



Vertical Agreements

The regulation of distribution practices
in 34 jurisdictions worldwide

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

The relevant legal sources include:

- Anti-Monopoly Law of the PRC (2007) (www.law-lib.com/law/law_view.asp?id=212679);
- Anti-Unfair Competition Law of the PRC (1993) (www.law-lib.com/law/law_view.asp?id=245);
- Price Law of the PRC (1997) (www.law-lib.com/law/law_view.asp?id=13648);
- Contract Law of the PRC (1999) as amended (www.law-lib.com/law/law_view.asp?id=475);
- Administrative Measures for Fair Transactions Between Retailers and Suppliers (2006) (Administrative Measures) (www.law-lib.com/law/law_view.asp?id=176387);
- Provisional Measures for the Prohibition against Monopolistic Pricing (2003) (Anti-Monopolistic Pricing Measures) (www.law-lib.com/law/law_view.asp?id=78393);
- Provisions on the Administrative Penalties for Pricing Violations (2006) as amended (www.law-lib.com/law/law_view.asp?id=242636);
- Judicial Interpretation of the Law Applied to Disputes Arising from Technology Contracts (2004) (Judicial Interpretation on Technology Contracts) (www.law-lib.com/law/law_view.asp?id=87711);
- Regulation on the Administration of Import and Export of Technologies (2001) (www.law-lib.com/law/law_view.asp?id=16753); and
- Provisions on the Prohibition of Regional Blockades in Market Economy Activities (2001) (www.law-lib.com/law/law_view.asp?id=15285).

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 a national level.

The Anti-Monopoly Law, China's main competition legislation, enters into force on 1 August 2008. China's principal competition authorities, the Anti-Monopoly Commission and the Anti-Monopoly Enforcement Authority, are to adopt measures implementing the provisions of the Anti-Monopoly Law. It can be expected that some of the implementing measures will refer to vertical agreements. Nonetheless, at the time of writing, no specific implementing measures have been adopted.

At the time of writing, 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) will in principle prevail. For the sake of completeness, in the remainder of this contribution 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 will also be relevant to the antitrust assessment of the agreement. However, these provisions regulate the conduct of companies in a dominant market position. This type of conduct is considered in the *Getting the Deal Through – Dominance* publication and is therefore not covered here. The case is less clear for article 14 of the Price Law, which appears to apply to any company regardless of its market position. However, articles 5 to 8 of the Anti-Monopolistic Pricing Measures, which are meant to implement article 14 of the Price Law, only apply to companies in a dominant market position. Therefore, article 14 of the Price Law may be interpreted as only applying to companies in a dominant market position. For this reason, the provisions in the Price Law and the Anti-Monopolistic Pricing Measures are not covered in this chapter.

2 List and describe the types of vertical restraints that are subject to antitrust law. Are those terms defined and how? Is the concept of vertical restraint itself 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.

3 Are there particular rules or laws applicable to the assessment of vertical restraints in specific sectors of industry? If so, please identify the sectors and the relevant sources.

Sectors subject to specific rules include, inter alia, 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) (http://www.law-lib.com/law/law_view.asp?id=10066), which apply to public utilities enterprises (such as postal services, certain telecom-

munications services, transportation, water supply, energy supply, etc);

- Telecommunication Regulation of the PRC (2000) (www.law-lib.com/law/law_view.asp?id=143), which applies to the telecommunications industry;
- Regulation on Prohibition of Anti-Unfair Competition Practices in Civil Air Transportation Market (1996) (www.law-lib.com/law/law_view.asp?id=62055), which applies to the civil air transport industry; and
- Regulation of the PRC on International Ocean Shipping (2001) (www.law-lib.com/law/law_view.asp?id=16764), which applies to international maritime transport.

(The main aims of the Several Provisions for the Prohibition of Public Utilities Enterprises from Restricting Competition and the Telecommunications Regulation are, in principle, the protection of end-consumers, but their text does not appear to exclude application to companies.)

These sector-specific rules are not assessed in this chapter, in part because they mainly concern the abuse of market power, the subject of the *Getting the Deal Through – Dominance* publication.)

- 4 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 various objectives, namely to prevent and prohibit monopolistic conduct, to protect market competition, to promote efficiency of economic operations, to safeguard the interests of consumers and the general public, and to promote the healthy development of the socialist market economy.

Furthermore, article 15 of the Anti-Monopoly Law provides the possibility to exempt monopoly agreements, including vertical ones, if certain conditions are fulfilled. Several of these conditions do not respond to purely economic concerns, for example social public 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.

- 5 What entity or agency is responsible for enforcing prohibitions on anti-competitive vertical restraints? Do governments or ministers have a role?

According to the Anti-Monopoly Law, the Anti-Monopoly Commission and the Anti-Monopoly Enforcement Authority have competences in the application of its provisions, including those relating to vertical agreements. The responsibility to enforce the provisions of the Anti-Monopoly law lies with the Anti-Monopoly Enforcement Authority.

At the time of writing, the composition of the Anti-Monopoly Enforcement Authority has not yet been decided. It is possible that the authority will be created anew, but it is equally possible that one or several departments of existing ministries and government bodies will assume the functions of the Anti-Monopoly Enforcement Authority.

Different ministries and bodies enforce the competition provisions in other laws. The State Administration for Industry and Commerce and its local delegates (jointly, AIC) 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. Several bodies share

the competence to enforce the provisions of the Administrative Measures.

- 6 What is the relevant test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction?

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.

- 7 To what extent does antitrust law apply to vertical restraints in agreements concluded by public or state-owned 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 AIC and the courts have held hospitals and universities to be undertakings for the purposes of the Anti-Unfair Competition Law (see, for example, *SAIC Reply on whether non-for-profit healthcare organisations fall under the Anti-Unfair Competition Law*, Gongshangfazi No. 248 [2001]; Intermediate People's Court of Yichang, *Hospital for Women and Children of Yichang City v AIC*, 21 November 2000; or Intermediate People's Court of Nanjing, *China Pharmaceutical University v Furu Technology*, 12 September 2004). It is possible that the Anti-Monopoly Enforcement Authority 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 committing certain actions restricting 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 to exclusive operations and sales according to the law. This complex provision seems to make the pricing policy of such enterprises subject to government intervention.

- 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 a vertical agreement fixing the resale price or the minimum resale price can be exempted from the prohibition of article 14. These circumstances are:

- improving technology or research and development (R&D) of new products;
- 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 circumstances listed in items (i) to (v) occurs, the company must further prove that the agreement does not significantly restrict competition in the relevant market and allows consumers a share of the resulting benefit.

- 9** When assessing vertical restraints under antitrust law (or when considering the application of exceptions from antitrust law) does the relevant agency take into account that some agreements may form part of a larger, interrelated, network of agreements or is each agreement assessed in isolation?

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

- 10** In what circumstances does antitrust law apply to agency agreements in which an undertaking agrees to perform certain services on a supplier's behalf in consideration of a commission payment?

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

- 11** 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. In many cases, the technology at issue will be protected by an IPR. For example, article 10 of the Judicial Interpretation on Technology Contracts prohibits the inclusion of clauses restricting the freedom of a technology recipient to undertake R&D or imposing inequitable conditions for sharing improvements of the technology. Therefore, these provisions apply only to agreements that contain provisions transferring technology which in many cases includes IPRs.

- 12** In what circumstances does antitrust law apply to agreements between a parent and a related 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.

- 13** Can the legality under antitrust law of a given vertical restraint change over time?

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

- 14** Briefly explain the analytical framework that applies when assessing vertical restraints under antitrust law.

Anti-Monopoly Law

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

Importantly, article 14 of the Anti-Monopoly Law empowers the Anti-Monopoly Enforcement Authority to determine other restrictions in vertical agreements that are in violation of the law unless justified under article 15.

Anti-Unfair Competition Law

- 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);
- 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

- monopolising technology and restricting technological improvements. 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 very similar prohibitions as the Contract Law and the Judicial Interpretation on Technology Contracts.

Administrative Measures

The Administrative Measures only apply to certain types of vertical agreements, ie, where the downstream vendor is a retailer selling to end consumers and where its sales are above 10 million renminbi.

- price restrictions upon supplier – where the retailer restricts the prices at which the supplier can sell products to other companies or consumers;
- exclusive dealing imposed upon supplier – where the retailer restricts the supplier's sales to other retailers.

Furthermore, additional prohibitions are imposed on retailers in a 'dominant position'. (The concept of 'dominant position' used in the Administrative Measures does not fully coincide with the concept of 'dominant market position' under the Anti-Monopoly Law, but in practice these two concepts may have the same effect.)

- tie-in sales imposed by supplier – where the supplier ties the sale of a product with other products that the retailer did not order; and
- exclusive dealing imposed upon retailer – where the supplier restricts the retailer's freedom to purchase from other suppliers.

According to article 23, the Administrative Measures only apply where no law or regulation regulates the same conduct.

Provisions on the Prohibition of Regional Blockades in Market Economy Activities

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

15 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints in 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 or the Anti-Monopoly Enforcement Authority will issue such block exemptions in due course (See 'Update and trends').

16 What are the consequences of an infringement of antitrust law for the validity, or enforceability by one of the parties, 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.

17 How is the restricting of 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 article 14 or 15 may give further guidance.

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 of clauses restricting the price (as well as other conditions) of the products or services developed with the transferred technology which the technology recipient can charge to its customers.

18 Have there been any developments in your jurisdiction in light of the landmark 2007 judgment by the US Supreme Court in *Leegin Creative Leather Products Inc v PSKS Inc*? If not, is any response or development anticipated?

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.

19 How is the restriction of the territory into which a buyer may resell contract products assessed under antitrust law? In what circumstances (if any) 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.

However, 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 (if any) may a supplier require a buyer of its products not to resell the products to certain customers?

At the time of writing, the Anti-Monopoly Law and the competition provisions in other laws and regulations do not contain rules on such customer restriction clauses contained in vertical agreements between companies.

- 21** How is the restricting of the uses to which a buyer (or a subsequent buyer) puts the contract products assessed under antitrust law?

At the time of writing, the Anti-Monopoly Law and the competition provisions in other laws and regulations do not contain rules on such use restriction clauses contained in vertical agreements between companies.

- 22** Briefly explain how agreements establishing 'selective' distribution systems are assessed under antitrust law.

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

- 23** How is the restriction of 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 from other sources, including the supplier's own products.

- 24** 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.

Nonetheless, 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.

- 25** How is the requiring of the buyer to purchase from the supplier a certain amount, or minimum percentage, of its requirements, 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 23 and 24 above. As such, it is possible that the provisions identified in these replies apply.

- 26** Explain how restricting the supplier's ability to supply to other buyers, or sell directly to consumers, is assessed under antitrust law.

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 to restrict the price that the supplier can charge when selling directly to consumers or to other companies.

- 27** To what extent are franchise agreements incorporating licences of intellectual property rights, 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 11.

Nonetheless, according to article 5 of the Administrative Measures on Commercial Franchising (www.law-lib.com/law/law_view.asp?id=87781), 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 is to choose its supplier.

- 28** 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 warranting to the buyer that it will not supply the contract products on more favourable terms to other buyers is assessed under antitrust law.

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

- 29** 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?

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 Anti-Monopoly Enforcement Authority, it is possible that a formal or informal consultation procedure will be adopted.

- 30** 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?

At the time of writing, no formal notification procedure exists (see question 29).

31 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?

As stated at question 29, it is possible that in the future the Anti-Monopoly Enforcement Authority 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 of other laws and regulations (such as the AIC).

32 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 minimum resale price.

The Anti-Monopoly Enforcement Authority must keep the identity of the complainant confidential. If the complaint is made in writing and is supported by sufficient evidence, the Anti-Monopoly Enforcement Authority is 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 such as the AIC may accept complaints filed by private parties.

33 How frequently is antitrust law applied to vertical restraints by the agency?

There have not yet been any cases under the Anti-Monopoly Law. The law enters into force on 1 August 2008.

The AIC has 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 the AIC.

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

34 May the agency impose penalties 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?

The Anti-Monopoly Enforcement Authority can directly impose penalties without the involvement of other agencies or the courts.

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

Under the Anti-Monopoly Law, the Anti-Monopoly Enforcement Authority has the following powers when investigating alleged infringements of the law, 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 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 enforcement officials of the Anti-Monopoly Enforcement Authority 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. The Anti-Monopoly Enforcement Authority 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 AIC 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 products obtained. Pending examination, such property cannot be removed, concealed or destroyed by the company.

36 What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

If the Anti-Monopoly Enforcement Authority 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, the Anti-Monopoly Enforcement Authority is 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 the Anti-Monopoly Enforcement Authority 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 of other laws and regulations, the enforcement authorities normally impose two types of sanctions, ie, the cessation of the illegal conduct and the imposition of penalties. If a company has obtained illegal gains, the authorities will also confiscate those gains. In addition, if the illegal conduct is serious, the authorities may suspend the company's business license.

Update and trends

During the course of 2008 and beyond, the Anti-Monopoly Commission and the Anti-Monopoly Enforcement Authority are expected to issue a significant number of regulations, guidelines and other rules that implement the provisions of the Anti-Monopoly Law. Some of these implementing measures will concern vertical restraints.

The decision as to whether the laws and regulations containing competition rules adopted prior to the Anti-Monopoly Law remain in force after the latter's entry into force on 1 August 2008 will have an important impact on the law applicable to vertical restraints.

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

37 Can sanctions or remedies be imposed on companies having no branch or office in your jurisdiction?

Yes, to the extent that the impact of a practice eliminates or restricts competition in China.

38 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints 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? Can the successful party recover its legal costs?

Both parties and non-parties to an agreement can bring damages claims if they have suffered losses due to the anticompeti-

tive clause included in a vertical agreement. Such cases will be decided by the district court unless foreign parties are involved or the case is significant (eg, the damage is substantial or the case has a particular legal significance). Injunctions and damages can be granted.

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

39 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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