

Vertical Agreements

in 35 jurisdictions worldwide

2014

Contributing editor: Stephen Kinsella OBE



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Stephen Kinsella OBE
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Getting the Deal Through is delighted to publish the eighth edition of *Vertical Agreements*, a volume in our series of annual reports that provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 35 jurisdictions featured. New jurisdictions this year include Indonesia, Norway, Russia and Sweden. There is also a new chapter on most-favoured-nation clauses.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editor Stephen Kinsella OBE of Sidley Austin LLP for his continued assistance with this volume.

Getting the Deal Through

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 March 2014

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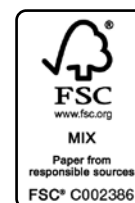
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China

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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 Antimonopoly Law of the People's Republic of China (PRC) (2007), which entered into force on 1 August 2008.

Vertical restraints are classed as a type of 'monopolistic conduct' under the Antimonopoly Law, and the two enforcement agencies having power in relation to monopolistic conduct, the State Administration for Industry and Commerce (SAIC) and the National Development and Reform Commission (NDRC), issued agency rules in 2009 and 2010, which are directly applicable to vertical restraints. These agency rules include:

- SAIC Rules on Procedures of Administrations for Industry and Commerce for Investigation of Monopoly Agreements and Abuse of Market Dominance Cases, promulgated on 26 May 2009 and effective on 1 July 2009;
- NDRC Rules against Pricing-related Monopolies, promulgated on 29 December 2010 and effective on 1 February 2011;
- NDRC Rules on Administrative Enforcement Procedures for Pricing-related Monopolies, promulgated on 29 December 2010 and effective on 1 February 2011; and
- SAIC Rules of Administrations for Industry and Commerce on Prohibition of Monopoly Agreement Acts, promulgated on 31 December 2010 and effective on 1 February 2011.

In addition to the Antimonopoly Law, certain other laws and regulations also have provisions regulating vertical restraints, including notably:

- 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) (Fair Transaction Administrative Measures);
- Provisional Measures for the Prohibition against Monopolistic Pricing (2003) (Anti-Monopolistic Pricing Measures);
- 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).

There are also 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.

It seems that the Antimonopoly Law in the foreseeable future will not replace the pertinent provisions in prior legislation such as the Anti-Unfair Competition Law and the Price Law, but rather will coexist with them. In the remainder of this chapter, we assume that the provisions in other laws continue to apply. It is widely believed that if any conflict occurs between the terms of the Antimonopoly Law and previous laws, the Antimonopoly Law should in principle prevail, but there have not been actual cases in this regard. Also, it seems that government agencies still have substantial discretion in choosing from the Antimonopoly Law and other laws as the basis for their enforcement, while the outcomes under different laws may be quite different.

Where a party occupies a dominant market position in one of the markets to which the vertical agreement relates, articles 17 to 19 of the Antimonopoly Law may also be relevant to the antitrust assessment of a given vertical restraint. The SAIC has also promulgated an agency rule to implement these articles in the Antimonopoly Law. However, these provisions are considered in *Getting the Deal Through – Dominance* 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 apply only to companies in a dominant market position and so are not considered in 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 Antimonopoly Law does not define the concept of vertical restraint. Nonetheless, while the concept of 'vertical' is not further explained, the Antimonopoly Law contains the concept of 'horizontal' agreement (namely, an agreement between competitors). By implication, a 'vertical' agreement would be any agreement between trading partners other than horizontal agreements.

Legal objective

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

In general, the Antimonopoly Law pursues multiple objectives, which cover both micro-economic efficiency and macro-economic development. Specifically, these objectives are:

- 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.

It would appear these objectives would also apply to the regulation of vertical restraints.

In addition, article 15 of the Antimonopoly 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 authorities

- 4 Which authority is responsible for enforcing prohibitions on anti-competitive vertical restraints? Where there are multiple responsible authorities, 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 Antimonopoly Law. NDRC is in charge of investigating and sanctioning anti-competitive vertical restraints related to pricing. At present, the only prohibitions explicitly provided for in the Antimonopoly Law are resale price maintenance and the fixing of minimum resale prices. SAIC has jurisdiction over anti-competitive vertical restraints not related to pricing. SAIC has delegated some powers to its local bureaux, and it is possible that NDRC will do likewise.

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 Fair Transaction 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? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?

The test is whether the vertical restraint has the effect of eliminating or restricting competition within the Chinese market. Where the activity takes place, in or outside China, is not a relevant factor.

At the time of writing, there has been no published decision in which the Antimonopoly Law was applied extraterritorially, or that considers in detail the jurisdictional reach of the Antimonopoly Law in a pure internet context.

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 Antimonopoly 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 Antimonopoly Law, the Anti-Unfair Competition Law and the Price Law, stipulate that any 'undertaking' is subject to those provisions. The Antimonopoly 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 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 NDRC, SAIC and the courts will reach a similar finding in relation to the Antimonopoly Law.

The Antimonopoly Law also prohibits administrative authorities and organisations from taking certain steps that might restrict competition, including the imposition of exclusive dealing obligations. The Antimonopoly Law does not have any provision that provides exemption or special treatment to public entities.

Article 7 of the Antimonopoly 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. This complex provision seems to make the pricing policy of such enterprises subject to government intervention and, possibly, exempt them from the Antimonopoly Law.

Sector-specific rules

- 7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

Some regulations enacted before the inception of the Antimonopoly Law address vertical restraint issues in specific industry sectors. These regulations have very rarely been enforced, if at all, and it remains uncertain how they will be enforced following the implementation of the Antimonopoly Law.

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 telecoms services, transport, water supply and energy supply);
- Telecommunication Regulation of the PRC (2000), which applies to the telecommunications industry;
- Regulation on the 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 agreement containing vertical restraints? If so, please describe.

Article 15 of the Antimonopoly Law lists the circumstances under which an agreement containing a vertical restraint 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;
- improving the operational efficiency and enhancing competitiveness of small and medium-sized enterprises;
- serving social public interests such as energy saving, environmental protection and disaster relief and aid;
- alleviating serious decreases in sales volumes or significant production overcapacities during economic recession; and
- safeguarding legitimate interests in foreign trade and foreign economic cooperation.

If a company wishes to argue that the prohibition of article 14 should be disapplied, it bears 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?

The Antimonopoly Law and the competition provisions in other laws or regulations do not contain a precise definition of an ‘agreement’. Nonetheless, article 13 of the Antimonopoly Law defines a ‘monopoly agreement’ as an ‘agreement, decision or other concerted practice which eliminates or restricts competition’. The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Monopoly Agreement Acts further provide that a monopoly agreement may be entered into between business undertakings either directly or through the coordination of industry associations.

10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

The agreement does not need to be in written form.

The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Monopoly Agreement Acts explicitly provide that a ‘monopoly agreement’ may be in written, oral and tacit forms (ie, a ‘concerted practice’).

These rules provide that the ‘concerted practice’ means a practice where coordination and concordance exist between the relevant business undertakings although there is no explicit written or oral agreement or decision, and also list the factors in determining a concerted practice as follows:

- whether the practices in the market taken by the business undertakings have concordance;
- whether the business undertakings conducted communications or exchange of information; and
- whether the business undertakings have reasonable justifications for their coordinated practice.

These rules further provide that in determining what constitutes a concerted practice, other factors need to be taken into consideration, including the structure of the relevant market, the competition situation, changes in the market and the situation of the industry.

The NDRC Rules Against Pricing-related Monopolies contain similar provisions on what constitutes a ‘monopoly agreement’.

Parent and related-company agreements

11 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 Antimonopoly 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 appears unlikely that Chinese competition laws and regulations would apply to such agreements.

Agent–principal agreements

12 In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier’s behalf for a sales-based commission payment?

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

13 Where antitrust rules do not apply (or apply differently) to agent–principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

The enforcement authorities have not issued guidance, or taken decisions, on this issue.

Intellectual property rights

14 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 Antimonopoly Law do not apply differently if an agreement grants an IPR. Article 55 of the Antimonopoly 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 Antimonopoly 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.

In addition, the State Administration for Industry and Commerce has been formulating Rules on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition, which will address IPR issues in antitrust law. In 2013 the agency circulated the sixth draft of the rules within a small group for comments, but it is unknown when it will finalise and formally issue the rules. The sixth draft prohibits a set of activities that an undertaking with dominant market position may take ‘without justifiable cause’ during exercise of its IPR, including tying and bundling, exclusive grant-back of technology improvement, prohibition of challenging the validity of the IPR, etc. These issues may arise in the context of vertical agreements.

Analytical framework for assessment

15 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.

Antimonopoly Law

Article 14 of the Antimonopoly 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 Antimonopoly Law also empowers NDRC and SAIC to prohibit other vertical restraints that they consider to be anti-competitive.

The general analytical framework underpinning the assessment of vertical restraints under the Antimonopoly 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 Antimonopoly 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 Antimonopoly 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 Antimonopoly 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 Antimonopoly 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 Judicial Interpretation on Technology Contracts.

Fair Transaction Administrative Measures

The Fair Transaction 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 Fair Transaction Administrative Measures only apply where no law or regulation regulates the same conduct. It remains to be seen how the Fair Transaction Administrative Measures will be deemed to interact with the Antimonopoly 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 to curb barriers to entry into regional markets that are erected by local governments and public authorities. 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.

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

As a general rule, the Antimonopoly 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 Antimonopoly 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.

Chinese courts' decisions in the *Johnson & Johnson* (J&J) case shed a light on how the supplier's market share may affect the court's analysis of the anti-competition effects of the alleged resale price maintenance. On 18 May 2012, the Shanghai No.1 Intermediate People's Court issued a judgment dismissing petitions from a lead distributor of J&J that accused J&J of retail price maintenance. On 1 August 2013, the Shanghai Higher People's Court made a final judgment on the J&J case, in which it reversed the judgment of the first-instance court, and ruled that J&J engaged in illegal retail price maintenance. In its analysis, the appellate court viewed the market share of the supplier as an important factor when determining whether

the resale price maintenance activities have anti-competition effects. Specifically, the appellate court opined that resale price maintenance activities conducted by suppliers with ‘strong market positions’ will affect market competition significantly, and therefore the supplier’s ‘market position’ is an important factor in anti-competition effects analysis. The most important factor when determining the strength of the supplier’s ‘market position’ is its market share.

- 17** To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

The Antimonopoly Law does not address these issues.

Block exemption and safe harbour

- 18** 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 Antimonopoly Law, the Anti-Unfair Competition Law and its implementing measures do not contain any safe harbours, and there are currently no block exemptions.

Types of restraint

- 19** How is restricting the buyer’s ability to determine its resale price assessed under antitrust law?

Article 14 of the Antimonopoly 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 2012, in the first-instance trial of the *J&J* case, the Shanghai No.1 Intermediate People’s Court, the distributor claimed that in its distribution agreements, J&J required it to sell products to hospitals in allocated territories only, and at prices no lower than minimum prices decided by J&J. The distribution relationship was terminated by J&J after it discovered that the distributor sold products outside its allocated territories and at prices lower than the minimum price. The presiding judge, in an interview, explained the rationale of the court’s judgment, stating that minimum price maintenance is not a per se violation of the Antimonopoly Law, and the court should consider whether such restriction has resulted in the elimination or restriction of competition. The court dismissed the distributor’s petitions because the distributor failed to prove that competition was eliminated or restricted.

In 2013, in the appellate trial of the *J&J* case, the Shanghai Higher People’s Court ruled that J&J engaged in illegal retail price maintenance and ordered it to pay damages (530,000 renminbi) to the distributor that filed the suit. The appellate court upheld the first-instance court’s view that retail price maintenance is not a per se violation of law. It also laid out four factors that need be assessed when determining whether retail price maintenance practices have anti-competition effects:

- whether there is sufficient competition in the relevant market;
- whether the defendant has a strong market position;
- what is the motivation of the defendant for its retail price maintenance activities, and whether the motivation is pro or anti-competition; and
- what are the effects of the retail price maintenance activities on competition, and whether the effects are pro or anti-competition.

The decision of the *J&J* case is expected to be the benchmark for court review of resale price maintenance cases in the foreseeable future.

In addition, two provincial authorities of NDRC conducted investigations in January 2013 into alleged resale price maintenance by spirits manufacturers Moutai and Wuliangye, and imposed fines of 247 million renminbi and 202 million renminbi respectively, representing 1 per cent of each company’s 2012 revenues. In August 2013, NDRC also announced that it decided to impose fines on six dairy powder producers for illegal resale price maintenance, and the fines totalled 668.73 million renminbi.

Further, 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.

- 20** Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a ‘loss leader’?

At the time of writing, there does not appear to be a decision issued by the court or published by NDRC or SAIC that specifically addresses these questions.

- 21** Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

In the *J&J* case, the appellate court used J&J’s ability to implement territorial sales restrictions (in fact, the ‘territories’ are hospitals, not geographical areas) as an evidence to prove J&J’s ‘strong market position’, but did not find such territorial sales restrictions per se a violation of the antitrust law. Other than this, at the time of writing, there does not appear to be a decision or guideline issued by the court or published by NDRC or SAIC that specifically addresses these questions.

- 22** Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

In the *J&J* case, the appellate court, the plaintiff, the defendant and their respective expert witnesses discussed the potential efficiencies of the resale price maintenance agreements – and lack thereof – in great detail. The appellate court determined that the agreements ‘do not have obvious effects of promoting competition’, because the defendant failed to demonstrate:

- the agreements had the result of improving product quality and safety;
- the agreements were necessary to prevent ‘free-riding’ of other distributors, because J&J had strong control of the distributors, and also assigned only one distributor for each hospital; or
- J&J needed to use the resale price maintenance agreements to promote a new brand or a new product in the relevant market, because J&J’s products at issue had been sold in China for over 15 years.

- 23** Explain how a buyer agreeing to set its retail price for supplier A’s products by reference to its retail price for supplier B’s equivalent products is assessed.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by NDRC or SAIC that addresses this issue.

24 Explain how a supplier 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.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by NDRC or SAIC that addresses this issue.

25 Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by NDRC or SAIC that addresses this issue.

26 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

At the time of writing, there does not appear to be a decision or guideline issued by the court or published by NDRC or SAIC that addresses this issue.

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

Territorial restrictions on sales appear to have formed part of the 2012 Johnson & Johnson case (see question 19). The Antimonopoly Law prohibits a business operator with a dominant market position from 'requiring a trading party to trade exclusively with itself or trade exclusively with designated business operator(s) without any justifiable cause'. Reflecting this, the SAIC Rules of Administrations for Industry and Commerce on Prohibition of Abuse of Market Dominance prohibit a business undertaking from imposing unreasonable transaction terms on the other party to the transaction 'without justifiable cause', and one such unreasonable transaction term is the imposition of 'unreasonable restrictions on the geographic area into which the goods may be sold'.

In the *Wuliangye* case in 2013, the provincial authority in its penalty decision described the supplier's territory management as one means of implementing the resale price maintenance requirements, but did not impose a separate penalty for the territory management activities.

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.

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

The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Abuse of Market Dominance prohibit the imposition of 'unreasonable transaction terms' by a business undertaking with dominant position 'without justifiable cause'. The rules list two factors to be assessed in determination of a 'justifiable cause', namely:

- whether the action in question is carried out on the basis of the operator's own ordinary business activities and its ordinary benefits; and
- the action's effects on the efficiency of the economy's operation, social and public interests, and economic development.

29 How is restricting the uses to which a buyer puts the contract products assessed?

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

30 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

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

31 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

32 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

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

33 Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

Not applicable – see question 32.

34 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

Not applicable – see question 32.

35 Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

Not applicable – see question 32.

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

Not applicable – see question 32.

37 Has the authority 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 – see question 32.

38 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

The enforcement authorities have not issued guidance, or taken decisions, on this issue.

39 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Article 13(5) of the Antimonopoly Law prohibits competing business undertakings from 'jointly boycotting transactions'. The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Monopoly Agreement Acts provide further clarification on this article, prohibiting competing business undertakings from jointly restricting specific business undertakings from dealing with other business undertakings that compete with the business undertakings that impose such restriction.

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 Fair Transaction 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.

40 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

There are no rules either in the Antimonopoly Law or the competition provisions in other laws or regulations that specifically address this issue. However, the Antimonopoly Law is written in a very general manner, prohibiting not only enumerated forms of monopolistic conduct but also 'other forms of' unspecified monopolistic conduct. The SAIC Rules of Administrations for Industry and Commerce on Prohibition of Monopoly Agreement Acts set forth that the SAIC shall have the authority to determine other forms of monopoly agreements that are not explicitly provided for in the rules. Therefore, there is a possibility the SAIC, following the general principles of the Antimonopoly Law, may determine that it is a violation of the law to restrict the buyer's ability to sell non-competing products that the supplier deems 'inappropriate'.

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

The Antimonopoly Law does not contain any provision on such clauses where they occur in vertical agreements between parties with no dominant market position.

Article 18(2) of the Fair Transaction 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.

42 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

There are no provisions in the Antimonopoly 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 40 and 41. As such, it is possible that the provisions identified in these replies apply.

43 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?

There are no provisions in the Antimonopoly 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 14.

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 the Administrative Measures on Commercial Franchising 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.

44 Explain how restricting the supplier's ability to supply to other buyers is assessed.

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

45 Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

46 Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

The Antimonopoly Law, its implementation rules and enforcement decisions do not address this issue.

Notifying agreements

47 Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

Neither the Antimonopoly 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 Antimonopoly Law and the enforcement practice of NDRC and SAIC, it is possible that a formal or informal consultation procedure may be adopted.

Authority guidance

48 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

Neither the NDRC, the SAIC nor the Chinese courts have disclosed any information that indicates such a possibility.

Complaints procedure for private parties

49 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

According to the Antimonopoly Law, any organisation or individual is entitled to report 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.

NDRC and 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 Fair Transaction 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

50 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

NDRC and SAIC authorities at national and local levels are understood to have taken several decisions regarding vertical restraints in violation of the Antimonopoly Law. However, they are not under a legal obligation to publish such decisions, and there is no centralised database where such decisions are reported or stored. Some decisions are published but few contain enough detail to provide guidance.

In 2011, NDRC issued one decision regarding a violation of the Antimonopoly Law that appears to relate in large part to vertical restraints. In this case, two distributors of a certain active pharmaceutical ingredient (API) entered into distribution agreements with the only two manufacturers of that API in China, pursuant to which the API manufacturers were required to obtain prior consent from the two distributors before selling the API to any other distributor. The NDRC imposed monetary fines and required a disgorgement of profits.

In 2012, the Shanghai No. 1 Intermediate People's Court issued a judgment dismissing petitions from a local distributor of Johnson & Johnson (J&J) that accused J&J of minimum resale price maintenance. The distributor claimed that in the distribution agreements, J&J required it to sell products to hospitals in allocated territories only, and at prices no lower than minimum prices decided by J&J. The distribution relationship was terminated by J&J after it discovered that the distributor sold products outside its authorised territories and at prices lower than the minimum price. The presiding judge, in an interview, explained the rationale of the court's decision, stating that minimum price maintenance is not a per se violation of the Antimonopoly Law, and the court should consider whether such restriction has resulted in the elimination or restriction of competition. The court dismissed the distributor's petitions because the distributor failed to prove that competition was eliminated or restricted.

In 2013, NDRC imposed fines on two spirits manufacturers, Maotai and Wuliangye, in relation to alleged resale price maintenance (see question 19).

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

The Antimonopoly 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.

52 May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

NDRC and SAIC can directly impose penalties without the involvement of other agencies or the courts.

If NDRC or SAIC finds that a vertical agreement violates article 14 of the Antimonopoly 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 authority

53 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

Under the Antimonopoly Law, NDRC and 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 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 products obtained. Pending examination, such property cannot be removed, concealed or destroyed by the company.

Private enforcement

- 54** 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?

Non-parties to a monopolistic agreement can bring damages claims if they have suffered losses due to an anti-competitive clause contained in a vertical agreement. The Antimonopoly Law does not explicitly address the issue of whether parties to an agreement can bring damages claims. However, the Supreme People's Court of China issued a judicial interpretation in 2012 that states that persons who

have a dispute over whether a contract violates antitrust laws have standing to file antitrust suits. Therefore, the parties to agreements can themselves bring damages claims in the court by alleging the agreements violate antitrust laws. The appellate court in the *J&J* case upheld the plaintiff's standing to sue because it found that the plaintiff suffered loss due to the resale price maintenance scheme, and also it had a dispute with J&J over the distribution agreement's compliance with China's antitrust law.

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

- 55** 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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