Chinese Antitrust Institutions—Many Cooks in the Kitchen

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The Anti-Monopoly Law has been in force for over six years. When the AML was enacted in August 2007, the question of which authority would be in charge of AML enforcement was still undecided. There were three strong contenders for the job—the Ministry of Commerce, the National Development and Reform Commission, and the State Administration for Industry and Commerce. The three authorities played active roles during the normative process, probably with a view to showcasing their credentials for the enforcement authority job. MOFCOM took the lead in the drafting of the 2004 version of the draft AML and, not surprisingly, the 2004 draft explicitly mentioned MOFCOM as the sole enforcement authority. Yet, as it turned out, China would have three authorities after all. During July and August 2008—just about when the AML started to take effect—the State Council issued so-called "san ding" notices through which it gave central government ministries and equivalent organizations instructions on their jurisdiction, staff, and internal organization. Through their san ding notices, MOFCOM, NDRC, and SAIC all obtained powers to enforce the AML in a limited way. An antitrust regime with three authorities is complicated, as is the particular jurisdictional carve-up. This paper examines what issues arise with this three-headed authority structure, and how they can be addressed.

I. INTRODUCTION

The Anti-Monopoly Law ("AML") has been in force for over six years.[2] This is not much, compared to the 13 years or so it took to enact the law. Reportedly, one of the main reasons why the legislative process took so long was the struggle about which authority would have jurisdiction to enforce the law.

There were three strong contenders for the job—the Ministry of Commerce ("MOFCOM"), the National Development and Reform Commission ("NDRC"), and the State Administration for Industry and Commerce ("SAIC"). The three authorities played active roles during the normative process, probably with a view to showcasing their credentials for the enforcement authority job. For example, MOFCOM took the lead in the drafting of the 2004 version of the draft AML.[3] Not surprisingly, the 2004 draft explicitly mentioned MOFCOM as the sole enforcement authority.[4]

All three authorities had some credible claims for being the AML enforcement body, based on the pre-existing antitrust-related work they had done: MOFCOM had been in charge of merger control since 2003; NDRC had been enforcing the Price Law,[5] including its antitrust-related provisions, since 1998; and SAIC had been the authority to enforce the Anti-Unfair Competition Law ("AUCL"),[6] with some antitrust-related rules, since 1993.

In 2007, it seems, the decision on who would enforce the AML had still not been made. But legislators thought the AML needed to be adopted. The way out was to draft the AML in a generic manner, by referring only to the "anti-monopoly enforcement authority," or authorities, in the law. This had the advantage of

allowing the enactment of the AML without waiting for the institutional question to be resolved. At the same time, this type of generic manner approach has been used not infrequently in Chinese legislative processes.[8]

In short, when the AML was enacted in August 2007, the question of which authority would be in charge of AML enforcement was still undecided. In my first paper about Chinese antitrust, a few months after the AML was passed, my co-author and I expressed hope that there would be a new and, in any case, a single, antitrust authority.[9] Three authorities, we found, was not a good idea.

Yet, as it turned out, China would have three authorities after all. During July and August 2008—just about when the AML started to take effect—the State Council issued so-called "*san ding*" notices through which it gave central government ministries and equivalent organizations instructions on their jurisdiction, staff, and internal organization.[10]

AN ANTITRUST REGIME WITH THREE AUTHORITIES IS COMPLICATED, AS IS THE PARTICULAR JURISDICTIONAL CARVE-UP

Through their *san ding* notices, MOFCOM, NDRC, and SAIC all obtained powers to enforce the AML in a limited way. MOFCOM is in charge of merger control. NDRC's responsibility is to take on monopoly agreements, abuses of dominance, and anticompetitive abuses of administrative powers (dubbed "administrative monopoly") as long as the underlying anticompetitive conduct is related to pricing. If the conduct is not related to pricing, it falls under SAIC's jurisdiction.

An antitrust regime with three authorities is complicated, as is the particular jurisdictional carve-up. This paper examines what issues arise with this three-headed authority structure, and how they can be addressed. First, section II will provide some background, and describe the scope of jurisdiction of the three authorities. Section III will look at the potential overlaps in jurisdiction of the authorities and the resulting problems, while section IV will put forward a few ideas on how to diffuse the potential for jurisdictional conflict. Section V will conclude.

II. BACKGROUND AND SCOPE OF JURISDICTION

A complete description of governmental stakeholders in the Chinese antitrust space would require a discussion of bodies other than MOFCOM, NDRC, and SAIC, such as the Ministry of Industry and Information Technology or the Ministry of Transportation, which have some limited sectoral antitrust powers.[11] However, this discussion is beyond the scope of this paper.[12]

This section will only focus on the three official antitrust authorities. For ease of presentation, given the relatively clear delimitation of its powers, I will start with MOFCOM, followed by NDRC and SAIC.

A. Ministry of Commerce

MOFCOM is the ministry in charge of foreign and domestic trade and commerce. It was established in 2003 as a result of the merger between the previously separate authorities in charge of domestic trade and foreign trade. MOFCOM currently has over 30 departments that perform different functions, including (i) foreign investment, foreign cooperation, and aid; (ii) WTO matters; (iii) domestic commerce; (iv) services; and (v) industry safety.

REPORTEDLY, MOFCOM HAD THE AMBITION OF BECOMING THE SOLE AML ENFORCEMENT AUTHORITY

1. Before the AML

Since 2003, MOFCOM has been the authority approving foreign M&A deals under the Regulation on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.[13] MOFCOM and SAIC were the two authorities in charge of the "antitrust review" under that regulation. However, for some reason, in practice only MOFCOM was seen to actively take on cases.[14] In 2006, the Regulation on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors was amended, and in 2007 MOFCOM published guidelines on the notification requirements and process.[15]

In addition, MOFCOM had played an active role in the legislative process of the AML. In 1994, the State Economic and Trade Commission, one of MOFCOM's predecessors, was requested by the State Council to prepare the legislative work for the AML. After its establishment in 2003, MOFCOM assumed, and continued to perform, this responsibility. In 2004, it established an antimonopoly investigation office, whose main function was the drafting of antitrust legislation and international communications.[16] Reportedly, MOFCOM had the ambition of becoming the sole AML enforcement authority, as it proposed in a draft version of the AML submitted to the State Council in 2004.[17]

2. After the AML

According to its *san ding* notice of July 2008, MOFCOM has the power to (1) conduct antitrust review in merger cases, (2) provide guidance to domestic enterprises facing antitrust litigation overseas, and (3) organize international exchanges and cooperation on multilateral and bilateral competition policies.[18]

After receiving the *san ding* authorization, MOFCOM established the Anti-Monopoly Bureau in September 2008. The Anti-Monopoly Bureau currently has seven divisions, and about 30 or so staff.

To implement its mandate under the *san ding* notice, the Anti-Monopoly Bureau lists an antitrust-related range of powers on its own webpage, going into more detail and, at times, expanding the scope of the mandate somewhat—for example, claiming jurisdiction over investigations into anticompetitive conduct in foreign trade.[19]

B. National Development and Reform Commission

NDRC is the governmental authority leading the formulation of economic and social development policy, macroeconomic management, and economic reform. It was formed on the basis of the previous State Planning Commission, which used to be the most powerful governmental agency in the planned economy phase. Today, NDRC still retains a great range of powers to review and approve various important matters, including domestic investment, economic development, key resources, etc. Price regulation is one of NDRC's economic management responsibilities.

IN ANTITRUST TERMS, THE MOST IMPORTANT MANDATE FOR NDRC WAS ITS RESPONSIBILITY FOR "INVESTIGATING AND HANDLING PRICE LAW VIOLATIONS AND PRICE MONOPOLY CONDUCT IN ACCORDANCE WITH THE LAW"

1. Before the AML

Since before the AML NDRC had been enforcing the Price Law, including its antitrust-related provisions. Under that law, NDRC and its local counterparts have jurisdiction over various types of pricing conduct, including cartels, predatory pricing, and price discrimination.[20]

In 2003, NDRC issued an implementing regulation of the Price Law, to provide more details on the antitrust provisions in that law.[21] Subsequently, the regulation was abrogated after NDRC published implementing rules of the AML.[22]

2. After the AML

The *san ding* notice for NDRC in July 2008 conferred upon it responsibility for: (1) drafting rules on price supervision and inspection, (2) guiding and organizing price supervision and inspection, (3) handling cases related to product and service prices and fee collection involving violations of price-related laws by central government agencies, and (4) handling price monopoly conduct and reconsideration cases and appeals concerning the sanctions imposed for price violations.[23]

In antitrust terms, the most important mandate for NDRC was its responsibility for "investigating and handling price law violations and price monopoly conduct in accordance with the law."

Internally, NDRC drafted more detailed rules on the extent of jurisdiction of its antitrust unit, the Price Supervision and Anti-Monopoly Bureau.[24] The Bureau is the department in charge of antitrust enforcement within NDRC. By 2013, it had around 40 staff, although only some of them work on AML cases.[25]

C. State Administration for Industry and Commerce

SAIC is the authority in charge of market supervision and management. Its role includes a wide variety of tasks such as consumer protection, product quality and food safety, company registration, trademark registration, etc.

1. Before the AML

Already, before the enactment of the AML, SAIC had been tackling some types of anticompetitive conduct under the AUCL. The AUCL contains a number of antitrust-related prohibitions, including those against tying and exclusive dealing by public service enterprises and statutory monopolists, predatory pricing, tying, and bid-rigging.[26]

Apart from its work enforcing the AUCL, as noted above, SAIC also shared jurisdiction with MOFCOM over the merger control process under the Regulation on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors. In practice, however, SAIC did not play an active role in this process.[27]

Beyond the case work, SAIC was also seen to participate in the legislative process of the AML. It was appointed by the State Council to prepare the AML draft along with MOFCOM.[28]

2. After the AML

The *san ding* notice for SAIC in July 2008 stated that SAIC is responsible for: (1) formulating specific antimonopoly and anti-unfair competition measures; (2) carrying out antitrust enforcement; (3) investigating unfair competition practices, commercial bribery, smuggling, and other cases violating economic laws; and (4) supervising the handling of large, significant, or typical cases.[29]

THE *SAN DING* GAVE SAIC RESPONSIBILITY FOR "ANTI-MONOPOLY ENFORCEMENT IN SUCH ASPECTS AS MONOPOLY AGREEMENTS, ABUSES OF A DOMINANT MARKET POSITION AND ABUSES OF ADMINISTRATIVE POWERS TO ELIMINATE OR RESTRICT COMPETITION (NOT INCLUDING PRICE MONOPOLY CONDUCT)."

In the antitrust area, the *san ding* gave SAIC responsibility for "anti-monopoly enforcement in such aspects as monopoly agreements, abuses of a dominant market position and abuses of administrative powers to eliminate or restrict competition (not including price monopoly conduct)."

SAIC's own view of its jurisdiction is the same as the description in *san ding* notice.[30]

The department responsible for antitrust enforcement within SAIC is the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau. The Bureau was established in 2009, and currently has five divisions, although only some of its staff deal with antitrust work in the strict sense.

III. POTENTIAL FOR JURISDICTIONAL CONFLICT

This section will focus on the three official authorities, and will look at two potential areas of jurisdictional conflict: first, between NDRC and SAIC and, second, between MOFCOM and NDRC/SAIC.

The section will also highlight the problems brought about by this potential for conflict.

A. NDRC/SAIC Division of Jurisdiction

In my view, there two broad areas where the potential for conflict could arise: first, there could be a conflict in cases where the allegedly anticompetitive conduct—as a single action—could fall under the jurisdiction of both NDRC and SAIC. In other words, the jurisdictions of the authorities directly overlap to an extent. Second, conflicts could arise in cases that have several different elements (not a single action) which each fall under the jurisdiction of a different authority. [31] I call these two scenarios "concurrent" jurisdiction and "parallel" jurisdiction, respectively.[32]

AT THE MARGINS, BOTH NDRC AND SAIC INCLUDED PROVISIONS GIVING THEM JURISDICTION OVER CONDUCT THAT COULD BE VIEWED AS AN EXPANSION OF THEIR JURISDICTION

These two scenarios will be examined below, followed by a description of the problems.

1. Concurrent Jurisdiction

In certain instances, the potential for concurrent jurisdiction is enshrined in the law itself. In other instances, the potential arises through the expansive case practice of the authorities.

a. Legal Provisions

As noted above, the AML did not allocate jurisdiction for enforcement to specific, named authorities. This means we must look at the AML implementing rules adopted by NDRC and SAIC.

An analysis of these rules shows that, at the margins, both NDRC and SAIC included provisions giving them jurisdiction over conduct that could be viewed as an expansion of their jurisdiction relative to the *san ding* notices (i.e., price-related conduct v. non-price related conduct).

(i) NDRC Expansion

NDRC's key regulation implementing the substantive provisions of the AML—the Anti-Price Monopoly Regulation—contains two provisions that seem to expand NDRC's field of action.[33]

First, Article 13 contains a prohibition against dominant companies refusing to deal with trading partners "through the setting of excessively high sales prices or excessively low purchase prices," unless valid

reasons justify the conduct. In other words, Article 13 regulates a particular type of "constructive" refusal to deal: instead of refusing outright to deal with the business partner, the dominant company makes an offer on terms so unfavorable that the partner cannot but decline. In the case of Article 13, the constructive refusal to deal is operated through pricing means—in the case of a dominant supplier, a price so high that the buyer cannot accept it.

The jurisdictional overlap is created by the circumstance that, as a general rule, a refusal to deal is not directly price-related: the dominant company simply says no, without any discussion or setting of prices. Not surprisingly, therefore, Article 4 of the Regulation on the Prohibition of Conduct Abusing a Dominant Market Position[34] ("SAIC Abuse of Dominance Regulation") implements the refusal to deal prohibition of the AML, implicitly claiming enforcement jurisdiction for SAIC.

In contrast, the constructive refusal to deal in Article 13 of the Anti-Price Monopoly Regulation is directly price-related, as it is operated through excessive price demands.

The potential scope of jurisdictional clash between NDRC and SAIC can actually be very real, just on the face of the text of the rules. Indeed, Article 4 of the SAIC Abuse of Dominance Regulation lists a few examples of how refusals to deal can be implemented. Paragraph (4) includes the example of "setting restrictive conditions to make it difficult for the trading partner to continue conducting transactions with it."

THE POTENTIAL CLASH OF JURISDICTION IN THE DISCOUNTS AREA IS PARTICULARLY STRONG

Now, Article 13 of the Anti-Price Monopoly Regulation precisely contemplates the scenario of a specific "restrictive condition" (*i.e.*, excessive prices) making it difficult for the buyer to accept the offer from the dominant supplier. Of course, a consistent interpretation of Article 13 of the Anti-Price Monopoly Regulation and Article 4(4) of the SAIC Abuse of Dominance Regulation could be that SAIC has jurisdiction over non-price related constructive refusals to deal, and NDRC over price-related constructive refusals to deal. However, so far, the soundness of this interpretation has not been confirmed in actual cases.

Second, Article 14 of the Anti-Price Monopoly Regulation states that exclusive dealing "through methods such as price discounts" is prohibited, absent valid justifications. The idea is similar to that of the constructive refusal to deal discussed above: a type of anticompetitive conduct (here, exclusive dealing) is implemented through pricing means (here, discounts). The idea that certain types of discounts can have the same or similar effects as exclusive dealing (through contractual obligations) is not new. In the famous *Hoffman-La Roche* case in the European Union, the European Court of Justice basically put contractual exclusive dealing and loyalty discounts on equal footing.[35]

Again, as with the potential jurisdictional conflict in the refusal to deal area, the potential for conflict here is that a type of conduct that is perhaps most often of non-price nature (*e.g.*, contractual stipulations)—over which SAIC has jurisdiction—is implemented through pricing means—where NDRC's jurisdiction starts

to kick in.

The potential clash of jurisdiction in the discounts area is particularly strong, as SAIC and its local offices investigated loyalty discounts under the AUCL before the AML was enacted. In the China Southern case, the dominant airline in Hunan, *China Southern*, had classified its distributors into five categories depending on their degree of loyalty (as measured by the percentage of the dominant airline's tickets among all the plane tickets sold by the distributors). For those distributors who were more loyal (*e.g.*, who sold all or most tickets from the dominant airline), the airline offered higher discounts on its tickets on 30 routes and the possibility to obtain tickets on the most popular routes on a preferential basis. The local Administration for Industry and Commerce ("AIC") in Hunan held such behavior to be anticompetitive. As the case was investigated in 2005, before the AML came into effect, the AIC sanctioned the airline under the AUCL.[36]

IN SHORT, IN THE AREAS OF REFUSAL TO DEAL, EXCLUSIVE DEALING, AND DISCRIMINATORY TREATMENT, THERE IS CONSIDERABLE SCOPE FOR JURISDICTIONAL OVERLAP

Hence, in the discounts area, both NDRC and SAIC have a claim for jurisdiction that cannot be easily rebutted. On the one hand, NDRC can refer to Article 14 of the Anti-Price Monopoly Regulation. On the other hand, SAIC can claim jurisdiction over exclusive dealing in general, under Article 5 of the SAIC Abuse of Dominance Regulation, and on the basis of the understanding that—in most cases—exclusive dealing cases are not directly related to pricing. SAIC might also be tempted to use the *China Southern* case as reference of actual case work in the area.

(ii) SAIC Expansion

Article 17(6) of the AML prohibits discriminatory treatment "concerning trading conditions, *such as transaction prices*" to trading partners in equivalent conditions.[37] Logically, the discriminatory treatment prohibition is also implemented in the Anti-Price Monopoly Regulation. Its Article 16 repeats the AML prohibition, just deleting the words "trading conditions, such as," and hence does not attempt to expand NDRC's jurisdiction.

In turn, Article 7 of the SAIC Abuse of Dominance Regulation, which implements the AML prohibition of discriminatory treatment, also copies the text of the AML prohibition but drops the words "such as transaction prices." Interestingly, the SAIC regulation does not add wording such as "non-pricing related" trading conditions. In a way, this open formulation could be interpreted as an attempt by SAIC to expand jurisdiction. Yet, after stating the general rule, Article 7 lists a few examples of factors where discriminatory treatment can occur, mainly referring to non-pricing elements: (i) product quantity, variety, or quality; and (ii) after-sale services, such as warranty, maintenance, components, and spare parts, etc.

However, Article 7 of the SAIC regulation also includes two elements that seem to relate to pricing. On the one hand, the provision prohibits unjustified discrimination through differences in terms "such as

volume discounts" or payment conditions and delivery.[38]

Here, again, there seems to be a high potential for jurisdictional clash between NDRC and SAIC. Again, one way of using a consistent interpretation to harmonize the different rules would be that—on the face of the text of its implementing regulation—NDRC would only be interested in pursuing jurisdiction over discrimination of the *transaction price* as such (that is, the price *level*), while SAIC would have jurisdiction over other conditions related to pricing including *discounts*.

However, this type of interpretation seems awkward, as a discount seems to be part of the price. Furthermore, given its claim of jurisdiction over exclusive dealing operated through discounts, it would seem strange if NDRC were to renounce jurisdiction over discriminatory treatment implemented through differentiated discounts.

In short, in the areas of refusal to deal, exclusive dealing, and discriminatory treatment, there is considerable scope for jurisdictional overlap. The underlying reason for the potential overlap is that, in many (if not most) instances, the same type of anticompetitive conduct (*e.g.*, exclusive dealing) can be implemented in various forms and methods, including through methods that directly relate to pricing and those that do not.

THERE ARE A NUMBER OF CASES WHERE NDRC AND SAIC HAVE VENTURED OUT OF THEIR PRICE-RELATED V. NON-PRICE RELATED JURISDICTION STRAIGHT-JACKETS

Yet an entirely different animal is the draft Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights ("draft SAIC IPR Regulation"), circulated on June 11, 2014 for public comment.[39] As its title indicates, the draft SAIC IPR Regulation was prepared by SAIC, and the idea is that SAIC will enforce it.[40] To an extent, the draft regulation follows the categories of anticompetitive conduct it claimed in its non-IPR related implementing rules; in the abuse of dominance area, for example, the draft SAIC IPR Regulation covers refusal to deal, exclusive dealing, tying, unreasonable restrictions, and discriminatory treatment. In addition, the draft regulation rarely refers directly to pricing conduct.

However, the SAIC draft also attempts to regulate IPR-specific figures, such as patent pools, standard essential patents, collective copyright management, and abuses through warning letters.[42] Obviously, these figures are broad in scope, and seem to go beyond the non-pricing domain. For example, Article 13 deals with the implementation of patents in standards; in many standard essential patent cases, the level of the royalty rate—a price-related issue—plays a key role in the dispute in case.

Hence, it is not difficult to see that the draft SAIC IPR Regulation—as a measure with the broad aim to regulate in the interface between antitrust and IPR without specific regard to the price v. non-price dichotomy—could be interpreted as an attempt of jurisdictional expansion.

Beyond the AML and its implementing regulations, SAIC's pre-existing jurisdiction under the AUCL also gives rise to potential jurisdictional conflicts. As noted, under the AUCL, SAIC has powers to enforce antitrust-related provisions. Some of them relate to non-pricing conduct—in particular, exclusive dealing (by public service enterprises and statutory monopolists) and tying.[43] But some of them explicitly relate to pricing conduct. First, Article 11 contains a prohibition of predatory *pricing*. Hence, both NDRC (under the AML and the Price Law) and SAIC (under the AUCL) have jurisdiction over predatory pricing, and the various applicable rules diverge to an extent. Second, Article 15 of the AUCL prohibits bid-rigging, and explicitly outlaws pricing manipulation.

b. Cases

There are a number of cases where NDRC and SAIC have ventured out of their price-related v. non-price related jurisdiction straight-jackets.

(i) NDRC Expansion

On the NDRC side, the prime example of an expansive interpretation of jurisdiction is the *Hubei Salt* case.[45] In 2010, the Price Bureau of Hubei province—NDRC's local office—investigated a salt company, the Wuchang branch of the Hubei Salt Industry Group ("Hubei Salt"), for tying edible salt—where the company enjoyed an exclusive right of distribution—and washing powder in sales to grocery stores. In short, *Hubei Salt* is an abuse of dominance case, where the objectionable conduct was clearly (and only) tying (by way of directly requiring buyers to purchase salt and washing powder together). In other words, this was a case of pure bundling, and no financial incentives such as discounts were involved.

Against this background, given that no pricing elements were involved, one would have expected SAIC to have jurisdiction over Hubei Salt's conduct.[46] Indeed, Article 6 of the SAIC Abuse of Dominance Regulation implements the AML's tying prohibition, while NDRC's Anti-Price Monopoly Regulation does not refer to tying or bundling at all. In that sense, the NDRC decision could be interpreted as a jurisdictional grab under the AML.

Yet, other explanations are possible. For example, edible salt is a heavily regulated product. In China, only government-appointed companies are entitled to distribute edible salt.[47] Most, if not all, of these companies are state-owned enterprises whose right to distribute covers a specified region in China.[48] In addition to granting exclusive rights to sell salt in a given region, the government also decides the prices at which edible salt can be put onto the market. The authorities responsible for setting the salt prices are the Price Bureaus at the provincial level.

Coming back to the *Hubei Salt* case, this means that the authority that investigated Hubei Salt under the AML was the same authority that had set the prices that the company could charge for the edible salt (under the Price Law framework).[49] This may have been the reason why the Price Bureau exerted jurisdiction

over Hubei Salt's tying conduct under the AML. But, to be sure, there is no such explanation in the press release by the Price Bureau in the *Hubei Salt* case.

(ii) SAIC Expansion

On the SAIC side, there is the *China Southern* case, mentioned above. In that case, SAIC's local office in Hunan found the airline to have engaged in conduct equivalent to exclusive dealing by way of setting up a complex scheme of loyalty discounts.

As mentioned, this case pre-dates the AML. Under the AML, price-related anticompetitive conduct including abuses of dominance falls under NDRC's purview. As mentioned above, NDRC claims jurisdiction over loyalty discounts under the Anti-Price Monopoly Regulation.

But even after the AML's entry into effect, local AICs have brought cases against predatory pricing[50] and bid-rigging.[51]

2. Parallel Jurisdiction

As noted above, by "parallel jurisdiction" I do not mean that the authorities expand their jurisdiction beyond the *san ding* notices. What I mean is that the conduct at stake has several aspects, some of which are related to pricing and some of which are not.

The background to this situation is, again, that different types of conduct can achieve the same result in economic terms—that is, their impact on the market is the same.

Looking back at the cases in the first six years of AML enforcement, there are quite a few where the conduct at stake has both pricing and non-pricing elements. The cases include both monopoly agreement and abuse of dominance cases.

a. NDRC Expansion

On the NDRC side, we have several monopoly agreements cases that merit attention.

On the horizontal agreements level, for instance, the *LCD panels* case is a good example, even though that the case was decided under the Price Law, not the AML.[52] In January 2013, NDRC announced that it had imposed fines of close to U.S. $56 million upon six liquid crystal display ("LCD") makers from Korea and Taiwan for manipulating prices of LCD panels from 2001 to 2006.

LOOKING BACK AT THE CASES IN THE FIRST SIX YEARS OF AML ENFORCEMENT, THERE ARE QUITE A FEW WHERE THE CONDUCT AT STAKE HAS BOTH PRICING AND NON-PRICING ELEMENTS

The descriptive part of NDRC's decision (essentially, a short press release) published online essentially focuses on price-fixing and information exchanges related to prices, which of course are related to pricing. In contrast, the much longer European Commission decision in the same case a few years earlier describes a more varied pattern of conduct of the companies involved, including "a regular and punctual exchange of information on prices, demand, production and capacity for the past, the present and the future."[53]

Even NDRC's own decision gives an indication that other, non-pricing forces were at play in *LCD panels*. Although there were no explanations whatsoever about these points, the orders imposed by NDRC to remedy the anticompetitive conduct did not only include a prohibition to fix prices and pay the fine, but also contained two additional orders: the companies had to commit, first, to provide the latest LCD technology to China and, second, to extend the warranty period during which they could be held liable vis-à-vis the TV makers using the LCD panels from 18 to 36 months.

As the NDRC decision did not describe the rationale behind these orders, it is not clear whether or not the underlying (competition) problems were related to pricing. The first of the additional remedies implies that NDRC might have thought that the LCD panel makers had not used the latest state-of-the-art technology in China, and took issue with it. The problem with regard to the second additional remedy seemed to be that TV makers themselves had a warranty obligation of 36 months *vis-à-vis* end consumers, while the warranty obligation of the LCD panel suppliers was shorter (18 months). Hence, there might have been a gap of liability that TV makers needed to assume even if any defect were attributable to the LCD panels, not their own fault.[54] These are the possible concerns NDRC *might* have had. As the descriptions show, the possible concerns are not related to pricing conduct as such.

On the vertical agreements level, the *White liquor* cases provide a good example of the "parallel jurisdiction" risk potential. In 2013, the local offices of NDRC in Guizhou and Sichuan imposed large fines on two manufacturers of Chinese traditional white liquor, Maotai and Wuliangye, for resale price maintenance ("RPM").

The description in the public decision (in the form of press release) in the *Wuliangye* case is somewhat longer than in the *Maotai* case, and hence this case provides more insights.[55] The decision by NDRC's local office in Sichuan province clearly states that Wuliangye had not only imposed RPM on its distributors, but also allocated exclusive territories: In 2012, Wuliangye had punished its 14 distributors for "improperly selling Wuliangye at low prices, outside the territory and through other channels." Yet the NDRC decision did not challenge the territorial restrictions but mentioned them in passing when discussing the methods of how the company had implemented RPM.

In principle, the fact that NDRC focused on RPM only makes sense, as it has jurisdiction over price-related anticompetitive agreements. In addition, at this point in time, neither the AML, nor any AML implementing rules, state that territorial or customer restrictions are illegal under the AML below the dominance level. However, if in the future vertical restraints other than RPM were to be held illegal under the AML, the *White liquor* cases would be an example to remember on how pricing and non-pricing elements can

be intertwined in this field.[56]

In the abuse of dominance area, NDRC closed its investigation of InterDigital in May 2014. The case was closed through NDRC's acceptance of the commitments proposed by InterDigital, which were published on NDRC's website[57] alongside some explanations on what the regulator's concerns were.[58]

The explanations in the NDRC press release were very succinct. However, NDRC still gave three examples of suspected anticompetitive conduct that InterDigital was alleged to have engaged in: (1) demanding excessively high licensing fees, (2) requiring free cross-licenses, and (3) bundling the licensing of standard essential patents ("SEPs") with non-SEPs.[59]

The last type of purported anticompetitive conduct—bundling—does not seem to be directly related to pricing.[60]

b. SAIC Expansion

MOFCOM'S MERGER CONTROL POWERS CAN IN PRINCIPLE OVERLAP WITH THOSE OF NDRC/SAIC IN BOTH THE MONOPOLY AGREEMENT AND ABUSE OF DOMINANCE AREAS

On the SAIC side, at the beginning of the AML enforcement area, the regulator seemed to focus on cartels, mainly local in nature. Generally speaking, SAIC and its local counterparts focused on market allocation conduct by the cartelists.

However, in several cases, the cartel conduct also included bread-and-butter price-fixing. For instance, in the *Anyang second-hand cars* case, the AIC of Henan province imposed fines on a cartel among 11 second-hand cars suppliers in the city of Anyang in January 2012.[61] The AIC found that the suppliers partitioned the second-hand car market in Anyang, but the agreements also included price-fixing.

Similarly, in the *Liaoning cements* case, in March 2012, the AIC of Liaoning province penalized a cartel led by a local industry association that agreed to reduce cement output volumes during wintertime.[62] The AIC's decision mentioned that the cartel also fixed the minimum unit price, but this aspect was not further analyzed in the decision.

Furthermore, in December 2012, the AIC of Zhejiang province fined three concrete companies in Jiangshan for entering into an agreement to divide up the market.[63] The AIC found that the cartel agreement also fixed prices.

As the description above shows, there are a range of cases where the conduct of the companies in breach of antitrust rules had both pricing and non-pricing elements.

B. The Division Of Jurisdiction Between MOFCOM And NDRC/SAIC

In general, MOFCOM's jurisdiction under the AML is more neatly delimited as a matter of principle. However, there is still some scope for potential conflict.[64]

As under Section III (A), we can broadly distinguish between instances of concurrent jurisdiction between MOFCOM and NDRC/SAIC and parallel jurisdiction between them.

1. Concurrent Jurisdiction

MOFCOM's merger control powers can in principle overlap with those of NDRC/SAIC in both the monopoly agreement and abuse of dominance areas.

a. Monopoly Agreements

For monopoly agreements, I can see two broad issues. First, MOFCOM at times makes an (overly) broad definition of what constitutes a "concentration between business operators," which triggers the merger filing obligation (if the thresholds are met). In a way, a broad definition expands the application of merger control rules into areas where in other jurisdictions only the monopoly agreement rules would apply.

The reasons for the expansive interpretation of the concentration concept are in part due to the legal provisions and in part due to MOFCOM's practice. Strictly legally speaking, in China the only two criteria for a transaction to trigger the merger filing obligation are that (1) we have a concentration and (2) the sales revenue thresholds are met.[65]

Other jurisdictions like the European Union and many of its Member States have an additional criterion for joint ventures, namely that they are "full-function." This essentially means that the joint ventures must operate as independent market players on their own right for the merger filing obligation to be triggered. This criterion is absent in Chinese law.

For example, a joint venture between two companies that is extremely limited in scope—say, only includes joint research—is notifiable in China if there is a legal entity being created in which both companies have a controlling right (which constitutes a "concentration"). Many relatively loose forms of cooperation that do not need merger notification in the European Union—and hence are to be examined under the agreement rules—fall under the merger control regime in China. The *P3* case is a telling example.

On June 17, 2014, MOFCOM blocked the proposed alliance among AP Møller-Maersk A/S, Mediterranean Shipping Company and CMA CGM—three container shipping lines operating on the Asia-Europe trade routes.[66] MOFCOM found that competition on those trade routes would have been restricted due to: (i) the relatively high aggregate market share of the parties (46.7 percent), and (ii) the negative

impact on shippers and ports, etc. Interestingly, the P3 cooperation did not amount to a concentration under European Union competition rules because the three parties had taken measures to ensure that the cooperation's main focus was that of sharing ships and associated services through a "network center" to be established in England, while the parties were to keep price, sales, marketing, and customer service functions separate. Hence, under European Union rules, the criterion of full functionality was not fulfilled and the cooperation was not deemed a concentration. In China, by contrast, given the absence of full function criterion, the transaction was notified to MOFCOM under the merger control rules.

In that sense, MOFCOM's wide interpretation of the merger filing criteria means that—in a way—its jurisdiction ventures in the turf of the monopoly agreement rules, where NDRC's and SAIC's jurisdictions would kick in.

It is possible that MOFCOM and other authorities such as NDRC would have had discussions on which authority should examine certain borderline cases but, if that was the case, there is no information available to the public.

In addition to this more systemic issue discussed above, I can think of another, more limited area where MOFCOM has taken an expansive approach to its merger control jurisdiction. In *Inbev/Anheuser-Busch and MediaTek/MStar*, MOFCOM imposed conditions that—essentially—expanded its powers to review future transactions by the merging parties even where those transactions would not qualify as "concentrations."

Inbev/Anheuser-Busch was MOFCOM's first conditional clearance decision.[67] The remedies required the merged entity "not to increase" existing shareholdings in two Chinese domestic brewers (in which it already had a minority stake) and not to acquire any shares, it seems, in two other domestic brewers. If the merged entity nonetheless intended to acquire shares in these four companies, it would need to seek MOFCOM's prior approval. In essence, this means that the merged entity needs to obtain MOFCOM clearance for future acquisitions with regard to these companies, even for acquisitions of just a handful of shares. In *MediaTek/MStar*, a transaction between two semiconductor companies from Taiwan, as one of the conditions for clearance, MOFCOM required the merging parties to obtain its approval before acquiring any competitor in the LCD TV control chip market (where MOFOCM identified competition concerns) in the future.[68]

CONVERSELY, THERE IS ARGUABLY ALSO A RISK OF ENCROACHMENT OF MONOPOLY AGREEMENT RULES INTO THE MERGER CONTROL DOMAIN

To the extent that future transactions do not give rise to an acquisition of a "controlling right" or "decisive influence"—which are the criteria for merger control[69] (in addition to the revenue thresholds)—MOFCOM would not have jurisdiction. In contrast, any acquisition below a controlling stake could still be interpreted as a monopoly agreement, where NDRC or SAIC might attempt to assert jurisdiction.[70]

Conversely, there is arguably also a risk of encroachment of monopoly agreement rules into the merger

control domain. The risk I refer to is that there is nothing in the law, or NDRC's and SAIC's implementing rules, that would prevent the authorities from examining a merger under the monopoly agreement rules.

The sale and purchase agreements, joint venture agreements, and other transactional documents that are the basis of a merger, are—technically speaking—agreements as understood in the AML. Yet there is nothing in the law that states that a transaction that qualifies as a concentration—or even a concentration reviewed and approved by MOFCOM—is not subject to the AML's monopoly agreement rules. Of course, it would make no sense if NDRC or SAIC started to examine a transaction that had already been approved by MOFCOM—which means or implies that MOFCOM considered the transaction not to have negative effects on competition—but the rules on the book would not explicitly preclude such action by NDRC or SAIC.

Luckily, to the best of my knowledge, there have been no such actions so far, and I have not heard any chatter that the authorities have any plans in that regard.

b. Abuse of Dominance

In the abuse of dominance area, the main issue is the following: merger control is essentially an analysis of prospective behavior. MOFCOM's review takes place before the transaction is implemented, yet MOFCOM needs to analyze what the competitive situation is likely to be after implementation of the transaction. Now, in some instances, MOFCOM's analysis shows concerns that, after the transaction, the merged entity would have a dominant position, which it could use to anticompetitive ends.

WHAT MAY BE DIFFERENT IS THAT MOFCOM MAY BE MORE SKEPTICAL THAN FOREIGN ANTITRUST AUTHORITIES OF WHAT MERGING PARTIES MAY OR MAY NOT DO IN THE FUTURE

In a number of transactions, the abuse of dominance concern was implicitly featured in MOFCOM's decision. For example, in *Henkel/Tiande Chemical, ARM/Giesecke & Devrient/Gemalto,* and *General Electric/Shenhua*, the issue was that, post-transaction, the merged entity would have a very strong market position[71] and the competition concern MOFCOM expressed essentially revolved around conduct that might resemble an abuse of dominance. The specific concern was different in the various cases—discriminatory treatment and excessive pricing (*Henkel/Tiande Chemical*), discriminatory treatment (*ARM/Giesecke & Devrient/Gemalto*), and tying (*General Electric/Shenhua*). In *Microsoft/Nokia*, one of MOFCOM's concerns was that Nokia would abuse its patent rights by (i) refusing to license, (ii) increasing royalties, or (iii) engaging in discriminatory treatment in relation to its patent licensing practices.[72] In that case, MOFCOM's assessment was very much forward-looking, focusing on conduct Nokia would engage in after the transaction.

To sum up, it seems conceivable that the competition concerns MOFCOM had in a number of transactions could have been dealt with through enforcement of the AML's abuse of dominance rules after the transaction, if the suspected conduct were to materialize.

The issue of pre-merger (merger control) v. post-merger (abuse of dominance) enforcement is not

unique to China. What may be different is that MOFCOM may be more skeptical than foreign antitrust authorities of what merging parties may or may not do in the future. While foreign authorities often make an economics-based assessment, including of the incentives the merging parties have after the transaction, MOFCOM often seems to understand the arguments behind the assurances of the parties, yet may still insist in obtaining commitments that put the assurances into formal commitments.

Conversely, there is a potential for encroachment of abuse of dominance enforcement into the merger field. For example, in the European Union, the European Commission applied the abuse of dominance rules to anticompetitive acquisitions by dominant companies.[73] Nothing similar has happened, nor am I aware of any significant academic discussion on this point, in China. In a way, there has not been any encroachment upon MOFCOM's merger powers by NDRC or SAIC using their jurisdiction under the abuse of dominance rules.[74]

2. Parallel Jurisdiction

As with the division of jurisdiction between NDRC and SAIC discussed in Section III(A) above, there are some areas where the conduct of market players have multiple elements, some of which fall under merger control and some of which could fall under the monopoly agreement rules.[75]

"Ancillary restraints" essentially represent an example of such parallel jurisdiction. In the European Union, ancillary restraints are defined as "restrictions directly related and necessary to the implementation of the concentration."[76] Typical examples of ancillary restraints are non-compete clauses, licensing agreements, and purchase and supply obligations. As can be seen from these examples, although the restrictions are deemed "directly related and necessary" for the implementation of the transaction, they are still at somewhat of a distance from the core content of the transaction (*e.g.*, the sale of shares, establishment of a joint venture, etc.).

Now, in the European Union such ancillary restraints form part of the merger review process and are covered by the merger clearance decision. In China, the case is less clear.

In China, there are no explicit rules on how to deal with ancillary restraints in the merger control context. Potentially, therefore, both the merger control and the monopoly agreement rules of the AML could apply to ancillary restraints. In short, at this stage in China's antitrust development, it is not clear how to resolve the issue of parallel jurisdiction over ancillary restraints.

C. Problems Brought About By These Potential Jurisdictional Conflicts

As explained above, there is not insignificant potential for concurrent or parallel jurisdiction between the antitrust authorities. The above analysis has focused much on the law, yet—as widely known—policies play an important role in China.

In the antitrust field, at times, policies other than competition policy guide antitrust enforcement. These other policies can be high-level policies—*e.g.*, access to technology—informing the actions of the Chinese government or the Communist Party. To the extent that such high-level policies inform specific antitrust enforcement cases, the jurisdiction of the various antitrust authorities would become (more) blurred, and the risk of overlap may increase further.

In any event, this situation with potential jurisdictional conflict creates a few problems, both in the framework of actual cases and outside it.

1. Problems in Actual Enforcement Cases

One of the most obvious negative effects that the unclear jurisdictional situation could have is that the antitrust authorities conduct simultaneous investigations into the same conduct.[77] This could result in a frontal clash.

From the perspective of the authorities, a major downside associated with duplicate investigations is that the same law (essentially, the AML) or similar provisions in different laws (*e.g.*, the AML, the Price Law, and the AUCL) are applied inconsistently in the same, specific cases. This could undermine the credibility of the authorities in the long run.[79]

So far, I am not aware of any cases where there have been direct clashes. However, there are two strings of cases that came relatively close. Both relate to instances of parallel jurisdiction exercise by NDRC and SAIC.

The first string relates to the car insurance cases in 2012. SAIC was relatively more active in these cases. In November and December of 2012, the AIC of Hunan province completed separate investigations against four car insurance cartels in four different cities in Hunan: Yongzhou, Zhangjiajie, Changde, and Binzhou.[80] The facts in these four cases were very similar: they all involved market allocation among insurance companies for their car insurance services through so-called "new car centers." In three out of the four cases, the local insurance industry association played a key role as cartel organizer. In the Yongzhou case, the AIC decision mentioned that the cartel also prohibited the new car center from offering any discount. In the Zhangjiajie case, the agreement among insurance companies also included the "plan of regulating and controlling insurance fees." In the Changde case, the cartel agreement required that the variances among the prices offered by the insurances companies should not be more than 3 percent.

ADDING A BIT OF DRAMA, THIS WAS A NEAR MISS—ONE COULD ARGUE THAT THE AUTHORITIES CAME CLOSE TO COLLISION IN THESE INVESTIGATIONS

At around the same time, at the end of December 2012, the local office of NDRC in Hunan province—the Price Bureau—fined a local insurance association and 11 insurance companies in Loudi city for monopolizing the new car insurance market through a new car center.[81] The Price Bureau found that the

illegal conduct included the fixing of discount rates, collective boycott, and market allocation.

From the above we can see that during the final months of 2012 both NDRC's and SAIC's local offices in the same province (Hunan) investigated the same type of conduct (car insurance cartels). Mostly, SAIC's offices investigated the market allocation element of the cartels, while NDRC's office appeared to focus primarily on the price-fixing element (discounts).

Adding a bit of drama, this was a near miss—one could argue that the authorities came close to collision in these investigations.[82] Based on the publicly available data, it seems that the conflict was averted as there seem to have been many isolated, local cartels and the NDRC and SAIC offices investigated cartels in different localities in Hunan.

The second string of cases with high potential for jurisdictional conflict concerns cartel conduct in the tourism sector in Yunnan province, a popular tourist destination in China. In 2013, both SAIC's and NDRC's offices in the province launched anticartel investigations.

In April 2013, the AIC in Yunnan penalized the participants in two cartels in the tourism industry.[83] Two local tourist associations were found to have entered into monopoly agreements with tourist agencies, hotels, tourist attractions, and bus companies. The agreements required that the tourist agencies use a specifically designated "tourist information management system" to provide tourist services, and choose only from the hotels and tourist attractions within that system. The agreements also fixed the prices of hotels rooms and admission tickets to tourist attractions, as well as transportation fees. Interestingly, the AIC's decision explicitly found the price-fixing to be illegal: "the parties organized the conclusion of the Self-discipline Agreement [among] tourist agencies, hotels and tourist attractions, and fixed the prices to enable the previously competitive tourist service companies to form a price alliance. [Such practice] is of strong anti-competitive nature."

NOW, IF THE RULES OF NDRC AND SAIC ARE DIFFERENT AND IT IS NOT CLEAR WHICH AUTHORITY WILL HAVE JURISDICTION, THEN COMPANIES DO NOT KNOW WHICH RULES TO ABIDE BY

Later that year, in September 2013, just a few days before the start of the week-long Chinese "golden week" holiday around National Day (October 1), NDRC issued a press release on its decision to impose sanctions on 39 companies in the tourism industry.[84] The contested practices of the companies mainly related to the preceding golden week holiday around Chinese New Year in February 2013. Part of the NDRC actions concerned business practices in Yunnan. In Lijiang, an ancient city in Yunnan, NDRC found eight travel agencies to have engaged in price-fixing of hotel rooms and meal vouchers. The companies reportedly met 24 times in 2011 and 2012 under the auspices of a local industry association. They also entered into a written contract that fixed prices and discounts and allocated market shares to each of the participants.

To a large extent, the cartel investigations against practices in the tourism industry in Yunnan had the potential of a head-on jurisdictional clash between NDRC and SAIC.

From the perspective of the companies subject to parallel investigations by NDRC and SAIC, one of the most significant risks would be that they are subject to two investigations and, potentially, two sets of fines and sanctions. Such a scenario would lead to a violation of the double jeopardy principle in Chinese administrative law.[85]

2. Problems Beyond Actual Cases

There are important differences in the rules of the Chinese antitrust authorities, even between NDRC and SAIC. The differences concern both rules of substantive and procedural law, both within the AML framework and outside.

On the substance, the NDRC and SAIC rules show some important differences. There are various examples. A particularly good example is that of the "valid reasons" that can justify potentially illegal abuses of dominance under the AML.

In the AML, except for excessive pricing, all the types of abusive conduct listed – namely, predatory pricing, refusal to deal, exclusive dealing, tying and unreasonable conditions, and discriminatory treatment—can be justified by valid reasons.

However, the approaches which NDRC and SAIC have taken to flesh out the AML rules are very different. Without going into excessive detail, it suffices to say that the format is different: NDRC provides specific examples of valid reasons for each different type of abuse. For example, the justification reasons for predatory pricing are different from those for loyalty discounts. In contrast, the SAIC regulation provides a set of relatively high-level principles that apply to all the types of abuses covered by the regulation.[86]

These differences in the substantive rules present a very significant challenge for companies operating in China. Companies want to conduct their business in compliance with the law. Now, if the rules of NDRC and SAIC are different and it is not clear which authority will have jurisdiction, then companies do not know which rules to abide by. Of course, companies can try to comply with both NDRC's and SAIC's rules. However, as the discussion on the valid reasons point above has shown, the rules are not always structured in the same way and may not always be fully consistent.

On the procedural side, NDRC and SAIC rules also diverge—for example, in the leniency program area. Indeed, both NDRC and SAIC have leniency programs based on the general principles outlined in the AML, but their programs have important differences.[87] A company wishing to self-report through a leniency application does not have a clear understanding on which authority will take on the case. This can in itself be a problem for the company. If the company submits the leniency application to the wrong authority, it might be deemed not to have submitted such application. To the best of my knowledge, there is

> THIS PARTICULAR PROBLEM CAN BE RESOLVED, TO A LARGE EXTENT, IF THE AUTHORITIES ALIGN THE SUBSTANTIVE RULES THEY WORK WITH

no clear established system whereby NDRC and SAIC would transfer leniency applications internally.

IV. IDEAS TO DIFFUSE POTENTIAL JURISDICTIONAL CONFLICTS

There are number of ways how the potential for jurisdictional conflict can be reduced; below, I discuss the alignment of rules and the establishment of a detailed cooperation system as possible ways.

The cleanest, but also most radical, solution to reduce conflict risks would be to merge the three existing antitrust authorities in China in one way or another, and create a single antitrust authority. A slightly less radical solution going into the same direction would be to have two authorities—one for merger, and one for non-merger enforcement—as the largest potential for jurisdictional conflict is between NDRC and SAIC (the two non-merger authorities). However, the topic of authority restructuring is beyond the scope of this paper, and I will therefore not further discuss it.

A. Alignment of Rules

As noted above, from companies' perspective, a major problem with the current institutional system is that the rules of the authorities diverge on important aspects. Hence, if it is difficult to anticipate which authority will exercise jurisdiction, it will be difficult to know what set of rules apply. This can be an obstacle to effective compliance.

This particular problem can be resolved, to a large extent, if the authorities align the substantive rules they work with. To the extent that the applicable rules are the same, companies know which obligations they have and can orient their compliance efforts toward them. The U.S. experience in this regard may be very useful.[88] In the past years, perhaps decades, there has been a substantial degree of convergence between the Department of Justice and the Federal Trade Commission as to the substantive rules of antitrust enforcement.[89]

THE CHINESE ANTITRUST AUTHORITIES NEED AN INSTITUTIONAL MECHANISM TO REACH AGREEMENT, AND RESOLVE DISAGREEMENT, ON THEIR JURISDICTION

The advantage of this approach is that no change in the institutional structure is required to achieve an alignment on the substance of the applicable law. And, given the similarity of their powers, rule alignment would be particularly important for NDRC and SAIC.

B. Cooperation System

The second way to reduce the potential for jurisdictional conflict would be to increase the degree of institutional cooperation between China's antitrust authorities. Ideally, the cooperation would be structural—the best would be to create a proper "cooperation system."[90] This system should include both substantive and procedural elements.

1. Cooperation on Substance

In terms of the substantive element, the authorities should establish clear rules on how to allocate jurisdiction in grey areas. The starting point of the division of jurisdiction between NDRC and SAIC must, of course, be the *san ding* notices.

Going back to the main risks of conflict between NDRC and SAIC discussed in Section 3—concurrent and parallel jurisdiction—these two scenarios may require different rules.

For concurrent jurisdiction, the risk of jurisdictional conflict could be reduced by agreeing to focus on the category of the conduct involved (that is, the goal the conduct attempts to achieve), not the method of implementation. For example, the goal of loyalty discounts could well be exclusive dealing, which is generally recognized to be non-price related and hence to fall under SAIC's purview.

For parallel jurisdiction, the principle for reducing the risk of jurisdictional overlap could be to determine the central focus of the anticompetitive conduct, perhaps similar to international tax rules allocating jurisdiction. For instance, where a cartel includes price-fixing, output reduction, and market partitioning, the authorities would examine whether the price-related aspect (price-fixing) or the non-price related aspect (output reduction and market partitioning) is more important. Detailed implementing rules would be needed to help the authorities guide through this potentially difficult exercise.[91]

2. Cooperation on Procedure

Whatever the substantive principles for jurisdictional division, there is always a potential for conflict.

Hence, a procedural—in fact, an institutional—set-up is required to deal with potential conflict issues. The Chinese antitrust authorities need an institutional mechanism to reach agreement, and resolve disagreement, on their jurisdiction.

At this point in time, both NDRC and SAIC officials at conferences and other occasions often state that the key principle of their jurisdictional carve-up is the "first come, first serve" principle. Unfortunately, this principle is high-level, and not very operative.

China might be tempted to look at foreign jurisdictions with more than one antitrust authority. For example, in the United States, the so-called "clearance process" between the Department of Justice and the Federal Trade Commission provides a detailed procedure of how to solve jurisdictional questions. As both the Department of Justice and the Federal Trade Commission have concurrent jurisdiction to review almost all antitrust investigations, in order to avoid duplication

GOING FORWARD, WE SHOULD EXPECT THE JURISDICTIONAL CARVE-UP ISSUE TO GAIN IN PROMINENCE, AS THE ANTITRUST AUTHORITIES CONTINUE TO SHIFT THEIR FOCUS TOWARDS ENFORCEMENT (AWAY FROM NORMATIVE AND OTHER TASKS) AND SOME OF THE ENFORCEMENT TEAMS AT THE AUTHORITIES CONTINUE TO GROW IN NUMBERS.

enforcement efforts, the authorities decided between themselves which authority would conduct an investigation of a particular transaction. This is accomplished through the clearance process, whereby one of the authorities requests the power to investigate a case from the other authority, which clears the request. The clearance process applies to both merger and non-merger investigations.[92] However, the process is clearly not perfect, and has been consistently criticized by some practitioners and scholars.[93] Given these insufficiencies, it is clear that, if the Chinese authorities were to look at the U.S. model, they would need to learn from both the ups and the downs of the clearance process.

A procedural mechanism on jurisdiction (and other issues) between Chinese antitrust authorities could be worked out on a bi- or trilateral basis. Equally, it would be possible to channel it through the Anti-Monopoly Commission. Indeed, the AML already empowers the Anti-Monopoly Commission with the task of "coordinating the administrative anti-monopoly enforcement."[94] Related to that, the antitrust authorities could decide whether or not to provide for an escalation possibility in case the issue could not be resolved among them. The natural choice for an appeal instance would be the Anti-Monopoly Commission.[95]

Any cooperation agreement between Chinese antitrust authorities, in particular NDRC and SAIC, should also cover other, practical aspects—for example, if an authority decides that the other authority has jurisdiction, how the file of the matter should be transferred, etc.

Finally, an important point about any cooperation between antitrust authorities is that the rules (whether high-level principles, detailed implementing rules, or both) should be made public so that market players can obtain certainty about substance and process.

V. CONCLUSION

China's particular institutional regime with three antitrust authorities is, to a large extent, a legacy of the past. Each of MOFCOM, NDRC, and SAIC had antitrust enforcement powers under laws and regulations other than the AML even before the latter's entry into force.

By taking over pre-existing structures, some of their tensions and potential for conflict have been imported into the AML framework.

Over the six years of AML enforcement, we have not witnessed a major, public clash among the three authorities. There have been a few near misses in the *Hunan car insurance* and *Yunnan tourism cases*, where there were simultaneous investigations in the same sectors and geographical regions, though it seems direct overlap and jurisdictional conflict was just about averted.

However, that does not mean that all has been fine. To the contrary, compliance costs are high for businesses, given the manifold and—at times—inconsistent rules issued by the different authorities. Furthermore, it is possible that the multiplicity of rules and uncertainty of institutional dynamics may have led to compliance over-deterrence, by encouraging companies to take the lowest denominator as the

benchmark for business practices, leading to a stifling of their competitiveness as well as business innovation.

Going forward, we should expect the jurisdictional carve-up issue to gain in prominence, as the antitrust authorities continue to shift their focus towards enforcement (away from normative and other tasks) and some of the enforcement teams at the authorities continue to grow in numbers.

Unless higher-ranked authorities such as the State Council push for more radical solutions such as creating a single authority, it will in principle be up to the three antitrust authorities themselves to come up with a more structured, institutionalized, and transparent *modus operandi* to clarify the boundaries of their powers and give the much-needed certainty to market players. ▲

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[2] Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, Aug. 30, 2007.

[3] *See* Ministry of Commerce, *MOFCOM legal department official introduced updates on the enactment of the Anti-Monopoly Law*, Jan 11, 2005, *available at* www.mofcom.gov.cn/article/ae/ai/200501/20050100331588.shtml.

[4] *See* Draft Anti-Monopoly Law, [2004] art. 40, *available at* http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=30676.

[5] Price Law of the People's Republic of China, [1997] Presidential Order No. 92, Dec. 29, 1997.

[6] Anti-Unfair Competition Law of the People's Republic of China, [1993] Presidential Order No. 10, Sep. 2, 1993.

[7] The Chinese language does not distinguish between plural and singular as such.

[8] Hao Qian, *The Multiple Hands: Institutional Dynamics of China's Competition Regime*, China's Anti-Monopoly Law – The First Five Years, 20-21 (Adrian Emch & David Stallibrass, eds. 2013).

[9] Adrian Emch & Hao Qian, *The New Chinese Anti-Monopoly Law – An Overview*, eSapience Center for Competition Policy, 21 (Nov. 2007).

[10] Hao Qian, *supra* 8, at 21-22.

[11] *Id.*, at 24-27. *See*, also, Li Huiying, *Conflict and Coordination Between Sectoral Regulation and Competition Law Enforcement in the Information Industry*, 1(1) CPI Antitrust Chron. (Jan. 25, 2012).

[12] For a somewhat more detailed discussion, *see* Hao Qian, *supra* 8, at 20.

[13] Provisional Regulation on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, [2006] Ministry of Foreign Trade and Economic Cooperation, State Administration of Taxation, State Administration for Industry and Commerce, China Securities Regulatory Commission and State Administration of Foreign Exchange Order No.10, Aug. 10, 2006, as last amended by Regulation on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, [2009] MOFCOM Order No. 6, Jun. 22, 2009.

[14] Hao Qian, *supra* 8, at 18.

[15] Guidelines for the Anti-Monopoly Notification of Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, [2007] MOFCOM Order No. 11, Mar. 8, 2007.

[16] *Id.*

[17] *See* Tencent report, *The Ministries' competition behind the Anti-Monopoly Law* (March 7, 2005), *available at* http://view.news.qq.com/a/20070826/000022.htm.

[18] Notice of the General Office of the State Council on Issuing the Provisions on the Main Functions, Internal Bodies and Staffing of the Ministry of Commerce, [2008] General Office of the State Council No. 77, Jul. 11, 2008.

[19] *See* Ministry of Commerce, *Important functions*, Jun. 13, 2011, *available at* http://fldj.mofcom.gov.cn/article/gywm/200809/20080905756026.shtml.

[20] Price Law of the People's Republic of China, [1997] Presidential Order No.92, Dec. 29, 1997 art. 14.

[21] Provisional Regulation on the Prohibition of Price Monopoly Conduct, [2003] NDRC Order No. 3, Jun.18, 2003.

[22] Anti-Price Monopoly Regulation, [2010] NDRC Order No. 7, Dec.29, 2010, art. 29.

[23] Notice of the General Office of the State Council on Issuing the Provisions on the Main Functions, Internal Bodies and Staffing of the National Development and Reform Commission, [2008] General Office of the State Council No. 102, Jul. 15, 2008.

[24] *See* National Development and Reform Commission, *Institutional settings, available at* http://jjs.ndrc.gov.cn/jgsz/.

[25] By administrative decision in 2008, NDRC authorized the price departments at the provincial level to investigate and sanction conduct in breach of the AML.

[26] Anti-Unfair Competition Law of the People's Republic of China, [1993] Presidential Order No. 10, Sep. 2, 1993, arts. 6, 11, 12, and 15.

[27] Hao Qian, *supra* 8, at 30.

[28] *See* Competition Law, *The 21 years of history of Anti-Monopoly Law in China* (Jul. 29, 2008), *available at* http://www.competitionlaw.cn/show.aspx?id=3984&cid=13.

[29] Notice of the General Office of the State Council on Issuing the Provisions on the Main Functions, Internal Bodies and Staffing of the State Administration for Industry and Commerce, [2008] General Office of the State Council No. 88 [2008], Jul. 11, 2008.

[30] *See* State Administration for Industry and Commerce, *Institutional settings, available at* http://www.saic.gov.cn/fldyfbzdjz/jgsz/.

[31] Wang Xiaoye, Thorough Comments on Chinese Antitrust Law 72 (2008).

[32] International competition law analyses may use the terms of "concurrent" jurisdiction (application of the same law) and "parallel" jurisdiction (application of different laws) differently. *See*, for example, International Competition Network, Antitrust Enforcement in Regulated Sectors Working Group, Subgroup 3: interrelations between antitrust and regulatory authorities, Report to the third ICN Annual Conference, Seoul, at 7 (April 2004)

[33] Anti-Price Monopoly Regulation, [2010] NDRC Order No.7, Dec. 29, 2010, arts. 13 and 14.

[34] Regulation on the Prohibition of Conduct Abusing a Dominant Market Position, [2010] SAIC Order No. 54, Dec. 31, 2010.

[35] *See* case 85/76, *Hoffmann-La Roche v. European Commission*, [1979] ECR 539, ¶ 89.

[36] SAIC Fair Trade Bureau & China Academy of Science International Legal Study Centre ed., Selected Anti-Monopoly Cases and the Investigation and Analysis on the Chinese Anti-Monopoly Enforcement 33-37 (2007).

[37] Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, Aug. 30, 2007, art. 17(6) (emphasis added).

[38] Regulation on the Prohibition of Conduct Abusing a Dominant Market Position, [2010] SAIC Order No. 54, Dec. 31, 2010, arts. 7(2) and (3).

[39] Draft Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights, [2014] SAIC release, Jun. 11, 2014.

[40] *Id.*, art. 20. In fact, when SAIC started drafting the normative text for a document regulating anticompetitive conduct involving IPRs, the initial plan was to draft "guidelines." However, the plan was later changed, and now SAIC opts for a regulation. Reportedly, the reason for this change was that the guidelines might have been adopted in the name of the Anti-Monopoly Commission, and hence they would have been applicable to all three antitrust authorities. Rumors had it, not all antitrust authorities agreed. Hence, SAIC now plans a regulation, which is in fact an "administrative regulation" that only binds itself.

[41] *Id.*, arts. 7-11.

[42] *Id.*, arts. 12-15.

[43] Anti-Unfair Competition Law of the People's Republic of China, [1993] Presidential Order No. 10, Sep. 2, 1993, arts. 6 and 12.

[44] Adrian Emch & Gregory K. Leonard, *Predatory Pricing in China—In Line with International Practice?*, Legal Issues of Economic Integration, 305-316 (2010).

[45] Hubei Price Bureau, *Wuchang Salt Company is fined for tying sales*, Nov. 15, 2010, *available at* http://www.sdpc.gov.cn/fzgggz/jggl/zhdt/201011/t20101115_380425.html.

[46] Adrian Emch, *Abuse of Dominance in China—The First Cases*, Capacity Building for the Enforcement of Competition Law 165 (Wang Xiaoye, ed. 2012).

[47] Measures on the Monopoly of Edible Salt, [1996] State Council Order No. 197, May 27, 1996.

[48] *Id.*

[49] Administrative Regulation on Edible Salt Prices, [2003] NDRC Order No. 27, Jan. 3, 2003, art. 5.

[50] *See* China Consumers Association, *Xinyu AIC announced ten typical cases*, Mar. 23, 2011, available at http://www.cca.org.cn/web/xfts/newsShow.jsp?id=51497.

[51] Administrative Penalty Decision of Zhejiang Province Pinghu Administration for Industry and Commerce, [2011] Ping Gong Shang Jian Chu Zi No. 154, Aug. 29, 2011, *available at* http://www.phaic.gov.cn/ReadNews.asp?NewsID=894; and Administrative Penalty Decision of Ningbo Administration for Industry and Commerce, [2013] Ningbo Administration for Industry and Commerce, Jul. 31, 2013, *available at* http://www.nbaic.gov.cn/art/2013/7/31/art_224_36672.html.

[52] National Development and Reform Commission, *Six LCD panels companies are fined for price-fixing conduct* (Jan. 17, 2013), *available at* http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201301/t20130117_523206.html; and National Development and Reform Commission, *NDRC officer responded to LCD price-fixing case* (Jan. 17, 2013), *available at* http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201301/t20130117_523207.html.

[53] European Commission decision, COMP/39.309 LCD (*Liquid Crystal Displays*), Dec. 8, 2010.

[54] *See*, *Domestic TV maker saves 400 million RMB due to extended warranty of LCD companies*, Beijing News (Jan. 5, 2013), *available at* http://tech.qq.com/a/20130105/000013.htm.

[55] Sichuan Development and Reform Commission, *Sichuan NDRC fines Wuliangye Group 202 million RMB for its pricing conduct* (Feb. 22, 2013), *available at* http://www.scdrc.gov.cn/dir25/159074.htm.

[56] The *White liquor* cases were not the only AML case where both RPM and territorial restrictions were imposed by manufacturers on distributors. Indeed, in *Johnson & Johnson*, a court case, the same occurred. *See* Shanghai High People's Court, *Beijing Ruibang Yonghe Science and Technology Trade Company v. Johnson & Johnson Medical (Shanghai) Ltd., Johnson & Johnson Medical (China) Ltd.,* Aug. 1, 2013, [2012] Hu Gao Min San (Zhi) Zhong Zi No. 63.

[57] National Development and Reform Commission, *NDRC suspends the investigation into IDC for price-monopoly conduct* (May, 22, 2014), *available at* http://www.ndrc.gov.cn/gzdt/201405/t20140522_612466.html.

[58] National Development and Reform Commission, *Press conference the supervision of pricing conduct and anti-monopoly work* (Jan. 19, 2014), *available at* http://www.sdpc.gov.cn/xwzx/xwfb/201402/t20140219_579522.html.

[59] In the *Qualcomm* case, too, the bundling of SEPs and non-SEPs also seems to have been an area of focus of the NDRC investigation. *See* National Development and Reform Commission, *Qualcomm CEO came to NDRC for the anti-monopoly investigation for the third time, available at* http://www.ndrc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201407/t20140711_618478.html.

[60] The case before NDRC was likely factually very similar to the court cases in *Huawei v. InterDigital*, where the Shenzhen Intermediate People's Court at first instance and the Guangdong High People's Court on appeal each issued two judgments. *See* Shenzhen Intermediate People's Court, *Huawei v. InterDigital*, [2011] Shen Zhong Fa Zhi Min Chu Zi No. 857 and No. 858; and Guangdong High People's Court, *Huawei v. InterDigital*, Oct. 21, 2013, [2013] Yue Gao Fa Min San Zhong Zi No. 305 and No. 306. In their judgments, both courts held that InterDigital's conduct amounted to excessive pricing and tying (SEPs and non-SEPs), in violation of the AML. When analyzing the excessive pricing element of the conduct, the courts actually stressed several aspects that were not price-related. In particular, the courts at both instances found that the filing of lawsuits by InterDigital before the District Court and the International Trade Commission in Washington, D.C. was a means by InterDigital to put undue pressure on Huawei with the ultimate goal to obtain higher, excessive royalties for the patent licensed to Huawei. *See* Ye Ruosi, Zhu Jianjun, & Chen Wenquan, *Determination of Whether Abuse of Dominance by Standard Essential Patent Owners Constitutes Monopoly: Comments on the Antitrust Lawsuit Huawei v. InterDigital*, 3 Electronic Intellectual Property 46-52 (2013). The filing of a lawsuit is in principle not related to pricing. Viewed from that perspective, it is not difficult to imagine that SAIC would argue it could have jurisdiction over SEP cases; for example, on the grounds that the lawsuit before the International Trade Commission would be equivalent to a refusal to deal.

[61] Administrative Penalty Decision of Henan Administration for Industry and Commerce, [2012] Yu Gong Shang Chu Zi No.1, Jan. 4, 2012, *available at* http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136758.html.

[62] Administrative Penalty Decision of Liaoning Administration for Industry and Commerce, [2012] Liao Gong Shang Chu Zi No. 2, Aug. 13, 2012, *available at*

http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136746.html.

[63] Administrative Penalty Decision of Zhejiang Administration for Industry and Commerce, [2012] Zhe Gong Shang An No. 16, Dec. 14, 2012, *available at* http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136765.html.

[64] Wang Jian & Zhu Hongwen, Research on Implementation of Antitrust Law 16 (2013).

[65] Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, Aug. 30, 2007, art. 21.

[66] *Maersk/MSC/CMA CGM*, [2014] MOFCOM Public Announcement No. 46, June 17, 2014.

[67] *Inbev/Anheuser-Busch*, [2008] MOFCOM Public Announcement No. 95, Nov. 18, 2008.

[68] MediaTek/MStar, [2013] MOFCOM Public Announcement No. 61, Aug. 26, 2013.

[69] Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, Aug. 30, 2007, art. 20.

[70] A related issue is that MOFCOM rules allow for voluntary notification even if the sales revenue thresholds are not met. Measures on the Notification of Concentrations between Business Operators, [2009] MOFCOM Order No. 11, Nov. 21, 2009, art. 16. However, the law itself in principle only allows voluntary notification for "concentrations between business operators," and hence MOFCOM should in principle not accept a notification for a transaction that does not qualify as a "concentration."

[71] In *Henkel/Tiande Chemical*, the MOFCOM decision mentioned the market share upstream. One of the parent companies (Tiande Chemical) had a market share at, or close to, the dominance presumption threshold of 50 percent. Henkel/Tiande Chemical, [2012] MOFCOM Public Announcement No. 6, Feb. 9, 2012. In *ARM/Giesecke & Devrient/Gemalto* and *General Electric/Shenhua*, the MOFCOM decisions did not indicate the precise level of market shares. However, it is possible or even likely that the market share of at least one of the merging parties was above 50 percent. Indeed, ARM has a very strong IPR portfolio, and the European Commission decision in the same case mentions high market share figures. Similarly, MOFCOM's decision in *General Electric/Shenhua* indicates that both General Electric (as one of only three players) and Shenhua were found to be the largest players in the two affected markets. *ARM/Giesecke & Devrient/Gemalto*, [2012] MOFCOM Public Announcement No. 87, Dec. 6, 2012; and *General Electric/Shenhua*, [2011] MOFCOM Public Announcement No. 74, Nov. 10, 2011.

[72] *Microsoft/Nokia*, [2014] MOFCOM Public Announcement No. 24, Apr. 8, 2014.

[73] *See* case 6/72 *Europeamballage Corporation and Continental Can v. European Commission*, [1973] ECR 215.

[74] NDRC's involvement in the MOFCOM merger control process as a stakeholder that is often consulted is another matter, which is beyond the scope of this paper.

[75] MOFCOM also has jurisdiction over antitrust-related fields under rules outside the AML framework, where potential overlaps with NDRC and SAIC are possible. For example, in the technology licensing space, MOFCOM has certain powers under the Foreign Trade Law and its implementing rules, which can overlap with the monopoly agreement and abuse of dominance rules in the AML for cross-border licensing agreements. *See* Foreign Trade Law of the People's Republic of China, [2004] Presidential Order No. 15, Apr. 6, 2004, art. 30; and Regulation of the People's Republic of China on the Administration of Import and Export of Technologies, [2001] State Council Order No. 331, Dec. 10, 2001, art. 29. However, I will not

discuss this issue further in this paper.

[76] European Commission Notice on restrictions directly related and necessary to concentrations, [2005] OJ C 56, ¶ 2.

[77] Jin Fuhai, Research on Difficult Issues in Antitrust Law 23 (2010).

[78] There have been discussions in this sense in a slightly different situation. As noted above, there were court cases brought by Huawei against InterDigital that ended in two judgments at both the first instance stage in Shenzhen and the appeal stage in Guangzhou. After the appeal judgments had already been out for some time—finding that InterDigital had breached the AML—NDRC issued its decision on supposedly very similar facts. However, the NDRC decision did not find an infringement. It was a decision accepting InterDigital's commitments, which means that the NDRC only talked about "suspected" anticompetitive practices by InterDigital but never clearly found that the company's conduct was illegal. Before the NDRC decision against InterDigital, there had been some criticism in the Chinese academic community. The concerns were mainly that there is public inconsistency if the courts find conduct to be illegal, while an administrative authority settles the case without a finding of illegality.

[79] Wang Xiaoye, *Several issues on China's anti-monopoly enforcement agencies*, 28(1) Dong Yue Tribune, 33-41 (2007). The negative implications for authority credibility are also present if the factual scope of the investigations by multiple regulators is different (e.g., different target companies), but the legal allegations are the same or similar.

[80] Administrative Penalty Decision of Hunan Province Administration for Industry and Commerce, [2012] Xiang Gong Shang Jing Chu Zi No. 2, Dec. 3, 2012, *available at* http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136762.html; Administrative Penalty Decision of Hunan Province Administration for Industry and Commerce, [2012] Xiang Gong Shang Jing Chu Zi No. 4, Dec. 3, 2012, *available at* http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136763.html; and Administrative Penalty Decision of Hunan Province Administration for Industry and Commerce, [2012] Xiang Gong Shang Jing Chu Zi No. 3, Dec. 3, 2012, *available at* http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136764.html.

[81] Hunan Price Bureau, Pricing monopoly among Loudi insurance companies (Dec. 28, 2012), *available at* http://www.priceonline.gov.cn/jianduju/Shownews.asp?ID=149735.

[82] *See* Xu Liu, *Improvements of the functions of the State Anti-Monopoly Commission and reform of anti-monopoly law enforcement mechanisms under the background of ministry reform* (Nov. 15, 2013), *available at* http://law.tongji.edu.cn/index.php?classid=2434&newsid=3836&t=show; and State Administration for Industry and Commerce, *Improvements to Chinese anti-monopoly law enforcement*, Nov. 26, 2013, *available at* http://www.saic.gov.cn/gsxh/ktyj/xsdt/201312/t20131206_140265.html.

[83] Administrative Penalty Decision of Yunnan Province Administration for Industry and Commerce, [2013] Yun Gong Shang Jing Zheng Chu Zi No. 1, (Apr. 7, 2013), *available at* http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136768.html.

[84] National Development and Reform Commission, *Illegal pricing conduct among travelling agencies sanctioned* (Sep. 29, 2013), *available at* http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhdt/201309/t20130929_560780.html.

[85] Law of the People's Republic of China on Administrative Penalties, [2009] Presidential Order No. 63,

Aug. 27, 2009, art. 24.

[86] Regulation on the Prohibition of Conduct Abusing a Dominant Market Position, [2010] SAIC Order No. 54, Dec. 31, 2010, art. 8.

[87] Adrian Emch, T*he antitrust enforcers' New Year resolutions*, China Law & Practice 20, 22 (February 2011). See Anti-Price Monopoly Regulation, [2010] NDRC Order No. 7, Dec.29, 2010, art. 14; Regulation on the Prohibition of Monopoly Agreement Conduct, [2010] SAIC Order No. 53, Dec. 31, 2010, arts. 11-13; and Regulation on the Procedure for the Handling of Cases Involving Monopoly Agreements and Abuses of a Dominant Market Position, [2009] SAIC Order No. 42, Jun. 5, 2009, art. 20.

[88] Wang Xiaoye, Competition Law 409 (2007).

[89] *See*, for example, William E. Kovacic, *Downsizing antitrust: is it time to end dual federal enforcement?*, Antitrust Bull., 532 (Fall, 1996).

[90] Wang Jian & Zhu Hongwen, Research on Implementation of Antitrust Law 19-21 (2013).

[91] Of course, ultimately, the goal of most if not all cartelists and other companies engaging in anticompetitive practices is to obtain higher revenues—hence, all anticompetitive conduct is in principle "price-related."

[92] U.S .Department of Justice, Division Manual Chapter VII, *Antitrust Division Relationships with Other Agencies and the Public, available at* http://www.justice.gov/atr/public/divisionmanual/chapter7.pdf; and *see*, also, Harry First, Eleanor M. Fox, & Daniel E. Hemli, *Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System*, New York University Law and Economics Working Papers, Paper 303 (2012).

[93] *See*, for example, Kovacic, *supra* note 89, at 515.

[94] Anti-Monopoly Law of the People's Republic of China, [2007] Presidential Order No. 68, Aug. 30, 2007, art. 9(1)(4).

[95] The Legislation Law stipulates that if a regulation enacted by a central-level ministry is in conflict with anther regulation of the same rank, such conflict can be escalated to the State Council. Legislation Law of the People's Republic of China, [2000] Presidential Order 30, 1 July 2000, art. 86(3). In a sense, the Anti-Monopoly Commission is an "extended arm" of the State Council.