GETTING THE DEAL THROUGH

GCR
GLOBAL COMPETITION REVIEW

Vertical Agreements

The regulation of distribution practices in 41 jurisdictions worldwide

2009

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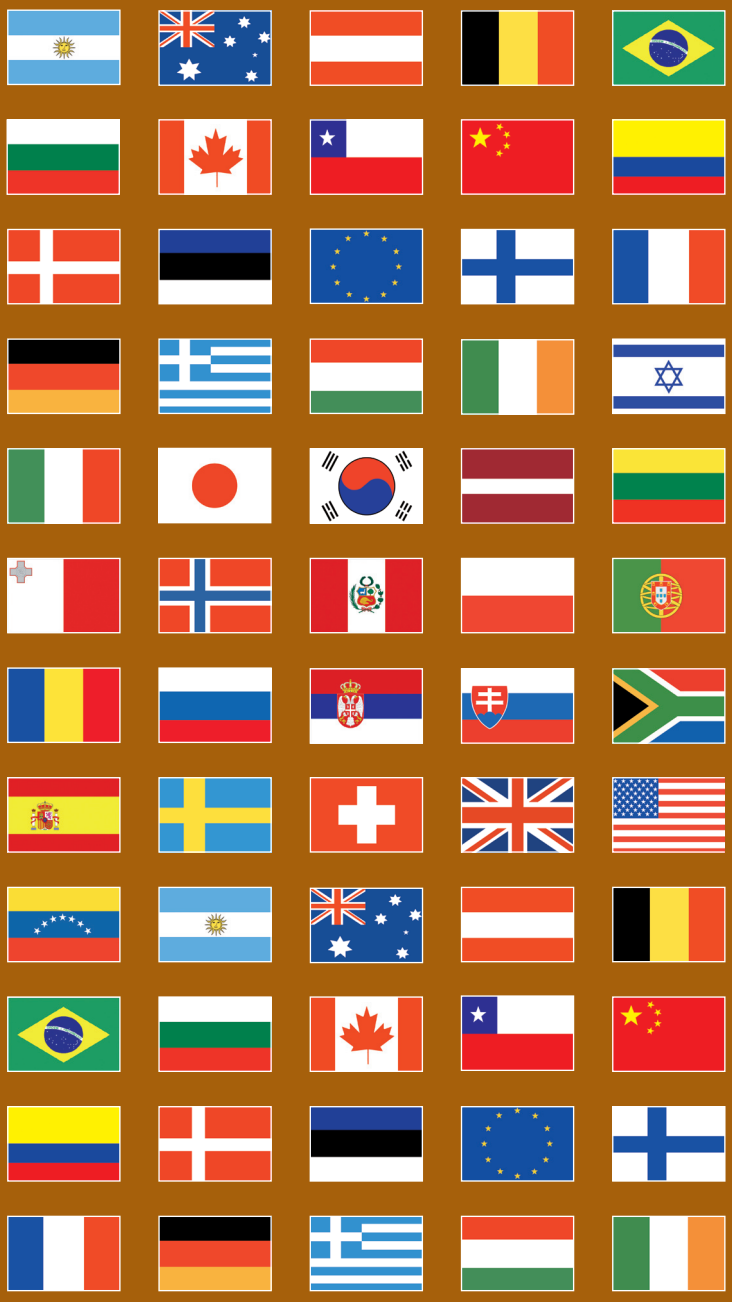

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Chen Yang and Adrian Emch

Sidley Austin LLP

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

China's main competition legislation is the Anti-Monopoly Law of the People's Republic of China (PRC) (2007). Other relevant sources include:

- Anti-Unfair Competition Law of the PRC (1993);
- Price Law of the PRC (1997);
- Contract Law of the PRC (1999) as amended;
- Administrative Measures for Fair Transactions Between Retailers and Suppliers (2006) (Administrative Measures);
- Provisional Measures for the Prohibition against Monopolistic Pricing (2003) (Anti-Monopolistic Pricing Measures);
- Provisions on the Administrative Penalties for Pricing Violations (2006) as amended;
- Regulation on the Prevention of Below-Cost Dumping Conduct (1999);
- Judicial Interpretation of the Law Applied to Disputes Arising from Technology Contracts (2004);
- Regulation on the Administration of Import and Export of Technologies (2001); and
- Provisions on the Prohibition of Regional Blockades in Market Economy Activities (2001).

In addition, there are rules implementing the Anti-Unfair Competition Law issued by several local governments (including Beijing, Shanghai and Shenzhen). This chapter considers only the rules adopted at the national level.

The Anti-Monopoly Law entered into force on 1 August 2008. China's principal competition authorities have already adopted measures implementing certain elements of the Anti-Monopoly Law. It is expected that additional rules and guidelines will be adopted in due course. Some of these additional implementing measures may refer to vertical agreements. However, at the time of writing, no specific implementing measures relating to vertical agreements have been adopted.

It is unclear whether the Anti-Monopoly Law will replace the pertinent provisions in prior legislation such as the Anti-Unfair Competition Law and the Price Law or will coexist with them. However, if any conflict occurs between the terms of the Anti-Monopoly Law and prior laws, the Anti-Monopoly Law (as the more recent text) should in principle prevail. For the sake of completeness, and given that the competition authorities have not at this stage issued sufficient relevant guidance on the Anti-Monopoly Law, in the remainder of this chapter we assume that the provisions in other laws continue to apply.

Where a party occupies a dominant market position on one of the markets to which the vertical agreement relates, articles 17 to 19 of the Anti-Monopoly Law may also be relevant to the antitrust assessment of a given vertical restraint. However, these provisions are considered in the *Getting the Deal Through – Dominance* publication and are therefore not covered here. A similar approach is taken in relation to the provisions in the Price Law and its implementing measures which may only apply to companies in a dominant market position and so are not considered in full detail in this chapter.

Types of vertical restraint

2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

The Anti-Monopoly Law does not define the concept of vertical restraint. Nonetheless, while the concept of 'vertical' is not further explained, the Anti-Monopoly Law contains the concept of 'horizontal' agreement (ie, an agreement between competitors). By implication, a 'vertical' agreement would be any agreement between trading partners other than horizontal agreements. Similarly, while the Anti-Monopoly Law does not define the concept of 'restraint', guidance is provided in the definition of 'monopoly agreement', being an agreement, decision or concerted practice that eliminates or restricts competition.

Legal objective

3 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to protect other interests?

The Anti-Monopoly Law pursues multiple objectives:

(i) to prevent and prohibit monopolistic conduct;
(ii) to protect market competition;
(iii) to promote efficiency of economic operations;
(iv) to safeguard the interests of consumers and the general public; and
(v) to promote the healthy development of the socialist market economy.

In addition, article 15 of the Anti-Monopoly Law provides the possibility to exempt 'monopoly' agreements, including vertical ones, if certain conditions are fulfilled. Many of these conditions are not purely economic. They include, for example, social interests (such as energy saving, environmental protection and disaster relief), alleviation of serious decreases in sales volumes or overcapacities during recession and the safeguard of legitimate interests in foreign trade and foreign economic cooperation.

Responsible agencies

4 What agency is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible agencies, how are cases allocated? Do governments or ministers have a role?

According to notices issued by the State Council, the National Development and Reform Commission (NDRC) and the State Administration of Industry and Commerce (SAIC) are responsible for enforcing the prohibitions on anti-competitive vertical restraints under the Anti-Monopoly Law. NDRC is in charge of investigating and sanctioning anti-competitive vertical restraints related to pricing. At present, the only prohibition explicitly provided for in the Anti-Monopoly Law is resale price maintenance and the fixing of minimum resale prices. SAIC has jurisdiction over anti-competitive vertical restraints not related to pricing. It is possible that NDRC and SAIC will delegate some or all of their powers to local bureaux at a later stage.

Different ministries and bodies enforce the competition provisions contained in other laws. For example, SAIC and its local bureaux are responsible for enforcing the provisions of the Anti-Unfair Competition Law and the Several Provisions for the Prohibition of Public Utilities Enterprises from Restricting Competition, while a number of bodies share the competence to enforce the provisions of the Administrative Measures.

Jurisdiction

5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially?

The Anti-Monopoly Law applies to monopolistic conduct in economic activities within China's territory and to conduct outside China which eliminates or restricts competition within the Chinese market.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

In principle, the Anti-Monopoly Law and the competition provisions in other laws and regulations (including provisions relating to vertical agreements) apply irrespective of the ownership of an entity.

Most laws containing competition provisions, including the Anti-Monopoly Law, the Anti-Unfair Competition Law and the Price Law, stipulate that any 'undertaking' is subject to those provisions. The Anti-Monopoly Law defines an undertaking as a natural person, legal person or other organisation that engages in the manufacture or sale of products or the provision of services. No reference is made to the ownership of the undertaking.

The Anti-Unfair Competition Law contains a similar definition, but refers to commercial operations related to goods or 'profitable' services. In the past, the State Administration of Industry and Commerce (SAIC), its local bureaux and the courts have held hospitals and universities to be undertakings for the purposes of the Anti-Unfair Competition Law. It is possible that the National Development and Reform Commission (NDRC), the SAIC and the courts will reach a similar finding in relation to the Anti-Monopoly Law.

The Anti-Monopoly Law also prohibits administrative authorities and organisations from taking certain steps that might restrict competition, including the imposition of exclusive dealing obligations. However, it is unclear whether these provisions apply to public or state-owned companies or, rather, only to government bodies.

Article 7 of the Anti-Monopoly Law establishes a particular system for state-owned enterprises in industries vital to the national economy and national security and industries subject at law to exclusive operations and sales. This complex provision seems to make the pricing policy of such enterprises subject to government intervention.

Sector-specific rules

7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry? Please identify the rules and the sectors they cover.

Sectors subject to specific rules include, inter alia, certain defined public utilities, telecommunications, civil air transport and international maritime transport. The sector-specific sources relevant to those industries are:

- several Provisions for the Prohibition of Public Utilities Enterprises from Restricting Competition (1993), which apply to public utilities enterprises (such as postal services, certain telecommunications services, transportation, water supply, energy supply, etc);
- Telecommunication Regulation of the PRC (2000), which applies to the telecommunications industry;
- Regulation on Prohibition of Anti-Unfair Competition Practices in Civil Air Transportation Market (1996), which applies to the civil air transport industry; and
- Regulation of the PRC on International Ocean Shipping (2001), which applies to international maritime transport.

General exceptions

8 Are there any general exceptions from antitrust law for certain types of vertical restraints? If so, please describe.

Article 15 of the Anti-Monopoly Law lists the circumstances under which an agreement containing a vertical restraint can be exempted from the prohibition of article 14. These circumstances are:

(i) improving technology or research and development (R&D) of new products;
(ii) improving product quality, reducing costs, enhancing efficiency, harmonising product specifications and standards, or dividing work based on specialisation;
(iii) improving the operational efficiency and enhancing competitiveness of small and medium-sized enterprises;
(iv) serving social public interests such as energy saving, environmental protection and disaster relief and aid;
(v) alleviating serious decreases in sales volumes or significant production overcapacities during economic recession; and
(vi) safeguarding legitimate interests in foreign trade and foreign economic cooperation.

Other circumstances may be added to this list in the future.

If a company wishes to argue that the prohibition of article 14 should be disapplied, it has the burden of proof to show that the agreement in question fulfils one of these circumstances. If it claims that one of the first five circumstances exists, the company must also prove that the agreement does not significantly restrict competition in the relevant market and allows consumers a share of the resulting benefit.

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction? When assessing vertical restraints under antitrust law does the agency take into account that some agreements may form part of a larger, interrelated network of agreements or is each agreement assessed in isolation?

The Anti-Monopoly Law and the competition provisions in other laws or regulations do not contain a precise definition of an 'agreement'. Nonetheless, article 13 of the Anti-Monopoly Law defines a 'monopoly agreement' as an 'agreement, decision or other concerted practice which eliminates or restricts competition'.

Parent and related-company agreements

10 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

It is unclear whether the Anti-Monopoly Law and the competition provisions in other laws or regulations apply to agreements between a parent and a related company. However, because one aim of the competition laws and regulations is to maintain fair market competition and since such intra-company agreements would not adversely affect the wider competitive environment, it is unlikely that such agreements would be prohibited.

Agent–principal agreements

11 In what circumstances does antitrust law apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a commission payment?

There are no provisions in the Anti-Monopoly Law or the competition provisions in other laws or regulations that specifically address this question.

Intellectual property rights

12 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

In principle, the provisions of the Anti-Monopoly Law do not apply differently if an agreement grants an IPR. Article 55 of the Anti-Monopoly Law states that application of the law is not precluded as a matter of principle on the grounds that an IPR is involved. Where a company restricts or eliminates competition by abusing an IPR, the provisions of the Anti-Monopoly Law apply.

In contrast, the competition provisions in the Contract Law and the Judicial Interpretation on Technology Contracts apply to technology contracts only. Similarly, the Regulation on the Administration of Import and Export of Technologies applies only to the import and export of technology as defined by that regulation. Article 10 of the Judicial Interpretation on Technology Contracts prohibits the inclusion in agreements of clauses restricting the freedom of a technology recipient to undertake R&D or clauses imposing inequitable conditions for sharing improvements of the technology.

Analytical framework for assessment

13 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

There is no uniform analytical framework that applies to the assessment of all vertical restraints under Chinese antitrust law. Rather, the various legal instruments provide limited information on the analytical approach that should be expected in relation to the specific types of conduct they cover. The instruments set out below cover the potential infringements identified. Where appropriate, explanations of likely analytical frameworks are provided.

Anti-Monopoly Law

Article 14 of the Anti-Monopoly Law identifies as illegal:

- resale price maintenance – the fixing of resale prices of products sold to third parties; and
- fixing of minimum resale price – the fixing of minimum resale prices of products sold to third parties.

Article 14 of the Anti-Monopoly Law also empowers the National Development and Reform Commission (NDRC) and the State Administration of Industry and Commerce (SAIC) to prohibit other vertical restraints, which they consider anti-competitive.

The general analytical framework underpinning the assessment of vertical restraints under the Anti-Monopoly Law is the following: if NDRC or SAIC finds that an agreement fixes resale prices or minimum resale prices, it is likely to conclude that article 14 of the Anti-Monopoly Law is breached. However, the parties can still argue that the prohibition in article 14 should be disapplied on the grounds that the agreement fulfils one of the circumstances listed in article 15 of the Anti-Monopoly Law, or has other beneficial effects which are not explicitly listed. In addition, the parties must prove, as a general rule, that the agreement does not significantly restrict competition in the relevant market and allows consumers a share of the resulting benefit. This same analysis would, in principle, apply for all types of vertical restraints examined under the Anti-Monopoly Law, whether the explicitly prohibited resale price maintenance and minimum resale price fixing, or additional yet unspecified restraints which NDRC or SAIC finds to be in breach of article 14.

Anti-Unfair Competition Law

The Anti-Unfair Competition Law identifies as illegal:

- predatory pricing – below-cost sales with the aim to exclude competitors (except for fresh and live goods, perishable goods before expiry date and reduction of excessive stock, seasonal sales, or clearance of debts and change or suspension of business operations); and
- tie-in sales – tying the sale of certain products to the sale of other products, with the result that a purchaser is forced to purchase goods against its will, or attaching other unreasonable conditions to the sale of a product.

At present, it is not clear whether these provisions in the Anti-Unfair Competition Law continue to apply after the entry into force of the Anti-Monopoly Law. The latter law censures predatory pricing and tie-in sales only where the company at issue is in a dominant market position.

Contract Law and Judicial Interpretation on Technology Contracts

The Contract Law and the Judicial Interpretation on Technology Contracts identify the monopolisation of technology and the restriction of technological improvements as illegal. This includes the following practices:

- restricting technological improvements made by one party to a technology contract or providing for an inequitable sharing of such technological improvements;
- restricting a technology recipient's procurement of technology from other sources;
- unfairly limiting the volume, variety, price, sales channels, or export markets of the technology recipient's products and services;

- requiring the technology recipient to purchase other unnecessary technology, raw materials, products, equipment, services, etc;
- unjustly restricting the technology recipient's options for sourcing supplies of raw materials, parts or equipment; or
- prohibiting or restricting the technology recipients' ability to challenge the IPR at issue in the technology contract.

For technology import–export contracts, the Regulation on the Administration of Import and Export of Technologies contains similar prohibitions to the Contract Law and the Judicial Interpretation on Technology Contracts.

Administrative Measures

The Administrative Measures only apply to certain types of vertical agreements, that is, where the buyer is a retailer selling to end consumers and where its sales are above 10 million renminbi. They prohibit:

- price restrictions upon suppliers – where the retailer restricts the prices at which the supplier can sell products to other companies or consumers;
- exclusive dealing imposed upon suppliers – where the retailer restricts the supplier's sales to other retailers;
- tie-in sales imposed upon retailers – where the supplier ties the sale of a product with other products that the retailer did not order; and
- exclusive dealing imposed upon retailers – where the supplier restricts the retailer's freedom to purchase from other suppliers.

In addition, if a retailer is in an 'advantageous position', it is prohibited from imposing an obligation upon its suppliers to purchase products designated by it.

However, according to article 23, the Administrative Measures only apply where no law or regulation regulates the same conduct. It remains to be seen how the Administrative Measures will be deemed to interact with the Anti-Monopoly Law and, in particular, with articles 14 and 15 thereof.

Provisions on the Prohibition of Regional Blockades in Market Economy Activities

The Provisions on the Prohibition of Regional Blockades in Market Economy Activities essentially aim at curbing barriers to entry into regional markets that are erected by local governments and public authorities. Exceptionally, they may also apply to the conduct of companies, in particular prohibiting:

- territorial restrictions on sales within China – restricting the 'import' of products and construction services originating in other regions within China.

However, the exact scope of this prohibition remains unclear.

14 To what extent does the agency consider market shares, market structures and other economic factors when assessing the legality of individual restraints? Does it consider the market positions and conduct of other suppliers and buyers in its analysis?

As a general rule, the Anti-Monopoly Law and the competition provisions in other laws or regulations do not require the enforcement agencies to take account of market shares, market structures and other economic factors in their assessment of the legality of individual restraints. For example, article 14 of the Anti-Monopoly Law prohibits resale price maintenance and the fixing of minimum resale prices without referring to these factors. Nonetheless, under article 15, the availability of exemptions for agreements containing vertical restraints refers inter alia to economic factors such as the improvement of product quality, cost reductions and efficiencies and requires that the agreements do not significantly restrict competition in the relevant market. To a certain extent, these conditions may be interpreted as an implicit requirement upon the enforcement agencies to take into account economic factors including market shares when assessing the legality of vertical restraints.

Block exemption and safe harbour

15 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

The Anti-Monopoly Law, the Anti-Unfair Competition Law and its implementing measures do not contain any safe harbours, and there are currently no block exemptions. Nonetheless, it is possible that the Anti-Monopoly Commission, the National Development and Reform Commission (NDRC) or the State Administration of Industry and Commerce (SAIC) will issue such block exemptions in due course (See 'Update and trends').

Types of restraint

16 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Article 14 of the Anti-Monopoly Law prohibits a supplier from fixing the buyer's resale price or minimum resale price. Nonetheless, an agreement containing such a restriction can be exempted if the conditions of article 15 are met. The adoption of measures implementing articles 14 or 15 may give further guidance on the circumstances in which exemptions might be available.

In addition, article 10(3) of the Judicial Interpretation on Technology Contracts and article 29(6) of the Regulation on the Administration of Import and Export of Technologies prohibit the inclusion in vertical agreements of clauses restricting the price the technology recipient can charge to its customers in relation to products or services developed from the transferred technology.

17 Have there been any developments in your jurisdiction in relation to resale price maintenance restrictions in light of the landmark US Supreme Court judgment in *Leegin Creative Leather Products Inc v PSKS Inc*. If not, is any development in this area anticipated? Has there been any more general discussion by the relevant agency (or any other influential stakeholder) of the policy in your jurisdiction regarding resale price maintenance?

Chinese government officials and academics have noted the adoption of the *Leegin* judgment (see US chapter). The judgment may have an impact on the drafting of measures implementing article 14 or 15 of the Anti-Monopoly Law.

18 Have decisions relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint? Have the decisions addressed the efficiencies that it is alleged can arise out of such restrictions?

At the time of writing, there does not appear to be a decision published by the National Development and Reform Commission (NDRC) or the State Administration of Industry and Commerce (SAIC) that specifically addresses these questions.

19 How is restricting the territory into which a buyer may resell contract products assessed under antitrust law? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

The Anti-Monopoly Law and the Anti-Unfair Competition Law do not explicitly censure territorial restrictions in a vertical agreement between companies.

The Provisions on the Prohibition of Regional Blockades in Market Economy Activities prohibit companies from restricting the import of products and construction services originating in other regions within China, but the exact scope of this prohibition is unclear.

20 Explain how restricting the customers to whom a buyer may resell contract products is assessed under antitrust law. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

At the time of writing, neither the Anti-Monopoly Law nor the competition provisions in other laws or regulations contain general rules on such customer restriction clauses contained in vertical agreements.

21 How is restricting the uses to which a buyer puts the contract products assessed under antitrust law?

At the time of writing, neither the Anti-Monopoly Law nor the competition provisions in other laws or regulations contain general rules on such use restriction clauses contained in vertical agreements.

22 How is restricting the buyer's ability to generate sales via the internet assessed under antitrust law? Have the agencies issued decisions or guidance in relation to restrictions on internet selling? If so, what are the key principles?

At the time of writing, neither the Anti-Monopoly Law nor the competition provisions in other laws or regulations contain rules addressing this issue.

23 Briefly explain how agreements establishing 'selective' distribution systems are assessed differently under antitrust law.

There are no rules either in the Anti-Monopoly Law or the competition provisions in other laws or regulations that specifically address selective distribution systems.

24 Are selective distribution systems more likely to comply with antitrust law where they relate to certain types of product? If so, which types of product and why?

Not applicable.

25 Regarding selective distribution systems, are restrictions on internet sales by approved distributors permitted? If so, in what circumstances? Must internet sales criteria mirror offline sales criteria or would discrepancies be permitted?

Not applicable.

26 Does the relevant agency take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

Not applicable.

27 Has the agency taken decisions dealing with the possible links between selective distribution systems and resale price maintenance policies? If so, what are the key principles in such decisions?

Not applicable.

28 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed under antitrust law?

The Anti-Monopoly Law does not contain any provision on such clauses where they occur in vertical agreements between parties not holding a dominant market position.

In contrast, article 10(5) of the Judicial Interpretation on Technology Contracts and article 29(5) of the Regulation on the Administration of Import and Export of Technologies can be viewed as prohibiting the inclusion in technology contracts or technology import–export contracts of clauses that restrict the possibility for the technology recipient to obtain the supplier's products from alternative sources. Similarly, although the text is not entirely clear, article 18(2) of the Administrative Measures may be interpreted as prohibiting a supplier from restricting the retailer's freedom to purchase products, including the supplier's own products, from other sources.

29 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed under antitrust law.

The Anti-Monopoly Law does not contain any provision on such clauses where they occur in vertical agreements between parties not holding a dominant market position.

However, article 18(2) of the Administrative Measures prohibits a supplier from restricting the retailer's freedom to purchase competing products from other suppliers. Furthermore, article 10(5) of the Judicial Interpretation on Technology Contracts and article 29(5) of the Regulation on the Administration of Import and Export of Technologies prohibit the inclusion in technology contracts or technology import–export contracts of clauses limiting the freedom of the technology recipient to purchase competing products.

30 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products assessed under antitrust law?

There are no provisions in the Anti-Monopoly Law or the competition provision in other laws or regulations that explicitly address this question. However, some provisions may be interpreted so as to apply to clauses of this kind. In particular, the establishment of a minimum amount, or minimum percentage, purchase requirement can have a similar effect to the exclusive dealing provisions discussed in the replies to questions 28 and 29. As such, it is possible that the provisions identified in these replies apply.

31 Explain how restricting the supplier's ability to supply to other resellers, or sell directly to consumers, is assessed under antitrust law.

The Anti-Monopoly Law does not contain any provision on such clauses where they occur in vertical agreements between parties not holding a dominant market position.

Article 7 of the Administrative Measures prohibits a retailer from restricting sales of products or services by its supplier to other retailers. This provision also contains a prohibition on the retailer restricting the price that the supplier can charge when selling directly to consumers or to other companies.

32 To what extent are franchise agreements incorporating licences of IPRs relating to trademarks or signs and know-how for the use and distribution of products assessed differently from 'simple' distribution agreements under antitrust law?

There are no provisions in the Anti-Monopoly Law or the competition provisions in other laws and regulations that explicitly address this question. For a discussion on the impact of clauses granting IPRs in vertical agreements, see question 12.

Nonetheless, according to article 5 of the Administrative Measures on Commercial Franchising, franchisors are prohibited from 'causing' a monopoly in the market or from restricting fair competition through franchising. Article 10(4) of these Administrative Measures prohibits a franchisor from obliging the franchisee to purchase products from it, except where it is necessary to guarantee the quality of the franchise product. Nonetheless, the franchisor is entitled to require that the purchased products comply with certain quality standards or to list a number of suppliers from which the franchisee can choose its supplier.

33 Explain how a supplier's warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer or that it will not supply the contract products on more favourable terms to other buyers is assessed under antitrust law. Would the analysis differ where the buyer commits to 'most favoured' terms in favour of the supplier?

There are no provisions in the Anti-Monopoly Law or the competition provisions in other laws and regulations that specifically address this question.

Notifying agreements

34 Is there a formal procedure for notifying agreements containing vertical restraints to the agency? Is it necessary or advisable to notify it of any particular categories of agreement? If there is a formal notification procedure, how does it work? What type of ruling (if any) does the agency deliver at the end of the procedure? And how long does this take? Is a reasoned decision published at the end of the procedure?

Neither the Anti-Monopoly Law nor the competition provisions in other laws and regulations provide for a notification system for agreements. However, depending on the adoption of measures implementing the Anti-Monopoly Law and the enforcement practice of the National Development and Reform Commission (NDRC) and the State Administration of Industry and Commerce (SAIC), it is possible that a formal or informal consultation procedure may be adopted.

Agency guidance

35 If there is no formal procedure for notification, is it possible to obtain guidance from the agency as to the antitrust assessment of a particular agreement in certain circumstances?

It is possible that in future the National Development and Reform Commission (NDRC) or the State Administration of Industry and Commerce (SAIC) may adopt a formal or informal consultation procedure in respect of vertical restraints.

Companies can also attempt to informally consult the government authorities that are competent to enforce the competition provisions in other laws and regulations.

Complaints procedure for private parties

36 Is there a procedure whereby private parties can complain to the agency about alleged vertical restraints?

According to the Anti-Monopoly Law, any organisation or individual is entitled to report a conduct that he or she suspects is an infringement of the law. This includes vertical agreements containing clauses fixing the resale price or setting a minimum resale price.

The National Development and Reform Commission (NDRC) and the State Administration of Industry and Commerce (SAIC) must keep the identity of the complainant confidential. If the complaint is made in writing and is supported by sufficient evidence, NDRC and SAIC are in principle under an obligation to conduct an investigation.

There are no detailed provisions on reporting procedures under the Anti-Unfair Competition Law or the competition provisions in other laws and regulations (although the Administrative Measures mention the possibility for entities and individuals to report illegal conduct to the authorities). More generally, government authorities may accept complaints filed by private parties.

Enforcement

37 How frequently is antitrust law applied to vertical restraints by the agency? What are the main enforcement priorities regarding vertical agreements?

There have not yet been any published decisions adopted under the Anti-Monopoly Law that relate to vertical restraints. The law entered into force relatively recently, on 1 August 2008.

The State Administration of Industry and Commerce (SAIC) and its local bureaux have reportedly dealt with over 6,000 competition cases in the past 10 years, although not all of these cases involved competition rules in the strict sense. Decisions relating to vertical restraints are not counted separately, and details of the decisions are not published. Therefore, it is not possible to determine exactly how many vertical restraints cases have been dealt with by SAIC and its local bureaux.

There is no detailed statistical data on competition law enforcement by other government agencies with regard to vertical agreements.

38 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

The Anti-Monopoly Law does not itself stipulate the consequences of an infringement of article 14 for the validity and enforceability of a contract that contains a prohibited vertical restraint. Nonetheless, according to articles 52 and 56 of the Contract Law, such a contract is null and void, and has no legally binding force from the beginning.

However, article 56 of the Contract Law also stipulates that invalid portions of a contract will not affect the validity or enforceability of the rest of the contract if such portions can be severed or separated from the whole.

39 May the agency impose penalties itself or must it petition the courts or another administrative or government agency? What sanctions and remedies can the agency or the courts impose when enforcing the prohibition of vertical restraints? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The National Development and Reform Commission (NDRC) and the State Administration of Industry and Commerce (SAIC) can directly impose penalties without the involvement of other agencies or the courts.

Update and trends

During the course of 2009 and beyond, there may be two important developments that would significantly affect the assessment of vertical restraints.

First, the Chinese competition authorities are expected to issue a number of regulations, guidelines or other rules that will implement the provisions of the Anti-Monopoly Law. Some of these implementing measures may concern vertical restraints.

Second, there may be a decision as to whether, and which, competition rules in the laws and regulations adopted prior to the Anti-Monopoly Law will remain in force. Some of these rules may be abrogated or amended. This will have an important impact on the legal regime applicable to vertical restraints.

If the NDRC or SAIC finds that a vertical agreement violates article 14 of the Anti-Monopoly Law, it must order that the parties to the agreement cease giving effect to the illegal clause of the agreement, and confiscate the gains obtained through the illegal conduct.

Furthermore, NDRC and SAIC are in principle under an obligation to impose a fine of 1 per cent to 10 per cent of a company's annual turnover, unless:

- the agreement is not implemented (in which case a fine of up to 500,000 renminbi will be imposed);
- the company has filed a leniency application (in which case NDRC and SAIC can grant immunity or impose a reduced penalty); or
- the company makes specific commitments that eliminate the negative effects of the agreement (in which case, in principle, no fine will be imposed).

Under the competition provisions in other laws and regulations, the enforcement authorities normally impose two types of sanctions, that is, the cessation of the illegal conduct and the imposition of penalties. If a company has obtained illegal gains, the authorities may also confiscate those gains. In addition, if the illegal conduct is serious, the authorities may suspend the company's business licence.

Courts can also hear cases alleging the illegality of clauses inserted in vertical agreements in actions for damages.

Investigative powers of the agency

40 What investigative powers does the agency have when enforcing the prohibition of vertical restraints?

Under the Anti-Monopoly Law, the National Development and Reform Commission (NDRC) and the State Administration of Industry and Commerce (SAIC) have the following powers when investigating alleged infringements, including those relating to vertical agreements:

- to conduct on-the-spot-inspections at the business premises of the companies under investigation or other relevant places;
- to interrogate the companies under investigation, interested parties and other relevant parties, and request that they explain all relevant circumstances;
- to examine and take copies of the relevant documents and information of the companies under investigation, interested parties or other relevant entities or individuals, such as agreements, accounting books, faxes or letters, electronic data, and other documents and materials;
- to seal and retain relevant evidence; and
- to investigate the companies' bank accounts.

The investigation must be carried out by at least two of NDRC's or SAIC's enforcement officials who are to present their credentials for the investigation. The officials must keep a written record of the inspection to be signed by the companies being investigated. NDRC and SAIC must maintain the confidentiality of any business secrets collected during the investigation.

Among the other laws and regulations containing competition rules, only the Anti-Unfair Competition Law specifies the agency's investigative powers. The Anti-Unfair Competition Law provides the State Administration of Industry and Commerce (SAIC) and its local bureaux with the following powers when investigating unfair competition practices:

- to interrogate companies, interested parties and witnesses and require them to supply evidence or other documents related to the alleged unfair practices;
- to examine and take copies of agreements, accounting books, documents, records, faxes or letters and other materials related to the alleged unfair practices; and
- to examine property connected with the suspected infringements and, where necessary, order the companies under investigation to suspend sales and to provide details on the source and quantity of

Sidley Austin LLP

Adrian Emch **aemch@sidley.com**
Chen Yang **cyang@sidley.com**

Suite 608, Tower C2, Oriental Plaza
No. 1 East Chang An Avenue
Dong Cheng District
Beijing 100738
China

Tel: +86 10 6505 5359
Fax: +86 10 6505 5360
www.sidley.com

products obtained. Pending examination, such property cannot be removed, concealed or destroyed by the company.

Private enforcement

41 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Both parties and non-parties to an agreement can bring damages claims if they have suffered losses due to an anti-competitive clause included in a vertical agreement. Such cases are generally expected to be decided by the intermediate courts. Injunctions and damages can be granted.

Generally, the adjudication is to be made within six months from the acceptance by the court of the case, with the possibility of extension for another six months upon approval. For expedited summary procedures, adjudication is made within three months without a possibility of extension. Successful parties can also recover from losing parties the legal costs charged by the court.

Other issues

42 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

Not applicable.

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Global Competition Contacts

BRUSSELS AND LONDON

Stephen Kinsella OBE
t: +32 2 504 6400
t: +44 20 7360 3600
e: skinsella@sidley.com

WASHINGTON, D.C.

Larry Fullerton
t: +1 202 736 8000
e: lfullerton@sidley.com

HONG KONG

William O. Fifield
t: +852 2509 7888
e: wfifield@sidley.com

CHICAGO

Charles W. Douglas
t: +1 312 853 7000
e: cdouglas@sidley.com

Thomas F. Ryan
t: +1 312 853 7000
e: tryan@sidley.com

John Treece
t: +1 312 853 7000
e: jtreece@sidley.com

www.sidley.com

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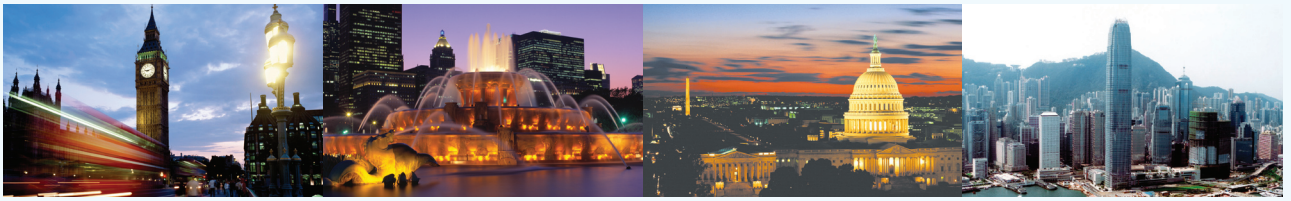

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