

Competition Policy and Enforcement in China

September 2014

Executive Summary

- China's increased level of competition enforcement activity and the high-profile reporting of its competition investigations have prompted growing attention and concern from US companies. Eighty-six percent of companies responding to the US-China Business Council's (USCBC's) 2014 member company survey indicated they are at least somewhat concerned about China's evolving competition regime – although more so about the *potential* impact than actual experience so far.
- China's competition regime framework is relatively new. The Antimonopoly Law (AML) came into force in 2008 after Chinese authorities spent more than a decade drafting the law and consulting with foreign competition authorities from the United States, the European Union, and other jurisdictions. The AML draws from elements of both the US and EU competition laws, though it is more closely tied to the EU model and contains some elements unique to China.
- The rise in competition-related investigations has corresponded to the buildup in personnel at regulatory agencies following the AML's implementation.
- USCBC monitoring of publicly announced cases indicates that both foreign and domestic companies have been targets of AML-related investigations, but that foreign companies appear to have faced increasing scrutiny in recent months.
- The perception that foreign companies are being disproportionately targeted is also fueled by China's domestic media reporting, which has played up foreign-related investigations versus those of domestic companies.
- Targeted or not, foreign companies have well-founded concerns about how investigations are conducted and decided. Company concerns include:
 - Fair treatment and nondiscrimination
 - Lack of due process and regulatory transparency
 - Lengthy time periods for merger reviews
 - Role of non-competitive factors in competition enforcement
 - Determination of remedies and fines
 - Broad definition of monopoly agreements
- Bigger questions remain unanswered about the objectives of China's competition regime, such as: Will China use the AML to protect domestic industry rather than promote fair competition? Is the government using the AML to force lower prices, rather than let the "market play the decisive role" as enshrined in the new economic reform program? The answers are not fully determined yet, but in at least some cases so far there are reasons for concern.
- Government and industry groups in the United States must take effective steps to engage with various stakeholders in China on these issues through high-level advocacy and working-level policy dialogue and technical exchanges. It should be expected that China, with its large economy, will develop into the third leg of the global antitrust regime, along with the United States and the European Union. The recommendations in this report are directed at supporting the development of a competition regime in China that protects the legitimate interests of all stakeholders and integrates rather than conflicts with international best practices.

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Introduction

China launched its first comprehensive competition law in 2008, and began taking steps to establish the infrastructure and capacity necessary to enforce it. While Chinese agencies conducted competition activity prior to 2008 – such as National Development and Reform Commission (NDRC) enforcement of the Price Law – much of the enforcement capacity required to implement the new Antimonopoly Law (AML) did not exist. The AML created new institutions charged with monitoring competition and market order and a unique regulatory structure that divided competition enforcement among multiple Chinese government agencies. With the framework in place, these agencies began creating the processes of how China’s new competition regime would operate in practice.

Now after six years of implementation, a clearer picture is beginning to emerge about the direction of China’s competition regime. Each of the three main Chinese regulatory authorities – NDRC, the Ministry of Commerce (MOFCOM), and the State Administration of Industry and Commerce (SAIC) – have built enforcement capacity, particularly staffing. This increase in competition personnel corresponds to increasing activity by these agencies in enforcing competition law, including merger reviews and investigations of anticompetitive behavior related to pricing and monopolistic conduct.

China’s increasing AML enforcement activity has garnered considerable attention from a wide range of stakeholders around the world, including government agencies, companies with operations in China, and media outlets. While US-China Business Council (USCBC) monitoring of publicly announced cases in China indicates that both foreign and domestic companies have been targets of AML-related investigations, in recent months foreign companies appear to have faced increasing scrutiny. The level of concern has been raised in part by high-profile reporting on [investigations of foreign companies](#) – not only in western media, but also in China’s domestic media, which has covered foreign-related investigations much more extensively than those of domestic companies and fueled questions about fair and equal treatment.

This report provides a detailed summary of China’s competition enforcement activity, analyzes the questions and concerns of foreign companies, and provides specific recommendations for how to further improve the substance and perception of China’s competition regime.

Background and Regulatory Framework for China’s Competition Regime

The [AML](#), passed in August 2007 and first implemented on August 1, 2008, serves as the foundation of China’s competition regime. Whereas previous laws contained some competition-related content – such as prohibiting the abuse of monopoly powers under the 1993 [Anti-Unfair Competition Law \(AUCL\)](#) and defining illegal pricing activities under the 1998 [Price Law](#) – the AML was the first Chinese law focused on competition as a whole. The law was in the drafting process for more than 13 years, during which Chinese authorities consulted repeatedly with foreign competition authorities from the United States, the European Union, and other jurisdictions. The process also included multiple rounds of public comment from outside stakeholders, including foreign companies and industry associations.

The AML draws from elements of both US and EU competition laws, though it is more closely tied to the EU model. Article 1, for example, states that the AML is designed to “prevent and restrain monopolistic conduct, protect fair market competition, enhance economic efficiency, safeguard the interests of consumers and of society as a whole, and promote the healthy development of socialist market economy.” Many of these goals – curbing monopolistic behavior, limiting intervention in the market place, and protecting consumer interest – match aspects of US competition practice. However, China’s goal of developing a healthy economy reflects an EU-style approach, as does prioritizing economic integration, fairness for business operators of varying sizes, and technology development alongside consumer interests.¹

¹ Eleanor M. Fox, “US and EU Competition Law: A Comparison,” in *Global Competition Policy*, ed. Edward M. Graham et al. (Washington, DC: Institute of International Economics, 1997), 339–354, accessed August 27, 2014, http://www.iie.com/publications/chapters_preview/56/10ie1664.pdf.

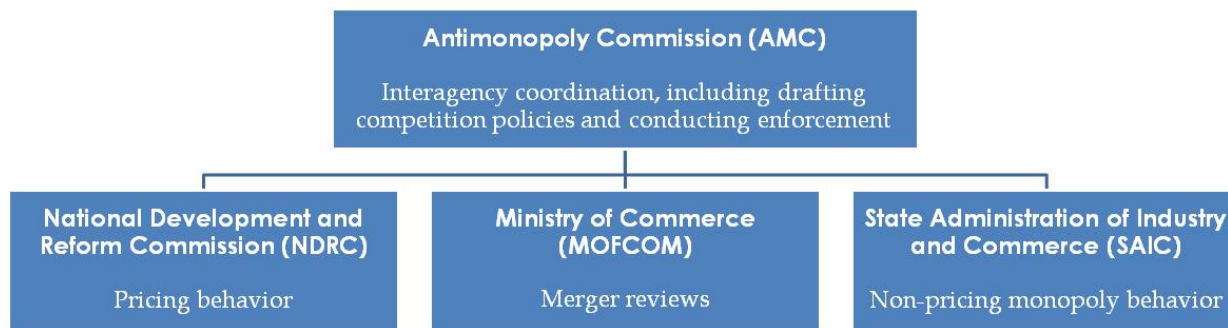
The AML also has provisions that are unique to China or that are applied differently in China than in other countries. Examples include articles that emphasize the need to harmonize competition policy with the specific needs of China’s socialist market economy (Articles 1 and 4), encourage mergers and acquisitions (M&As) as a means to achieve economic scale (Article 5), institute national security reviews of Chinese M&A transactions with foreign companies (Article 31), and prohibit the abuse of intellectual property to eliminate or restrict market competition (Article 55). Chapter V prohibits administrative monopolies – administrative agencies and government bodies that abuse administrative authority to eliminate or restrict market competition, particularly in support of government-owned or affiliated enterprises. The AML also exempts some areas from coverage, including state-owned industries with national security interests or in economic sectors deemed “critical” (Article 7). Other exemptions include agreements between enterprises that are designed to improve technology, develop new products through R&D, conserve energy, or enhance the efficiency of small and medium-sized businesses (Article 15).

In the six years since the implementation of the AML, Chinese agencies have released follow-up regulations to clarify key provisions. Important regulations include 2010 NDRC rules defining price monopolies, 2010 SAIC rules defining “abuse of a dominant market position” and “monopoly agreements,” 2011 MOFCOM national security review rules for foreign M&A transactions, and 2014 MOFCOM rules that created a simplified review procedure for certain types of M&A transactions. Other regulations, such as SAIC rules related to the abuse of intellectual property rights and MOFCOM rules for imposing remedies on mergers, remain in draft form at the time this report was published (for a fuller list of AML-related implementing rules and regulations, see Appendix 1).

AML Enforcement Structure

The AML established a new competition enforcement structure in China, involving both new and existing government agencies (see Chart 1). Article 9 of the AML established the Antimonopoly Commission (AMC) to organize and guide competition and antimonopoly work, including the drafting of competition policies and guidelines and the coordination of administrative enforcement and investigations. The AMC was [initially headed by Vice Premier Wang Qishan](#) in 2008 and included representatives of the State Council, NDRC, MOFCOM, SAIC, and 11 other government agencies. Its working office was set up within MOFCOM and led by the head of the agency’s Antimonopoly Bureau, Shang Ming. The AMC is likely now headed by Vice Premier Wang Yang since he inherited many of Wang Qishan’s former portfolios, though no official announcement has been made.

Chart 1: China’s Main Antimonopoly Authorities



Primary AML enforcement capacity is divided among three government agencies:

- **MOFCOM** Via its Antimonopoly Bureau, MOFCOM is responsible for reviewing M&A transactions and other types of proposed business concentrations. It may approve or reject these transactions, either with or without remedy conditions.

- **NDRC** Via its Price Supervision and Antimonopoly Bureau, NDRC manages enforcement of price-related conduct, including investigations of pricing practices by companies, price-related aspects of monopoly agreements, and company abuse of dominant market position to set or control prices.
- **SAIC** Through its Antimonopoly and Anti-Unfair Competition Bureau, SAIC is in charge of investigating non-price-related monopolistic behavior, including monopoly agreements, abuse of market dominance, and monopoly control.

The courts provide another channel for competition enforcement. Article 50 of the AML allows for civil liability, stating that a business operator engaging in monopolistic conduct that inflicts losses on other parties is subject to civil liability.

AML Enforcement Since 2008: Growing Capacity, Increased Actions

Since the AML went into force, China's three main administrative enforcement agencies – MOFCOM, NDRC, and SAIC – have taken steps to implement competition enforcement by establishing internal structures to implement the law, increasing the number of personnel charged with competition enforcement, enhancing the professionalism and the economic rigor of competition analysis, and improving some aspects of transparency. Chinese regulators also actively and regularly engage with counterparts from the United States, the European Union, and other jurisdictions.

China's competition regime is still in its early stages. Important concerns remain not just with the AML legal framework, but more importantly with China's enforcement track record. Some concerns raised by international observers during the AML drafting process – such as the role of industrial policy considerations in competition reviews, lack of due process, and insufficient transparency – remain relevant based on China's initial enforcement efforts. The persistence of these questions is impacting the international view of China's role as a global competition regulator.

M&A Reviews—MOFCOM

Since the AML's 2008 implementation, MOFCOM has increased enforcement capacity and laid down clear markers that global transactions – even those between foreign companies that have little business in China – must be reviewed in China. MOFCOM's Antimonopoly Bureau has grown to approximately 30 staff in the past five years, and may increase further as MOFCOM continues to expand its number of M&A reviews.²

From August 2008 through the first half of 2014, MOFCOM conducted full reviews of 869 proposed merger transactions, with the number increasing steadily year-on-year (see Table 1). The vast majority (844) of cases reviewed, including transactions involving foreign companies were cleared in full by MOFCOM. Of the remaining 25 cases, all but two were approved with conditions, including high-profile deals such as InBev-Anheuser Busch (2009), Western Digital-Hitachi (2012), Marubeni-Gavilon (2013), and Thermo Fisher-Life Technologies (2014). The other two proposed transactions were rejected by MOFCOM: Coca-Cola's proposed acquisition of Huiyuan (2009) and the proposed P3 Network shipping alliance between European shipping companies Maersk, MSC, and CMA CGM (2014). Nearly all of these cases involved foreign-foreign global acquisitions in which the reviewed companies had subsidiaries in China.

In these conditional cases, MOFCOM has applied a variety of remedies to address competition concerns, including structural remedies such as divestiture of assets and behavioral remedies such as information firewalls, non-discrimination, and mandatory licensing (for a fuller list and description of MOFCOM's M&A reviews, including remedies, see Appendix 2).

² Fei Deng and Cunzhen Huang, "A Five Year Review of Merger Enforcement in China," *The Antitrust Source* 13:1 (October 2013): 1, accessed July 11, 2014, http://www.edgeworthetheconomics.com/files/documents/Fei_Antitrust_Source_A_Five_Year_Review_of_Merger_Enforcement_in_China.pdf.

MOFCOM also implemented “simplified” reviews of a handful of cases. Under MOFCOM’s April 2014 [simplified case provisions](#), if there are no public objections, cases can be reviewed under new simplified standards. The first of these reviews was subsequently conducted on Rolls-Royce Holding PLC’s proposed buyout of Daimler AG’s 50 percent share of their joint venture, Rolls-Royce Power Systems AG. The transaction was [posted](#) on May 22, 2014 for public comment through May 31, 2014. The case was included among the list of transactions approved by MOFCOM during the second quarter of 2014, with final approval listed on June 9, 2014. As of this report’s publication, MOFCOM has posted 21 proposed simplified cases to its [website](#) since May 2014.

Table 1: Merger Reviews Completed by MOFCOM, 2008-2014 1H³

	Approved		Rejected	Total Reviewed
	Unconditionally	Conditionally		
2008	16	1	0	17
2009	72	4	1	77
2010	113	1	0	114
2011	164	4	0	168
2012	158	6	0	164
2013	211	4	0	215
2014 1H	110	3	1	114
TOTAL	844	23	2	869

Source: Fei Deng, “Merger Review and Private Litigation under China’s Anti-Monopoly Law,” US-China Business Council Annual Meeting, June 2, 2014; Ministry of Commerce Antimonopoly Bureau Quarterly Reports.

Primary questions and concerns raised by foreign companies about MOFCOM merger reviews relate to due process and transparency, MOFCOM’s consultation process with other enforcement agencies, lengthy time periods for merger reviews, consideration of non-competition factors (such as industrial policy concerns), and the application of remedies and fines.

Recent Activity

Some recent merger and acquisition reviews whose decisions have been released by MOFCOM include:

- Merck kGaA-AZ Electronic Materials (April 2014)** MOFCOM approved the purchase of AZ Electronic Materials by Merck kGaA, after reviewing the merger for its impact on competition in flat panel display (FPD) manufacturing. MOFCOM argued that the two companies’ combined market share in two products used in FPD manufacturing – liquid crystals and photoresists – would have restricted competition in China and globally. In its [decision](#), MOFCOM required the two companies to eliminate tie-in sales or subsidies for the two products, and required Merck to license liquid crystal patents on non-exclusive, commercially reasonable, and non-discriminatory terms. Both conditions were imposed for a period of three years.
- Maersk, MSC (Mediterranean Shipping Company) and CMA CGM’s “P3 Network” (June 2014)** MOFCOM rejected plans by three leading European shipping companies – Denmark’s Maersk, Switzerland’s MSC, and France’s CMA GCM – to form a shipping alliance that would have allowed the companies to share ships and port facilities. In its [decision](#), the agency noted that the three companies involved in the alliance already held a 46.7 percent market share in the Asia-Europe container shipping line market. Moreover, MOFCOM argued that the alliance would have allowed the companies to increase their market dominance in ways that would restrict competition and unfairly increase the alliance’s bargaining power against consignors and ports.

³ These statistics run through June 30, 2014, and thus do not include merger reviews announced after that date, including the July 2014 conditional approval of the battery joint venture formed by subsidiaries of Panasonic Corp., Toyota Corp., Hunan Corun New Energy, and Changshu Sinogy Venture Capital Co.

- **Primearth EV Energy, Toyota Motor China Investment, Toyota Tsusho, Hunan Corun New Energy, Changshu Sinogy Venture Capital (July 2014)** MOFCOM gave conditional approval for plans by five domestic and foreign companies to form a new joint venture (JV) in the automotive battery industry. In its analysis, MOFCOM focused on nickel metal-hydride car batteries, used in the vast majority of hybrid vehicles, arguing that the industry was very concentrated. As such, the new JV could restrict or even eliminate competition in the hybrid vehicle market and increase Toyota's market dominance. In its [decision](#), MOFCOM required the JV to sell products to third parties on a non-discriminatory basis. Within three years, the JV must also bring product(s) to market to meet market demand.

Pricing Investigations—NDRC

NDRC has also taken significant steps to increase its level of enforcement activity, particularly since early 2013. Between 2008 and 2012, [NDRC conducted nearly 20 price-related investigations](#). By comparison, the agency investigated [more than 80 companies](#) in 2013 alone across a range of sectors, including pharmaceuticals, infant formula, Chinese liquor, and the telecom industry. NDRC's investigations of pricing issues have been supplemented by provincial and local level investigations.

NDRC's investigative activity has grown as the agency has increased staff in its Price Supervision and Antimonopoly Bureau, with similar increases at the provincial level. In September 2013, NDRC Price Supervision and Antimonopoly Bureau Director Xu Kunlin [reported](#) that NDRC had added 150 new price investigation-related staff across the country since 2008. In December 2013, Xu [announced](#) plans to add at least 170 new employees to his department in Beijing and to NDRC local offices. Of that total, 20 joined the NDRC's 46-person team in Beijing.

Western and Chinese media have highlighted price investigations targeting foreign companies. Ongoing USCBC monitoring of publicly announced cases indicates that the investigations are not focused only on foreign companies: More than half of the companies investigated in these cases are domestic (Appendix 3).⁴ Chinese companies have been investigated in sectors from pharmaceuticals to financial services. Notable foreign company investigations have occurred in the pharmaceutical, infant milk powder, and auto parts aftermarket sectors. In recent months, however, foreign companies seem to be gaining more scrutiny.

To date, NDRC investigations have largely been concentrated in specific industries. Some sectors appear to be targeted not because of the presence of foreign companies, but because they have had recent safety or corruption problems. Many of the sectors are also consumer-facing, suggesting that NDRC takes into account consumer complaints or perceived public concern when considering cases to investigate.⁵ In November 2013, NDRC Price Supervision and Antimonopoly Bureau Deputy Inspector Lu Yanchun [announced](#) his agency's intent to focus on price fixing in six major industries: automobiles, aviation, cosmetics, household appliances, pharmaceuticals, and telecom – all consumer-facing products and services. While subsequent statements and actions from NDRC indicate that [its focus will not be limited to these sectors](#), recent investigative activity still appears to be in line with a sector-driven focus.

As companies have learned more about NDRC investigations, concerns have arisen about the methods and procedures for examining anti-competitive behavior. These concerns include due process, treatment of foreign and domestic firms, the influence of industrial policy in launching and conducting investigations, and how key terms such as "fair price" are interpreted by Chinese regulators.

⁴ It is challenging to compile a complete list of companies that have been investigated by NDRC for a number of reasons. First, it is not clear that all of NDRC's investigations are made public. Additionally, foreign and domestic media coverage of investigations, which generally name foreign firms but sometimes exclude domestic firms, are uneven, making it difficult to fully evaluate whether the investigation of domestic companies is administered in proportion to their activity in sensitive industries.

⁵ Further evidence of this approach comes from an August 2014 interview with the NDRC's pricing bureau head. Xu Kunlin indicated that the majority of NDRC cases "came to our attention mainly from informant reports." See Fei Deng and Yizhe Zhang, "Interview with Xu Kunlin, Director General of the Bureau of Price Supervision and Anti-monopoly Under the National Development and Reform Commission of the People's Republic of China," *The Antitrust Source* 13:6 (August 2014): 1, accessed August 27, 2014,

http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug14_xu_intrvw_7_23f.authcheckdam.pdf.

Recent Activity

Some recent pricing investigations conducted by NDRC include:

- **Banking** In October 2013, [NDRC launched a round of investigations](#) aimed at curbing arbitrary fees in the banking sector. The initial campaign targeted domestic banks of varying sizes and ownership types, including both state-owned and private national, municipal, and joint-stock commercial banks. In the [first eight months of this ongoing campaign](#), NDRC levied total fines of RMB 825 million (\$134.1 million) against 64 banks.
- **Telecom** NDRC has been active in the telecom sector since at least April 2011, when it announced an investigation of China Telecom and China Unicom for abuse of market dominance via price discrimination against Internet service providers (ISPs). Though that case was likely suspended, in late 2013 NDRC launched two high-profile investigations involving foreign companies: one against Qualcomm, Inc. (which is ongoing) and the other involving InterDigital, Inc. In May 2014, InterDigital [announced](#) that NDRC had suspended its antitrust investigation based on specific commitments InterDigital had made related to licensing practices, royalties, and the handling of future disputes with Chinese manufacturers.
- **Contact lenses and eyeglasses** In May 2014, NDRC [announced](#) that it had investigated seven foreign companies in the Chinese contact lens and eyeglass market for pricing violations under the AML, including Bausch & Lomb, Inc.; Essilor International SA; and Nikon Corp. Two companies were exempted from fines due to “cooperation.” NDRC statements allege that the companies had violated the AML by requiring suppliers to sign contracts mandating strict adherence to manufacturer’s suggested retail price, requiring resellers to hold similar promotions at the same time, and setting resale prices. Fines totaled RMB 19.6 million (\$3.2 million) for the five non-exempt companies.
- **Automobiles** In August 2014, NDRC [announced](#) that local officials in several provinces had launched two separate competition enforcement proceedings in the auto industry for abusing prices: one against foreign luxury car manufacturers and one against foreign auto parts manufacturers. In the case against luxury automobiles, NDRC announced investigations against Chrysler, Audi, and Mercedes-Benz, conducted by the Shanghai Development and Reform Commission (SDRC), the Hubei Price Bureau, and the Jiangsu Price Bureau. The NDRC announcement stated that Chrysler and Audi had been found to have exhibited monopolistic behavior, and Jiangsu provincial officials subsequently [came to a similar determination](#) about Mercedes-Benz. At the time of publication, final penalties have not yet been announced, though the [Chinese media](#) has reported that Audi may be fined RMB 250 million (\$40.6 million). Toyota subsequently [said](#) that it had also been approached by NDRC for information about its Lexus unit, and that it was cooperating with investigators. NDRC’s initial statements followed [announcements from several foreign automakers](#) that they would cut prices in response to NDRC pressure.

In the case against automobile parts, NDRC in August 2014 [announced](#) that it had fined 10 of 12 Japanese auto parts manufacturers a total of RMB 1.24 billion (\$201.6 million) for colluding to set the pricing of vehicles, auto parts, and bearings. Fines ranged between 4 and 8 percent of the companies’ sales in the previous year. Two of the companies—Hitachi and Nachi-Fujikoshi Corporation—were exempted from fines for cooperation.

Investigations of Monopolistic Behavior—SAIC

Of the three agencies charged with carrying out AML enforcement, SAIC has received the least media attention internationally. Yet SAIC, like its counterpart agencies, continues to slowly build its enforcement capacity by increasing staffing and caseload. Unlike NDRC, SAIC has conducted most of its investigations to date at the sub-national level, via provincial and local associations of industry and commerce.

Based on [statements in February 2014 by SAIC Deputy Commissioner Sun Hongzhi](#) and additional notices [posted on SAIC's website](#), SAIC authorized its provincial branches to investigate more than 30 competition cases over the last six years, announcing formal decisions in 16 cases.⁶ In July 2013, SAIC announced a [new information platform](#) designed to publicize full texts of these decisions, which includes information on 16 concluded cases (for a selected list of SAIC investigations, including these 16 cases, see Appendix 4).

SAIC's published decisions clearly indicate the agency's priorities and also hint at future enforcement activities. The majority of closed cases involved monopoly agreements between domestic – not foreign – companies, particularly through local industry associations. However, SAIC's most recent enforcement activity indicates that the agency is seeking to expand its enforcement efforts to include other areas of monopoly behavior such as vertical agreements, bundling, and the abuse of dominant market position. In addition, SAIC's two most high-profile cases, both ongoing, involve foreign companies: TetraPak and Microsoft.

Fines in these cases have been imposed either on either companies or industry associations, depending on the nature of the anticompetitive activity. Penalties have ranged from RMB 200,000 to 500,000 (\$32,512 to \$81,281) for industry associations and from RMB 60,000 to 3 million (\$9,754 to \$487,686) for companies.

As with the NDRC, Chinese and foreign companies have a number of concerns about SAIC's approach and procedures, including questions about due process, transparency, and fair treatment of foreign and domestic firms in non-price competition investigations.

Recent Activity

Some recent SAIC enforcement actions include:

- **Shankai Sports International** After a March 2013 report on China Central Television's *Jiaodian Fangtan* ("Focus Interview") program about World Cup ticket sales, the [Beijing Administration of Industry and Commerce \(AIC\) launched an investigation](#) into Shankai Sports International, the authorized vendor for 2014 World Cup package tours from China, Hong Kong and Macao. Shankai had been authorized to sell game tickets, accommodation, food and beverages, the services of multilingual hosts, and parking. The company bundled the options into packages, as opposed to offering each service individually. SAIC determined that the bundling violated a March 2011 agreement with Beijing China Travel Service Company (Beijing CTS), under which Beijing CTS would help to arrange hotel, transportation, and tourism services. In early June 2014, [SAIC announced](#) that it halted its probe based on Shankai's admission that its actions violated the AML.
- **Tetra Pak** In July 2013, SAIC [announced](#) its investigation against Swedish company Tetra Pak, the world's largest manufacturer of food packaging. SAIC authorized more than 20 provincial and municipal AICs to investigate whether the company abused its dominant position in liquid food packaging, in terms of bundling and preferential treatment. At the time of publication, the investigation is still ongoing.

Private Litigation—Chinese Courts

As administrative enforcement of competition cases has increased, private litigation has also increased. With the exception of 2011, the number of monopoly cases in local courts has increased year-on-year (see Table 2). According to official court statistics through the end of 2013, Chinese courts have ruled on 171 monopoly-related cases since 2008, with nearly 70 taking place in 2013 alone. Competition cases are generally first heard

⁶ In February 2014, Sun indicated that SAIC had authorized provincial authorities to launch 30 investigations as of that point, with 13 decisions posted. SAIC's official website has posted an additional three cases since then.

in intermediate courts at the provincial level, usually within those courts' intellectual property tribunals, as monopoly and unfair competition cases are classified under the IP umbrella.⁷

Most of the cases that have been brought in civil courts allege abuse of "dominant market position." For the first several years of the AML, the majority of cases brought before local courts found that the plaintiffs had not provided sufficient evidence of the defendant's dominant market position. In May 2012, the Supreme People's Court issued the Provisions on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct, addressing some of these issues by lowering the burden of proof for plaintiffs under certain circumstances.⁸

Table 2: Monopoly-Related Cases Heard and Adjudicated by Chinese Civil Courts, 2008-2013

	First-Instance Cases Accepted by Courts	First-Instance Cases Adjudicated by Courts
2008-2009	10	6
2010	33	23
2011	18	24
2012	55	49
2013	72	69
TOTAL	188	171

Source: Supreme People's Court Annual White Paper on Civil Protection of Intellectual Property Rights (IPR), 2008-2014; State Intellectual Property Rights Report on the IPR Protection Situation in 2012; Presentation by Jin Kesheng, Deputy Chief Judge of Supreme People's Court IPR Tribunal at China Competition Policy and Law Annual Conference (Beijing, 18 Dec. 2012).

Companies' concerns about court cases largely overlap with their broader concerns about enforcement. The most significant issues are lack of transparency and due process. Companies have also noted concerns that parallel issues in non-competition-related civil cases, including a high burden of proof and admissibility of non-documentary evidence.

Recent Activity

Some high-profile civil suits involving monopoly issues include:

- Qihoo v. Tencent** In September 2010, Tencent, the owner of China's popular QQ online communication platform, bundled its QQ Doctor anti-virus application into its QQ instant messaging app. In November 2011, Qihoo – a major Chinese anti-virus software company – filed a monopoly suit in the Guangdong Higher People's Court charging Tencent with abusing its dominant market position. Its basis for this claim was Tencent's bundling of its antivirus software with its QQ software. Qihoo claimed lost sales and damages of RMB 150 million (\$24.4 million). In March 2013, the [court ruled against Qihoo](#), finding it had not defined the appropriate relevant market or proven Tencent's dominant position. The court ordered Qihoo to pay RMB 790,000 (\$128,424) in legal costs. Qihoo appealed to the Supreme People's Court, but the [original decision was upheld](#) in February 2014.
- Huawei v. InterDigital** In December 2011, Chinese telecommunications giant Huawei alleged that US wireless firm InterDigital abused its market dominant position and failed to negotiate on fair, reasonable, and non-discriminatory licensing terms for standard-essential patents related to 2G, 3G, and 4G technology. In its February 2013 ruling, the court upheld several of Huawei's claims. The court ruled that InterDigital did indeed hold a dominant market position and engaged in various monopolistic behaviors. The court required damages of RMB 20 million (\$3.3 million) and set a royalty rate for InterDigital's relevant patents not to exceed 0.019 percent of the sales price of Huawei products. This ruling was upheld in October 2013 by the Guangdong Higher People's Court. In

⁷ Supreme People's Court, Regulations on Causes of Action in Civil Cases (2011), accessed July 9, 2014, http://www.gov.cn/jrzq/2011-03/20/content_1828234.htm.

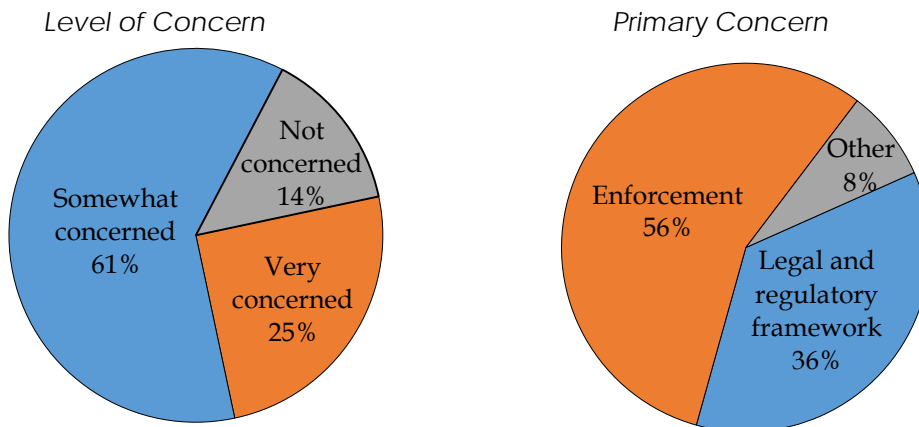
⁸ Adrian Emch and Jonathan Liang, "Private Antitrust Litigation in China – The Burden of Proof and Its Challenges," *CPI Antitrust Chronicle* 4:1 (April 2013): 11.

December 2013, [the two companies announced](#) a settlement, with both sides agreeing to submit to binding arbitration and to withdraw other pending legal actions in the United States and Europe.

US Company Views on Competition Enforcement

China's increased level of competition enforcement activity and the high-profile reporting of competition investigations have prompted increasing attention, questions, and concerns among US companies. The results of USCBC's 2014 member company survey (see Charts 2 and 3) provide a good illustration of this, as 86 percent of companies surveyed indicate they are at least somewhat concerned about these issues, with over half citing enforcement as a primary concern.

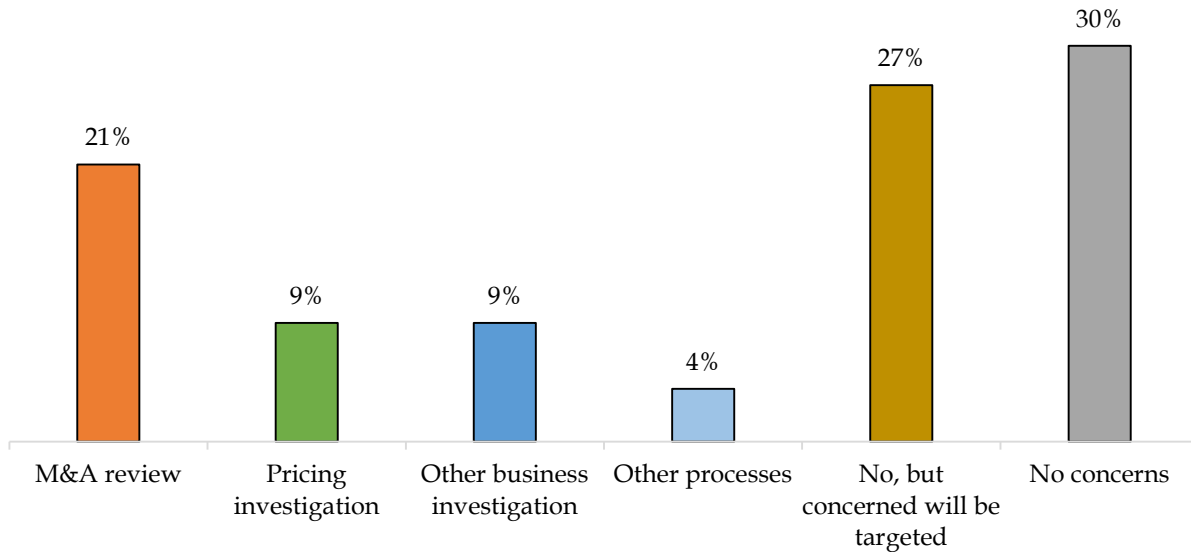
Chart 2: China's Competition Legal/Enforcement Environment



Source: USCBC 2014 Member Company Survey

Although most companies reported that they have not been targeted by an antitrust investigation, almost 30 percent of companies are concerned they will be subjected to one. Twenty-one percent of surveyed companies reported having undergone MOFCOM merger reviews, and an additional 18 percent also indicated experience with either pricing or other types of competition-related investigations.

Chart 3: Direct Company Experience with Competition Enforcement Actions



Source: USCBC 2014 Member Survey; multiple responses allowed

The biggest AML challenges that companies cited in the survey include:

- Fair treatment and nondiscrimination
- Lack of due process and regulatory transparency
- Lengthy time periods for merger reviews
- Role of non-competitive factors in competition enforcement
- Determination of remedies and fines
- Broad definition of monopoly agreements

Top Challenges and Policy Recommendations

Many questions remain unanswered about the objectives of China’s competition regime. Among them: Will China use the AML to protect domestic industry rather than promote fair competition? Is the government using the AML to force lower prices rather than letting the “market play the decisive role” as enshrined in the new economic reform program? What approach will China ultimately adopt for its economy and its antitrust regime—a government-dictated, state-run model, or a market- and consumer-oriented model? The answers are not fully determined yet, but in at least some cases so far there are reasons for concern.

Government and industry groups in the United States must take effective steps to engage with various stakeholders in China through high-level advocacy and working-level policy dialogue and technical exchanges. It should be expected that China, with its large economy, will develop into the third leg of the global antitrust regime, along with the United States and the European Union. The following recommendations are directed at supporting the development of a competition regime in China that protects the legitimate interests of all stakeholders and integrates rather than conflicts with international best practices.

Fair Treatment/Nondiscrimination

Chinese authorities regularly state that AML enforcement activities do not target foreign companies. While USCBC research indicates that competition enforcement activities have involved both domestic and foreign companies, the data is incomplete. Improved transparency about investigations from Chinese regulators would allow a better assessment of whether China’s competition enforcement is considering foreign and domestic firms equally.

Targeted or not, foreign companies have well-founded concerns about how investigations are conducted and decided. China's legal framework for antitrust enforcement provides opportunities for protectionism and industrial policy to sway decisions. For example, MOFCOM merger reviews can consider non-competition factors including those related to industrial policy. The framework also lays out a specific time period during which MOFCOM must consult with industry regulators such as NDRC, the Ministry of Industry and Information Technology, or the Ministry of Agriculture, providing domestic-focused regulators and interests the ability to influence decisions based on protectionist or industrial policy goals rather than competitive factors. NDRC and SAIC also have considerable leeway to select investigation targets and carry out the investigations. Some high-profile cases appear to reflect broader Chinese industrial policy concerns on intellectual property, standards, and the protection of domestic industries, as opposed to the interests of fair competition.

Companies also have concerns about security reviews for the foreign acquisition of domestic companies (detailed in Article 31 of the AML), which MOFCOM began to implement more than four years ago. While China has the right under international trade law to consider national security, concerns remain that these procedures could be used to promote domestic economic protectionism.

Finally, Chinese competition enforcement practices can create *de facto* discrimination against foreign companies by not giving proper weight to market considerations. For example, pricing investigators have shown an interest in assessing price discrimination by comparing the prices companies charge in China versus what they and their competitors charge in other markets. In other cases, investigators appear to have taken an approach that calculates the sum of a product's component parts as an indication of the fair price of a finished product. Such comparisons do not take into account that product prices are based on local market conditions, including a fair calculation of supply and demand, resulting in appropriately different prices in different markets. The lack of easily accessible public summaries of how pricing decisions are made, combined with various cost factors in certain industries that have been investigated, lead some analysts to believe that the decisions do not fully account for pricing factors that are specific to particular markets, such as transportation costs, distribution costs, import duties, taxes and other fees. Further, they conclude that China does not properly account for important factors in product pricing such as design costs, intellectual property costs, and the cost of skilled labor.

At the 2014 Strategic and Economic Dialogue (S&ED), the US and China affirmed that "the objective of competition policy is to promote consumer welfare and economic efficiency rather than promote individual competitors or industries, and that enforcement of their respective competition laws should be fair, objective, transparent, and non-discriminatory." Implementing this language fully and consistently during competition reviews would alleviate many of the concerns that US stakeholders have about China's competition regime.

Recommendations

To address concerns about fair treatment and national interest, USCBC recommends that relevant Chinese government agencies:

- Fully implement China's 2014 S&ED commitment to ensure that competition enforcement is "fair, objective, transparent, and non-discriminatory." This commitment would include not only ensuring that sectors and companies under investigation are chosen based on these principles, but also in ensuring fair treatment for all parties during those reviews.
- Clarify the process by which companies can appeal administrative decisions on antitrust matters, including merger reviews and anti-monopoly investigations, to provide greater confidence in these processes.
- Limit the use of MOFCOM merger security reviews only to those transactions that have genuine national security concerns, and ensure that such reviews are not used by either industry regulators or competitors to delay or distort M&A review decisions based on foreign ownership.

- Revise MOFCOM's 2011 Provisions on the Implementation of a Security Review System for the Acquisitions of Domestic Enterprises by Foreign Investors to give consideration to the scope, criteria, and procedures for conducting such reviews to ensure that they are not protectionist in nature. Such recommendations have previously been [submitted by USCBC](#) and other stakeholders.
- Improve the economic analysis used in pricing investigations to better account for underlying factors that result in different prices in different markets.

Due Process and Transparency

Each of China's main enforcement bodies (MOFCOM, NDRC, SAIC, and Chinese courts) have taken initial steps to introduce transparency to their procedures over the last several years, but more needs to be done. Progress in this area has been most notable in the increased publishing of information and decisions about completed cases. Most of the key agencies have established specific platforms to publish more detailed information as a resource for interested parties, such as SAIC's [dedicated webpage](#) for case decisions. These agencies also regularly brief the public on progress in expanding competition enforcement and the handling of specific cases, as NDRC did in [February 2014](#). MOFCOM has also established a formal pre-consultation process that allows potential applicants to have frank discussions about merger transactions.

However, as Chinese regulators increase the level of enforcement activity, there is a growing concern that such efforts have not ensured that these procedures are fair and robust for all parties in all investigations. Such concerns primarily relate to weaknesses in due process: Proceedings should be fair for all parties involved and carried out in accordance with established rules and principles.

Specific issues include:

- **Pressure to "admit guilt" without the ability to see and respond to evidence** Some companies involved in AML investigations or discussions with enforcement officials have raised concerns that there is undue pressure to confess they have violated the AML. In these cases, company representatives are often not told why they are under investigation or on what grounds an investigation has been launched, but they are still told they will face a reduced penalty if they "cooperate." Such steps not only make it difficult for a company to prepare for a conversation with AML regulators, but also undermine confidence in the enforcement system.
- **Inability to have appropriate legal representation at "dawn raids"** Companies involved in competition-related "dawn raids" – unannounced on-site investigations of anticompetitive conduct – indicate that enforcement officials are often unwilling to wait even a short amount of time to allow for legal representation (either internal or external legal counsel) to be present, as is often done in the United States and the European Union. While it is reasonable to expect that officials would desire to conduct such investigations quickly and efficiently, best practices in other jurisdictions often allow, upon request, a short window of time – even as little as 30 minutes – to have a company's counsel present before investigators proceed. Chinese investigators have in some cases also prohibited legal counsel from being present during employee interviews, even in an observer capacity. Many companies note that they are not even permitted to know what evidence investigators have seized. Such procedures do not align with international best practices, and they create significant challenges in understanding the scope and nature of investigations. This makes it much more difficult for companies to prepare for future discussions with enforcement agencies and respond to questions and allegations.
- **Inability to have appropriate legal representation at ongoing proceedings** Even after initial "dawn raids," companies report that requests to have legal counsel present at competition enforcement proceedings – such as merger and pricing reviews – are often denied. While NDRC and MOFCOM officials have told USCBC they are willing to admit outside legal counsel to AML-related proceedings

if they receive specific requests and evidence of standing contractual relationships, companies continue to report that these requests are frequently denied. Excluding legal counsel hinders companies from being able to fully respond to and address regulator concerns. Additionally, AML-related procedures frequently have an international dimension (including global mergers, international pricing practices, contract provisions with multinational business partners, and investment decisions of small and large investors), and companies must work with competition enforcement officials in multiple jurisdictions. Thus, the inability to have legal counsel present makes it difficult for companies to ensure full compliance.

- **Suspicion toward companies that ask for legal counsel to be present** In some cases, Chinese officials have indicated that company requests to have legal counsel present during competition proceedings is a “red flag” that could signal guilt. In other cases, companies have been pressured to omit legal counsel from the process to help the process “run more smoothly.” Such practices contradict both the letter and the spirit of China’s efforts to promote rule of law and due process, and they are out of line with international best practices.
- **Insufficient transparency during competition reviews** Companies continue to note questions and concerns about transparency and information-sharing during competition reviews. For example, during merger reviews, MOFCOM officials may indicate they have received complaints from third-parties, but say that they cannot share further information about the complainant or the specific complaints. This makes it difficult for companies to be able to place complaints in context or to address specific concerns. When companies do not understand the nature of the complaints, the review process is lengthened, causing unnecessary delays. It also allows non-competitive factors to be introduced into proceedings. Some international jurisdictions allow parties to view third-party complaints either in full or in a redacted version, helping the process run more efficiently.
- **Insufficient transparency in publishing case decisions** While all of China’s key enforcement agencies have made progress in publishing case information, such publications are often incomplete. MOFCOM, for example, publishes detailed information about decisions and remedies for merger cases that it rejects or conditionally clears. It also releases public notices about cleared simplified cases. However, these cases represent only a small percentage of the total number of cases, and MOFCOM does not release decisions for cases it clears unconditionally. Similarly, NDRC releases some—but not all—the results of past investigations, often just announcing the final charge and the fine. In many cases, these results provide limited rationale for why different companies receive different penalties, and how a company’s level of “cooperation” is judged. Such incomplete information makes it challenging for potential applicants to fully understand how Chinese regulators review transactions, and ultimately makes it harder for them to fully and properly comply with Chinese competition laws and practices.

Recommendations

To address the issues that companies face with due process concerns, USCBC recommends that appropriate Chinese government agencies strengthen due process and build confidence in AML enforcement processes among all key stakeholders. These steps include:

- Adjust the investigation process to allow a brief window of time for the company’s legal counsel or an appropriate legal representative to be present for “dawn raids” and all further investigative proceedings. Other international competition regulators, such as the US Federal Trade Commission (FTC), US Department of Justice (DOJ), and the European Commission competition authorities can share best practices on how they handle requests from companies under investigation to have company legal counsel present.
- Provide companies facing competition investigations with the legal grounds and evidence prompting an investigation, and ensure that they have a fair opportunity to present evidence in their defense.

China made a specific commitment on this point at the 2014 S&ED. Fully implementing this commitment would ensure a cooperative dialogue with regulators and result in a more efficient discussion on remedies and better compliance in the future.

- Provide more information about MOFCOM concerns and third-party complaints to companies undergoing merger reviews, and provide it as early as possible to avoid delays and better allow companies to provide evidence to address the issues.
- Strengthen education and training of enforcement officials about due process issues and international legal practices to ensure that legitimate company requests to have legal counsel present is not viewed as a sign of guilt, but as a part of normal legal practice.
- Allow qualified foreign and domestic lawyers to consistently accompany clients to AML-related proceedings, including merger reviews and AML enforcement proceedings.
- Release more information about case decisions to help all parties better prepare for competition review, which will make them more efficient. USCBC recommends that each agency – MOFCOM, NDRC, SAIC, and courts at varying levels – release complete information for cases that they handle, including summaries of the cases and how decisions and final remedies are determined. If this is not possible in the near term due to capacity constraints, USCBC recommends that agencies consider other means to increase transparency, such as inviting industry representatives to attend roundtables with government officials and experts to discuss sample cases and releasing batches of model cases that could provide more information. For any of these means taken, USCBC recommends that enforcement agencies coordinate with the parties to the case to appropriately redact sensitive information and to release the remainder to the general public to protect trade secrets and other confidential business information.

Time Periods for M&A Reviews

While long and uncertain timeframes across the range of competition investigations create challenges for companies, these challenges have been most acute for merger reviews. Articles 25 and 26 of the AML describe a specific timeline for M&A review processes – a preliminary review that lasts up to 30 days, a more detailed review that lasts up to 90 days, and an extension period if the review is not completed that can last up to 60 days. Clear timelines for reviews were established to provide important guidance to potential filers, helping them make preparations preceding transactions.

In practice, however, the 180-day period is increasingly stretched as the number of transactions that MOFCOM reviews grows. Moreover, the length of time for reviews of normal processes is longer than in other jurisdictions. There are a number of factors contributing to these long processes:

- **Limited regulator capacity** MOFCOM capacity to tackle its growing caseload remains limited. Although MOFCOM's Antimonopoly Bureau has increased its staff in recent years, half of its 30 staff members are administrative and do not review cases. At the same time, the number of cases MOFCOM reviews has ballooned – nearly tripling from 77 in 2009 to 215 in 2013.
- **Challenges of the pre-consultation process** The 180-day review timeline does not officially begin until MOFCOM accepts the company's application and supporting materials. Companies may have to engage in several rounds of communication with MOFCOM up front to gather and provide necessary materials. This pre-consultation process can help to foster better communication between MOFCOM and potential applicants, but in practice can also cause unnecessary delays. Companies have heard informally that increasing workloads are causing MOFCOM officials to "slow-walk" the pre-consultation process. This pre-filing period has lengthened from several weeks in 2009 to up to two to three months today.

- **Increasing requests to withdraw and refile merger applications** Some companies undergoing merger reviews that have been unable to agree with MOFCOM on remedies have been asked to withdraw their application and refile anew, thus extending the review period even further. This now appears to be the rule as opposed to be the exception. Of the 15 cases that have been conditionally cleared or rejected since the beginning of 2012, only one of these cases – Merck kGaA’s acquisition of AZ Electronic Materials – was finalized within the required 180 day period (at 106 days). Many of these other cases had to formally withdraw their application and re-file. Such practices negate the value of setting a specific time period for reviews.
- **Last-minute concerns raised without sufficient time to address them** Companies report that challenges arise when MOFCOM presents new concerns to filers late in the review period. Some of this is structural: MOFCOM is required to consult with other government agencies during the process, which takes place late in the review process, typically late in the second phase. This process often dredges up new concerns that MOFCOM did not previously raise with merger filers, thus significantly changing the ongoing conversation and potential remedies.

As noted previously, MOFCOM released a set of simplified merger guidelines earlier this year that could alleviate time pressures by providing the means to more quickly and efficiently handle merger cases that do not require a more detailed review. These measures are a welcome step forward, especially if they are applied in practice to a significant portion of MOFCOM reviews.

Prolonged timelines and delays in merger reviews create challenges for both foreign and domestic companies seeking to build and grow their business in China through M&A. Such anticipated and unanticipated delays hamper companies managing global M&A transactions as they can impact merger approvals in other jurisdictions. These inefficiencies also limit China’s ability to be viewed as a pro-competitive market for M&A.

Recommendations

To alleviate concerns about lengthening timeframes for merger reviews, USCBC recommends that MOFCOM and other relevant agencies take several key steps:

- Significantly increase the number of professional personnel conducting merger review activities, commensurate with MOFCOM’s increased caseload.
- Expand education and training programs for new and existing competition enforcement personnel from MOFCOM, NDRC, and SAIC. Such training programs should focus not only on best practices and procedures under Chinese domestic law for merger reviews, but should also include international regulatory best practices, global industry analysis, and international business practices. This training will help to ensure that personnel have a solid understanding of the industries and businesses they regulate, enabling them to better target behavior that is truly anticompetitive, and ensuring more efficient use of resources.
- Commit that regulators will use the pre-consultation process solely as a means to work with applicants to ensure they are submitting complete applications, and not as a *de facto* means of extending review periods.
- Encourage companies to pursue merger filings under MOFCOM’s new Interim Provision on Standards Used for Simple Cases of Concentrations of Business Operators. Ensure that the new simplified procedures are applied broadly and that both foreign and domestic companies have equal eligibility to apply under the guidelines. This would free up limited bandwidth for MOFCOM reviewers to focus on more difficult cases.
- Limit the use of withdrawal/re-filing procedures to extreme circumstances, and work to improve China’s track record of prolonged reviews. As part of this, MOFCOM should consider adjustments to

the interagency consultation process to limit the possibility that new issues are raised with merger transactions without sufficient time to address them within statutory timelines. The agency should also work with merger filers to provide more information earlier about potential concerns raised by other agencies. This will allow applicants to prepare relevant materials and consider potential remedies.

Role of Non-Competitive Factors in Competition Enforcement

Article 4 of the AML grants competition agencies the ability to weigh competitive factors along with non-competitive factors when it comes to enforcement. Article 27 provides some additional clarity on the scope of non-competitive factors. The article lays out five specific areas that competition regulators may consider, representing both kinds of factors:

- Market share and the degree of control in the relevant market;
- Degree of market concentration in the relevant market;
- Influence on market access and technological progress;
- Influence on consumers and other business operators; and
- Influence on national economic development.

Additionally, the article contains a general clause allowing regulators to consider undefined “other areas” that may impact market competition. Such language is broad enough to give considerable discretion to regulators. Such broad discretion in this area has already raised concern.

Recent competition enforcement proceedings have raised strategic and operational concerns about how regulators consider non-competitive factors. For example, in recent proceedings involving large innovative companies and their royalty rates and licensing practices, regulators have given strong consideration to the impact of their business activity on Chinese policy goals such as innovation, patent creation, and technology licensing. This limits companies’ ability to exercise their intellectual property rights. Such actions contradict regulations such as the December 2013 [Interim Administrative Provisions for Patents Involved in National Standards](#). Language in this regulation seeks to balance China’s goal of encouraging the adoption of innovative standards with the need to preserve the free exercise of intellectual property by patent owners. Such balance is essential to incentivize companies and individuals to invest in innovation. This concern is also mirrored in ongoing discussions about SAIC’s Draft Regulations on the Prohibition of Conduct that Eliminates or Restricts Competition through Abuse of Intellectual Property Rights, including language related to “essential facilities” (for more information, see USCBC’s [July 2014](#) comments on these draft regulations).

Competition reviews have built in time for government stakeholders to express non-competitive concerns, including those related to industrial policy. MOFCOM is required to consult with other agencies during the merger review process. Some analysts are concerned that this allows for domestic-focused regulators and interests to influence decisions based on protectionist or industrial policy goals and not competitive factors. This process remains opaque.

Recommendations

To address concerns that companies have with non-competitive factors in competition enforcement, USCBC recommends that appropriate Chinese government agencies:

- Commit to basing competition enforcement practices—including merger reviews and investigations of monopoly conduct—on competition considerations only, and not on protectionist or industrial policy concerns. Agencies should fully implement China’s 2014 S&ED commitment that “the objective of competition policy is to promote consumer welfare and economic efficiency rather than promote individual competitors or industries.” To this end, they should ensure that existing competition laws and regulations, including the AML, keep with the letter and spirit of this commitment. The government should also eliminate AML Article 27(5) (“the influence of the concentration of business

operators on the national economic development”) to alleviate concerns that protectionism and industrial policy factor into competition reviews. Alternatively, clarify through public statements and follow-up regulations that this clause is to be invoked only under narrow, defined circumstances, and provide greater clarity as to those circumstances.

- Provide clearer timetables and information about the interagency review process for M&A transactions, including how MOFCOM consults with agencies, what information is provided, and what scope of feedback is sought and considered.
- Revise regulations such as SAIC’s Draft Regulations on the Prohibition of Conduct that Eliminates or Restricts Competition through Abuse of Intellectual Property Rights to ensure that efforts to tackle anticompetitive behavior balance competing goals, such as promoting innovation and the free exercise of intellectual property rights in China (additional recommendations are provided in USCBC’s [July 2014](#) comments on these draft regulations).

Application of Remedies and Fines

As China’s antitrust enforcement agencies have gained experience and set best practices for competition enforcement, they have also signaled acceptable remedies to address monopoly concerns.

- **MOFCOM** Like its international counterparts, MOFCOM utilizes both structural and behavioral remedies, including divestiture of assets, information firewalls, and mandatory licensing. However, MOFCOM has been increasingly willing to impose a mix of remedies that differs from international best practice. In the United States and the European Union, regulators generally apply structural remedies to cases of horizontal mergers (mergers involving firms who operate in the same relevant market, often as competitors), and limit use of behavioral remedies to vertical mergers (mergers involving firms that operate in different segments of an industry supply chain, often in supplier-customer relationship). MOFCOM, however, favors a heavier use of behavioral remedies, including regular application of behavioral remedies even in cases where the monopoly concerns raised have been horizontal. Some of these behavioral remedies restrict or eliminate the legitimate business value of conducting the transaction in the first place.⁹

For example, in the Marubeni/Gavilon transaction (2013), MOFCOM required the post-merger entity to maintain separate Marubeni and Gavilon subsidiaries for the purposes of exporting and selling soybeans to China, and required those subsidiaries to compete on market terms. MOFCOM also prohibited Marubeni from purchasing Gavilon soybeans except as an arms-length transaction and set up an information firewall to prevent information flow between the subsidiaries. Such conditions seriously impacted the business value of the transaction for the two parties by limiting corporate integration. In contrast, the United States and European Union passed the transaction without any conditions, structural or behavioral.

Divergent application of remedies partially stems from the fact that Chinese enforcement agencies are legally bound to consider non-competitive factors. However, the remedies imposed – particularly by MOFCOM – create significant challenges for foreign and domestic companies alike. For MOFCOM remedies, the broader use of behavioral remedies tests firms seeking to expand their operations in China through M&A. In many cases, these behavioral remedies require ongoing monitoring and government intervention in corporate operations. Such activities may contradict broader Chinese economic development goals, such as the third plenum goals of giving the market a decisive role in the economy, creating a more efficient high value-added economy, and promoting industry consolidation in fragmented sectors. By being out of line with international best practice, they hinder China’s development as a viable and attractive global destination for M&A. This ultimately harms

⁹ For a more in-depth analysis of MOFCOM’s remedies and how they differ from their international counterparts, see Fei and Huang.

Chinese companies' ability to gain important experience in using M&A as a tool for business expansion on a global scale.

- **NDRC and SAIC** As noted, these agencies have a shorter track record of investigations and resulting fines, and greater variability in terms of fines. NDRC fines have ranged widely from RMB 530,000 (\$86,158) in the August 2014 decision against five manufacturers of aerated bricks in Hainan to 1.24 billion (\$201.6 million) in the August 2014 decision against 12 Japanese auto parts manufacturers. To date, SAIC fines have generally been smaller due in part to their investigative activity against smaller players. Penalties for the industry associations ranged from 200,000 RMB to 500,000 RMB (\$32,512 to \$81,281), and the companies were fined from 60,000 RMB to 3 million RMB (\$9,754 to \$487,686).¹⁰

The AML's Article 47 lays out specific fines – between 1 and 10 percent of the previous year's sales revenue – for cases in which a company abuses its dominant market position. This is the basis for both NDRC and SAIC competition investigations. However, these standards create specific obstacles, for regulators and companies alike. First, it is unclear how pricing decisions are made, which raises questions about whether they fully account for pricing factors that are specific to particular markets, such as transportation costs, distribution costs, import duties, taxes and other fees. In addition, basing fines on a percentage of sales serves to discriminate against both domestic and foreign large companies while limiting flexibility in setting fines based on the level of the infraction.

Recommendations

To ensure that fines and remedies applied in competition enforcement proceedings achieve the goals that Chinese regulators seek while also being commensurate with the violations in question, USCBC recommends that relevant Chinese government agencies:

- Set greater harmonization with international practice as an explicit goal for the development of China's competition regime. To further that goal, regulators should increase engagement with international competition regulators and experts to share information on best regulatory practices, remedy and penalty options, and individual cases. They should also expand existing mechanisms – including the 2011 [memorandum of understanding \(MOU\) among FTC, DOJ, MOFCOM, NDRC, and SAIC](#) and the 2011 [Guidance for Case Cooperation between MOFCOM and the DOJ and FTC on Concentration of Business Operators \(Merger\) Cases](#) – as well as similar mechanisms with other competition regulators to promote more regular exchange, training, and collaboration on individual cases. Regulators should also deepen exchanges with new cooperative mechanisms, including agreement and information exchanges involving NDRC, MOFCOM, and SAIC.
- Avoid the excessive application of behavioral remedies and limit their use to circumstances in which such remedies are necessary to address monopoly concerns. Ensure that the application of such remedies does not unduly negate the pro-competitive impact of the proposed transaction.
- Revise the AML's Article 47 to first, add specific language communicating that fines are based on a company's net sales in the relevant market in China, or at a minimum on the company's China sales; second, eliminate the minimum fine as a percentage of turnover, as it may discriminate against large companies and limit local officials' ability to assess a fine based on the level of the infraction; and third, replace the current 10 percent maximum fine with a fixed maximum fine that would be appropriate for companies of all sizes while still serving as an appropriate deterrent.

Broad Definition of Monopoly and Pricing Agreements

¹⁰ Zhan Hao, "2014 China Anti-Monopoly Semi-Annual Report," (Beijing: Anjie Law Firm, June 2014), p. 11, accessed August 27, 2014, <http://en.anjielaw.com/downloadRepository/b4d90032-58b3-4a22-835d-3456899fa431.pdf>.

US companies have a number of lingering questions about provisions within the AML that define monopolistic behavior. Many of their concerns related to the ways in which China's competition regime deviates from international best practices. Companies also highlight provisions designed to protect against anticompetitive practice but instead yield unintended negative consequences for foreign and domestic companies operating in China.

One key difference between Chinese and international best practices relates to the types of agreements that companies are permitted to sign with their trading partners under the AML's Article 14. This article specifically prohibits manufacturers and their trading partners from signing certain agreements with distributors. These include agreements to fix resale prices or set minimum resale prices, known as resale price maintenance (RPM) agreements, and "other monopoly agreements" as determined by NDRC or SAIC (further details on the latter are provided in the NDRC's February 2010 [Anti-Price Monopoly Provisions](#) and SAIC's December 2010 [Provisions on the Prohibition of Monopolistic Agreements](#)).

Such clauses – which appear to eliminate RPM agreements in blanket fashion – are out of sync with evolving practices in other legal jurisdictions. While some RPM agreements are justifiably construed as price-fixing arrangements, some may have pro-competitive benefits. For example, RPM agreements can help to avoid so-called "free-rider effects," in which customers try products at retailers that offer full service and then purchase final products from discount retailers. Such practices disincentivize retailers from offering better customer service and promotional activities. RPM agreements can thus promote consumer welfare by incentivizing distributors to offer better customer service that benefit both customers and distributors. International thinking by antitrust scholars in the United States, the European Union, and other jurisdictions has evolved considerably over time from blanket bans of RPMs to greater consideration of the so-called "rule of reason," under which an RPM agreement is judged on its merits. The judgment weighs the pro- and anti-competitive effects of the agreement.

To date, there have been a handful of cases involving RPM, including administrative price investigations involving vision care products, milk powder, *baijiu* and the Rainbow-J&J civil case. While it appears in these cases that Chinese regulators consider the impact of the RPM agreements rather than determining they are by their very nature illegal, all of these decisions have ultimately found the RPM agreements to be anti-competitive. It thus remains unclear whether or not the "rule of reason" approach was the basis or the justification for these decisions. Notably, none of these decisions set a formal precedent for other decisions. As such, regulators and companies cannot fully evaluate how existing and potential RPM agreements might be considered in the future.

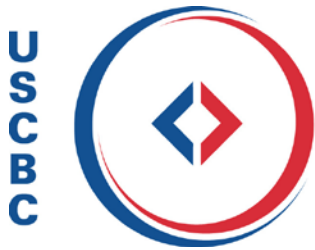
Companies also fear that other agreements they sign with distributors could be construed as monopolistic. For example, many companies selling complex products such as automobiles frequently sign agreements with their manufacturing partners to ensure that the product-specific parts those partners manufacture are only sold through company-authorized dealers. These agreements are designed to promote strong customer service and customer safety by ensuring that only trained, certified personnel conduct repairs of such products using spare parts.

Recommendations

To permit greater room for business arrangements that promote competition while still appropriately prohibiting anticompetitive monopoly agreements, USCBC recommends that relevant Chinese government agencies:

- Draft and release regulatory and judicial guidance stating that relevant competition enforcement authorities – including NDRC, SAIC, and the courts – will apply a "rule of reason" analysis to monopoly agreements considered under Article 14. Such guidance could be provided by:
 - Drafting a joint NDRC-SAIC notice to clarify implementation of Article 14, requiring regulators as part of their competition analysis to adopt a "rule of reason" analysis that would weigh both the pro- and anti-competitive impacts of potential monopoly agreements;

- Adding a new clause to the AML’s Article 15 exempting any agreements “whose pro-competitive impact can be shown to outweigh any monopoly concerns” from the prohibitions in Article 13 and 14; and
 - Releasing a judicial interpretation clarifying how the courts should consider RPMs and other monopoly agreements. This would require judges to adopt a “rule of reason” analysis that would weight both the pro- and anti-competitive impact of potential monopoly agreements.
- Provide guidance to regulators and court officials as they consider agreements between companies and manufacturers to sell contracted components only through company-authorized dealers. Such direction would be in line with competition policy goals such as promoting consumer interests and broader economic goals, like guaranteeing product safety.



Appendix 1: China's Core Competition Laws, Regulations, and Policies

National Laws

- [Anti-Unfair Competition Law \(AUCL\)](#) (*National People's Congress, passed September 1993*)
This law, which took effect December 1, 1993, aims to encourage and protect fair market competition, prohibit unfair competition, and safeguard the rights and interests of both businesses and consumers.
- [Price Law](#) (*National People's Congress, passed December 1997*)
This law, which took effect May 1, 1998, seeks to standardize pricing, give a greater role to pricing in allocating resources, stabilize market prices, and protect the rights and interests of both businesses and consumers.
- [Anti-Monopoly Law \(AML\)](#) (*National People's Congress, passed August 2007*)
This law, which took effect August 8, 2007, represents China's first comprehensive law to cover competition and monopoly behaviors, including merger reviews, price cartels, and monopoly behaviors.

Regulations, State Council

- [Notice on the State Council Antimonopoly Commission Main Functions and Members](#) (*July 2008*)
This notice, which took effect July 28, 2008, describes the main functions of the State Council Antimonopoly Commission, establishes its working group within MOFCOM, and lists the group's members.
- [Provisions on the Notification Thresholds for Concentrations of Business Operators](#) (*August 2008*)
These provisions, which took effect August 3, 2008, define concentrations of business operators and provide specific notification thresholds for M&A to notify MOFCOM.
- [Guidelines on the Definition of the Relevant Market by the Anti-Monopoly Commission of the State Council](#) (*May 2009*)
These guidelines, which took effect May 24, 2009, provide competition enforcement agencies with the tools to define a relevant market and also describe the analytical approach of defining a hypothetical monopolist.
- [Provisions on Administrative Penalties for Price Violation Behavior](#) (*December 2010*)
These regulations, which took effect December 4, 2010, describe detailed administrative penalties for those violating the Price Law. They replaced a [2008 version of these regulations](#) that predated the implementation of the AML.
- [Notice on Establishing a Security Review System Regarding M&A of Domestic Enterprises by Foreign Investors](#) (*February 2011*)
This notice, which took effect March 5, 2011, establishes a national security review process in certain cases where foreign investors are purchasing domestic companies, including creation of panels to review and block or impose conditions on relevant transactions.

Regulations, MOFCOM

- [Interim Measures on Evidence Collection Related to Concentrations of Business Operators that Fall Below Notification Thresholds but Are Suspected of Anticompetitive Effects \(Draft\)](#) (January 2009)
These draft measures, which were released twice for public comment in [January](#) and [February](#) 2009 have not yet been finalized, set evidence collection and procedural rules for MOFCOM (and other agencies) to review certain types of concentrations of business operators that are below notification thresholds where there is suspicion of a negative competitive impact.
- [Measures on Calculating the Turnover of Concentrations of Financial Institution Business Operators for Merger Control Purposes](#) (MOFCOM, People's Bank of China, China Banking Regulatory Commission, China Insurance Regulatory Commission, and China Securities Regulatory Commission, July 2009)
These measures, which took effect August 14, 2009, provide more specific detail on notification thresholds specifically for financial institutions, explain the calculation of business turnover of financial institutions, and provide specific guidance on how to determine if a financial deal should be reported.
- [Measures on Reporting Proposed Concentrations of Business Operators](#) (November 2009)
These measures, which took effect January 1, 2010, define and specify several key concepts on how to calculate business turnover in concentrations of business operators, such as what constitutes an acquisition of control over other business operators.
- [Interim Measures Concerning the Divestiture of Assets or Businesses when Implementing Concentrations of Business Operators](#) (July 2010)
This measure, which took effect July 5, 2010, clarifies the requirements and procedures for companies that must divest assets or businesses as part of the conditions placed by MOFCOM after it reviews a proposed concentration.
- [Provisions on the Implementation of a Security Review System for the Acquisitions of Domestic Enterprises by Foreign Investors](#) (August 2011)
These provisions, which took effect September 1, 2011 and replaced [March 2011 interim regulations](#), describe the detailed structure and process for how China should conduct national security reviews of foreign company acquisitions of domestic companies. MOFCOM and NDRC are placed at the head of a joint committee to handle reviews.
- [Interim Provisions on Evaluating the Competitive Effects of Concentrations of Business Operators](#) (August 2011)
These provisions, which took effect on September 5, 2011, describe the factors that MOFCOM should consider in evaluating the competitive impact of a proposed transaction, such as market concentration and impact on market entry, with detailed descriptions of how regulators should consider each.
- [Interim Measures on the Investigation of Concentrations of Business Operators not Notified in Accordance with the Law](#) (December 2011)
These measures, which took effect February 1, 2012, provide greater clarity on the investigation of concentrations of business operators that are above notification thresholds but failed to notify MOFCOM.
- [Provisions on Standardizing Competitive Behavior in the Overseas Investment Cooperation](#) (March 2013)
These provisions, which took effect April 17, 2013, set rules for proper competition related to overseas investment cooperation and define unfair competition.

- [Provision on the Imposition of Restrictive Conditions on Business Operators during Concentrations of Business Operators \(Draft\)](#) (March 2013)
This draft provisions, which were released for public comment in March 2013 but have not yet been finalized, aim to clarify restrictive conditions that can be placed on concentrations of business operators and reduce the negative impact these concentrations have on competition. The measures, when finalized, would replace the July 2010 [Interim Measures Concerning the Divestiture of Assets or Businesses when Implementing Concentrations of Business Operators](#).
- [Interim Provisions on Standards Used for Simple Cases of Concentrations of Business Operators](#) (February 2014)
These provisions, which took effect February 12, 2014, establish a simplified process to allow more rapid approvals of certain types of concentrations between business operators.
- [Trial Guiding Opinions on Filing of Simple Cases of Concentration of Business Operators](#) (April 2014)
These provisions, which took effect April 18, 2014, lay out more specific procedures governing the application, evaluation, and approval of certain types of concentrations between business operators under a simplified review.

Regulations, NDRC

- [Interim Provisions Prohibiting on the Seeking of Excessive Profits](#) (January 1995)
These provisions, which took effect January 25, 1995, permit provincial branches of NDRC to evaluate and determine appropriate rules and bounds for appropriate pricing behavior, with behavior outside of those ranges determined to be "excessive profits." The provisions were amended slightly by the State Council's 2011 [Decision on Eliminating and Revising Certain Administrative Laws and Regulations](#).
- [Provisions Prohibiting Low-Cost Dumping](#) (August 1999)
These provisions, which took effect August 3, 1999, provide further details on provisions in the Price Law related to dumping, or selling products below cost as anticompetitive behavior.
- [Anti-Price Monopoly Provisions](#) (December 2010)
These provisions, which took effect February 1, 2011, clarify and define price-related monopoly acts, including price monopoly agreements, abuse of dominant market position, and abuse of administrative powers to eliminate or restrict competition. They replace the 2003 [Interim Provisions Prohibiting Price Monopoly Behavior](#).
- [Provisions on Procedures for Administrative Law Enforcement on Anti-Price Monopoly](#) (December 2010)
These provisions, which took effect February 1, 2011, outline NDRC's enforcement structures, powers and obligations as they relate to pricing monopolies, specifically how investigations are conducted and how to handle leniency on self-reporting.

Regulations, SAIC

- [Procedural Provisions Prohibiting Behavior Abusing Administrative Power to Eliminate or Restrict Competition](#) (June 2009)
The provisions, which took effect July 1, 2009, prohibit entities from abusing administrative power for the purpose of eliminating or restricting competition, and describe procedures under which SAIC can address such abuse.

- [Procedural Provision on Investigating Cases Involving Prohibition on Monopoly Agreements and the Abuse of Dominant Market Position](#) *(June 2009)*
The provisions, which took effect July 1, 2009, set specific rules and procedures for SAIC and its local branches to investigate cases involving monopoly agreements and abuse of dominant market position.
- [Provision on the Prohibition of Monopolistic Agreements](#) *(December 2010)*
These provisions, which took effect February 1, 2011, provide detailed definitions and criteria for judging monopoly agreements, and prohibit business operators from reaching monopolistic agreements.
- [Provision on the Prohibition on the Abuse of a Dominant Market Position](#) *(December 2010)*
These provisions, which took effect February 1, 2011, provide detailed definitions and criteria for judging “dominant market position,” defining it to mean a business operator has the ability to control price, quantity, or other conditions of goods, or has the ability to obstruct or affect other business operators.
- [Provision on the Prohibition of the Anti-Competitive Abuse of Administrative Power](#) *(December 2010)*
These provisions, which took effect February 1, 2011, provide detailed definitions and criteria for determining inappropriate use of administrative power and for judging its anti-competitive effects.
- [Provisions to Prohibit Intellectual Property Abuse to Eliminate or Restrict Competition \(Draft\)](#) *(June 2014)*
The regulations, which were most recently released for public comment in June 2014 but have not been finalized, discuss the relationship between intellectual property and competition. They aim to provide clear guidance to antitrust regulators about when the protection and exercise of intellectual property rights constitutes anti-competitive behavior.

Regulations, Supreme People’s Court

- [Notice on Studying and Implementing the Antimonopoly Law](#) *(July 2008)*
This notice, which took effective July 28, 2008, states that the People’s Court should accept and try cases that are brought by any party concerned about monopolistic conduct of another party.
- [Provisions on Certain Issues relating to Application of Laws for Hearing Civil Monopoly Disputes](#) *(May 2012)*
These provisions, which took effect June 1, 2012, cover a range of topics including burden of proof, the relationship between administrative and civil enforcement, and the statute of limitations.



Appendix 2: Merger Reviews Rejected or Modified by MOFCOM (2008 – present)

According to statistics through the first half of 2014, MOFCOM has conducted full reviews of approximately 870 proposed merger transactions, with the number increasing steadily year-on-year (see Table 1). The vast majority of these cases (844) that have been reviewed were approved by MOFCOM unconditionally. Of the remaining 25 cases, all involve foreign companies. Twenty-three of these were approved with conditions, and two rejected.

The table below includes information and descriptions for each case that MOFCOM has either approved conditionally or rejected since the launch of the Antimonopoly Law in August 2008, including the 25 cases mentioned above and one additional conditional clearance issued in July 2014.

Date Announced	Industry	Parties	Remedy	Case Duration
November 2008	Beverage Manufacturing	InBev, Anheuser-Busch	<u>Conditionally approved</u> : Pre-merger, Anheuser-Busch had a 27 percent stake in Tsingtao Brewery (the second-largest beer producer in China) and InBev had a 29 percent stake in Zhujiang Brewery (fourth-largest). MOFCOM imposed three conditions on the post-merger entity: InBev and AB should not increase their stakes in Zhujiang Brewery and Tsingtao Brewery from pre-merger levels; InBev may not acquire any stakes in China Resources Snow Breweries or Beijing Yanjing Brewery (largest and third-largest, respectively); and InBev will be obliged to notify MOFCOM of any changes in its controlling shareholders.	70 days
March 2009	Beverage Manufacturing	Coca-Cola, Huiyuan	<u>Rejected</u> : MOFCOM asserted that the proposed acquisition would enable Coca-Cola to leverage its dominant position in the carbonated soft drinks to dominate the neighboring juice market. Such dominance would raise entry barriers and limit the ability of medium and small-sized juice companies to compete and innovate. MOFCOM stated that since the two parties were not able to agree on an acceptable remedy with MOFCOM, they had to reject the transaction.	182 days

April 2009	Chemical Manufacturing	Mitsubishi Rayon, Lucite	<u>Conditionally approved</u> : This case raised competition concerns in the methylmethacrylate (“MMA”) market, where the parties would have a post-merger market share of 64 percent. According to MOFCOM, Mitsubishi had businesses in both the MMA market and downstream markets, and thus would have been able to foreclose downstream competitors by leveraging its dominant position in the MMA market. MOFCOM required the parties to divest assets, with Lucite to divest 50 percent of its annual MMA production capacity for five years to one or more unaffiliated third party purchasers. Lucite China must also grant third-party purchasers the right to purchase 50 percent 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, with compliance verified annually by an independent auditor.	124 days
September 2009	Auto Manufacturing / Equipment Manufacturing	General Motors, Delphi	<u>Conditionally approved</u> : MOFCOM argued that GM would have the ability to bar its competitors in the auto manufacturing market as Delphi was the exclusive supplier for various Chinese auto manufacturers. MOFCOM cleared the transaction subject to conditions: GM/Delphi must continue to supply Chinese auto manufacturers on a non-discriminatory basis; GM and Delphi would not exchange confidential information relating to any third party; GM/Delphi must cooperate with customers to achieve a smooth transition when they switch to other auto parts suppliers; and GM must continue its diversified and non-discriminatory policy of purchasing auto parts from multiple suppliers.	42 days
September 2009	Pharmaceuticals	Pfizer, Wyeth	<u>Conditionally approved</u> : MOFCOM believed the acquisition would have anti-competitive effects on the swine mycoplasma pneumonia vaccine (SMPV) market in China. The agency argued that the combined entity would possess a 49 percent market share in an increasingly concentrated SMPV market in China. According to MOFCOM, this would have enabled Pfizer/Wyeth to enlarge their market share and consequently increase the price of SMPV and raise entry barriers to the SMPV market. MOFCOM ordered a divestiture of Pfizer’s SMPV business in China. Pfizer had to find a third party buyer approved by MOFCOM within six months and ensure that the divested business included all tangible and intangible assets necessary for the survival and competitiveness of the divested business.	113 days

October 2009	Battery Manufacturing	Panasonic, Sanyo	<u>Conditionally approved</u> : MOFCOM argued that the acquisition would have anti-competitive effects in three highly concentrated battery markets: rechargeable button-shaped lithium batteries, nickel-hydrate batteries for daily use, and nickel-hydrate batteries for automobile use. Post-transaction, Panasonic/Sanyo would have market shares of 62, 46 and 77 percent, respectively. MOFCOM considered that the high market shares in already concentrated markets would easily enable the parties to raise prices. Both parties were ordered to divest substantial businesses in all three merger-relevant markets. Sanyo and Panasonic were to spin off their relevant businesses within six months to an independent third party approved by MOFCOM.	283 days
August 2010	Healthcare	Novartis, Alcon	<u>Conditionally approved</u> : MOFCOM believed that post-transaction Novartis/Alcon would be able to coordinate with Hydron (a key supplier of contact lens care products) on price, quantity, and sales territories. Therefore, the transaction was cleared on conditions that Novartis cease sales of its ophthalmic anti-inflammatory/anti-infective combinations under its current brands in China, and not sell any of these products under the same or different brands in China for the next five years. Furthermore, Novartis would terminate its distribution agreement with Hydron within 12 months.	116 days
June 2011	Chemicals / Fertilizer	Uralkali, Silvinit	<u>Conditionally approved</u> : The potassium chloride market was highly concentrated with the top three producing countries accounting for more than 80 percent of the world's total reserves. MOFCOM believed that, since China relies heavily on imports of these products, 50 percent of which are from Uralkali, Silvinit, or their affiliated companies, the transaction would increase the level of concentration in the market. In addition, the merged entity would benefit from an increased market power through the ownership of more potassium resources and stronger production capabilities. Thus, MOFCOM imposed acquisition conditions to maintain a stable level of imports of potassium chloride into China. The merged entity would have to continue to provide the whole range of potassium chloride products to the Chinese market in sufficient quantity and maintain the current methods, processes, and existing customary negotiations procedures.	81 days

October 2011	Textile Machine Manufacturing / Private Equity	Alpha V, Savio	<u>Conditionally approved</u> : Uster (28 percent owned by private equity investor Alpha V) and Leopfe (a wholly-owned subsidiary of Savio) were the only two global suppliers of yarn clearers – devices to remove faults from yarn and improve its quality – remove faults (thick places, thin places, foreign matter) from the yarn. MOFCOM believed that after the transaction it is likely that Uster and Leopfe could coordinate with each other through Alpha V to restrict and/or eliminate the competition in the yarn clearer market. MOFCOM imposed several conditions on the acquisition, including requiring Alpha V to divest its shares in Uster to an independent party within 6 months upon MOFCOM’s approval of the transaction and prohibiting Alpha V from participating in or influencing Uster’s operations and management before completion of the divesture process.	110 days
November 2011	Energy	General Electric, Shenhua (formation of a JV)	<u>Conditionally approved</u> : GE China and China Shenhua Coal to Liquid and Chemical Co., Ltd. (CSCLC, a subsidiary of state-owned Shenhua Group) had announced plans to establish a 50/50 joint venture (JV) to license coal-water slurry (CWS) gasification technology to industrial and power projects in China. GE Infrastructure Technology, another subsidiary of GE, would license GE’s CWS gasification technology to the proposed JV. MOFCOM found that this transaction might exclude or restrict competition in the CWS gasification technology licensing market. The JV was approved, subject to the condition that it may not force potential licensees for CWS gasification technologies to use its technology. Further, it may not raise these licensees’ cost of using other technologies by restricting feedstock supply.	212 days
December 2011	Computing Components	Seagate, Samsung	<u>Conditionally approved</u> : MOFCOM raised concerns regarding market share in the hard disk drive (HDD) manufacturing industry, with Seagate and Samsung representing two of the top five companies that collectively hold a virtual monopoly in the market. MOFCOM believed that reducing the number of competitors would encourage collusion. The acquisition was approved, but required that Samsung HDD remain an independent competitor to Seagate and others. Seagate was also required to ensure that an unaffiliated Chinese supplier would not be restricted from supplying other HDD manufacturers.	208 days

February 2012	Chemical Manufacturing	Henkel Hong Kong, Tiande (formation of a JV)	Conditionally approved : MOFCOM's review of the proposed joint venture focused on three chemical products that appear in correlated upstream and downstream roles in compound production. MOFCOM's fear that a JV between these parties that supply each other with inputs for different chemical compound outputs would eventually lead to them stifling competition by restricting competitor access to product inputs. MOFCOM required Tiande to provide one of the concerned chemicals to all downstream customers on a "fair, reasonable and non-discriminatory" basis. Tiande was also prohibited from selling this chemical at an unreasonably high price, offer more favorable terms of supply to the JV, or exchange competitive information with Henkel or the JV.	186 days
March 2012	Electronics Components	Western Digital, Hitachi	Conditionally approved : Western Digital and Hitachi were among the world's five largest manufacturers of data storage drives at the time. MOFCOM was concerned that because China has the world's greatest number of consumers who buy computers, they would potentially suffer most widely from increased HDD prices. China is also home to large numbers of manufacturers which incorporate HDDs in their computer products. MOFCOM approved the acquisition but imposed conditions requiring Hitachi GST to remain as an independent competitor in the global HDD market, with independent manufacturing, pricing, and marketing. Western Digital and Hitachi were also prevented from substantially altering their business models or coercing customers into exclusively purchasing their HDDs.	336 days
May 2012	Mobile Phone Manufacturing	Google, Motorola Mobility	Conditionally approved : MOFCOM was concerned with the dominant market share in China of Google's mobile operating system, Android. It believed Google could provide preferential licensing conditions to Motorola to use Android on Motorola devices, giving it an advantage over other mobile phone manufacturers. MOFCOM also stated that Google's acquisition of Motorola's patent portfolio would allow it to impose unreasonable licensing conditions of such patents to competitors. MOFCOM's remedy required Google to license Android free of charge and to treat all mobile device OEMs equally.	233 days
June 2012	Aviation Electronic Systems	UTC, Goodrich	Conditionally approved : UTC and Goodrich comprised 84 percent of the market share in aircraft electronic systems, a market that MOFCOM stated had high entry barriers due to research costs. MOFCOM approved the acquisition but required the companies divest Goodrich's electronics systems business, and find a suitable buyer for this business divestiture within six months.	187 days

August 2012	E-Commerce	Walmart, Yihaodian	<u>Conditionally approved</u> : MOFCOM argued that Walmart's rich experience in operating physical markets for goods and grocery shopping could allow it to expand and eliminate competition in the online e-commerce goods and groceries shopping space. MOFCOM limited Walmart's acquisition to Yihaodian's online direct sales business, and prohibited the company from providing online trading services to other trading parties without first obtaining a value-added telecom services permit. Walmart was also prohibited from operating Yihaodian's current online trading platform service.	242 days
December 2012	Application Processors / Intellectual Property	ARM, G&D, Gemalto (formation of a JV)	<u>Conditionally approved</u> : Key concerns raised by MOFCOM about this joint venture focused on licensing of intellectual property related to application processors to offer a trusted execution environment (TEE) – a secure area in application processors used in electronics. MOFCOM argued that ARM's globally dominant position in IP licensing and role in establishing TEE created risk that the JV would restrict other companies from providing TEEs by limiting IP licensing. MOFCOM ruled that ARM disclose the security monitoring code and other information that is necessary to develop alternative TEE solutions based on its application processor technology.	217 days
April 2013	Natural Resources/ Mining	Glencore, Xstrata	<u>Conditionally approved</u> : MOFCOM was concerned with competition in the minerals market, largely due to China's heavy reliance on imports of copper, lead, and zinc. Specifically, the agency was concerned that the post-merger market shares of Glencore and Xstrata for these three minerals would harm competition, with downstream Chinese users of Glencore's inputs likely affected negatively. MOFCOM required the combined entity to divest and sell a copper mine in Peru within 18 months of the decision. Additionally, Glencore was required to provide lead and zinc concentrate to Chinese customers for eight years after the decision.	381 days
April 2013	Agricultural Products	Marubeni, Gavilon	<u>Conditionally approved</u> : MOFCOM argued that Marubeni's sales infrastructure in China and share of the soybean import market in China, combined with Gavilon's US soybean sourcing operations, would limit competition in the soybean import market. MOFCOM approved the acquisition with conditions on the deal: establishing two independent subsidiaries as relating to soya bean exports and sales to China; maintaining two separate operating teams with independent operations; prohibiting the exchange of competitive information between the two subsidiaries, backed up by a mandatory firewall; and prohibiting the Marubeni subsidiary's purchase of soya beans from the Gavilon subsidiary, except on an arm's length basis.	308 days

August 2013	Medical Devices	Baxter, Gambro	<u>Conditionally approved</u> : Baxter and Gambro were both major competitors in the highly concentrated CRPT device market (equipment used for treatment of kidney issues). MOFCOM concluded that Baxter would have a dominant market position for CRPT products after the merger, since the transaction would eliminate one of Baxter's main competitors and thus negatively impact competition. The transaction was approved, but with conditions that Baxter divest its worldwide CRPT business and discontinue its OEM agreement with competitor Niplo in the Chinese market.	221 days
August 2013	Electronic Components	Mediatek, MStar	<u>Conditionally approved</u> : MOFCOM found that Mediatek and MStar were primary competitors in the LCD TV control chip market, which they stated was a market with high technical barriers to entry. MOFCOM argued that the post-acquisition environment would eliminate the benefits the competitive relationship brought to the market, as the combined company would have a market share as high as 61 percent in the global market and 80 percent in China. MOFCOM also alleged that other LCD TV control chip manufacturers would not be able to compete effectively with the combined entity, meaning that downstream TV makers in China would have restricted choices in the procurement of LCD TV control chips. MOFCOM's approval required MStar's Taiwanese subsidiary to take ownership of MStar's LCD TV control chip business, and continue operating as a competitor in the Chinese market.	417 days
January 2014	Biotechnology	Thermo Fisher, Life Technologies	<u>Conditionally approved</u> : MOFCOM found considerable overlap in the two companies' businesses in three biotechnology areas, with 59 relevant products between them. MOFCOM's analysis led it to focus on a portion of those products that would have high market concentration and estimated price increases in a post-acquisition environment. The final approval of the acquisition set conditions that Thermo Fisher divest its global cell culture business, sell its 51 percent stake in a Chinese bioengineering subsidiary, and reduce prices of certain products that had potential for significant price increases due to market concentration after the acquisition. (Those prices should be reduced by 1 percent per year for 10 years.)	196 days

April 2014	IT / Software / Mobile Equipment Manufacturing	Microsoft, Nokia	<u>Conditionally approved</u> : While Microsoft's acquisition of Nokia's handset business seemed to have little direct impact on competition in China's mobile market because of the parties' relatively small market shares in operating systems and devices, MOFCOM raised concerns that the transaction could result in restrictions in licensing of patents deemed essential to competition for smartphones. The agency argued that Microsoft held essential patents for Android operating system licenses, which has an 80 percent market share of mobile devices in China, and would have an incentive to increase licensing costs to other smartphone makers utilizing the Android operating system. MOFCOM imposed conditions that Microsoft and Nokia were required to honor fair, reasonable, and non-discriminatory (FRAND) commitments for standard-essential patents (SEPs); and to refrain from seeking injunctions for infringement of such SEPs against smartphones produced by Chinese producers.	208 days
May 2014	Mobile Device Manufacturing	Merck kGaA, AZ Electronic Materials	<u>Conditionally approved</u> : Merck kGaA is the world's leading manufacturer of liquid crystal for use in tablets and smartphones, while AZ Electronic Materials has significant global and China market share in photoresist, a complementary product used in tablets and smartphones. MOFCOM found that after the acquisition, Merck would be the world's largest supplier of both, while competitors would only be able to supply one of the two aforementioned raw materials. This, they argued, would thus allow Merck to restrict competition. MOFCOM's conditions for acquisition include: Merck must report any licensing deals it signs in China to the ministry; Merck cannot force Chinese customers to buy products from both companies; and Merck must license liquid crystal patents on non-exclusive terms.	106 days
June 2014	Transportation Shipping	Maersk, MSC, CMA CGM	<u>Rejected</u> : MOFCOM rejected plans by three leading European shipping companies - Denmark's Maersk, Switzerland's MSC, and France's CMA GCM - to form a shipping alliance that would allow the companies to share ships and port facilities. In its decision, MOFCOM noted that the three companies involved in the alliance already held a 46.7 percent market share in the Asia-Europe container shipping line market, and that the alliance would allow them to enhance their market dominance in ways that would restrict competition and unfairly increase their bargaining power against consignors and ports.	273 days

July 2014	Battery Manufacturing	Primearth EV Energy, Toyota Motor China Investment, Toyota Tsusho, Hunan Corun New Energy, Changshu Sinogy Venture Capital (formation of a JV)	<u>Conditionally approved</u> : MOFCOM's review of the proposed JV focused on nickel metal-hydride car batteries, used in the vast majority of hybrid vehicles. Globally, the top four suppliers of nickel metal-hydride car batteries have 97 percent global market share, with Primearth EV Energy (PEVE) among them. MOFCOM considered that, due to high concentration of major players and high market entry barriers, this joint venture could restrict or even eliminate competition in the hybrid vehicle market. Further, MOFCOM believed that the JV would further increase Toyota's dominance in the hybrid vehicle market and thwart development of China's domestic hybrid vehicle companies. The JV was approved with the conditions that it must continue to sell products to third parties on a non-discriminatory basis. Also, within three years, the JV must bring their product(s) market to meet market demand.	184 days
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Appendix 3: Selected Pricing Investigations by NDRC and Its Provincial Branches (2008-present)

NDRC has taken significant steps to increase its level of enforcement activity, particularly since the beginning of 2013. From the time the Antimonopoly Law (AML) was passed in 2008 to 2012, the NDRC conducted less than 20 price related investigations. By comparison, the agency investigated more than 80 companies in 2013 alone across a range of sectors, including pharmaceuticals, infant formula, Chinese liquor, and the telecom industry. 2014 has been, if anything, even more active.

The two tables below include information about selected price-related investigations concluded by NDRC and its provincial branches since the launch of the AML in August 2008. It also includes information about pricing investigations that were announced, but – according to public sources – have yet to be concluded. Both lists are compiled based on publicly available information, and therefore may not include every investigation conducted by NDRC officials at the central and provincial level.

Completed Cases

Date Announced	Industry	Location	Companies Involved	Description
March 2010	Rice noodle manufacturing	Guangxi	Juezhihe, Xianyige, Liuzhou Brothers, Yongcai and other involved rice noodle manufacturers	Starting in 2010, eighteen rice noodle manufacturers held a series of meetings to discuss profit sharing and business integration and to set market prices. The Guangxi Price Bureau ruled that these behaviors violated the Price Law and the Antimonopoly Law. The bureau fined three of the leading companies RMB 100,000 (US \$16,256) apiece, and ordered fines of RMB 30,000-80,000 (US \$4,877-13,005) for other manufacturers according to their behavior.
August 2010	Paper making	Zhejiang	Fuyang Paper Manufacturing Industry Association	In 2010, the Fuyang Paper Manufacturing Industry Association held five meetings with more than 20 attending member companies to discuss the sales price for white paperboard. The Zhejiang Price Bureau ruled that the behavior violated both the Price Law and Antimonopoly Law, and ordered the Association to pay fines of RMB 500,000 (US \$81,281).

November 2010	Household products	Hubei	Wuchang Salt Company	In July and August 2010, the Wuchang Salt Company required distributors to purchase both salt and Huolierba detergent powder. After an investigation, the Hubei Price Bureau announced that Wuchang had violated Articles 7 and 17(5) of the AML, but that the company had voluntarily returned illegal revenue to distributors. The Hubei Price Bureau also required Wuchang to take further unspecified corrective measures within the month.
May 2011	Household products	Shanghai	Unilever	In March 2011 Unilever released information to the media that it might raise detergent and soap prices because of raw materials costs, activity that caused customers to engage in "panic buying." NDRC ruled that such behavior violated Article 14(3) of the Price Law, ordered Unilever to cancel its price hike, and fined the group RMB 2 million (US \$325,124).
November 2011	Pharmaceuticals	Shandong	Weifang Shuntong, Huaxin	NDRC found that Shutong and Huaxin had signed exclusive distribution agreements with the only two domestic producers, allowing them to control the supply of promethazine hydrochloride, a key raw material for the compound reserpine commonly used in high blood pressure treatments. Those agreements required the producers to obtain approval from both companies before selling product to any other party, thus eliminating competition. NDRC found that these actions violated the AML and the Price Law, and, under the AML, fined Weifang Shuntong RMB 6.877 million (US \$1.1 million) and Huaxin RMB 150,000 (US \$24,384).
February 2012	Chemicals	Hubei	Hubei Yihua Group	NDRC and its branch in Hubei found that Yihua, one of the world's largest manufacturers of sodium hydrosulphite, had worked with other companies to fix prices and subsequently imposed those prices on its customers. Methods included requiring customers to enter purchase agreements with Yihua and its subsidiaries and imposing conditions on material and equipment suppliers. These actions caused the price of sodium hydrosulphite to increase by 300 percent in 2011. NDRC and its branch in Hubei found that these actions violated the AML and imposed fines of RMB 10.12 million (US \$1.6 million).
March 2012	Sea sand	Guangdong	Guangdong Sea Sand Association and its members	Investigation reports stated that several companies took steps to set and manipulate resource fees for mining sea sand under the umbrella of the Guangdong Sea Sand Association. The Guangdong Price Bureau determined these actions violated Article 16(2) of the AML and issued fines and warnings to members of the association. Three members of the association - Guangdong Baohai Sand and Stone, Dongguan Jianghai, and

				Shenzhen Donghai Century Information Consulting – were collectively fined RMB 759,200 (US \$123,417). Other members were issued warnings.
January 2013	LCD panels	nationwide	Samsung, LG, Chimei, AUO, Chunghwa Picture Tubes (CPT), HannStar Display Corporation	NDRC’s investigation found that these six foreign LCD manufacturers met repeatedly between 2001 and 2006 to exchange information on the LCD panel market and set or manipulate LCD panel prices in China. NDRC ruled that these behaviors violated Article 14.1 and Article 40 of the Price Law. NDRC ordered the parties to return the overcharged funds to Chinese television enterprises (RMB 172 million (US \$28.0 million)). NDRC confiscated other illegal gains (RMB 36.75 million (US \$6.0 million)) and ordered the companies to pay fines of RMB 144 million (US \$23.4 million). NDRC also ordered the parties to take other corrective measures, including providing fair treatment of all customers in the procurement of high-end or new technology products, and extending the free repair warranty period from 18 to 36 months for LCD panels used on televisions that Chinese television enterprises sell in mainland China.
February 2013	White liquor (baijiu)	Guizhou	Kweichow Moutai Group	The Guizhou Price Bureau ruled that Kweichow Moutai has sought to fix the minimum resale price to third-party distributors since 2012, taking punitive measures against those who did not implement the price. The bureau ruled that such activities violated Article 14 of the AML as a resale price maintenance agreement and fined Kweichow Moutai RMB 247 million (US \$40.2 million), or 1 percent of the “related” sales revenue in the previous year.
February 2013	White liquor (baijiu)	Sichuan	Wuliangye Group	The Sichuan Development and Reform Commission found that between 2009 and 2013, Wuliangye signed agreements with over 3,200 independent dealers to limit the lowest resale price for its products. It then enacted punitive measures against those who did not implement the price. The commission ruled that such activities violated Article 14 of the AML as a resale price maintenance agreement and fined Wuliangye RMB 202 million (US \$32.8 million), or 1 percent of the “related” sales revenue in the previous year.

August 2013	Gold jewelry	Shanghai	Shanghai Laofengxiang, Yuyan Plaza	The Shanghai Price Bureau ruled that Shanghai Laofengxiang and several other gold jewelry stores sought to set retail prices within strict bounds for gold jewelry products under the umbrella of the Shanghai Gold & Jewelry Trade Association. The bureau ruled that this behavior violated Articles 13 and 16 of the AML and fined the association RMB 500,000 (US \$81,281) and the five stores a total of RMB 10.09 million (US \$1.6 million), or 1 percent of their previous year's sales.
August 2013	Milk powder	nationwide	Biostime, Mead Johnson Nutrition, Dumex, Abbott, FrieslandCampina, Wyeth, Fonterra, Beingmate, Meiji	The nine milk powder companies were accused of fixing resale prices for distributors and retailers, including fixing or restricting prices for resale to a third party and adopting punitive measures for parties that do not meet those requirements. NDRC judged these behaviors to violate Article 14 of the AML and fined six of these producers a total of RMB 668.7 million (US \$108.7 million). Fines ranged from 3 percent to 6 percent of prior year revenue.
September 2013	Tourism	Hainan	Sanya Platinum Crystal Crafts, Crystal Source, Good Royal Crystal	The Hainan Price Bureau ruled that these three companies formed a cartel, holding coordination meetings and signing a formal agreement in June 2012 to fix prices, commission rates, and market share for crystal products. They also formed a joint bank account to guarantee the agreement. The bureau found these activities violated Article 13 of the AML. Sanya Platinum Crystal Crafts and Crystal Source were fined RMB 3.6 million (US \$585,223) (4 percent of the previous year's revenue) and RMB 1.35 million (US \$219,459) (2 percent of the previous year's revenue), respectively, for the monopoly agreement. They were also fined RMB 99,000 (US \$16,094) and RMB 90,000 (US \$14,631), respectively, for concealing, transferring, or destroying financial data and evidence. Good Royal Crystal was exempt from punishment due to "cooperation."
September 2013	Tourism	Hainan, Yunnan	Tourist shops selling crystal and spirulina products	Tourist-oriented shops selling crystal products and spirulina (a popular Chinese herbal product) in the tourist hubs of Sanya, Hainan, and Lijiang, Yunnan were accused of using price discounts to lure customers. According to the investigation, They first raised prices on these products far above cost and then offered discounts to bring prices back down. Sticker prices for these products were often tens or hundreds of times the cost of the products. Pricing agencies in Hainan and Yunnan found these practices to violate Article 14(4) of the Price Law, and fined each offending shop RMB 300,000 (US \$48,769).

September 2013	Tourism	Yunnan	Eight travel agencies in Yunnan, including the Lijiang branch of Ctrip, under the guidance of the Lijiang Tourism Association Travel Agency Division	The Yunnan Development and Reform Commission ruled that eight travel agencies, operating under the umbrella of the Lijiang Tourism Association's Travel Agency Division, signed agreements in 2009 and 2010 to set prices for tour groups, sharing RMB 227 million (US \$26.9 million) in profits over two years. The commission found this conduct violated Articles 13 and 16 of the AML as a price monopoly agreement. The agency was fined RMB 500,000 (US \$81,281) and the travel agencies were collectively fined RMB 3.35 million (US \$544,583), or 5 percent of the previous year's revenue.
September 2013	Tourism	Hainan	Travel agencies in Hainan, including Hainan Haikou Civil Tourism Agency and the Hainan Tongxing Tianxia Travel Agency	The Hainan Price Bureau ruled that several travel agencies in Hainan used bait-and-switch tactics to lure customers. They priced tours at or below cost in order to attract tourists. They then made up for those losses with high commissions from shopping activities organized by the tour groups and pressuring tourists to purchase. The bureau ruled that such behavior violates Article 14 of the Price Law and fined each agency RMB 300,000 (US \$48,769).
December 2013	Insurance	Hunan	Hunan Loudi City Insurance Industry Association and 12 domestic insurance-related companies	According to the investigation, the Hunan Loudi Insurance Industry Association organized companies to conduct anticompetitive behavior, including setting unified prices for new car insurance discount rates, dividing up the market, and signing agreements with the association-organized automobile service center. The Hunan Price Bureau found that this behavior violated the AML and fined the association and six of the insurance companies RMB 2.19 million (US \$256,011). The other five companies were exempt from penalties for cooperating with authorities.
February 2014	Banking	nationwide	Domestic commercial banks (unnamed)	Chinese banks were accused of imposing arbitrary charges and fees on customers. In February 2014, NDRC held a press conference announcing that to date it has ordered 64 branches of different banks to return RMB 409 million (US \$66.5 million) in fees from those charges, and imposed fines of RMB 416 million (US \$67.6 million). Further investigations and fines are possible.
May 2014	Telecommunications	nationwide	InterDigital	InterDigital was accused of abuse of market dominance, charging discriminative high price patent license fees for China's communications equipment manufacturers, and issuing bundled license for non-standard essential patents and standard essential patents. In June 2014, NDRC announced that the investigation was suspended.

May 2014	Vision care	nationwide	Essilor, Zeiss, Nikon, Bausch & Lomb, Johnson & Johnson, Hoya, Weicon	Seven manufacturers of eyeglasses and contact lenses were accused of setting minimum resale prices and running promotions that effectively served as resale price maintenance (RPM) arrangements. NDRC determined that their activities violated Article 14 of the AML and fined five of the manufacturers a total of more than RMB 19 million (US \$3.1 million), with rates of either 1 percent or 2 percent of the previous year's sales.
July 2014	Brick manufacturing	Hainan	Five domestic manufacturers of aerated bricks: Hainan Houde New Century Building Materials; Guanyiduo New Environmentally Friendly Wall Materials; Hainan Xinhongda Building Materials; Hainan Guangsheng New Building Materials; and Hainan Hailiyuan Industrial	According to the investigation reports, in October 2012, five manufacturers of aerated bricks – bricks with holes to allow airflow – established without authorization an aerated brick industry association to harmonize sales price, supervision and control and statistics for each company's production, sales, and shipments. The five companies subsequently agreed upon and coordinated price increases, signed monopoly agreements to divide sales. Two companies were exempted from fines due to their cooperation; the other three companies were fined RMB 530,000 (US \$86,158), or 1 percent of the previous year's sales.
August 2014	Automotive	Nationwide	Hitachi, Denso, Aisan, Mitsubishi Electric, Mitsuba, Yazaki, Furukawa Electric, Sumitomo Electric, Nachi-Fujikoshi, NSK, JTEKT, and NTN	NDRC announced that 12 Japanese companies – eight auto parts manufacturers and four bearings manufacturers – had held frequent consultations to set and influence pricing of vehicles, auto parts, and bearings. NDRC exempted Hitachi and Nachi-Fujikoshi Corporation from fines due to their collaboration, but issued high fines for the other companies: RMB 832 million (US \$135.3 million) for the other 7 auto parts companies and RMB 403.4 million (US \$65.6 million) for the other three bearings companies. These figures range between 4 and 8 percent of the company's previous year sales.
August 2014	Automotive	Hubei	Four Mercedes-Benz dealerships	The Hubei Price Bureau announced that four Mercedes-Benz dealerships had overcharged customers for the pre-delivery inspection (PDI) of purchased automobiles, and had colluded to set prices. The bureau fined the dealerships a collective total of RMB 1.63 million (US \$264,976).

Ongoing Cases

Date Launched	Industry	Companies Involved	Potential Issues
November 2011	Telecommunications	China Mobile, China Unicom	Alleged abuse of market dominance through price discrimination
August 2012	E-Commerce	360 Buy, Gome, Suning	Alleged illegal and fraudulent behavior while engaging in low-cost competition
March 2013	Cement	Cement companies nationwide	Alleged supply restrictions
July 2013	Pharmaceutical	GlaxoSmithKline, Merck, Astellas, Novartis, Boehringer Ingelheim, Baxter International, Fresenius, UCB, and many others	Alleged unfair import pricing (33 companies); internal cost structure (transfer pricing) (27 companies)
August 2013	Automobile	Imported cars and domestic auto joint ventures (no specific companies named) <i>(Note: this is likely related to a series of automotive-related investigations announced in 2014.)</i>	Alleged “excessive” pricing
November 2013	Telecommunications	Qualcomm	Alleged abuse of market dominance through discriminatory royalty rates for patents
April 2014	Pharmaceutical	Nine unnamed pharmaceutical companies across six provinces, including Jiangsu, Anhui, Zhejiang, Hebei, Liaoning and Shanghai	Alleged monopolistic pricing practices
July 2014	Automotive	Luxury car makers, including Mercedes-Benz, Audi, Toyota, Land Rover, and others	Alleged abuse of dominant market position; imposition of horizontal and vertical restraints on competition (initial findings released, but fines not yet announced)
August 2014	Express delivery	Domestic express delivery companies in Chongqing and Xiangtan, Hunan, including HT Express, STO Express, TK Express, YTO Express, Yunda, and ZTO Express	Alleged illegal pricing behavior, including collusion
August 2014	Real estate	Real estate brokers in Tianjin (no specific companies named as targets)	Alleged monopolistic pricing practices



Appendix 4: Selected Monopoly Investigations by SAIC and Its Provincial Branches (2008-present)

Based on [February 2014 statements by SAIC Deputy Commissioner Sun Hongzhi](#) and follow-up notices posted on SAIC’s website, it appears that over the last six years SAIC has authorized its provincial branches to investigate at least 31 cases and announced formal decisions in 14 of them.

The two tables below include information about price-related investigations that were closed by SAIC and its provincial branches since the launch of the AML in August 2008. It also contains information about pricing investigations that were announced – but according to public sources – have not yet concluded.

Completed Cases

Date Announced	Industry	Location	Companies Involved	Description
August 2010	Concrete	Jiangsu	Lianyungang Construction Material and Machinery Association and 16 member companies	Jiangsu investigators ruled that in 2009, the Lianyungang Construction Material and Machinery Association's Concrete Committee and 16 member companies signed agreements to monopolize the market. The deal prohibited all involved from independently signing contracts with buyers. The Jiangsu AIC ruled that this behavior constituted an illegal monopoly agreement under the AML. It confiscated illegal profits of more than RMB 136,481.20 (US \$22,187) and fined five participants in the cartel a combined total of RMB 530,723.19 (US \$86,275).

April 2011	Liquefied Petroleum Gas	Jiangxi	Taihe County Huawei LPG Station and six other gas companies	According to the investigation report, Taihe County Huawei Liquefied Petroleum Gas (LPG) Station in October 2008 signed an agreement with six other LPG companies to monopolize and divide up the market, with each company getting a specific piece. The Jiangxi AIC found such behavior illegal under Article 14(1) of the AML, and as a result, confiscated illegal gains of RMB 205,537 (US \$33,413) and fined Taihe County Huawei LPG Station RMB 130,230 (US \$21,170).
January 2012	Second-hand automobiles	Henan	11 secondhand car dealerships in Anyang, Henan	SAIC ruled that a group of three secondhand auto dealerships in Anyang, Henan formed a cartel and signed an agreement to set a uniform price and market share in 2007. By 2009, this cartel expanded to include 11 dealerships. SAIC ruled that these activities violated Article 13 of the Antimonopoly Agreement. It then confiscated RMB 1.468 million (US \$238.641) in illegal profits and imposed a fine of RMB 265,000 (US \$43,071) on the participants.
August 2012	Cement	Liaoning	Liaoning Construction Material Industry Association and 12 member companies	According to investigation reports, the Liaoning Construction Material Industry Association's Cement Committee and 12 member companies from central Liaoning signed agreements in 2010 to monopolize the market, control production, and set market share. The Liaoning AIC ruled that their behavior constituted an illegal monopoly agreement under the AML and imposed fines of RMB 16.37 million (US \$2.7 million) on the association and the 12 involved members.
November 2012	Insurance	Hunan	Yongzhou Insurance Association and 10 member companies	SAIC ruled that the Yongzhou (Hunan) Insurance Industry Association and 12 insurance companies in October 2011 signed an agreement establishing a new car insurance service center. This center served as a window for consumer purchases of new car insurance, of which 10 proceeded to set-up. SAIC judged the agreement to be an illegal monopoly agreement under the Antimonopoly Agreement, fining the insurance companies RMB 400,000 (US \$65,025) and the twelve companies a combined total of RMB 972,000 (US \$158,010).

December 2012	Insurance	Hunan	Zhangjiajie Insurance Association and 8 member companies	Investigation reports indicate that the Zhangjiajie (Hunan) Insurance Industry Association and 8 insurance companies in October 2010 signed agreements to establish a new car insurance service center as a window for consumer purchases of new car insurance. SAIC determined the agreement was an illegal monopoly agreement under the Antimonopoly Agreement and fined the association RMB 400,000 (US \$65,025).
December 2012	Insurance	Hunan	Changde Insurance Association and 9 member companies	SAIC ruled that the Changde (Hunan) Insurance Industry Association and 9 insurance companies in May 2006 signed agreements to establish a new car insurance service center as a window for consumer purchases of new car insurance. SAIC believed the agreement was an illegal monopoly agreement under the Antimonopoly Agreement and fined the association RMB 450,000 (US \$73,153).
December 2012	Insurance	Hunan	Chenzhou Insurance Association and 14 member companies	SAIC investigation reports indicate that the Chenzhou (Hunan) Insurance Industry Association and 10 insurance companies in June 2007 signed an agreement to establish a new car insurance service center as a window for consumer purchases of new car insurance. Ultimately, 14 companies participated. SAIC judged the agreement to be an illegal monopoly agreement under the Antimonopoly Agreement and fined the association RMB 450,000 (US \$73,153).
December 2012	Concrete	Zhejiang	Jiangshan Tiger Product Concrete, Jiangshan Yongcheng Concrete, and Jiangshan Hengjiang Product Concrete	The Zhejiang AIC ruled that three concrete companies - Jiangshan Tiger Product Concrete, Jiangshan Yongcheng Concrete, and Jiangshan Hengjiang Product Concrete - in September 2009 made an oral agreement to divide the city's concrete market, set prices, and eliminate competition between them. The Zhejiang AIC judged the agreement to be an illegal monopoly agreement under the Antimonopoly Agreement and fined the three companies a total of RMB 1.18 million (US \$191,823).

March 2013	Construction Equipment	Zhejiang	Cixi Construction and Engineering Testing Association, Cixi Building and Engineering Quality Supervision Station Energy Office, and three companies	The Zhejiang AIC stated that the Cixi Construction and Engineering Testing Association, along with the Cixi Building and Engineering Quality Supervision Station's Energy Office and three companies, signed in March 2010 an agreement to divide market share among the three companies and set ground rules for competition. The Zhejiang AIC determined that this was illegal behavior, but decided in early 2012 to suspend the investigation for one year based on initial submissions provided by the parties. In March 2013, the Zhejiang AIC closed the investigation without punishing the enterprises.
March 2013	Bricks/ceramics	Sichuan	Yibin Building Material Industry Association Brick Committee, three of its member companies, and one individual	The Sichuan AIC ruled that three major brickmaking companies working under the Yibin Building Material Industry Association Brick Committee signed a series of agreements in May 2009 designed to limit the output of bricks in the market and control market share. The Sichuan AIC judged the agreement to be an illegal monopoly agreement under the Antimonopoly Agreement and fined the three companies a total of RMB 1 million (US \$162,562). The Sichuan AIC also fined an individual involved in the case RMB 60,000 (US \$9,754).
April 2013	Tourism	Yunnan	Xishuangbanna Tourism Association, Xishuangbanna Travel Agency Association	According to investigation reports, the Xishuangbanna Tourism Association launched a new information platform in 2003. Between 2009 and 2011, the association convinced more than 80 other groups -- hotels, attraction, passenger car services, and travel agencies -- to sign on. This agreement promoted specific tours to specific stops with punitive actions for those who deviated from those recommendations. Meanwhile, the Xishuangbanna Travel Agency Association and 24 travel agencies signed agreements to set prices and itineraries for travel. The Yunnan AIC found the behavior of both organizations to violate the AML and fined each organization RMB 400,000 (US \$65,025).

December 2013	Water supply engineering	Guangdong	Huizhou Daya Bay Yiyuan Purified Water	Investigation reports state that Huizhou Daya Bay Yiyuan Purified Water used its strong market position to require local real estate companies to sign agreements bundling water supply with other services. The Guangdong AIC determined that Yiyuan's behavior constituted a violation of Article 17(5) of the AML and required Huizhou halt business practices, turn over illegal gains of just over RMB 860,000 (US \$139,803), and to pay a fine of 2 percent of Yiyuan's 2012 revenue, or just under RMB 2.4 million (US \$390,149).
June 2014	Sports and entertainment	Beijing	Shankai Sports International	Shankai Sports International -- the authorized vendor of package tours to the 2014 FIFA World Cup in Brazil for China, Hong Kong, and Macao -- was accused of bundling various products and services, such as game tickets, accommodation, food and beverages, multilingual hostesses, and parking and requiring customers to purchase set bundles. This violated a March 2011 agreement with Beijing China Travel Service Company in which that agency was assigned to arrange such hotel, transportation, and tourism services. The Beijing AIC launched an investigation, but suspended it in June 2014, stating that Shankai admitted that its actions violated the AML and it took undisclosed steps to address concerns.
July 2014	Fireworks	Inner Mongolia	6 fireworks companies in Chifeng, Inner Mongolia	Six fireworks companies in Chifeng, Inner Mongolia that were designated by local product production safety bureaus as the sole wholesalers for various fireworks products were accused of abusing their dominant market position. Specifically, these companies were accused of requiring distributors to apply for fireworks purchases, use standard markings, and pay for fireworks in advance throughout the year or see their purchasing quotas cut. Four of the companies also signed an illegal monopoly agreement. The Inner Mongolia AIC fined the six companies RMB 583,700 (US \$94,887).

July 2014	Tobacco	Inner Mongolia	Chifeng Subsidiary of the Inner Mongolia Tobacco Company	The Chifeng Subsidiary of the Inner Mongolia Tobacco Company was accused of using its market position to bundle sales, requiring retailers to purchase both popular and less popular cigarette products. The Inner Mongolia AIC fined the company RMB 5.95 million (US \$967,244), or 1 percent of sales.
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Ongoing Cases

Date Launched	Industry	Companies involved	Potential Issues
July 2013	Food and beverage packaging	Tetra Pak	Alleged abuse of market dominance
July 2014	Information technology	Microsoft	Alleged abuse of market dominance