive effect on competition. In addition, the concentration will also reduce the room for small and medium-sized juice companies to survive, and will have an adverse effect on the structure of competition in China's juice market.

In order to reduce this concentration's adverse effects on competition, the Ministry of Commerce negotiated with Coca-Cola Co. about adding restrictive conditions, and asked it to submit a workable solution. Coca-Cola Co. expressed their views on the issues raised by the Ministry of Commerce, and submitted a preliminary resolution proposal and a revised proposal. After an assessment, the Ministry of Commerce concluded that the revised proposal still could not effectively reduce this concentration's adverse impact on competition. Therefore, under Article 28 of the

Antimonopoly Law, the Ministry of Commerce decided to forbid the concentration.[247]

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[247] The Chinese MOFCOM's decision: 商务部收到可口可乐公司收购中国汇源公司的经营者集中反垄断申报材料。经申报方补充，申报材料达到了《反垄断法》第二十三条规定的要求，11月20日商务部对此项集中予以立案审查，12月20日决定在初步审查基础上实施进一步审查。 商务部依据《反垄断法》的相关规定，从市场份额及市场控制力、市场集中度、集中对市场进入和技术进步的影响、集中对消费者和其他有关经营者的 影响及品牌对果汁饮料市场竞争产生的影响等几个方面对此项集中进行了审查。审查工作严格遵循相关法律法规的规定。审查过程中，充分听取了有关方面的意见。 经审查，商务部认定：此项集中将对竞争产生不利影响。集中完成后可口可乐公司可能利用其在碳酸软饮料市场的支配地位，搭售、捆绑销售果汁饮 料，或者设定其他排他性的交易条件，集中限制果汁饮料市场竞争，导致消费者被迫接受更高价格、更少种类的产品；同时，由于既有品牌对市场进入的限制作用， 潜在竞争难以消除该等限制竞争效果；此外，集中还挤压了国内中小型果汁企业生存空间，给中国果汁饮料市场竞争格局造成不良影响。

为了减少集中对竞争产生的不利影响，商务部与可口可乐公司就附加限制性条件进行了商谈，要求申报方提出可行的解决方案。可口可乐公司对商务部 提出的问题表述了自己的意见，提出初步解决方案及其修改方案。经过评估，商务部认为修改方案仍不能有效减少此项集中对竞争产生的不利影响。据此，根据《反 垄断法》第二十八条，商务部做出禁止此项集中的决定。

反垄断审查的目的是保护市场公平竞争，维护消费者利益和社会公共利益。自2008年8月1日《反垄断法》实施以来，商务部收到40起经营者集 中申报，依照法律规定立案审查了29起，已审结24起，其中无条件批准23起，对于1起具有排除、限制竞争效果的集中，商务部与申报方进行商谈，申报方提 出了减少排除限制竞争的解决方案并作出承诺，商务部附加了减少集中对竞争不利影响的限制性条件批准了该集中。2008年9月18日，商务部收到可口可乐公司收购中国汇源公司的经营者集中反垄断申报材料。经申报方补充，申报材料达到了《反垄断法》第二十三条规定的要求，11月20日商务部对此项集中予以立案审查，12月20日决定在初步审查基础上实施进一步审查。 商务部依据《反垄断法》的相关规定，从市场份额及市场控制力、市场集中度、集中对市场进入和技术进步的影响、集中对消费者和其他有关经营者的 影响及品牌对果汁饮料市场竞争

Coca-Cola submitted the initial merger filing yet in September 2008. After several supplemental submissions, MOFCOM opened the second-stage review (90 days period). Finally MOFCOM concluded that transaction would have an adverse effect on competition asking Coca-Cola to propose a new solution – opening for a conditional approval, as in *Inbev/Anheuser-Busch* – to address MOFCOM's worries. But, MOFCOM ultimately did not approve the remedies proposed by Coca-Cola as they were

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产生的影响等几个方面对此项集中进行了审查。审查工作严格遵循相关法律法规的规定。审查过程中，充分听取了有关方面的意见。经审查，商务部认定：此项集中将对竞争产生不利影响。集中完成后可口可乐公司可能利用其在碳酸软饮料市场的支配地位，搭售、捆绑销售果汁饮 料，或者设定其他排他性的交易条件，集中限制果汁饮料市场竞争，导致消费者被迫接受更高价格、更少种类的产品；同时，由于既有品牌对市场进入的限制作用， 潜在竞争难以消除该等限制竞争效果；此外，集中还挤压了国内中小型果汁企业生存空间，给中国果汁饮料市场竞争格局造成不良影响。

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inconsistent to address adverse effects on competition. Unfortunately MOFCOM did not disclosed any kind of proposals made although media have reported that MOFCOM sought the divesture of the famous "Huiyuan" brand, a condition that reportedly was unacceptable for Coca-Cola.

The decision also indicates that MOFCOM made an important investigation, soliciting information from other governmental authorities, trade associations, juice beverage industry competitors, suppliers, downstream sellers, and the parties, and took legal experts, economists, and agricultural experts.

MOFCOM identified three reasons to stop the operation. In the first place it concluded that the purchase of Huiyuan would enable Coca-Cola to use its dominant position in the market for carbonated soft drinks in the beverage market juice. Secondly MOFCOM found that the control of Coca-Cola on the juice drinks market would be greatly strengthened by controlling two famous brands of fruit juice, the "Minute Maid" brand name owned by Coca-Cola and "Huiyuan." Paired with the leverage effect, this was viewed as the establishment of barriers against any potential competitor trying to enter the market of juice drinks. In the third place, the Agency ruled that the transaction would press juice from small producers in China, retain local producers to participate in the beverage market, fruit juices, and reduce their innovation, which would have harmed competition in the Chinese market drink fruit juices and undermine sustainable development of sound.

Although the underlying data and evidence have not been published, MOFCOM's reasoning raises the following worries:

The MOFCOM's decision relied on the fact that Coca-Cola occupied a dominant position in the Chinese market a soft drink, but did not state how it has reached this conclusion. Even if AML provides in prima facie a dominant position which is based on solid market shares or combined market shares of the two or three largest firms in the market, the announcement MOFCOM did not show whether it interest was based on one of these or presuppositions that market share was given to Coca-Cola. But subject to that presumption, AML recognizes factors that may rebut this presumption, even if a company has the power to control prices or market competition in question. The MOFCOM declaration did not include any assessment that Coca-Cola has such power, a proposal that seems questionable given the presence of other competitors.

It was also unclear on what basis MOFCOM considered that Coca-Cola could use its position in the carbonated soft drinks market to increase its sales in drink beverages market: using tying or bundling arrangements or the imposition of other restrictive conditions? How this may result in fewer options and higher prices for consumers? MOFCOM gave no basis for these concerns in its decision.

It seems that MOFCOM also concluded that Coca-Cola's accumulation of the famous brand – Huiyuan – in the Chinese drink industry would have substantial anticompetitive effects, even if the brand's products were not directly competing with those sold under the Minute Maid brand. But MOFCOM did not consider in its decision how hard it is for new brands to grow over time, the

difficulties for introducing a new brand in a traditional and very sensitive sector such as the drinks markets (*brand-ability*). To address these problems managers use the force of famous brands in order to reduce entry barriers in the markets.

MOFCOM's decision, as in the *InBev/AB* merger, specifically focused its analysis on the fact that the proposed acquisition may negatively affect smaller competitors' juices in China. In most jurisdictions, the protection of competition, instead of individual competitor is considered the objective of antitrust law. To tell the truth the article 27 of the AML specifically allows MOFCOM to take into account the impact on individual competitors and other companies concerned (eg suppliers or customers). Thus confirming that Chinese competition law is trying to protect small domestic competitors and this may be a risk and an obstacle to foreign businesses looking to capture domestic companies in China.

Remarkable in this case MOFCOM also concluded that the proposed operation would impede innovation from national producers of fruit juice. We mind that innovation is a complex analysis and a much debated field in competition law, and it is particularly difficult to assess without detailed information on the costs of R & D and expenditure and other related data. Therefore, the reference to innovation also is cause of concern.

A larger problem regards the question whether the burden of proof will be equally divided between the parties and the Ministry of Commerce through the merger antitrust review regime. The negative decision in this case suggests that MOFCOM considers that neither the AML nor its newly issued draft rules and guidelines require MOFCOM to demonstrate the probability of anticompetitive effects in order to reject a potential trade.

For example if MOFCOM has no burden of proof for demonstrating the theories of potential competitive harm - as the theory using here - so concentrations China could prove to

be an almost insurmountable barrier for many parties, particularly in the absence of detailed data strictly obtained on sales in the relevant product markets. The remote possibility of legal action against administrative bodies like the MOFCOM for individuals willing to overturn its decisions, armor completely the system creating a huge problem for China.

In sum, the decision of MOFCOM to block the *Coca-Cola/Huiyuan* deal seems to be a difficult obstacle, especially for foreign companies with substantial market positions and strong brands looking to make acquisitions in China, particularly if the target company has a Chinese name famous brand.

The Mitsubishi Rayon/Lucite Case

Another controversial although conditional approved merger was the *Mitsubishi Rayon/Lucite* deal. The main business of both Mitsubishi Rayon and Lucite in China were the production and the sales of methyl methacrylate (MMA), a polymer necessary to make acrylic glass. Before the merger proposal Mitsubishi Rayon and Lucite were the fourth largest and the second largest producers of MMA in the world. According to many studies the proposed concentration had some impact only in the MMA area. In addition, because both companies were involved in vertical activities of which MMA was an input, thus there were some concerns about vertical competition issues. In that case MMA was defined as relevant product market and MOFCOM estimated that post-merger market share of merged party would have accounted for 64

percent presuming that Mitsubishi Rayon/Lucite would have incredible market power after the merger.[248]

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[248] The Chinese Official Statement: 從日本三菱人造絲公司（三菱人造絲公司）的收購璐彩特國際公司（璐彩特）已收到中國商務部中華人民共和國反壟斷的經營者集中申報，按照“反壟斷“，第30條。現公告如下：個案和審查程序。 2008年12月22日，日本三菱麗陽公司向商務部申報材料提交。三菱麗陽公司根據商務部提交補充材料2009年1月20日，商務部對申報的材料已經達到了“反壟斷法”第二十三條標準報表三菱麗陽公司的情況下，審查和通信。鑑於兩部分，甲基丙烯酸甲酯（甲基丙烯酸甲酯稱為“MMA”），一個更大的市場份額，在大市場的濃度變化綜合作用的結果，買方在MMA的兼併和收購的結果市場力量將有一個垂直的效果塊，2009年2月20日，在第一階段的審查已經被完成，商務部已決定到申請一個進一步的檢討，一個書面通知，三菱人造絲公司，一個進一步修訂的最後期限為20　2009年5月。經過進一步審查，商務部對集中所造成的影響的評價，2009年5月20日完成審計。
第二，研究的內容。第二十七屆，商務部根據“反壟斷法”，以下幾個方面的運營商把重點放在全面檢討：（A）專注於運營商參與的市場監管者在相關市場的市場佔有率;
（二）相關市場的市場集中度;
（三）經營者集中對市場，技術進步的影響;
（四）經營者集中對消費者和其他利益相關者;
（五）經營者集中對國民經濟發展的影響，;
（六）其他因素對市場競爭的影響。
第三，修訂過程中。原因，的部，商務部依照的法律審查的材料表的聲明，以仔細檢查的重要問題，涉及一個深入的分析和建議通過寫作，測試和研討會，以及與有關各方的採訪表和等，行業協會，MMA生產商，PMMA粒子生產商，PMMA板製造商在重點領域，如雙方的意見，徵求意見。　在第四的位置，相關的市場。三菱麗陽和璐彩特公司重疊主要是在MMA的生產和銷售。除了MMA，兩家公司在某些特定的甲基的單體（SpMAs），卡聚甲基丙烯酸甲酯PMMA顆粒，也有少量的產品重疊。因此，相關產品市場為MMA，SpMAs，顆粒物和聚甲基丙烯酸甲酯PMMA板。在MMA中的重點除了其他三種類型的產品市場影響不大。相關地域市場為中國市場的濃度。　第五，競爭的問題。經審查，商務部依法將專注於總體評價，確認集中的負面影響如下：（A），有能力“剝離” 璐彩特國際（中國）化工有限公司，有限公司（中國璐彩特）在其年生產能力分拆上市的公司，一旦一個或多個不相關的第三方購買人（“第三方購買者”）的銷售

According to the statement, MOFCOM addressed *prima facie* the horizontal competition effects and announced that for the calculation of market share also the forthcoming production should have been taken into consideration. In fact the case was filed in December 2008 and so the market shares had to be calculated from 2008 data.

Regarding the horizontal effects MOFCOM found that the proposed transaction was likely to affect seriously competition in the MMA market in Mainland China, since

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，50％的自旋冷靜期為五年。第三方購買人將有權在未來五年成本和生產成本（即成本，沒有利潤）購買中國公司璐彩特MMA產品，該成本價由獨立審計師的年度審計。 如果旋轉，關閉“剝離”的能力期間可以不被完成，在財政部，商務部重點，雙方同意的權利的獨立受託人將被分配璐彩特中國公司股份的100％，銷售到獨立第三方（“全分拆”建議分拆交易完成後，預計將在六個月內完成。璐彩特公司為擴展名的應用程序，如果有合理的理由，商務部有權延長的期限超過6個月（期間“分拆”） （B）璐彩特獨立操作，直到完成中國社會的產量 在交易完成後，完成所提議的能力進行一個完整的出售或分拆上市期間（“經營期限”），璐彩特中國公司與三菱麗陽公司在中國的MMA單體，將是一個獨立運營部門，分別有自己的管理人員和董事會成員。 獨立運營期間，將重點放在雙方將繼續銷售在中國MMA根據相互競爭，這兩家公司的定價對中國市場，客戶可能不是相互交流信息和其他競爭性信息。 在此期間，雙方違反承諾的獨立經營重點放在嚴重侵犯的情況下，支付的總金額在25萬到50萬元之間萬元以下的罰款，由商務部指定的金額按照行為違反的性質及其對中國的影響在市場上的競爭來決定。 （C）收購在未來五年不再是不再建造一個新的工廠 商務部的同意下，合併後三菱麗陽提供擬議中的交易後五年內不得從事下列行為之一的：1，在中國收購MMA單體，PMMA聚合物或鑄塑塑料板製造商。2，在中國生產的新的MMA單體，PMMA聚合物或塑料板鑄造廠。 決定自公告之日起生效。中華人民共和國商務部中國 2009年4月24日

the parties would have a reached a significant combined market power after the operation (64% of market share), much higher than the power of Jilin Petrochemical and Heilongjiang Longxin Company, the second and the third two largest MMA competitors in China. MOFCOM's assumption was that, with such dominant MMA market position, *Mitsubishi/Rayon* would have significantly reduced competition in China.
Additionally since Mitsubishi Rayon was active in the MMA market segment as well as in the two downstream markets of PMMA, MOFCOM concluded that, post-merger entity would have been able to close downstream competitors by employing its dominant position in the upstream MMA market segment.

Thus as a condition to approval, MOFCOM required Lucite to divest upfront 50% of its annual MMA production capacity for five years to an unaffiliated third party purchasers. MOFCOM gave the purchaser the right to buy 50% of Lucite China's annual MMA production for five years at cost (equal to the production and management cost per unit), with no added profit margin, to be verified each year by an independent and external auditor. If Lucite would have not completed the operation within the specified time period, then MOFCOM may authorize the selling of the 100% of Mitsubishi Rayon's equity interest in Lucite to an independent third party.

Additionally MOFCOM ordered the Chinese operations of MMA monomer market of Lucite and Mitsubishi Rayon had to be managed separately, with independent management and board membership, from the closing of the proposed transaction to the completion of the divesting plan. During that period, the parties had to continue to sell MMA in competition with each other in China and were prohibited from sharing pricing, customer, or other competitive information related to the China market. If the parties breached any of these commitments, they would have been fined between RMB 250,000 and RMB 500,000.

Finally, the decisions required that, for five years from the closing of the proposed transaction, the post-merger Mitsubishi/Rayon would have been forbidden from acquiring producers or build new plants in China that manufacture MMA monomer, PMMA polymer, or cast sheet products, without a specific prior approval of MOFCOM's.

MOFCOM's decision demonstrated an increasingly sophisticated analysis of relevant markets and competition concerns than the previous decisions. However many other competition problems remained unanswered. First, it is not clear why MOFCOM banned the entities from establishing their own new MMA monomer and PMMA polymer production facility, which would have some positive effect on competition and reduce possible vertical effects. Additionally the restriction in further growth in upstream MMA production capacity is not demonstrated by the Authority and it was presumably based just on MOFCOM's concerns about potential adverse effects on downstream markets. These considerations seemed not reasonable and thus would not seem to justify the prohibition.

Second, it is unclear whether divesting half of the productivity of Lucite will reduce MOFCOM's concerns about foreclosure effects on downstream markets for MMA in China since the parties could transfer that production to plants outside China and the price of imported MMA appears not to be subjected to MOFCOM's decision.

Not mentioned that there is a persistent procedural concern in this MOFCOM's decisions as well as in the *InBev/Anheuser Busch*, *Coca-Cola/Huiyuan*. MOFCOM seems first identifying

competitive concerns and then requests the parties to propose solutions (so creating the conditions for the approval). MOFCOM then verifies whether the conditions proposed would adequately reduce MOFCOM's worries. The point is that it is unclear what the standard of proof of anticompetitive effect is. Surely some proof requirement for MOFCOM and a greater transparency are needed to a further development of the AML ant its practice.

Again although the MOFCOM's decision seem better structured and more accurate we may infer that MOFCOM is conducting its investigation taking into consideration the effect on the local industry and competitors rather than the competition issues. In other words, similar to its *Coca Cola/Huiyuan* decision, MOFCOM has focused its competition analysis on the effects on domestic competitors, but failed to discuss how the proposed deal would harm consumer welfare, which is one of the ultimate goals of antitrust / competition laws in most of other jurisdictions, and in China's AML. This consideration may be confirmed by the circumstance that MOFOCM solicits many comments from Chinese competitors' and this constitutes a substantial factor in MOFCOM's competition analysis.

The Google/Motorola Case

But controversial cases concerned also the technologic sector, a field that is becoming more attractive for foreign firms also in China. For example on 19 May 2012, MOFOCM approved the acquisition by Google of Motorola Mobility again imposing several conditions.

In *Google/Motorola* case MOFCOM determined the relevant product markets as those for smartphones and their operating systems, understanding that this field is worldwide. Thus, it recognized that Google had a significant market share in Android operating systems in China (about 79% of the Chinese market share at the end of 2011). Considering the strong dependence on Android by device producers, and Google's impressive financial resources as well as R&D capacities, the Authority assumed that Google had a "DMP" (*dominant market position*) in the smart mobile operating systems even if MOFCOM recognized the smartphone market to be highly competitive as well as Motorola had no significant competitive advantage.

MOFCOM also assumed that many of the Motorola patents that Google would purchase as part of the operation were crucial patents that device producers had to employ in order to produce their products worldwide. But despite the worldwide nature of these patents, MOFCOM explicitly indicated that its analysis was exclusively conducted on the dynamics of these markets in China. This is clearly in contrast with the other antitrust jurisdiction that took into consideration many the worldwide market share and effects.

The first concern of MOFCOM was that after the transaction, Google could license Android software to Motorola under more favorable conditions than those offered to its direct competitors, thereby conferring Motorola a strong competitive advantage. We note that this consideration is different with the conclusion endorsed by the European Commission (as well as the U.S. FTC) which, after questioning many market participants and experts, understood that Google would not have the incentive to engage in such discrimination.

MOFCOM's second critic was that Google would be enabled to abuse its dominant position – presumably in the mobile operating system market – by creating unreasonable terms and conditions in the licensing of Motorola's patents. Again, this conclusion is in contrast with the position of the EU authorities which required no remedy probably relying on Google's public pledge to continue Motorola's policy to license such essential patents under the same terms.

In order to reduce such concerns, MOFCOM approved the operation under the following conditions: "a) Google will license Android free of charge and in open source, consistent with its current commercial practice; b) Google will treat all original equipment manufacturers (i.e., mobile terminal manufacturers) in a non-discriminatory manner with respect to the provision of Android; c) Google will continue to comply with the obligations Motorola currently undertakes with respect to its (presumably only essential) patents to license them on fair, reasonable and non-discriminatory (FRAND) terms; d) Google will appoint an independent supervising trustee to supervise its performance of these conditions".[249]

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[249] See Professor Li Ping Sidley LLP 2012: A）谷歌將免費授權Android的的充電和開放源碼的，符合其目前的商業實踐中，B）就提供的Android，谷歌將在一個非歧視性的方式對待所有的原始設備

The first two conditions were imposed for a 5 years period, but Google may ask MOFCOM to modify or eliminate them before that time. After 5 years, the Authority may continue to verify the market conditions of Chinese mobile device and operating systems markets, to address further decisions that may be required from its evaluation.

Also within this case MOFCOM assumed a different conclusion with respect to a major global M&A operations, imposing conditions where other regulators did not – we've seen for instance the *InBev/Anheuser-Busch* - or some conditions that go beyond those imposed by others (for instance *Western Digital/Hitachi*, or *Seagate/Samsung*).

In *Seagate/Samsung,*[250] MOFCOM concluded that the proposed merger would have anticompetitive effects by reducing competitive pressure on remaining Chinese competitors and thus increasing the risk for them. MOFCOM therefore asked Seagate to keep Samsung an independent undertaking by creating an independent subsidiary to manufacture and commerce all Samsung devices, and preventing information exchanges between the two companies. MOFCOM announced also that Seagate could ask for

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製造商（例如，移動終端製造商）c）我們將繼續遵守目前，摩托羅拉承諾尊重其（大概只有必要的）的專利許可，以公平，合理和非歧視（FRAND）的條款d）我們將委聘獨立受託人監督的義務這些條件，監督其性能

[250] The transaction was approved just few months before Google/Motorola. The MOFCOM decision was published on 2 March 2012. See the official announcement: 本次交易已只是幾個月前谷歌/摩托羅拉。 2012年3月2日，商務部決定發表。

a waiver of these conditions after one year and MOFCOM may approve it depending on competitive conditions of the marketplace.
This decision diverged significantly from those endorsed by the U.S. and Europe antitrust authorities where the merger was approved without any remedy or condition.

A similar approach has been confirmed also in the review of the merger *Western Digital/Hitachi* an operation that was cleared by the European Commission's earlier but with some specific conditions. The EU authorities required that Western Digital would have divested production assets for the manufacture of 3.5 inch hard disk drives. Toshiba, the external competitor, agreed to acquire those assets and thus the operation was cleared successfully. The remedy was deemed sufficient also by the U.S. Federal Trade Commission.

MOFCOM recognized the divestiture that had been imposed by the EU and U.S. authorities, but required additional remedies to approve the merger. Specifically MOFCOM asked for: 1) "maintaining Hitachi as an independent competitor and independently operating business; 2) ensuring Hitachi to continue to market hard disk drive products independently by its original sales team, under the same brands as before; 3) establishing a firewall to prevent the exchange of information; 4) continuing to invest in R&D as before; 5) appointing a trustee to supervise the implementation of these obligations".[251]

Additionally - as seen in *Seagate/Samsung* case - MOFCOM determined that Western Digital "could ask for a waiver of the obligation to maintain Hitachi as an independent competitor after two years, based on the status of competition on the market at the time". In sum, in both *Western Digital/Hitachi* and *Samsung/Seagate*, MOFCOM concluded that the merger would

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[251] See Professor Li Ping at the "Mergers and concentration in China", meeting held at the Beijing university on 23 April 2011

“have anticompetitive effects by reducing the number of competitors, reducing competition and innovation, and increasing the risk of coordination among the remaining competitors, given the high degree of market transparency”.[252]

Thus, the MOFCOM's decision once again demonstrates the difference in the merger review with respect of other regulators around the world (notably the U.S. and the EU which approve the operations without imposing many remedy). As seen *Google/Motorola* is the third recent decision in the IT industry, after the already mentioned *Western Digital/Hitachi* and *Seagate/Samsung* in which MOFCOM supported a different conclusion.

We are sure that there are many possible explanations for the MOFCOM's more aggressive review. Firstly the MOFCOM's role under the AML seems going beyond pure antitrust concerns. In particular, MOFCOM had to take into consideration factors that are not strictly connected with the competition; we’re talking about the impact of these operations on Chinese national economic development. Thus, it is probable that MOFCOM was worried that Google would be able to impact on Chinese handset producers, thereby reducing the potential growth of crucial Chinese industry with effect on the national economic development and the employment. Similar concerns are behind also to the previous controversial decisions we’ve already have discussed.

Secondly we should note that MOFCOM is less experienced with vertical mergers and thus is not capable to deal with many antitrust theories. In particular we have

[252] See Id.

the suspect that MOFCOM’s experts are less experienced with analysis of a dominant firm's positioning and its powers and seem not able to address its effect on a vertical merger.

Thirdly, MOFCOM is quite uncomfortable with "informal" remedies such as those that were proposed by Google: the company’s pledge to continue licensing Motorola's patents at the same conditions. MOFCOM needs that such commitments be clearly set as formal conditions. For example while western countries authorities had valued the parties' argument that they lack the incentive to discriminate against other terminal producers with respect to Android, MOFOCM requested a formal commitment by Google for this point probably thinking that if Google was confident that it had no incentives to discriminate, the offering of a formal commitment would not be a problem.

MINISTRY OF COMMERCE PUBLIC ANNOUNCEMENT CONCERNING ANTI-MONOPOLY REVIEW DECISIONS ON CONDITIONAL APPROVAL OF GOOGLE'S ACQUISITION OF MOTOROLA MOBILITY

The Ministry of Commerce of the People's Republic of China ("MOFCOM") received the antitrust notification in connection with Google Inc. ("Google") 's acquisition of Motorola Mobility Holdings, Inc. ("Motorola Mobility")(the "Concentration"). Upon review, MOFCOM decided to conditionally approve the Concentration. Pursuant to Article 30 of Anti-Monopoly Law of the People's Republic of China (the "AML"), we hereby make the following public announcement:

I. Case Docketing and Review Procedures

On 30 September 2011, MOFCOM received the merger notification in connection with Google's acquisition of Motorola Mobility. Upon examination, MOFCOM found that the notification documents and materials were not complete and requested the notifying party to submit supplemental materials. On 21 November, MOFCOM found that the notification documents and materials (as supplemented) met the requirements under Article 23 of the AML, and docketed the notification of the Concentration and commenced Phase I review.

Upon Phase I review, MOFCOM was of the view that the Concentration will likely have eliminative or restrictive competitive effect on China's smart mobile terminal operating system market. The case entered further review phase. On 21 December, MOFCOM decided to commence Phase II review. On 20 March 2012, with the notifying party's consent, MOFCOM decided to extend the Phase II review period.

During the review process, MOFCOM solicited opinions from relevant government agencies, industry associations and downstream enterprises, consulted relevant experts for technical

issues and verified the authenticity, completeness and accuracy of the documents and materials submitted by notifying party.

II. Competition Analysis

Pursuant to the AML and its relevant provisions, MOFCOM examined the pertinent aspects of this Concentration, including relevant market conditions, free and open source aspects of Android system, Google's fair treatment of terminal manufacturers, the licensing of Motorola Mobility patents, market entry etc., and conducted a comprehensive assessment over the impacts of the Concentration on competition in the relevant market.

1. The Concentration

On 15 August 2011, Google and Motorola Mobility entered into an acquisition agreement. Pursuant to such agreement, Google will acquire all of the shares of Motorola Mobility and Motorola Mobility will become Google's wholly-owned subsidiary upon consummation of such acquisition. Google is mainly active in providing internet search engine and online advertising service, as well as providing online service and software products. Google developed Android, a smart mobile device operating system, and supplies it to manufacturers of smart mobile devices on a free and open source basis. Motorola Mobility is one of the mobile device manufacturers and its main products include hand phone and tablet computer.

2. Relevant Market

Smart mobile terminal and smart mobile terminal operating system constitute the relevant product markets for this Concentration. Smart mobile terminal refers to a smart terminal with an open operating system platform, processing capacity comparable to a personal computer, high-speed access capacity and rich interface for human-computer interaction. Such smart terminals currently mainly refers to smartphones, and also covers tablet computers and smart television sets etc.. Smart mobile terminal has become a key access point and main innovation platform for internet businesses, and its open operating system

platform, unique human-computer interaction experience and convenient portability have significantly distinguished it from other products such as personal computer and functional hand-phone, and therefore smart mobile terminal constitutes an independent market. Smart mobile terminal operating system is a program which administers the hardware and software resources of a smart mobile terminal. It is significantly distinct from other products such as computer operating system, and therefore constitutes a separate relevant product market. Smart mobile terminal and its operating system markets have the characteristics of a global market. MOFCOM considered the competition conditions in global markets during its review; bur focused its review on China market conditions.

3. Relevant Market Conditions

Smart mobile terminal market and its operating system market have different competition conditions. The smart mobile terminal market is relatively fragmented with fierce competition, with frequent product replacement and continuous product upgrade; each of the manufacturers faces fairly high competitive pressure. Our investigation shows that compared to other competitors, Motorola Mobility enjoys no significant competitive advantage. In significant contrast to the aforementioned market, smart mobile terminal operating system market is a highly concentrated market. The latest data indicate that, in the fourth quarter of 2011, the Google-developed Android system alone possesses a market share of 73.99% on China market, with Nokia's Symbian system taking 12.53% and Apple's iOStaking10.67%;the combined market share of these three systems on China market reaches97.19%. Given the exceptionally high market share of Android system, the high reliance of smart mobile terminal manufacturers upon Android system, the strong financial resources and technical development capabilities of Google and the high market entry barriers, MOFCOM found that Android system has a dominant position in smart mobile terminal

operating system market. In light of the facts that (i) Nokia has announced that it will gradually abandon Symbian system, (ii) the sale prices of Apple mobile-phones are generally much higher than smartphones using Android system, and (iii) the WINDOWS PHONE operating system developed by Microsoft Corporation is still in its starting stage, the market dominance of Android system is expected to be maintained and strengthened for a considerably long period of time in the future.

1. The Free and Open-source Aspects of Android System

Currently, Android system has formed a complete eco-system / value chain. Smart mobile terminal manufacturers, software developers and end users have all become reliant on Android system. Terminal manufacturers must design and develop products based on Android system, software developers conduct research and development based on Android system, and the developed application software operates only on Android system and is not compatible with any other operating system. End users will also have considerable reliance on Android system due to such factors as use habits. Our investigation finds that, for smart mobile terminal manufacturers, the cost of switching operating system is tremendous: They will have to modify relevant hardware and software to adapt to the new operating system, and in addition, the change of operating system may also result in altered user experience, thereby creating fairly high commercial risk. The free and open-source aspects of Android system are important factors for it to gain market dominance in a relatively short period of time. To continue providing Android system on a free and open-source basis is vital to the protection of the reasonable expectation and legitimate interests of stakeholders. If Google changes it current business model of making available Android system on a free and open-source basis after the completion of the Concentration, each of the stakeholders will suffer material adverse impact.

2. Google's Fair Treatment of Terminal Manufacturers

After the completion of the Concentration, Motorola Mobility will become a wholly-owned subsidiary of Google. Given Google's dominant position in smart mobile terminal operating system market, Google has both the incentive and ability to treat Motorola Mobility more favorably than it treats other smart mobile terminal manufacturers, such as providing the latest Android system to Motorola Mobility before providing it to other manufacturers. During its investigation, MOFCOM found that, before launching a new version of Android system, Google will, on a non-preferential basis, select a smart mobile terminal manufacturer for cooperation in order to test the compatibility of the new version of Android system with the terminal hardware device. The selected terminal manufacturer will have an opportunity to obtain the new version of Android system ahead of other manufacturers, thereby gaining a competitive advantage on the smart mobile terminal market. After completion of the Concentration, Google will likely only select Motorola Mobility as its testing partner. Google's discriminative treatments of smart mobile terminal manufacturers will distort competition on such market, and put the terminal manufacturers other than Motorola Mobility in an unfavorable competitive position.

3. Licensing of Motorola Mobility Patents

Motorola Mobility holds a large number of patents in mobile-phone field and many of them are essential patents. Google's main objective in acquiring Motorola Mobility is to own these mobile-phone patents. After completion of the Concentration, Google will currently have strong development and integration abilities for both software and hardware, and by leveraging its dominant position in smart mobile terminal market, Google will have both the incentive and ability to impose unreasonable licensing terms on licensees in patents licensing arrangements, which will harm competition on the relevant market and eventually harm consumer interests.

4. Market Entry

As mentioned above, smart mobile terminal operating system market is highly concentrated, with Android system, Symbian system and Apple iOS collectively holding over 97% market share. The other undertakings in the market, with negligible market shares, are marginal competitors. The development of smart mobile terminal operating system requires strong technical and financial strengths, and the high market concentration constitutes an extremely high barrier for new entrants. The success of a smart mobile terminal operating system will critically rely on the friendliness of software development environment surrounding such operating system and the attractiveness to software developers. Excellent application development environment can significantly lower development threshold, improve development efficiency, enhance user experience, thereby attracting numerous software developers, and eventually application software with good user experience will attract consumers and potential buyers. The number and the user experience of application software developed based on smart mobile terminal operating system have become one of the key factors for the competition among various operating systems. Currently, the typical software development environments based on smart mobile terminal operating system include Android development environment, Apple development environment and Microsoft development environment. The large number of Android applications and Apple applications has successfully attracted the vast majority of the software developers and consumers. In switching development environment, a software developer will not only be required to adapt to the new technical requirements, but will also be exposed to huge commercial risk of losing numerous consumers. In addition, from the consumers' perspective, switching the operating system means incurring such additional costs as being acquainted with new operating interfaces and replacement of smart terminals. In light of the above, Android system and Apple system have established complete systems with strong market attractiveness and good reputation, and either the marginal competitors or new entrants will face extremely high market entry barrier. In the foreseeable

future, it will be difficult for new market entries to mitigate or eliminate the above eliminative or restrictive competitive effect.

II. Consultations Regarding Restrictive Conditions

During the review process, MOFCOM pointed out to Google that the Concentration will have eliminative or restrictive competitive effect, and conducted several rounds of consultation sessions with the parties as to how to address the aforementioned competition concerns. On 15 May 2012, Google proposed the final commitments to address the competition concerns. Upon assessment, MOFCOM was of the view that such commitments are sufficient to mitigate the adverse impact of the Concentration on competition.

III. Review Decisions

Upon review, MOFCOM was of the view that Google's acquisition of Motorola Mobility will have eliminative or restrictive effect on competition. Based on Google's commitments to MOFCOM, MOFCOM decided to approve the Concentration with restrictive conditions. Google shall fulfill the following obligations:

1) Google shall license Android platform on a free and open source basis, in a manner consistent with its current commercial practice. Android platform refers to the current and future versions of open source software stack for mobile devices, including the operating system, middleware and key open source application programs, in the form currently published on http://code.google.com/android/ and available on such website or its successor websites within the commitment period (unless such obligations are modified or discharged). This obligation will not impact Google's rights to keep or make Android platform related software close-sourced. This obligation will not impact Google's ability to seek payment or other consideration for its

provision of Android platform related products and services (including but not limited to application programs operating on Android platform).

(2) Google shall treat all original equipment manufacturers on a non-discriminative basis for provision of Android platform. This obligation only applies to the original equipment manufacturers that have agreed not to carry out differentiation or derivation from Android platform. This obligation does not apply to Google's provision, licensing or distribution of Android platform related products and services (including but not limited to application programs operating on Android platform).

(3) After the Concentration, Google shall continue to comply with Motorola Mobility's current obligations of offering fair, reasonable and non-discriminatory ("FRAND") terms with respect to the patents of Motorola Mobility

(4) Pursuant to MOFCOM's Provisional Rules on Assets or Business Divestiture in Connection with the Implementation of Concentration of Undertakings (MOFCOM Public Announcement [2010] No. 41), Google shall entrust an independent supervisory trustee to supervise Google's performance of the above obligations.

The obligations under Items (1) and (2) above shall be in force for a period of 5 years since the date of this decision. In the event that relevant market conditions or market competition changes, Google may apply to MOFCOM to modify or discharge these two obligations. If Google no longer controls Motorola Mobility, these two obligations shall no longer be in force.

Within 5 year since the date this decision is issued by MOFCOM, Google shall report its performance of the above obligations to MOFCOM and its supervisory trustee every 6 months. Upon expiration of the 5-year period, MOFCOM is entitled to re-assess the market conditions of China's smart mobile terminal operating system market and make further decisions in accordance with the law based on such re-assessment.

MOFCOM has the right to supervise and examine, through supervisory trustee or on its own, Google's performance of the above obligations. Where Google fails to properly perform the above obligations, MOFCOM has the right to impose sanctions in accordance with the relevant provisions of the AML.

This announcement shall take effect on the date of its promulgation.

Ministry of Commerce of the People's Republic of China"

商務部公告關於反壟斷審查決定有條件批准谷歌收購摩托羅拉移

財政部，商務部收到中華人民共和國（“中國商務部”）與谷歌公司（“谷歌”）收購摩托羅拉移動控股公司（“摩托羅拉移動（Motorola Mobility）”）（以下簡稱“集中反壟斷通知“）。經審查，商務部決定有條件地批准的濃度。根據中國人民共和國（以下簡稱“反壟斷法”）的反壟斷法“第30條規定，現就以下公告：

的導套和評論程序

2011年9月30日，商務部收到谷歌收購摩托羅拉移動（Motorola Mobility）的合併通知。經審查，商務部發現，該通知的文件和資料不完整，並要求通知當事方提交的補充材料。11月21日，商務部通知文件和材料（經補充）符合“反壟斷法”第23條的規定，並的濃度和通知，開始階段我檢討。
第一階段審查後，商務部的濃度可能會認為中國的智能移動終端操作系統市場上有排泄或限制競爭的效果。案件進入進一步審查階段。　　12月21日，商務部決定開始第二階段的審查。2012年3月20日，與通知當事人同意，商務部決定延長第二階段審查期間。
在審查過程中，商務部徵求意見，相關政府機構，行業協會和下游企業的技術問題，徵詢有關專家的意見和驗證通知當事人提交的文件和材料的真實性，完整性和準確性。

II。競爭分析

根據“反壟斷法”及其相關規定，商務部審查了相關方面的這種集中，包括相關市場的條件下，自由和開源的Android系統，谷歌的公平對待，終端製造商，摩托羅拉移動專利的許可，市場准入等。，並進行了全面評估的影響，集中對相關市場的競爭。

1。濃度

2011年8月15日，谷歌和摩托羅拉移動（Motorola Mobility）訂立收購協議。根據該協議，谷歌將收購摩托羅拉移動和摩托羅拉移動（Motorola Mobility）的所有股份完善有關收購後，將成為谷歌的全資附屬公司。谷歌是主要活躍在互聯網搜索引擎和網絡廣告服務，以及提供在線服務和軟件產品。谷歌開發的Android，智能移動設備操作系統，並提供一個自由和開放源碼的基礎上的智能移動設備的製造商。摩托羅拉移動（Motorola Mobility）的移動設備製造商之一，其主要產品包括手部手機和平板電腦。

2。相關市場

智能移動終端和智能移動終端操作系統構成相關濃度。智能移動終端是指一個開放的操作系統平台的智能終端，處理能力相當於一台個人電腦，高速的接入能力和豐富的接口，人機交互。目前，這種智能終端主要是指智能手機，還包括平板電腦和智能電視等。智能移動終端已經成為一個主要的接入點和互聯網業務的主要創新平台，其開放的操作系統平台，獨特的人機交互體驗，攜帶方便，顯著區別其他產品如個人電腦和電話功能手，因此，智能移動終端構成一個獨立的市場。智能移動終端操作系統是一個程序，它管理的智能移動終端的硬件和軟件資源。這是顯著不同於其他產品，如計算機操作系統，並因此構成一個單獨的相關產品的市場。智能移動終端操作系統市場的特點，一個全球性的市場。其審查過程中，商務部認為在全球市場上的競爭條件;車針對中國市場的條件的審查重點。

3。相關市場條件

智能移動終端市場和其操作系統的市場有不同的競爭條件。相對分散的智能移動終端市場的激烈競爭，頻繁的產品更新換代和產品的不斷升級，每個廠家面臨著相當高的競爭壓力。我們的調查顯示，摩托羅拉移動（Motorola Mobility）享有與其他競爭對手相比，沒有顯著的競爭優勢。在上述市場的顯著的對比，智能移動終端操作系統市場是一個高度集中的市場。最新

數據顯示，在2011年第四季度，谷歌開發的Androidsystemalone擁有中國市場上的市場份額為73.99％，12.53％與諾基亞的Symbian系統和蘋果的iOStaking10.67％;合併後的市場份額，這三個系統上中國市場reaches97.19％。由於非常高的市場份額的Android系統，在Android系統的智能移動終端製造商，雄厚的財力和技術開發能力，谷歌和較高的市場進入壁壘的高度依賴，商務部發現，Android系統具有優勢地位的智能移動終端操作系統市場。在光的事實是，（i）諾基亞宣布將逐步放棄Symbian系統，（ii）銷售的蘋果移動電話的價格一般都遠遠高於s系統，及（iii）開發的Windows Phone操作系統微軟公司仍然處於起步階段，Android系統的市場主導地位預計將繼續保持和加強的在未來的時間。

1。免費和開源的Android系統方面

目前，Android系統已經形成了一個完整的生態系統/價值鏈。Android系統的智能移動終端製造商，軟件開發商和最終用戶都成為依賴。終端廠商必須設計和開發基於Android系統的產品，軟件開發人員進行研究和開發基於Android系統的，只在Android系統開發的應用軟件，而不是與任何其他的操作系統兼容。最終用戶也將有相當大的依賴Android系統由於使用習慣等因素。我們的調查發現，智能移動終端製造商，操作系統切換的成本是巨大的：他們將不得不修改相關的硬件和軟件，以適應新的操作系統，此外，操作系統的變化，也可能導致改變用戶體驗，從而創造相當高的商業風險。免費和開源的Android系統是在一個相對短的時間內獲得市場優勢的重要因素。一個自由和開放源碼的基礎上，繼續提供Android系統的合理期望和利益相關者的合法權益的保護是至關重要的。如果谷歌提供Android系統的一個自由和開放源碼的基礎上完成後的濃度改變目前的商業模式，每個利益相關者都將受到重大不利影響。

2。谷歌終端廠商的公平待遇

摩托羅拉移動（Motorola Mobility）的濃度完成後，將成為谷歌的全資附屬公司。鑑於谷歌的主導地位在智能移動終端操作

系統系統市場，谷歌有雙方的激勵和能力，以治療摩托羅拉移動更有利比它把其他智能移動終端製造商，如提供了最新的Android系統的摩托羅拉移動（Motorola Mobility）之前提供給其他製造商。在調查期間，商務部發現，在此之前推出了新版本的Android系統，谷歌將，非優惠的基礎上，選擇一個智能移動終端製造商合作，以測試新版本的Android系統的兼容性終端的硬件設備。所選擇的終端製造商將有機會獲得新版本的Android系統領先於其他廠商的智能移動終端市場，從而獲得競爭優勢。的濃度完成後，谷歌可能會選擇摩托羅拉移動作為其測試合作夥伴。谷歌的智能移動終端製造商的歧視性治療，這樣的市場，將扭曲市場競爭將處於不利的競爭地位的摩托羅拉移動終端製造商以外。

3。摩托羅拉移動專利授權

摩托羅拉移動（Motorola Mobility）擁有大量的專利在移動電話領域，其中許多是必不可少的專利。谷歌收購摩托羅拉移動（Motorola Mobility）的主要目標，是擁有這些移動電話的專利。的濃度完成後，谷歌將目前擁有強大的開發和集成能力的軟件和硬件，並利用其在智能移動終端市場的主導地位，谷歌將有兩個動機和能力，造成不合理的專利許可條款，向持牌人許可安排，這將損害相關市場的競爭，最終損害消費者的利益。

4。市場准入

正如上面提到的，高度集中的智能移動終端操作系統市場，Android系統，Symbian系統和蘋果iOS共同持有超過97％的市場份額。在市場上的其他經營者，可以忽略不計的市場份額，是邊緣的競爭對手。智能移動終端操作系統的發展，需要強大的技術和資金優勢，市場集中度較高，新進入者構成了一個非常高的障礙。成功的智能移動終端操作系統會嚴格依靠的友好情誼，圍繞著上述操作系統的軟件開發環境和軟件開發人員的吸引力。優秀的應用開發環境可以顯著降低開發門檻，提高了

開發效率，提升用戶體驗，從而吸引了眾多軟件開發商，最終的應用軟件具有良好的用戶體驗將吸引消費者和潛在買家。開發了基於智能移動終端操作系統上的應用軟件的數量和用戶體驗已成為各種操作系統之間的競爭的關鍵因素之一。目前，典型的軟件開發環境基於智能移動終端操作系統，包括Android，蘋果的開發環境開發環境和微軟的開發環境。大量的Android應用程序和蘋果應用程序已經成功地吸引了絕大多數的軟件開發者和消費者。在開關的開發環境，軟件開發，不僅需要適應新的技術要求，但也將面臨巨大的商業風險，失去了眾多消費者。另外，從消費者的角度而言，切換操作系統裝置招致該等熟悉新的操作系統接口和更換智能終端的額外費用。鑑於上述，Android系統和蘋果系統已建立了完整的系統，具有很強的市場吸引力和良好的信譽，和邊際競爭對手或新進入者將面臨極高的市場准入門檻。在可預見的未來，這將是困難的新市場項目，以減輕或消除上述排泄或限制競爭的效果。

II。就限制性條件

在審查過程中，商務部指出，谷歌的集中度將有排泄或限制競爭的效果，並與有關各方就如何解決上述競爭問題進行了多輪諮詢會。 2012年5月15日，谷歌提出了最後，以解決競爭問題的承諾。經過評估，商務部認為這樣的承諾，是足以減少集中對競爭的不利影響。

III。复議決定

經審查，商務部認為，谷歌收購摩托羅拉移動（Motorola Mobility）將有排泄或限制對競爭的影響。基於谷歌的承諾，商務部，商務部決定，含有限制性條件批准集中。谷歌應當履行下列義務：
1）谷歌Android平台的授權一個自由和開放源碼的基礎上，在其目前的商業慣例相一致的方式。 Android平台是指當前和未來版本的開源軟件棧的移動設備，包括操作系統，中間件和關鍵的開源應用程序，在目前的形式上http://code.google.com/android/發布可在該網站或其繼任者的網站在承諾期（除非修改或解除這些義務）。這種義務不會

影響谷歌的權利保留或使Android平台相關的軟件特寫。這種義務不會影響谷歌的能力，要求支付其提供的Android平台相關產品和服務（包括但不限於Android平台上運行的應用程序）或其他代價。
（2）谷歌應將所有的原始設備製造商提供Android平台上的一個非歧視性的基礎上。該義務僅適用於原始設備製造商已同意不進行Android平台的分化或偏離。這種義務並不適用於谷歌的規定，許可或分佈的Android平台相關產品和服務（包括但不限於Android平台上運行的應用程序）。
（3）濃縮後，谷歌將繼續遵守與摩托羅拉移動的現時義務提供公平，合理和非歧視（FRAND）的摩托羅拉移動（Motorola Mobility）的專利
（4）根據商務部的臨時規則對資產或業務剝離，集中經營（商務部公開公告[2010] 41號）執行，谷歌將委託一個獨立的監督受託人監督谷歌的上述義務。
上述（1）和（2）項下的義務應力，這一決定之日起5年為一個週期。在事件有關的市場條件或市場競爭的變化，谷歌可能會向商務部修改或履行這兩項義務。如果谷歌不再控制摩托羅拉移動（Motorola Mobility），這兩項義務將不再有效。在這一決定是由商務部簽發之日起的5年以來，谷歌應報告其履行上述義務向商務部和監督受託人每6個月。期滿後的5年期間，商務部有權重新評估中國的智能移動終端操作系統市場的市場條件下，按照法律這種重新評估的基礎上做出進一步的決策。
商務部有權進行監督檢查，通過監督受託人或自己的，谷歌的上述義務的性能。谷歌未能適當地履行上述義務的，商務部有權根據“反壟斷法”的有關規定實施制裁。

本公告自頒布之日起生效。

中華人民共和國商務部“

Also with regards to the IPRs protection China has a complicated regime that is a pain in the neck for international investors and firms. To illustrate China offers a weaker protection for trademark and patents; China uses the principle of priority of the application (*first to file*): this means that first mover take precedence with respect of who first used the mark. International firms seeking the protection of their trademarks must act promptly. This also means that one can record a brand regardless of prior use by a third party and that the initial user is bound to succumb to the claims of those who first recorded it.

For example if a foreign company in China begins to distribute products bearing a brand that has not been registered in China it could be anticipated in the registration of the same trademark by a Chinese competitor which obtain a legitimately use in mainland China. Thus the registration of a foreign brand may be lawfully performed by local companies, even if the brand was regularly and previously registered in foreign countries but not in China (even through extension of the international registration).

It is true, however, that the criterion of the first to file is not applicable in case of bad faith. Here the competent authorities may - with a special request and opposition procedure – cancel the mark. Obviously, this opposition procedure can be time consuming and expensive and firms generally prefer to prevent such situation.

Once a mark has been filed, the Chinese law adopts a registration system similar to that in force in the majority of countries that have signed international conventions although, as mentioned, China employs the *retroactive effect* of

registration at the time of filing in case of conflict between two applicants: in this case who filed first will prevail. Other jurisdictions use a different principle that emphasizes the priority of the use and therefore consider prevailing who demonstrate to be the first using a particular brand. Even in China, however there are two hypotheses giving rights to the first users:

- The first hypothesis occurs when on the same day was presented more registrations of the same mark (Article 29, Law on Trademarks and art. Implementing Regulation 19);
- The second scenario is when the unregistered mark was used by a third party and has already become "influential" (Article 31 of the Trade Marks).

China's legislation basically consists of the following acts:

- The Trademark Law - Trademark Law, adopted on August 23, 1982 and amended in 1993 and 2001;
- The implementing Rules of Trademark Law of 15 September 2002;
- The Rules for Trademark Review and Adjudication, of October 17, 2002;
- The Provisions on the Determination and Protection of Well-known marks of 1 June 2003;
- The Working Rules for Identifying Well-Known Trademarks, of April 21, 2009.

In line with the international discipline once a trademark has been registered, the owner acquires the right to put on the goods the terms "Registered Trademark" or symbols of the same meaning (eg, TM or ® or Chinese "zhu" (注) in the upper or lower right corner of brand used.

Obviously the mark also in China must be new and must have "distinctive features" that allow to identify the service or product in comparison to others. This is why it is not allowed

(Article 11 Law on Trademarks) to register a generic or merely descriptive trademark. Thus, cannot be registered as trademarks:

- signs consisting of generic names, or signs that represent the product in relation to which they are used;
- signs which direct reference to the quality, material, function, use, weight, quantity and other characteristics of the goods in respect of which the trademarks are used;
- marks which do not contain of any distinctive character.

One aspect that should not be overlooked is the possibility of simultaneous recording of the "Chinese version" of the brand. In China is possible to register the Latin trade mark also in Chinese ideograms (or more often the transliterations of the Latin brand into Chinese). This practice, although not required by Chinese law, is convenient for foreign firms because it protects the trademark from Chinese transliterations of the sound of a word in Latin characters (Chinese language in fact admits more transliterations of the same Latin word and this may create confusion). Thus, since the transliteration can be more than one, the registration of all or most of the possible transliterations prevent others from a legitimate use of a mark consisting of different sounds from same Latin words. Additionally, this will help firms to record the possible Chinese symbol or graphics that best identifies the original Latin mark.

Therefore, the character has a dual communicative function, on the one hand tied to the mere meaning of the word, the other one linked to the association of meaning evoked by symbols. In addition, a third vehicle of communication is phonetic. In fact, the choice of the "Chinese version" of the mark (or "Chinese versions") should seek a balance between sound

and content also trying phonetic and semantic affinity with the original record. For example the Chinese version of:

- Coca-Cola is 可口可乐, ke ke kou, which means "delightful and happy";
- Mercedes-Benz 奔驰, well who, what means "fast";
- Lego is 乐 高, the gao, which means "extra fun";
- Singer 胜 家, jia sheng, which means "winning family";
- Carrefour is 家乐福, jia it was, which means "happy home".

In other cases, companies have focused only on the phonetic choosing the Chinese versions of the mark without any meaning. It did so, and with success, Motorola, whose Chinese name is written and read 摩托罗拉 Motuoluola: the four characters used on the whole mean nothing. The same technique is often used for the brands that are patronymics, for example Gucci, in Chinese 古 驰 pronounced Guchi. In still other cases, the translation is based on the meaning of the original name, without any consideration of the affinity of sound:

- Volkswagen 大众 汽车 one read Dazhongqiche;
- Apple Computer is 苹果 电脑 one read Pinguo Diannao.

Registration of Trademarks: Implications for foreign firms

With regards to the registration process China embraces the procedure experienced by the western countries admitting both an international trademark registration and a domestic registration process. Generally where an international firms has a trade mark already been registered under an international treaty - through the WIPO in Geneva - it can for instance include China among the countries where registration is effective. This option is quite recent but is now possible after the accession of China to the Madrid Agreement of 1891, to the Madrid Protocol of 1989, and to the Paris Convention of 1883 which govern the international brand protection.

To obtain an extension is necessary, therefore, to forward the request to WIPO offices. After this step, firms should contact the relevant Chinese authorities, ie Trademarks Office, which will adopt the measures for implementation of such extension (the timing is about one year), validating the registered trademark on an international level in the Chinese state. The Chinese Trademark Office will issue, upon request, a certificate attesting to the validity of the territory of China of the international registration.

The extension of the validity in China may be refused by the Trademark Office in the case of already registered mark by third parties in China or whether the trademark does not meet the requirements prescribed under the Chinese law (for example distinctness, etc…).

The international registration allows a degree of protection of the brand name equivalent, in principle, to that provided by

the national registration obtained by direct procedure. However international firms should be aware that there is a substantial difference that should not be underestimated: the mark international registration in China does not have full autonomy in relation to the mark registered in the country of origin. The hypothetical removal or modification of the mark at the origin's jurisdiction will result in the removal of the same brand from China. This factor should be properly considered by firms before adopting the international registration.

A part from the international registration firms may use the domestic procedure (*direct registration*). The procedure of direct recording (for the international brands that have not yet been registered under international arrangements) takes place at national level, at the Chinese Trademark Office ("TO") (中國商標局). The registration procedure is carried out as summarized below (obviously it's desirable, although not required by Chinese law, to carry out a preliminary research on the existence of similar or identical trademarks to avoid obstacles): a) The company files with the Trademark Office which within a period of 3-6 months will issue a receipt; b) the Trademark Office scrutinizes the request to ensure that there are no identical or similar marks previously registered; c) the TO publishes the tentative of approval as Official Mark; d) thus any third party may oppose to the registration within three months from the publication of the approval; e) if no objection occurs or if the opposition of third party is denied the Trademark Office will issue the *Certificate of Registration* and the mark becomes "官方標誌" (Official Mark). The process ends successfully when the Certificate is released and the mark is given full protection under the Chinese law.

The importance of the Certificate of Registration is emphasized by the provisions of art. 38 of Trademarks

Regulation, which provides that if the Certificate of Registration of the mark is lost or damaged, it must be promptly, requested a reissue by the Trademark Office. The entire procedure for registering the brand is time consuming and it can last 2 years but if a third party makes opposition the process may request up to 4 years. The procedure is also complicated by the fact that, according to the Trademark Law, if the natural or legal person entitled to registered the mark is foreigner (eg. person without habitual residence or place of business in China) it must necessarily act through an organization (trademark agency) recognized by the state as a trade mark agent (Article 18 of the Trade Marks).[253]

The protection of the trademark in China lasts ten year from the date of approval of registration (Article 37 Law on Trademarks) and it can be renewed for decades. Generally, within the six months prior to the expiration period, the holder may submit an application for the renewal of registration for another ten year time. If the holder has not been able to meet this deadline, the art. 38 of the Trade Marks Ordinance expressly provides the possibility of granting a "grace period" for an additional six months. Failure to timely request renewal application involves the removal of the mark.

The well-known Trademark

[253] We note however that with a reform dated 2001 the FIE (Foreign Invested Enterprises) have been considered equivalent to Chinese enterprises and thus they can registered directly the trademark without the necessary assistance of the trademark agency.

The difficulties for international firms arise also from the lower protection offered to well-known trademarks under the Chinese Legislation. As known the term *well-known mark* characterizes the brand widely known among consumers globally and receives a certain protection also in China. This area is governed by *ad hoc* rules, which should ensure greater protection and should meet that international standards expressed in the Paris Convention for the Protection of Industrial Property (which China has accepted). More recently China has also adopted the Working Rules for Identifying Well-known Trademarks (工作規則確定馳名商標) approved by China's State Administration for Industry and Commerce (SAIC) and enforced by April 21, 2009, as well as the "List of Well-Known Trademarks Recognized through Administrative Procedures" adopted on May 27, 2011, (通過行政程序認定馳名商標名單) again from SAIC. Under these regulations the well-known mark, even if not registered in China, may obtain some legal protection.

In particular international firms holder of a mark with a global reputation, although not registered in China, may oppose the use or ask for cancellation of the registration of the same mark or similar mark if used by third parties for goods identical or similar to those for which it is being used abroad, as it appears misleading to the public and would undermine the interests of the owner of the well-known mark in question.

On the other hand if the trademark is additionally registered also within China the protection become cross-sectorial and thus also extends to those classes of goods in which it was recorded. In this case the holder may also benefits of a greater protection as it may object to the registration and use of the mark – for example the copying or imitation or translation of the well-known trademark - even with respect to kinds of

products other than those for which it was registered, where there are assumptions and deceptive nature of possible prejudice to the rights of the owner of the well-known mark (Article 13 of the Trade Marks).

Once noted that foreign firms may have some kind of protection for well-known trademarks it remains to be seen when, according to Chinese Rules, a trademark can be considered well-known. The Law on Trademarks, the Provisions on the Determination and Protection of Well-known marks and Working Rules have identified a number of factors - which must be met in whole or in part – that can measure the degree of brand awareness, such as: 1) the level of brand awareness among the relevant public (in relation to the ark and the goods involved); 2) the temporal extension of the use of the mark; 3) the spatial and temporal brand advertising; 4) the actions (eg administrative or judicial) taken to protect the mark (in China or in other countries); 5) other factors that attest to the reputation of the mark.

Although some steps towards international standards have been done, the analysis of the current situation, according to many commentators,[254] is characterized by a persistent great difficulty for foreign companies to recognize their "well-known" in China. International firms face many risks in this matter because they are required to demonstrate a stronger trademark global reputation to

[254] See for details SHANG Ming-zhu editor. (2009). Anti-monopoly law and IPRs protection : interpretations and applications, Law Press, p.247.

meet the Chinese standards than what is asked them in western countries. In other words the burden of proof is not aligned with international standards and international firms need to fulfill something more with respect of western jurisdiction.

According to Chinese system, international firms must provide relevant evidence demonstrating the reputation of the firms and its trademark for being protected as a well-known brand. Chinese law requires as relevant evidence, among other things, the documents relating to the advertising and promotion of the brand, the volume of business, the size of the market of the goods bearing the mark, and actions taken before the courts in other jurisdictions. The Trademark Office, for example, attaches much importance to the advertising done on the national and local media or may considers important written documentation or photographic media events such as, for example, the ceremonies for the signing of the contracts, which participated representatives of Chinese authorities. If these requirements are not met international firms may be not protected.

Once the trademark has been recognized as well-known, the TO may add it to the list of famous brands prepared by the TO. This list is however actually still composed mainly from Chinese brands and this reflects the hard task international firms are exposed. Just few international trademarks have been admitted (for example McDonald's, Disney, Jaguar, Cartier, Tissot and Ferrari).

The small number of foreign brands recognized as well-known in China is the result of two factors: a) at one side there's the restrictive notion of reputation, which makes it difficult, especially for the foreign operator, meet all the

requirements. In brief, a well-known brand at an international level is not necessarily regarded as such in China; b) on the other side there's the complex process to recognize it. The procedures for obtaining it are time consuming and expensive - for example firms may obtain it throughout an administrative process of the TO or a judicial recognition before a tribunal, in each case the review may last up to 5 years – and this discourages international firms with scarce economic resources or with a minor exposition to Mainland China.

The Patent Protection

The reform of the patent law of 1995-2001 has been another important step to meet the international accepted criteria in the IPR field. The Reform has brought an innovative concept for the Chinese legislation that until recently did not admit any recognition material for the inventor of a "work of genius". The admission of China to the WTO has pushed the government to a complete restyle of the Patent Act to gradually strengthen the protection of the rights of patent holders from possible violations by third parties as well as encouraging the development of national intellectual property and to offer foreign entities a regulatory protection of intellectual property that in line with their countries of origin.

To this respect the Patent Law ("Patent Act") of 1984 has been subject of three amendments. The first amendment was adopted in early 1992 with China's accession to the Patent Cooperation Treaty (PCT) in 1994. The second amendment was adopted in 2000 - with the aim of aligning the provisions with the Trade Related

Aspects of Intellectual Property Rights Agreement (TRIPS) before entering China to the WTO. The third amendment was secured by the Implementing Regulations of the Patent Law of the People's Republic of China approved on June 15, 2001.[255] The willing of People's Republic of China to match the international system of intellectual property protection was also ensured with the adhesion to many international treaties.[256]

According to the Patent Act the Chinese legislation is quite similar to the western jurisdiction provisions. For example when defining the *patentability* of an invention the Article 2 recalls that: "1) the invention is an innovative solution to the technical problems related to a product, a process or a development of the latter; 2) the utility model is a new solution to the technical problems, such as the invention, but it should be connected to the shape or configuration of a product or the combination thereof and which is susceptible of practical use;

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[255] The purpose expressly stated in the preamble of the Patent Act was to protect and at the same time promote the creative and inventive in the field of science and technology, to meet the needs of socialist modernization.

[256] China has formally joined the Patent Cooperation Treaty, the Budapest Treaty on the recognition of the patentability of the deposit of microorganisms in 1995, the Treaty of Strasbourg on the classification of patents in 1996 and the Agreement Locarno Classification of Industrial Designs, in 1996. Additionally, on 27 December 2008, at the conclusion of the sixth session of the eleventh Standing Committee of the National People's Congress, was approved the third amendment to the Patent Act, which came into force on 1 October 2009. This was followed by the adoption, Jan. 9, 2010, of the Amendment to the Implementing Regulations of the Patent Law of the People's Republic of China (the "Rules") in force since 1 February 2010.

3) the design is a new design relating to shapes, patterns, colors of a product and the combination thereof which is able to produce an aesthetic effect and suitable for the industrial application".

Additionally the Patent Act (Article 22) prescribes three requirements for both inventions and for utility models to successfully be patented: novelty, originality and industrial application. It continues stating that: "1) there is a requirement of novelty when, at the time of submission of the application, the same technology is not already known by the public". On the contrary the concept of originality assumes a different depending on whether it's an invention or a utility model, due to the intrinsic different content of originality of the same. For utility models is considered sufficient that the work "has a real distinctiveness and that it is an improvement over the status of the technology existing at the time of application". The degree of originality required for inventions is higher: the invention must have "original and evident features and must be a significant advance (and not a mere progress) on the status of the technology existing at the time of application".[257]

In China, not all of the intellectual property can be patented. Art. 5 of the Patents Act states that cannot be patented: 1) creative works contrary to public morality, the law of the PRC or detrimental to the public interest; 2)

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[257] The absolute nature of novelty of the invention-creation is mitigated from the so-called "grace period" of six months prior to the submission of the application; during this period the requirement of novelty is not denied if occurred any of the following circumstances: 1) the work was exhibited at an international exhibition sponsored or recognized by the Chinese government; 2) the work was advertised at an academic conference or science; 3) the work has been disclosed to third parties, without the proponent patent application had agreed.

the invention-creation based on genetic resources obtained or used illegally;[258] 3) scientific discoveries; 4) the rules and methods of reasoning; 5) the methods of diagnosis and treatment of diseases; 6) the animals and plant varieties; 7) the substances that are result of a process of nuclear transformation; 8) the design of two-dimensional images or color (or combination of images and colors) with the main function of "marking".[259] On the other hand pharmaceuticals, beverages and flavors are legitimate objects patents. Also for patents, as seen with trademarks, is valid the principle of *first to file*. Under this rule, if two or more applicants apply for the same patent creation, the patent right is granted to the first of applicants.

With regards of the Chinese competent authorities it's useful to remind that the State Intellectual Property Office – SIPO is responsible for the registration of patents and it's set up within

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[258] Article. 26 of the Patent Act adds, the last paragraph, that if they are used such genetic resources, the applicant must specify in its application for a patent, the direct or indirect source of such resources or, failing that, explain why it is not possible provide such information about the origin of genetic resources used. These forecasts for the protection of genetic resources were introduced by the third amendment to the Patent Act and the impact of these applications depend on the definition of terms and practices which will be considered as illegal use or acquisition

[259] This exclusion, introduced by the third amendment to the Patent Act, it probably has the purpose to prevent registration as substantial design copies of marks. With reference to this exception, among other things, difficult to detect by means of uniform criteria and objective, stakeholders should consider choosing other forms of protection, such as registration as a trade mark by virtue of the purpose of "marking" design same.

the State Council.[260] The Patent Office centrally accepts and examines patent applications and decides upon the grant.

Obtaining the registration of a patent is quite difficult for foreign firms as it involves the filing of an application with the Patent Office and the language to be used for this purpose is Chinese. All the written documentation delivered to the Patent Office (SIPO), shall be in Chinese language, except technical and scientific names of those who do not have a Chinese official, for which one must also indicate the name in the original language.

The approval process is made of three steps: 1) The SIPO receives the application and opens the examination stage (investigation stage); 2) If the result is positive, after 18 months from the filing the application shall be published in the Official Patent Office[261]; 3) at this point the must make the request to examine the patent on the *merits* within 3 years from the submission of the application. In the absence of such request without a valid

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[260] In May 2011, the SIPO has made available an online search system that is the largest database of China patent: according to a statement by the press (China Daily), an article published on the same internet SIPO, the search system contains more 80 million abstracts of patent documents and more than 70 million documents in full, gathered more than one hundred countries and organizations.

[261] The procedure ends here for utility models and designs. In fact, art. 40 of the Patent Act provides that, if the application for a patent for utility model or design positively exceed the preliminary examination, the Patent Office's decision to grant the patent issues the certificate, the registration and publication and publication the patent right is effective.

reason the application is deemed abandoned; 4) If the results of the test is negative, the applicant is invited to make comments or amend the application. If no response is provided, without justification, the application is deemed to be withdrawn. On the other hand if the committee responsible has rather successfully examined the application it issues the Official Patent Certificate within the next two months.

Generally the process is quite long. The registration procedure for the issuance of national invention patent requires a timeframe of about 24-36 months. The time for recording the utility models and design, since it's a simplified process, takes generally much shorter time.

Additionally, as seen with trademarks, if the subject (individual, company or other entity) is foreigner (thus does not have their domicile or place of business in China) and wants to apply for a patent in China it must act necessarily through an agency (patent agency), which operates in the country. This requirement does not apply, or rather is optional for applicants operating in China through Foreign Invested Enterprises.

As we have seen for the brands international firms may also choose the international registration procedure - under the Patent Cooperation Treaty (PCT), which China joined in 1994 - as an alternative to the purely domestic application. Through this procedure firms may request and obtain the extension to the Republic of China of the protection already recognized internationally for their creation. In the event of such an extension, the effect of registration in China runs from the date of filing of the "international patent application" in the country of origin.

As the general practice the procedure under the PCT provides for an initial examination "at an international level" of the work, using the state of the art research in the area concerned and, on request, by means of a preliminary

examination as to the patentability. The second evaluation is "national" in each country designated in accordance with its internal rules, each national patent office will proceed autonomously and, if the results of the test are positive, it records the patent as a national patent. As already said, this procedure has the advantage of being faster and more economical for international enterprises. On the other hand these firms will not have the assistance of the local agency and the Chinese patent protection will follow patent's events of the original place where it was issued.

With regards to the identification of the person entitled to file a patent application and thus to become the holder, China generally follows the international rules: thus it depends whether the inventor acted in service or out of service (that means independently). In the case of creation not during a service, the inventor-creator is the only individual entitled to submit the application and to obtain the patent at the end of the procedure. Otherwise if the work of genius has been created pursuant to an employment relationship or job (this is also considered the situation in which the employee has made the creation in some way related to their work, within one year from retirement, by switching to another company) and it has been created primarily through the use of materials and technical tools of the employer (such as money, tools, raw materials, spare parts and technical or confidential information), the employer will obtain the patent unless there has been a different agreement between the parties.

As in western codes the inventor-creator, however, has still the right to be mentioned in the patent certificate and also has the right to receive from the employer a fee as well as a one-off

remuneration based on the profits made. In the event that a plurality of persons (natural or legal persons, individuals or work units) has collaborated in the creation of a single intellectual work, everyone is entitled to apply for a patent jointly, unless otherwise agreed.

Lastly we mind that also in China the patent has a variable duration: 1) 10 years for inventions; 2) 20 years for utility models and designs. Both periods start from the date of filing of the patent application.

13 – The need for a Chinese Merger Regime

As seen in the previous paragraphs, the Antitrust Authority has ruled several times on the merits of proposed mergers with foreign companies. The most resounding verdict was delivered against *Coca-Cola/Huiyuan*, but also with respect of many other important operations. We've seen the dubious line of reasoning of MOFCOM in those cases. Thus, many observers have interpreted this decision as a belated revenge to the fierce barrage political fact in 2005 when the United States blocked the acquisition of Unocal by the Chinese oil giant CNOOC.[262] It's too early to say that China is making a political use of antitrust law.

Certainly, to reject the transaction, MOFCOM has used a device obsolete as the leveraging theory; fell into disuse for decades in almost every country in the world, but it is sure that there is a lack of information on the reasons that led to the rejection of Coca-Cola.

But also when we've discussed the conditional approval of other cases the Chinese Antitrust has not been very tender. After acquiring the German Anheuser Busch, the Belgian beer giant InBev saw the white mice to keep the various holdings beyond the Great Wall in line with the conditions dictated by the MOFCOM. Mitsubishi Rayon, also, after receiving the go-ahead to buy British chemical company Lucite by a dozen anti-monopoly authorities in the world, has been forced to drastically reduce its industrial capacity in China.

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[262] See Wall Street Journal "China blocks Coca-Cola/Huiyan Deal", 23 Sep 2008 at 12

Adopting a hard line also led operations far from its borders, likely, Beijing wanted to convey an important message to the economic and financial international henceforth, anywhere in the world, expansive projects of multinationals will have to deal with Chinese anti-monopoly authorities. Thus everything will depend on how Beijing will decide to use the room for maneuver available to the application of the anti-monopoly law.

Generally merger conditions are remedies that competition bodies may impose on merging undertakings so that a proposed plan may be successfully approved. These remedies may be requested where competition in the relevant market is likely to be negatively impacted as a result of the operation. These conditions that may be imposed may be conventionally divided as structural or behavioral remedies: "(i) Structural remedies are the one-off measures adopted by a competition authority that are intended to restore the competitive structure of the market; (ii) Behavioral remedies (also called conduct remedies) refer to the ongoing measures designed to modify or constrain the behavior of the merging firms".[263]

Structural remedies are generally more definitive and secure, easy to administer, and to enforce. They often consist of a special request of divesting part of the concentrated undertaking. But structural remedies are not suitable for all kind of merger situations because in many circumstances there are not businesses that can be successfully divested in order to reduce the negative effect of the merger on competition. Thus, an effective system of remedies will cast both structural and behavioral provisions.

Regarding the general approach of MOFCOM to merger remedies, China is quite aligned with the international practice: remedies have been required in cases where

[263] See Professor Bainbridge, "Merger reviews Problems" Antitrust Review 2003 II at 44

operations raised many competition concerns and both kinds of conditions have been required by MOFCOM. However there are a number of differences between MOFCOM's line of reasoning and the approach of US and EU competition agencies.

The first difference is about the numbers. Between 2008 and 2011, MOFCOM requested conditions in 10 transactions, accounting for 2.6 percent of the 382 M&A operations it reviewed. In the EU during the same time, the EU Commission approved with conditions 62 transactions out of 1189 transactions, about 5.2 percent. MOFCOM therefore seems less aggressive and more cautious than the EU Commission with respect to merger remedies.

The second difference is related to the kind of remedies required. Many antitrust authorities (mainly US[264] and EU) employ structural remedies rather than behavioral remedies. MOFCOM has acted in a different way being more receptive to behavioral remedies than to structural ones. It has imposed behavioral remedies in the cases of *InBev/AB, GM/Delphi*, *Uralkali/Silvinit*, *GE/Shenhua* and *Seagate/Samsung*; it requested structural remedies in the cases of *Pfizer/Wyeth*, *Panasonic/Sanyo* and *Alpha*

[264] Before the adoption of the "U.S. 2011 Merger Remedies Guide" the Antitrust Division of US also preferred using structural remedies. However, the U.S. 2011 Merger Remedies Guide seems to allow more use of behavioral remedies for companies engaged in specified anticompetitive risks. The guidelines expanded the types of behavioral remedies available by providing for relatively more complex, interventionist, and ongoing restraints.

V/Savio, and; used a combined remedies in the cases of *Mitsubishi Rayon/Lucite* and *Novartis/Alcon*.

As seen in the previous discussed cases there have been enacted more behavioral remedy cases than structural remedy cases in China. Additionally while certain types of behavioral remedies (for example the commitments not to raise prices post-merger or not to discriminate against customers) are generally no accepted in EU and US (because their implementation is quite difficult to supervise), such behavioral remedies have been accepted by MOFCOM in many cases.

Another point is related to flexibility of MOFCOM. China's Authority seems to be more flexible with the condition that can be endorsed. In the *Uralkali/Silvinit*, for instance the Ministry of Commerce determined that the relevant market was highly concentrated and that the merged entity would become the second largest player in China, controlling, together with the largest player, almost 70 percent of the worldwide supply of potassium chloride. While the MOFCOM could have ordered an important divestiture or just the block of the plan for the too concentrated nature of the relevant market, it required the undertakings to: *"(i) continue to follow the current method of sale and related procedures; (ii) continue to supply a broad range and a sufficient volume of products to Chinese customers, and; (iii) maintain the customary negotiation procedures and take into account the historical and current trading situation with its Chinese customers*."[265] MOFCOM's decisions may be welcomed by undertakings faced with hard competition issues, since it offers a larger range of possible remedies that may be used to clear successfully the transaction.

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[265] Comment of Dery Beker "MOFOCM divestitures plans in China: a new deal?" Antitrust pacific review, 2011 II at 22

Lastly, but importantly, we need to stress that in other jurisdictions, such as the EU and the U.S., the merger review addresses only competition concerns. MOFCOM, on the other hand, often takes into consideration also non-competition concerns. For example non-competition concerns justified the reason for taking remedies in 5 out of 10 conditional approval by MOFCOM. As discussed, the *InBev/AB* case is the most obvious example of the use of remedies to address non-competition concerns.

Although MOFCOM openly recognized that the *InBev/AB* operation did not give rise to any competitive concerns in mainland China, MOFCOM still required the merged undertaking to notify the operation to MOFCOM and determined that the company should obtain its prior consent for future operations involving the increase of "shareholding in two of the merged entity's existing joint ventures in China or any acquisition of the merged entity's other two major Chinese domestic competitors".[266] These conditions reduced AB-Inbev's ability to enter into any additional acquisitions in the Chinese beer brewering industry. This assumption was clearly made to discourage an increase of foreign penetration in China and to protect the domestic beer industry players.

The same consideration was behind the *Mitsubishi Rayon/Lucite* conditional clearance. Although MOFCOM excluded a significant competition problem it nevertheless required that, "for five years from the closing of the transaction, the merged entity may not, without MOFCOM's prior approval, acquire other producers or even build new plants in China, not

[266] See id

only with respect to the problematic product but also other non-problematic products".[267]

Given the unpredictability of such non-competition issues, it's quite difficult for parties to anticipate whether a proposed operation will be cleared successfully and which conditions may be imposed by MOFCOM. Foreign companies involved in a M&A operation may be favored by the fact that there has been only a limited number of remedy cases, additionally when remedies are required, MOFCOM also seems to be relatively flexible with the acceptable remedies. Generally MOFCOM is open to behavioral remedies while other antitrust authorities are less suitable with them. The result is that in many cases, the remedies requested are not so burdensome for the undertakings involved.

On the contrary Chinese merger review is more unpredictable than in other jurisdictions due to the non-competition concerns. Companies should be aware to bear in mind that MOFCOM could use a completely different approach for requesting the remedies.

For example in the *GM/Delphi* case, as seen a vertical merger subjected to merger review in many jurisdictions including the U.S. and the EU was approved conditionally in China while in the EU and US competition authorities intervened only if the merging parties are found in a dominant market position in either the upstream or downstream market. Thus while neither the U.S. Federal Trade Commission nor the EU Commission had imposed any condition because the authorities did not find any party to occupy a dominant market position or to exercise significant market power in either the upstream or downstream market. By contrary, MOFCOM imposed behavioral remedies even though it admitted and

[267] See id

recognized that neither the two merged entities were in a dominant market position or had significant market power.

Another case we've already mentioned was the *Seagate/Samsung* case. While the proposed merger had been cleared unconditionally in seven other jurisdictions including the U.S. and the EU, MOFCOM required additional remedies. The EU Commission reported that "the transaction would not likely result in a substantial lessening of competition" while MOFCOM came up with a completely diverging conclusion requiring that "Seagate to operate the target business globally as a separate business for a period of at least one year". This condition effectively impeded the parties from complete the proposed operation for at least one year..

In conclusion we believe that MOFCOM is creating its own approach to merger review. Undertakings should pay attention to the differences between the approach taken by MOFCOM and other competition agencies when notifying a case and they should not base their expectation exclusively on a European or U.S. review method analysis when approaching to Chinese merger review.

But there is also another aspect of the anti-monopoly law that might hold surprises. So far, the new rules have been applied only to the industrial concentrations. The discipline that concerns the formation of cartels, abuse of dominant position, agreements restricting competition (materials that, because of a bizarre division of powers, not falling within the prerogatives of MOFCOM) have not yet found practical applications. Moreover, although a transaction was deemed approved if MOFCOM fails to act within the AML time frame, MOFCOM effectively bans a transaction by simply refusing to accept a notification and

thus to let the clock start. Commentators are worried that this flexibility could lead Chinese authorities to arbitrarily block or impede mergers that could involve national interests. [268]

These early decisions show also how the Chinese authorities are trying to adhere to transparency. In this perspective, decisions made against some foreign operators may well be analyzed as waypoints to bring greater transparency in the public decision-making sector. From the first decision published, the InBev/AB, to the recent case of Google/Motorola, MOFOM came up with more valid arguments and consideration demonstrating significant efforts by the competition authorities.

In the same way MOFCOM had responded to numerous requests for clarification raised by the controversial decision of *Coca-Cola/Huiyuan* that were made on the basis of unclear motivations. MOFCOM has taken care to provide more details on the components and reasoning that motivated his decision.

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[268] This risk of arbitrarily decision may be occurred in the attempt by the Internet portal company Sina.com to acquire an interest in Focus Media, a Chinese advertising and digital media company. The transaction was announced in December 2008 and notification submitted to MOFCOM. MOFCOM never accepted the notification, and the parties finally abandoned the deal in September 2009 since they could not close it without the expiration of the waiting period, which never began. Similarly, the proposed acquisition of General Motor's Hummer division by Sichuan Tengzhong Heavy Industrial Machinery may have been abandoned in February 2010 after being announced in June 2009, in significant part because MOFCOM apparently never accepted notification of the transaction. This may be one method to deter transactions that MOFCOM does not want to approve, without publishing any reasons.

Despite all the obstacles encountered we note that MOFOCM is trying indeed to show its willingness to transparency and rigor. At the opinion of most observers, MOFOCM's decisions are actually established on the basis of analytical work and investigation In addition, the desire for transparency has recently been further affirmed by the Chinese government: anxious not to be accused, officially wrongly, distort competition and be in the pay of economic nationalism, the competition authorities have explicitly asked observers to act of neutrality of public action in the matter.[269]

A new milestone was reached on May 8, 2012 with the adoption, by the Chinese Supreme Court, of the principles of interpretation relating to civil litigation in case of a violation of the Anti-Monopoly Law. These *principles* provide useful clarification on the conduct of litigation relating to the AML and should result in a greater number of sanctions for competitive behavior, which remained often unpunished for the lack of clear guidelines for the courts.

The *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of* Civil *Dispute Cases* specifically are aimed to allow better control of the behavior of public operators. So this step will strengthen the judicial transparency within the Chinese economy. It is

[269] For example openly questioned about it at the annual conference of MOFCOM on 27 December 2011, the Director General of anti-monopoly office stated that all operators will be treated equally in all respects, regardless of nationality, rejecting the accusations of discrimination.

therefore the competition law that now seems best able to change public policy Chinese in economic matters.

But there is one crucial challenge that may balance the future competition law in China. We're talking about the need for an independent judiciary system. Beyond the recurring criticisms raised by the opacity of China's judicial system and the lack of legal certainty resulting, it is indisputable that courts do not yet have all the skills and structures required to treatment of crucial technical issues that may arise during a complex concentration. This deficiency is strongly detrimental to the credibility of the current system China is trying to establish; to this day the judicial system remains disproportionately subject to the arbitrary administration and uncertainties that may result from jurisdictional disputes between administrations.

14 - The National Security Review

With the publishing of the AML and the accession to the World Trade Organization, we have seen that China is trying to attract more qualified international investor and firms to spur its growth. In the previous paragraph we have also discussed about the MOFCOM merger review which may involve international firms interested in entering the Chinese marketplace throughout the acquisition of Chinese undertakings. We have seen that Chinese merger regime may also be enforced to international firms acquiring a Chinese SOE although – in some circumstances – these kinds of operation may involve the national security review, an additional review that is not clear under the AML as it requested more regulation. Actually on 3 February 2011, China's State Council published a new circular explaining this extra hurdle for foreign investments that may raise national security concerns: *the Circular of the General Office of the State Council on the Establishment of a Security Review System Regarding Mergers and Acquisition of Domestic Enterprises by Foreign Investors (the "Circular").* In brief if the target company is active in a specific national industry, such as the financial, transportation or mining sectors, the international firms must seek a special approval from authorities supervising the relevant industry.

The Circular, which entered into effect on 5 March 2011, explains what is the meaning of *national security review* and specifies what type of operation are subject to it. In particular the Circular applies to foreign investors

desiring to acquire actual control (*controlling interest*) over domestic enterprises in these following sensitive sectors: 1) military enterprises or enterprises located near key and sensitive military facilities, and other entities relating to national defense; 2) key domestic enterprises in areas such as agriculture, energy and resources, infrastructure, transport, technology, and manufacturing of important equipment.

A "controlling interest" is explained in the Circular "as including a foreign investor (including its affiliates), either alone or in aggregate with all the other foreign investors, holding a 50% or more interest in an enterprise or having actual control over the target's affairs, such as its business decisions, finance, human resources and technology functions".

Regarding the operations that may activate the special review process the Circular includes: a) the purchase of the assets from a PRC incorporated enterprise for the purpose of establishing a foreign invested enterprise ("FIE"); b) the acquisition of interests in a PRC domestic enterprise; c) the acquisition from Chinese shareholders or equity holders of, or; d) the subscription of new shares or equity interests in, an existing FIE incorporated in the PRC. Surely if the operation meets also the relevant thresholds it will be subject to merger control approval by MOFCOM. Thus an operation may be scrutinized twice.

As we can see these provisions have the potential to be interpreted extensively and to catch both significant and arguably less significant operations such as those not requiring the MOFCOM's merger consent. Additionally the meaning of many terms raises uncertainties for international firms as they will be largely subject to the discretion of the Chinese authorities. Think for instance to terms such as the "surrounding area of important or sensitive military facilities", the "importance to national

defense security" or the "key (sectors)". The meaning of these terms, as one can imagine, is quite understandable at this time.

The Circular further explains that the national security review can be started by an impulse of "the relevant government agencies or following an application from the relevant foreign investors, national industry associations, and enterprises operating within the same industry as the target, or within the upstream or downstream industries of the target". The security review process should assess the effect of the operation on "(i) national defense, productivity, supply capabilities, (ii) operational stability of the PRC economy, (iii) social order and (iv) research and development of the PRC's technologies key to national security".

Charged with the review process is a special Ministerial Committee nominated by the State Council. The Committee is controlled by the National Reform and Development Commission and the MOFCOM, together with the ministries relevant to a particular transaction. The review process is started by the applicant who is requested to submit any operation which may have a security impact to the MOFCOM for review it. Therefore MOFCOM will charge the Ministerial Committee for review if it deems necessary.

The review by the Ministerial Committee is split into two phases, a general review and a special review phase. In the former, the Ministerial Committee may consult the relevant authorities asking to analyze the impact of the operation. If no objection is raised by the relevant authorities, the Ministerial Committee will grant approval for the operation. If objections are raised, the Committee will open the special review phase. If

at the end of this phase the Committee disagrees with the analysis of the relevant authorities, the Committee will submit the matter to the State Council for a final decision.

Notably the Circular does not provide a secure timeline for the security review. Thus investors should submit any application as early as possible. The review procedure can last up to 35 working days if only a general phase is required and may last up to 100 working days if a special review is involved. However no specific time provisions are provided if the review is subject additionally to the State Council for the final decision. These uncertainties are clearly another risk for operations involving foreign undertakings which may already need to pass successfully the rigid scrutiny of the merger control review.

When a potential operation is found to be a material threat to national security, the Committee will ask MOFCOM or other relevant authorities to forbid or to cancel the operation, or request the foreign firms to take remedial action, including transfer of the foreign held interests or assets, or take others actions to eliminate any threat to national security.

At the time of the writing this special mechanism has not been tested yet thus leaving great uncertainties for international firms willing to assume a controlling power over Chinese companies in sensitive sectors. However we believe that also these crucial points will be addressed in line with the international practice. MOFCOM's spokesman stated in fact that "the purpose of the security review is to promote the structures of foreign investment in China, providing with a further clear layer of regulation and review of foreign investments in China. This Circular should give more guidance for international firms".

Although many point remains dubious international companies looking for acquisitions of firms involved in a sensitive sector need thus to be aware that the they will need to file with the MOFCOM even if they do not meet the

threshold for a merger control review. They should also take into consideration that this process may impact the timing and overall feasibility of the deals.

15 – SOEs. When the State is the Competitor

As mentioned in Chapter I in the decades preceding the reforms, the Chinese industry was dominated by *State Owned Enterprises* (SOEs). They were the key instruments of the traditional system of economic planning, through which the Communist Party set economic objectives and guidelines. SOEs received subsidies repayable and poured all the profits to the State; even to no-profitable enterprises the government guaranteed business continuity, covering any losses. Practically the principle of state ownership prevented the existence of any other private or mixed company.

SOEs' employees enjoyed a broad set of social insurance benefits for life: a permanent employment, housing, health care, education for their children, retirement. Industrial production was concentrated, following the Soviet model, in the heavy industry.[270] In 1978 Chinese SOEs generated 77% of total industrial production and corporate profits accounted for 14% of GDP. Due to the prosperity of the sector and the importance of these organizations in maintaining control of the government in the economy, industrial reform was delayed and the Communist Party decided to focus primarily on improving conditions sub-urban and rural areas.

In the early 80s, SOEs were affected by the new deal of Deng Xiaoping and they began operating in a more competitive market. At the beginning of the eighties, a

[270] See for details CHAO Xi, "Transforming Chinese enterprises: ideology, efficiency and instrumentalism in the process of reform", in John Gilespie, Pip Nicholson (ed.), Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform, Canberra , ANU E Press and Asian Pacific Press, 2005, pp.98-99, 103.

large number of new economic actors came on the market, such as small private companies and companies with foreign participation. However the private sector in these years was much discriminated and mostly confined to individual firms operating the agricultural sector and employed less than eight workers. It was only in 1988 that ws recognized for the first time the possibility of establishing private limited liability company.

As discussed in the first Chapter companies with foreign investment where introduced from the late 80s and began operating throughout the *joint venture* (JV) with foreign participation, and the *Wholly Foreign Owned Enterprises* (WFOE). There were also established some *Special Economic Zones* to help foreign investors enter Chinese market. Among economic actors who worked with the SOE in the first phase of reforms there were the *Township and Village Enterprises* (TVE). The TVE, a kind of collective enterprises in rural areas, because of their public nature, were favored with respect of the private initiatives and were supported by local governments that gave them wide availability of funds.

Thanks to a more flexible context, the absence of limits imposed by the planning, the ability to serve a greater number of customers, the possibility to adapt to different local situation, SOEs soon became the most vibrant element of the Chinese economy of the eighties. Their production increased by 25% per year since the mid-eighties to mid-nineties and within the same period of time, their annual contribution to GDP grew from 13% to 30%. [271]

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[271] See for details Charles Harvie, China's Township and Village Enterprises and Their Evolving Business Alliances and Organisational

SOEs also benefited from the *dual track system.* Introduced in 1984 the dual track system was characterized by the flanking of the free market although state played a strong control. The system ensured the maintenance of state control over key areas but introduced the free market for non-strategic areas and productions. For example SOEs, after reaching the quotas set by the state plan, were free to enter the rest of the production in the market deciding price and market shares.

This situation helped to shape a more efficient economy and the creation of *marketability* of goods for SOEs. The planner imposed mandatory targets for each company but additionally to these targets, the SOE were free to negotiate their own prices, choose suppliers and customers for goods casted to the market. Even if the SOEs experimented greater autonomy the presence of State determined a slow growth process. Communist Party thus began to pay more attention to efficiency and provided, through gradual experimentation, little by little greater managerial autonomy to SOEs although many members of the bureaucracy and workers opposed resistance. The formers, who had managed the industrial state until then, were frightened by the loss of their privileges; the latters feared the end of the system of lifetime employment and of all social benefits related to their position: health care, education for their children.[272]

The experiments conducted created a more competitive environment for SOEs and thus, after a controversial

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Change, in "University of Wollongong", 1999, http://www.uow.edu.au/content/groups/public/ @ web / @ commerce / @ econ/documents/doc/uow012253.pdf

[272] See also LIU Junhai "有国企业公司制改革的法律分析与思想", in Qian Weiqing (ed.),有国企业改革,法律报告(Report of the Legal Reform SOE-s) CITIC Publishing House, 2004, p. 98-103.

political debate, on April 1988 government approved the first law. SOEs faced significant changes. Firstly the separate property was introduced: SOEs' property remained under the State but the companies were run by managers with broader decision-making powers. SOEs also became responsible for profits and losses and therefore vulnerable to competition arising from the private sector. Consequently in 1986 the first bankruptcy law for SOEs was introduced as well: this meant that the end of the lifetime employment for employers and many privileges.

From 1992 onwards, the government's focus shifted to the transformation of the company vehicles. The *Company Law* of December 1993, subsequently amended in 1999, 2004 and 2005, was a cornerstone of a new era. The intention was to build a legal background in which companies with several proprietary forms could operate and compete. In this context, SOEs were transformed into *corporations:* Limited Liability Company or Joint Stock Company. Through this transaction, the government opened these enterprises to different owners than the government and its local branches. Thus, at the end of the nineties an impressive phenomenon of privatization began: the shares of the SOEs were purchased by workers or managers, with many problems of speculation and *information asymmetries*.

The reforms also changed the mechanism of SOEs of funding stiffening the *Budget Constraint.* SOEs had to turn to the banks to get the money for long-term investment. But often the loans were requested and granted without an accurate reflection on the actual possibility of return, with the result that many SOEs

faced massive debt with the banks, increasing the amount of *non-performing loans (NPL)*[273] and the risk of macroeconomic instability.[274]

SOEs faced a process of de-politicization of the corporate activity with improvement on *corporate governance rules* and China experienced an improvement in the efficiency of the market. In 1997 the Party launched the policy of *wading fangxiao* 抓大放小 (we hold large companies but we support small businesses) that encouraged the reform and development of small businesses, while larger enterprises had to be kept under state control though renovated and more competitive. SOEs saw another era of reorganization with ownership diversification that lead to the formation of large corporate groups but also with a diminished role in China.[275]

The result of the reorganization of SOEs was a strong reduction of the state sector, dozens of small SOEs failed or suffered staff cuts. The total number of SOEs declined from 120,000 in the mid-nineties to 32,000 in 2004. In addition, the production of SOEs went from being 77% of the total industrial production in 1978 to 49.6% in 1998, their contribution to GDP fell.[276] With the *Company Law*

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[273] Non-performing loans are loans that cannot be returned to the bank by the person who contracted them.

[274] See also Barry Naughton, The Chinese Economy: Transitions and Growth, Cambridge, Massachusetts Institute of Technology Press, 2007, pp. 297-326.

[275] For detail see also Jean-Fraçois HUCHET, "La face cahée du secteur des Réformés d'Etat en Chine", Perspectives Chinoises, 61, 61, 2000, p. 41-52.

[276] See also LI Weye, Louis Putterman, Reforming China's SOEs: An Overview, in "Palgrave Macmillan: Comparative Economic Studies",

TVE also underwent a process of restructuring and privatization similar to that of SOEs. Not being able to rely more on the support of local governments to obtain financing, gradually lost the dynamism typical of the first reform period (1978-89). The Asian crisis of 1997 did not directly hit China, but the difficulties experienced by neighboring countries encouraged the country to improve its industrial structure and strengthening the tax system, the social security system and the banking system. In 2003 was created the *State Asset Supervision and Administration Commission* (SASAC), which managed the state's participation in the new *corporations.*

The AML maintains a disparity with privately held firms

As seen the SOEs reforms affected the structure of the state industry and modified the orientation of the production. Heavy ineffective industry during the period of the planned economy were abandoned, restructured and saw many competitors in their strategic field. If in the early 80s SOEs preferred to diversify the industrial production in consumer goods, textiles, food, etc.. which required an intensive processing but a low level of technology, capable of generating opportunities and applications without the need for large investments, the

2008, http://www.palgrave-journals.com/ces/journal/v50/n3/pdf/ces200831a.pdf

raise of competition has led the country to enter new sector *capital intensive* such as the high-tech products, electronics and telecommunications.

Given the damage that may arise from SOEs, even before the AML, the Chinese state has tried to mitigate the abuse with a variety of laws, regulations, and official statements. Back in October 1980, the *Provisional Regulations On Development And Protection Of Socialist Market* has been targeting the monopolies, especially SOEs. In November 1990, the State Council enacted the *Communication Concerning the Blockade of Local Markets* that further encouraged the movement of goods and demonstrated the intention of the central government to limit SOEs powers. Eventually in April 2001, the State Council issued the *Regulation Prohibiting the Regional Blocs in the Market Economy*, the most complete document banning regional barriers to competition in China before the AML.

Additionally we stress that SOEs have a definite favorable treatment than private firms. Their profits, in constant growth were the result of local incentives rather the efficiency. The faced an interest bank rate of 30 % lower of that paid by private companies, thus distorting the allocation of credit as well as the efficient allocation of capital to the private sector and to the production system as a whole. SOEs had privileges also in lower land's rent rate as well as the prices of utilities. Their tax burden between 2007 and 2009 and was 10%, compared with 24% of non-public companies. But the disparity did not end with these direct subsidies. Privileges came also from the alternation of functions between state managers and public administrators: more than 30% of the rulers with the level of minister were in charge of state-owned enterprises. No doubts

SOEs have been favored by government and Chinese political environment.[277]

In this newer context, although the Communist Party lost many powers over the SOEs it still played an important role in monitoring them. And this is true also after the approval of the AML which granted the government still much power over SOEs.

The Article 7 of the AML says in fact that *"industries controlled by the State-owned economy and relied upon by the national economy and national security or industries implementing exclusive operation and sales in accordance with the law shall be protected by the State to conduct lawful operation by the undertakings. The State shall supervise and control the price of commodities and services provided by these undertakings and the operation of these undertakings so as to protect the interests of the consumer and facilitate technological progress*".[278] It states also that "*the undertakings mentioned in the paragraph above shall operate, in good faith, in accordance with the law and in a self-disciplined manner, accepting public supervision and shall not harm the interests of the consumer from a controlling or exclusive dealing position".*[279]

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[277] ROE, Return on Equity, and state-owned enterprises' was 7.7% per annum between 2001 and 2008. But the survey of Unirule Institute of Economics of 2010 estimated that without the grant of privileges, the ROE would have been negative, even by -6.2%.

[278] *See* Mark Williams, Competition Policy And Law In China, Hong Kong, And Taiwan 2008.

[279] *See* Id.

The exemption contained in the article 7 of the AML for SOEs operating in strategic sectors is quite broad and vague. While China has privatized much of its business (as mentioned in the previous paragraph), state monopolies remains in the key sectors, including telecommunications, banking, electricity, petroleum, railroads, aviation and insurance. These SOEs are not subject to market discipline completely and they are lavishly funded by the state banks. Article 7 seems to recognize the strategic role of SOEs in this sector and thus provide an exemption well shielded by the AML. [280]

Is quite clear that two types of industries would come under the ambit of Article 7: (1) "*industries controlled by the State-owned economy and concerning the lifeline of national economy and national security*"; and (2) "*industries implementing exclusive operation and sales*" in accordance with the law. Thus if an undertaking falls under Article 7, its lawful business operations are protected by the state. In addition, the state will lawfully "regulate and controls [the undertaking's] business operations and the prices of their commodities and services" in order to protect "the interests of consumers and promote technical progresses." Additionally in the wording of Article 7, these companies must carry out their activities in compliance with the law, in good faith and in a way of self-discipline, accept social control, and do not damage "the interests of consumers under of their dominant position or exclusive".

Also a neophyte may observe the disposal of Article 7 is quite problematic and vague. If we take into consideration the requirements the company must meet in order to

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[280] *See* Randall Peeren boom, China's Long March Toward Rule Of Law 210–11 (2002)

come under the protection of Article 7 they are not so clear as it seems. It is for the Anti-Monopoly Authority to determine when the operation of an SOE involves "the lifeline of the national economy and national security." The State Council announced in 2006 a list of seven strategic industries that are strategic for the state and presumably, this list comprises the industries referred to in Article 7.[281] But the State Council fell short of specifying whether the list is exclusive, probably it's not. Furthermore, the company does not have to be of national economic interest or national security.

It is interesting to notice that terms like "legitimate", "in accordance with the law," and other variations appear multiple times throughout the article 7. These terms have been introduced to reduce the risk to protect any kind of interests not expressly foreseen by the law even if they could defend the socialist market economy.

To this regard the Chinese AML seems to have followed the recommendation of US Bar Association as well as the international law and practice provided from 2006 to AML drafters. The term in *accordance with law* means that these social objectives stressed in article 7 should be defined and carried out somewhere else outside of the competition law. In

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[281] The industries were: 1) Energy saving and environmental protection (clean energy technology); 2) Next generation IT (modernization of the country's telecommunications infrastructure); 3) Bio-technology (pharma and vaccine manufacturers); 4) High end equipment (airplanes, satellites, manufacturing technology); 5) New energy (nuclear, wind, solar); 6) New materials (rare earths); 7) New energy cars (electric and hybrid cars, batteries).

other words the AML does protect only lawful interest – *rectius:* interest expressly provided by law - that fall under an exigency of national economy, the socialist market economy, or the public interest. There must be another legislation that enable those interests to be protected only if is considered necessary to do so.

This would mean the addressees referred to in Article 7 of the AML are not exempt, simply due to its location to fulfill some socially desirable objectives, but Article 7 will only be available if activity is also lawful as specified somewhere else in another body of law or separate legislation or rules.

In other words, "legitimate business operations" means the operations of business expressly required by law. To illustrate, it would not be sufficient for SOEs to be eligible for exemption under Article 7, simply because it is beneficial to the national economy, in a general sense. The state would protect anti-competitive behavior of the SOEs only if such conduct is legitimated (or lawful) by the Law and thus the State has expressly authorized the SOEs to act in those ways through separate legislation or regulations.

Similarly, an undertaking with exclusive rights granted by a provincial entity would not be able to enjoy the exemption Article 7, since presumably the grant of exclusive rights by the provincial government would not be permitted under Chapter V of the AML unless the State has specifically given the provincial government that authority. [282]

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[282] See also Alan O. Sykes, Constructive Unilateral Threats in International Commercial Relations, 23 LAW & POL'Y IN INT'L BUS. 263, 276 (1992). See also John H. Jackson, Remarks, The Limits of International Trade, 94 AM. SOC'Y INT'L L. PROC. 222, 222-23 (2000)

The reasons to trust the AML

The largest Chinese SOEs, we refer to the three biggest oil corporation (Sinopec, China National Petroleum, and China National Offshore Oil), are regulated by the State-owned Assets Supervision and Administration Commission (SASAC), while the SOEs operating in the financial sector, such as the four largest national banks (Industrial and Commercial Bank of China, China Construction Bank, Agricultural Bank of China, and Bank of China), are supervised by the China Banking Regulatory Commission.

SOEs are currently dominant in many crucial sectors such as banking, oil and gas, telecom, insurance, transportation infrastructure, and utilities. The next table shows the statistics of Fortune Global 500 companies in China for 2012. If we take into consideration the 73 Chinese biggest undertakings only five firms are POE (privately owned enterprises) while 68 are SOEs. Mind also that the highest rank reached by a private company is 242 while the biggest SOEs is 5.

Table 1: Statistics of Fortune Global 500 Companies in China in 2012

	Number	Highest rank
SOEs	68	5
Under supervision by SASAC	43	5
Private	5	242
Total	73	

Sources: Fortune magazine's 2012 Global 500.
http://money.cnn.com/magazines/fortune/global500/

The next table shows the numbers of Top 500 Enterprises in China in 2012. As reported there are 310 SOEs and just 190 private companies in the ranking with SOEs dominating the landscape also with bigger size. For instance we can point out that all 30 corporations are SOEs and these corporation are also engaged in merger and acquisition (M&A) operations. 110 SOEs cleared 918 merger operations compared to the 193 operations cleared by POEs.

Table 2: Statistics of 2012 Enterprise Top 500 in China

	Number	Top Rank	Merger and Acquisition
SOEs	310	1	918
Private	190	32	193
Total	500		1111

Source: 2012 Enterprise Top 500 in China.
http://www.cec-ceda.org.cn/more_new.php?sid=6

The problem in China is that although SOEs are in a dominant market position and they are actively involved in M&A process, practically no SOEs have been challenged seriously by thee AML authorities (MOFOCM, NDRC and SAIC) since the introduction of AML in China. We note that MOFCOM has published a number of provisions with respect of M&A, but just only one restriction dealt with a SOE in the *GE/ Shenhua* case.[283] On the other hand we've

[283] See the official MOFCOM's announcement.

MOFCOM Announcement [2011] No. 74 regarding the Anti-Monopoly Review Decision for Conditional Clearance of the

Contemplated Joint Venture between GE (China) Co., Ltd. and China Shenhua Coal to Liquid and Chemical Co., Ltd.

The Ministry of Commerce of the People's Republic of China "MOFCOM") received an antimonopoly filing in connection with the contemplated joint venture between GE (China) Co., Ltd. ("GE China") and China Shenhua Coal to Liquid and Chemical Co., Ltd. ("CSCLC"). After review, MOFCOM decides to clear this concentration between undertakings subject to restrictive conditions. The decision is hereby announced as follows in accordance with Article 30 of the Anti-Monopoly Law of the People's Republic of China ("AML"):

1 Docket and Review Procedures

On April 13, 2011, MOFCOM received the antimonopoly filing for the contemplated joint venture between GE China and CSCLC. After review, MOFCOM decided that the filing documents and materials were incomplete, and requested additional information. On May 16, 2011, MOFCOM confirmed that the filing documents, as supplemented, complied with the requirement of Article 23 of the AML, accepted the filing into docket and commenced the preliminary review. After review, MOFCOM determined that this concentration is likely to have the effect of restricting or eliminating competition in the licensing market of coal-water slurry gasification technology. On June 15, 2011, MOFCOM decided to conduct further review of the concentration. On September 13, MOFCOM decided to extend the period of the further review.

In the process of review, MOFCOM solicited comments from relevant governmental authorities, trade associations and other competitors in the market, and verified the information that the filing party submitted against third-party information, and solicited opinions from industry experts regarding relevant issues.

2 Competition Analysis

On the basis of the factors specified in Article 27 of the AML, MOFCOM reviewed the concentration of undertakings, and analyzed in depth the effect of this concentration over market competition, and concluded that it is likely to have adverse effects that may restrict or eliminate competition. One party to the joint venture, GE China, is a

foreign invested company incorporated by GE in China. GE Infrastructure Technology Company is a subsidiary of GE, and in the context of this joint venture, it is responsible for licensing the coalwater slurry gasification technology to the contemplated joint venture. The other party to the joint venture, CSCLC, primarily engages in the development and operation of coal liquefaction, coal chemical projects and associated projects. The parent company of CSCLC, Shenhua Group Co., Ltd. ("Shenhua Group"), is a complex energy enterprise focuses on the production and supply of coal, electricity and heat, as well as railway and port transportation services. The contemplated joint venture will primarily provide technology licensing and engineering services of coal-water slurry gasification to industrial and electrical power projects. The coalwater slurry gasification technology is a coal gasification technology to transform coal from its solid form into coal-water slurry, which will be further processed to produce a mixture of gases, including carbon monoxide and hydrogen, etc..

Since coal-water slurry gasification technology is significantly different from other coal gasification technologies in terms of technological processes, requirements for raw coals, feeding method, etc., the licensing market of coal-water slurry gasification technology constitutes the relevant product market. Since the operational scope of the contemplated joint venture is limited to China, and the scope in which domestic demanders of coalwater slurry gasification technology choose technology suppliers is limited to inside China, the relevant geographic market for this concentration is the China market.

The market for licensing of coal slurry gasification technologies in China is highly concentrated, with only three major competitors, including GE Infrastructure Technology Company with its coalwater slurry gasification technology, Yankuang East China Science and Technology with its opposed multi-injector coal-water slurry gasification technology, and Northwest Chemical Research Institute with its multi-component slurry gasification technology, among which the coalwater slurry gasification technology of GE Infrastructure Technology Company has the highest market share.

Coal-water slurry gasification technology has specific requirements regarding the ash content, ash fusion point and water content of the raw coal, and a newly built coal-water slurry gasification project by a technology demander must have reliable supply of raw coal. The quality of coal in Shenfu area in China (including Erdos in Inner Mongolia Autonomous Region and Yulin

region in Shaanxi Province) is able to meet the requirements for coalwater slurry gasification technology. The coal production of Shenhua Group in Shenfu area accounts for the largest share in this area, and Shenhua applies strict quality managements and the quality of the coal produced is reliable and stable. The coal produced by Shenhua Group from the Shenfu area was used by many coal-water slurry gasification projects as raw coal. In 2010, Shenhua Group is the largest supplier of raw coal for coalwater slurry gasification technology. In addition, the coal produced by Shenhua Group from the Shenfu area was mainly transported by selfoperated railway and coal wharf operated, and the freight costs are relatively low. MOFCOM investigated the entry of the licensing market of coal-water slurry gasification technology. The investigation revealed that the coal-water slurry gasification technology is a complex of many sophisticated technologies, and the process and engineering technologies involved could only become mature after a long period of practice, and there are significant commercial risks for new technologies that have not been sufficiently tested.

To enter the licensing market for coal-water slurry gasification technology, it is necessary to seek a technology user who is willing to share part of the costs for the first set of demonstrative equipment, and thus it is very difficult for the new licensor of the technology to enter this market. The coal-water slurry gasification technology is technology intensive, and protected by a large number of patents. It is a long period for the R&D and industrialized application of the technology. MOFCOM concluded that there are significant difficulties for new entry into the licensing market for licensing of coal-water slurry gasification technology.

In summary, Shenhua Group is the largest supplier of the raw coal for coal-water slurry gasification technology, and GE Infrastructure Technology Company has the largest share in the market for coal slurry gasification technology. The joint venture between GE China and CSCLC to provide licensing of coal-water slurry gasification technology may restrict competition in the licensing market of coal-water slurry gasification technology, by taking Shenhua Group's advantage in raw coal and by controlling the supply of raw coal.

3 Negotiation of Restrictive Conditions

seen in Chapter 4 how many conditional approvals MOFCOM imposed to M&A involving foreign investors.

The *GE/Shenhua*'s decision was published by MOFCOM on 10 November 2011 and was a conditional merger operation regarding a proposed joint venture between General Electric (China) Ltd. (GE China) and China Shenhua Coal to Liquid and Chemical Co., Ltd. (CSCLC). The proposed operation was announced on January, 2011 and its scope was the establishment of a 50/50 Joint Venture to license coal-water slurry (CWS) gasification technology to industrial and power projects in China between GE and CSCLC. Shenhua Group Corporation Limited was a State-owned mining and energy

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MOFCOM raised anti-competitive concerns to the filing party about the concentration, and requested the filing party to provide explanations and propose solutions. After many rounds of discussion, a final solution was submitted by Shenhua Group and CSCLC on October 28, 2011. After evaluation, MOFCOM concluded that the final solution presented by Shenhua Group and CSCLC could resolve the anti-competitive concerns.

4 Review Decision

Considering the joint venture between GE China and CSCLC may restrict competition in the licensing market of coal-water slurry gasification technology in China, MOFCOM decided to clear this concentration subject to restrictive conditions, and requested Shenhua Group and CSCLC to perform the following obligations: GE China and CSCLC, which establish the joint venture to license coal-water slurry gasification technology, must not force technology customers into using joint venture's technology, or raise the costs of using other alternative technologies, by restricting the supply of raw coal for the coal-water slurry gasification technology, or by conditioning the license on the supply of raw coal. MOFCOM has the power to supervise and inspect the implementation of the above restrictive condition.

This announcement comes into effect as of the date of its release.

undertaking in China with businesses in the production and supply of coal, electricity and transportation services.

MOFCOM reviewed the transaction and found that the proposed operation was capable to exclude or restrict competition in the CWS gasification technology licensing market and thus, in order to reduce these competition concerns, MOFCOM asked CSCLC and Shenhua Group "not to compel licensees of CWS gasification technology to use JV's technology by restraining the supply of raw coal, or by conditioning such supply on licensing of JV's technology, nor to raise the cost of such supply for those using other technologies".

Remarkably we can point this was the first conditional merger control decision where a Chinese SOE has been involved. Thus is significant if we also note the already mentioned antitrust investigation against China Telecom and China Unicom NDRC. These should prove the intention of Chinese authorities to fight against anticompetitive conducts of SOEs.

This different kind of treatment for SOEs may be explained by more reasons. Firstly we've seen that Article 7 of the AML gives SOEs many certain legal shields. For instance, if the enterprise operates in an protected industry regarding the national security no investigation may be triggered by antitrust authorities. And we've seen in the previous paragraph that there is no clear definition of what are the strategic important industries for the State Council.

Secondly, SOEs are deeply connected with many levels of government agencies and the Party. This linking practically impede the independence of the antitrust organs and make it quite difficult for AML enforcement authorities to fight against anticompetitive practices of

SOEs. Those connections are strengthened by the circumstance that many executives of SOEs are also vice minister in the Chinese administrative system and they are ranked above the AML enforcement agencies, as for example the MOFCOM's antimonopoly bureau. A lower agency will find very difficult prosecute a SOEs where the top executive is expression of an higher ranked agency.

Although these assumptions are still quite hard to overcome there are some recent developments highlighting a different and a more independent approach towards SOEs. In November 2011, the formal investigations from NDRC against China Telecom and China Unicom for alleged price discriminations in the broadband market resulted in an announcement by the two companies that they would increase broadband speeds and reduce service charges, to settle the NRDC's requests. Surely these developments may be a good sign since it means that also SOEs may be prosecuted by AML authorities. We believe that there are more reasons behind this approach and some important considerations that may spur Chinese authorities to scrutinize the SOEs deeper.

First, the Chinese government believes that SOEs may effectively improve the overall efficiency of the Chinese economy. Since China is becoming a medium income country the future growth will be assured by reducing inefficiency rather than further increases or development. Raising the pressure over SOEs is crucial to improve these efficiencies and this is why in the future government will surely put more powers to AML antitrust agencies to promote competition in the SOEs' industries.

Second, public opinion is becoming important. It is playing an increasing role in each government decision-making. For instance, the investigation of NDRC of China Telecom began by public dissatisfaction with SOEs

monopoly in the telecom sector, which produced poor services and higher prices.

Third, the increasing competition between SOEs is bringing more powers to antitrust authorities. In fact, even if SOEs are state owned, the management of these enterprises is facing greater flexibility thus the competition level between them is expected to raise. AML enforcement authorities will deal with a growing demand in the next years from the same SOEs to defend themselves from each other.

Fourth, AML authorities will also need to meet the raising demand of competition effectiveness from private and foreign owned firms in China. These firms are the fastest growing sectors in China and thus they'll be requiring more protection from AML authorities against the abuse of powers of SOEs as well as administrative monopolies.

Fifth, SOEs are getting multinational companies with ramification in many other countries. This means that SOEs will face also strictly scrutinize by foreign competition authorities Chinese SOEs are entering the international expansion to continue growing and to reach more effective level of competition. SOEs are seeking the expansion in EU but also in many underdevelopment countries, especially in Africa, a continent rich of minerals and thus strategic for China but still very poor. In these years SOEs proposed mergers have been reviewed carefully by the EU Commission (for example see the purchase of the Norwegian Elkem AS by China National Bluestar Group[284] or the joint venture arrangement

[284] Elkem/*China National Bluestar Group* Co., Ltd. As of 31 mar 2011

between Sinochem Group and Koninklijke DSM[285] in 2011. We believe these experiences maturated by SOEs abroad will produce some positive effects also in the domestic market.

[285] *Koninklijke* DSM NV / *Sinochem Group,* As of 30 Apr 2011

16 - Administrative Powers: the Additional Concern

Another problem related with the application of the AML for foreign firms is the extent to which it governs administrative monopolies. Traditionally administrative monopolies abuses are the actions of government and its subordinated agencies in order to promote, manipulate, or impede economic activities to advantage or disadvantage some operators. Administrative Monopolies are quite strong in China since the State used the government agencies and SOEs to control and run the country; although administrative monopoly are a different thing with respect to SOEs, there is a strong link with them because many SOEs may benefit from administrative monopoly given their fiscal contribution.[286]

Traditionally there are two types administrative monopoly: those which protect a local zone (geographic protection) and those which protect an entire industry. The first is easy to understand and is aimed to provide a protection in a designated area, the second relates to the protection of a few, often public sector industries (for example energy, transport and telecommunications).

Administrative monopolies may impose constraints to competition in several ways. For example they can impose:

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[286] See also Adrian Emc, *"An overview on the administrative monopolies in China",* Freshfiled publications, 2008, I at 56.

1) Regional block. This happens when a local government refuses to grant licenses to companies which commerce commodities originate from other regions;

2) Limitation of access to the market. In this case the local governments discriminate local firms by limiting or refusing to investment or the establishment of branches by companies in other regions;

3) Designated offers. Here the local government and its subordinate agencies may impose on companies to purchase, use of or dealing with the products provided by some designated undertakings;

4) Constrained restriction of competition. In this case administrative authorities may require undertakings to carry out a monopolistic behavior that is not permitted under antitrust laws;

5) Prohibited leads. Here the government and its subordinate agencies may lay down rules that drop or limit competition for a specific undertaking.

In other words administrative monopoly abuse means the ability of administrative powers and agencies to limit, hinder and delete the competition between market participants. The agencies engaged in administrative monopolies may comprise agencies under the central government as well as local governments' agencies at various levels.

Before the approval of the AML, central and local governments had in fact great interference over the economy: the ministers responsible for supervising certain specific areas like energy and telecommunications were deeply engaged in shielding this sector from undesired firms and foreigners. In the "*The opinions on encouraging and guiding development of non-public economy"* issued by the State Council in 2005, Government tried to reduce this tight link between economy and State stating that "the non-public economy should enjoy equal

treatment with the state-owned enterprises". However government adopted a smoothed approach to this transition and the "umbilical cord" among government agencies and their affiliates were not cut. Thus, until the approval of the AML, government was still seeking to assure a level that promoted conspirators' interests or those of their affiliates by recurring to regulation policies that restricted the entry of competitors by imposing fees, introducing different licensing procedures, and so on.

The supply of gasoline gives a high-profile example of the abuse of administrative monopolies in China. In 1999, various departments of the State Council published a document that prohibited any company with the exception of Sinochem and PetroChina from the sale of oil products. In 2001, they posted another paper that prohibited the selling of petrol produced from any other company than Sinochem and PetroChina. Such practices were achieved also in many other areas including energy, infrastructure, services, and transportation. This kind of abuse of administrative authority contributed greatly to the serious problems of bribery in China. This because local governments are financially dependent on compensation from local enterprises such as infrastructure, energy, and transport services; the prohibition of administrative monopoly has traditionally conflicted with the interests of local government.[287]

Examples of abuse of administrative powers comprise also the administrative permissions that *de facto* purse

[287] See for details ZHENG Peng-cheng. (2011). *Research on the Legal Control of Administrative Monopoly*. Peking University Press, p.50.

discriminatory effects to favor specific subsidiary. Administrative Monopolies thus disable the rational use and allocation of economic resources, causing wastage and duplication. Thus, the potential harm to consumers was thus strong argument for banning definitively these behaviors and for securing them in the context of the AML.

In response, the perpetrators of AML devoted a whole chapter to tackle anti-competitive practices by administrative monopolies. The AML sets a comprehensive ban (Article 8 of the AML) against the abuse of administrative power that eliminates or restricts competition. Then it proceeds to address the specific categories of abuse by instructions issued under Chapter V of AML. With this respect the approval of the AML seems to have helped. The article 51 of the AML states that "*where any administrative organ or an organization empowered by a law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order it to make correction and impose punishments on the directly liable person(s)-in-charge and other directly liable persons*".[288] Additionally the Articles 32 states that "*any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power, restrict or restrict in a disguised form entities and individuals to operate, purchase or use the commodities provided by business operators designated by it*".

Thus, with the approval of the AML, administrative monopolies abusing their administrative strength to delete or limit competition in some market sectors should be banned and thus, the use of AML to crack the

[288] See Article 51 of the AML

administrative monopolies would restrict the regulatory powers of the government.

As a result in these first years of enforcement there have been may resistances from officials and government departments to implement such disposition of the AML. The issue is much more complicated by the fact that according to Chinese law administration, only a government department that is at a higher level in the bureaucratic system has the administrative authority to control the behavior of those at the lower levels. And since the administrative monopolies are created by government departments, antimonopoly agency would need the power to cancel them when it comes to administrative monopolies.

Thus in the context of AML, the antitrust bodies may find many resistances as under Article 51 of the AML, when it comes to public entities at a higher level, agencies monopolies can only suggest remedies. Consequently, the AML's ability to effectively deal with administrative monopolies depends on how the State Council establishes its responsibilities in relation to other enforcement authorities, and in particular, its relative position, which will decide its influence on other government departments.[289]

This is in contrast with the tendency in other jurisdictions, where the competition authorities are

[289] *See for details* ZHENG Peng-cheng. (2011). *Research on the Legal Control of Administrative Monopoly*. Peking University Press, p.50.

becoming empowered to reverse the state's actions that breach the rules of competition. In the European Union, for example, the EU Commission may ban anti-competitive practices by any kind of administrative bodies as well as the government body. We note for example that EU may also prevent anticompetitive state aid by the Member States that violate the rules on competition laid down in Articles 86 and 87 of the EC Treaty.[290]

A part the above considerations and critics the AML resemble quite well the western jurisdiction. For example, an administrative body would now violate Article 32 if it obliged its subsidiary divisions to contract and to acquire goods only from a specific designated business or businesses that clearly are affiliated to the main agency. But the usability of Article 32 (but generally the whole Chapter V of the AML) goes also beyond the administrative bodies. China's reforms involving government bodies have resulted in an impressive raise of Associations (trade association, industry association and so on…). Each association is somewhat affiliated to the local government and thus the possibility of advantaging the members of association throughout corruption may be very strong and incentivized. In this case Article 32 will also limit the *self-disciplinary* provisions rule that may require members of the association to purchase only from a designated manufacturer affiliated with the administrative agency. The regulation set by an industrial association is banned also under

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[290] Also if we take into consideration other socialist countries China seems to play a different game. For Example in Russia, the acts, actions, or agreements of federal or state anti-competitive are prohibited under anti-monopoly legislation and administrative monopoly are covered by the antitrust agency's authority in Russia. In Hungary, the Competition Bureau also has jurisdiction over competition by restricting the activities of the government. This examples show that economic transition from a centrally planned to a market-oriented economy is no justification to allow administrative monopoly in order to escape jurisdiction of AML.

Article 36 which specifically takes into consideration anticompetitive conducts by—in addition to administrative bodies—trade associations that were formerly government offices. In particular industrial associations are quite familiar with the imposing of rules and conducts – often anticompetitive – to their associates.

According to the wording of Article 36 industrial associations' provisions that compel undertakings "to engage in the monopolistic conducts as prescribed in this Law" are forbidden. Just for example an association would thus violate Article 36 if its bylaws provide "discriminatory eligibility requirements for membership and such requirements would have the effect of maintaining the concentration of business operators that eliminates or restricts competition or might be eliminating or restricting competition."[291]

Other important provisions in Chapter V are those contained in Articles 33 through 35. Article 33 states that administrative agencies and authorized organizations may not abuse their administrative powers by employing certain practices to restrain the free circulation of commodities between regions.

Article 33 is very specific saying that "Any administrative organ or organization empowered by a law or an administrative regulation to administer public affairs may not have any of the following conducts by abusing its administrative power to block free circulation of commodities between regions:

(1) imposing discriminative charge items, discriminative charge standards or discriminative prices upon commodities from outside the locality,

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[291] See id

(2) imposing such technical requirements and inspection standards upon commodities from outside the locality as different from those upon local commodities of the same classification, or taking such discriminative technical measures as repeated inspections or repeated certifications to commodities from outside the locality, so as to restrict them to enter local market,

(3) exerting administrative licensing specially on commodities from outside the locality so as to restrict them to enter local market,

(4) setting barriers or taking other measures so as to hamper commodities from outside the locality from entering the local market or local commodities from moving outside the local region, or

(5) other conducts for the purpose of hampering commodities from free circulation between regions".

Additionally the Article 34 and Article 35 prohibit administrative agencies and other organizations from abusing their administrative powers in respect of the localities or industries.

Article 34 of the AML says that "Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality to participate in local tendering and bidding activities by such means as imposing discriminative qualification requirements or assessment standards or releasing information in an unlawful manner". While Article 35 states that: "any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality to invest or set up branches in the locality by imposing unequal treatment thereupon compared upon local operators".

Thus although the provisions of Chapter V are an important step we note that – to provide a violation of the AML - the finding of such conducts alone may not be sufficient to give rise to liability under the AML. This is because any provision of Chapter V also requests that there is an "abuse of administrative powers," in addition to the each banished conduct. For example a trade association may escape liability if the association is calling on its members to deal exclusively with a designated undertaking, unless this practice is also considered an abuse of administrative power of the association. The problem is that the standard "abuse" is unclear and this raises several questions about the effectiveness of such dispositions.

In western jurisdictions the powers of antitrust authorities are much stronger. The US have many supplementary provisions against state unlawful restrictions while the European Union has adopted many decisions against such limitations. Restrictions by a Member State which discriminate or disabled citizens from other Member States are strictly prohibited since "they are considered the worst sort of economic restriction".[292] In addition under the EU law state enterprises and those companies holding special privileges from the state are expressly bound by competition law, subject to the exception that they can do what is needed to allow them to carry out public tasks assigned to them.

However we believe that also with regards to administrative monopolies the AML should be reviewed with more respect. The Chinese process towards a modern competition law takes time and undoubtedly the

[292] See id

adoption of the AML is only a first step. In fact, as seen with the SOEs in the previous paragraph, Chinese authorities will be pushed to eliminate these *safe-harbors* of competition from the necessity to spur the growth in the next decades and thus to eliminate the remaining inefficiencies.

Remarkable at this point is the first case in China against an administrative monopoly. On June 27, 2011, a local AIC office published the first decision against an abuse of administrative power to eliminate or restrict competition. The decision came from the Guangdong province. On Nov 12, 2010 Guangzhou city issued an order requiring the use of GPS services of a specific and affiliate private company for monitoring the transportation of all hazardous goods in the city. Competitors of the favored company protested and submitted a claim at the Guangdong Provincial Administration for Industry and Commerce. The Guangdong AIC investigated the city's decision and actually concluded that the specific administrative decision was "an abuse of administrative power under the Anti-Monopoly Law of the People's Republic of China". The antitrust body made thus a recommendation to Guangdong's provincial government as well as to the Guangzhou city's government to fix the abuse. On Sept 12, 2011 Guangdong's provincial government voided the Guangzhou city's government decision ruling that "the order violated Articles 8 and 32 of the AML" and was a "clear abuse of administrative power to eliminate or restrict competition".

17 – Converging Towards International Standards

The AML, as mentioned above, follows the international rules on monopoly agreements: Cartels, called "monopoly agreements" under the new Law, are defined as "*agreements, decisions, or other concerted actions which eliminate or restrict competition*." We stress that according to Article 13 of the AML, examples of such prohibited agreements between competing business operators include: "(1) fixing or changing prices of commodities; (2) limiting the output or sales of commodities; (3) dividing the sales market or the raw material procurement market; (4) restricting the purchase of new technology or new facilities or the development of new technology or new products; or (5) making boycotting transactions." Furthermore, Article 14 also bans monopoly agreements between business operators and trading counterparts that involve: "(1) fixing the price of commodities for resale to a third party; or (2) restricting the minimum price of commodities for resale to a third party."[293]

Both of these provisions stand for future flexibility in implementation of the AML by giving a broad general rule that let the enforcing agencies detect any additional types of behavior to represent an antitrust agreement in violation of the Law. Notably this is a common

[293] *See* Xin Huang and Yun Zhou, *Research on Administrative Monopoly and*
Antimonopoly Legislation 2009

international practice. Article 15 of the AML provides also an exemption scheme to the prohibited behavior described in Articles 13 and 14 of the law. Accordingly the prohibitions of Articles 13 and 14 will not involve concerted actions between undertakings so long as the firms can demonstrate that the agreements were made for: "(1) . . . improving technologies, researching and developing new products; (2) . . . upgrading product quality, reducing cost, improving efficiency, unifying product specifications or standards, or carrying out professional labor division; (3) . . . enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators; (4) . . . achieving public interests such as conserving energy, protecting the environment, and relieving the victims of a disaster and so on; (5) . . . mitigating serious decreases in sales volume or obviously excessive production during economic recessions; (6) . . . safeguarding the justifiable interests in the foreign trade or foreign economic cooperation; or (7) other circumstances as stipulated by laws and the State Council".[294] Where these conditions occur, firms also have the burden of proving "that the agreement can enable consumers to share the interests derived from the agreement, and will not severely restrict the competition in the relevant market." [295]

Thus if we take a look to the common international standards and the goals of the law's shapers, the AML's

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[294] See article 13 of the AML. For details over the exemptions cases see also Su Sun and Hu Fu Liu " The Dragon Raise: a new perspective on competition law?" Harvard Business Law Journal 2008.

[295] See id. **在此條件下發生的，公司也有負擔的證明"，該協議能**夠使消費者分享來自協議的利益，並且不會嚴重限制相關市場的競爭**在此條件下發生的，公司也有負擔的證明"，該協議能**夠使消費者分享來自協議的利益，並且不會嚴重限制相關市場的競爭

definition of what may be considered a monopolistic agreement is quite successful. If we compare it to US and EU standards, the AML's coding of cartels reflect the legal definitions of monopolistic agreement in these countries.

We can note the AML's anti-cartel enforcement coding is very close to the law's construction expressed and contained in the Article 101 of the EU's Treaty and also in Section 2 of the United Kingdom's Competition Act. Admittedly the EU and UKCA make lists of some banned types of cartel behavior. The EU treaty also includes a list of specific exemptions to the general prohibitions against cartelist conduct that is similar to Article 15 of the AML. The wording and measures contained in the AML's anti-cartel provisions are also similar to the broadly written anti-cartel provisions of Western antitrust rules. For example as the AML, both the EU and the UK competition provisions present their specific anti-trust rules with an initial general ban of antitrust conduct that can be adequately adapted by government bodies to suite different anticompetitive situations.

The United States discipline stays on a different approach: instead of determining any specific types of monopoly agreement activity, it provides a broader prohibition of monopolistic conduct. In fact in the U.S. law, "*every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with any foreign nations*" is deemed unlawful and considered a cartelist conduct within Sherman Act.

Making such huge extension in anti-cartel enforcement statutes is quite good as it allows a significant flexibility in the agencies' capability for defining and thus banning

cartels behavior that may not easily suit into a specific prohibited behavior. The Chinese Law gives some helpful guidance to undertakings by classifying the specific examples of what is considered banned and then the AML provides an extensive definition that will allow authorities to set the extent of the exemptions.[296] In fact Commentators[297] have shown that it's preferable not to lock enforcement agencies into a narrow legal scheme while antitrust laws should instead allow the law to meet each special needs of the Chinese socialist economic market. However this situation also poses greater risk of uncertainty for firms.

Surely the aligning of the definitions and standards with the common procedures employed by the international community has lessened the friction with the US and EU.[298]

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[296] See for details also Wang and J.L. Mao, Against Cartels in China, 2009, Shanghai Law Papers " 什麼是禁止的行為，在國家結構的新的反壟斷制度，選擇包括一個廣泛的規定，允許政府更大的酌情權，在法律的應用也有好處決定未來發展的規律什麼是禁止的行為，在國家結構的新的反壟斷制度，選擇包括一個廣泛的規定，允許政府更大的酌情權，在法律的應用也有好處決定未來發展的規律什麼是禁止的行為，在國家結構的新的反壟斷制度，選擇包括一個廣泛的規定，允許政府更大的酌情權，在法律的應用也有好處決定未來發展的規律什麼是禁止的行為，在國家結構的新的反壟斷制度，選擇包括一個廣泛的規定，允許政府更大的酌情權，在法律的應用也有好處決定未來發展的規律

[297] *See* Xiaoye Wang and Liu Ming Jabao, *Research on the AML. Chendu News Channel;* GH 679 - 23 Sep 2011 -

[298] *Compare* Treaty Establishing the European Community, arts. 81, 82, Dec. 24, 2002, 2002 O.J. (C 325) 64 *with* Anti-Monopoly Law of the People's Republic of China. China had actively sought advice from and cooperation with the EC regarding its competition policy. *See* Commission of the European Communities, *A Policy Paper on EU-China Trade and Investment: Competition and Partnership* (2006); Blanca Rodriguez Galindo, Head of the Int'l Relations Unit,

Legal Liabilities

Chapter Seven of the AML provides legal liabilities for prohibited behavior under China's antitrust regime. According to the Article 46 of the AML where undertakings sign a monopoly agreement and implement it in violation of the AML, the antitrust bodies may: a) order them to stop the illegal conduct; b) confiscate the illegal profits; c) impose a fine of 1% up to 10% of the sales revenue occurred in the previous year (if the monopoly arrangement has yet to be enforced, a fine can reach a maximum of 500,000 Yuan). The question we try to address in the section is whether the penalty and leniency system is enough – compared also with other major antitrust and competition authorities – to discourage anticompetitive cartels.

In the European Union, the sanctions for undertakings found intentionally or negligently to violate the article 101 of the EU treaty may reach the 10% of companies' global sales of the previous business year. Additionally they can be raised or mitigating under some specific circumstances by the discretion of the European Commission.

The United Kingdom implements a system of liabilities very similar to the EU but also adds some criminal responsibilities for executive directors and apical officer of the involved

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Directorate-General for Competition, European Commission, Presentation at Int'l Seminar Review of Anti Monopoly Law (May 19-21, 2006).

corporations. The individual punishment in fact does not exist under EU law. In UK criminal sanctions may be applied for individuals found to have infringed the "criminal cartel offense" as provided by the Enterprise Act of 2002 and for directors who have hindered the investigations of the Federal Trade commission within the United Kingdom Competition Act. Additionally guilty officers and directors may face liability under the Company Directors Disqualification Act (CDDA); Federal Commission or other relevant sectorial regulators may ask the Courts for disqualification of corporate directors in several situations.

United States takes seriously the penalties against antimonopoly agreements enforcing the most punishing regime around the world to fight cartelist. Cartelist may face fines up to $100 million and individuals found guilty may be fined up to 1 million.[299] Additionally conspirators in the United States also may be imprisoned for much longer time than under the UK Law: officers found guilty for entering into cartel agreements may be sentenced to prison up to ten years.

According to the US department of justice: "Between 2000 and 2009, more than 330 individuals were sentenced and of those, more than 200 were sentenced to serve prison terms in cases prosecuted by the Department of Justice's Antitrust Division. In the 2010 fiscal year alone, 26,046 days of imprisonment were imposed on individuals for their cartelist behavior." [300]

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[299] We remind for example that in 2004, George W. Bush approved the Antitrust Criminal Penalty Enhancement and Reform Act which "increase[ed] the maximum criminal fine for companies violating the Sherman Act from US$10 million to US$100 million, making antitrust fines one of the most severe under US criminal laws." This Act also "increased the maximum individual fine from US$350,000 to US$1 million".

[300] Official statements of the DOJ of 19 April 2011

We should remind also that criminal penalties are not the only deterrent for conspirators under the U.S. antitrust Law. Several monopoly agreements cases are prosecuted in the criminal courts, however the Department of Justice's has also the ability to bring civil actions against guilty firms as well.[301] Not only. Also private parties have the right to bring damage claims against cartelists.[302] Thus cartelists in the U.S. face potential higher damages in a single anticompetitive conduct. We note that even if other antitrust jurisdiction allows private damages, the unique cumulative effects of damages in the U.S. is an extraordinary deterrent to monopoly agreements affecting the U.S. economy.

From a comparison with western regimes the China's anti-cartel provision seem lacking of sufficient penalties. Here we note that the most prominent issue is the possibility of under deterrence of cartels, which would threaten the efficacy of AML's antitrust system. As shown in the previous paragraphs cartels are very hard to detect

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[301] See for details Rebecca Truman, *US enforces Antitrust Law*, Kingdom's Journal of Law; Sep 2010 at 678

[302] According to the Clayton Antitrust Act of 1914, "*any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee*." Thus according to an ABA research document "between January 1990 and December 2007, nearly $19 billion dollars were obtained by private U.S. parties from international cartelists".

and even more difficult to prosecute. Thus the potential for high fines and damages is quite crucial to overcome these difficulties and should ultimately aim to assure that undertakings will be adequately deterred from engaging in cartel activities.[303] Another risk we can point out is related to the consequences of a weak Chinese anti-cartel regime for international coordination. Taking into consideration that China's market is now the world's second biggest (and will probably become the first), the consequences of a poor cartel deterrence may lessen the ability to fight cartels globally.

The AML also provides penalties for the abuse of market dominance powers as well as concentration completed violating the AML. Articles 47 states that: "Where any business operator abuses its dominant market status in violation of this Law, it shall be ordered to cease doing so. The anti-monopoly authority shall confiscate its illegal gains and impose thereupon a fine of 1% up to 10% of the sales revenue in the previous year" . According to article 48: "Where any business operator implements concentration in violation of this Law, the anti-monopoly authority shall order it to cease doing so, to dispose of shares or assets, transfer the business or take other necessary measures to restore the market situation before the concentration within a time limit, and may impose a fine of less than 500,000 yuan".

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[303] See Michael Peel, *Repatriation to Create Legal Landmark*, FIN. TIMES (Dec. 12, 2007), *available at* http://www.ft.com/intl/cms/s/0/b20e9b0e-a855-11dc-9485-0000 779fd2ac.html#axzz1q1Bb15j7 where the author states that: "Antitrust around the world", Oxford Press 2009 "A recent example of multinational extradition procedure is the Marine Hose cartel case. Three British executives faced the threat of extradition to the United States to serve prison sentences but cooperation between the United States and the United Kingdom in their enforcement measures allowed the men to serve their sentences in Britain instead".

Besides the issues involving penalties provisions, China has also taken the first step towards creating a modern leniency program within the AML. We refer to the provisions contained in the Article 46 of the AML which states that "*where any business operator voluntarily reports the conditions on reaching the monopoly agreement and provides important evidences to the anti-monopoly authority, it may be imposed a mitigated punishment or exemption from punishment as the case may be*".

Leniency program have been developed to serve an increasingly crucial role in the effort to find out and fight cartels at both domestic and international levels. The reason for employing a leniency program is to constitute a system where to the possibility to be exempted from penalties (at least partially) will spur cartel member to reports its cartel membership to the antitrust bodies. Leniency programs are well known in antitrust regimes around the world and play a significant role making easier the detecting of monopoly agreements for antitrust agencies. "The programs are shaped to encourage violators to confess and implicate their co-conspirators, providing first-hand, and direct 'insider' evidence of conduct that the other parties to the cartel want to conceal, subsequently making the cartel easier to prosecute".[304]

As known the United States were the first introducing the idea of a leniency regime. The Chicago School at the beginning

[304] BT Hammington, *Leniency programs: an indispensable instrument for antitrust rules*, Antitrust Pacific Review 2008 II ed. At 34

of the XX century had demonstrated the necessity of mixing severe penalties with successful leniency regimes for balancing the intrinsic difficulty of detecting monopoly agreements for antitrust agencies.[305] From the late sixties under the development of Europe and Japan the American approach has been imported practically in every western jurisdiction. The movement has been so effective that today leniency regimes are diffused around the globe from Canada to the United Kingdom to Japan to South Africa to Brazil.

Anyway the shape of Chinese leniency program is not so satisfactorily. First of all the sanctions for monopoly agreements under the AML are not very severe if compared to penalties enforced in western antitrust regimes, raising – as mentioned – the chance of not deter undertakings from the wrongdoing. Secondly the leniency program, as introduced by the Article 46 of the AML, is quite confused in the procedural rules of both NDRC and SAIC and seems not to be able to force undertakings to report an anticompetitive agreement. The current leniency program is shaped in such a way that companies may face many issues. This, in part, is the result of dividing cartel enforcement between the SAIC and the NDRC based on the circumstance whether the monopoly arrangement was price-based. We have more times stressed how much hard is to divide price-agreements from no price-agreements. For example, in a case where the cartelists' conduct produces only an indirect effect on prices without any intention of direct effect, conspirator may be confused whether the application for leniency should be made to the SAIC or the NDRC. But equally troublesome for

[305] The Chicago School stressed four central aspects for an effective leniency program: (1) severe sanctions; (2) perceived high risk of detection; (3) transparency and predictability to the greatest extent possible; and (4) the presence of important and predictable leniency system.

cartelists are the unreasonable differences between the procedural rules of the SAIC and the NDRC.[306]

The confusion on leniency regimes depends also on the different provisions enacted by the NDRC and the SAIC. For instance the NDRC rules allow for a undertaking to seek an exemption from penalties for a breach of the AML for price-related arrangements if the corporation is *first in reporting* as well as gives enough evidence its anticompetitive conducts *may* be exempt according to the NDRC rules. The SAIC rules, differently, uses instead the term *will* be exempt from penalties in respect of the leniency program. We suspect that SAIC procedure rules are more certain in granting leniency to the "first in reporting" company than the NDRC rules. This is inconsistent with the AML and the international standards.

Additionally the NDRC rules expressly mention that the *"second in reporting*" company (ie. the second cartelist that give evidence for escaping penalties) on a price-fixing cartel may receive a maximum of 50% discount on penalties. The "third company reporting may be granted a discounted fine less than 50% of standard penalties. The SAIC procedural rules, instead do not determine any detailed discount fine ranges for the first company reporting the existence of a monopoly agreement. Another controversial point is the fact that according to the SAIC rules, when undertakings voluntarily cease monopoly agreement or other monopoly actions (for example the abusing of its dominance position), the SAIC regulator may, at its own discretion, mitigate or totally exempt penalty for the

[306] We remind that the two AML Enforcement Authorities being referenced are the SAIC and the NDRC. The SAIC's enforcement capacity is limited to non-price related monopoly agreements, while the NDRC is in charge of handling price-related cartels.

undertaking. On the contrary the NDRC rules do not contain any equivalent disposition.

A lowered deterrence factor melted with an ineffective leniency program may significantly reduce the AML power since cartelist will perceive a lessened government's powers. On this field we should admit that Chinese AML may need to be adjusted to meet the international standards and demonstrate to be strong enough to force cartelists to step forward and confess their conducts.[307]

These problems are enhanced by the general lack of transparency in China's antitrust regulatory system as mentioned in the first Chapter. With an incomplete guidance and with ineffective rules on leniency undertakings seeking to escape from penalties are situated in a difficult scenario.

18 – A Weak Enforcement Regime?

As seen in the first Chapter thanks to its policy of reform and opening up began in 1979, the Chinese government managed to trigger a virtuous economic *catching up*, while maintaining tight control on many industries and promoting the establishment of national giants which now are rival of the largest Western companies. This spectacular growth (10.8% per year on average) lasts practically from thirty years and it attests the success of this policy.

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[307] *See* Rebecca Buchman, *China Hurries Antitrust Law*, WALL STREET JOURNAL, June 11, 2004, page A7.

But while the political debate in the United States and the European Union is focused around the benefits expected from the re-industrialization and the necessary of stronger intervention of the state, China seems conversely, suffer today of an excess of public action. In this part of the world, the debate is crystallized around the omnipresent hand of the state in the economy and its tendency to engulf all the resources and forces of the country to detriment of the private sector. It is in this ambivalent context, which revolves around the omnipotence of public policy and discuss about its limits the AML has brought legal tools to advocates more economic liberalism, positioning the Chinese government not only as an economic player in the world but also as an arbitrator.

The adoption of the AML after more than thirteen years of heated discussions, has led to important expectations. AML's goal was to allow China to compete with the standards in force in Western countries. Practically it has allowed the establishment of a merger review regime and gave a coherent legal framework for punishing abuse dominance of monopolies as well as the abuse of administrative powers and SOEs presence.

Some evidence, however, could foreshadow a manipulation of the text by the government: the promotion of *"healthy development of the economy socialist market* "is therefore one of the five objectives of the law, even as the improvement of economic efficiency or the consumers protection (art. 1). In addition, the law provides that the *"impact of the concentration economic actors on the national economic development* "is one parameters which may be taken into account when

considering operations merger and acquisition (art. 27) and establishes a right of where additional foreign entity is involved in a transaction involving the *"national security*" (Art. 31).

These fears have worried foreign firms as well as private companies. The implementation of competition law has in fact revealed significant asymmetries between the public and private and the difficulties of the authorities to assimilate the new requirements transparency demanded by economic agents.

The interference of state action in the competition law

International business community has fears that government officials in China can be expected to administer the AML harder against multinational corporations than Chinese companies. Those firms are worried that Chinese authorities will assume their decisions basing on ideological beliefs, public socialist interest rather than on maximizing competition.

Although these problems have been largely avoided in the United States and Western jurisdictions, even here the ideological beliefs have occasionally dulled the goal of maximizing competition, such as when the competition sought to protect small businesses from competition of larger and more efficient firms. In the Us, for example, some special interest of politicians had led the Congress to grant some exemptions and immunities from the antitrust laws to particular groups or firms.

In China, this suspect is higher because of the strong state's authority and control over the economy; in addition, there is a strong feeling that nationalism and the national security may strengthen this risk. As a result, the ideology and concerns of public interest can play a more important role in preventing competition than in the United States or in Europe. Detractors may also find many arguments supporting this vision. For example the AML is quite explicit saying that Chinese Competition Law pursues also other objectives that – at first glance – may not be compatible with competition. For example, Article 4 of the AML provides that one of the objectives of the Law is to "improve the control of the economy," or the debated Article 31 of the AML which ensures the national security

review for international mergers involving Chinese interests. Multinational companies may therefore have legitimate concerns about how the AML will be applied. Given the unpredictability of the application of these provisions, international firms face concerns that Chinese authorities have more incentives to deviate from the goal of maximizing competition, in comparison with the authority of the United States or the European Union.

If four years of implementation are certainly insufficient to draw definitive conclusions on the AML enforcement, especially considering the obstacles to the readability of the decisions (for example the lack of reliable data and statistics, the difficulty in analyzing synthetically decisions whose scope varies greatly by industry, region or companies and individuals involved and the opacity of the MOFCOM's decisions) the perplexity of foreign economic partners relies, first of all, in the fact that the enforcement of the AML is left in the hands of three administrations subject to central government.

Such fears were and are largely unfounded, because although the government has many legal tools allowing its opposition to merger operations for political reasons (we've seen that this opportunity is offered by specific regulatory provisions further strengthened recently by the entry into force on 5 March 2011 of the Circular on National Security Review), the government has always been careful to isolate its intervention for fear of undermining the credibility of the AML and thus the Chinese growth's sustainability. We believe that although some controversial decisions the Chinese authorities conducts reveal rather a natural line of reasoning consistent with the special environment of the Chinese economy.

Is there an asymmetry of treatment between domestic and foreign firms or between public and private companies?

No doubts. The significant majority of transactions to date have involved foreign operators rather the Chinese partners and thus they have faced the intervention of the MOFOCM rather than the other antitrust authorities (NDRC and SAIC). In other words MOFOCM is the first regulator foreign firms may deal with. If MOFCOM skills are clearly defined, the scope exact powers of two other administrations seems, however, less established, and this may results in more uncertainties practices and conflicts of jurisdiction.

MOFOCM has in theory a right of scrutinize and eventually ban all foreign investments in Chinese companies operating in a sector related to national security (national defense, security, infrastructure key strategic technologies and products agricultural and vital energy). Foreign investors have seen in this complicated process the proof of interference by the Chinese in the competition law and have accused Chinese government of asymmetry with respect of mergers involving non-Chinese enterprises.

To this regard we should note the apparent asymmetry in the treatment of Chinese enterprises and foreign companies is actually highly skewed by factors yet unrelated to public policy. The fact is that a vast majority of operations effectively implies non-Chinese companies, and practically almost all the important operations are, at present, realized with the help of a foreign partner, given the power of this type of economic actor. This asymmetry is thus created mechanically, by the mere fact of the

existence threshold beyond which the transactions are subject to a review of the authorities.
To tell the truth an asymmetry, if we would look carefully, is between state owned and private owned companies. This imbalance can be explained by the strongly presence of the SOEs in the Chinese economy[308] and by the special provisions – still not completely clear – of the Article 7 of the Anti-Monopoly Law that escape public enterprises operating in crucial sectors from the application of the AML. Thus, the apparent asymmetry between domestic and foreign firms, often regarded as a symptom of political interference in competition policy, regards actually the large prevailing imbalance in China between public and private.

The difficult in learning transparency

However the concerns raised by the application of the AML to foreign investors were fed by decisions sometimes considered unfair. In these cases foreign operators had a reasonably suspect of interference of the State in the application of competition law. As discussed these MOFCOM's decisions are particularly representative:

1) The decision of Nov 2008 that approved under condition the proposed acquisition of *InBev/AB*. The international business community much debated about the particularly strict conditions that MOFCOM imposed to both InBev and AB to approve the merger without exhaustive investigation of the case.

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[308] We've seen that according to an analysis conducted in October 2011 by the U.S. congressional committee in charge of review of US-China relations (US-China Economic and Security *Review Commission)* controls, broadly, about 50% of the national economy (Excluding agriculture)

2) The decision of March 2009 when MOFCOM stopped the proposed acquisition by the U.S. Coca-Cola Company of Huiyuan. Here MOFOCM actually investigated the case but the accuracy and relevance of the results were difficult to prove, they seemed uncertain and raised the doubts of political or symbolic interests.

Controversies that may arise studying these individual decisions are however to be tempered. Indeed, illustrating a traditional Chinese proverb recommends *"throw more stones to cross the river"* authorities' actions have been conducted with a good prudence and pragmatism although some improvements should be required in the long run. Thus, if the motivations of some decisions have been undoubtedly seemed inadequate, it would be unjustified to question the legitimacy of the whole system set up by China on the basis of these observations alone.

Instead these questioned decisions show how the Competition Law is forcing the Chinese government to embrace the principles of transparency and explanation which are still little used. Thus, initially believed to be the Trojan horse of government in the economy, ultimately the AML shapes a mechanical device that government must respect to preserve the Chinese growth for future. In this perspective, the decisions assumed against these foreign operators may be considered as waypoints on the road to greater transparency in the public decision-making process.

Three Enforcement Agencies: a Weak system?

We have seen that the antitrust responsibilities are divided between three different agencies: the NDRC, the SAIC and the MOFCOM. The NDRC is the body equivalent of the previous State Planning Commission, the body that ruled the economy in China before the economic Reforms.[309] NDRC and SAIC are charged by a great number of antitrust responsibilities.[310] They must control and regulate many aspects of the country's economic development, including "formation of strategic industry policy, oversight of infrastructure and energy projects, development of high-tech industry and the associated authority funding, development of clean energy, coping with climate change, [and] building up national reservation of strategic resources."[311] Both bodies are responsible to enforce antitrust law against monopoly

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[309] For an example of the Anti-Unfair Competition Law's continued use and development, see, e.g., *Proposed Amendments to the PRC Anti-Unfair Competition Law*, Freshfields Bruckhaus Deringer Llp 1 (Mar. 2009), http://www.freshfields.com/publications/pdfs/2009/mar09/25519.pdf.

[310] *See id.* ("The NDRC may be perhaps the largest and most important Chinese ministry overseeing the country's real economy."); Nathan Bush & Yue Bo, *Adding Antitrust to NDRC's Arsenal*, CPI Feb. 2011, at 2 ("Although some of its powers were transferred to other agencies . . . during a further restructuring in 2008, the NDRC remains among the mightiest agencies of the central government.").

[311]It is also worthwhile to note that enforcement of the Price Law had become more active in the years leading up to the AML. *See* Bush & Bo, *supra* note 66, at 3 ("Historically, the Price Law's rules . . . were sparsely enforced. . . . In 2007, however, NDRC began responding more forcefully . . . amidst growing concerns about inflation, with a series of highly-publicized investigations and edicts.").

agreements and the abuse of dominance.[312] Price is factor that divides them: "if the case in question was price-based, it goes to [the] NDRC; otherwise it will be under [the] SAIC's purview."[313] The other body is the Ministry of Commerce ("MOFCOM")[314] which played a far and strategic role in Chinese competition law.[315] MOFCOM is the Chinese "principal body to control the inflow of international goods and capital and has assumed a number of duties within China's newly established competition regime under the AML"[316]. The presence of three antitrust bodies is however a risk for firms.

With two enforcement authorities issuing parallel rules on monopoly agreements jurisdictional conflicts may be

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[312] *See* Li, *supra* note 62, at 2 (stating that the NDRC and SAIC "share power to enforce the law against cartels and abuse of dominance").

[313] *Id.*

[314] *See* Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, Antitrust Source 3–4 (Oct. 2007), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct07_Bush10_18f.authcheckdam.pdf ("MOFCOM . . . [took] the lead in drafting the AML.").

[315] MOFCOM took its most recent form in 2003, but the agency has evolved out of extensive history of other Chinese governmental agencies spanning back from the late 1940s. For an extensive look at these historical predecessors to MOFCOM, see *The History*, Ministry Of Commerce: People's Republic Of China (Dec. 7, 2010), http://english.mofcom.gov.cn/history.shtml.

[316] Li, *supra* note 62, at 4.

expected to arise.[317] This because the distinction between non-price- and price-related behavior, which delineates SAIC/NDRC jurisdiction, is easy only in theory. In other words there is no real bright-line between an arrangement to reduce output and an agreement to fix prices, just as a refusal to supply a product does not differ from supplying that product at an excessive price. SAIC's provisions, like the NDRC's rules, offer no secure guidance about which authority would be in charge if jurisdictional conflicts arise.

Moreover the distinction is quite uncomfortable especially when we take into consideration the possibility of SAIC and NDRC to delegate powers. In fact SAIC as well as NDRC may delegate the enforcement of the AML to local authorities (local AIC offices or NDRC subdivisions) with the risk that the local approaches will differ each other. With this respect is notable the SAIC's preference to maintain greater control over enforcement proceedings and to delegate to local authorities on a by case basis, while NDRC prefers to delegate powers grating much higher level of autonomy. In this context the SAIC's system may guarantee a greater coordination in the enforcement of the AML both at the local levels.[318] On the other hand, the NDRC's enforcement may result more bureaucratic and may fail to be well coordinated.

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[317] See Antimonopoly Law to Benefit All, CHINA DAILY (Jun. 2, 2004), translation available at http:/www1.china.org.cn/English/government/97133.htm. The report, entitled Competition-Restricting Behavior of Multinational Companies in China and Possible Countermeasures, was issued by the Antimonopoly Division of the Fair Trade Bureau of the SAIC in the SAIC's official publication, Industry and Commerce Administration and contains some helpful critics to this enforcement scheme.

[318] See Antimonopoly Law Enforcement Crucial Issues in China. CHINA DAILY (Jun. 9, 2009).

Another point of friction concerns the leniency regime. We have seen that both the NDRC's rules on Anti-Price Monopoly Administrative Law Enforcement Procedures and the SAIC's rules on Industry and Commerce Authorities' Prohibiting Monopoly Agreements address the AML's leniency regime. But here the SAIC rules do not take into consideration the possible fine reduction percentages beyond those applicable to the 'first to report' undertaking. This is probably the most crucial of several apparent inconsistencies between the NDRC and SAIC provisions in this area, and the uncertainty created by these differences may be an ongoing concern for undertakings.[319]

Consider also that the SAIC rules on Industry and Commerce Authorities' Prohibiting Monopoly Agreements and rules on Industry and Commerce Authorities' are generally less detailed than the substantive NDRC rules, and thus offer less information concerning the jurisdiction's division.[320]

Another point is that that neither office seems to have adequate manpower or the resources currently to handle potentially huge amount of work raising from the AML's enforcement. The amount of resources to be employed

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[319] See Interim Provisions on Preventing Acts of Price Monopoly, Order [2003] No. 3 (adopted by the State Planning and Development Commission (SPDC) on June 18, 2003 and effective November 1, 2003), available at http://www.sdpc.gov.cn/zcfb/zcfbl/zcfbl2003/t20050613_6683.htm. The report shows interesting problems related with the leniency regime and crucial comments released before publishing the act.

[320] See also "Relevant Differences between SAIC and NDRC rules" at http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=371689&pdmc=110106.

appears to be large, given the size of the Chinese economy and the amount of illegal activities that may occur. Although staffing levels can be increased rapidly, consistent knowledge, skills and experience take much time to be built. Having two enforcement body means that offices and staff must be doubled and this may result in a strong waste of human resources.

The rules on Private Litigation

On 8 May 2012, the Supreme People's Court published the much awaited *Provisions on Certain Issues Concerning the Application of Law in Hearing Cases Involving Civil Disputes Arising out of Monopolistic Behaviors* (關於在審理案件中涉及的壟斷行為產生的民事糾紛案件應用法律若干問題的規定"的若干問題) (or the *Judicial Interpretation*), that came into effect from June 2012. This is the first official interpretation on antitrust litigations and thus contains the foundations of this kind of litigation in China. The Judicial Interpretation gives a precise guidance to the courts' for the enforcement of the AML and set the minimum compliance that firms must meet in order the escape liabilities from antitrust violations.

The drafting of these Rules has been very long. The Supreme Court began the drafting in early 2009, just after the publishing of the AML. After many amendments and adjustments with the assistance of EU and US experts, the Supreme Court issued the first draft for public consultation on 25 April 2011 for obtaining comments and suggestions. Lastly the Judicial Committee of the Supreme Court approved the Judicial Interpretation on 30 January 2012. The text containing the Rules has been published more than three month late. All this time long means that the Supreme Court has been disputing during the drafting process as well as the Court acted prudently.

The AML contains scarce provisions regarding the civil litigation. There is only one article (Article 50 of the AML) providing that "any undertaking who engages in monopolistic act resulting in losses to another person, it shall bear civil liabilities according to law". The Judicial Interpretation thus not only integrates the Chinese AML and covers many procedural situations for civil litigations; it also allows understanding how the other parts of the Chinese Law (eg. Tort Liability Law, Contract Law, Criminal Law and Civil Procedure Law) may be used under antitrust civil trials. The Judicial Interpretation are thus an important piece of legislation that makes clear how the to file, the acceptance, the jurisdiction, evidence rules, civil liabilities and time limit.

Remarkable, to what may be useful in this work to point out, the Judicial Interpretation has lowered the burden of proof on the plaintiff's side while has increased it for the defendant. This is an important change in the Chinese antitrust environment. The previous system contained such high burden of proof on the plaintiff that was almost impossible for it to win an antitrust trial. With the release of the Judicial Interpretation, undertakings suspected of enacting monopolistic conduct - with a special regard on those suspected to abuse their market dominant position – will face a higher risk to be prosecuted also in civil Courts.

Who can Sue

Article 1 of the Rules states that "any natural person, legal person or other organization who suffers harm as a

result of any monopolistic conduct, or is involved in any dispute over the violation of the AML by any contract, articles of association of any industry association, may initiate a civil litigation to the court". This means that an antitrust dispute may be triggered both on a contractual claim or an action in tort and thus also in the situations where there is no contractual relation. Additionally the Rules make clear that "a court shall accept a stand-alone civil litigation [thus before any decisions took by an antitrust agency] directly filed by a plaintiff, or a civil case followed by a valid decision of infringement of the AML by the antitrust law enforcement agency". Thus and notably a previous administrative action is not a precondition to start an antitrust civil litigation.

The provisions mentioned derived from some basis of the Chinese Civil Procedure Law (under which "the court shall accept the filing of litigation whenever the conditions under Article 108 of the Civil Procedure Law are satisfied"), and have been greeted with respect also by the international business community since they are in line with the common practice in western jurisdictions. The scope of these Rules is to enlarge the number of potential plaintiff that may bring an antitrust dispute before the courts and to reduce the burden of proof they must meet. This has been done to confer those market participants more power to supervise and deter the monopolistic conducts.

A reduced Burden of Proof for Plaintiffs

The crucial element of the entire antitrust litigation is in the allocation of the burden of proof. Prior to the AML Chinese Law has been characterized by the difficulties of the plaintiff in gathering the evidence and proving that an antitrust behavior has occurred. The Judicial Rules China has clarified issues such as the allocation for the burden of proof, facts exempted from proving, expert testimony.

The Judicial Rules use different rules regarding the asset of the burden of proof accordingly to the types of monopolistic behaviors. For instance, if the alleged monopolistic behavior falls into any of the monopoly arrangements addressed within Article 13 of the AML, the plaintiff will just be required to prove the presence of the horizontal monopoly arrangement and will not obliged to demonstrate the anti-competition effect of the arrangement. But, as to litigations concerning the existence of the abuse of market dominant position, the plaintiff must not only demonstrate the presence of a dominant position but also the alleged illegal conduct , while on the other hand the defendant shall demonstrate the legitimacy of its behavior if it denies the plaintiff's action. In the first draft of the Judicial Rules, the same provision on allocation of the burden of proof was enforced to both cases involving horizontal monopoly arrangements and vertical monopoly arrangements. These provisions have been removed from the published and official version of the Judicial Rules. Thus, the burden of proof in cases regarding vertical monopoly arrangement is not provided, and the plaintiffs may still be required to demonstrate the effect of excluding or reducing competition of the vertical monopoly arrangement, as expressed in general under of the Civil Procedure Law.

Thus, the Judicial Rules are somewhat favorable to the plaintiff. We note that if the monopolistic behavior is the result of abusing a market dominant position by a public utility firms or other enterprises with a reserved lawful exclusive status, the tribunal may determine that the defendant occupies a dominant position in the relevant market. Additionally according to the Rules the defendant's public information or agenda may be directly brought before the court as evidence to demonstrate the market dominant situation. For instance, the contents

published by undertakings in its website, marketing communications, industry reports where the firm is claimed to be the leader of its sector be considered as evidence of a market dominant position by the tribunal. These rules significantly reduce the plaintiff's burden of proof, while the same is transferred to the defendant if this (as supposed) denies the evidence. Moreover, the Judicial Rules spur the parties to provide testifiers, economic experts, submit documents and reports and so on.[321] These measures should reduce as well the burden of proof for plaintiffs. Generally the Rules have the positive effect of make easier for plaintiffs to set a trial for alleged antitrust violation at civil litigation. This will surely encourage antitrust litigations filed by individuals or small and medium enterprises with limited economic resources as well as will induce large corporations to pay more attention to their behaviors.

However, there are still some crucial points that have not been addressed correctly. For instance Judicial Rules have not adopted the system of *evidence disclosure*. Given that the crucial evidence indispensable for demonstrating antitrust claims or antitrust conduct is often held or provided by the defendant, the plaintiff, especially if weak (think for example to individual consumers or small undertakings) have no way for understanding and assuming the detailed circumstances indispensable for the litigation. Thus, if the plaintiff cannot ask the court an official order for obtaining the disclosure of this evidence (think for example to the market share of the alleged monopolist), the plaintiff will still be disadvantaged when accusing large enterprises. The Judicial Rules also do not address many other issues much debated during the drafting

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[321] The famous *Qihoo v. Tencent* case, held before the Guangdong Provincial Higher People's Court of the first instance, is so far the only antitrust case to have benefited of these new Rules introducing an expert witness.

process, such for example whether the circumstances determined by the effective decision of the tribunal could be considered lawful evidence, or whether undertakings' commitment during the phases of investigation could be deemed evidence demonstrating the presence of the monopolistic behavior. Additionally, the Judicial Rules fails to give information on how to calculate the loss determined by monopolistic behavior and especially, the calculation thresholds for the compensation damages. In fact without a secure compensation system, the plaintiff would still have doubts in suing the conspirators for the uncertainty of being fully restored in its damages claims.

Although is too early to understand the effect on antitrust litigation in China we note that the application of these Rule will be deeply clarified the judicial practice and by future additional Rules. In sum the Rules have somewhat a positive impact in enlarging the market competition in China, by the fact they reduce the monopolistic behaviors, and facilitate the antitrust civil litigation. These achievements are reached by a reasonable shift of the burden of proof from the plaintiff to the defendant. Thus, it will be easier for the victims of antitrust behaviors such as consumers or SMEs, to sue against *big businesses* acting unlawfully.

Significant challenges remain

There are two additional problems Chinese competition law will have to deal with. The first challenge is the need for an independent judiciary system where the current antitrust enforcement may trust and thus may legitimize its actions. Beyond the recurring criticisms raised by the opacity of China's judicial system and the lack of legal certainty, it is indisputable that the judicial system has not yet all the skills and structures required to address properly the technical issues that may arise during complex concentrations. This deficiency is strong and it reduces the credibility of the antitrust law, which remains disproportionately subject to arbitrary acts and uncertainties. The problem is that judges do not have the necessary skills for a thorough review of decisions made by antitrust agencies.

The second challenge concerns the scope of the Chinese competition Law with respect of monopolistic conducts occurred outside Chinese territory. Pursuant to Article 2 of the AML, we know that the AML should also apply to monopolistic behavior conducted outside the territory of People’s Republic of China, which has the effect of eliminating or restricting the competition on the domestic market of China. This provision justified the attention of foreign observers, given its potential impact on many global operations. The real power of this instrument of influence remains to be defined, but in any event, it seems inevitable that the rise of China on the international scene will be accompanied by a deeper use of this provision.

Conclusions

In this essay we have addressed the main challenges for international firms after the adoption of the AML in China, a country which is facing crucial changes in both its political, social and economic system. China is in fact asked to shift from a centralized planned economy to a market driven economy while maintaining its unique social and political context which contains many limitations for civil and human rights. This passage is sensitive but indispensable in order to keep the unemployment under control, to ensure the growth and thus to legitimate the country's governance. In other words China is stimulating an atrophied market arena traditionally dominated by corruption and inefficiencies through the creation of a competitive system opened to the foreign presence. The government's aim is to transform China from a labor intensive into a capital intensive country as well as to acquire foreign technologies, capitals and competencies for completing the *catching-up*. This also means that future sustainable growth may be achieved by reducing the excessive powers of the SOEs, by limiting the State's role into the economy and by promoting healthy competition between firms.

In this context the adoption of the AML it's a sort of milestone that should signal the completion of this movement and thus give firms a leading role in the future development of the economy. Accordingly the AML has introduced in China a modern review concentration regime, a coherent legal framework for punishing the

abuse of dominance position and more powers against SOEs and administrative monopolies.

However we have seen that the problems and the gaps inherited from the past - such as the Chinese unique political context that is trying to spur innovation while developing a *socialist market economy*, the unschooled Courts and antitrust bodies - pose many doubts in the application of the AML, especially for foreign investors. Consequently international firms interested in investing in China remain subject to several questions and uncertainties. The main risk is that since the AML contains many vague provisions they – together with an unprepared and ancillary judicial system – could be easily manipulated by the government.

Despite these significant impediments in reaching its goal and its unique background, we have shown that the AML deserves to be greeted with more optimism. It may succeed. For example we have seen that in these first years of enactment the judicial system seems to act more independently than what was expected and its decisions appears motivated and quite aligned towards international standards; SOEs are still a pain in the neck for competitors but both the government agencies and the judicial system are determined in using their powers to reduce SOEs anticompetitive conducts.

We have discussed that all these factors explain why the AML for international firms is and will be enforced differently than in the U.S. and EU systems. Merger concentration review in China takes into consideration circumstances – as the protection of domestic companies and competitors – that are not addressed in the U.S. and EU merger review systems; the monopolistic agreements between competitors are treated more softly that the EU and U.S. because of the lack of detailed guidelines; SOEs and administrative bodies are still playing a more central

role in the economy than in the EU and U.S. because China is coming from a central driven system.

A journey of thousand miles begins with a single step said Lao-tzu, a famous Chinese philosopher. And Chinese antitrust regime makes no exception. We mean that China will be developing its own antitrust system; this process takes time and Chinese authorities and courts are just at the beginning. But what has emerged from this work is that this will not resemble slavishly the western ones: as the U.S. and the EU regimes differs each other, Chinese antitrust regime will take into account its unique environment and social context. However this not necessarily means that the antitrust regime will be applied to discriminate foreign firms with respect of domestic firms.

Appendix

The Anti-Monopoly Law of People's Republic of China (AML)

Order of the President of the People's Republic of China

The Anti-monopoly Law of the People's Republic of China, which has been adopted at the 29th meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China on August 30, 2007, is hereby promulgated, and shall come into force as of August 1, 2008.

President of the People's Republic of China: Hu Jintao August 30, 2007 Anti-monopoly Law of the People's Republic of China

(Adopted at the 29th meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China on August 30, 2007)

Chapter I General Provisions

Article 1 This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy.

Article 2 This Law shall be applicable to monopolistic conducts in economic activities within the People's Republic of China.
This Law shall apply to the conducts outside the territory of the People's Republic of China if they eliminate or have restrictive effect on competition on the domestic market of the PRC.

Article 3 For the purposes of this Law, "monopolistic conducts" are defined as the following:
(1) monopolistic agreements among business operators;
(2) abuse of dominant market positions by business operators; and
(3) concentration of business operators that eliminates or restricts competition or might be eliminating or restricting competition.

Article 4 The State constitutes and carries out competition rules which accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system.

Article 5 Business operators may, through fair competition, voluntary alliance concentrate themselves according to law, expand the scope of business operations, and enhance competitiveness.

Article 6 Any business with a dominant position may not abuse that dominant position to eliminate, or restrict competition.

Article 7 With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries implementing exclusive operation and sales according to law, the state protects the lawful business operations conducted by the business operators therein.
The state also lawfully regulates and controls their business operations and the prices of their commodities and services so as to safeguard the interests of consumers and promote technical progresses.
The business operators as mentioned above shall lawfully operate, be honest and faithful, be strictly self-disciplined, accept social supervision, shall not damage the interests of consumers by virtue of their dominant or exclusive positions.

Article 8 No administrative organ or organization empowered by a law or administrative regulation to administer public affairs may abuse its administrative powers to eliminate or restrict competition.

Article 9 The State Council shall establish the Anti-monopoly Commission, which is in charge of organizing, coordinating, guiding anti-monopoly work, performs the following functions:
(1) studying and drafting related competition policies;
(2) organizing the investigation and assessment of overall competition situations in the market, and issuing assessment reports;
(3) constituting and issuing anti-monopoly guidelines;
(4) coordinating anti-monopoly administrative law enforcement; and
(5) other functions as assigned by the State Council.
The State Council shall stipulate composition and working rules of the Anti-monopoly Commission.

Article 10 The anti-monopoly authority designated by the State Council (hereinafter referred to as the Anti- monopoly Authority under the State Council) shall be in charge of anti-monopoly law enforcement in accordance with this Law.
The Anti-monopoly Authority under the State Council) may, when needed, authorize the corresponding authorities in the people's governments of the provinces, autonomous regions and municipalities directly under the Central Government to take charge of anti-monopoly law enforcement in accordance with this Law.

Article 11 A trade association shall intensify industrial self-discipline, guide business operators to lawfully compete, safeguard the competition order in the market.

Article 12 For the purposes of this Law, "business operator" refers to a natural person, legal person, or any other organization that is in the engagement of commodities production or operation or service provision, and "relevant market" refers to the commodity scope or territorial scope within which the business operators compete against each other during a certain period of time for specific commodities or services (hereinafter generally referred to as "commodities").

Chapter II Monopoly Agreement

Article 13 Any of the following monopoly agreements among the competing business operators shall be prohibited:
(1) fixing or changing prices of commodities;
(2) limiting the output or sales of commodities;
(3) dividing the sales market or the raw material procurement market;
(4) restricting the purchase of new technology or new facilities or the development of new technology or new products;
(5) making boycott transactions; or
(6) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.
For the purposes of this Law, "monopoly agreements" refer to agreements, decisions or other concerted actions which eliminate or restrict competition.

Article 14 Any of the following agreements among business operators and their trading parties are prohibited:
(1) fixing the price of commodities for resale to a third party;
(2) restricting the minimum price of commodities for resale to a third party; or
(3) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.

Article 15 An agreement among business operators shall be exempted from application of articles 13 and 14 if it can be proven to be in any of the following circumstances:

(1) for the purpose of improving technologies, researching and developing new products;
(2) for the purpose of upgrading product quality, reducing cost, improving efficiency, unifying product specifications or standards, or carrying out professional labor division;
(3) for the purpose of enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators;
(4) for the purpose of achieving public interests such as conserving energy, protecting the environment and relieving the victims of a disaster and so on;
(5) for the purpose of mitigating serious decrease in sales volume or obviously excessive production during economic recessions;
(6) for the purpose of safeguarding the justifiable interests in the foreign trade or foreign economic cooperation; or
(7) other circumstances as stipulated by laws and the State Council.
Where a monopoly agreement is in any of the circumstances stipulated in Items 1 through 5 and is exempt from Articles 13 and 14 of this Law, the business operators must additionally prove that the agreement can enable consumers to share the interests derived from the agreement, and will not severely restrict the competition in relevant market.

Article 16 Any trade association may not organize the business operators in its own industry to implement the monopolistic conduct as prohibited by this Chapter.

Chapter III Abuse of Market Dominance

Article 17 A business operator with a dominant market position shall not abuse its dominant market position to conduct following acts:
(1) selling commodities at unfairly high prices or buying commodities at unfairly low prices;
(2) selling products at prices below cost without any justifiable cause;
(3) refusing to trade with a trading party without any justifiable cause;
(4) requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause;
(5) tying products or imposing unreasonable trading conditions at the time of trading without any justifiable cause;
(6) applying dissimilar prices or other transaction terms to counterparties with equal standing;
(7) other conducts determined as abuse of a dominant position by the Anti-monopoly Authority under the State Council
For the purposes of this Law, "dominant market position" refers to a market position held by a business operator having the capacity to control the price, quantity or other trading conditions of commodities in relevant market, or to hinder or affect any other business operator to enter the relevant market.

Article 18 The dominant market status shall be determined according to the following factors:
(1) the market share of a business operator in relevant market, and the competition situation of the relevant market;
(2) the capacity of a business operator to control the sales markets or the raw material procurement market;
(3) the financial and technical conditions of the business operator;
(4) the degree of dependence of other business operators upon of the business operator in transactions;
(5) the degree of difficulty for other business operators to enter the relevant market; and

(6) other factors related to determine a dominant market position of the said business operator.

Article 19 Where a business operator is under any of the following circumstances, it may be assumed to be have a dominant market position:
(1) the relevant market share of a business operator accounts for1/2 or above in the relevant market;
(2) the joint relevant market share of two business operators accounts for 2/3 or above; or
(3) the joint relevant market share of three business operators accounts for 3/4 or above.
A business operator with a market share of less than 1/10 shall not be presumed as having a dominant market position even if they fall within the scope of second or third item.
Where a business operator who has been presumed to have a dominant market position can otherwise prove that they do not have a dominant market, it shall not be determined as having a dominant market position.

Chapter IV Concentration of Business operators

Article 20 A concentration refers to the following circumstances:
(1) the merger of business operators;
(2) acquiring control over other business operators by virtue of acquiring their equities or assets; or
(3) acquiring control over other business operators or possibility of exercising decisive influence on other business operators by virtue of contact or any other means.

Article 21 Where a concentration reaches the threshold of declaration stipulated by the State Council, a declaration must be lodged in advance with the Anti-monopoly Authority under the State Council, or otherwise the concentration shall not be implemented.

Article 22 Where a concentration is under any of the following circumstances, it may not be declared to the Anti-monopoly Authority under the State Council:
(1) one business operator who is a party to the concentration has the power to exercise more than half the voting rights of every other business operator, whether of the equity or the assets; or
(2) one business operator who is not a party to the concentration has the power to exercise more than half the voting rights of every business operator concerned, whether of the equity or the assets.

Article 23 A business operator shall, when lodge a concentration declaration with the Anti-monopoly Authority under the State Council, submit the following documents and materials:
(1) a declaration paper;
(2) explanations on the effect of the concentration on the relevant market competition;
(3) the agreement of concentration;
(4) the financial reports and accounting reports of the proceeding accounting year of the business operator; and

(5) other documents and materials as stipulated by the Anti-monopoly Authority under the State Council.
Such items shall be embodied in the declaration paper as the name, domicile and business scopes of the business operators involved in the concentration as well as the date of the scheduled concentration and other items as stipulated by the Anti-monopoly Authority under the State Council.

Article 24 Where the documents or materials submitted by a business operator are incomplete, it shall submit the rest of the documents and materials within the time limit stipulated by the Anti-monopoly Authority under the State Council; otherwise, the declaration shall be deemed as not filed.

Article 25 The Anti-monopoly Authority under the State Council shall conduct a preliminary review of the declared concentration of business operators, make a decision whether to conduct further review and notify the business operators in written form within 30 days upon receipt of the documents and materials submitted
by the business operators pursuant to Article 23 of this Law. Before such a decision made by the Anti- monopoly Authority under the State Council, the concentration may be not implemented.
Where the Anti-monopoly Authority under the State Council decides not to conduct further review or fails to make a decision at expiry of the stipulated period, the concentration may be implemented.

Article 26 Where the Anti-monopoly Authority under the State Council decides to conduct further review, they shall, within 90 days from the date of decision, complete the review, make a decision on whether to prohibit the concentration, and notify the business operators concerned of the decision in written form. A decision of prohibition shall be attached with reasons

therefor. Within the review period the concentration may not be implemented.
Under any of the following circumstances, the Anti-monopoly Authority under the State Council may notify the business operators in written form that the time limit as stipulated in the preceding paragraph may be extended to no more than 60 days:
(1) the business operators concerned agree to extend the time limit;
(2) the documents or materials submitted are inaccurate and need further verification;
(3) things have significantly changed after declaration.
If the Anti-monopoly Authority under the State Council fails to make a decision at expiry of the period, the concentration may be implemented.

Article 27 In the case of the examination on the concentration of business operators, it shall consider the relevant elements as follows:
(1) the market share of the business operators involved in the relevant market and the controlling power thereof over that market,
(2) the degree of market concentration in the relevant market,
(3) the influence of the concentration of business operators on the market access and technological progress,
(4) the influence of the concentration of business operators on the consumers and other business operators,
(5) the influence of the concentration of business operators on the national economic development, and
(6) other elements that may have an effect on the market competition and shall be taken into account as regarded by the Anti-monopoly Authority under the State Council.

Article 28 Where a concentration has or may have effect of eliminating or restricting competition, the Antimonopoly Authority under the State Council shall make a decision to prohibit the concentration. However, if the business operators concerned can prove that the concentration will bring more positive impact than negative impact on competition, or the concentration is pursuant to public interests, the Anti-

monopoly Authority under the State Council may decide not to prohibit the concentration.

Article 29 Where the concentration is not prohibited, the Anti-monopoly Authority under the State Council may decide to attach restrictive conditions for reducing the negative impact of such concentration on competition.

Article 30 Where the Anti-monopoly Authority under the State Council decides to prohibit a concentration or attaches restrictive conditions on concentration, it shall publicize such decisions to the general public in a timely manner.

Article 31 Where a foreign investor merges and acquires a domestic enterprise or participate in concentration by other means, if state security is involved, besides the examination on the concentration in accordance with this Law, the examination on national security shall also be conducted in accordance with the relevant State provisions.

Chapter V Abuse of Administrative Power to Eliminate or Restrict Competition

Article 32 Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power, restrict or restrict in a disguised form entities and individuals to operate, purchase or use the commodities provided by business operators designated by it.

Article 33 Any administrative organ or organization empowered by a law or an administrative regulation to administer public affairs may not have any of the following

conducts by abusing its administrative power to block free circulation of commodities between regions:
(1) imposing discriminative charge items, discriminative charge standards or discriminative prices upon commodities from outside the locality,
(2) imposing such technical requirements and inspection standards upon commodities from outside the locality as different from those upon local commodities of the same classification, or taking such discriminative technical measures as repeated inspections or repeated certifications to commodities from outside the locality, so as to restrict them to enter local market,
(3) exerting administrative licensing specially on commodities from outside the locality so as to restrict them to enter local market,
(4) setting barriers or taking other measures so as to hamper commodities from outside the locality from entering the local market or local commodities from moving outside the local region, or
(5) other conducts for the purpose of hampering commodities from free circulation between regions.

Article 34 Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality to participate in local tendering and bidding activities by such means as imposing discriminative qualification requirements or assessment standards or releasing information in an unlawful manner.

Article 35 Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality to invest or set up branches in the locality by imposing unequal treatment thereupon compared upon local operators.

Article 36 Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to force business operators to engage in the monopolistic conducts as prescribed in this Law.

Article 37 Any administrative organ may not abuse its administrative power to set down such provisions in respect of eliminating or restricting competition.

Chapter VI Investigation into the Suspicious Monopolistic Conducts

Article 38 The anti-monopoly authority shall make investigations into suspicious monopolistic conducts in accordance with law.
Any entity or individual may report suspicious monopolistic conducts to the anti-monopoly authority. The anti-monopoly authority shall keep the informer confidential.
Where an informer makes the reporting in written form and provides relevant facts and evidences, the anti- monopoly authority shall make necessary investigation.

Article 39 The anti-monopoly authority may take any of the following measures in investigating suspicious monopolistic conducts:
(1) conducting the inspection by getting into the business premises of business operators under investigation or by getting into any other relevant place,
(2) inquiring of the business operators under investigation, interested parties, or other relevant entities or individuals, and requiring them to explain the relevant conditions,
(3) consulting and duplicating the relevant documents, agreements, account books, business correspondences and electronic data, etc. of the business operators under

investigation, interested parties and other relevant entities or individuals,
(4) seizing and detaining relevant evidence, and
(5) inquiring about the business operators' bank accounts under investigation.
Before the measures as prescribed in the preceding paragraph are approved, a written report shall be submitted to the chief person(s)-in-charge of the anti-monopoly authority.

Article 40 When inspecting suspicious monopolistic conducts, there shall be at least two law enforcers, and they shall show their law enforcement certificates.
When inquiring about and investigating suspicious monopolistic conducts, law enforcers shall make notes thereon, which shall bear the signatures of the persons under inquiry or investigation.

Article 41 The anti-monopoly authority and functionaries thereof shall be obliged to keep confidential the trade secrets they have access to during the course of the law enforcement.

Article 42 Business operators, interested parties and other relevant entities and individuals under investigation shall show cooperation with the anti-monopoly authority in performing its functions, and may not reject or hamper the investigation by the anti-monopoly authority.

Article 43 Business operators, interested parties under investigation have the right to voice their opinions. The anti-monopoly authority shall verify the facts, reasons and evidences provided by the business operators, interested parties under investigation.

Article 44 Where the anti-monopoly authority deems that a monopolistic conduct is constituted after investigating and verifying a suspicious monopolistic conduct, it shall make a decision on how to deal with the monopolistic conduct, and publicize it.

Article 45 As regards a suspicious monopolistic conduct that the anti-monopoly authority is investigating, if the business operators under investigation promise to eliminate the impact of the conduct by taking specific measures within the time limit prescribed by the anti-monopoly authority, the anti-monopoly authority may decide to suspend the investigation.
The decision on suspending the investigation shall specify the specific measures as promised by the business operators under investigation.
Where the anti-monopoly authority decides to suspend the investigation, it shall supervise the implementation of the promise by the relevant business operators. If the business operators keep their promise, the antimonopoly authority may decide to terminate the investigation.
However, the anti-monopoly authority shall resume the investigation, where
(1) the business operators fail to implement the promise,
(2) significant changes have taken place to the facts based on which the decision on suspending the investigation was made; or
(3) the decision on suspending the investigation was made based on incomplete or inaccurate information provided by the business operators.

Chapter VII Legal Liabilities

Article 46 Where business operators reach an monopoly agreement and perform it in violation of this Law, the anti-monopoly authority shall order them to cease doing so, and shall confiscate the illegal gains and impose a fine of 1% up to 10% of the sales revenue in the previous year.
Where the reached monopoly agreement has not been performed, a fine of less than 500,000 yuan shall be imposed.

Where any business operator voluntarily reports the conditions on reaching the monopoly agreement and provides important evidences to the anti-monopoly authority, it may be imposed a mitigated punishment or exemption from punishment as the case may be.
Where a guild help the achievement of a monopoly agreement by business operators in its own industry in violation of this Law, a fine of less than 500,000 yuan shall be imposed thereupon by the anti-monopoly authority; in case of serious circumstances, the social group registration authority may deregister the guild.

Article 47 Where any business operator abuses its dominant market status in violation of this Law, it shall be ordered to cease doing so. The anti-monopoly authority shall confiscate its illegal gains and impose thereupon a fine of 1% up to 10% of the sales revenue in the previous year.

Article 48 Where any business operator implements concentration in violation of this Law, the anti-monopoly authority shall order it to cease doing so, to dispose of shares or assets, transfer the business or take other necessary measures to restore the market situation before the concentration within a time limit, and may impose a fine of less than 500,000 yuan.

Article 49 The specific amount of the fines as prescribed in Articles 46 through 48 shall be determined in consideration of such factors as the nature, extent and duration of the violations.

Article 50 Where any loss was caused by a business operator's monopolistic conducts to other entities and individuals, the business operator shall assume the civil liabilities.

Article 51 Where any administrative organ or an organization empowered by a law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order it to make correction and impose punishments on the directly liable person(s)-in-charge and other directly liable persons.

The anti-monopoly authority may put forward suggestions on handling according to law to the relevant superior authority.
Where it is otherwise provided in a law or administrative regulation for the handling the organization empowered by a law or administrative regulation to administer public affairs who abuses its administrative power to eliminate or restrict competition, such provisions shall prevail.

Article 52 As regards the inspection and investigation by the anti-monopoly authority, if business operators refuse to provide related materials and information, provide fraudulent materials or information, conceal, destroy or remove evidence, or refuse or obstruct investigation in other ways, the anti-monopoly authority shall order them to make rectification, impose a fine of less than 20,000 yuan on individuals, and a fine of less than 200,000 yuan on entities; and in case of serious circumstances, the anti-monopoly authority may impose a fine of 20,000 yuan up to 100,000 yuan on individuals, and a fine of 200,000 yuan up to one million yuan on entities; where a crime is constituted, the relevant business operators shall assume criminal liabilities.

Article 53 Where any party concerned objects to the decision made by the anti-monopoly authority in accordance with Articles 28 and 29 of this Law, it may first apply for an administrative reconsideration; if it objects to the reconsideration decision, it may lodge an administrative lawsuit in accordance with law.
Where any party concerned is dissatisfied with any decision made by the anti-monopoly authority other than the decisions prescribed in the preceding paragraph, it may lodge an application for administrative reconsideration or initiate an administrative lawsuit in accordance with law.

Article 54 Where any functionary of the anti-monopoly authority abuses his/her power, neglects his/her duty, seeks private benefits, or discloses trade secrets he/she has access to during the process of law enforcement, and a crime is constituted, he/she shall be subject to the criminal liability; where no crime is constituted, he/she shall be imposed upon a disciplinary sanction.

Chapter VIII Supplementary Provisions

Article 55 This Law does not govern the conduct of business operators to exercise their intellectual property rights under laws and relevant administrative regulations on intellectual property rights; however, business operators' conduct to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law.

Article 56 This Law does not govern the ally or concerted actions of agricultural producers and rural economic organizations in the economic activities such as production, processing, sales, transportation and storage of agricultural products.

Article 57 This Law shall enter into force as of August 1, 2008.

SAIC Regulations on Prohibition of Monopoly Agreements

Article 1
These Rules are formulated in accordance with the Anti-Monopoly Law of the People's Republic of China (hereinafter referred to as "AML") for purpose of preventing monopoly agreement in economic activities.

Article 2
Undertakings are prohibited from reaching any monopoly agreement in economic activities.
Monopoly agreements shall mean any agreement, decision and other concerted practice reached among undertakings or organized by industry association that eliminate or restrict competition in violation of Article 13, 14, 16 of the AML.
An agreement or decision may take written and oral forms.
Other concerted practice shall mean colluded coordination in practice between undertakings without express oral or written agreements or decisions.

Article 3
To find other concerted practice, the following factors shall be considered:
(1) Whether the market conduct of undertakings are uniform;
(2) Whether there is any intention of contact or information exchange among the undertakings.
(3) Whether the undertakings can provide a reasonable justification for the uniformity of conduct.
The market structure, competitive conditions, changes in the market, industry condition, etc. shall also be considered in finding other concerted practice.

Article 4

Competing undertakings shall be prohibited from entering into the following monopoly agreements that restrict output or sales volume of products:
(1) Agreements that restrict output of products or certain types or models of a product by curtailing production, fixed production, stop production or
otherwise.
(2) Agreements that restrict sales volume of products, or certain types or models of a product by refusing to supply, restricting the products supply or otherwise.

Article 5
Competing undertakings shall be prohibited from entering into the following monopoly agreements that split sales market or raw material purchasing market:
(1) Agreements that split market by territory, customer or product type and volume.
(2) Agreements that split purchasing market of raw material, semi-finished products, parts, components, relevant equipments and other raw materials by territory, type and volume.
(3) Agreements that split suppliers of raw material, semi-finished products, parts, components, relevant equipments and other raw materials.

Article 6
Competing undertakings shall be prohibited from entering into the following monopoly agreements that restrict purchasing new technologies, new equipments, or restrict developing new technologies or new products:
(1) Agreements that restrict purchasing and using new technologies, new processes;
(2) Agreements that restrict purchasing, leasing or using new equipments;
(3) Agreements that restrict investing in and developing new technologies, new process, or new products.
(4) Agreements that refuse to use new technologies, new process, or new equipments;
(5) Agreements that refuse to adopt new technical standards.

Article 7
Competing undertakings shall be prohibited from entering into the following monopoly agreements to jointly boycott:
(1) concerted refusal to supply or sell products to a specific undertaking;
(2) concerted refusal to purchase or sell products of a specific undertaking;
(3) concerted restraint on a specific undertaking from dealing with a competing undertaking.

Article 8
Except price monopoly agreement, the State Administration for Industry and Commerce shall be responsible for finding other monopoly agreements according to law that are not expressly provided for in these Rules.

Article 9
Industry associations shall be prohibited from organizing its members to engage in any monopoly agreement as prohibited hereunder by means set forth below:
(1) formulating and issuing articles of association, rules, decision, notice or standard containing contents eliminating or restricting competition by the industry association ;
(2) Convening, organizing or promoting undertakings in the relevant industry to reach agreements, decisions, minutes and/or memorandums containing contents eliminating or restricting competition.

Article 10
Where undertakings have entered into and implemented a monopoly agreement in violation of provisions from Article 4 to Article 8 of these Rules, the AIC authorities shall order them to cease the violation, confiscate the illegal gains, and impose a fine of 1-10% of the turnover in the previous fiscal year; where

the monopoly agreement has not been enforced, the violator may be imposed a fine of no more than RMB 500,000.
The AIC authorities shall impose a fine of no more than RMB 500,000 on any industry association that organizes its members to enter into monopoly agreements in violation of Article 9 of these Rules. In serious cases, the AIC authorities may request the relevant social organization registration administration to duly deregister such industry association.
When determining the specific magnitude of the fine, the AIC authorities shall consider the nature, circumstances, the seriousness and the duration of the violation and other relevant factors.
Where undertakings collude or industry association organizes undertakings in the relevant industry to collude and a monopoly agreement has not yet been concluded, the AIC authorities shall prevent it in time.
Where the undertakings voluntarily cease monopoly agreement, they may, to the discretion of the Administration for Industry and Commerce authorities, be given a mitigated penalty or be exempted from penalty.

Article 11
Undertakings who report to the AIC authority the monopoly agreement and provide important evidence on their own initiatives may be granted by the AIC authority a mitigated penalty or be exempted from penalty.
Exemption or mitigation of the penalty by AIC authority shall be determined in accordance with the time sequences of voluntary self-reports by the undertakings, importance of the evidence provided, relevant information about concluding or implementing the monopoly agreement, and its cooperation with the investigation.
Important evidence refers to evidence that is sufficient to initiate an investigation or that plays a pivotal role in finding a monopoly agreement by AIC authority, including information on the parties to the agreement, products involved, the form and content of the agreement and specific details of implementation of the agreement.

Article 12
For the first undertaking who voluntarily selfreports to the AIC authority the monopoly agreement, provides important evidence and cooperates with the investigation comprehensively and voluntarily, penalty should be exempted. For other undertaking who voluntarily self-reports the monopoly agreement, and provides important evidence, penalty shall be mitigated discretionally.

Article 13
Exemption or mitigation of penalty referred to in Article 11 and 12 herein shall mainly refer to exemption or mitigation of fines that are specified in Article 46 of the AML.

Article 14
Where undertakings can provide materials to prove that the agreement concluded falls under Article 15 of the AML, and AIC authority finds so, these Rules shall not be applicable to such agreement.

Article 15
Undertakings that are not satisfied with the administrative penalty or any other rulings rendered by the AIC authority according to these Rules may apply for an administrative review or bring an administrative action in accordance with law.

Article 16
Anti-Monopoly Law enforcement officials with the AIC authority shall handle cases strictly in accordance with *the Procedural Rules by Administration of Industry and Commerce regarding Investigation and Handling of Cases relating to Monopoly Agreement and Abuse of Dominant Market Position.*
Any Anti-Monopoly Law enforcement official with the AIC authority who misuse his/her authority, neglect his/her duties,

engage in malpractices for his/her personal gain, or disclose trade secrets obtained in the law enforcement work shall be punished according to relevant rules and regulations.

Article 17

These Rules are not applicable to any alliance or concerted practice by agricultural producers and rural economic organizations in their business activities of production, processing, sale, transportation and storage of farm products etc.

Article 18

For the purpose of these Rules, products shall include services.

Article 19

These Rules are subject to interpretation by the State Administration for Industry and Commerce.

Article 20

These Rules shall come into effect on February 1, 2011.

SAIC Regulations on Prohibition of Abuse of Dominant Market Position

Article 1
These Rules are formulated in accordance with *The Anti-Monopoly Law of the People's Republic of China* ("AML") for the purpose of prohibiting abuse of dominant market position in economic activities.

Article 2
An undertaking with a dominant market position is prohibited from abusing its dominant market position to eliminate or restrict competition in economic activities

Article 3
"A dominant market position" refers to a market position by which an undertaking is able to control the price, output or other transaction conditions of a product in the relevant market, or to impede or prevent entry into the relevant market by other undertakings.
For purpose of this Article, "Other transaction conditions" refers to elements other than price and volume that may substantially affect market transactions, including product quality, payment condition, delivery method and after-sale service of the product etc.
For purpose of this Article, "Impeding or preventing entry into the relevant market by other undertakings" refers to preventing other undertakings from entering the relevant market, or deferring other undertakings' entry into the relevant market within a reasonable time, or increasing the market entry cost, thus making it difficult for the new entrant to compete effectively in the market although entry into the relevant market is possible.

Article 4

An undertaking with a dominant market position is prohibited from refusing to deal with the counterparty by means of the following without valid justification:
(1) reducing its current trade volume with the counterparty;
(2) delaying, terminating its current transaction with the counterparty;
(3) refusing to have any new transaction with the counterparty;
(4) imposing restrictive conditions which makes it difficult for the counterparty to continue its dealings with the said undertaking;
(5) refusing to allow the counterparty to use its necessary facilities under reasonable conditions in the course of production and operations.
For finding of violation under Item (5), factors such as the following shall be considered on a comprehensive basis: feasibility in separately investing and building, or developing such facilities, degree of reliance of the counterparty on such facilities in effectively running its production and operations, possibilities of such undertaking making available such facilities, and its impact over the production and operations of such undertaking.

Article 5
An undertaking with a dominant market position is prohibited from engaging in any of the following restrictive trading conduct without valid justification:
(1) restricting the counterparty to trade exclusively with itself;
(2) restricting the counterparty to trade exclusively with a designated undertaking;
(3) restricting the counterparty from trading with any of its competitors.

Article 6
An undertaking with a dominant market position is prohibited from tying in products or imposing any other unreasonable trading conditions at the time of the transaction:
(1) forcibly tying in different products or bundling of different products in violation of the trade practices or consumer habits, or in disregard of the functions of the product;

(2) imposing unreasonable restrictions regarding term of the contract, method of payment, transport of the products, manner of delivery and manner in which the services are delivered etc.
(3) imposing unreasonable restrictions regarding sales territory, target customers and after-sales services etc. for the products;
(4) imposing trading conditions irrelevant to the subject product of the transaction.

Article 7
An undertaking with a dominant market position is prohibited from according differential treatment to similarly situated counterparties in respect of conditions of the transaction without valid justification:
(1) offering different trade volumes, grades, qualities;
(2) offering differential preferential conditions, such as differential quantity-based discounts;
(3) applying differential terms of payment and method of delivery;
(4) applying differential after-sales services conditions, such as different warranty services and warranty period, different maintenance items and maintenance period, different spare parts supply and technical instructions.

Article 8
The relevant administration for industry and commerce shall consider the following factors on a comprehensive basis when determining the valid justification as cited in Article 4 to Article 7:
(1) whether the conduct is based on normal operations and for normal benefits of the undertaking;
(2) the effect of the relevant conduct on economic efficiency, public interest and economic growth.

Article 9

Except price monopolistic conduct, the State Administration for Industry and Commerce shall determine, according to laws, any other abuse of dominant market position not expressly covered in these Rules.

Article 10

In finding of a dominant market position, the following factors shall be taken into consideration:

(1) Market share of the undertaking in question, and the competition status in the relevant market.

Market share refers to the turnover, sales volume and other measurements of an undertaking expressed as a percentage in the relevant market over a given period of time.

When analyzing the competition status of relevant market, consideration shall be given to development of the relevant market, number of existing competitors, market shares, differentiation of products and situation of potential competitors, etc..

(2) Ability of the undertaking to control the sales market or the raw materials purchasing market.

When determining the ability of the undertaking to control the sales market or the raw materials purchasing market, consideration shall be given to its ability to control the sales channels or the purchase channels, the ability to impact or determine the price, the output, term or other contract conditions and to have priority access to raw material, such as raw material supplies, semiproducts, part and component, as well as relevant equipment necessary for the production and operation of an undertaking.

(3) The financial and technological conditions of the undertaking.

When determining the financial and technological conditions of the undertaking, consideration shall be given to capital scale, the financial position, the profitability, the financing capability, the R&D capability, technical equipment, technology innovation and application ability, and the intellectual property owned by such undertaking.

Analysis of the financial and technological conditions of the undertaking shall also take into consideration those of its affiliates.
(4) Degree of dependence of other undertakings on the undertaking in question.
When determining the degree of dependence of other undertakings on the undertaking in question, consideration shall be given to transaction volume, duration of the trading relationship with such undertaking in question, and degree of difficulty to switch to other counterparties.
(5) Degree of difficulty for other undertakings to enter the relevant market.
When determining the degree of difficulty for other undertakings to enter the relevant market, considerations shall be given to regulation on the market access, possession of essential facilities, distribution channel, financial and technological
requirements and costs, etc.
(6) Other factors concerning the finding of a dominant market position.

Article 11
Undertakings may be considered to be in a dominant market position in one of the following events:
(1) the market share of one undertaking in relevant market reaches or exceeds 1/2;
(2) the combined market share of two undertakings in relevant market reaches or exceeds 2/3; or
(3) the combined market share of three undertakings in relevant market reaches or exceeds 3/4.
Among those undertakings that fall within Item (2) or (3) of the preceding paragraph, an undertaking shall not be considered to have the dominant market

Article 12

Where an undertaking that is presumed to hold a dominant market position proves that, based on the elements set forth in Article 10, it has no ability to control the price, the output of the product, or other transaction conditions in relevant market, or the ability to prevent or affect entry into the relevant market by other undertakings, it shall not be considered to hold a dominant market position.

Article 13

An undertaking that is suspected of having abused its dominant market position may provide supporting evidence to prove the rationality of the challenged conduct within the time limit stipulated by the Administration for Industry and Commerce authority.

Article 14

Where undertaking abuses the dominant market position thereof, violating Articles 4 to Article 7 and Article 9 of these Rules, the Administration for Industry and Commerce authorities shall order the undertaking to stop the violation, confiscate its illegal gains and impose a fine of 1-10% of the turnover in the previous fiscal year.

The Administration for Industry and Commerce authorities shall consider the nature, circumstances, the seriousness and the duration of the violation and other relevant factors, when determining the specific magnitude of the fine.

Where the undertakings voluntarily cease abuse of dominant market position, they may, to the discretion of the Administration for Industry and Commerce authorities, be given a mitigated penalty or be exempted from penalty.

Article 15

Undertakings that are not satisfied with the administrative penalty or any other rulings by the Administration for Industry and Commerce may apply for an administrative review or bring an administrative action according to law.

Article 16

Anti-Monopoly Law enforcement officials of the Administration for Industry and Commerce authority shall handle cases strictly in accordance with *the Procedural Rules by Administration of Industry and Commerce regarding Investigation and Handling of Cases relating to Monopoly Agreement and Abuse of Dominant Market Position*.

Any Anti-Monopoly Law enforcement official with the AIC authority who misuse his/her authority, neglect his/her duties, engage in malpractices for his/her personal gain, or disclose trade secrets obtained in the law enforcement work shall be punished according to relevant rules and regulations.

Article 17

For the purpose of these Rules, a "product" referred to herein shall include service.

Article 18

The State Administration for Industry and Commerce is responsible to interpret these Rules.

Article 19

These Rules shall come into effect as of February 1, 2011.

SAIC Regulations on Prohibition of Abuse of Administrative Powers

Article 1
These Rules are promulgated in accordance with the *Anti-Monopoly Law of the People's Republic of China* (hereinafter the *Anti-Monopoly Law*) in order to prevent abuse of administrative power for the purpose of eliminating or restricting competition.

Article 2
Administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration shall not abuse their administrative power to eliminate or restrict competition.

Article 3
Administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration shall not abuse their administrative power by engaging in any of the following conducts:
(1) restricting or disguisedly restricting organizations or individuals to deal, purchase, or use products provided by designated undertakings or restricting the normal operation activities of others by expressly requiring, implying, rejecting or postponing administrative licensing, repeatedly inspecting, or any other forms;
(2) blocking or restricting the entry of products originating from other regions into the local market by imposing technical requirements or inspection standards on products originating from other regions that are different from those on local like products, or taking discriminatory technical measures, such as repeated inspection or certification on products originating from other regions;
(3) blocking or restricting the entry of products originating from other regions into the local market by creating administrative licensing targeting products from other regions, or adopting different conditions, procedures, time limit when

implementing administrative licensing on products originating from other regions;
(4) blocking or restricting either the entry of products originating from other regions into the local market or the exit of local products to the market of other regions by setting up checkpoints or other measures;
(5) repulsing or restricting participation of undertakings from other regions in local bidding activities by imposing discriminatory qualification requirements or assessment standards or by failing to publish information in accordance with the law;
(6) repulsing or restricting either investment or the establishment of local branches in their region by undertakings from other regions by adopting discriminatory treatment etc.;
(7) compelling undertakings to conclude and implement monopoly agreement for the purpose of eliminating or restricting competition, or compelling undertakings to
abuse their dominant market position.

Article 4
Administrative agencies shall not abuse their administrative power to promulgate or issue any regulation containing eliminating or restricting competition contents by forms of decision, public notice, announcement, notification, opinion, meeting minutes, or any other forms. The preceding paragraph applies to organizations empowered by laws and regulations to perform the functions of public affairs administration.

Article 5
Undertakings shall not engage in any of the following conducts:
(1) conclude, implement monopoly agreement or abuse dominant market position on the ground of the administrative restriction by administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration;

(2) conclude, implement monopoly agreement or abuse dominant market position on the ground of the administrative authorization by administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration;
(3) conclude, implement monopoly agreement or abuse dominant market position on the ground of the administrative regulation promulgated or issued by administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration.

Article 6
When an administrative agency or an organization empowered by laws and regulations to perform the functions of public affairs administration violates Article 3 or Article 4 of these Rules, SAIC and Provincial AIC may, in accordance with Article 51 of the *Anti-Monopoly Law*, make a proposal on handling of the matter to the relevant superior authority in connection with any abuse of administrative power, and effects thereof, by administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration for the purpose of eliminating or restricting competition.

Article 7
An undertaking which engages in monopolistic conducts in violation of Article 5 hereof shall be dealt with in accordance with the *SAIC Rules on Prohibition of Monopoly Agreements* and the *SAIC Rules on Prohibition of Dominant Market Position*.

Article 8
Where an undertaking has entered into and implemented a monopoly agreement, the AIC authority shall order the undertaking to cease the violation, confiscate the illegal gains, and impose a fine of 1-10% of the turnover in the previous fiscal year; where the monopoly agreement has not been implemented, the offender may be imposed a fine of no more than RMB 500,000.

Where an undertaking abuses its dominant market position, the AIC authority shall order the undertaking to cease the violation, confiscate the illegal gains, and impose a fine of 1-10% of the turnover in the previous fiscal year.

Article 9

Where other laws or administrative regulations provide for the handling of abuses by administrative agencies and organizations empowered by laws and regulations to perform the functions of public affairs administration of their administrative power to engage in conducts that eliminate or restrict competition, those provisions shall apply.

Article 10

Anti-Monopoly Law enforcement officials with the AIC authority shall handle cases strictly in accordance with *Procedural Rules by Administration of Industry and Commerce regarding Investigation and Handling of Cases relating to Monopoly Agreement and Abuse of Dominant Market Position*.

Any Anti-Monopoly Law enforcement official with the AIC authority who misuse his/her authority, neglect his/her duties, engage in malpractices for his/her personal gain, or disclose trade secrets obtained in the law enforcement work shall be punished according to relevant rules and regulations.

Article 11

For the purpose of these Rules, products shall include services.

Article 12

These Rules are subject to interpretation by the State Administration for Industry and Commerce.

Article 13

These Rules shall come into effect on February 1, 2011.

NDRC Regulations on Monopolistic Pricing Behaviors

On December 29 2010, pursuant to the Anti-monopoly Law, the NDRC issued the Regulation against Monopolistic Pricing, entered into force on February 1, 2011.

Article 1
These Regulations have been formulated in accordance with the Anti-Monopoly Law of the People's Republic of China (hereafter referred to as the "Anti-Monopoly Law") to prevent and prohibit price monopoly behavior so as to safeguard fair market competition and protect the interests of consumers and of the public in general.

Article 2
These Regulations shall apply to price monopolies in economic activities within the People's Republic of China. These Regulations shall apply to price monopoly activities outside the territory of the People's Republic of China if such activities eliminate or have a restrictive effect on competition in the domestic market of the People's Republic of China.

Article 3
Price monopoly behavior referred to herein include:
(i) price monopoly agreements entered into by business operators; and
(ii) elimination or restriction of competition by pricing means by business operators who have a market dominant position.

These regulations shall apply in circumstances where administrative authorities or organizations which are authorized by laws or regulations to administer public affairs abuse their administrative power to eliminate or restrict competition on price.

Article 4
Industries that are of vital importance to national economic activity and/or to national security, those in which the state-owned entities dominate, and also the industries that lawfully franchise monopoly are afforded protection for their legitimate business activities by the State, also the State supervises and controls their business activities, determines the pricing of goods and services, safeguards the interests of consumers and promotes technical progress.

Business operators in such industries above-mentioned are charged with particular responsibility to operate lawfully, to conduct themselves with honesty, to be mindful of the need for strict self-discipline and to submit to public supervision. They shall not harm or hinder the interests of consumers by utilizing their market dominant position or exclusivity.

Article 5
The "price monopoly agreements" referred to herein is the agreements, decisions or other concerted actions with respect to price for the purpose of eliminating or restricting competition.

Article 6
The following factors shall be taken into consideration when determining whether or not an action is a concerted action:

(i) whether the price-related activities of business operators are in parallel; and
(ii) whether the business operators have communicated with each other.
When determining whether or not an action is a concerted action, the market structure and variations in market behavior and so forth shall also be factored in.

Article 7
Business operators in competition with each other are prohibited from entering into any of the following price

monopoly agreements:

(i) fixing or changing the price level of goods and services (hereinafter collectively referred to as "goods");
(ii) fixing or changing variations in the range of prices;
(iii) fixing or changing commission charges, discounts or other charges that may affect prices;
(iv) using an agreed price as the basis for transactions with third parties;
(v) agreeing on a standard formula to be used to calculate prices;
(vi) agreeing that no change shall be made to prices without the consent of other business operators;
(vii) fixing or changing prices by other means; and
(viii) other price monopoly agreements as determined by the price regulatory authority of the State Council.

Article 8
The following price monopoly agreements entered into between business operators and trading partners are prohibited:

(i) fixing resale prices of goods;
(ii) setting minimum resale prices of goods; and
(iii) other price monopoly agreements as determined by the price regulatory authorities of the State Council.

Article 9
Industry associations are prohibited from engaging in the following practices:
(i) formulating rules, decisions, notices and so forth which eliminate or restrict price competition;
(ii) assisting or providing facilitation for business operators to reach price monopoly agreements prohibited by these Regulations; and

(iii) assisting or providing facilitation for business operators to reach or execute any other manifestations of price monopoly agreements.

Article 10

Article 7 and Article 8 herein shall not apply to business operators provided they can demonstrate that any agreement entered into by them complies with Article 15 of the Anti-monopoly Law.

Article 11

Business operators that have a market dominant position shall not sell goods at an unfairly high price or purchase goods at an unfairly low price.

When determining what an "unfairly high price" and an "unfairly low price" is, the following factors shall be taken into consideration:

(i) whether the sale price or purchase price is obviously higher or lower than the price at which other business operators can sell or purchase the same goods;
(ii) whether any increase in the sale price or decrease in the purchase price exceeds the normal range while costs remain stable; and;
(iii) whether an increase in the sale price is obviously greater than that in the cost, or the decrease in the purchase price is obviously greater than that in the costs incurred by trading partners; and
(iv) Other factors that need to be taken into consideration.

Article 12

Business operators that have a market dominant position shall not, without a justifiable reason, sell goods at a price lower than the cost.

The "justifiable reason" referred to herein includes:

(i) reducing prices to dispose of perishable goods, seasonal

goods, goods for which the expiry date is imminent and overstocked goods;
(ii) selling goods at lowered prices in order to discharge debts, during the process of changing the line of production or when closing the business.
(iii) promoting new products; and
(iv) other reasons that can be shown to be justifiable.

Article 13
Business operators that have a market dominant position shall not, without a justifiable reason, refuse to transact with trading partners by setting excessively high or low prices.
The "justifiable reason" referred to herein includes:
(i) where the trading partners have severely poor credit records or are experiencing continued deterioration of operating conditions, which may bring great risks to the security of transactions;
(ii) where the trading partners are able to purchase the same or substitute goods from other business operators at a reasonable price, or to sell goods to other business operators at a reasonable price; and
(iii) other reasons that can be shown to be justifiable.

Article 14
Business operators that have a market dominant position shall not, without a justifiable reason, restrict trading partners to transacting only with them or only with business operators nominated by them.

The "justifiable reason" referred to herein includes:
(i) guaranteeing the quality and safety of products;
(ii) maintaining the brand reputation or improving the service;
(iii) being able to significantly reduce costs and improve efficiency, and
enable consumers to share the benefits so accrued; and

(iv) other reasons that can be shown to be justifiable.

Article 15
Business operators that have a market dominant position shall not, without a justifiable reason, levy unreasonable transaction charges beyond the price.

Article 16
Business operators that have a market dominant position shall not, without a justifiable reason, impose selective price discrimination on trading partners who are entitled to the same transactions terms.

Article 17
The market dominant position referred to herein is the market position of a business operator that has the ability to control the price or supply of goods or other transaction conditions in the relevant market or to impede or affect the entry of other business operators into the relevant market.

Other transaction terms refer to factors other than price and supply of goods that have the potential to wield a substantial impact on market transactions, including goods ratings, payment conditions, delivery methods, after-sales services, trade options, technical constraints and so forth.
Impeding or affecting the entry of other business operators into the relevant market refers to preventing other business operators from entering the relevant market or delaying their entry, or preventing other business operators from competing efficiently with existing business operators due to high entry costs even if they are equipped and otherwise qualified to enter the relevant market.

Article 18
The determination of whether or not a business operator enjoys a market dominant position shall be made in consideration of the following factors, on the basis of the definition of the relevant market:

(i) the business operator's market share and the state of competition in the relevant market;
(ii) the business operator's ability to control sales markets or raw materials procurement markets;
(iii) the business operator's financial and technical circumstances;
(iv) the level of dependence of other business operators on the business operator during transactions;
(v) The level of difficulty experienced by other business operators when endeavoring to enter the relevant market; and
(vi) other factors deemed pertinent to determination of the market dominant position of the business operator.

Article 19

In any of the following circumstances, it can be presumed that the business operator has a market dominant position:

(i) the market share of a business operator in the relevant market accounts for 1/2 or more;
(ii) the total market shares of two business operators in the relevant market account for 2/3 or more;
(iii) the total market shares of three business operators in the relevant market account for 3/4 or more.

Notwithstanding the conditions stated in (ii) and (iii) above, a business operator shall not be presumed to have a market dominant position if its own market share is less than 1/10.
If it is evidenced that the business operator, which has been presumed to have a market dominant position, does not have a market dominant position in fact, it shall not be considered to have a market dominant position.

Article 20

Administrative authorities or organizations authorized by laws or regulations to administer public affairs shall not abuse their administrative power so as to hinder the free inter-regional circulation of goods by engaging in any of the following practices:

(i) imposing discriminatory charges on non-local goods;
(ii) imposing discriminatory charge rates on non-local goods;
(iii) setting discriminatory prices for non-local goods; and
(iv) other price settings or charges levies that hinder the free circulation of goods.

Article 21
Administrative authorities or organizations authorized by laws or regulations to administer public affairs shall not abuse their administrative power so as to force business operators to engage in any price monopoly practices prohibited herein.

Article 22
Administrative authorities or organizations shall not abuse their administrative power by formulating any regulation containing provisions that eliminate or restrict competition.

Article 23
If any business operator engages in any of the price monopoly practices stipulated herein, penalties shall be imposed by the price regulatory authorities of the State Council or authorized price regulatory authorities of provincial, autonomous regional or municipal governments in accordance with Article 46, Article 47 and Article 49 of the Anti-Monopoly Law.

Any industry association that violates these Regulations and assists or otherwise provides facilitation for business operators in the industry to enter into price monopoly agreement (s) shall be penalized in accordance with Article 46 and Article 49 of the Anti-Monopoly Law.

Article 24

If administrative authorities or organizations authorized by laws or regulations to administer public affairs abuse their administrative power to eliminate or restrict competition, Article 51 of the Anti-Monopoly Law shall apply.

Article 25

Where business operators refuse to submit relevant materials or information, submit false materials or information, conceal, destroy or transfer evidence, or refuse to submit to an investigation being undertaken by price regulatory authorities or hinder such investigation in other ways, Article 52 of the Anti-Monopoly Law shall apply.

Article 26

These Regulations shall not apply to the exercise of intellectual property rights by business operators in accordance with laws and administrative regulations governing intellectual property rights; however, these Regulations shall apply when a business operator engages in price monopoly practices by abusing its intellectual property rights to eliminate or restrict competition.

Article 27

These Regulations shall not apply to joint or concerted actions carried out by agricultural producers or to the operation of rural economic organizations such as agricultural production, processing, sale, transportation, storage and so forth.

Article 28

The National Reform and Development Commission shall be responsible for the interpretation of these Regulations.

Article 29

These regulations shall become effective as of February 1, 2011. The Interim Regulations regarding Prohibition of Price Monopoly Activities promulgated by the National Reform and

Development Commission on June 18, 2003 are hereby rescinded.

Price Law

(Issued on December 29, 1997 and by President's decree of PRC (No. 92). Adopted at the 29th Meeting of the Standing Committee of the Eighth National People's Congress and implementation as of May 1, 1998.)

CHAPTER ONE - GENERAL PROVISIONS

Article 1 This law is formulated with a view to standardizing price behavior so as to strengthen their role in rational disposition of resources, stabilize the general price level of the market, protect the lawful rights and interests of consumers and business operators and then promote the healthy development of the socialist market economy.

Article 2 The law is applicable to all the price behaviors that occur within the territory of the People's Republic of China.
The term "price" used in the law includes prices of all kinds of merchandise and prices of all kinds of services.
The term "price of merchandise" refers to the prices of all kinds of tangible and non-tangible assets.
The term "price of services" refers to fees collected for services rendered.

Article 3 The State shall introduce and gradually improve the mechanism of regulation of prices mainly through market force and under a kind of macroeconomic control. Under such a mechanism, pricing should be made to accord with the value law with most of the merchandises and services to adopt market regulated prices while only a few of them to be put under government-set or guided prices.
Market-regulated prices refer to prices fixed independently by business operators through market competition.

"Business operator" used in this law refers to legal persons, other organizations or individuals that engage in production or marketing of merchandises or provide paid services.
Government-guided prices refer to prices as fixed by business operators according to benchmark prices and range of the prices as set by the government department in charge of price or other related departments within their term of reference.
Government-set prices as fixed by the government department in charge of prices or related departments within their term of reference according to the provisions of this law.

Article 4 The State shall support and prompt fair, open and legal market competition, maintain normal price order and exercise administration, regulation and necessary control over conduct of prices.

Article 5 The State Council department in charge of prices shall be responsible for the administration of the work related to prices in the whole country and other related departments shall be responsible for such work within their terms of reference.
Price departments of the people's governments at and above the county level shall be responsible for the work related to prices within the regions under their jurisdiction. Price departments of the people's governments at and above the county level shall be responsible for the work related to prices within their terms of reference.

CHAPTER TWO - PRICE BEHAVIOR OF BUSINESS OPERATORS

Article 6 Prices of all merchandises and services, except those as set in Article 18 of this law to adopt government-set or guided prices, shall be subject to market regulation to be fixed by business operators independently according to the provisions of this law.

Article 7 In fixing prices, business operators should follow the principle of fairness, lawfulness, honesty and trustworthiness.

Article 8 Prices should be fixed by business operators basing on the cost of production or operation and market supply and demand.

Article 9 Business operators should strive for a better management to their own production and business operations so as to lower cost and provide consumers with merchandises and services at reasonable prices while obtaining lawful profits in market competition.

Article 10 Business operators should establish and improve their system of internal price management, accurately record and verify the cost of production or operations for their merchandise or services, in which any deception or forgery is not allowed.

Article 11 Operators shall enjoy the following rights in pricing:
1. To fix prices that are subject to market regulation;
2. To fix prices within the guided range as set by the government;
3. To fix prices for new products which are subject to government-set or guided prices, except special products for trial sales; and
4. To report or claim against actions that have infringe upon their rights of independent pricing.

Article 12 In their work related to prices, business operators should strictly keep up with laws, regulations, government guided-prices, government-set prices, legal price intervention measures and emergency measures adopted by the government according to law.

Article 13 In marketing and purchasing merchandises or providing services, business operators should clearly tap the related prices, specify names, places of origin, specifications,

grades, price units, prices or items, fee collection standards and other related information according to the government's regulations.
Business operators must not sell merchandises at prices above the marked prices or collect fees not specified.

Article 14 Business operators must not act whatsoever in the following ways to effect abnormal price behaviors:
1. To work collaboratively with others to control market prices to great detriments to the lawful rights and interests of other business operators or consumers;
2. To engage in dumping sales (except the cases of sales of fresh and live merchandises, seasonal merchandises and stockpiled merchandises at discount) at below-cost prices in order to attain an upper hand over rivals or dominate the market and disrupt the normal production and operation order to great detriments to the interests of the State or the lawful rights and interests of other business operators;
3. To fabricate and spread price rise information for pushing up the prices to excessively high level;
4. To resort to deceitful or misleading means in terms of prices to entice consumers or other business operators into trading in terms of prices;
5. To discriminate in terms of prices same kinds of merchandises or services offered by certain business operators under same trading conditions;
6. To disguisely raise or lower prices at irrational ranges by artificially raising or lowering grades of merchandises or services;
7. To seek exorbitant profits in violation of laws and regulations; and
8. To effect other illicit price behaviors that are forbidden by law or administrative decrees.

Article 15 In collecting fees for services rendered, all intermediary organizations should abide by the provisions of this law, except otherwise provided by other laws.

Article 16 In a bid to keep the domestic market order, business operators must observe related provisions of this chapter in selling imported merchandises or purchasing export merchandises.

Article 17 Organizations of various sectors should abide by laws and regulations governing prices, persist in self-discipline with regard to prices and accept guidance from government price departments.

CHAPTER THREE - PRICE BEHAVIOR OF GOVERNMENT

Article 18 The government shall issue government-set or guided prices for the following merchandises and services if necessary:
1. The few merchandises that are of great importance to development of the national economy and the people's livelihood;
2. The few merchandises that are in shortage of resources;
3. Merchandises of monopoly in nature;
4. Important public utilities;
5. Important services of public welfare in nature.

Article 19 Scope of specific items and uses for government-set or guided prices shall depend on the price catalogs issued by the central and local governments.
Catalogs of central government-set prices shall be fixed and revised by the price department of the State Council an published after the approval of the State Council.
Catalogs of prices to be set by departments of the people's governments of provinces, autonomous regions and municipalities within their power according to scope of specific items and uses as set in the central price catalog and be published with the examination and approval of the people's governments at the same level.

Local people's governments below the provincial, autonomous regional and municipal level shall not make their own price catalogs.

Article 20 State Council price department and other related departments shall fix government-set and guided prices according to scope of items and uses as set in the central prices and the government-set and guided prices for major merchandises and services shall get the approval from the State Council.
Price departments and other related departments of the people's governments of provinces, autonomous regions and municipalities shall fix indicative local government-set and guided prices within their respective power according to scope of items and uses as set in the local price catalogs.
People's governments of cities and counties may fix government-set and guided prices for their localities within their own power according to scope of items and uses as prescribed in the local price catalogs.

Article 21 Government-set and guided prices shall be fixed according to the average cost and market supply and demand of related merchandises or services, the economic and social development and the affordance of the people, allowing rational price differentials between buying and selling, between wholesale and retail sale, among different regions and different seasons.

Article 22 In fixing government-set and guided prices, price departments and other related departments shall carry out investigations into prices and costs and hear views from consumers, business operators and other quarters.
Upon investigated by government price departments and related departments in terms of prices and costs, related units should provide true fact and necessary books, documents and other materials.

Article 23 In fixing government-set and guided prices for public utilities services of public welfare in nature and the

prices for merchandises of monopoly in nature that are important to immediate interest of people public hearings presided over by government price department should be conveyed to solicit views from consumers, business operators and other quarters to explore the necessity and feasibility.

Article 24 After the government-set and guided prices are determined, they shall be made public by the price departments.

Article 25 The scope and level of the government-set and guided prices shall properly be adjusted in the light of the operation of the national economy.
Consumers and business operators may put forward their recommendations with regard to the adjustment of the government-set and guided prices.

CHAPTER FOUR - CONTROL AND ADJUSTMENT TO GENERAL PRICE LEVEL

Article 26 To stabilize the general price level is one of the major objectives of macro-economic policy. The State shall set targets for the monitoring and adjustment of general price level in the light of the requirements of the development of the national economy and the endurance of the people, list them into the national economic and social development programs and help their realization through means of monetary, fiscal, investment and import and export policies and measures.

Article 27 The government shall build a major merchandise reserve system and establish a price regulation fund to control prices and stabilize the market.

Article 28 In order to better control prices, government price departments shall establish a price monitoring system to

monitor changes in the prices of major merchandises and services.

Article 29 Whereas the selling prices of grain and other major farm produce are too low on the market, the government shall introduce protective prices and adopt corresponding measures to ensure the protective prices be put into effect.

Article 30 Whereas prices of major merchandises or services rise sharply or are likely to rise sharply, the State Council and the people's governments of provinces, autonomous regions and municipalities may set limit at disparity of prices or rate of profitability for part of the merchandises, fix price ceilings or introduce other measures for intervention such as a system for announcing or recording price rises.
After adoption of above-mentioned intervention measures, provincial, autonomous regional and municipal people's governments should report to the State Council for the record.

Article 31 When such abnormalities as violent fluctuation in the general price level occur nationwide, the State Council shall introduce power for the concentrated fixation of prices in the whole country or part of the regions for the time being or adopt such emergency measures as freezing part or all prices.

Article 32 The intervention or emergency measures introduced according to the provisions of Article 30 and Article 31 shall be removed or lifted in time when the situations that call for such measures disappear.

CHAPTER FIVE - MONITORING AND CHECKING OF PRICES

Article 33 The price departments of the people's governments at and above the county level exercise monitoring and checking over pricing activities according to law and mete out administrative punishments on acts that violate the law.

Article 34 In exercising monitoring and checking of prices, government price departments shall exercise the following powers:
1. To inquire into people concerned or related personnel and demand for evidences or other materials relating to law-violating acts;
2. To look into and duplicate account books, bills, vouchers, documents or other materias related to price law violating acts and verify banking materials associated with price law violating acts.
3. To check property related to the price law violating acts and, if necessary, order the people concerned to stop business operation.
4. To register and keep some evidences that are liable to be destroyed or kept out of hand or is hard to obtain for which people concerned or related personnel must not in any case remove, hide or destroy.

Article 35 In accepting the monitoring and checking by government price departments, business operators should provide their account books, bills and vouchers, documents or other materials needed for such monitoring and checking.

Article 36 The personnel of government prices departments are wholly prohibited to use materials or information obtained according to law for purposes other than price control or reveal business secrets of the people concerned.

Article 37 Consumer organizations, workers' price monitoring organizations, neighborhood committees, village committees and consumers have the right to exercise monitoring over price activities. Government price departments should give a full play to the monitoring roles of the people.
Medias have the right to mobilize public opinion for the monitoring of prices.

Article 38 Government price departments shall establish a system for reporting acts of violation of the price law.
Any unit or individual has the right to report acts of violation of price law and the government price departments shall encourage such reporting and undertake to keep secret what concerns concerning the reporters.

CHAPTER SIX - LEGAL LIABILITIES

Article 39 Business operators who refuse to implement the government-set or guided prices, legal price intervention measures or emergency measures shall be ordered to correct, have their illegal proceeds confiscated and be fined concurrently for an amount less than five times the illegal proceeds. In cases of no illegal proceeds involved, a fine may still be imposed. For serious cases, they shall be ordered to stop business operation and make correction.

Article 40 Business operators who have violated one of the acts listed in Article 14 of this law shall be ordered to correct, have their illegal proceeds confiscated and be fined concurrently for an amount less than five times the illegal proceeds. In cases of no illegal proceeds involved, a warning shall be issued, together with a fine. For serious cases, they shall be ordered to stop operation for correction or have their business licenses revoked. If other laws have stipulations concerning the punishments for acts listed in Article 14 of this law, the related laws shall prevail.
Whether acts listed in 1, 2 of Article 14 and are of national in nature shall be upon the judgment of the State Council price department and whether the acts are regional in nature, they shall be confirmed by price departments of provincial, autonomous regional and municipal people's governments.

Article 41 Whereas business operators have caused overpayment by consumers or other business operators in violation of price law, the part in excess of the due payment

shall be returned. If damages are done, the business operators shall undertake to compensate for the losses.

Article 42 Whereas business operators violate the provisions about price marking, they shall be ordered to correct, have their proceeds confiscated and be fined concurrently for an amount of less than RMB5,000.

Article 43 For business operators who refuse to stop operation for correction as ordered or remove, hide or destroy things recorded for keeping according to law, a fine ranging from over one time to less than three times the value of the things removed, hidden or destroyed shall be imposed.

Article 44 Business operators who refuse to provide materials needed for price monitoring and checking or provide false materials shall be ordered to correct, with a warning. Whereas they refuse to correct within the prescribed time limit, a fine shall be imposed.

Article 45 Whereas local people's governments at all levels or related government departments at all levels fix or adjust prices beyond their terms of reference or refuse to implement price intervention measures or emergency measures shall be ordered to correct and may be criticized by issuing circulars. People in charge or related people directly responsible shall be given administrative punishments according to law.

Article 46 Whereas government personnel in charge of prices have leaked State secrets, commercial secrets or abused their power, resort to deception for personal gains, commit dereliction of duty or accept bribes and the cases are serious enough as to constitute crimes, criminal responsibilities shall be affixed. If a case is not serious enough to constitute a crime, an administrative punishment shall be meted out.

CHAPTER SEVEN - SUPPLEMENTARY PROVISIONS

Article 47 State administrative organs shall collect fees strictly according to law, limit fee collection items and scope and standards of fee collection. Specific administration methods for such fee collection shall be provided for separately by the State Council.

Interest rates, exchange rates, insurance premium rates, securities and futures prices shall be subject to related laws or administrative decrees instead of this law.

MOFCOM Regulations on Acquisition of Domestic Enterprises by Foreign Investors in China

Come into force as of September 8, 2006.

Chapter I General Principles

Article 1

These Provisions are formulated in accordance with the laws and administrative regulations concerning foreign-invested enterprises, Company Law and other relevant laws and administrative regulations in order to promote and standardize foreign investors' investment in China, introduce foreign advanced technology and management experience, enhance the level of utilizing foreign investment, realize reasonable allocation of resources, ensure employment, safeguard fair competition and national economic security.

Article 2

"Merger with and acquisition of domestic enterprises by foreign investors" in terms of these Regulations means a foreign investor purchases the stock right of a shareholder of a non-foreign-invested enterprise in China (domestic company) or capital increase of a domestic company so as to convert and re-establish a domestic company as a foreign-invested enterprise (equity merger and acquisition); or, a foreign investor establishes a foreign-invested enterprise and purchases and operates the assets of a domestic enterprise by the agreement of that enterprise, or, a foreign investor purchases the assets of a domestic enterprise by agreement and uses this asset investment to establish a foreign-invested enterprise and operate the assets （Asset Merger and Acquisition）

Article 3

Foreign investors' merger with and acquisition of domestic enterprises shall comply with the laws, administrative regulations and rules of China and follow the principles of fairness and reasonableness, consideration for equal value and good faith, shall not result in excessive concentration, exclusion or restriction of competition, and shall not interfere with social economic order or harm social public interests.

Article 4

Foreign investors' merger with and acquisition of domestic enterprises shall comply with the requirements stipulated by laws, administrative regulations and rules of China, and policies concerning industry, land and environment. According to the Guiding Catalogue of Foreign Invested Industry, to an industry that is not allowed to be operated by a sole foreign investor, its merger and acquisition shall not result in foreign investor holding the enterprise's entire equity. To an industry that needs Chinese party to have the holdings or have relative holdings, and the Chinese party shall maintain its holdings or relative holdings in the enterprise after the enterprise in that industry is merged and acquired. To an industry that is forbidden to be operated by a sole foreign investor, the foreign investor shall not merge with or acquire any enterprise in that industry. The business range of the original invested enterprise of the merged or acquired domestic enterprise shall accord with the requirements of the policy concerning foreign-invested industry. Whichever does not meet the requirements shall be readjusted.

Article 5

A foreign investor's merger with or acquisition of domestic enterprises involving the transference of state owned equity and management of state owned equity of listed companies shall abide by corresponding regulations concerning the management of state owned assets.

Article 6

A foreign investor establishes a foreign-invested enterprise by merging or acquiring a domestic enterprise shall be approved

by the examination and approval organ in accordance with the provisions of these Regulations and register for changes or establish a registration to the registration management authority,

Article 7
The persons concerned of all parties concerning foreign investor's merger with and acquisition of domestic enterprises shall pay tax and accept the supervision of taxation authority in accordance with Taxation Law of China.

Article 8
The persons concerned of all parties concerning foreign investor's merger with and acquisition of domestic enterprises shall abide by the laws and administrative regulations of China concerning the administration of foreign exchange, go through the formalities of foreign exchange examination and approval, registration, record and changes in time to foreign exchange authority.

Chapter II Basic Rules

Article 9
If the ratio of financial contribution of a foreign investor in the registered capital of the foreign- invested enterprise established after the merger and acquisition (M&A) is more than 25 percent, this enterprise shall enjoy the treatment of a foreign-invested enterprise. If the ratio of financial contribution of the foreign investor in the registered capital of the foreign-invested enterprise established after merger and acquisition is less than 25%, this enterprise shall not enjoy the treatment of a foreign-invested enterprise except for separate provisions stipulated by laws and administrative regulations.
Its Borrowing external debts shall be handled according to relevant provisions relating to domestic non-foreign-invested

enterprises' borrowing external debts. The examination and approval organ shall issue to it the Approval Certificate of Foreign-invested Enterprises with annotations "ratio of foreign investment less than 25%" (Approval Certificate).
The registration administration authority and foreign exchange administration authority shall issue separately to it the Business License for foreign- invested enterprises with annotations "ratio of foreign investment less than 25%" and Foreign Exchange Registration Card.
If domestic companies, enterprises or natural persons merge or acquire the domestic companies that have something to do with them in the name of the companies legally established or controlled by them in foreign countries, the established foreign-invested enterprises shall not enjoy the treatment of foreign-invested enterprises except that if the company in foreign countries offers to buy the capital increase of domestic companies, or increase capital to the enterprises established by this company in foreign country after merger, the sum of capital increase takes more than 25 per cent of the enterprise's registered capital.
To the foreign- invested enterprise established according to the way as prescribed in this section, except for the actual controller, the foreign investor provide funds more than 25 per cent of the enterprise's registered capital, it may enjoy the treatment of foreign-invested enterprises.
The treatment for the Foreign-invested enterprises established after foreign investor's merger with or acquisition of the domestic listed companies shall be handled in accordance with relevant regulations of the state.

Article 10

In terms of these Regulations, the examination and approval organ is the Ministry of Commerce of the People's Republic of China or provincial commercial authority, the registration authority is State Administration for Industry and Commerce or its authorized local administration for industry and commerce, foreign exchange administrative authority is State Administration of Foreign Exchange and its branches.

If the foreign-invested enterprises established after merger and acquisition are, according to the provisions of laws, administrative regulations and rules, the foreign-invested enterprises of special type or industry that shall be approved by the Ministry of Commerce, provincial examination and approval organ shall submit the applications to the Ministry of Commerce for approval, the Ministry of Commerce will make the decision whether or not to approve it.

Article 11

The domestic companies. Enterprises or natural persons shall, when they merge or acquire domestic companies having something to do with them in the name of the companies in foreign countries legally established or controlled by them, be submitted to the Ministry of Commerce for approval. The person concerned shall not evade above requirements by domestic investment of the foreign-invested enterprises or by other means.

Article 12

If a foreign investor merges or acquires a domestic enterprise and obtains the actual right to control it, and it involves major industry, has or may have the influence on the state security or caused the transference of the actual right of the domestic enterprise owning famous trademark or having a name of long history, the person concerned shall submit a report on it to the Ministry of Commerce.

If a person concerned fails to submit a report, and its merger or acquisition does cause or may cause serious influence on the state economic security, the Ministry of Commerce may, together with corresponding departments, ask the person concerned to stop the deal or transfer corresponding stock ownership, assets or take other effective measures in order to eliminate the influence of the merger or acquisition on the state security.

Article 13

Once a foreign investor annexes stock rights, the foreign invested enterprise established after the annexation shall inherit the creditor's rights and debt of the merged or acquired company. As for the annexation of foreign investor's assets, the domestic enterprise that sold the assets shall bear the original creditor's rights and debt.

The foreign investor, merged and acquired enterprise, creditor and other persons concerned may reach an agreement on the treatment of the creditor's rights and debt of the merged and acquired domestic enterprise, but they shall not harm the third party's interests and social public interests. The treatment agreement on the creditor's rights and debt shall be submitted to the examination and approval organ for approval. The domestic enterprise selling its assets shall, at least 15 days before the investor submits the applications to the examination and approval organ, send the notice to the creditor and publish an announcement in a nationwide newspaper at the level of province and higher.

Article 14

The parties concerned relating to an M&A shall take the value of the stock right to be transferred and the assessment result of the assets to be sold that are made by the assets evaluation institution as the basis of determining the transaction price. The parties concerned relating to an M&A may agree on an asset assessment institution lawfully established within China.

The international used assessment method shall be adopted for the asset assessment. It is prohibited to divert any capital abroad in any disguised form by transferring any equities or selling assets at a price which is obviously lower than the assessment result.

If a foreign investor's M&A of a domestic enterprise causes the modification of any equity formed by the investments of state-owned assets or transference of the property right of state-owned assets, it shall satisfy the relevant provisions of the administration of state-owned assets.

Article 15

The parties concerned relating to a M&A shall make clear whether or not there is a connected relationship between the parties concerned. If two parties belong to a same actual controller, the parties concerned shall disclose their actual controller to the examination and approval organ and make an explanation about whether the purpose of M&A and the assessment result accord with the sound value of the market. The parties concerned shall not evade the aforesaid requirements by trust, holding shares on behalf of others, or other means.

Article 16

A foreign investor shall, to establish a foreign-invested enterprise by merging and acquiring a domestic enterprise, pay all the considerations to the shareholders who transfer the equities or to the domestic enterprise which sells the assets within 3 months from the date of issuing the business license to the foreign-invested enterprise.

If it needs to extend the time limit due to any case under special circumstances, the foreign investor shall, upon the approval of the examination and approval organ, pay 60 per cent or more of the whole consideration within 6 months as of the date of issuing the business license to the foreign-invested enterprise, and pay off the consideration within one year, and distribute the earnings according to the proportion of the actually contributed investments.

Where a foreign investor offers to buy the capital increase of a domestic company, the shareholders of the limited liability company and the domestic joint stock limited company established by the way of initiation shall pay no less than 20% of the newly registered capital when the company applies for a business license for foreign-invested enterprise.

The time to pay the rest financial contribution shall be in line with the provisions of the Company Law, the laws relating to

foreign investments and the Regulations on the Administration of Company Registration.
Provided there are any other provisions stipulated by any other laws or administrative regulations, such provisions shall prevail. Where a limited-liability company issues new stocks for increasing the registered capital, the shareholders shall offer to buy new stocks in accordance with the relevant provisions relating to the share payment for establishing a limited-liability company.
Where a foreign investor carries out an M&A, it shall stipulate the time limit for financial contribution in the contract and articles of the foreign-invested enterprise to be established. Where the foreign investor establishes a foreign-invested enterprise, and through the agreement of this enterprise purchases the assets of a domestic enterprise and operates such assets, it shall pay the contribution of the consideration of the asset within the time limit for the payment of consideration as stipulated in Paragraph 1 of the present Article.
The remaining financial contribution shall satisfy the corresponding provisions relating to the capital contribution for establishing a foreign-invested enterprise. Where a foreign investor establishes a foreign-invested enterprise by merging and acquiring a domestic enterprise, if the proportion of its contribution is less than 25 per cent of the enterprise's registered capital and if it provides funds in cash, it shall pay up it within 3 months from the day when a business license is issued to the foreign-invested enterprise; if it provides funds in kind or industrial property, it shall pay up it within 6 months from the day when a business license is issued to the foreign-invested enterprise.

Article 17

The means of the consideration payment shall accord with the provisions of relevant laws and administrative regulations of the state. If a foreign investor uses the RMB assets it lawfully owns as a means of payment, it shall obtain the approval of the foreign exchange administrations.

If a foreign investor uses the shares which are at its disposition as a means of payment, it shall handle it according to Chapter IV of these Regulations.

Article 18

After a foreign investor purchases the equities of a domestic company by agreement, and the domestic company has been converted into a foreign-invested enterprise, the registered capital of this foreign-invested enterprise shall be the registered capital of the original domestic company, and the proportion of the foreign investor's contribution shall be the proportion of its purchased equities in the original registered capital.

Where a foreign investor offers to buy the capital increase of a domestic limited-liability company, the registered capital of the foreign-invested enterprise established after the M & A shall be the sum of the amount of the registered capital and the capital increase of the former domestic company.

The foreign investor and other former shareholders of the merged and acquired domestic company shall, on the basis of the assets evaluation of the domestic company, determine their respective proportion of capital contributions in the foreign-invested enterprise.

Where a foreign investor offers to buy the capital increase of a domestic limited-liability company, the registered capital shall be determined under the Company Law.

Article 19

As for M&A of the equity by a foreign investor, the foreign-invested enterprise established after the M & A shall determine the upper limits of the total investments according to the following rates except for any other provisions stipulated by the state: (1)If the registered capital is less than US$ 2.1 million, the total investments shall not exceed 10/7 of the registered capital; (2)If the registered capital is more than US$ 2.1 million

to US$ 5 million, the total investments shall not exceed two times the registered capital; (3) If the registered capital is more than US$ 5 million to US$ 12 million, the total investments shall not exceed 2.5 times the registered capital; and (4)If the registered capital is more than US$ 12 million, the total investments shall not exceed 3 times the registered capital.

Article 20

For a foreign investor's M&A of assets, the investor shall, according to the transaction price for purchasing the assets and the actual production and operation scale, determine the total investments of the foreign-invested enterprise to be established.

The proportion between the registered capital and total investments of the foreign-invested enterprise to be established shall conform to the relevant provisions.

Chapter III Examination, Approval and Registration

Article 21

If a foreign investor merges and acquires equity, the investor shall, according to the total investments of the foreign-invested enterprise established after the M&A, the type of the enterprise and the industry it engages in, and in accordance with the provisions of laws, administrative regulations and rules relating to the establishment of foreign-invested enterprises, submit following documents to the examination and approval organ with corresponding authority:

(1) A resolution of the shareholders of the merged domestic limited-liability company on unanimous agreement with the foreign investor's merger with and acquisition of the equity or the resolution of the merged and acquired domestic limited-liability company at the shareholders' conference on agreement with the foreign investor's merger with and acquisition of the equity;

(2) An application of the merged domestic company for converting into a foreign-invested enterprise;

(3) An contract and the articles of the foreign-invested enterprise established after M&A;

(4) An agreement on the foreign investor's acquisition of the shareholders' equities of the domestic company or the foreign investor's purchase of the capital increase of the domestic company;
(5) The financial audit report of the merged domestic company in the previous financial year;
(6) The investor's identity, registration and credit certification that have been notarized and certified according to law;
(7) The descriptions about the enterprises invested by the merged domestic enterprise;
(8) The (duplicates) of the business licenses of the merged domestic company and its invested enterprises;
(9) The plan for the settlement of the employees of the merged domestic enterprise; (10) The documents to be submitted as required by Articles 13, 14 and 15 of these Regulations. If the business scope, scale, right of using a land of the foreign-invested enterprise established after M & A are subject to the license of other corresponding governmental departments, the relevant license shall be submitted along with the foresaid documents.

Article 22

An equity purchase agreement, or capital increase agreement of the domestic company shall apply to Chinese law and contain the following contents:
(1) The status of each party reaching the agreement, including the appellation (name) location, name, occupation and nationality of each legal representative;
(2) The proportion of price of the purchased equities or subscribed capital increase;
(3) The term and method of execution of the agreement;
(4) The rights and obligations of each party reaching the agreement;
(5) The liabilities for breach of contract, and settlement of disputes; and

(6) The time and place for conclusion of the agreement.

Article 23

For an M&A based on assets, the foreign investor shall, according to the total investments of the foreign-invested enterprise to be established, the type of the enterprise and the industry it engages in, and in accordance with the provisions of the laws, administrative regulations and rules relating to the establishment of foreign-invested enterprises, submit the following documents to the examination and approval organ with corresponding authority:

(1) A resolution of the property right holders or power mechanism of the domestic enterprise on agreeing with the sale of assets;

(2) An application for the establishment of a foreign-invested enterprise;

(3) A contract and the articles of the foreign-invested enterprise to be established; (4) An asset purchase agreement signed by the foreign-invested enterprise to be established and the domestic enterprise, or by the foreign investor and the domestic enterprise;

(5)The articles and business license (duplicate) of the merged and acquired domestic enterprise;

(6) The notice of the merged and acquired domestic enterprise, certifications of the announced creditors, and statement about whether the creditors have raised any objections;

(7) The investor's identity, or certificate of opening a business, and relevant credit certificates that have been notarized and certified according to law; (

8) The plan on the settlement of employees of the merged and acquired domestic enterprise; and

(9) The documents as prescribed in Articles 13, 14 and 15 of these Regulations.

If the assets purchased and operated in accordance with previous paragraph involves in the license of other corresponding governmental departments, the relevant licenses shall be submitted along with the preceding documents. Where a foreign investor purchases the assets of a domestic enterprise by agreement and invests such assets in

establishing a foreign-invested enterprise, it shall not, prior to the establishment of the foreign- invested enterprise, use such assets to do any business.

Article 24

The assets purchase agreement shall apply to Chinese law and contain the following main contents:

(1) The status of each party reaching the agreement, including the appellation (name), and location, and the name, occupation and nationality of each legal representative;

(2) The term and method for the execution of the agreement;

(3) The rights and obligations of each part reaching the agreements;

(4) The liabilities for breach of contract, and settlement of disputes;

(5)The time and place for the conclusion of the agreement.

Article 25

Where a foreign investor establish a foreign-invested enterprise by taking over a domestic enterprise, provided there are any other provisions in these Regulations, the examination and approval organ shall, within 30 days after receipt of all documents as stipulated to be submitted, make a decision of approval or disapproval.

If it decides to make a decision of approval, an approval certificate shall be issued by the examination and approval organ. Where a foreign investor purchases the equities of a domestic company by agreement, and the examination and approval organ makes a decision of approval, the investor shall simultaneously send a copy of the approval documents separately to the party that transfers the equities, the foreign exchange administrations in the area where the domestic company is located.

The foreign exchange administrations in the area where the party that transfers the equities is located shall handle the

registration for foreign funds and foreign exchange based on equity-transfer and foreign exchange collection and issue corresponding certificates, which is an effective document proving that the consideration for equity M&A paid by the foreign investor has been in place.

Article 26

Where a foreign investor merges and acquires assets, the investor shall, within 30 days after receipt of the approval certificate, apply to the registration administrations for registration and get the business license for foreign ?invested enterprises.

Where a foreign investor merges and acquires equities, the merged and acquired domestic company shall, in accordance with these Regulations, apply to the original registration administration for modifying its registration and get the business license for foreign-invested enterprises.

If the original registration administration has no authority for registration, it shall, within 10 days after receipt of the application documents, transfer these application documents to the registration administration with authority and simultaneously enclosed the registration files of the domestic company.

When applying for registration modification, the merged and acquired domestic company shall submit the following documents and be responsible for their authenticity and effectiveness:

(1) An application for registration modification;

(2) An agreement on the foreign investor's purchase of equities of the domestic company or subscription of capital increase of a domestic company;

(3) The revised regulations of the company or the amendment of the original regulations, and the contract of the foreign-invested enterprise which shall be submitted in accordance with law;

(4) The approval certificate for foreign-invested enterprises;

(5) The certification for the foreign investor's subject qualification or the identity of natural person;

(6) The revised name list of the members of the board of directors, the documents with the name and domicile of the new directors, and the appoint documents for the new directors;
(7) Other relevant documents and certificates as stipulated by the State Administration for Industry and Commerce.
The investor shall, within 30 days after receipt of the business license for foreign-invested enterprises, go through the registration formalities in the taxation, customs, land administration and foreign exchange administration authorities.

Chapter IV Foreign Investors' M&A of Domestic Companies Based on the Payment of Equities Section 1 Requirements for Equity M&A

Article 27

"Foreign Investors' M&A of Domestic Companies Based on the Payment of Equities" in terms of these Regulations means that the shareholders of an overseas company purchase the equities or increased shares of a domestic company by paying its equities or the increased shares.

Article 28

"Overseas company" in terms of this Chapter shall be established lawfully and there is a perfect system of company law in its registration place, and the company and its management level have no record of punishment made by the supervision administration in recent 3 years. Except for the companies with special-purpose as mentioned in Section 3 of this Chapter, an overseas company shall be a listed company and there shall be a perfect system for dealing in securities in the place where it gets listed.

Article 29

The equities of a domestic company involving in a foreign investor's M&A of equities shall meet the following conditions: (1) Lawfully held by the shareholders and may be transferred in accordance with the law; (2) No dispute over their ownership, no hypothecation and any other restrictions on rights; (3) The equities of an overseas company shall be listed publicly in an overseas open and lawful securities exchange market (excluding the over-counter exchange market); and (4)The transaction price of the equities of the overseas company in recent one year remains stable. The Items (3) and (4) of the preceding Paragraph is inapplicable to the companies with special-purpose as mentioned in Section 3 of this Chapter.

Article 30

Where a foreign investor merges and acquires a domestic company based on the equities, the domestic company or its shareholders shall engage an intermediary institution registered within China to serve as a consultant (hereinafter referred to as the "M&A consultant"). The M&A consultant shall make duteous investigations on the genuineness of the application documents for M&A, the financial status of the overseas company and whether the M&A meets the requirements of Articles 14, 28 and 29 of these Regulations, and provide a M&A consultant report and put forward clear-cut professional comments on each of the aforesaid items.

Article 31

A M&A consultant shall satisfy the following requirements: (1) Having a good reputation and corresponding experiences; (2) No record of serious violation of any law or regulation; and (3) Being capable of investigating and analyzing the legal systems of the registration place of the overseas company and the place where the overseas company is get listed, and the financial status of the overseas company. Section 2 Application Documents and Procedures

Article 32

An equity M&A of a domestic company by a foreign investor shall be submitted to the Ministry of Commerce for the

examination and approval The domestic company shall not only submit the documents as required in Chapter III of these Regulations but also the following documents: (1) A statement of the equity changes and major assets changes of the domestic company in recent one year; (2) A M&A consultant's report; (3) The business opening certifications or identity certification of the domestic and overseas companies involved and their shareholders; (4) Descriptions about the equities held by the shareholders of the overseas company, and the name list of the shareholders holding 5 % or more of the equities of the overseas company; (5) The Regulations of the overseas company and a description about external guaranties; and (6) The financial paper audited in the past annual year and a report on the stock dealings in the past half year of the overseas company.

Article 33

The Ministry of Commerce shall, within 30 days after receipt of all submitted documents as stipulated, examine the application for M&A. If the application meet the requirements, an approval certificate shall be issued, on which the remark that "A foreign investor's equity M&A of a domestic company" shall be given, and the business license shall be valid for 6 months as of the day when it is issued."

Article 34

A domestic company shall, within 30 days after receiving the foresaid certificate, it shall go through the formalities for changes in the registration administration and the foreign exchange administration. The registration administration and the foreign exchange administration shall respectively issue to it a business license for foreign-invested enterprises and a foreign exchange registration card with annotations that "Valid for 8 months as of the date of issuance".

When a domestic company goes through the formalities for registration modification in the registration administration, it shall, in advance, submit an application for equity conversion, amendment of the company's regulation, agreement of equity transference and other documents signed by the legal representative of the domestic company for the purposes of resuming the equity structure.

Article 35

Within 6 months as of the date of issuance of a business license, the domestic company or its shareholders shall, in regard to the matters relating to holding the equities of the overseas company, apply to the Ministry of Commerce and the foreign exchange administrations for going through the formalities of the examination, approval and registration for investing in an enterprise abroad.

Besides the documents as stipulated in the Rules on the Examination and Approval of Investing in Enterprises Abroad, the parties concerned shall submit to the Ministry of Commerce the approval certificate for foreign-invested enterprises with the said annotation and a the business license for foreign-invested enterprises with the said annotation.

After the examination and approval of the overseas company's equities held by the domestic company or its shareholders, the Ministry of Commerce shall issue the approval certificate of Chinese enterprise investment overseas and replace the approval certificate of foreign-invested enterprises with no annotation by a one with annotation.

After a domestic company obtains the approval certificate of foreign-invested enterprise without annotation, it shall, within 30 days, apply to the registration administration and the foreign exchange administration for replacing the business license of foreign-invested enterprise and the foreign exchange registration card without annotation by a one with annotation.

Article 36

Within 6 months as of the date of issuance of a business license, if the domestic and overseas companies fail to go through the formalities of equity modification, the approval certificate with

annotation and approval certificate of Chinese enterprise overseas investment shall be invalid automatically.
The registration administration shall, according to the application documents for registration of equity modification submitted by the domestic company in advance, examine and approve the modification registration and resume the equity structure of the domestic company to the status before the equity M&A.
If a domestic company fails to increase shares, before the registration administration examines and approves the modification registration according to the preceding Paragraph, the domestic company shall, in accordance with the provisions of the Company Law, reduce the registered capital correspondingly and make an announcement in a newspaper.
If a domestic company fails to go through the corresponding registration formalities according to the preceding Paragraph, it shall be punished by the registration administration in accordance with relevant provisions of the Regulations on the Administration of Company Registration.

Article 37
Before obtaining the approval certificate of foreign-invested enterprise and a foreign exchange registration certificate without annotation, it shall not distribute its profits to its shareholders, provide a guarantee to any connected company, pay the capital items such as the equity transfer, capital decrease or liquidation.

Article 38
A domestic company or its shareholders shall go through the tax modification registration in the taxation administration by the approval document and business license without annotation issued by the Ministry of Commerce and the registration administration. Section 3 Special provisions for the company with special purpose

Article 39

"The company with special-purpose" in terms of these Regulations refers to an overseas company directly or indirectly controlled by a domestic company or a natural person for the purpose of making the equities of its actual owned domestic company to be listed abroad.

The provisions of this Section shall apply to the company with special purpose that purchases the equities of the shareholders of a domestic company or the additionally issued shares of a domestic company by paying its equities or its additionally issued shares in order to be listed abroad.

If the parties concerned makes an overseas company holding the equities of a the company with special purpose as a subject to get listed abroad, this overseas company shall satisfy corresponding requirements for the company with special purpose as prescribed in this Section.

Article 40

The listing transaction abroad of the company with special-purpose shall be approved by the securities regulatory administration of the State Council. The country or region where the company with special purpose shall have perfect laws and supervision system and the securities supervision administration of this country or region shall have signed a memorandum of understanding for supervision cooperation with the securities supervision administration of the State Council and keep an effective supervision cooperation.

Article 41

A domestic company with its equities listed abroad as mentioned in this Section shall satisfy the following requirements: (1) Its property right is clear. No dispute or potential dispute over its property right; (2) Having a complete business system and good sustainable operation capacity; (3) Having a sound corporate governance structure and internal management system; and (4) The company and its main shareholders have no record of serious violation of any law or regulations in recent three years.

Article 42

Where a domestic company set up a company with special purpose abroad, it shall apply to the Ministry of Commerce for going through the examination and approval formalities.

When going through such formalities, the domestic company shall, besides the documents as required in the Rules on the Examination and Approval of Investing in Enterprises Abroad, submit the following documents simultaneously: (1) The identity of the final controller of the company with special purpose; (2) The business plan on the overseas listing of the company with special purpose; and (3) The assessment report made by the M&A consultant on the issuing price of the stock to be listed abroad in the future.

After obtaining the approval document of the investment abroad for Chinese enterprise, the person who establishes or controls the company shall apply to the foreign exchange administration in the area where the company is located for going through the formalities relating to the registration of foreign exchange for overseas investments.

Article 43

The total value of issuing the stocks listed abroad of the company with special purpose shall not be lower than the value of the equities M&A of the domestic company assessed by the relevant asset assessment institution.

Article 44

Where a company with special purpose merges and acquires a domestic company by equities, the domestic company shall, besides the documents as required in Article 32 of these Regulations, submit to the Ministry of Commerce the following documents: (1) The approval documents and certificate for the investment in an enterprise abroad when the company with special purpose is established; (2) Registration Form of foreign

exchange for the investments abroad of the company with special purpose; (3) The identity or the business opening certification or regulations of the final controller of the company with special purpose; (4) The business plan on listing abroad of the company with special purpose; and (5)The assessment report made by the M&A consultant on the issuing price of the stock to be listed abroad in the future.

If the overseas company holding the equities of the company with special purpose serves as a subject to be listed abroad, the domestic company shall also submit the following documents: (1) The business opening certification and the regulations of the overseas company; and (2) The detailed descriptions by the company with special purposes and the overseas company to the equities transaction arrangement and the discount method.

Article 45

If the Ministry of Commerce approves the documents as required in Article 44 of these Regulations after preliminary examination, it shall issue a letter of principle approval letter.

The domestic company shall, by the principle approval letter, submit the documents for listing application to the securities supervision administration of the State Council. The securities supervision administration of the State Council shall make a decision on approval or disapproval within 20 working days. After the domestic company obtains the approval, it shall apply for the approval certificate to the Ministry of Commerce.

The Ministry of Commerce shall issue to it an approval certificate with the annotation "Equities holding by the overseas company with special purpose, and valid for 1 year as of the issuance of a business license".

If the M&A causes the change of equities of company with special purpose, the domestic company or natural person holding the equities of the company with special purpose shall, by approval certificate for foreign- invested enterprises with annotation, apply to the Ministry of Commerce for going through the examination and approval formalities for the changes of the investment in an enterprise abroad on corresponding items.

Article 46

The domestic company shall, within 30 days after receipt of the approval certificate with annotation, apply for the modification registration to the registration administration and the foreign exchange administration for modifying the registration.

The registration administration and the foreign exchange administration shall respectively issue business license and foreign exchange registration card for foreign- invested enterprises with annotation " Be valid for 14 months as of the date of issuance".

When the domestic company handles the modification registration in the registration administration, it shall, in advance, submit the equity change application, the amendment of the company's regulations, the equity transfer agreement and other documents signed by the legal representative of the domestic company for the purposes of resuming the equities structure.

Article 47

The domestic company shall, within 30 days after the company with special purpose or its connected overseas company realizes the overseas listing, report to the Ministry of Commerce the information about the overseas listing and its plan on the repatriation of financial income, and apply for a the replacement of an approval certificate for foreign-invested enterprises with annotation.

At the same time, the domestic company shall, within 30 days after the realization of overseas listing, report to the securities supervision administration of the State Council the information about the overseas listing and provide with corresponding documents for the record.

It shall also submit its plan on repatriation of financial income to the foreign exchange administration and execute this plan under the supervision of the foreign exchange administration.

It shall, within 30 days after receiving the approval certificate without annotation, apply for the replacement of the business license and foreign exchange registration card to the registration administration and foreign exchange administration with annotation.
If the domestic company fails to report to the Ministry of Commerce within the aforesaid time limit, the approval certificate of the domestic company with annotation shall be invalid automatically, its equities structure will resume to the state before the equity M&A, and it shall go through the formalities for modifying the registration in accordance with Article 36 of these Regulations.

Article 48

The financial income from overseas listing of the company with special purpose shall, according to the repatriation plan submitted to the foreign exchange administration for the record, be repatriated according to current regulations for administration of foreign exchange.
The financial income may be repatriated by following means: (1) providing commercial loans to the domestic company; (2) setting up a new foreign-invested enterprise within the territory of China; and (3) M & A of a domestic enterprise. To repatriate the financial income of a company with special purpose under the aforesaid circumstances, the person concerned shall abide by the laws and administrative regulations of China on the administration of foreign investments and foreign debts.
If the repatriation of the overseas financial income of a company with special purpose causes the domestic company and natural person to hold more equities of the company with special purpose or increase the net assets of the company with special purpose, the persons concerned shall disclose the relevant information and report for approval according to the fact, and go through corresponding formalities for the registration of foreign exchange of foreign investments and registration modification of overseas investments .
The foreign exchange income from profit, bonus and capital change obtained by the domestic company or natural person

from the company with special purpose shall be repatriated within 6 months after the date of obtainment.
The profit or bonus may enter into current account for foreign exchange or be converted into RMB. The foreign exchange income from capital change may, with the examination and approval of the foreign exchange administration, be deposited in the special capital account or be converted into RMB.

Article 49
Within 1 year after the date of issuance of a business license, if the domestic company fails to obtain the approval certificate without annotation, the approval certificate with annotation shall be invalid automatically, and modification registration shall be handled in accordance with Article 36 of these Regulations.

Article 50
After the company with special purpose realizes the overseas listing and the domestic company obtains the approval certificate and business license without annotation, if the person concerned continues to M&A this domestic company by paying its equities, it shall apply to the provisions of Sections 1 and 2 of this Chapter.

Chapter V Anti-monopolization Examination

Article 51
If a foreign investor merges and acquires a domestic company under any of the following circumstances, the investor shall report the information involved to the Ministry of Commerce and the State Administration for Industry and Commerce: (1) The business volume of any party of the M&A in Chinese market in current year o exceeds RMB 1.5 billion yuan; (2) Merging and acquiring more than 10 enterprises in the domestic connective industries within 1 year; (3) The market share of any party

relating to the M&A has reached 20% in Chinese market; and (4)The M&A leads to the fact that the market share of the party to the M&A has reached 25% in China.
Though failing to meet foresaid requirements, but at the request of the domestic enterprise with competition relationship, the relevant functional department or industrial association, the Ministry of Commerce or the State Administration for Industry and Commerce believes that the market share of the foreign investor M&A is huge, or there are other major factors which seriously impact the market competition, it may demand the foreign investor to provide a report.
The aforesaid persons concerned include the enterprises being related to the foreign investor.

Article 52
If the M&A of a domestic company by a foreign investor is under any of the circumstances as prescribed in Article 51 and if the Ministry of Commerce and the State Administration for Industry and Commerce believe that it may lead to excessive concentration, hamper fair competition or harm the consumer's interests, they shall, within 90 days as of the date of receipt of all the submitted documents as stipulated, either jointly or solely convene through negotiation the relevant departments, institutions, enterprises and other interested parties to hold a hearing, and make a decision on approval or disapproval in accordance with the law.

Article 53
If an overseas M&A is under any of the following circumstances, the parties that carry out the M&A shall, before announcing the M&A plan or when submitting it to the competent authority in the country where it is located, submit the M&A plan to the Ministry of Commerce and the State Administration for Industry and Commerce.
The Ministry of Commerce and the State Administration for Industry and Commerce shall examine whether it will lead to excessive centralization in the domestic market, hinder domestic fair competition, or harm domestic consumers'

benefits, and then make a decision on approval or disapproval: (1) The overseas party of the M&A owns assets of more than RMB 3 billion Yuan in the territory of China; (2) The business volume of the overseas party of the M&A in the Chinese market is more than RMB 1.5 billion yuan in the current year; (3) The market share of the overseas party of the M&A and its connected enterprises in Chinese Market has reached 20%; (4) Due to overseas M&A, the market share of the overseas party of the M&A and its connected enterprises in China has reached 25%; or (5) Due to overseas M&A, there will be more than 15 foreign-invested enterprises participating directly or indirectly in equities of corresponding domestic industries.

Article 54

Where a M&A is under any of the following circumstances, any party of the M&A may apply for examination exemption to the Ministry of Commerce and the State Administration for Industry and Commerce: (1) May improve the conditions for market fair competition; (2) Re-organizing losing enterprises and ensure outplacement; (3) Introduce advanced technology and qualified management personnel and be able to improve the enterprise's international competitiveness; or (4) May improve the environment.

Chapter VI Supplementary Provisions

Article 55

These Regulations is applicable to the case that an investment company established by a foreign investor within China merges and acquires a domestic enterprise.

Where a foreign investor purchases the equities of the shareholder of a foreign-invested enterprise in China or offer to buy the capital increase of a foreign-invested enterprise in China, it shall be applicable to current laws, administrative regulations on foreign-invested enterprises as well as

corresponding provisions on equities changes of the investors of foreign-invested enterprise. If any case is not covered by the aforesaid laws, administrative regulations or provisions, it shall be handled according to these Regulations.
Where a foreign investor merges or acquires a domestic enterprise through a foreign-invested enterprise established by it within China, it shall apply to corresponding provisions on the combination and split-up of foreign-invested enterprises and corresponding provisions on domestic investment of foreign-invested enterprise.
If any case is not covered by the aforesaid provisions, it shall be handled according to these Regulations.
Where a foreign investor merges and acquires a domestic limited liability company and transforms it into a joint stock limited company, or if the domestic company is a joint stock limited company, it shall be applicable. to the corresponding provisions on the establishment of a joint stock limited company; if any case is not covered by the aforesaid provisions, it shall be applicable to these Regulations.

Article 56
An applicant or declarer shall submit the documents after classifying the documents into different categories and the catalogue is enclosed in accordance with these Regulations.. All documents required to be submitted shall be written in Chinese.

Article 57
A Chinese natural-person shareholder of a domestic company taken over by equities may, after obtaining the approval, continue to be a Chinese investor of the foreign-invested enterprise established after modification.

Article 58
If a natural-person shareholder of a domestic company changes his nationality, the enterprise nature of the company shall not be changed.

Article 59

The staffs of corresponding governmental authorities shall be devoted to their duties, perform their duties in accordance with the law, and shall not seek any improper benefit by taking the advantage of their positions, and shall keep confidential the commercial secrets they have known.

Article 60

Where an investor from Hong Kong Special Administrative Region, Macao Special Administrative Region or Taiwan Region mergers and acquires a enterprise of any other region in China, it shall be handled according to these Regulations.

Article 61

These Regulations shall come into force as of September 8, 2006.

Law Against Unfair Competition

Chapter I General Provisions

Article 1. This Law is formulated with a view to safeguarding the healthy development of the socialist market economy, encouraging and protect fair competition, preventing acts of unfair competition, and defending the lawful rights and interests of operators and consumers.

Article 2. An operator shall, in transactions in the market, follow the principle of voluntariness, equality, fairness, honesty and credibility, and observe generally recognized business ethics. "Unfair competition" in this Law refers to acts of operator which contravene the provisions of this Law, damage the lawful rights and interests of other operator, and disturb the socio-economic order.

"Operator" in this Law refers to a legal person or other economic organization or individual engaging in the trading of goods or profit-making services. ("Goods" mentioned hereinafter include services.)

Article 3. The People's Governments at various levels shall adopt measures to prevent acts of unfair competition and create a favorable environment and conditions for fair competition. The administrative authorities for industry and commerce in the People' s Governments above the county level shall supervise and inspect acts of unfair competition. In respect of those acts which, according to the provisions of various laws and administrative regulations, are subject to supervision and inspection by other departments, these provisions shall be abided by.

Article 4. The state encourages, supports and protects all organizations and individuals in carrying out social supervision

over acts of unfair competition.

Staff members of State organs shall not support or cover up acts of unfair competition

Chapter II Acts of Unfair Competition

Article 5. An operator may not adopt the following unfair means to carry to transactions in the market and cause damage to competitors:

(1) passing off the registered trademark of another person;

(2) using, without authorization, the name, packaging or decoration peculiar to well-known goods or using a name, packaging or decoration similar to that of well-known goods, so that his goods are confused with the well-known goods of another person, causing buyers to mistake them for the well-known goods of the other person;

(3) using, without authorization, the business name or personal name of the other person on his own goods, leading people to mistake them for the goods of the other person;

(4) forging or falsely using, on his goods, symbols of quality such as symbols of certification and symbols of famous and high-quality goods, falsifying the origin of his goods, and making false representations which are misleading as to the quality of the goods.

Article 6. A public utility enterprise or any other operator having monopolistic status according to law may not restrict

others to buying the goods of operators designated by it so as to exclude other operators from competing fairly.

Article 7. Governments and their subordinate departments may not abuse their administrative powers to restrict others to buying the goods of operators designated by them and to restrict the lawful business activities of other operators.

Governments and their subordinate departments shall not abuse their administrative powers to restrict the entry of goods from other parts of the country into the local market or the flow of local goods to markets in other parts of the country.

Article 8. An operator may not practice bribery by using money, gifts or other means to sell or buy goods. Where an operator secretly pays a kickback to the other party, be it an entity or individual, without accounting for it in the books, he shall be punished for offering a bribe; where the other party, be it an entity or individual, secretly accepts a kickback without accounting for it in the books, it or he shall be punished for taking a bribe.

In the selling or buying of goods, an operator may express clearly his intention to offer a discount to the other party and pay a commission to the middleman. Where an operator gives a discount to the other party and pays a commission to the middleman, he must enter the items in the books factually. An operator accepting a discount or commission must enter it in the books factually.

Article 9. An operator may not use advertisements or other means to give false, misleading publicity as to the quality, composition, performance, use, manufacturer, useful life, origin, etc. , of the goods.

An advertisement operator shall not act as an agent for, or design, produce or release advertisements containing false representations of which he is obviously aware or should be aware.

Article 10. An operator may not adopt the following means to infringe business secrets:

(1) obtaining business secrets from the owners of rights by stealing, promising of gain, resorting to coercion or other improper means;

(2) disclosing, using, or allowing others to use business secrets of the owners of rights obtained by the means mentioned in the preceding item;

(3) disclosing, using or allowing others to use business secrets that he has obtained by breaking an engagement or disregarding the requirement of the owners of the rights to maintain the business secrets in confidence.

Where a third party obtains, uses or discloses the business secrets of others when he obviously has or should have full awareness of the illegal acts mentioned in the preceding paragraph, he shall be deemed to have infringed the business secrets of others.

"Business secret" in this Article means technical information and operational information which is not known to the public, which is capable of bringing economic benefits to the owner of rights, which has practical applicability and which the owner of rights has taken measures to keep secret.

Article 11. An operator may not sell goods at a price below cost for the purpose of excluding his competitors.

None of the following acts constitute acts of unfair competition:

(1) selling fresh or live goods;

(2) disposing of goods the useful life of which is about to expire or other overstocked goods;

(3) reducing prices seasonably;

(4) selling goods at reduced prices for paying off debts, changing the line of production or closing the business.

Article 12. An operator may not, in sales of goods, make a tie-in sale against the wish of the buyer or attach other unreasonable conditions.

Article 13. An operator may not make the following kinds of sales with prizes attached:

(1) making sales with prizes attached by the fraudulent method of falsely claiming the existence of prizes or intentionally causing internally chosen people to win the prizes;

(2) promoting the sale of inferior but high-priced goods by offering prizes;

(3) making sales with prizes attached in the form of a lottery where the amount for the highest prize exceeds 5 , 000 yuan (RMB).

Article 14. An operator may not utter or disseminate falsehoods to damage the goodwill of a competitor or the reputation of his goods

Article 15. Tenderers may not submit tenders in collusion with one another to force the tender price up or down.

A tenderer shall not collaborate with the party inviting tenders to exclude competitors from fair competition.

Chapter III Supervision and Inspection

Article 16. The supervising and inspecting authorities above the county level may exercise supervision over and carry out inspection of acts of unfair competition.

Article 17. In exercising supervision over and carrying Out inspection of acts of unfair competition, the supervising and inspecting authorities are entitled to exercise the following functions and powers:

(1) questioning operators under scrutiny, interested parties and witnesses, and requiring them to provide evidential material or other information related to acts of unfair competition in accordance with prescribed procedure;

(2) consulting and copying written agreements, account books, receipts, bills, vouchers, invoices, documents, records, business correspondence and other material related to acts of unfair competition;

(3) inspecting property related to acts of unfair competition as stipulated in Article 5 of this Law and, where necessary, ordering the operator under investigation to explain the source and quantity of the goods, temporarily stop selling them pending inspection, and not to remove, conceal or destroy them.

Article 18. When exercising supervision over and carrying Out inspection of acts of unfair competition, members of the supervising and inspecting authorities shall produce warrants of inspection.

Article 19. When the supervising and inspecting authorities are exercising supervision over and carrying out inspection of

acts of unfair competition, the operators under investigation, interested parties and witnesses shall truthfully provide them with relevant data or information.

Chapter IV Legal Responsibility

Article 20. Where an operator, in contravention of the provisions of this Law, causes damage to the injured operator, he shall bear the responsibility for compensating the damages. Where the losses suffered by the injured operator are difficult to calculate, the amount of damages shall be the profits gained by the infringer during the period of infringement through the infringing act. The infringer shall also bear all reasonable costs paid by the injured operator in investigating the acts of unfair competition committed by the operator suspected of infringing his lawful rights and interests.

Where the lawful rights and interests of the injured operator are damaged by the acts of unfair competition, he may institute proceedings before a People' s Court.

Article 21. Where an operator passes off the registered trademark of another person, uses the business name or personal name of another person without authorization, forges or falsely uses symbols of quality such as symbols of certification and symbols of famous and high-quality goods, falsifies the origin of the goods and makes false representations which are misleading as to the quality of the goods, he shall be punished in accordance with the provisions of the Trademark Law and the Product Quality Law of the People' s Republic of China.

Where an operator uses, without authorization, the name, packaging or decoration peculiar to well-known goods or uses the name, packaging or decoration similar to that of well-known goods so that his goods are confused with the well-

known goods of another person, causing buyers to mistake them for the well-known goods, the relevant supervising and inspecting authority shall order him to cease the offense, confiscate the illegal income, and may impose, according to circumstances, a fine of more than twice and less than three times the amount of illegal income; where the circumstances are serious, the said authority may revoke his business license; where an operator sells goods which are counterfeit or of inferior quality, constituting a crime, his criminal responsibilities shall be investigated according to law.

Article 22. Where an operator practices bribery, by using money, gifts or other means to sell or buy goods, constituting a crime, his criminal responsibilities shall be investigated according to law; where the act does not constitute a crime, the relevant supervising and inspecting authority may, according to circumstances, impose a fine of more than 10, 000 yuan (RMB) and less than 200, 000 yuan (RMB). His illegal income, if any, shall be confiscated.

Article 23. Where a public utility enterprise or any other operator having monopolistic status according to law restricts others to buying the goods of operators designated by it so as to exclude other operators from competing fairly, the supervising and inspecting authorities at the level of provinces or municipalities which are divided into districts shall order it to desist from the illegal acts and may punish it by imposing, according to circumstances, fines of more than 50, 000 yuan (RMB) and less than 200, 000 yuan (RMB). Where the designated operators take advantage of the arrangement to foist inferior but high-priced goods on buyers or make exorbitant charges, the supervising and inspecting authorities shall confiscate the illegal income and may, according to circumstances, impose fines of more than twice and less than three times the illegal income.

Article 24. Where an operator uses advertisement or other means to give false, misleading publicity to his goods, the relevant supervising and inspecting authority shall order him to desist from the illegal act, dispel the bad influence, and may, according to circumstances, impose a fine of more than 10, 000 yuan (RMB) and less than 200,000 yuan (RMB).

Where an advertisement operator acts as an agent for, or designs, produces or releases advertisements containing false representations of which he is obviously aware or should be aware, the relevant supervising and inspecting authority shall order him to desist from the illegal act, confiscate his illegal income, and impose a fine on him according to law.

Article 25. Where any party infringes the business secret of another person in contravention ofthe provisions of Article 10 of this Law, the relevant supervising and inspecting authority shall order him to desist from the illegal act and may, according to circumstances, impose on him a fine of more than 10,000 yuan (RMB) and less than 200,000 yuan (RMB).

Article 26. Where an operator makes sales with prizes attached in contravention of the provisions of Article 13 of this Law, the relevant supervising and inspecting authority shall order him to desist from the illegal act and may, according to circumstances, impose on him a fine of more than 10,000 yuan (RMB) and less than 100,000 yuan (RMB).

Article 27. Where tenderers submit tenders in collusion with one another to force the tender price up or down, or where a tenderer collaborates with the party inviting tenders to exclude competitors from competing fairly, his successful bid is null and void. The supervising and inspecting authority may, according to circumstances, impose on them a fine of more than 10,000 yuan (RMB) and less than 200,000 yuan (RMB).

Article 28. Where an operator commits an act in contravention of an order to temporarily stop selling, and not to remove, conceal or destroy, property related to acts of unfair

competition, the relevant supervising and inspecting authority may, according to circumstances, impose on him a fine of more than twice and less than three times the price of the property which has been sold, removed, concealed or destroyed.

Article 29. Where a party is not satisfied with the decision on punishment made by the relevant supervising and inspecting authority, he may, within 15 days from the date of receipt of the decision on punishment, apply to the competent authority at the next highest level for reconsideration; where the party is not satisfied with the decision made after reconsideration, he may, within 15 days from the date of receipt of the written decision made after reconsideration, institute proceedings before a People's court. The party may also directly institute proceedings before a People's Court.

Article 30. Where a government and its subordinate departments, in contravention to the provisions of Article 7 of this Law, restrict others to buying the goods of operators designated by them, restrict the legitimate business activities of other operators, or restrict the normal flow of goods between regions, the higher authorities shall order them to rectify the situation; where the circumstances are serious, the competent authorities at the same level or the next highest level shall impose disciplinary sanctions on the persons directly responsible. Where the designated operators, taking advantage of this arrangement, foist inferior but high-priced goods on buyers or make exorbitant charges, the supervising and inspecting authorities shall confiscate the illegal income and may, according to circumstances, impose a fine of more than twice and less than three times the illegal income.

Article 31. Where a staff member of the State organ responsible for supervision over and inspection of acts of unfair competition abuses his powers and neglects his duty,

constituting a crime, his criminal responsibilities shall be investigated according to law; where the act does not constitute a crime, he shall be subject to disciplinary sanction.

Article 32. Where a staff member of the State organ responsible for supervision over and inspection of acts of unfair competition practices illegally out of personal consideration, intentionally covers up for an operator and causes him to avoid prosecution, obviously knowing that he has contravened the provisions of this Law, constituting a crime, the said staff member's criminal responsibilities shall be investigated according to law.

Chapter V Supplementary Provision

Article 33. This Law shall enter into force as of December 1, 1993

Bidding Law

(Adopted at the 11th Meeting of the Standing Committee of the Ninth National People's Congress on August 30, 1999 and promulgated by Order No. 21 of the President of the People's Republic of China on August 30, 1999)

General Provisions

Article 1

This Law is enacted in order to regulate bid invitation and bidding activities, protect the interests of the State and the public as well as the lawful rights and interests of the parties involved in bid invitation and bidding activities, increase economic benefits and ensure project quality.

Article 2

This Law is applicable to any bid invitation and bidding activities conducted within the territory of the People's Republic of China.

Article 3

The following construction projects to be undertaken within the territory of the People's Republic of China, including the surveying, design, construction and supervision of such projects as well as the purchase of key equipment and materials for such projects, shall be subject to bid invitation: (1) large infrastructure and public utility projects that concern public interests and security; (2) projects invested completely or partly with State-owned funds or financed by the State; and (3) projects using loans or aid funds from international organizations or governments of other countries. The specific scope and threshold for bidding of the projects listed in the preceding paragraph shall be formulated by the development planning department under the State Council, together with the

relevant departments under the State Council, and be submitted to the State Council for approval. Where there are provisions in other laws or in the regulations of the State Council governing scope of other projects for which bid invitation is required, such provisions shall be followed.

Article 4

No units or individuals may break up into parts a project for which bid invitation is required by law or try to dodge bid invitation by any other means.

Article 5

Bid invitation and bidding activities shall be conducted in adherence to the principles of openness, fairness, impartiality and good faith.

Article 6

Bid invitation and bidding for projects for which bid invitation is required by law shall be subject to limitations imposed by the local authorities or departments. No units or individuals may, in violation of law, impose limitations on legal persons or other organizations from other regions or departments or exclude them from participating in bidding or illegally interfere, by any means, in bid invitation and bidding activities.

Article 7

All bid invitation and bidding activities and the parties involved shall be subject to supervision in accordance with law. Relevant departments for administrative supervision shall, in accordance with law, exercise supervision over bid invitation and bidding activities, and investigate and deal with any violations of law in such activities. The division of specific duties and powers among the departments for administrative supervision over bid invitation and bidding activities and the relevant departments shall be determined by the State Council.

Chapter II Bid invitation

Article 8

A bid inviter is a legal person or other organization that, in accordance with the provisions of this Law, presents a project for bidding and calls for bids.

Article 9

Where a project for bidding is required by relevant State regulations to undergo examination for approval, it shall do so before obtaining approval. A bid inviter shall have the funds needed for the project for bidding or confirmed sources of funds and the fact shall be truthfully stated in its bid invitation documents.

Article 10

Bid invitation is classified into two categories: public invitation and invited bidding. Public invitation means that the bid inviter, in the form of announcement for bidding, invites unspecified legal persons or other organizations to bid. Invited biding means that the bid inviter, in the form of written invitation, to invite specified legal persons or other organizations to bid.

Article 11

Where a national key project determined by the development planning department under the State Council or a local key project determined by the people's government of a province, an autonomous region or a municipality directly under the Central Government is not suited for public invitation, it may be subject to invited bidding with the approval of the said department and the said people's government respectively.

Article 12

A bid inviter shall have the right to choose, on its own, a bid invitation agency and entrust it with the handling of the matters of bid invitation. No units or individuals may, by any means, designate a bid invitation agency for the bid inviter. A bid inviter who has the capability of preparing documents for

bid invitation and arranging for bid evaluation may handle the matters of bid invitation on its own. No units or individuals may compel the bid inviter to entrust a bid invitation agency with the handling of such matters. Where a bid inviter handles, on its own, the matter of bid invitation for a project for which bid invitation is required by law, he shall register with the relevant department for administrative supervision.

Article 13

A bid invitation agency is an intermediary organization set up in accordance with law to engage in bid invitation as an agent and provide service in this field. A bid invitation agency shall satisfy the following conditions: (1) having a place and the necessary funds for serving as a bid invitation agency; (2) having the necessary professionals to prepare documents for bid invitation and arrange for bid evaluation; and (3) having a pool of experts in technology, economics, etc. who meet the qualifications prescribed in Paragraph 3 of Article 37 of this Law and who can be candidates for members of a bid evaluation committee.

Article 14

The qualifications of a bid invitation agency for engineering projects shall be subject to verification by the administrative department for construction under the State Council or the people's government of a province, an autonomous region or a municipality directly under the Central Government. The specific measures therefor shall be formulated by the administrative department for construction under the State Council together with the relevant departments under the State Council. The competent departments for verifying the qualifications of bid invitation agencies in other fields of endeavor shall be determined by the State Council. There shall be no subordination or other relationship of interest between a bid invitation agency and an administrative organ or any other State organ.

Article 15

A bid invitation agency shall handle the matters of bid invitation within the scope entrusted to it by the bid inviter and shall abide by the provisions of this Law regarding the bid inviters.

Article 16

Where a bid inviter adopts public invitation, it shall make an announcement for bidding. An announcement for bidding made for which bid invitation is required by law shall be published in newspapers, information networks or other medium as are designated by the State. In the announcement for bidding shall be clearly stated such particulars as the name and address of the bid inviter, the nature, number, site and time of the projects involved and the means of obtaining the bid invitation documents.

Article 17

Where a bid inviter adopts invited bidding, it shall send written invitation to at least three specified legal persons or other organizations that are capable of undertaking the project for bidding and have a good reputation and qualification. In the written invitation for bidding shall be clearly stated the particulars specified in Paragraph 2 of Article 16 of this Law.

Article 18

Based on the requirements of the project for bidding, a bid inviter may, in its announcement or written invitation for bidding, request potential bidders to provide certificates and information concerning their competence and business achievements and examine the qualifications of the potential bidders. Where there are State regulations governing qualifications of the bidders, such regulations shall be followed. No bid inviter may, with unreasonable requirements, impose limitations on any potential bidder or exclude them from bidding or discriminate against them.

Article 19
A bid inviter shall, on the basis of the characteristics and requirements of a project, prepare bid invitation documents. Such documents shall include technical specifications of the project for bidding, criteria for examination of the bidders' qualifications, requirements for bid quotation, bid evaluation criteria, and other substantive requirements and terms, as well as the principal clauses of a contract to be signed. Where there are State regulations governing the technology and standards for the project subject to bidding, a bid inviter shall, in accordance with such regulations, state its requirements in the bid invitation documents. Where it is necessary to divide a project for bidding into bid lots or to fix a time limit for completion of the project, the bid inviter shall do it reasonably and shall state it clearly in the bid invitation documents.

Article 20
In a bid invitation document no specified producer or supplier may be demanded or indicated, nor any other particulars favoring or excluding potential bidders may be contained.

Article 21
A bid inviter may, in light of the specific conditions of a project subject to bidding, make arrangements for potential bidders to inspect the site of the project.

Article 22
No bid inviter may disclose to others the names and number of the potential bidders who have obtained the bid invitation documents or other information relating to bid invitation and bidding activities which may affect fair competition. Where a bid inviter has fixed a base price for bid, it shall keep such price confidential.

Article 23
Where necessary clarifications or modifications are to be made in the bid invitation documents already issued, the bid inviter shall notify in writing all the recipients of the documents at

least 15 days prior to the deadline for submission of bid documents set in the bid invitation documents. Such clarifications or modifications shall be a component of the bid invitation documents.

Article 24

A bid inviter shall set a reasonable period of time for bidders to prepare their bid documents; but for a project for which bid invitation is required by law, the minimum period from the date of issuing the bid invitation documents to the deadline for submission of bid documents by bidders shall be not less than 20 days.

Chapter III Bidding

Article 25

A bidder is a legal person or other organization, that, in response to a bid invitation, participates in the competition. Where individuals are allowed to participate in the bidding for a scientific research project subject to bidding in accordance with law, the provisions of this Law on bidders shall be applicable to them.

Article 26

A bidder shall have the capability of undertaking the projects that are subject to bidding invitation. Where in relevant State regulations or bid invitation documents there are provisions governing qualifications of bidders, a bidder shall meet such qualifications.

Article 27

A bidder shall prepare its bid documents in compliance with the requirements set in the bid invitation documents. The bid documents shall be prepared in response to the substantive requirements and terms specified in the bid invitation

documents. Where a project subject to bid invitation is a construction project, the bid documents shall include such information as the resume and professional achievements of the project director and chief technicians to be assigned and the mechanical equipment to be employed for completion of the project in question.

Article 28

A bidder shall deliver its bid documents to the place of submission prior to the deadline for submission set in the bid invitation documents. Upon receiving the bid documents, the bid inviter shall sign for and safe-keep them but may not open them. Where there are less than three bidders, the bid inviter shall, in accordance with this Law, invite bids anew. The bid inviter shall refuse to accept any bid documents delivered after the deadline for submission set in the bid invitation documents.

Article 29

Prior to the deadline for submission of bid documents set in the bid invitation documents, a bidder may supplement, modify or withdraw its bid documents already delivered and shall notify the bid inviter of the same in writing. Such supplements or modifications shall be a component of the bid documents.

Article 30

Where a bidder, after winning the bid and on the basis of the actual conditions clearly stated in the bid invitation documents, intends to subcontract some minor or less crucial parts of the project, shall make it clear in the bid documents.

Article 31

Two or more legal persons or other organizations may form a consortium and jointly bid in the capacity of one bidder. Each party to the consortium shall have the necessary capability of undertaking the project subject to bidding. Where in relevant State regulations or bid invitation documents there are provisions governing qualifications of bidders, all parties to the consortium shall meet such qualifications. Where units of the same profession form a consortium, the qualification grade of

the consortium shall be determined on the basis of the unit at a lower qualification level.
All parties to a consortium shall sign an agreement on joint bidding, in which the tasks and responsibilities of each party are clearly defined, and shall submit to the bid inviter the said agreement together with the bid documents. Where such a consortium wins the bid, all parties of the consortium shall jointly sign a contract with the bid inviter and bear joint and several liability to the bid inviter for the bid the consortium wins. No bid inviter may compel bidders to form a consortium for joint bidding or limit competition among bidders.

Article 32
No bidder may collude with each other in the matter of their quotations or exclude others from fair competition so as to impair the lawful rights and interests of the bid inviter or the other bidders. No bidder may collude with the bid inviter in bidding so as to impair the interests of the State and the general public or the lawful rights and interests of others. Bidders are prohibited from bribing the bid inviter or members of the bid evaluation committee for the purpose of winning the bid.

Article 33
No bidder may compete for a bid at a price below cost, or to win the bid in the name of another person or by other fraudulent means.

Chapter IV Opening, Evaluation and Winning of Bids

Article 34
Opening of bids shall be done in public at the same time as the deadline for submission of bid documents set in the bid invitation documents; and the place for opening the bids shall be the one predetermined in the said bid invitation documents.

Article 35
Opening of bids shall be presided over by the bid inviter, and all bidders shall be invited to participate.

Article 36
Before bids are opened, the bidders or their elected representatives shall check the sealing of their bid documents, and the sealing may also be checked and notarized by the notary agency commissioned by the bid inviter. After checking and verifying that nothing is wrong, a staff member shall open the bids in public and read out the names of the bidders, bid prices and other main contents in the bid documents. All the bid documents received by the bid inviter prior to the deadline for submission as required in the bid invitation documents shall be opened and read out in public at the time when the bids are opened. The bid opening process shall be recorded, which shall be filed for future examination.

Article 37
The bid evaluation committee established by the bid inviter in accordance with law shall be responsible for evaluation of the bids. The bid evaluation committee for a project for which bid invitation is required by law shall be composed of the representatives of the bid inviter and experts in the relevant technological, economic and other fields. The number of the committee members shall be an odd number not less than five, among whom, the number of experts in technical, economic and other fields shall be not less than two-third of the total. The experts mentioned in the preceding paragraph shall have at least eight years' experience in relevant fields with senior professional titles or at an equivalent professional level, and they shall be chosen by the bid inviter from the name lists of experts provided by relevant departments under the State Council or under the people's governments of provinces, autonomous regions or municipalities directly under the Central Government, or from the name lists of experts in the relevant fields contained in the pools of experts provided by bid invitation agencies. For an ordinary project subject to bid invitation, a random choice may be made, but for a special

project, the experts may be chosen directly by the bid inviter. No one who has a relationship of interest with a bidder may become a member of the bid evaluation committee for the related project. Where such a person is already a member, he shall be replaced. The name list of the members of the bid evaluation committee shall be kept confidential before the bidders who win the bid are determined.

Article 38

A bid inviter shall take necessary measures to ensure that bid evaluation is conducted in a strictly confidential manner. No units or individuals may illegally interfere in or exert influence on the bid evaluation process or results.

Article 39

The bid evaluation committee may ask a bid inviter to make necessary clarification or explanation of the parts of the bid invitation documents that are not clear in meaning; however, such clarification or explanation may not exceed the scope of the documents or alter any substantive contents of the documents.

Article 40

The bid evaluation committee shall, in accordance with the evaluation criteria and methods specified in the bid invitation documents, evaluate and compare all the bid documents, and it shall refer to the base price where there is one available. After the bid evaluation committee has completed evaluation, it shall present a written report to the bid inviter and recommend the candidates that are qualified for winning the bid. The bid inviter shall, based on the written report on bid evaluation presented by the bid evaluation committee, decode on the bid winner from among the candidates recommended by the said committee. It may also authorize the bid evaluation committee to decide on the bid winner directly. Where there are specific

regulations formulated by the State Council on bid evaluation of special projects subject to bid invitation, those regulations shall be followed.

Article 41

The bid offered by a winner shall satisfy one of the following requirements: (1) it meets, to the maximum extent, all the comprehensive evaluation criteria specified in the bid invitation documents; (2) it meets the substantive requirements specified in the bid invitation documents and offers the lowest of the bid prices evaluated; with the exception of the bid price that is below cost.

Article 42

If after evaluation the bid evaluation committee believes that none of the bids satisfies the requirements specified in the bid invitation documents, it may reject all of them. Where all the bids for a project for which bid invitation is required by law are rejected, the bid inviter shall invite bids anew in accordance with this Law.

Article 43

Before the bid winner is decided on, no bid inviter may negotiate with the bidders on such substantive matters as the bid prices and bidding plans, etc.

Article 44

Members of the bid evaluation committee shall objectively and impartially perform their duties, comply with the code of professional ethics and be responsible for their own evaluation opinions. No member of the bid evaluation committee may make any private contact with the bidders, or receive or accept any money, things of value or other favors from the bidders. No member of the bid evaluation committee or staff member involved in bid evaluation may disclose any information concerning the evaluation and comparison of the bid documents, the recommended candidates for winning the bid or any other information relating to bid evaluation.

Article 45

As soon as the bid winner is decided on, the bid inviter shall notify the winner of the fact in writing and, at the same time, inform all the unsuccessful bidders of the result. The notification is legally binding on both the bid inviter and the bid winner. Where after the notification is sent out, the bid inviter changes the bidding result or the bid winner gives up the bid won, it shall bear legal liability in accordance with law.

Article 46

The bid inviter and the bid winner shall, within 30 days beginning from the date the notification is sent out, sign a written contract on the basis of bid invitation documents and the bid documents of the winner. They may not conclude any other agreement contrary to the substantive matters of the contract. Where in the bid invitation documents the bid winner is required to provide performance security, it shall do so.

Article 47

For a project for which bid invitation is required by law, the bid inviter shall, within 15 days beginning from the date the bid winner is decided on, submit a written report about the bid invitation and bidding to the relevant department for administrative supervision.

Article 48

A bid winner shall, in accordance with the provisions of the contract, fulfil its obligations and finish the project. It may not transfer the bid won to others or break it up into parts and transfer them to others. A bid winner may, in accordance with the provisions of the contract or with the agreement of the bid inviter, subcontract some minor or less crucial parts of the project to others. The subcontractors shall meet the necessary qualifications and may not further subcontract the work. A bid winner shall be responsible to the bid inviter for the

subcontracted parts, and the subcontractors shall bear joint and several liability for the subcontracted work.

Chapter V Legal Liability

Article 49

Any unit that, in violation of the provisions of this Law, fails to invite bids for a project subject to bid invitation, or breaks up the project into parts, or by any other means tries to dodge bid invitation shall put it right within a time limit and may be fined not less than 0.5 percent but not more than 1 percent of the contract value of the project; where a project, which completely or partly uses state-owned funds is concerned, its construction or allocation of funds may be suspended. The persons who are directly in charge and the other persons who are directly responsible shall be given sanctions in accordance with law.

Article 50

Where a bid invitation agency, in violation of the provisions of this Law, divulges confidential information and materials relating to the bid invitation and bidding activities or colludes with the bid inviter and bidders to damage the interests of the State and the general public or the lawful rights and interests of others, it shall be fined not less than 50,000 yuan but not more than 250,000 yuan. The persons who are directly in charge and the other persons who are directly responsible shall be fined not less than 5 per cent but not more than 10 per cent of the fine imposed on the agency; the illegal gains, if any, shall be confiscated.

If the circumstances are serious, the qualifications of the agency shall be suspended or revoked. If a crime is constituted, criminal responsibility shall be pursued in accordance with law. If any losses are caused to others, liability for compensation shall be imposed in accordance with law. Where the bid result is affected by any of the acts mentioned in the preceding paragraph, it shall be nullified.

Article 51

Any bid inviter who, with unreasonable requirements, imposes limitations on or excludes potential bidders from bidding or discriminates against them, compels bidders to form a consortium to bid jointly, or restrains competition among the bidders shall be ordered to make rectification and may be fined not less than 10,000 yuan but not more than 50,000 yuan.

Article 52

Any bid inviter for a project for which bid invitation is required by law who discloses the names and number of potential bidders who have already obtained the bid invitation documents or any other relevant information regarding bid invitation and bidding which may affect fair competition or divulges the bid base price shall be given a disciplinary warning and may also be fined not less than 10,000 yuan but not more than 100,000 yuan. The persons who are directly in charge and the other persons who are directly responsible shall be given sanctions in accordance with law. If a crime is constituted, criminal responsibility shall be pursued in accordance with law. Where the bidding result is affected by any of the acts mentioned in the preceding paragraph, it shall be nullified.

Article 53

Where a bidder wins a bid through colluding with other bidders or with the bid inviter in matters of bidding, or through bribing the bid inviter or members of the bid evaluation committee, the bid won shall be nullified and the bidder shall be fined not less than 0.5 percent but not more than 1 percent of the value of the bid won. The persons who are directly in charge and the other persons who are directly responsible shall be fined not less than 5 percent but not more than 10 per cent of the fine imposed on the bidder. The illegal gains, if any, shall be confiscated. If the circumstances are serious, the bidder shall be disqualified for one to two years from taking part in bidding for projects for which bid invitation is required by law and the

matter shall be made known to the general public, or its business license shall be revoked by the administrative department of industry and commerce. If a crime is constituted, criminal responsibility shall be pursued in accordance with law. If any losses are caused to others, liability for compensation shall be imposed in accordance with law.

Article 54

Where a bidder wins a bid by submitting the bid in the name of another person or by other fraudulent means, the bid won shall be nullified. If losses are caused to the bid inviter, it shall bear liability for compensation in accordance with law. If a crime is constituted, criminal responsibility shall be pursued in accordance with law. Where a bidder for a project for which bid invitation is required by law commits any of the acts mentioned in the preceding paragraph, which does not constitute a crime, it shall be fined not less than 0.5 percent but not more than 1 percent of the value of the bid it wins. The persons who are directly in charge and the other persons who are directly responsible shall be fined not less than 5 percent but not more than 10 percent of the fine imposed on the bidder. The illegal gains, if any, shall be confiscated. If the circumstances are serious, the bidder shall be disqualified for one to three years from taking part in bidding for projects for which bid invitation is required by law and the matter shall be made known to the general public or its business license shall be revoked by the administrative department of industry and commerce .

Article 55

Where a bid inviter for a project for which bid invitation is required by law, in violation of the provisions of this Law , negotiates with bidders on such substantive matters as the bid prices and bidding plans, it shall be given a disciplinary warning and the persons who are directly in charge and the other persons who are directly responsible shall be given sanctions in accordance with law. If any of the acts mentioned in the preceding paragraph affects the bidding result, the bid won shall be nullified.

Article 56

Where a member of the bid evaluation committee receives or accepts money, things of value or other favors from a bidder or where a member of the bid evaluation committee or a staff member involved in bid evaluation discloses to another person any information concerning the evaluation and comparison of bid documents, the recommended candidate for winning the bid or any other information relating to bid evaluation, he shall be given a disciplinary warning, the money or things of value he received or accepted shall be confiscated, and he may also be fined not less than 3,000 yuan but not more than 50,000 yuan. The said member who commits the violation mentioned above shall be disqualified for membership of the committee and he may no longer take part in any bid evaluation of projects for which bid invitation is required by law. If a crime is constituted, criminal responsibility shall be pursued in accordance with law.

Article 57

Where a bid inviter decides on the bid winner from among people other than the candidates recommended by the bid evaluation committee in accordance with law, or a bid inviter decides on the bid winner on its own after all the bids for the project for which bid invitation is required by law have been rejected by the bid evaluation committee, the bid won shall be nullified. The bid inviter shall be ordered to make rectification and may be fined not less than 0.5 percent but not more than 1 percent of the value of the bid. The persons who are directly in charge and the other persons who are directly responsible shall be given sanctions in accordance with law.

Article 58

Where a bid winner transfers the bid won to others, or breaks it up into several parts and transfers them separately to others, or in violation of the provisions of this Law, subcontracts some major components or crucial work of the bid won to others, or

where further subcontracting occurs, the transferring and subcontracting shall be invalid, and the said bid winner and subcontractor shall be fined not less than 0.5 percent but not more than 1 percent of the value of the parts transferred or subcontracted. The illegal gains, if any, shall be confiscated, and the bid winner and subcontractor shall be ordered to suspend operation for rectification. If the circumstances are serious, its business license shall be revoked by the administrative department of industry and commerce.

Article 59

Where a bid inviter and a bid winner fail to conclude a contract in accordance with the bid invitation documents and the bid documents of the bid winner, or where a bid inviter and a bid winner conclude an agreement contrary to the substantive contents of the contract, they shall be ordered to put it right and may be fined not less than 0.5 percent but not more than 1 percent of the value of the bid won.

Article 60

Where a bid winner fails to perform the contract signed with the bid inviter, its performance security shall be kept unrefunded. Where the losses caused to the bid inviter are larger than the amount of the security, it shall compensate for the excess amount. Where no such security is provided, it shall bear the liability for the losses caused to the bid inviter. Where a bid winner fails to fulfil its obligations in accordance with the contract signed with the bid inviter, if the circumstances are serious, it shall be disqualified for two to five years from taking part in bidding for a project for which bid invitation is required by law and the matter shall be made known to the general public, or its business license shall be revoked by the administrative department of industry and commerce. Where a contract cannot be fulfilled due to force majure, the provisions of the preceding two paragraphs shall not be applicable.

Article 61

The administrative sanctions prescribed in this Chapter shall be decided by the relevant department of administration and

supervision designated by the State Council, with the exception of those departments which this Law prescribes for enforcing administrative sanctions.

Article 62

Any unit that, in violation of the provisions of this Law, imposes limitations on a legal person or any other organization from another place or department or excludes it from taking part in bidding, designates a bid invitation agency for a bid inviter, compels a bid inviter to authorize a bid invitation agency to handle matters of bid invitation , or interferes with bid invitation and bidding activities by any other means shall be ordered to put it right. The persons who are directly in charge and the other persons who are directly responsible shall be given such sanctions as a disciplinary warning and recording of a demerit or a serious demerit in accordance with law. If the circumstances are serious, the persons shall be given sanctions such as demotion, removal from office and expulsion in accordance with law. Where an individual, by taking advantage of his position and power, commits any of the illegal acts mentioned in the preceding paragraph shall be investigated for his responsibility in accordance with the provisions of the preceding paragraph.

Article 63

Where staff members of State organs who are responsible for administrative supervision over bid invitation and bidding activities in accordance with law engage in malpractices for personal gain, abuse their power or neglect their duty, which is serious enough to constitute a crime, they shall be pursued for criminal responsibility in accordance with law. If such act does not constitute a crime , administrative sanctions shall be imposed in accordance with law.

Article 64

Where a bid won is nullified because provisions of this Law is violated in inviting bids for a project as is required by law, a new bid winner shall be decided on from among other bidders in accordance with the requirements for winning a bid as prescribed in this Law, or bids shall be invited anew in accordance with this Law.

Chapter VI Supplementary Provisions

Article 65

Any bidder or any other interested person who believes that the bid invitation and bidding activities do not comply with the relevant provisions of this Law shall have the right to raise objections to the bid inviter or to file a complaint with the relevant department of administrative supervision.

Article 66

Special projects that concern State security or secret, emergency rescue and disaster relief or that involve the use of relief funds for providing work as a form of relief or the need to employ farmers as workers which therefore are not suited to bid invitation may be subject to no bid invitation as prescribed in the relevant State regulations.

Article 67

Where in the case of projects for which loans or funds are provided by international organizations or governments of other countries, the lenders or fund-providers have formulated differing regulations on the specific requirements for bid invitation and on the procedures, their regulations may be applicable, with the exception of the regulations that are against the public interests of the People's Republic of China.

Article 68

This Law shall go into force as of January 1, 2000.

The Law on Chinese-Foreign Equity Joint Ventures

Article 1 With a view to expanding international economic co-operation and technical exchange, the People's Republic of China permits foreign companies, enterprises, other economic organizations or individuals (hereafter referred to as "foreign joint venturers") to joint with Chinese companies, enterprise or other economic organizations (hereafter referred to as "Chinese joint ventures") in establishing joint ventures in the People's Republic of China in accordance with the principle of equality and mutual benefit and subject to approval by the Chinese Government.

Article 2 The Chinese Government protects, in accordance with the law, the investment of foreign joint ventures, the profits due to them and their other lawful rights and interest in a joint venture, pursuant to the agreement, contract and articles of association approved by the Chinese Government. Joint ventures shall follow the provisions of the laws and regulations of the People's Republic of China in all their activities. The state does not practise nationalization and expropriation of a joint venture; under special circumstances, the state, in accordance with the needs of social public interest, expropriates a joint venture pursuant to legal procedures and offers corresponding compensations.

Article 3 The joint venture agreement, contract and articles of association signed by the parties to the venture shall be submitted to the competent authorities of foreign economic relations and trade (hereafter referred to as approval

authorities), and the approval authorities shall, within three months, decide whether to approve or disapprove them. After approval, the joint venture shall register with the state competent authorities of administration for industry and commerce to obtain a licence to do business and start operations.

Article 4 A joint venture shall take the form of a limited liability company . The proportion of the investment contributed by the foreign joint venturer(s) shall generally not be less than 25% of the registered capital of a joint venture. The parties to the venture shall share the profits, risks and losses in proportion to their respective contributions to the registered capital. No assignment of the registered capital of a joint venturer shall be made without the consent of the other parties to the venture.

Article 5 Each party to a joint venture may make its investment in cash, in kind or in industrial property rights, etc. The technology and the equipment that serve as a foreign joint venturer's investment must be advanced technology and equipment that actually suit our country's needs. If the foreign joint venturer causes losses by deception through the intentional use of backward technology and equipment, it shall pay compensation for the losses. The investment of a Chinese joint venturer may include the right to the use of a site provided for the joint venture during the period of its operation. If the right to the use of the site does not constitute a part of a Chinese joint venturer's investment, the joint venture shall pay the Chinese Government a fee for its use. The various investments referred to above shall be specified in the joint venture contract and articles of association, and the value of each (excluding that of the site) shall be jointly assessed by the parties to the venture.

Article 6 A joint venture shall have a board of directors , which shall have its size and composition stipulated in the contract and the articles of association after consultation between the parties to the venture, and the directors shall be appointed and replaced by the parties to the venture. The Chairman and the

vice-chairman are determined by the parties to the venture or elected by the board of directors. Either party of the Chinese-foreign joint venturers may be the chairman and the other shall assume the office of vice-chairman. In handling major problems, the board of directors shall reach a decision through consultation by the parties to the venture, in accordance with the principle of equality and mutual benefit. The board of directors is empowered, pursuant to the provisions of the articles of association of the joint venture, to discuss and decide all major problems of the venture: expansion programmes, proposals for production and operating activities, the budget for revenues and expenditures, distribution of profits, plans concerning manpower and pay scales, the termination of business and the appointment or employment of the president, the vice-president(s), the chief engineer, the treasurer and the auditors, as well as their powers and terms of employment, etc. The offices of president and vice-president(s) (or factory manager and deputy manager(s) shall be assumed by the respective parties to the venture. Contracts shall be entered into in accordance with the law to prescribe the recruitment, dismissal, remuneration, welfare, labor protection, labor insurance, etc..

Article 7 The staff employees of the joint venture may establish trade unions in accordance with the law, carry out the activities of the trade union and defend the lawful rights and interests of the employees. Joint ventures shall provide necessary conditions for the activities of the trade unions thereof.

Article 8 After payment, pursuant to the provisions of the tax laws of the People's Republic of China, of the joint venture income tax on the gross profit earned by the joint venture and after deduction from the gross profit of a reserve fund, a bonus and welfare fund for staff and workers, and a venture expansion fund, as provided in the articles of association of the

joint venture, the net profit shall be distributed to the parties to the joint venture in proportion to their respective contributions to the registered capital. A joint venture may enjoy the preferential treatment of reduction of or exemption from tax pursuant to relevant state taxation laws or administrative decrees. A foreign joint venturer that reinvests in China its share of the net profit may apply for refund of a part of the income taxes already paid.

Article 9 A joint venture shall, with its business licence, open a foreign exchange account at the banks or other financial organizations approved by the state foreign exchange control administrative organs to handle foreign exchange business. The pertinent foreign exchange transactions of a joint venture shall be conducted in accordance with the regulations on foreign exchange control of the People's Republic of China. In its operating activities a joint venture may directly raise funds from foreign banks. All insurances of joint ventures shall be procured at the insurance companies within the territory of the People's Republic of China.

Article 10 The Joint venture may purchase the materials such as raw materials, fuels, etc. as needed within the approved scope of business either on the domestic or international market according to the principle of fairness and reasonableness . A joint venture is encouraged to market its products outside China . Export products may be distributed to foreign markets through the joint venture directly or through associated agencies, and they may also be distributed through China's foreign trade agencies. Products of the joint venture may also be distributed in the Chinese market. Whenever necessary, a joint venture may establish branches outside China.

Article 11 The net profit that a foreign joint venturer receives after fulfilling its obligations under the laws and the agreement and the contract, the funds it receives at the time of the joint venture's scheduled expiration or early termination, and its other funds may be remitted abroad in accordance with the

foreign exchange regulations and in the currency specified in the joint venture contract. A foreign joint venturer shall be encouraged to deposit in the Bank of China foreign exchange that it is entitled to remit abroad.

Article 12 The wages, salaries and other legitimate income earned by the foreign staff and workers of a joint venture, after payment of the individual income tax under the tax laws of the People's Republic of China, may be remitted abroad in accordance with the foreign exchange regulations.

Article 13 The contract period of a joint venture may be decided differently according to its particular line of business and circumstance. The joint ventures of some trades should decided the contract period; and other may or may not decide the contract period. A joint venture that has set a contract period should, if the parties to the joint venture agree to extend the contract period , apply to the approval authorities six months ahead of the expiration of the contract period. The latter should make the decision of approval or disapproval within one month as of the date of application.

Article 14 In case of heavy losses , failure of a party to fulfil the obligations prescribed by the contract and the articles of association, force majeure , etc, the contract may be terminated through consultation and agreement by the parties to the venture, subject to approval by the approval authorities and to registration with the state competent authorities of administration for industry and commerce. In cases of losses caused by a breach of contract, the financial responsibility shall be borne by the party that has violated the contract.

Article 15 Disputes arising between the parties to a joint venture that the board of directors cannot settle through consultation may be settled through mediation or arbitration

by a Chinese arbitration agency or through arbitration by another arbitration agency agreed upon by the parties to the venture. Where no arbitration clauses have been included in the joint venture contract or no written arbitration agreement have been reached after a dispute arises, any party may bring a suit with the people's court.

Article 16 This Law shall come into force on the date of its promulgation.

Law on Foreign-capital Enterprises

(Adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986 Amended according to the Decision on Revision of the Law of the People's Republic of China on Foreign-Capital Enterprises adopted at the 18th Meeting of the Standing Committee of the Ninth National People's Congress on October 31, 2000)

Article 1 With a view to expanding economic cooperation and technological exchange with foreign countries and promoting the development of China's national economy, the People's Republic of China permits foreign enterprises, other foreign economic organizations and individuals (hereinafter collectively referred to as "foreign investors") to set up enterprises with foreign capital in China and protects the lawful rights and interests of such enterprises.

Article 2 As mentioned in this Law, "enterprises with foreign capital" refers to those enterprises established in China by foreign investors, exclusively with their own capital, in accordance with relevant Chinese laws. The term does not include branches set up in China by foreign enterprises and other foreign economic organizations.

Article 3 Enterprises with foreign capital shall be established in such a manner as to help the development of China's national economy. The State may encourage the establishment of foreign capital enterprises that are export-oriented or technologically advanced.

Regulations shall be formulated by the State Council regarding the lines of business which the State forbids enterprises with

foreign capital to engage in or on which it places certain restrictions.

Article 4 The investments of a foreign investor in China, the profits it earns and its other lawful rights and interests are protected by Chinese law.

Enterprises with foreign capital shall abide by Chinese laws and regulations and may not engage in any activities detrimental to China's public interests.

Article 5 The State does not nationalize or requisition any enterprise with foreign capital. However, under special circumstances when public interests require, enterprises with foreign capital may be requisitioned through legal procedures and appropriate compensation shall be made.

Article 6 The application to establish an enterprise with foreign capital shall be submitted for examination and approval to the department under the State Council which is in charge of foreign economic relations and trade, or to an institution authorized by the State Council. The authorities in charge of examination and approval shall, within 90 days from the date they receives such application, decide whether or not to grant approval.

Article 7 When the application for the establishment of an enterprise with foreign capital is approved, the foreign investor shall, within 30 days from the date of receiving the certificate of approval, apply to the administrative department for industry and commerce for registration in order to obtain a business licence. The date of issue of the business licence of foreign-capital enterprise shall be the date of its establishment,

Article 8 An enterprise with foreign capital which meets the conditions for being considered a legal person under Chinese law shall acquire the status of a Chinese legal person in accordance with law.

Article 9 An enterprise with foreign capital shall make investments in China within the period approved by the authorities in charge of examination and approval. If it fails to do so, the administrative departments for industry and commerce shall have the power to cancel its business licence.

The administrative department for industry and commerce shall inspect and supervise the investment situation of an enterprise with foreign capital.

Article 10 In the event of separation, merger or other major change, an enterprise with foreign capital

shall report the matter to and seek approval from the authorities in charge of examination and approval, and register the change with the administrative department for industry and commerce.

Article 11 Enterprises with foreign capital shall conduct their operation and management in accordance with the approved articles of association and shall be free from any interference.

Article 12 When employing Chinese workers and staff, an enterprise with foreign capital shall conclude contracts with them according to law, in which matters concerning employment, dismissal, remuneration, welfare benefits, occupational protection and labour insurance shall be clearly prescribed.

Article 13 Workers and staff of enterprises with foreign capital may organize trade unions in accordance with law, in order to conduct trade union activities and protect their lawful rights and interests.

The said enterprises shall provide the necessary conditions for the activities of the trade unions in their respective enterprises.

Article 14 An enterprise with foreign capital shall set up account books in China, conduct independent accounting, submit the fiscal reports and statements as required and accept supervision by the financial and tax authorities.

If an enterprise with foreign capital refuses to maintain account books in China, the financial and tax authorities may impose a fine on it, and the administrative department for industry and commerce may order it to suspend operation or may revoke its business licence.

Article 15 A foreign-capital enterprise may, in adherence to the principles of fairness and rationality, purchase on both the Chinese and the world market the raw and semi-processed materials, fuels and other materials it needs within the approved scope of operation.

Article 16 Enterprises with foreign capital shall apply to insurance companies in China for such kinds of insurance coverage as are needed.

Article 17 Enterprises with foreign capital shall pay taxes in accordance with relevant State regulations for tax payment, and may enjoy preferential treatment for reduction of or exemption from taxes.

An enterprise with foreign capital that reinvests its profits in China after paying the income tax may, in accordance with relevant State regulations, apply for refund of a part of the income tax already paid on the reinvested amount.

Article 18 An enterprise with foreign capital shall handle its foreign exchange transactions in accordance with the State regulations on foreign exchange control.

An enterprise with foreign capital shall open an account with the Bank of China or with a bank designated by the State authority exercising foreign exchange control.

Article 19 The foreign investor may remit abroad the profits that are lawfully earned from an enterprise with its investment, as well as other lawful earnings and any funds remaining after the enterprise is liquidated.

Wages, salaries and other legitimate income earned by foreign employees in an enterprise with foreign capital may be remitted abroad after the payment of individual income tax in accordance with law.

Article 20 With respect to the period of operation of an enterprise with foreign capital, the foreign investor shall report to and secure approval from the authorities in charge of examination and approval. For an extension of the period of operation, an application shall be submitted to the said authorities 180 days before the expiration of the period. The authorities in charge of examination and approval shall, within 30 days from the date of receiving such application, decide whether or not to grant the extension.

Article 21 When terminating its operation, an enterprise with foreign capital shall promptly issue a public notice and proceed with liquidation in accordance with legal procedure.

Pending the completion of liquidation, a foreign investor may not dispose of the assets of the enterprise except for the purpose of liquidation.

Article 22 At the termination of operation, the enterprise with foreign capital shall cancel its registration with the

administrative department for industry and commerce and hand in its business licence for cancellation.

Article 23 The department under the State Council which is in charge of foreign economic relations and trade shall, in accordance with this Law, formulate rules for its implementation, which shall go into effect after being submitted to and approved by the State Council.

Article 24 This Law shall go into effect as of the date of its promulgation.

The Rules on Wholly Foreign-Owned Enterprises

Detailed Implementing Rules for the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises (Approved by the State Council on October 28, 1990; promulgated by the Ministry of Foreign Trade and Economy Cooperation on December 12, 1990; and amended pursuant to the State Council's Decision concerning the amendment to Detailed Implementing Rules for the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises on April 12, 2001)

CHAPTER 1 GENERAL PROVISIONS

Article 1 These Detailed Implementing Rules are formulated pursuant to Article 23 of the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises.

Article 2 Wholly foreign-owned enterprises shall be governed and protected by the laws of China.
In their business activities in the People's Republic of China, wholly foreign-owned enterprises must abide by the laws and regulations of China and may not harm China's public interest.

Article 3 The establishment of wholly foreign-owned enterprises must be beneficial to the development of China's national economy and yield notable economic benefits. The state encourages to foreign-owned enterprises to adopt advance technologies and equipment, develop new products, save energy and raw materials, upgrade and replace existing products; and encourages to establish such foreign-owned enterprises as shall export all or most of their products.

Article 4 The establishment of wholly foreign-owned enterprises in prohibited or restrained industries shall be subject to the regulations for guiding the direction of foreign investment and the catalog for guiding foreign investment in industry of China.

Article 5 Applications for the establishment of wholly foreign-owned enterprises shall not be approved in any of the following circumstances:
1. China's sovereignty or public interest would be harmed;
2. China's state security would be jeopardized;
3. China's laws and regulations would be violated;
4. the requirements for the development of China's national economy would not be satisfied; or
5. environmental pollution might be caused.

Article 6 Wholly foreign-owned enterprises shall enjoy autonomy, and shall not be subject to interference, in their operation and management activities when operating within their approved scope of business.

CHAPTER 2 ESTABLISHMENT PROCEDURES

Article 7 The examination and approval of applications for the establishment of wholly foreign-owned enterprises shall be carried out by the Ministry of Foreign Economic Relations and Trade; upon examination and approval, an approval certificate shall be issued.
The State Council authorizes the People's Government of the provinces, autonomous regions, municipalities directly under the central government, municipalities with independent development plans and Special Economic Zones to examine and approve applications, and to issue approval certificates, for the establishment of wholly foreign-owned enterprises in the following situations:
1. the total amount of investment does not exceed the maximum amount which the State Council has authorized the People's Government in question to examine and approve; and
2. the state will not need to allocate raw materials, and the

nationwide comprehensive balance of energy, communications, transportation, foreign trade export quotas, etc. will not be affected.
Within 15 days after the People's Government of a province, autonomous region, municipality directly under the central government, municipality with independent development plans or Special Economic Zone has approved the establishment of a wholly foreign-owned enterprise within its authority as delegated by the State Council, it shall report its approval to the Ministry of Foreign Economic Relations and Trade for the record (the Ministry of Foreign Economic Relations and Trade and the People's Governments of the provinces, autonomous regions, municipalities directly under the central government, municipalities with independent development plans and Special Economic Zones are hereinafter collectively referred to as "examination and approval authorities").

Article 8 For the approval of applications for the establishment of wholly foreign-owned enterprises whose products would involve export licenses, export quotas or import licenses or would be products the import of which is restricted by the state, prior consent shall be obtained from the department for foreign economic relations and trade in accordance with the limits of administration authority.

Article 9 Prior to applying for the establishment of a wholly foreign-owned enterprise, foreign investors shall submit a report covering the following matters to the local People's Government at or above county level of the place where they intend to establish the enterprise. The contents of such report shall include: the purpose of the wholly foreign-owned enterprise to be established; the scope and scale of business; the products to be produced; the technology and equipment to be used; the area of and requirements for the land to be used; the conditions for and quantities of the water, electricity, coal,

coal gas or other energy sources required; requirements for public facilities; etc.
Local People's Governments at or above county level shall reply to the foreign investors in writing within 30 days after the date of receipt of their reports.

Article 10 A foreign investor which wishes to establish a wholly foreign-owned enterprise shall apply and submit the following documents to the examination and approval authorities through the local People's Government at or above county level of the place where it intends to establish the enterprise:
1. an application for the establishment of a wholly foreign-owned enterprise;
2. a feasibility study;
3. the articles of association of the wholly foreign-owned enterprise;
4. the name of the legal representative (or a list of the names of the members of the board of directors) of the wholly foreign-owned enterprise;
5. the legal certificates and a certificate of creditworthiness of the foreign investor;
6. the written reply from the local People's Government at or above county level of the intended place of establishment of the wholly foreign-owned enterprise;
7. a list of the supplies requiring to be imported; and
8. other documents to be submitted.
The documents mentioned under items (1) and (3) of the preceding paragraph must be written in Chinese. Those mentioned under items (2), (4) and (5) may be written in a foreign language, but, if written in a foreign language, shall be accompanied by Chinese translations.
Where two or more foreign investors jointly apply for the establishment of a wholly foreign-owned enterprise, a duplicate of the contract between them shall be submitted to the examination and approval authorities for the record.

Article 11 Examination and approval authorities shall decide whether to approve or to disapprove an application for the

establishment of a wholly foreign-owned enterprise within 90 days from the date of receipt of all the documents pertaining to such application. If the examination and approval authorities find that not all of the aforementioned documents have been submitted or that they are not in order, it may demand that the missing document(s) be submitted or that the submitted documents be amended within a specified period of time.

Article 12 Upon approval by the examination and approval authorities of an application for the establishment of a wholly foreign-owned enterprise, the foreign investor shall, within 30 days from the date of receipt of the approval document, apply to the administration of industry and commerce authorities for registration and obtain a business license. The date of issuance of the business license of the wholly foreign-owned enterprise shall be the date of establishment of the enterprise.
The approval certificate for a wholly foreign-owned enterprise shall expire automatically if the foreign investor has failed to apply to the administration of industry and commerce authorities for registration within a full 30 days from the date of issuance of the approval certificate.
A wholly foreign-owned enterprise shall carry out tax registration with the tax authorities within 30 days after the date of its establishment.

Article 13 Foreign investors may entrust Chinese service organizations for foreign investment enterprises or other economic organizations with handling on their behalf the matters set forth in Article 9, the first paragraph of Article 10 and Article 11, provided that they enter into a contract of entrustment.

Article 14 Written applications for the establishment of a wholly foreign-owned enterprise shall include the following:
1. the name, address and place of registration of the foreign

investor and the name, nationality and position of its legal representative;
2. the name and address of the wholly foreign-owned enterprise to be established;
3. the scope of business, types of product and scale of production;
4. the total amount of investment, registered capital and sources of funds of, and the method and time limit of contribution of capital to, the wholly foreign-owned enterprise to be established;
5. the form of organization, structure and legal representative of the wholly foreign-owned enterprise to be established;
6. the main equipment to be used and the age of such equipment; and the level and source of the production technology and production process to be used;
7. the targeted buyers and areas of sale of the products and the sales channels and methods;
8. the arrangements for the receipt and expenditure of foreign exchange;
9. the establishment and staffing of the relevant structure, and arrangements for the employment, training, wages, welfare benefits, insurance, labor protection, etc. of staff and workers;
10. the possible degree of environmental pollution and the measures to solve such problem;
11. the selection and area of the land to be used;
12. the funds, energy and raw materials for capital construction, production and operation, and the methods for obtaining the same;
13. the schedule of implementation of the project; and
14. the term of operation of the wholly foreign-owned enterprise to be established.

Article 15 The articles of association of a wholly foreign-owned enterprise shall cover the following matters:
1. the name and address;
2. the purpose and scope of business;
3. the total amount of investment, registered capital and time limit for contribution of capital;
4. the form of organization;

5. the internal organizations and their powers and rules of procedure; and the duties and limits of authority of such personnel as the legal representative, the general manager, the chief engineer and the chief accountant;
6. the principles and systems for financial affairs, accounting and auditing;
7. labor management;
8. the term of operation, termination and liquidation; and
9. the procedure for amendment of the articles of association.

Article 16 The articles of association of a wholly foreign-owned enterprise, and any amendments thereto, shall become effective upon approval by the examination and approval authorities.

Article 17 If a wholly foreign-owned enterprise is divided or merges or if a major change in its capital occurs due to any other reason, approval must be obtained from the examination and approval authorities, and a Chinese registered accountant shall be engaged to verify the event and to issue a capital verification certificate. Upon approval by the examination and approval authorities, the change shall be registered with the administration of industry and commerce authorities.

CHAPTER 3 FORM OF ORGANIZATION AND REGISTERED CAPITAL

Article 18 The form of organization of wholly foreign-owned enterprises shall be a limited liability company. Upon approval, they may also have other forms of liability.
In wholly foreign-owned enterprises that are limited liability companies, the liability of the foreign investors vis-vis the enterprises shall be limited to the amounts of capital contributed by them.
In wholly foreign-owned enterprises with other forms of liability, the liability of the foreign investors in respect of the

enterprises shall be as specified in the laws and regulations of China.

Article 19 The term "total amount of investment of a wholly foreign-owned enterprise" means the total amount of funds required to set up a wholly foreign-owned enterprise, i.e. the sum of the capital construction funds and the working capital required to be invested in order to realize its scale of production.

Article 20 The term "registered capital of a wholly foreign-owned enterprise" means the total amount of capital for the establishment of a wholly foreign-owned enterprise as registered with the administration of industry and commerce authorities, i.e. the total amount of capital subscribed by the foreign investor.
The amount of the registered capital of a wholly foreign-owned enterprise shall correspond to its scale of business. The ratio between the registered capital and the total amount of investment shall conform to the relevant regulations of China.

Article 21 Wholly foreign-owned enterprises may not reduce their registered capital during their term of operation. But if the registered capital must be reduced due to the change of total investment and business scale, approval in advance by the examing and approving authorities is required.

Article 22 The increase or assignment of the registered capital of a wholly foreign-owned enterprise must be approved by the examination and approval authorities. Upon approval, such change shall be registered with the administration of industry and commerce authorities.

Article 23 The mortgage or assignment by a wholly foreign-owned enterprise to a foreign party of its property or interest must be approved by the examination and approval authorities and reported to the administration of industry and commerce authorities for the record.

Article 24 The legal representative of a wholly foreign-owned enterprise shall be the responsible person who, pursuant to the enterprise's articles of association, has the power to represent the enterprise.
If the legal representative is unable to exercise his powers, he shall appoint an agent, in writing, to exercise his powers on his behalf.

CHAPTER 4 METHODS AND TIME LIMITS FOR CONTRIBUTION OF CAPITAL

Article 25 Foreign investors may make their capital contributions in freely convertible foreign currencies, and also by valuating and contributing machinery, equipment, industrial property, proprietary technology, etc.
Upon approval by the examination and approval authorities, foreign investors may also use as capital contribution Renminbi profits derived by them from other foreign investment enterprises established in the People's Republic of China.

Article 26 Machinery and equipment valuated and used as capital contribution by a foreign investor must be the equipment required indeed by the foreign-owned enterprise.
The amounts at which such machinery and equipment are valuated may not exceed the current normal prices on the international market for the same kind of machinery and equipment.
With respect to valuated machinery and equipment to be contributed, a detailed list of valuated contributions shall be made. Such list shall include the descriptions, types, quantities, valuation, etc. of the machinery and equipment. The list shall be annexed to, and submitted to the examination and approval authorities along with, the application for establishment of the wholly foreign-owned enterprise.

Article 27 The title of industrial property and proprietary technology valuated and used as capital contribution by a foreign investor must be owned by the foreign investor.
The valuation of such industrial property and proprietary technology shall be consistent with common international principles of valuation, and the amount at which they are valuated shall not exceed 20 percent of the registered capital of the wholly foreign-owned enterprise.
Detailed information shall be prepared with respect to the valuated industrial property and proprietary technology to be contributed. Such information shall include copies of certificates pertaining to ownership and details of their validity, information on the technical performance and practical value, the basis and standards of valuation, etc. The said information shall be annexed to, and submitted to the examination and approval authorities along with, the application for establishment of the wholly foreign-owned enterprise.

Article 28 When valuated machinery and equipment contributed as capital have arrived at the Chinese port, the wholly foreign-owned enterprise shall request a Chinese commodity inspection organization to inspect the same. Such commodity inspection organization shall issue an inspection report.
In the event of discrepancies between the kinds, quality and quantities of valuated and contributed machinery and equipment and the kinds, quality and quantities of the machinery and equipment specified on the list of valuated contributions submitted by the foreign investor to the examination and approval authorities, the examination and approval authorities shall have the power to demand the foreign investor to rectify such discrepancies within a specified period of time.

Article 29 The examination and approval authorities shall have the power to conduct an inspection after valuated industrial property and proprietary technology contributed as capital have been put in use. In the event of discrepancies between such industrial property and proprietary technology

and the information originally supplied by the foreign investor, the examination and approval authorities shall have the power to demand the foreign investor to rectify such discrepancies within a specified period of time.

Article 30 The time limit within which foreign investors are to contribute their capital shall be stated in the applications for establishment of a wholly foreign-owned enterprise and the enterprise's articles of association. Foreign investors may contribute their capital in instalments, provided that the final instalment is contributed within three years from the date of issuance of the business license. The first of such instalments may not account for less than 15 percent of the amount of capital to be contributed by the foreign investor and shall be contributed in full within 90 days from the date of issuance of the business license of the wholly foreign-owned enterprise.
If a foreign investor fails to contribute the first instalment of its capital contribution within the time limit set forth in the preceding paragraph, its approval certificate shall automatically expire upon the expiry of such time limit. In such event, the wholly foreign-owned enterprise shall cancel its registration with, and turn over its business license for cancellation to, the administration of industry and commerce authorities. If the wholly foreign-owned enterprise fails to cancel its registration and to turn over its business license for cancellation, the administration of industry and commerce authorities shall revoke its business license and make a public announcement.

Article 31 Foreign investors shall contribute according to schedule all instalments following the first instalment of their capital contributions. If and when a capital contribution is 30 days overdue without legitimate reason, the matter shall be handled pursuant to the second paragraph of Article 31 hereof.
If a foreign investor requests an extension of the time limit for its capital contribution for legitimate reasons, such extension

shall be agreed to by the examination and approval authorities and reported to the administration of industry and commerce authorities for the record.

Article 32 After a foreign investor has contributed all instalments of its capital contribution, the wholly foreign-owned enterprise shall engage a Chinese registered accountant to verify the contribution and to issue an investment verification report, which shall be submitted to the examination and approval authorities and the administration of industry and commerce authorities for the record.

CHAPTER 5 USE OF LAND AND FEES THEREFORE

Article 33 The land to be used by wholly foreign-owned enterprises shall be arranged for by the local People's Governments at or above county level of the locations of the enterprises upon examination in the light of local circumstances.

Article 34 Within 30 days from the date of issuance of their business licenses, wholly foreign-owned enterprises shall carry out land use procedures with and obtain a land certificate from the land administration department of the local People's Governments at or above county level of the places where they are located, on the strength of their approval certificates and business licenses.

Article 35 The land certificates shall be the legal certificates on the strength of which wholly foreign-owned enterprises may use land. Without approval, wholly foreign-owned enterprises may not assign their land use rights during their terms of operation.

Article 36 When collecting their land certificates, wholly foreign-owned enterprises shall pay land use fees to the land administration departments of the places where they are located.

Article 37 Wholly foreign-owned enterprises using developed land shall pay land development fees.
The land development fees mentioned in the preceding paragraph shall include the requisitioning, demolition, removal and resettlement expenses and the construction expenses incurred when linking the wholly foreign-owned enterprise to the existing infrastructure. Land developers may charge the land development fees as a lump sum or in annual instalments.

Article 38 Wholly foreign-owned enterprises using undeveloped land may develop the land themselves or entrust relevant Chinese units with such development. The construction of infrastructural facilities shall be centrally arranged by the local People's Governments at or above county level of the places where the wholly foreign-owned enterprises are located.

Article 39 The scales for the land use fees and land development fees charged to wholly foreign-owned enterprises shall be set in accordance with the relevant regulations of China.

Article 40 The term of the use of land by a wholly foreign-owned enterprise shall be the same as its approved term of operation.

Article 41 In addition to obtaining land use rights in accordance with this Chapter, wholly foreign-owned enterprises may obtain such rights pursuant to other laws and regulations of China.

CHAPTER 6 PURCHASES AND SALES

Article 42 Wholly foreign-owned enterprises shall have the right to decide on their own on the purchase of machinery,

equipment, raw materials, fuel, spare parts, accessories, components, devices, means of transportation, office articles, etc. for their own use (hereinafter referred to as "supplies").
When purchasing supplies in China, wholly foreign-owned enterprises shall be granted terms equal to those granted to Chinese enterprises, given that conditions are equal.

Article 43 Wholly foreign-owned enterprises may sell their products in China. The state encourages wholly foreign-owned enterprises to export their products.

Article 44 Wholly foreign-owned enterprises shall have the right to export their own products, and they may also entrust Chinese foreign trade companies or companies outside the People's Republic of China with selling their products on their behalf.
Wholly foreign-owned enterprises shall have the right to sell their own products in China, and they may also entrust Chinese commercial organizations with selling their products on their behalf.

Article 45 For those of the machinery and equipment contributed as capital by foreign investors for which China requires an import license, the wholly foreign-owned enterprises shall, either directly or through an appointed agency, apply for import licenses to and obtain the same from the licensing authorities, on the strength of the enterprises approved lists of imported equipment and supplies.
With respect to the supplies imported by wholly foreign-owned enterprises within their approved scopes of business which are required for use in their own production and for which China requires an import license, the enterprises shall draw up annual import plans and, once every six months, apply for import licenses to and obtain the same from the licensing authorities.
For those of the products exported by wholly foreign-owned enterprises for which China requires an export license, the enterprises shall draw up annual export plans and, once every six months, apply for export licenses to and obtain the same

from the licensing authorities.

Article 46 The prices of the supplies and technical services imported by wholly foreign-owned enterprises may not exceed the arm's length prices of the same supplies and services on the international market at that time. The prices of products exported by wholly foreign-owned enterprises shall be set by wholly foreign-owned enterprises themselves by reference to the prices on the international market at that time, provided that they may not be lower than reasonable export prices. The tax authorities shall have the power to investigate pursuant to the tax laws the legal liability of wholly foreign-owned enterprises evading taxes by such means as importing at high prices and exporting at low prices, etc.

Article 47 Wholly foreign-owned enterprises shall provide statistical information and submit statistical statements in accordance with the Statistics Law of the People's Republic of China and China's regulations concerning the system for statistics on the use of foreign investment.

CHAPTER 7 TAXATION

Article 48 Wholly foreign-owned enterprises shall pay taxes in accordance with the laws and regulations of China.

Article 49 The staff and workers of wholly foreign-owned enterprises shall pay individual income tax in accordance with the laws and regulations of China.

Article 50 Wholly foreign-owned enterprises shall be exempt from duties and taxes in accordance with Chinese relevant taxation laws on the following imported supplies:
1. machinery, equipment, spare parts and building materials, and the materials required for the installation and

reinforcement of machinery, used by the foreign investors as capital contribution;
2. machinery, equipment, spare parts, means of transportation for use in production and production management equipment imported by wholly foreign-owned enterprises with funds from their total amounts of investment and required for their own production;
3. raw materials, auxiliary materials, components, spare parts and packaging materials imported by wholly foreign-owned enterprises for the production of export products.
If, upon approval, the imported supplies mentioned in the preceding paragraph are sold in the People's Republic of China rather than being exported or are used for the production of products to be sold in the People's Republic of China rather than for the production of export products, duties and tax shall be paid in accordance with China's tax laws.

Article 51 Export products produced by wholly foreign-owned enterprises other than products the export of which is restricted by China, shall be exempt from duties and taxes in accordance with Chinese taxation laws.

CHAPTER 8 EXCHANGE CONTROL

Article 52 The foreign exchange matters of wholly foreign-owned enterprises shall be handled in accordance with the relevant exchange control regulations of China.

Article 53 On the strength of their business licenses issued by the administration of industry and commerce authorities, wholly foreign-owned enterprises may open accounts with banks in the People's Republic of China allowed to engage in foreign exchange business. The payments into and out of such accounts shall be supervised by the banks with which they have been opened.
The foreign exchange revenue of wholly foreign-owned enterprises shall be deposited in the foreign exchange accounts with their banks. Foreign exchange expenditure shall be paid out of their foreign exchange bank accounts.

Article 54 Wholly foreign-owned enterprises which wish to open foreign exchange accounts with banks outside the People's Republic of China for reasons of production and business needs must obtain approval from China's exchange control authorities and regularly report details of the foreign exchange receipts and payments and submit the banks statements in accordance with the regulations of China's exchange control authorities.

Article 55 Upon payment of tax in accordance with China's tax laws, the wages and other lawful foreign exchange income of the expatriate, Hong Kong, Macao and Taiwan staff and workers of wholly foreign-owned enterprises may be freely remitted out of the country.

CHAPTER 9 FINANCIAL AFFAIRS AND ACCOUNTING

Article 56 Wholly foreign-owned enterprises shall establish a financial and accounting system in accordance with the laws and regulations of China and the regulations of China's financial authorities and shall submit such system to the financial and taxation authorities of the place where they are located for the record.

Article 57 The fiscal year of wholly foreign-owned enterprises shall commence on January 1 of the Gregorian calendar and end on December 31 of the same year.

Article 58 Wholly foreign-owned enterprises shall make allocations to a reserve fund and a bonus and welfare fund for staff and workers from their profits after paying income tax in accordance with China's tax laws. The rate of allocations to the reserve fund may not be lower than 10 percent of the after-tax profits; once the cumulative amount of allocations equals 50

percent of the registered capital, no further allocations need be made. The rate of allocations to the bonus and welfare fund for staff and workers shall be determined by the wholly foreign-owned enterprises themselves.
Wholly foreign-owned enterprises may not distribute profits until the losses from preceding fiscal years have been made up. Retained profits from preceding fiscal years may be distributed together with the distributable profits of the current fiscal year.

Article 59 Accounting vouchers, books and statements printed by wholly foreign-owned enterprises themselves shall be written in Chinese. Those written in a foreign language shall include notes in Chinese.

Article 60 Wholly foreign-owned enterprises shall keep independent accounts.
The annual accounting statements and liquidation accounting statements of wholly foreign-owned enterprises shall be prepared in accordance with the regulations of China's financial and taxation authorities. If accounting statements are prepared in a foreign currency, Renminbi accounting statements shall be prepared simultaneously by translating such foreign currency amounts into Renminbi.
Chinese registered accountants shall be engaged to verify the annual accounting statements and liquidation accounting statements of wholly foreign-owned enterprises and to issue a report thereon.
The annual accounting statements and liquidation accounting statements of wholly foreign-owned enterprises described in the second and third paragraphs, together with the reports issued by the Chinese registered accountants, shall be submitted within the prescribed time limits to the financial and taxation authorities and, for the record, to the examination and approval authorities and the administration of industry and commerce authorities.

Article 61 Foreign investors may engage at their own expense Chinese or foreign accounting staff to inspect the accounting books of their wholly foreign-owned enterprises.

Article 62 Wholly foreign-owned enterprises shall submit annual balance sheets and profit and loss statements to the financial and taxation authorities and, for the record, to the examination and approval authorities and the administration of industry and commerce authorities.

Article 63 Wholly foreign-owned enterprises shall maintain their accounting books in the place where they are located. Such accounting books shall be subject to supervision by the financial and taxation authorities.
If a wholly foreign-owned enterprise violates the provisions of the preceding paragraph, the financial and taxation authorities may impose a fine on it and the administration of industry and commerce authorities may order it to suspend business or revoke its business license.

CHAPTER 10 STAFF AND WORKERS

Article 64 Wholly foreign-owned enterprises shall enter into labor contracts with the staff and workers they employ in the People's Republic of China, in accordance with the laws and regulations of China. Such contracts shall specifically cover such matters as employment, dismissal, remuneration, welfare, labor protection, labor insurance, etc.
Wholly foreign-owned enterprises may not employ children as laborers.
Article 65 Wholly foreign-owned enterprises shall be responsible for the business and technical training of their staff and workers and establish an assessment system, in order that the production and management skills of their staff and workers are sufficient to meet the enterprises¡¯ production and development requirements.

CHAPTER 11 LABOR UNION

Article 66 The staff and workers of wholly foreign-owned enterprises shall have the right to establish basic-level labor unions and carry on labor union activities in accordance with the Law of the People's Republic of China on Labor Unions.

Article 67 The labor union of a wholly foreign-owned enterprise shall represent the rights and interests of the staff and workers. It shall have the right to enter into a labor contract with the enterprise on behalf of the staff and workers and to supervise the implementation thereof.

Article 68 The basic tasks of the labor union of a wholly foreign-owned enterprise shall be to protect the lawful rights and interests of the staff and workers in accordance with the laws and regulations of China, to assist the enterprise in arranging and using the bonus and welfare fund for staff and workers in a rational way; to organize the staff and workers to engage in political, scientific, technological and vocational study; to organize cultural and athletic activities; and to teach the staff and workers to observe labor discipline and make efforts to accomplish the various economic tasks of the enterprise.
When a wholly foreign-owned enterprise studies and decides on matters such as rewards, punishment, the wage system, welfare benefits, labor protection, labor insurance, etc., of staff and workers, a representative of its labor union shall have the right to attend the meeting. Wholly foreign-owned enterprises shall listen to the opinions of their labor unions and obtain their cooperation.

Article 69 Wholly foreign-owned enterprises shall actively support the work of their labor unions and, in accordance with the Law of the People's Republic of China on Labor Unions, provide them with the necessary premises and equipment for office work and meetings and for use in organizing collective welfare, cultural and athletic activities for staff and workers. Wholly foreign-owned enterprises shall each month allocate labor union funds at the rate of 2 percent of the total take-home

pay of their staff and workers. Such funds shall be used by their labor unions in accordance with the measures for the use of labor union funds formulated by the All-China Federation of Trade Unions.

CHAPTER 12 TERM, TERMINATION AND LIQUIDATION

Article 70 The term of operation of wholly foreign-owned enterprises shall be set forth by the foreign investors in their applications for the establishment of a wholly foreign-owned enterprise, on the basis of the specific circumstances of the industries and enterprises in question, and shall be approved by the examination and approval authorities.

Article 71 The term of operation of wholly foreign-owned enterprises shall be reckoned from the date of issuance of their business licenses.
If the term of operation of a wholly foreign-owned enterprise needs to be extended upon expiry, a written application for extension of the term of operation shall be submitted to the examination and approval authorities 180 days prior to expiry. The examination and approval authorities shall decide whether to approve or reject the application within 30 days from the date of receipt thereof.
Wholly foreign-owned enterprises which have obtained approval to extend their term of operation shall register the change with the administration of industry and commerce authorities within 30 days from the date of receipt of the approval document for such extension.

Article 72 A wholly foreign-owned enterprise shall be terminated in any of the following circumstances:
1. its term of operation has expired;
2. it suffers heavy losses due to mismanagement and the foreign investor decides to dissolve it;

3. it suffers heavy losses due to an event of force majeure such as a natural disaster, war, etc.;
4. it becomes bankrupt;
5. it is lawfully closed because it has violated the laws and regulations of China, thereby harming the public interest; or
6. another reason for dissolution as specified in the wholly foreign-owned enterprise's articles of association has arisen.
In any of the circumstances mentioned under items (2), (3) and (4) of the preceding paragraph, the wholly foreign-owned enterprise shall voluntarily submit a written application for termination to the examination and approval authorities for approval. The date of the examination and approval authorities' approval shall be the date of the enterprise's termination.

Article 73 A wholly foreign-owned enterprise which has been terminated pursuant to items (1), (2), (3) or (6) of Article 75 shall make a public announcement and notify its creditors within 15 days from the date of termination. In addition, it shall, within 15 days from the date of issuance of the public announcement of termination, submit a proposal to the examination and approval authorities concerning the procedure and principles of liquidation and the candidates for the liquidation committee, and implement the same upon examination and approval by the examination and approval authorities.

Article 74 A liquidation committee shall be composed of the legal representative of the wholly foreign-owned enterprise, representatives of its creditors and representatives of the relevant competent authorities. In addition, accountants, lawyers, etc. registered in China shall be invited to serve on the committee.
The liquidation expenses shall be paid out of the property currently held by the foreign-owned enterprise on a priority basis.

Article 75 A liquidation committee shall exercise the following powers:

1. convene creditors meetings;
2. take over the management of and sort out the enterprise's property, and prepare a balance sheet and a property list;
3. valuate the property and state the basis for the calculation of the values assigned;
4. prepare the liquidation plan;
5. redeem the enterprise's claims and satisfy its debts;
6. recover any amounts to be contributed by the shareholders which have not yet been contributed;
7. distribute the balance of the property; and
8. represent the wholly foreign-owned enterprise when it sues or is being sued.

Article 76 Prior to completion of the liquidation of a wholly foreign-owned enterprise, the foreign investor may not remit or carry the enterprise's funds out of the People's Republic of China and may not dispose of the enterprise's property on its own authority.
Upon completion of the liquidation of a wholly foreign-owned enterprise, if the sum of the net amount of its assets and the balance of its property exceeds its registered capital, the portion in excess shall be regarded as profit, and income tax shall be paid on such portion in accordance with China's tax laws.

Article 77 Upon completion of the liquidation of a wholly foreign-owned enterprise, procedures for the cancellation of registration shall be carried out with, and its business license shall be returned for cancellation to, the administration of industry and commerce authorities.

Article 78 When wholly foreign-owned enterprises liquidate and dispose of their property, Chinese enterprises or other organizations shall have a preemptive right to purchase the same, provided that conditions are equal.

Article 79 A wholly foreign-owned enterprise which is terminated pursuant to item (4) of Article 75 shall be liquidated by reference to the relevant laws and regulations of China.
A wholly foreign-owned enterprise which is terminated pursuant to item (5) of Article 75 shall be liquidated in accordance with the relevant regulations of China.

CHAPTER 13 SUPPLEMENTARY PROVISIONS

Article 80 All items of insurance of wholly foreign-owned enterprises shall be taken out from insurance companies in the People's Republic of China.

Article 81 Economic contracts between wholly foreign-owned enterprises and other companies, enterprises or other economic organizations and persons shall be governed by the Contract Law of the People's Republic of China.
Economic contracts between wholly foreign-owned enterprises and foreign companies, enterprises or individuals shall be governed by the Foreign Economic Contract Law of the People's Republic of China.

Article 82 Matters concerning wholly-owned enterprises established in Mainland China by companies, enterprises, or other economic organizations and individuals from Hong Kong, Macao and Taiwan or by Chinese citizens resident abroad shall be handled by reference to these Detailed Implementing Rules.

Article 83 Expatriate, Hong Kong, Macao and Taiwan staff and workers of wholly foreign-owned enterprises may carry in reasonable quantities of means of transport and daily necessities for their own use. Such staff and workers shall carry out customs formalities for such goods in accordance with the regulations of China.

Article 84 These Detailed Rules shall be implemented as from the date of promulgation.

Interim Provisions on M&A of Domestic Enterprises by Foreign Investors

(The Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (hereinafter referred to as the "Provisions"), reviewed and adopted at the First Ministry Meeting of the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China on January 2, 2003, is promulgated on 2003-3-7 and will come into force on April 12, 2003.)

Article 1 The Provisions are formulated in accordance with the laws and administrative regulations governing foreign investment enterprises and other relevant laws and administrative regulations to promote and regulate foreign investors' investment in China introduce advanced technologies and management experience from abroad, improve the utilization of foreign investment, rationalize the allocation of resources, ensure employment and safeguard fair competition and national economic security.

Article 2 For the purpose of the Provisions, mergers and acquisitions of a domestic enterprise by foreign investors shall mean that foreign investors, by agreement, purchase equity interest from shareholders of domestic enterprise with no foreign investment (hereinafter referred to as the "Domestic Company") or subscribe to the increase in the registered capital of the Domestic Company with the result that such Domestic Company changes into a foreign investment enterprise (hereinafter referred to as "Equity Merger and Acquisition"); or the foreign investors establish a foreign investment enterprise and then, through such enterprise, purchase the assets of a domestic enterprise by agreement and operate such assets, or the foreign investors purchase the assets of a domestic enterprise by agreement and use such assets as investment to establish a foreign investment enterprise to operate such assets (hereinafter referred to as "Asset Merger and Acquisition").

Article 3 In mergers and acquisitions of domestic enterprises, foreign investors shall comply with the laws, administrative regulations and departmental rules and adhere to the principles of fairness, reasonableness, compensation for equal value, and honesty and good faith, and shall not create excessive concentration, eliminate or hinder competition, disturb the social economic order or harm the societal public interests.

Article 4 In mergers and acquisitions of domestic enterprises, foreign investors shall comply with the requirements regarding the investors' qualifications and industrial policy as set forth in the laws, administrative regulations and departmental rules and the relevant requirements under industry policies. In the case of industries where no wholly foreign ownership is allowed under the Guidance Catalog of Foreign Investment Industries, any merger or acquisition of a domestic enterprise engaging in the industry shall not lead to the foreign investors' wholly ownership of all equity interest in the acquired enterprise. In the case of industries which require the Chinese party to be controlling or relatively controlling, the Chinese party shall remain to be in the controlling or relatively controlling position in the acquired enterprise after any merger or acquisition of the domestic enterprise engaging in such industries. In the case of industries where operation by foreign investors is prohibited, no foreign investors may merge with or acquire any enterprise engaging in such industries.

Article 5 Any merger or acquisition of a domestic enterprise by foreign investors to set up a foreign investment enterprise shall be subject to the approval of the examination and approval authorities in accordance with the Provisions, and procedures for change registration or establishment registration shall be handled with the registration authorities. The contribution made by the foreign investors to the registered capital of the

foreign investment enterprise established after the merger or acquisition shall generally not be less than 25% of the registered capital. Except as provided otherwise by the laws or administrative regulations, if the contribution made by foreign investors is less than 25% of the registered capital, the foreign investment enterprise shall be subject to the examination, approval and registration in accordance with the currently applicable examination and registration procedures for the establishment of a foreign investment enterprise. When issuing the foreign investment enterprise approval certificates, the examination and approval authority shall add a notation "foreign investment proportion less than 25%". When issuing the foreign investment enterprise business licenses, the registration authority shall add the notation "foreign investment proportion less than 25%" .

Article 6 For the purpose of the Provisions, the examination and approval authority shall be the Ministry of Foreign Trade and Economic Cooperation of the PRC (hereinafter referred to as "MOFTEC") or the administrative authority in charge of foreign trade and economic cooperation at the provincial level (hereinafter referred to as the "Provincial Examination and Approval Authority"), and the registration authority shall be the State Administration for Industry and Commerce of the PRC (hereinafter referred to as "SAIC") or its authorized local industrial and commercial bureaus. If the foreign investment enterprise established after the merger or acquisition falls into a specific type or a specific industry subject to MOFTEC approval in accordance with the laws, administrative regulations and departmental rules, the provincial examination and approval authority shall submit the application documents to MOFTEC for examination and approval and MOFTEC shall decide to approve or disapprove the application in accordance with the law.

Article 7 In the case of Equity Merger and Acquisition by foreign investors, the foreign investment enterprise established thereafter shall succeed to the creditor's rights and liabilities of the merged or acquired Domestic Company .In the case of Asset

Merger and Acquisition by foreign investors, the domestic enterprise selling assets shall assume all its original creditor's rights and liabilities. The Foreign investors, merged or acquired domestic enterprises, creditors and other parties may reach separate agreements regarding the disposition of the creditor's rights and liabilities of the merged or acquired domestic enterprises, provided that the agreement shall not result in any damage to any third party interest or societal public interest. Any agreement on the disposition of the creditor's rights and liabilities shall be submitted to the examination and approval authority. The domestic enterprise selling assets shall, within 10 days of the adoption of the resolution to sell its assets, gives notice to its creditors and makes a public announcement on a newspaper at the provincial level or above with national circulation. A creditor of the domestic enterprise may, within 10 days from the date of receipt of such notice or publication of such public announcement, requests the domestic enterprise selling assets to provide the corresponding security.

Article 8 The parties to a merger or acquisition shall determine the transaction price on the basis of the result of the evaluation of the equity interest to be transferred or of the assets to be sold conducted by the asset evaluation institution. The parties to a merger or acquisition may agree on an asset evaluation institution established within the territory of China in accordance with the law. Asset evaluation shall be conducted by adopting internationally recognized evaluation methods. Where the merger or acquisition of a domestic enterprise leads to any change in the equity interest formed by the investment of state-owned assets or resulting in any transfer of the property right in state-owned assets, evaluation shall be conducted and transaction price shall be determined in accordance with the relevant regulations governing the administration of state-owned assets. It is prohibited to transfer equity interest or sell assets at a price obviously lower than the evaluation result for

the purpose of transferring the capital out of China in a disguised way.

Article 9 In case of a merger or acquisition of a domestic enterprise by foreign investors to set up a foreign investment enterprise, the foreign investors shall, within 3 months from the date of issuance of the foreign investment enterprise business license, pay the full consideration to the shareholder(s) transferring equity interest or to the domestic enterprise selling assets. If the above time limit needs to be extended under special circumstances, the foreign investors shall, upon the approval by the examination and approval authority, pay 60% or more of the total consideration within 6 months and full considerations within 1 year from the date of issuance of the foreign investment enterprise business license, and shall distribute the proceeds in proportion to the actual capital contribution. Where the foreign investors conduct Equity Merger and Acquisition and the foreign investment enterprise established after such mergers and acquisitions increases its registered capital, the investors shall set forth a time schedule for capital contribution in the contract and the articles of association of the foreign investment enterprise. If it is set forth that the capital contribution shall be paid up in one lump sum, the investors shall make the contribution within 6 months from the date of issuance of the foreign investment enterprise business license ; or if it is set forth that the capital contribution shall be paid by installments, the investors' first installment shall not be less than 15% of their respective capital subscription and shall be made within 3 months from the date of issuance of the foreign investment enterprise business license .In case of an Asset Mergers and Acquisition by foreign investors, the investors shall set forth the time schedule for capital contribution in the contract and the articles of association of the foreign investment enterprise to be established. If the investors intend to establish a foreign investment enterprise and purchase and operate such assets of a domestic enterprise through such enterprise, the investors shall pay the part of its capital contribution equal to the price of such assets within the time schedule specified for consideration

payment in Paragraph 1 of this Article and the remaining part of its capital contribution shall be paid within the time schedule agreed upon in accordance with Paragraph 2 of this Article .Where foreign investors establish a foreign investment enterprise through merger or acquisition of a domestic enterprise, and the proportion of the foreign investors' capital contribution is less than 25% of the registered capital ,if the investors pay their capital contribution in cash, the full contribution shall be made within 3 months from the date of issuance of the foreign investment enterprise business license ; if the investors pay their capital contribution in kind or in industrial property rights and so on, full contribution shall be made within 6 months from the date of issuance of the foreign investment enterprise business license. The instruments of payment of any consideration shall be in compliance with the provisions of the relevant state laws and administrative regulations. Where a foreign investor intends to use any stock it has the right to dispose of or any Renminbi assets it legitimately possesses as the instrument of payment, such payment shall be subject to the approval of the foreign exchange administration authority.

Article 10 Where a foreign investor acquires any equity interest held by a shareholder of a Domestic Company by agreement, after the Domestic Company has changed into and established as a foreign investment enterprise, the registered capital of such foreign investment enterprise shall be the registered capital of the original Domestic Company and the proportion of the the foreign investor's capital contribution shall be the proportion of the equity interest acquired by the foreign investor in the original registered capital. Where a Domestic Company subject to Equity Merger and Acquisition an Equity Merger and Acquisition also increases its capital at the same time, the registered capital of the foreign investment enterprise established upon the Merger and Acquisition shall

be the sum of the registered capital of the original Domestic Company and the increased capital. The foreign investors and the other original investors of the acquired Domestic Company shall determine the proportion of their capital contribution respectively to the registered capital of the foreign investment enterprise based on the evaluation of the Domestic Company's assets. Where foreign investors subscribe to any increased capital of a Domestic Company, after the Domestic Company has changed into and established as a foreign investment enterprise, the registered capital of such foreign investment enterprise shall be the sum of the registered capital of the original Domestic Company and the increased capital. The foreign investors and the other original shareholders of the acquired Domestic Company shall determine the proportion of their capital contribution respectively to the registered capital of the foreign investment enterprise based upon the evaluation of the Domestic Company's assets. If a natural person shareholder of the Domestic Company subject to Equity Merger and Acquisition has been a shareholder of such Domestic Company for more than 1 year, the person may, upon approval, continue to be a Chinese party investor of the foreign investment enterprise established after the change.

Article 11 In case of an Equity Merger and Acquisition by foreign investors, the ceiling for the total amount of investment of the foreign investment enterprise established upon the Merger and Acquisition shall be determined according to the following proportions:
(1) no more than ten sevenths (10/7) of the registered capital of the foreign investment enterprise, if the registered capital is less than US$ 2.1 million;
(2) no more than twice the registered capital, if the registered capital is between US$ 2.1million and US$ 5 million;
(3) no more than two and a half times the registered capital, if the registered capital is more than US$ 5 million but less than or equal to US$ 12 million; or

(4) no more than three times the registered capital, if the registered capital is more than US$ 12 million.

Article 12 In case of an Equity Merger and Acquisition by foreign investors, the investors shall submit the following documents to the examination and approval authority with corresponding jurisdiction of approval based on the total amount of investment of the foreign investment enterprise established upon the Merger and Acquisition:
(1) the resolution adopted by the shareholders of the domestic limited liability company subject to the Merger and Acquisition unanimously approving the Equity Merger and Acquisition by the foreign investors, or the resolution adopted by the shareholders' meeting of the domestic company limited by shares subject to the Merger and Acquisition approving the Equity Merger and Acquisition by the foreign investors;
(2) the application of the Domestic Company subject to the Merger and Acquisition to be changed in to and established as a foreign investment enterprise in accordance with the law;
(3) the contract and the articles of association of the foreign investment enterprise established upon the Merger and Acquisition;
(4) the agreement for the purchase of the shareholders' equity interest or subscription for the increased capital of the Domestic Company by the foreign investors
(5) the audited financial report for the most recent fiscal year of the Domestic Company subject to the Merger and Acquisition;
(6) identification documents or incorporation certification and creditworthiness certification of the foreign investors;
(7) explanation of the situation regarding the enterprises the Domestic Company subject to the Merger and Acquisition has invested in;

(8) the business licenses (duplicates) of the Domestic Company subject to the Merger and Acquisition and enterprises it has invested in;
(9) the plan for the re-settlement of the employees of the Domestic Company subject to the Merger and Acquisition; and
(10) documents required to be submitted under Articles 7 and 19 of the Provisions. Where any permission given by any other government authority is required in connection with the business scope or business scale, or obtaining of any land use right by the foreign investment enterprise to be established upon the Merger and Acquisition, the relevant documents of such permission shall be submitted simultaneously. The business scope of any company the Domestic Company subject to the Merger and Acquisition originally invested in shall comply with the requirements of relevant foreign investment industrial policies. Adjustments shall be made in case of noncompliance.

Article 13 The equity interest purchase agreement or the agreement to increase the capital of the Domestic Company as set forth in Article 12 of these Provisions shall be governed by the Chinese law and shall contain the following main contents:
(1) information regarding each of the parties to the agreement, including its full name, address, and the name, position and citizenship of its legal representative, etc.;
(2) proportions and the price of the equity interest to be acquired or the increased capital to be subscribed;
(3) term and methods of performance of the agreement;
(4) rights and obligations of the parties to the agreement;
(5) liabilities for breach of the agreement and settlement of dispute; and
(6) the date and the place of the execution of the agreement.

Article 14 In the case of an Asset Merger and Acquisition by foreign investors, the total amount of investment of the foreign investment enterprise established upon the Merger and Acquisition shall be determined on the basis of the transaction price of such assets and the actual scale of production and operation. The proportion between the registered capital and

the total amount of investment of the foreign investment enterprise to be established shall be consistent with the relevant regulations.

Article 15 In the case of an Asset Merger and Acquisition by foreign investors, the investors shall submit the following documents to the examination and approval authority with the corresponding jurisdiction of approval, based on the total amount of investment, enterprise type, and industry of the foreign investment enterprise to be established and in accordance with the laws, administrative regulations and departmental rules governing the establishment of foreign investment enterprises:
(1) the resolution by the property rights holders or the agency of authority of the domestic enterprise approving the sale of such assets;
(2) the application for the establishment of the foreign investment enterprise;
(3) the contract and the articles of association of the foreign investment enterprise to be established;
(4) the asset purchase agreement executed between the foreign investment enterprise to be established and the domestic enterprise or the asset purchase agreement executed between the foreign investors and the domestic enterprise;
(5) the articles of association and the business license (duplicates) of the domestic enterprise subject to the Merger and Acquisition;
(6) certification proving that the domestic enterprise subject to the Merger and Acquisition has given notice and the public announcement to its creditors;
(7) identification documents or incorporation certification and creditworthiness certification of the foreign investors;
(8) the plan for the re-settlement of employees of the domestic enterprise subject to the Merger and Acquisition; and

(9) documents required to be submitted under Articles 7 and 19 of the Provisions. Where any permission given by any other government authority is required in connection with the purchase and operation of the assets of the domestic enterprise as specified in the above paragraph, the relevant documents of such permission shall be submitted simultaneously. If foreign investors purchase any assets by agreement with the domestic enterprise and invest such assets to set up a foreign investment enterprise, such assets shall not be used for operation purposes until and unless the foreign investment enterprise has been duly established.

Article 16 The asset purchase agreement set forth in Article 15 shall be governed by the Chinese law and shall contain the following main contents:
(1) information regarding each of the parties to the agreement, including its name and address, and the name, position and citizenship of its legal representative, etc.;
(2) list and the price of the assets to be purchased;
(3) term and methods of performance of the agreement;
(4) rights and obligations of the parties to the agreement;
(5) liabilities for breach of the agreement and settlement of dispute; and
(6) the date and the place of the execution of the agreement.

Article 17 Except as otherwise provided for in Article 20, where foreign investors establish a foreign investment enterprise through merger and acquisition of a domestic enterprise,, the examination and approval authority shall, within 30 days upon its receipt of all the documents required to be submitted, decide according to law whether to approve the application for the establishment. Upon such approval, the examination and approval authority shall issue the foreign investment enterprise approval certificate. If the examination and approval authority decides to approve foreign investors' acquisition of equity interest of a Domestic Company from its shareholders, the examination and approval authority shall concurrently copy the relevant approval documents to the local foreign exchange administration authority of the transferor and

of the Domestic Company respectively. The foreign exchange administration authority in the locality of the transferor shall complete the foreign capital foreign exchange registration procedures for the transferor's receipt of foreign exchange and shall issue the foreign capital foreign exchange registration certificate certifying the payment of the consideration for the above acquisition by the foreign investors.

Article 18 In the case of an Asset Merger and Acquisition by foreign investors, the investors shall, within 30 days of its receipt of the foreign investment enterprise approval certificate for, apply to the registration authority for the establishment registration and obtain the foreign investment enterprise business license. In the case of an Equity Merger and Acquisition by foreign investors, the acquired Domestic Company shall apply to its original registration and administration authority for the change of registration and obtain the foreign investment enterprise business license in accordance with the Provisions. If the original registration and administration authority has no jurisdiction of registration and administration, it shall, within 10 days upon its receipt of the application documents, deliver such documents to the registration and administration authority with such jurisdiction, accompanied by the registration files of the Domestic Company. The acquired Domestic Company shall submit and be responsible for the authenticity and effectiveness of the following documents at the time of its application for the change of registration:
(1) the application for the change of registration;
(2) the resolution adopted by the shareholders' meeting of the acquired Domestic Company in accordance with the Company Law of the PRC and its articles of association, approving the transfer of equity interest or the increased capital;

(3) the agreement for the purchase of the shareholders' equity interest or subscription for the increased capital of the Domestic Company by the foreign investors
(4) amended articles of association of the Domestic Company or any amendment to the original articles of association and the contract of the foreign investment enterprise to be submitted as required by law;
(5) the foreign investment enterprise approval certificate ;
(6) identification documents or incorporation certification and creditworthiness certification of the foreign investors;
(7) the amended list of directors, the document specifying the names and addresses of new directors and the documents of appointment of new directors; and
(8) other relevant documents and certificates required by SAIC.
In case of the transfer of state-owned equity interest and in case of foreign investors' subscription to any increased capital of a company with state-owned equity interest, the approval documents of the authority in charge of economic and trade administration shall also be submitted. Investors shall, within 30 days upon the receipt of the foreign investment enterprise business license, handle the necessary registration formalities with authorities for taxation, customs, land administration and foreign exchange administration, etc..

Article 19 In case of any of the following occurrences in connection with the merger or acquisition of a domestic enterprise by foreign investors, the investors shall submit notification to MOFTEC and SAIC:
(1) the revenue of a party to the merger or acquisition in the domestic market for the current year exceeds RMB1.5 billion ;
(2) the foreign investors have merged with or acquired more than 10 domestic enterprises in aggregate engaging in the related businesses within one year;
(3) the market share of a party to the merger or acquisition in the domestic market has reached 20%; or
(4) the market share of a party to the merger or acquisition in the domestic market will reach 25% as a result of the merger or acquisition. Even without the above occurrences, MOFTEC or SAIC may still require the foreign investors to submit

notification upon the request by any competing domestic enterprise, relevant functional department or industrial association, if MOFTEC or SAIC finds that the merger or acquisition will involve a huge market share, or if there is any other material aspect of the merger or acquisition which might severely affect market competition, national economy or people's livelihood and national economic security. The above-mentioned "a party to a merger or acquisition" shall include any affiliated enterprise of foreign investors.

Article 20 In case of any of the described in Article 19 in connection with a merger or acquisition of a domestic enterprise by foreign investors, and if MOFTEC and SAIC believe that the merger or acquisition might lead to over-concentration, impair fair competition or damage consumers' interests, MOFTEC and SAIC shall, within 90 days upon its receipt of all the documents required to be submitted, jointly or separately after consultation with each other, hold a hearing of the relevant departments, organizations, enterprises and other related parties and decide according to law whether to approve the application for the merger or acquisition.

Article 21 In case of any of the following occurrences in connection with an offshore merger or acquisition, any party to the merger and acquisition shall, prior to its public announcement of the plan for the merger or acquisition or together with its application to the regulatory authorities of the country where it is located, submit to MOFTEC and SAIC the plan for the merger or acquisition. MOFTEC and SAIC shall examine whether the merger or acquisition might cause over-concentration of the domestic market, impair fair competition in the domestic market or damage the domestic consumers' interests, and decide whether to approve the plan:
(1) the assets owned by a party to the offshore merger and acquisition within China exceeds RMB 3 billion;

(2) the sales of a party to the offshore merger or acquisition in the domestic market for the current year have exceeded RMB 1..5 billion;
(3) the aggregate market share in the domestic market by a party to the offshore merger or acquisition and its affiliated enterprises has reached 20%;
(4) the aggregate market share in the domestic market by a party to the offshore merger or acquisition and all of its affiliated enterprises in the domestic market will reach 25% as a result of the offshore merger or acquisition; or
(5) as a result of the offshore merger or acquisition, a party to the offshore merger or acquisition will hold, directly or indirectly, equity of more than 15 foreign investment enterprises engaging in the related businesses within China.

Article 22 In case of any of the following occurrences in connection with a merger or acquisition, a party to the merger or acquisition may apply to MOFTEC and SAIC for an exemption from examination:
(1) the merger or acquisition may improve the conditions for fair competition in the domestic market;
(2) the merger or acquisition will restructure the enterprise running at a loss and ensure employment;
(3) the merger or acquisition will absorb advanced technologies and management professionals and enhance the international competitiveness of the domestic enterprise; or
(4) the merger or acquisition will improve the environment.

Article 23 All documents submitted by investors shall be grouped into categories as required by the regulations and accompanied by a table of contents of the documents. All documents required to be submitted shall be in Chinese.

Article 24 The Provisions shall apply to all mergers and acquisitions of domestic enterprises by investment companies duly established by foreign investors within China. Any acquisition of equity interest of PRC foreign investment enterprise by foreign investors shall be governed by the currently laws and administrative regulations governing

foreign investment enterprises and Certain Regulations on Change in Shareholders' Equity Interest of Foreign Investment Enterprises. Matters not covered therein shall be governed by the Provisions.

Article 25 Any merger or acquisition by investors in Hong Kong Special Administrative Region, Macao Special Administrative Region and Taiwan of a domestic enterprise established in any other regions of the PRC shall be handled with reference to the Provisions.

Article 26 The Provisions shall come into force on April 12, 2003.

Supreme Court's Regulation on Private Antitrust Litigation

To ensure the proper judgment of civil disputes arising from the monopoly, prevent monopolistic conducts, protecting and promoting fair competition in the market, safeguarding the interests of consumers and social public interests, this regulation is enacted according to the relevant regulations such as the Anti-monopoly Law of the People's Republic of China, the General Principle of the Civil Law of the People's Republic of China, the Law of the People's Republic of China on Tort Liability, the Contract Law of the People's Republic of China and the Civil Procedural Law of the People Republic of China.

Article 1 The civil disputes arising from the monopoly regulated in the law (the "civil monopoly dispute cases") shall refer to the civil lawsuit filed by the individual, legal person or other organizations for the losses coming from the monopoly and the violation against the Anti-monopoly law by the contract or the industry rules.

Article 2 When the plaintiff files the civil lawsuit directly or files the lawsuit after the effect of the decision made by the Anti-monopoly enforcement administration to the determination of the monopoly, also other conditions for the case filing are met, the people's court shall accept the case.

Article 3 The intermediate courts of the capital cities of the provinces and autonomous regions, within the municipalities, of the cities specifically designated by the state plan directly under the Central Government and the intermediate courts designated by the Supreme People's Court shall have jurisdiction over civil monopoly dispute cases as the courts of first instance

The primary court may have the jurisdiction over the first instance of the civil monopoly dispute cases after the approval of the Supreme People's Court.

Article 4 The territorial jurisdiction over the civil monopoly dispute cases shall be determined according to the jurisdiction rules in the Civil Procedural Law, relevant judicial explanations related to tort dispute cases and contract dispute cases.

Article 5 In civil dispute case, of which the subject matters are not monopolistic dispute, provided the defendant defends or files a counterclaim based on the monopolistic conducts conducted by the plaintiff, and the people's court where the case are filed do not have jurisdiction over civil monopoly dispute cases, the case shall be transferred to the people's court with jurisdiction if there are evidence for the defense or counterclaim of the defendant or the ruling of the case would be based on Anti-monopoly Law.

Article 6 Under the circumstance that two or more plaintiffs file lawsuits separately to the same people's court with jurisdiction over one monopolistic conduct, the court may try these cases together.

Under the circumstance that two or more plaintiffs file lawsuits separately to different people's courts with jurisdiction over one monopolistic conduct, the later courts shall within seven days after knowing the first case filing decide on transferring the case to the court which accepted the first case; The transferred court may try the case together. The defendant shall actively submit the information of the case filing in other courts in the phrase of defending.

Article 7 Where the alleged monopolistic conduct is found to be the monopolistic agreement in accordance with the conditions stipulated in Article 13, paragraph 1(1)—(5) and Article 14 (1)(2) of Anti-monopoly Law, the defendant shall undertake the burden of proof about the effectiveness of the

alleged monopolistic agreement in eliminating or restricting competition.

Article 8 Where the alleged monopolistic conduct is found to be the abuse of dominant market positions regulated in the paragraph 1 of Article 17, the plaintiff shall undertake the burden of proof of the dominant market positions of the alleged conductor in that relevant market and that the alleged abuse of dominant market positions.

The defendant shall take the burden of proof when it pleading for the reasonability of the conduct.

Article 9 Where the alleged monopolistic conduct is found the abuse of the dominant position in the market by the public enterprise or other operators with monopolistic position, the people's court may preliminarily determine the dominant market positions of the alleged conductor with the reference to the market structure and competition conditions unless the conductor has sufficient evidence to prove otherwise.

Article 10 The plaintiff may submit the information released by the defendant as the proof to its dominant positions in the market. And the people's court may determine the dominant market positions of the conductor when the information could demonstrate the defendant's dominant position in the relevant market, unless the conductor has sufficient evidence to prove otherwise.

Article 11 The evidence of the cases concerning state secrets, business secrets, personal privacies and other contents which shall be confidential, the people's court may according to its power or by the party's application to hear the case not in public, restrict or prohibit to copy the evidences, present evidence only the counsel and ordering for submitting confidential promises and other effective methods to protect the evidences.

Article 12 The parties may apply to the people's court for the appearance of persons with professional knowledge to illustrate the professional issues involved in this case.

Article 13 The parties may apply to the people's court for market investigation or economic analysis report made by entrusted independent professional organizations or persons; the parties may also entrust independent professional organizations or persons through negotiation on the approval by the people's court; or to be appointed by the people's court when no consensus could be concluded between the parties after the negotiation.

The people's court may judge the reports and investigations in accordance with the conditions in Civil Procedural Law and relevant judicial explanation concerning expert conclusions in the last paragraph.

Article 14 Once the defendant committed monopolistic conducts and infringed the plaintiff's legitimate rights, the people's court shall determine that the defendant committing monopolistic conducts bear civil responsibilities of aggrieving cease and losses compensation, in according to the claims of the parties and the investigated facts, pursuant to General Principles of Civil Law, Tort Liability Law and Anti-monopoly Law.

According to the claims of the plaintiff, the people's courts may order to include the reasonable expenses for the investigation and prevention on the monopolistic conducts in the compensation.

Article 15 The people's court shall determine the invalid of the alleged contract, industry rules and other regulations against

the coercive regulations in the Anti-monopoly law or other laws and regulations.

Article 16 The statute of limitation for civil monopoly disputes shall be calculated from the day when the aggrieved parties knew or should have known the aggrieving.

The limitation of actions shall be interrupted when the plaintiff reported the alleged monopolistic conducts to the antimonopoly authorities. Whereas the antimonopoly authorities decide that the cases are inadmissible, should be dismissed or to stop the investigation, the statute of limitation shall be calculated anew from the day when the aggrieved parties knew or should have known the decision of the anti-monopoly authorities. Whereas the antimonopoly authorities decide that the monopolistic conducts are established, the statute of limitation shall be calculated anew from the day when the aggrieved parties knew or should have known the decision of the anti-monopoly authorities.

Whereas the aggrieved parties file a claim after 2 years of the monopolistic conduct, and that's taken as the pleading by the defendant, the compensation shall be calculated from 2 years earlier prior to the date when the lawsuits are filed.

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