



China Primer Series: Anti-Monopoly Law 2015

China's adoption of the Anti-Monopoly Law ("AML")¹ is a landmark in the evolution of China's economic transformation. The AML was a carefully thought-out, negotiated, strategic development dictated by the central government, a process that started almost twenty years ago. China has moved from a centrally planned command economy to one that is largely, despite the existence of state-owned enterprises as major players, a free market economy. The AML is the ultimate recognition on the part of the Chinese government that free and fair competition in the market place is in the essential interest of the Chinese people.

Recent enforcement activities raised concern among foreign companies about the fair and impartial implementation of the AML. The purpose of this primer is to provide a framework of the AML and how it is enforced. For further information about investigations and compliance issues, please contact Becky Koblitz at bkoblitz@sheppardmullin.com.

A. General Background of the Anti-Monopoly Law

Similar to the antitrust laws of other jurisdictions, the AML has as its purpose the safeguarding of healthy competition among companies in the market for the benefit of consumers. But due to China's political structure and the tendency towards heavy-handed state intervention in the Chinese economy, the AML also supports China's industrial policies.

The AML applies to all public and private enterprises in China, foreign companies doing business in China, nonprofit organizations, trade associations and government administrative organs. In theory the AML also applies to state-owned entities ("SOEs") but in practice, the majority of the SOEs are out of the reach of the antitrust enforcement authorities.

Trade associations can potentially be exempt from the AML when they are functioning as government entities that are "strengthening the self-discipline within the industry, leading companies toward lawful competition and maintaining the

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¹ Anti-Monopoly Law of the People's Republic of China (adopted at the 29th Sess. of the Standing Comm. of the 10th National People's Congress on August 30, 2007, effective August 1, 2008) [hereinafter "AML"].

market competition order.”²

The AML does not preclude companies from lawfully exercising their intellectual property rights, but conversely the AML does prohibit companies from abusing their intellectual property rights to eliminate or restrict competition.³

The AML does not apply to agricultural producers and rural economic organizations that engage in concerted conduct with regard to production, processing, sales, transportation and storage of agricultural products.⁴

In addition to applying to activities that take place within the territorial limits of China, meaning mainland China (but not including Macau, Hong Kong and Taiwan), the AML also applies extraterritorially to anti-competitive activities occurring outside of China that have the effect of eliminating or restricting competition in the Chinese domestic market.⁵ It is applicable to anticompetitive activities that took place after August 1, 2008, when the AML became effective.

The AML protects competition in the marketplace for the benefit of the consumers by making the following unlawful: agreements that restrict or eliminate competition, abusing a dominant position in a relevant market to restrict or eliminate competition (commonly known as monopolization), transactions that have the potential to restrict or eliminate competition and using a government administrative organ to restrict or eliminate competition.

1. Dealings with competitors

The AML prohibits anticompetitive agreements among competitors and lists examples of types of such agreements, like those that fix prices, limit output or sales volumes of products, allocate purchasing markets or sales markets, restrict the purchase of new technology or new facilities or restrict the development of new technology or new products, and, finally, those that implement group boycotts.⁶ Although bid-rigging is not specifically listed, it falls under price-fixing or allocation of markets.

2. Dealings in the supply chain: resale price maintenance

The AML prohibits anticompetitive agreements among trading (i.e. supply chain) partners that (1) fix the price of goods sold to third parties or (2) limit the minimum price at which goods can be sold to third parties.⁷

3. Dealings in the supply chain: Monopolization or abuse of dominance

The AML prohibits a company that has a dominant position in the relevant market from selling at unfairly high prices or buying at unfairly low prices. Moreover it is a violation for such a company to engage in the following conduct without legitimate business justification: selling below cost, refusing to deal, exclusive dealing, tying arrangements or discriminating based on price or other conditions.⁸

4. Merger review

The AML prohibits merger transactions that are potentially anticompetitive, i.e., that may eliminate or restrict

² AML at art. 11.

³ *Id.* at art. 55.

⁴ *Id.* at art. 56.

⁵ *Id.* at art. 2.

⁶ AML at art. 13: General prohibitions related to dealings with competitors (often referred to as horizontal relationships), prohibiting agreements that:

- (1) fix or change prices of goods (“prices” covers price spreads, discounts, standard formula for pricing, transactions with third parties based on a specific price),
- (2) restrict the quantity of production or the sales volume of goods (for example, curtail or stop production, set the output level, refuse to supply, restrict amount supplied),
- (3) allocate supply markets of raw material or sales market,
- (4) restrict purchasing of new technology or new facilities or restrict developing new technology or new products (includes restricting investing in development of new technologies, refusing to adopt new technical standards),
- (5) jointly boycott transactions (includes preventing a company from dealing with a competitor), and
- (6) the catch-all “other anticompetitive agreements” as determined by the enforcement agencies.

⁷ *Id.* at art. 14.

⁸ *Id.* at art. 17: It is a violation if a company or companies occupying a dominant position in a market do the following:

- (1) sell products at unfairly high prices or buy products at unfairly low prices; or
- (2) sell products at prices below cost without justification; or
- (3) refuse to trade with other companies without justification; or
- (4) enter into exclusive dealing agreements without justification; or
- (5) enter into tying agreements or impose other unreasonable conditions without justification; or
- (6) discriminate (when dealing with parties with equal standing) based on price or other trading conditions and without justification for doing so, or
- (7) other forms of abusing dominant position as determined by the enforcement agencies.

competition in the relevant market.⁹

5. Using a government administrative organ to restrict or eliminate competition

The AML prohibits government administrative organs from misusing their official positions to restrict or eliminate competition. Specifically, local government entities are prohibited from forcing companies or individuals to deal exclusively with companies designated by the government entity, blocking inter-regional trade, discriminating in the context of tendering and bidding activities, discriminating in the context of investing and establishing local branches, forcing companies to engage in anticompetitive conduct that is forbidden by the AML, and from passing provisions that would eliminate or restrict competition.¹⁰

Tucked away in rules issued by State Administration of Industry and Commerce (“SAIC”), the agency responsible for enforcing the AML with regard to abuse of administrative power, is a provision relevant to companies. This provision prohibits companies from concluding and implementing anticompetitive agreements or, if they have a dominant market position, abusing this position based on any of the following government actions: restrictions, authorizations or legislation (“provisions”).¹¹

6. Statute of limitations for enforcing a violation

There is no statute of limitations for AML violations investigated by the government.

B. Administrative, Criminal, and Civil Liability

1. Administrative liability

When the investigation is not withdrawn (as unfounded), suspended, or terminated based on an exemption, the company will face administrative penalties for violating the AML. There are no criminal sanctions for AML violations (except for non-compliance with an investigation, *see* discussion below).¹² The penalties for violating the AML are relatively low in comparison to the United States and EU (although the fines are on the rise in China), however, the damage to a company’s image or brand and costs to defend the company may both be substantial. In general, the enforcement agencies will consider such factors as the nature, extent and duration of the violations when determining the specific levels of fines related to anticompetitive agreements, monopolization and illegal mergers. The penalties are as follows:

- a. **Anticompetitive agreements such as price-fixing cartels or resale price maintenance agreements.** The enforcement agency can order the companies to cease and desist, confiscate illegal gains and impose a fine of from 1% up to 10% of sales revenue (turnover NOT just profits) made in the previous year. In practice the sales revenue is limited to business in China. Furthermore, the government limits revenue considered-to sales related to the products that are the subject of the alleged illegal conduct (although nothing in the law requires it to do so). If branch offices of a company are the parties that violated the AML, then the Chinese authorities limit sales revenue to the branch office rather than basing it on the consolidated sales of the entire company. In the event the anticompetitive agreement has not been implemented, the government can impose a fine not less than 500,000 RMB.¹³ Trade associations can be fined up to 500,000 RMB and where the circumstances are “serious” (not defined) the trade association may be deregistered.¹⁴

The government may reduce the penalty or even decide not to impose a penalty if a company that was engaged in an anticompetitive agreement voluntarily provides information about the agreement and provides “important evidence” (not defined in the statute) to the respective enforcement agency.¹⁵ *See* discussion below at D.3.f.: “You have the right to be exempt from penalties or to reduced penalties” regarding the leniency program.

- b. **Monopolization (abuse of dominance).** The enforcement agency can order the companies to cease and desist, confiscate illegal gains and impose fine of from 1% up to 10% of sales revenue made in the previous year (in practice this is limited to sales revenue of China business).¹⁶ There is no leniency program for monopolization cases. However, there is a provision in the AML that states that the government will take into consideration the nature and extent of the violation when deciding the penalty.¹⁷

⁹ *Id.* at art. 28.

¹⁰ *Id.* at arts. 32-37.

¹¹ Rules Regarding the Prohibition of Abuses of Administrative Power that are Anticompetitive, State Administration for Industry and Commerce, issued December 31, 2010, effective February 1, 2011, art. 5.

¹² Under the Criminal law there is criminal liability for bid-rigging, but there is no cross-reference in the AML to the Criminal Law with regard to bid-rigging. In the PRC Criminal Law, under art. 223 there is also no specific reference to the AML, only a description of the offense of bid-rigging. *See* Criminal Law of the People’s Republic of China (adopted July 1, 1979, at the 2nd Sess. of the 5th National People’s Congress, revised for the 8th time on February 25, 2011, effective May 1, 2011).

¹³ AML art. 46.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at art. 47.

¹⁷ *Id.* at art. 49.

- c. **Where a company, based on an administrative organ's abuse of power, enters into an anticompetitive agreement or engages in anticompetitive conduct.** The enforcement agency can order the companies to cease and desist, confiscate illegal gains and impose a fine of from 1% up to 10% of sales revenue made in the previous year (in practice this is sales revenue of China business). In the event the anticompetitive agreement has not been implemented, the government can impose a fine not less than 500,000 RMB.¹⁸
- d. **Mergers.** If mergers are implemented in violation of the AML the enforcement agency can order the companies not to proceed with the merger, to dispose shares or assets, transfer the business or adopt other necessary measures to restore the market situation to what it was prior to the merger within a prescribed time period and may impose a fine of up to 500,000 RMB.¹⁹
- e. **Conduct during investigations.** The investigated company and individuals must cooperate or risk being fined. Lack of cooperation includes (i) refusing to submit relevant material and information, (ii) submitting fraudulent material or information, (iii) concealing, destroying or removing evidence, or (iv) refusing or obstructing the investigation in other ways. Individuals can be fined not less than 20,000 RMB and companies can be fined not less than 200,000 RMB. Where the circumstances are serious (serious is not defined), the individual can be fined from 20,000 RMB up to 100,000 RMB and a company can be fined from 200,000 RMB up to one million RMB.²⁰

2. Criminal Liability

The investigated company and individuals also risk criminal liabilities for non-compliance with **investigations**.²¹ Lack of cooperation includes (i) refusing to submit relevant material and information, (ii) submitting fraudulent material or information, (iii) concealing, destroying or removing evidence, or (iv) refusing or obstructing the investigation in other ways.

Antitrust enforcement officials themselves risk criminal liability if, while enforcing the law, they abuse their authority, neglect their duties, personally gain from telling lies or disclose trade secrets.²²

3. Civil Liability

Companies sued in private civil litigation are liable for direct and indirect damages arising from the AML violations alleged in the lawsuit.²³ For example, where a court found that a distribution agreement was a resale price maintenance agreement in violation of the AML, the damages awarded to the plaintiff were related to economic losses based on the defendant's refusal to supply the plaintiff with the products because the plaintiff did not comply with terms of the distribution agreement.

C. Enforcement

Both the government and private parties can enforce the AML. The AML has been in effect since August 2008 but continues to evolve as the enforcement agencies adopt regulations and guidelines in order to flesh out the statutory skeleton by providing guidance on and clarification of such aspects as terminology and procedures for government enforcement. The AML also can be enforced through civil actions, brought by businesses and individuals seeking damages caused by violations of the AML.

1. Government Agencies

Unlike other jurisdictions where antitrust enforcement is centralized, in China three agencies enforce the AML: the National Development and Reform Commission ("NDRC"), the State Administration for Industry and Commerce ("SAIC") and the Ministry of Commerce ("MOFCOM").

Cases related to anticompetitive conduct are split between the NDRC and the SAIC. The NDRC, through its Price Supervision and Antimonopoly Bureau, handles price-related violations and SAIC, through its Antimonopoly and Unfair Competition Enforcement Bureau, the non-price related violations. The distinction between price and non-price related situations is sometimes unclear (for example, an agreement to allocate markets can also have price ramifications) and it is difficult for companies / informants to decide to whom to go to lodge a complaint. There are times when the cases are overlapping and the two agencies decide amongst themselves who will take the lead. The decisions are often based on their historical expertise. Before the AML existed, the NDRC enforced the Price Law²⁴ while the SAIC enforced the Anti-

¹⁸ *Id.* at art. 46

¹⁹ *Id.* at art. 48. See also Interim Measures for Investigating and Handling Failure to Legally Declare the Concentration of Business Operators, Ministry of Commerce, issued December 30, 2011, effective February 1, 2012.

²⁰ *Id.* at art. 52.

²¹ *Id.* at art. 52.

²² *Id.* at art. 54: Where any functionary in the Anti-monopoly Law Enforcement Agency abuses his authority, neglects his duty, makes falsehood for personal gains, or discloses trade secrets known when enforcing the law, and a crime is constituted, he shall be investigated for criminal liability; and if no crime is constituted, he may be given a disciplinary sanction."

²³ *Id.* at art. 50.

²⁴ Price Law of the People's Republic of China (adopted December 29, 1997, at the 8th National People's Congress, effective May 1, 1998) [hereinafter the "Price Law"].

Unfair Competition Law (“AUCL”).²⁵ Both of these laws have provisions that *relate* to antitrust issues, prohibiting anticompetitive conduct such as price fixing, bid-rigging or predatory pricing.²⁶ The Price Law and AUCL are still in effect and there is no regulation or guidance as to how the NDRC and SAIC will reconcile enforcement of the Price Law, AUCL and AML for a particular conduct.

MOFCOM has historically been responsible for foreign investment-related issues. Prior to the passing of the AML foreign companies acquiring domestic companies that met certain thresholds were required to go through a pre-merger notification process under the M&A regulations of 2006. The Antimonopoly Bureau is the department within MOFCOM that is responsible for enforcing the AML through merger reviews.

2. Private Parties (Civil Lawsuits in the Courts)

There is just one sentence in the AML that refers to private enforcement: companies are liable for civil damages caused by their anticompetitive conduct.²⁷ The brevity of this statutory language combined with the fact that antitrust principles are new to the Chinese bar may have contributed to the situation that all of the more than fifty civil antitrust cases that were filed between 2008 and 2011 were dismissed in favor of the defendants. Although there have only been relatively few private antitrust actions involving foreign companies, this does not mean the risk of being sued should be ignored. The 2012 Supreme People’s Court Judicial Interpretations (“SPC Judicial Interpretations”)²⁸ have made it somewhat easier for plaintiffs to bring antitrust cases. The SPC Judicial Interpretations ease the plaintiffs’ ability to file a case by increasing the types of courts that will have jurisdiction over an antitrust case, shifting the burden of proof to the defendant in certain situations, encouraging the use of expert witnesses and giving guidance on calculation of damages.

- a. **Standing.** Plaintiffs can file complaints based on antitrust violations themselves or as a follow-on suit to decisions of the enforcement agencies, suing for both direct and indirect damages (for example, indirect downstream purchasers who paid higher prices for products due to anticompetitive agreements or conduct).²⁹ In China, class action suits can only be filed by an “authority prescribed by law.”³⁰ Therefore, if there are multiple plaintiffs, if they are not able to be represented by a qualified authority, they can file jointly or separately. If they file separately in the same court, the court can hear the cases at the same time. If they file in different courts, the case that was filed last can be transferred to the court that has the initial case. Defendants always have the obligation to tell the court of any litigation involving the same conduct for which it is being sued.³¹
- b. **Jurisdiction of the courts.** The intellectual property courts were initially designated as the courts with jurisdiction over antitrust suits, but as of June 2012, when the SPC Judicial Interpretations became effective, all intermediate courts have been invested with antitrust jurisdiction.³²
- c. **Relationship between a government investigation and a civil action.** Under the AML, there is no prerequisite that the government open an investigation before a party can file a civil action. The SPC Judicial Interpretations refer to two situations; (i) where a plaintiff either files an antitrust lawsuit without the existence of a government investigation or (ii) files a lawsuit after a government decision is issued that confirms that there was an antitrust violation.³³ However, there is no specific guidance or case precedent for the situation where a private action is filed while the government investigation is still pending. Theoretically, the court could suspend its action until the government investigation is concluded.³⁴
- d. **Statute of limitations for filing an antitrust claim.** Neither the AML nor the SPC Judicial Interpretations explicitly provide for a statute of limitations. However, based on a reference to a two-year statute of limitations in the SPC Judicial Interpretations in the provision regarding calculation of damages, the general consensus is that the

²⁵ Anti-Unfair Competition Law of the People’s Republic of China (adopted September 2, 1993, at the 3rd Meeting of the Standing Comm. Of the 8th National People’s Congress, effective December 1, 1993) [hereinafter the “AUCL”], Issue No. 5.

²⁶ Price Law art. 14 (pricing activities), AUCL art. 6 (exclusionary practices), art. 7 (administrative monopolies), art. 11 (selling below cost), art. 12 (tying), and art. 15 (bid-rigging).

²⁷ AML at art.50.

²⁸ Provisions of the Supreme People’s Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (adopted January 30, 2012, at the 1539th Session of the Judicial Committee of the Supreme People’s Court, effective June 1, 2012).

²⁹ Implied by SPC Judicial Interpretations art. 1.

³⁰ The Standing Committee of the National People’s Congress published *Decision of the Standing Committee of the National People’s Congress on Amending the Civil Procedure Law of the People’s Republic of China* on August 31, 2012, which says in Article 9 that “One article is added as Article 55: “For conduct that pollutes environment, infringes upon the lawful rights and interests of vast consumers or otherwise damages the public interest, an authority or relevant organization as prescribed by law may institute an action in a people’s court.” The Committee does not provide specifics about the “authority or relevant organization.”

³¹ SPC Judicial Interpretations art. 6.

³² *Id.* at art. 3.

³³ *Id.* at art. 2.

³⁴ Under art. 150 of the Civil Procedure Law of People’s Republic of China the court can suspend the trial while waiting for the antitrust enforcement agencies’ decision. Art. 150 lists circumstances for when an action shall be suspended, among others, when the action depends on the results of the trial of another case that has not been concluded.

general two-year statute of limitation for civil cases of the Civil Procedure Law is applicable.³⁵

- e. **Statute of limitations for calculating damages.** The calculation of damages is limited to two years. Where the alleged monopolistic conduct has continued for more than two years when the plaintiff files the lawsuit, if the defendant raises a statute of limitations defense, the compensation for damages will be calculated based on the two years immediately preceding the date when the lawsuit was filed.³⁶

D. Government Investigations

Government investigations of alleged anticompetitive conduct can be initiated based on written information from companies and individuals such as disgruntled consumers or competitors or whistle-blowers. The information includes relevant facts such as, who is the violator, what is the violation, when and where did this take place. The identity of the informer will be kept confidential.

Sometimes the government starts off through “indirect” investigations by means of trade associations or government surveys. For example, in 2013 the NDRC authorized the Car Dealers Association to get information from foreign car manufacturers. The purpose was to find out about the sales practices of the foreign companies, including potential violations of the AML. Another example are surveys done by industrial associations, which are quasi government entities, for the purpose of “quality and standard control,” whereby the companies are requested to provide information regarding production, capacity, and financial statements with profits and loss.

Another enforcement method are industry “sweeps,” where the antitrust enforcement agencies target industries important to consumers such as eyewear, milk powder, automobiles, health-care and information technology.

Government investigations are not confined to anti-competitive conduct. MOFCOM has the discretionary power to initiate an investigation of a merger, even when it does not meet the threshold requirements. MOFCOM also can initiate an investigation if a merger that should have gone through the pre-merger notification process but the parties did not file for such obligatory review.

1. Investigation Procedure

Under the AML, the authorities have a broad scope of investigatory powers.³⁷ In general, the enforcement officers, after submitting a written report and obtaining approval from the principal officials of the enforcement agency, can enter the business premises and basically take whatever documents they allege to be relevant. In addition, they can interrogate in person, by telephone, or in writing whoever they allege may have relevant information. It should be noted that there is no definition of the term “relevant information” or “relevant evidence” and no stipulation of whether this information is admissible as evidence in private follow-on lawsuits. Nevertheless the scope of the investigation can be expected to be quite broad.

2. The Investigated Parties’ Obligations

The investigated company and individuals must cooperate or risk being fined and individuals who don’t cooperate also risk criminal liabilities. Lack of cooperation includes (i) refusing to submit related material and information, (ii) submitting fraudulent material or information, (iii) concealing, destroying or removing evidence, or (iv) refusing or obstructing the investigation in other ways. *See* B.1.e. above for specific amounts of the fines.

3. The Investigated Parties’ Rights

- a. **You have the right to see law enforcement badges.** There must be at least two law enforcement officials when the investigation of a company’s premises takes place and they must show their law enforcement badges.³⁸ The company that is being investigated has the right to demand to see their badges before the company starts to cooperate with them. The enforcement officers are not required to present search warrants or any similar document that shows the purpose or scope of their search.
- b. **Investigated companies have the right to sign investigation protocols and interview transcripts.** The law enforcement officer must make a written transcript of any interviews and the investigation of the premises.³⁹ The persons who were interviewed must sign the respective transcripts and the person who has been authorized by the company to sign on behalf of the company must sign the investigation transcript.
- c. **You have the right to confidentiality.** Although confidential documents are not exempt from being confiscated, the government must keep company’s business or trade secrets confidential.⁴⁰
- d. **You have the right to voice your version of the facts and potentially be exempt from the AML (if the violation**

³⁵ SPC Judicial Interpretations art. 16.

³⁶ *Id.*

³⁷ AML art. 39.

³⁸ AML art. 40.

³⁹ AML art. 40.

⁴⁰ AML art. 41.

involves an anticompetitive agreement) or have the investigation suspended (if the violation relates to anticompetitive conduct).

- **Exemptions (available in the case of anti-competitive agreements).** *To date, no exemptions have been granted, so this free pass remains highly theoretical and speculative, but for completeness sake, the following explains exemptions.* The company that is being investigated has the right to present their version of the situation, support any statements with evidence, showing that it fulfills the criteria for an exemption and, if the investigation involves anti-competitive agreements, request exemption from the application of the AML. There are two categories of circumstances for exemptions: circumstances related to domestic needs and those related to foreign trade. The domestic needs have two aspects. The first is the economic development of China, for example, improving technology and quality of products, bolstering the competitiveness of small and medium-sized companies. The second is protecting China's public interest, for example, conserving energy, protecting the environment, aiding in disaster relief and dealing with economic recession.⁴¹ Even if the alleged anticompetitive agreement meets the requirements for exemptions related to domestic needs, the parties to the alleged anti-competitive agreement must still show that such agreement does not *substantially*⁴² restrict competition in the relevant market and benefits consumers. The exempt purpose related to foreign trade is "to protect justifiable interests of foreign trade or foreign economic cooperation."⁴³ If the purpose of the alleged anti-competitive agreement meets the foreign trade related requirement for being exempt from the application of the AML, the parties to the alleged anti-competitive agreement do not need to provide further information. The enforcement agency must then verify the facts, reasons and evidence that have been submitted.⁴⁴
 - **Suspension of investigation (available in the case of anti-competitive conduct).** The company that is being investigated has the right to present their version of the situation, support any statements with evidence, present concrete measures it will take to eliminate the anti-competitive conduct and request that the investigation be suspended.⁴⁵ If the agency suspends the investigation, it must state what measures the company will undertake. Even though the agencies' decisions do not have to be published, there is a standard requiring them to provide justification for the decisions to suspend the investigation. The agency will supervise the company to see if it carries out the promised measures to remedy the situation and the company in turn must give status reports on its progress but there is no indication of how often this is required. If the company successfully carries out the measures then the agency has the discretionary authority to terminate the investigation but if the company fails to carry out the measures or it turns out that the suspension was based on insufficient or incorrect information then the agency will resume the investigation.
- e. **You have a right to a hearing and to present your defense without fear of retribution.** Before the administrative body makes a decision regarding an administrative penalty, the party has the right to be informed of the facts, reasons and basis for a potential penalty, the right to present its version of the facts and its defense, and the right to a hearing.⁴⁶ The party also has the right to present its defense in lieu of a hearing. The party has three days to decide whether it wants a hearing.⁴⁷ If the party requests a hearing then the administrative body must arrange the hearing, giving the party seven days' notice of the time and place of the hearing.⁴⁸ The hearing is public except where State secrets, business secrets or private affairs are involved.⁴⁹ The person presiding over the hearing must be someone other than the investigator that was selected by the administrative organ to handle the investigation. If the party thinks that the person presiding over the hearing has a direct interest in the subject case then the party has the right to request that this person be withdrawn.⁵⁰ During the hearing the investigator will present the facts and supporting evidence of the alleged violation and the recommended administrative penalty. The alleged violator may present its defense and cross-examine the investigator.⁵¹ The investigated parties have the right

⁴¹ AML art. 15.

⁴² "Substantially" is not defined in the AML or subsequent regulations.

⁴³ AML art. 15(6).

⁴⁴ *Id.* at art. 43.

⁴⁵ *Id.* at art. 45.

⁴⁶ The AML does not specifically mention that the companies have a right to a public hearing, however, the SAIC regulations refer to this right by way of reference to the PRC Administrative Punishment Law [Revised] (adopted March 17, 1996, at the 8th National People's Congress, effective August 27, 2009), [hereinafter the "Administrative Punishment Law"] and the NDRC issued regulations in 2013 regarding procedures related to price-related investigations, which incorporate the same steps: Provisions on the Procedures for Price-related Administrative Penalties (2013 Amendment), State Development & Reform Commission, issued March 6, 2013. [hereinafter the "2013 amended NDRC investigation procedures"]

⁴⁷ Administrative Punishment Law art. 42(1), 2013 amended NDRC investigation procedures, art. 32.

⁴⁸ *Id.* art. 42(2), *Id.* art. 33.

⁴⁹ *Id.* art. 42(3), *Id.* art. 36.

⁵⁰ *Id.* art. 42(4), *Id.* art. 34.

⁵¹ *Id.* art. 42(6), *Id.* art. 36.

to defend themselves without fear of retribution.⁵²

f. You have the right to be exempt from penalties or to reduced penalties.

- **Leniency.** The AML has a general provision (often referred to as the leniency program), that if a party to an anticompetitive agreement volunteers information about the agreement and provides important evidence the enforcement agency may exempt the party from punishment or mitigate the punishment.⁵³ Both the NDRC and SAIC regulations offer parties a chance to reduce penalties if they volunteer “important evidence”⁵⁴ regarding anticompetitive agreements related to pricing. Under the NDRC regulations, the punishment can be reduced as follows:⁵⁵
 - (a) the company that is the first to volunteer important information concerning the conclusion of the anticompetitive agreement related to prices and provides important evidence may be exempt from punishment,
 - (b) the punishment of the company that is the second to voluntarily report important information on the conclusion of an anticompetitive agreement related to prices and provides important evidence may be reduced by up to 50%,
 - (c) the punishment of any other company that voluntarily reports important information on the conclusion of an anticompetitive agreement related to prices and provides important evidence may be reduced no more than 50%.

The SAIC regulations are not as specific in terms of the amount of reduction of penalties available to parties who volunteer information. The SAIC explicitly states that the organizer of a cartel cannot qualify for exemption from fines⁵⁶ (the NDRC is silent about whether an organizer can qualify for such exemption).

- **Reduction of fines based on other factors.** The AML gives the enforcement agencies the discretion to reduce fines by considering additional factors such as the nature, extent and duration of the violations.⁵⁷

g. You have the right to appeal the administrative decision. If the company disagrees with the administrative decision, the company has the right to apply for administrative reconsideration or file an administrative lawsuit. To date there have not been any appeals.

4. Publication of Administrative Decisions

The enforcement agencies are not obligated by the AML to publish their decisions. The SAIC however, starting in September 2013, began publishing its decisions online, going back to the first case it concluded under the AML. The NDRC has issued press releases, but not for all of its cases. In the fall of 2014 the NDRC, started to publish decisions of prominent investigations.

E. Merger Review

1. Thresholds. Both foreign and domestic companies must obtain approval from MOFCOM before implementing merger transactions that meet thresholds as set forth in the AML.

a. The “critical mass” threshold. If a transaction meets the following **turnover thresholds** then the parties to the transaction must seek clearance from MOFCOM:

- In the last financial year the aggregate *global*⁵⁸ *turnover*⁵⁹ of all the parties to the transaction exceeds RMB 10 billion and each of at least two of the parties to the transaction has a *Chinese*⁶⁰ turnover of at least RMB 400 million; or

⁵² *Id.* art. 32, *Id.* art. 37. The reviewing authority may not impose a heavier fine because the party defends itself or requests a hearing.

⁵³ AML art. 46.

⁵⁴ The NDRC regulations define “important evidence” as evidence that plays a key role in the determination of an anticompetitive agreement related to prices. The SAIC regulations define “important evidence” as evidence that will facilitate or enable the initiation of an investigation or evidence that plays a crucial role in affirming the existence of anticompetitive conduct.

⁵⁵ Procedural Rules Regarding Investigations of Price-related Anticompetitive Conduct, National Development and Reform Commission, issued December 29, 2010, effective February 1, 2011, art. 14.

⁵⁶ Procedural Rules Regarding Investigations of Anticompetitive Agreements and Monopolization, State Administration for Industry and Commerce, issued May 26, 2009, effective July 1, 2009, art. 20.

⁵⁷ AML art. 49.

⁵⁸ Guidelines on Merger Notifications issued by Ministry of Commerce on June 2014 [hereinafter “June 2014 Revised Merger Notification Guidelines”] art. 5: “global” ...includes the turnover in mainland China...Turnover in mainland China includes products or services (including exports from foreign countries into mainland China) of the company that are sold to buyers located in mainland China. It excludes the company’s products or services exported from mainland China to foreign countries or regions.

⁵⁹ Because the AML does not define the terms “turnover,” the June 2014 Revised Merger Notification Guidelines clarified this term in art. 5: “The turnover includes the revenue gained through selling products and providing services minus the corresponding taxes and extra charges of the relevant undertakings during the last fiscal year.” Further descriptions of “turnover” are in articles 6 and 7.

⁶⁰ June 2014 Revised Merger Notification Guidelines art. 5: Turnover in mainland China includes products or services (including exports from foreign countries into mainland China) of the company that are sold to buyers located in mainland China. It excludes the company’s products or services exported from mainland China to foreign countries or regions.

- In the last financial year the aggregate Chinese turnover of all the parties to the transaction exceeds RMB 2 billion and each of at least two of the parties to the transaction has a Chinese turnover of at least RMB 400 million.⁶¹

b. **“Suitability” definition.** Under the AML the following types of transactions are identified as **“suitable for notification”** and must be cleared by MOFCOM before the transactions can be consummated.⁶²

- mergers between companies,
- acquisitions of another company’s shares or assets that results in gaining *control* over that company, and
- contracts or other means that result in gaining *control* over another company or enables one company to exert *decisive influence* over the other company.

Because the AML did not define “control,” there was much ambiguity regarding the term. Now, with the issuance of the June 2014 guidelines, “control” has been defined in a way that reflects how MOFCOM dealt with control issues in its merger reviews in the past. In the June 2014 Revised Merger Notification Guidelines, gaining “control” or having the power to exert “decisive influence” are collectively referred to as “control,” which includes both sole and joint control. The June 2014 Revised Merger Notification Guidelines list factors to consider when one firm might gain control or decisive influence. Gaining control can be both direct and indirect. Factors include purpose of the transaction, change of the shareholder structure before and after transaction, issues related to voting, appointment and dismissal of senior management officers, relationship between shareholders and directors, and whether there is a material commercial relationship and cooperative agreement between the companies (but “material commercial relationship” is not defined).⁶³

Although the AML and subsequent guidelines do not specifically mention cases of only minority shares, the tools are implicitly in the June 2014 Revised Merger Notification Guidelines: one can analyze the impact or strength of minority shares, focusing on the extent to which the shares exert “decisive influence” over another company. Minority shares can be an issue because they can alter the relationship between the parties depending on the power that can be exercised through the minority shares. A company can have, for example, “active” shares, which influence decision-making, and “passive” shares, which are purely financial interests without any influence over decision-making. Thus, a minority interest could allow for control over the entity that is being acquired or the ability to exercise decisive influence over that entity, in which case the transaction must be filed for approval.

2. Joint ventures

Joint ventures must also be cleared. Although the AML does not specifically mention joint ventures, MOFCOM’s conditional approvals of several joint ventures and article 4 of the recent June 2014 Revised Merger Notification Guidelines confirm that certain joint ventures qualify for premerger notification and require MOFCOM’s approval: “A newly established joint venture will constitute a ‘concentration between companies’ (meaning it is reportable) where more than two companies exist that jointly control the joint venture. It will not constitute a ‘concentration between companies’ (i.e. not be reportable) where only one company solely controls the joint venture (the other companies in the joint venture do not gain control).”

3. Transactions that do not have to be reported for pre-merger notification

Inter-company transactions such as transactions between affiliates do not have to be reported. Specifically, these two types of structures are exempt:

- where one of the parties to the transaction holds 50% or more of the voting shares or assets of every other party to the transaction, or
- a company that is not one of the parties to the transaction holds 50% or more of the voting shares or assets of every other party to the transaction.⁶⁴

4. Transactions below thresholds

MOFCOM also has discretionary authority to investigate transactions that are below the threshold requirements but, in MOFCOM’s opinion, will have or already have the potential to restrict or eliminate competition. There are no implementing regulations regarding this except for draft interim measures circulated in 2009. There also have not been

⁶¹ Regulation of State Council on Notification Thresholds issued by the State Council August 3, 2008 effective August 3, 2008 [hereinafter “State Council notification thresholds regulation”], art. 3.; June 2014 Revised Merger Notification Guidelines art. 2.

⁶² AML art. 20 refers to these transactions as “concentration of business operators”, this primer uses the terms “transactions” or “mergers”.

⁶³ June 2014 Revised Merger Notification Guidelines art. 3.

⁶⁴ AML art. 22.

any instances of such investigations, at least none that have been made public.

F. Two Filing Procedures: Simplified and Normal

1. Simplified Pre-filing Procedure

Up until February 2014 there was only one review process and the review time varied from taking from 41 days to 416 days.⁶⁵ Now, with a so-called simplified merger review process that is theoretically more efficient, those transactions that are clearly harmless will be cleared quickly and also with less paperwork, and more MOFCOM resources should be available to focus on those that initially appear to be problematic. Although there is no time frame in the guidelines, the officials have stated publically that they are aiming for clearing transactions within 30 days.

The simplified merger review deals must meet **one** of the following criteria:⁶⁶

- For horizontal transactions: the aggregate market share of all parties to the transaction is less than 15%
- For vertical transactions: the market share of each of the parties in each of the relevant vertical markets is less than 25%
- For neither horizontal nor vertical transactions: the market share of each of the parties in each of the markets is less than 25%
- For offshore joint ventures: the offshore joint venture does not do business within China
- For equity or assets acquisitions of offshore enterprises: the offshore enterprise does not do business within China
- For decreases in the number of controlling shareholders in a joint venture.

However, even if a transaction meets one of these criteria MOFCOM can still **reject a simplified merger review** of the transaction under the following circumstances:⁶⁷

- If, as a result of the transaction, a joint venture that was originally controlled by more than two parties ends up being controlled by one party and this controlling party also competes with the joint venture in the same relevant market
- It is difficult to define the relevant market of the transaction
- The transaction is likely to cause adverse consequences for market entry and technological advances
- The transaction is likely to cause adverse consequences for consumers and other enterprises
- The transaction is likely to cause adverse consequences for national economic development
- “Catch-all clause:” Other circumstances that MOFCOM considers as having potential adverse consequences for market competition.

Some of these circumstances, in particular, those relating to national economic development and market competition, give MOFCOM an opportunity to decide based on industrial policy.

Furthermore, even if a transaction is categorized as a “simple” transaction, MOFCOM can still reject this classification under the following circumstances:⁶⁸

- The applicant hides material information, submits false information or submits misleading information, or
- A third party provides evidence that the transaction will or may exclude or restrain competition, or
- MOFCOM thinks there has been “material change” in the transaction or in competitive status within the relevant market (“material change” is not defined).

Steps in the simplified pre-merger filing process.⁶⁹

Step 1. Self-assessment: Self-access and if your transaction qualifies for the simplified process based on your self-assessment, fill out the notification form and gather documents.

Step 2. Non-mandatory pre-filing consultation: This consultation would take place prior to the formal submission of the notification form and supporting documents. The parties to the transaction can meet with MOFCOM officials to discuss whether the transaction meets any of the criteria for the simplified procedure.⁷⁰

Step 3. Filing and acceptance by MOFCOM as a simplified case:⁷¹ After the notification form is filed, as it is reviewing the submission, MOFCOM might request more documents or clarifications. The regulations do not specify how much

⁶⁵ MOFCOM decisions for GM/Delphi taking 41 days, MediaTek/MStar taking 416 days.

⁶⁶ Interim Provisions on Standards Applicable to Simple Mergers, issued by Ministry of Commerce February 11, 2014, effective February 12, 2014, art. 2.

⁶⁷ *Id.* at art. 3.

⁶⁸ *Id.* at art. 4.

⁶⁹ These steps summarize the provisions set forth in the Guidelines for the Simplified Process for Merger Review issued by Ministry of Commerce April 18, 2014 effective April 18, 2014[hereafter “Guidelines for Simplified Process”].

⁷⁰ Guidelines for Simplified Process art. 1.

⁷¹ *Id.* at arts. 2, 7.

time MOFCOM can spend to review and determine whether the submission meets the criteria. Once MOFCOM decides the transaction meets the criteria, it will open a file. MOFCOM's acceptance triggers the waiting period before the deal can be consummated but the regulations do not specify the length of the waiting period. MOFCOM has publically stated that it aims for a waiting period of 30 days. If MOFCOM thinks the transaction does not meet the criteria for the simplified review process, then the parties must **refile** under the normal procedure.

Step 4. Public comment period:⁷² After MOFCOM accepts the transaction as a simple case, there will be a 10-day period when a public announcement of the transaction is posted on the MOFCOM website. During this period any third party can oppose the categorization of the transaction as a simplified case. The opposing third party must submit evidence as well as the source of their information on which they base their opposition so MOFCOM can verify the authenticity of the challenge as well as supporting evidence. The regulations do not specify that MOFCOM must immediately post the announcement on the website once it accepts the transaction as a simplified case.

Step 5. MOFCOM can approve or withdraw its acknowledgement of the transaction as a simplified case. The regulations do not specify how much time MOFCOM can take to review the challenges to the transaction qualifying as a simplified case. If MOFCOM withdraws its acknowledgement of the transaction as a simplified case, then the notifying party must **refile** under the normal procedure. During this time the notifying party has an opportunity to express their views. If MOFCOM approves the transaction as a simplified case, then the transaction is further reviewed for **final clearance**.⁷³

If the notifying party submits false statements or misleading information or conceals material information MOFCOM may revoke the classification of the transaction as a simplified case. It has the option to fine the notifying party 100,000 RMB (in the case of individuals) and up to 1,000,000 RMB (in the case of an enterprise). These fines are pursuant to AML Article 52.⁷⁴

2. Normal pre-filing procedure⁷⁵

Step 1. Pre-filing consultation: Parties to the transaction will meet with MOFCOM to discuss major issues such as whether filing is necessary, definition of relevant market, potential impact on competition and required data. This is the time to get a sense of MOFCOM's concerns.

Step 2. Submit notification form: MOFCOM reviews the notification form to see if it is sufficient. MOFCOM may ask for more material to make it complete and they may ask questions. The notifying party can redact confidential information/documents that the notifying party does not want to have published or disclosed by MOFCOM. A non-confidential version of the filing documents should be submitted with the request to keep certain information confidential. MOFCOM has the last word as to whether such information can be regarded as confidential. MOFCOM may send the non-confidential version to third parties such as governmental agencies, trade associations, competitors of the parties to the transaction, suppliers or customers, asking for their comments. The AML prohibits MOFCOM staff from disclosing business secrets of the parties and their affiliates.

Step 3. Acceptance by MOFCOM/Phase I review: When MOFCOM declares that the notification is complete this triggers the formal review process of 30 calendar days starting from the day after the day on which MOFCOM declares the notification is complete, commonly referred to as "Phase I period." During this Phase I period the parties and MOFCOM negotiate remedies if necessary. If the Phase I period expires and the parties have not been notified or requested to provide more information, the transaction is deemed to be approved and can be consummated.

Step 4. Phase II and extended Phase II reviews: If MOFCOM needs to conduct a more in-depth investigation, it has an additional 90 days (commonly referred to as the "Phase II period"). This can be extended a further 60 days ("extended Phase II").

Throughout the review process MOFCOM looks at both competitive and industrial policy issues related to the relevant market. During this time MOFCOM consults other agencies, third parties, such as industrial associations, the parties' competitors, and economists. MOFCOM will raise its concerns and the parties to the transaction can negotiate remedies.

Step 5. MOFCOM will make its decision: MOFCOM has three options: clear the deal, clear the deal with conditions or block the deal. If MOFCOM clears the transaction it is not obligated to publish its decision. The transaction will eventually appear on the quarterly list of approved transactions. If MOFCOM clears the transaction with conditions or blocks the transaction, MOFCOM will publish its decision on its website.

⁷² *Id.* at arts. 8, 9.

⁷³ *Id.* at arts. 9, 10.

⁷⁴ *Id.* at art. 11.

⁷⁵ Since there is no single source for the normal pre-merger filing process, these steps summarize points from the following legislation: AML arts. 20-30, 41; Rules for Merger Notification Filings issued by Ministry of Commerce November 21, 2009 effective January 1, 2010; Rules for the Review of Merger Notifications issued by Ministry of Commerce November 24, 2009, effective January 1, 2010; and June 2014 Revised Merger Notification Guidelines.

During the review process--usually early on in the review process--if MOFCOM thinks that there is a national security **issue**, it will require the filings to be reviewed by a separate interagency committee. This can delay the review process. The 30-day period will be suspended during the national security review.⁷⁶

3. Pros and Cons of the Two Pre-merger Review Processes

In the simplified review system, there is of course less material to file and the length of review time should be shorter, however, there is the chance that MOFCOM would ultimately reject the simple filing application or after it is accepted, circumstances in the market might change and MOFCOM may revoke the acceptance—then you are back at square one and must refile using the normal procedure.

As shown in the table below, there is less material to file, but parties still need to submit comprehensive information related to market definition including market shares of the parties and the competitors.

TYPE OF INFORMATION	SIMPLIFIED	NORMAL
Detailed information about affiliates	No	Yes
-just involved affiliates	Yes	Yes
Detailed information on structure of supply/demand	No	Yes
-including information on suppliers/customers	No	Yes
-including information on market entrants	No	Yes
Cooperative agreements between notifying parties	No	Yes
Information on efficiencies generated by merger	No	Yes
Failing entity analysis	No	Yes
Opinions of government authorities/customers, competitors, suppliers, customers etc.	No	Yes

There are **timing issues** related to the simplified procedure. Deadlines are not in the provisions/guidelines issued by MOFCOM:

- There is no timeframe for MOFCOM to decide whether the notification meets the criteria for simple procedure after MOFCOM accepts the filing as a simplified case,
- There is no specific time period within which MOFCOM would review and clear the transaction.
- There is no deadline for MOFCOM to post the deal on their website for public comment after it accepts the transaction as a single transaction.

For the time being, while MOFCOM irons out the procedure, it is best to save the simple procedure for “no brainer” transactions that are not controversial and definitely meet the criteria for simple transactions and which are not likely to fall prey to any of the criteria for rejecting or withdrawing the simple case status.⁷⁷

4. Right to Appeal

If a company disagrees with MOFCOM’s decisions, it has the right to appeal the MOFCOM decision. It must first apply for administrative reconsideration and if it is still not in agreement with the decision, then it may file an administrative lawsuit.

G. Procedural Issues Related to Civil Antitrust Actions

1. Burden of proof

The general rule of the PRC Civil Procedure Law⁷⁸ is that the person who asserts a claim bears the burden of proof. There have been many antitrust suits filed but only a few plaintiffs have been successful. This was probably due to inexperience with the AML and the requirements to establish an antitrust claim under the AML. The 2012 SPC Judicial Interpretations made things relatively easier for the plaintiffs, for example, by shifting the burden of proof from the plaintiff to the defendant

⁷⁶ Provisions Regarding the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, issued by Ministry of Commerce August 25, 2011, effective September 1, 2011.

⁷⁷ In the period between May 22, 2014 and December 9, 2014, MOFCOM published 67 simplified cases on its website (this is in accordance with the public disclosure step in the simplified review process). Of these 67 cases, 44 cases involve foreign companies. By the end of the third quarter (September 30, 2014), MOFCOM approved 24 cases, 15 of which involve foreign companies. As of January 2015, three of the 67 cases are still in public comment period and 40 cases are still pending. MOFCOM did not reject any cases.

⁷⁸ The PRC Civil Procedure Law governs antitrust actions. This primer will focus only on issues specific to civil antitrust actions.

when the defendant was a utility company or an obviously a dominant player: the defendant had the burden of proof to prove why it did not have market power.⁷⁹ Likewise, the SPC Judicial Interpretations shifted the burden of proof to the defendant in horizontal cartel agreement cases, in other words, such agreements are presumed to be anti-competitive unless the defendant can prove otherwise, i.e., that there are no anticompetitive affects related to the allegedly anticompetitive agreement.⁸⁰ For abuse of dominance cases the general rule still applies (the plaintiff has the burden to show that the defendant has a dominant market position and has abused its dominant market position). After the plaintiff makes such a case, the defendant has the burden to prove its justification for the alleged abuse of dominance conduct.⁸¹

2. Evidence

The SPC Judicial Interpretations also encourage the use of expert witnesses,⁸² and ease the financial burden of the plaintiff by making the cost of the expert witness a court cost payable by the defendant if it loses. The SPC Judicial Interpretations' provision allowing the party that wins the case to have the expenses for expert witnesses borne by the party that loses the case is an exception to the general rule that expert witness expenses shall be borne by the party that requests an expert witness.

3. Statements obtained during leniency negotiations

Theoretically, if a company has been granted leniency by the government, then the probability is high that there would have been information given to the government that would bolster a future plaintiff's civil damage action. The issue of discoverability of statements made during leniency negotiations for the purpose of using this evidence in civil actions has not been specifically addressed in China. A party in a civil suit may want evidence that was provided in a government investigation, such as information related to circumstances of the anticompetitive agreement. In general, in China, this party could apply to the court to obtain the evidence. The court has the discretionary authority to grant this application, i.e., the court decides if the evidence is necessary for trying the civil case.

4. Calculation of damages

In an antitrust action an injured party may obtain compensatory damages, including lost profits. In situations where the court finds it difficult to calculate the losses, the court may determine the amount of compensation by calculating the profit gained by the defendant during the period when the plaintiff was damaged plus the plaintiff's reasonable expenses during the investigation and legal proceedings.⁸³ The calculation of damages will be limited to two years. Where the alleged monopolistic conduct has continued for more than two years when the plaintiff files the lawsuit, if the defendant raises a statute of limitations defense, the compensation for damages shall be calculated for the two years before the day of filing of the lawsuit.⁸⁴

⁷⁹ SPC Judicial Interpretations art. 9.

⁸⁰ *Id.* art. 7.

⁸¹ *Id.* art. 8. Although this article refers only to AML art. 17.1, the general consensus is that this article governs all subsections of AML art. 17.

⁸² *Id.* art. 13.

⁸³ *Id.* art. 14.

⁸⁴ *Id.* art. 16.

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