



International Distribution Institute

# **Anti-monopoly Legal Issues in Distribution in China**

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# Government Authorities

- **Anti-monopoly Committee under the State Council**
  - Duties: organizing, coordinating and guiding anti-monopoly work; do not enforce AML
- **Ministry of Commerce of China (MOFCOM)**
  - Internal Dept.: Anti-monopoly Bureau
  - Duties : anti-monopoly examination and law enforcement agent for concentration of undertakings

## **Government Authorities (cont'd)**

- **State Administration for Industry and Commerce (SAIC)**
  - Internal Dept.: Anti-monopoly and Anti-unfair Competition Enforcement Bureau
  - Duties: monopolistic agreement (except for price monopoly) and abuses of market dominant position
- **National Development and Reform Commission (NDRC)**
  - Internal Dept.: Price Supervision and Inspection and Anti-monopoly Bureau
  - Duties: price monopoly

NDRC

SAIC

MOFCOM

**Monopoly**

**Monopoly Agreement**

**Abuse of Market Dominance**

**Merger Control**

**Horizontal**

**Vertical**

# PART 1: MONOPOLY AGREEMENT

## Contents

- Horizontal agreements
- Vertical agreements
- Industry associations
- Liabilities

# Monopoly Agreement

- An agreement, decision or other concerted act that eliminates or restricts competition
- Other concerted act: actual existence of coordinated actions. SAIC:
  - Consistent actions by market players
  - Intentional contact or information exchange?
  - Reasonable explanations re consistent actions?
  - Relevant market structure, competition situation, market changes, industry situation

## Monopoly Agreement (cont'd)

- Horizontal agreements: Focus of antimonopoly. Illegal *per se*.
- Vertical agreements: Parties are at different levels of a manufacture-distribution process. Not in direct competition. Controversial (in terms of economics)

# Horizontal Agreement – Price-related

- An agreement between competitors
- “Fix or alter commodity prices” [AML Clause 13, paragraph 1.] NDRC:
  - Fix or alter price levels of commodity or service
  - Fix or alter range of fluctuation of price
  - Fix or alter broker fees, discounts or other fees that have an impact on price

## Horizontal Agreement – Price-related (cont'd)

- Use an agreed price as basis for dealing with third parties
- Reaching an agreement upon the formula based on which price is calculated
- Reaching an agreement that a party shall not alter the price without consent of other party(ies)
- Fix or alter price by other means

## Horizontal Agreement – Price-related (cont'd)

- Case A (Jan 2016): Five pharmaceutical companies, reached agreement on price raises, dividing markets
- Case B (Dec 2015): Eight foreign shipping companies, Reached agreements on bid prices
- Case C (August 2014): Hitachi Automotive Systems, reached agreement on bid prices, fix or change prices

# Horizontal Agreement – Non-related with Price

- An agreement that restricts output of production or sales volume
  - Restrict output, fix output, suspend production
  - Refuse to deliver, restrict amount of products for sale
- An agreement that divides sales market or raw materials market
  - Divide sales territory, targets or types and quantity of products for sale
  - Divide raw materials purchase territory, types, and quantity, incl. raw materials, semi-finished, components, and related equipment, etc.
  - Divide raw material suppliers

## Horizontal Agreement – Non-related with Price (cont'd)

- An agreement that restricts purchase of new technology, new equipment, or restricts development of new tech or new products
  - Restrict purchase or use of new tech, new process
  - Restrict purchase, lease, or use of new equipment
  - Restrict investment and R&D of new tech, process or products
  - Restrict use of new tech, process or equipment
  - Restrict adoption of new tech standards

# Horizontal Agreement – Non-related with Price (cont'd)

- Jointly refuse (or boycott) transactions
  - Jointly refuse to supply or sell to a specific undertaking
  - Jointly refuse to purchase or distribute products of a specific undertaking
  - Restrict a specific undertaking from transacting with a competitor

# Vertical Monopoly Agreement

- AML, Clause 14:
  - fix the price of resale to third parties
  - Restrict and fix the minimum price of resale to third parties
  - Other monopolistic agreements identified by enforcement entities

## **Vertical Monopoly Agreement (cont'd)**

- Producer determined retail price, producer guiding retail price, minimum price
- Producer recommended price, suggested price
- Nokia's distribution and retail model in China (2009)

## Vertical Monopoly Agreement (cont'd)

- Case A (Dec 2016): Medtronic case: fixed distribution and retail prices
- Case B (Dec 2016): Shanghai General Motors Automobile, setting minimum resale price
  - Other auto maker cases: Audi, Mercedes-Benz, Dongfeng Nissan
- Case C (April 2016): Hankook auto tires, fixed minimum resale prices

## Industry Associations: Monopoly Agreements Organized by Them

- AML, Clause 16: An industry association shall not organize undertakings in the industry to adopt monopoly agreements
- Types of activities:
  - Formulating rules, decisions, notices that eliminate or restrict competition
  - Organize undertakings in the industry to reach monopoly agreements
- “Industry self-disciplined price”?
- If an association violates the law, is an enterprise involved also culpable?

# **Industry Associations: Monopoly Agreements (cont'd)**

- Case A (July 2015): Animation gaming association in Panyu, Guangzhou; boycotting transactions with other exhibitors
- Case B (July 2013): Auto insurance association in Chenzhou city, Hunan province. Dividing sales market

## Exempted Monopoly Agreements

- AML, Clause 15:
  - In order to improve technology or R&D of new products
  - To improve product quality, reduce cost, improve efficiency, uniform product specifications or standards, carry out specialized division of work
  - To improve operational efficiency of medium and small undertakings, and their competitiveness
  - To realize public social interests such as energy conservation, environment protection
  - To mitigate sharp sales decreases or obvious over-production

# Penalties for Violation of AML

- AML, Clause 46:
- A business undertaking: If a monopoly agreement is reached and implemented, confiscation of illegal gains, and a fine equal to 1% to 10% of sales turnover for the last year
- An industry association: a fine up to RMB500,000. In a serious case, its official registration may be rescinded

## Penalties for Violation of AML (cont'd)

- If one investigated target proactively reports a violation and provides important evidence, the penalty may be mitigated or even exempted
- Price-related: the first reporter: penalty exempted. Second reporter: mitigated by 50% or more. Other reporters: mitigated by less than 50%

## PART 2: ABUSE OF MARKET DOMINANCE

- Market dominance: an undertaking that has the market position to control products price, quantity, or other transaction terms, or prevent entry of new entrants. AML Clause 17
- SAIC issued details rules

# Relevant Market; Dominance?

- Product market and territory market
- Basis for determination: replacement analysis, demands analysis, and supply replacement
- Presumed market dominance, AML Clause 19
  - One player with market share of more than  $\frac{1}{2}$
  - Two players, with combined market share of  $\frac{2}{3}$
  - Three players, combined  $\frac{3}{4}$
  - In latter two cases, a player with less than 10% is excluded

# Abuse of Market Dominance – Price-related

- Sales at unfair high price or purchases at unfair low price (AML Clause 11)
  - Sale or purchase price obviously higher/lower than price of sales or purchases made by other undertakings
  - Increase of sales price or decrease of purchase price beyond normal ranges, with costs remaining stable
  - The sales price increase range obviously higher than the cost increase range; or purchase price decrease range obviously higher than the cost decrease range of the counterparty

## **Abuse of Market Dominance – Price-related (cont'd)**

- Sales at below-cost price without just reasons
- Disguised refusal to transact with counterparties by setting excessively high sales price or low purchase price without just reasons
- One restricts a counterparty to transact with itself or with its designated undertaking(s) by means of price discounts, without just reasons. [AML Clause 14]

# Abuse of Market Dominance – Non-related with Price

- Refuse to transact with other parties, without just reasons
- Restrict a counterparty in entering into transactions
  - Restricts a counterparty to deal with with the first party or its designated party only, or prohibit from transactions with a competitor
- Tie products or impose other unreasonable trading terms, without just reasons

## **Abuse of Market Dominance – Non-related with Price (cont'd)**

- Offer differential treatment to counterparties that have same terms, without just reasons
- Overlaps between AML and Anti-unfair Competition Law?

## **Abuse of Market Dominance (cont'd)**

- Case A (Nov 2016): Tetra Pak Packaging. Tying without just reasons. Restrictions on transactions, loyalty discounts
- Case B: Qualcomm (Feb 2015): abuse of patent licensing
- Case C (July 2016): pipeline gas provider: predatory price in facilities installation

## PART 3: MERGER CONTROL FILING

- Three Types of Concentration
  - Merger of two undertakings
  - One party acquires control of another party by acquiring equity shares or assets of the latter party
  - One party acquires control of another party or may exert a decisive influence on the latter party via a contract or other means

## Thresholds for Notification

- In the preceding financial year, the combined worldwide turnover is more than RMB10 billion, and the nationwide turnover within China of each of at least two is more than RMB 400 million
- In the preceding financial year, the combined nationwide turnover within China is more than RMB 2 billion, and the nationwide turnover within China of each of at least two is more than RMB 400 million
- The concentration has, or is likely to have, the effect of eliminating or restricting competition

# Consequence of Non-submission

- If not submit:
  - The concentration in question may not be completed
  - If the concentration were completed (without AMB clearance), may be ordered to suspend the transaction, divest shares or assets within prescribed time limit, or carry out other measures to resume to pre-transaction situation. A fine up to RMB500,000 may be imposed. Other consequences: Reputational, government relations, PR, etc.



**Questions and Views?**

**Thank you! ☺**

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