

## Enhanced Antitrust Enforcement Expected in China as Long-awaited Anti-Monopoly ‘Implementing Rules’ Finalised

*China looks set to enter a new phase of enforcement in relation to the Anti-Monopoly Law (AML), with two of its main antitrust enforcement agencies recently promulgating key implementing rules that contain guidance on, and outline an enforcement framework for, the AML’s key behavioural prohibitions.*

In the final days of 2010, the National Development and Reform Commission of China (NDRC) and the State Administration of Industry and Commerce of China (SAIC) promulgated a total of five AML-related implementing rules, the contents of which are summarised in the tables below. As previous delays in finalising the rules were believed to be a major reason for the NDRC and SAIC holding off from significant enforcement efforts in relation to the AML’s behavioural prohibitions, there are expectations for more vigorous enforcement in the months ahead. Indeed, since the promulgation of the new rules, one significant new enforcement action has already been announced by the NDRC.

The newly promulgated implementing rules are as follows:

- Implementing rules issued by the NDRC on 29 December 2010 (and commencing 1 February 2011):

Rules	Content
Rules on Anti-Price Monopoly	<p>Outlines, and provides some explanation of the assessment methodology and enforcement procedures for, price-related violations of the AML. More specifically, these Rules include provisions illustrating the scope of, and outlining relevant factors that may be considered when identifying, or considering application of ‘exceptions’ to, a number of specific price-related violations - such as price cartels, vertical price restrictions such as resale price maintenance arrangements, and price-related abuse of a dominant market position (i.e., unfair high or low pricing, predatory pricing, discriminatory pricing, etc).</p> <p>The Rules also contain provisions prohibiting administrative authorities and organisations from engaging in acts of ‘administrative monopoly’ (that is, imposing discriminatory charges, standards or prices on non-local goods and services or otherwise impeding the free flow of goods and services by setting prices or charges) and outlining applicable penalties and exemptions for relevant price-related violations of the AML - all of which provisions largely restate text in the AML.</p>

<p>Rules on Anti-Price Monopoly Administrative Law Enforcement Procedures</p>	<p>Outlines key powers and obligations of the NDRC and subordinate authorities in relation to their enforcement functions regarding price-related violations of the AML, and includes explanation of such matters as:</p> <ul style="list-style-type: none"> <li>• when the NDRC may delegate investigation powers;</li> <li>• when and how investigations may be carried out, and results of investigation acted upon;</li> <li>• the obligations of investigated parties to cooperate with an investigation; and</li> <li>• application of leniency in cases of for self-reporting by entities engaged in price-related AML violations.</li> </ul>
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- Implementing rules issued by the SAIC on 31 December 2010 (and commencing 1 February 2011):

Rules	Content
<p>Rules on Industry and Commerce Authorities' Prohibiting Monopoly Agreements and Rules on Industry and Commerce Authorities' Prohibiting Abuse of Dominant Market Position</p>	<p>Outlines, and provides some explanation of the assessment methodology and enforcement procedures for non-price-related violations of the AML. More specifically, these Rules include provisions illustrating the scope of, and outlining relevant factors that may be considered when identifying, or considering application of 'exceptions' to, a number of specific violations such as:</p> <ul style="list-style-type: none"> <li>• in the case of the Rules relating to 'Monopoly Agreements', market-sharing or joint boycott cartels; and</li> <li>• in the case of the Rules relating to 'Abuse of Dominant Market Position', abuse practices such as refusals to deal, exclusive dealing, tying practices, and application of discriminatory terms.</li> </ul> <p>Both of these Rules also contain provisions dealing with applicable penalties and exemptions, which (like some of the other substantive aspects of the Rules) largely restate text in the AML.</p>
<p>Rules on Industry and Commerce Authorities' Prohibiting Abuse of Administrative Powers to Exclude or Restrict Competition</p>	<p>Outlines, and provides some explanation of both the assessment and enforcement methodology relating to 'administrative monopoly' practices (being use of administrative powers by relevant government-related bodies to exclude or restrict competition). These Rules also set out the responsibilities that apply to business operators not to take advantage of any administrative monopoly arrangements that do exist to implement or enforcement arrangements that would violate the AML. Further, these Rules contain provisions dealing with applicable penalties which largely restate text in the AML.</p>

Several drafts of each of the Rules mentioned above were published by the NDRC and SAIC during 2009 and 2010, and those drafts were the subject of extensive consultation between the antitrust agencies and the business sector, lawyers and academics. These consultation processes are generally regarded as having been very productive, with some significant enhancements being made to each of the Rules (in terms of their alignment with assessment and enforcement methodology in mature antitrust regimes) before their recent finalisation.

### How helpful are the new Rules in terms of ‘guiding’ business operator conduct?

While the main new ‘substantive’ Rules relevant to business operators (being the NDRC’s *Rules on Anti-Price Monopoly*, and the SAIC’s *Rules on Industry and Commerce Authorities’ Prohibiting Monopoly Agreements and Rules on Industry and Commerce Authorities’ Prohibiting Abuse of Dominant Market Position*) do provide new information and explanation in relation to the AML’s behavioural prohibitions, they offer significantly less practical guidance than business operators dealing in jurisdictions such as the EU and US will be used to receiving via explanatory documents or guidance regulations in those jurisdictions. Accordingly the true scope and impact of many of the AML behavioural prohibitions is only likely to become clearer once the SAIC and NDRC begin enhanced enforcement of these rules.

For example, the *Rules on Anti-Price Monopoly* confirm text in the AML that identifies below-cost pricing by dominant business operators as behaviour that can be deemed unlawful abuse of dominance in China, or alternatively can be deemed lawful when “justified” in all the circumstances. These Rules helpfully supplement the AML text by providing several examples of valid justifications for below-cost pricing (e.g. when business operators are disposing of fresh produce or seasonal products which may otherwise expire without sale). However, no attempt is made in the Rules to address or signal the NDRC’s favoured approach regarding some of the more contentious issues that antitrust regulators around the world commonly grapple with in such ‘predatory pricing’ cases, such as how below-cost pricing is identified (i.e. what is the appropriate measure of cost to use?) and whether it is necessary to show that the relevant business operator would be able to recoup any losses made through the below-cost pricing in order for such pricing to be considered unlawful abuse.

Similarly, the *Rules on Anti-Price Monopoly* confirm that the practice of resale price maintenance (i.e. stipulating a specific or minimum price at which goods may be resold) will breach the AML monopoly agreement prohibition unless a relevant exclusion applies. However, these Rules provide no new information to supplement or elaborate on the very general text in the AML referencing the exclusion - which simply provides that an agreement or arrangement which may otherwise breach the monopoly agreement prohibition will be lawful if its purpose is to achieve certain efficiencies or other public or business benefits. Accordingly, promulgation of these Rules fails to resolve the many uncertainties that exist about the circumstances in which business operators can include resale price restrictions in their agreements with distributors or retailers.

This dearth of crucial details is evident throughout the substantive Rules, and accordingly the extent to which they provide useful compliance guidance to business operators is limited.

Nonetheless, the information in the substantive Rules on issues such as the types of “justifications” that may be recognised for conduct that otherwise may be deemed unlawful abuse of dominance will be welcomed by

relevant businesses operating in China.

Amongst the useful guidance or explanation that is provided in the substantive Rules, the following is particularly notable:

- Article 11 of the *Rules on Anti-Price Monopoly* lists factors the NDRC will consider when determining if pricing by dominant business operators is “unfairly high” or “unfairly low”. These factors include whether the sale price has increased or decreased beyond a “normal range” despite costs being “generally stable”, and how the prices compare with the charges imposed by other business operators;
- Article 13 of the *Rules on Anti-Price Monopoly* indicates that a dominant business operator may be deemed to have a valid justification for refusing to trade with a willing counterparty (conduct which may otherwise constitute an unlawful ‘refusal to deal’) if significant transaction risks would arise through such trade (which it seems from the Rules will be accepted as the case if the counterparty has an adverse credit history or there is “continued deterioration” of operating conditions on the part of the counterparty). Also in relation to a refusal to trade, the SAIC’s *Rules on Industry and Commerce Authorities’ Prohibiting Abuse of Dominant Market Position* indicates that a form of the ‘essential facilities’ doctrine that is applied in jurisdictions like the US will also apply in China, with the SAIC Rules providing that the abuse of dominance prohibition will be breached where a dominant business operator unreasonably prevents counterparties from accessing its essential facilities/network and such access is necessary for others’ operation;
- Article 14 of the *Rules on Anti-Price Monopoly* indicates that trading terms imposed by a dominant business operator will not be deemed to be unreasonable or unjustifiably restrictive terms in violation of the abuse of dominance prohibition in the AML if the purpose of those terms is to ensure product quality and safety or maintain/improve brand image or service levels.

The SAIC *Rules on Industry and Commerce Authorities’ Prohibiting Monopoly Agreements and Rules on Industry and Commerce Authorities’ Prohibiting Abuse of Dominant Market Position* are less detailed than the substantive NDRC Rules, and provide less guidance regarding when relevant exemptions/exclusions from the relevant prohibitions over which they have jurisdiction may apply. In the main, the SAIC’s substantive Rules simply provide more specific examples of the types of agreements and arrangements that may violate the AML’s behavioural prohibitions - rather than explaining when relevant exclusions may apply or indicating the methodology that will be applied to determine whether conduct relevantly limits or excludes competition.

## Leniency

The NDRC’s *Rules on Anti-Price Monopoly Administrative Law Enforcement Procedures* and the SAIC’s *Rules on Industry and Commerce Authorities’ Prohibiting Monopoly Agreements* both contain provisions explaining aspects of the AML’s leniency regime.

In summary, these Rules provide that a business operator who actively reports their involvement in a ‘monopoly agreement’ (such as a price cartel) in violation of the AML, and provide significant evidence regarding that violation, may qualify for leniency in the form of fine reductions.

According to the NDRC Rules mentioned above, these fine reductions will be as follows:

If the reporting business operator is the:	Possible fine reduction
First to report	100 percent
Second to report	no less than 50 percent
Others	no more than 50 percent

Notably, the SAIC Rules mentioned above do not detail possible fine reduction percentages beyond those applicable to the ‘first to report’ business operator (in respect of which the SAIC position mirrors the NDRC position). This is the most significant of several apparent inconsistencies between the NDRC and SAIC provisions in this area, and the uncertainty generated by these inconsistencies will be an ongoing concern for business operators - particularly as some conduct may be seen to potentially fall within the jurisdiction of both anti-monopoly agencies.

### New enforcement action following promulgation of the new Rules

Shortly after the promulgation of the new Rules described above, the NDRC announced that it had fined a paper manufacturer trade association (the Zhejiang Fuyang Paper Association) in Fuyang City of China RMB500,000 for price fixing and coordinating output on 4 January 2011. Although the NDRC has been involved in a number of anti-cartel enforcement actions in recent months, those actions were taken under powers vested in the NDRC by laws other than the AML, such as China’s Price Law. It is understood the 4 January action is the first time the NDRC has fined a price cartel under the AML.

In announcing this new enforcement action, the NDRC stated that it would seek to continuously publish typical price violation cases with a view to strengthening enforcement under the AML.

### What does all of this mean for businesses operating in, or selling into, China?

The long-awaited finalisation of the above anti-monopoly implementing rules, in conjunction with the latest anti-cartel case in Fuyang City, appears to signal the beginning of a new phase in antitrust enforcement in China. After being largely dormant since the AML commenced in August 2008, the AML’s behavioural prohibitions appear set to be given new prominence in 2011 and beyond, and business operators in China should ensure they are in a position to maximise compliance with these prohibitions.

Although only limited guidance is available to business operators in the new Rules, learnings from other mature antitrust regimes and an understanding of the likely enforcement priorities of China’s antitrust agencies can aid business operators to avoid arrangements giving rise to significant risks under the AML. Mayer Brown JSM’s involvement in the consultation process leading to finalisation of the new Rules, and ongoing dialogue with China’s key antitrust agencies, mean the firm is uniquely placed to assist both domestic Chinese firms and international business operators with their AML compliance endeavours.

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