A Decade in Review: Antitrust Enforcement by China’s NDRC and SAIC

Yong Huang, Elizabeth Xiao-Ru Wang, and Roger Xin Zhang

The year 2018 marks a decade of antitrust enforcement in China since the Anti-Monopoly Law (AML) was enacted. China recently announced the creation of the State Administration for Market Regulation (SAMR), which consolidates the enforcement responsibilities of existing antitrust bureaus that were previously hosted within the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration for Industry and Commerce (SAIC). This is a significant regulatory development that will have profound implications for future antitrust enforcement in China.

Against that backdrop, this article provides an overview of past antitrust investigations conducted by the NDRC and the SAIC and discusses the potential effects of the recent regulatory restructuring on antitrust enforcement in China going forward. We first discuss the roles of the NDRC and the SAIC in China’s antitrust enforcement. We then provide an analysis of the past rulings published by the NDRC and the SAIC. We highlight two landmark cases and discuss the economic framework embodied in the agencies’ rulings in these cases. Finally, we identify both potential uncertainties and synergies resulting from the consolidation of antitrust enforcement under the SAMR.

Roles of the NDRC and the SAIC in China’s Antitrust Enforcement

When the AML was enacted in 2008, agencies within three different ministries were given responsibilities for enforcing different aspects of the it. In particular, merger review is the responsibility of a bureau under MOFCOM. The NDRC’s duty of AML enforcement is to investigate price-related conduct, such as price-fixing agreements and abuse of market dominance through monopolistic pricing behaviors. The SAIC is primarily responsible for investigating non-price related monopolistic conduct such as market division, exclusive dealing, and tying/bundling arrangements. Under the existing regime, conduct that involves both price and non-price violations can be subject to investigations by both the NDRC and the SAIC. In addition, the NDRC and the SAIC also have the authority to investigate conduct involving abuse of administrative power to eliminate or restrict competition, a unique aspect of China’s AML that aims to curtail the misuse of government power.

Furthermore, both the NDRC and the SAIC have significant enforcement resources at the local level, e.g., at the provincial and municipal level. The agencies’ local branches have been actively engaged in antitrust enforcement activities. For example, in 2017 the Zhejiang Provincial Price

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1 Specifically, Chapter 2 of the AML identifies various monopolistic agreements (including both horizontal agreements in Article 13 and non-horizontal agreements in Article 14), Chapter 3 of the AML lists various types of conduct that can constitute an abuse of market dominance, and Chapter 5 of the AML lists various types of conduct that can constitute an abuse of administrative power that eliminates or restricts competition.
Bureau under the NDRC investigated and penalized 17 paper manufacturers and an associated trade association for horizontally fixing the prices of paper products. In another 2017 investigation conducted by Zhengzhou Provincial Price Bureau under the NDRC, 23 electricity supply companies and their associated trade association were penalized for horizontal price fixing.

Similarly, in 2016, the SAIC delegated its Shandong branch to investigate a natural gas provider that was found to have abused its market dominance by forcing its customers to pre-pay for services.

According to existing provisions, any individual or any company can file an anti-monopoly complaint to these authorities. A substantial portion of the agencies’ investigations to date have been triggered by complaints made to the agencies by competitors or consumers. For example, several NDRC’s investigations were initiated based on complaints from the public, including the 2013 automobile insurance price-fixing investigations and the 2017 Zhengzhou electricity supplier horizontal price-fixing investigation. Similarly, a few SAIC investigations were initiated due to complaints from the public and the media, including investigations into abuse of dominance conduct by telecommunication services and utilities companies.

Aside from conducting antitrust investigations under the AML, the NDRC and the SAIC engage in significant legislative efforts, particularly with respect to drafting guidelines for certain industries and key enforcement areas. For example, in March 2016, the NDRC published a draft of anti-monopoly guidelines for the automobile industry, the first of its kind authorized by the Anti-Monopoly Commission under the State Council. More recently, the NDRC published trade association price behavior guidelines in July 2017, and price behavior guidelines for operators of active pharmaceutical ingredients and drugs prone to shortages in November 2017. In 2016, the NDRC also issued four other draft guidelines on leniency, commitment, exemption procedures, and illegal gains and fines. In 2010, the SAIC published a set of three substantive regulations to

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implement the AML.\textsuperscript{12} Recently, the SAIC, along with the NDRC, MOFCOM, and the State Intellectual Property Office (SIPO), also drafted intellectual property guidelines.\textsuperscript{13}

On March 17, 2018, China passed new legislation to create a new authority—the SAMR—that will take over antitrust and regulation related responsibilities from the NDRC, the SAIC, and MOFCOM.

**Key Patterns of the Enforcement Activities by the NDRC and the SAIC**

**Number of Investigations Released.** Since the AML was enacted in 2008, both the NDRC and the SAIC have increased their enforcement activities. It was reported that the NDRC and its local branches have conducted more than 210 AML investigations over the last decade.\textsuperscript{14} Between 2008 and 2012, when AML enforcement was in its early stage, the NDRC conducted a total of approximately 20 investigations.\textsuperscript{15} Its enforcement activities have increased significantly since 2013, and reached a record high of over 70 concluded investigations in 2017.\textsuperscript{16} Among those closed investigations in 2017, 16 involved conduct related to monopolistic agreements and/or abuse of dominance and over 60 involved abuse of administrative power.\textsuperscript{17}

Between 2008 and 2017, it was reported that the SAIC and its local branches conducted more than 130 investigations, including 41 related to abuse of administrative power and 91 related to monopolistic agreements and/or abuse of market dominance.\textsuperscript{18} To the best of our knowledge, approximately half of the SAIC’s investigations have been concluded to date.

Not all of the agencies’ official decisions are publicly available. The NDRC started publishing its official decisions in September 2014 (including some cases closed in 2013).\textsuperscript{19} Similarly, in 2013, the SAIC published all of its historical decisions and began publishing current decisions for closed investigations involving monopolistic agreements and/or abuse of market dominance.\textsuperscript{20} While the

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\textsuperscript{12} These regulations are published on the SAIC’s website, http://home.saic.gov.cn/fldyfbzdjz/zcfg/ (in Chinese).


\textsuperscript{16} China Fair Competition Net, supra note 14.

\textsuperscript{17} Id.

\textsuperscript{18} Id.


\textsuperscript{20} All the SAIC decisions involving monopolistic agreements and abuse of market dominance are published on the “Competition Enforcement Bulletin” section on the SAIC’s website, http://home.saic.gov.cn/fldyfbzdjz/zffgg/ (in Chinese).
NDRC has released some of its decisions related to abuse of administrative power, it appears that the SAIC’s website has not. 21

The NDRC and the SAIC conduct enforcement activities at both the national and the local level (e.g., at the provincial or municipal level). However, it is our understanding that although the NDRC’s website has posted its decisions in all national-level investigations since 2014, only a handful of the NDRC’s local branches have released a subset of their official decisions. In contrast, it appears that the SAIC has published decisions issued at both the national and local levels.

Our review in the rest of this section focuses on decisions that have been officially released on the agencies’ websites. Pre-2013 decisions and rulings issued by the local NDRC branches are typically not posted on the national NDRC’s website. Such decisions are not included in our analysis. The SAIC has published all decisions on closed investigations against monopolist agreement and abuse of market dominance on its website, including those conducted by its local branches. Our analysis thus includes all these SAIC’s AML investigations with official rulings. To the extent that the NDRC and the SAIC closed investigations without finding violations and thus did not publish any official decisions, these matters are not included in our study.

Figure 1 below summarizes, by publishing year, the number of parties that have received an official ruling from the NDRC and the SAIC. 22 To date, the NDRC has published official decisions issued to 118 parties, including 73 for abuse of market dominance and/or monopolistic agreement and 45 for abuse of administrative power. The SAIC has published official decisions issued to 214 parties for abuse of market dominance and/or monopolistic agreement.

21 In February 2018, one such abuse of administrative power decision was published on a local SAIC’s website instead of the national SAIC’s website. See Jiangsu Administration for Industry and Commerce, Re Correcting the Abuse of Administrative Power of Suzhou Road and Transportation Management Agency (Feb. 26, 2018), http://www.zggpjz.com/m/view.php?aid=3333 (in Chinese). See also Pengpai News, supra note 19.

22 We have noticed that there is usually a delay between the date the official decision was made and the date the decision was publicly released. This is especially the case for the SAIC investigations ruled on before 2013 because all these decisions were publicly published in 2013. In addition, 24 of the decisions the NDRC published in 2014 are titled “NDRC Administrative Penalty Decision of 2013.” Therefore, we count these as 2013 decisions in this figure.
Types of Conduct. The NDRC’s and the SAIC’s enforcement activities focus on three categories of anticompetitive conduct: monopolistic agreement, abuse of market dominance, and abuse of administrative power. In this section, we provide a breakdown of the agencies’ decisions by the type of conduct within the categories of monopolistic agreements and abuse of market dominance. Because the agencies’ websites (particularly the SAIC’s website) do not contain sufficiently comprehensive information on abuse of administrative power, we focus our analysis on the agencies’ non-administrative investigation decisions.

With respect to monopolistic agreements, Article 13 of the AML prohibits competitors from reaching horizontal agreements on fixing prices, restricting production or capacity, dividing markets, restricting technology advancement or innovation, group boycotting, and other monopolistic conduct. In addition, Article 14 prohibits vertical agreements involving fixing resale prices, restricting minimum resale prices and other conduct deemed as monopolistic agreements by the agencies.

For abuse of market dominance, Article 17 of the AML prohibits behaviors involving excessively high or unfairly low pricing, predatory pricing, refusal to deal, exclusive dealing, tying, price discrimination or unfair trade conditions, and other types of conduct deemed by the agencies as abuse of market dominance.

Table 1 below summarizes the types of anticompetitive conduct that have been identified in the agencies’ released decisions and reports the number of parties involved in each.23

<table>
<thead>
<tr>
<th>Category</th>
<th>Types of Conduct</th>
<th># of Parties Investigated by the NDRC</th>
<th># of Parties Investigated by the SAIC</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monopolistic Agreements</td>
<td>Market Division</td>
<td>12</td>
<td>139</td>
<td>151</td>
</tr>
<tr>
<td></td>
<td>Horizontal Price Fixing</td>
<td>68</td>
<td>0</td>
<td>68</td>
</tr>
<tr>
<td></td>
<td>Production or Capacity Restrictions</td>
<td>0</td>
<td>28</td>
<td>28</td>
</tr>
<tr>
<td></td>
<td>Monopolistic Conduct Involving Trade Associations</td>
<td>1</td>
<td>15</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>Group Boycotts</td>
<td>3</td>
<td>11</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>Resale Price Maintenance</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Tying</td>
<td>1</td>
<td>21</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>Refusal to Deal</td>
<td>2</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Exclusive Dealing</td>
<td>0</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Abuse of Market Dominance</td>
<td>Price Discrimination</td>
<td>0</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Excessive Pricing</td>
<td>3</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Other Acts of Abuse or Dominance</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

A large portion of the agencies’ enforcement activities involve investigating horizontal agreements (e.g., horizontal market division, price fixing, production or capacity restrictions, monopolistic conduct involving trade associations, and group boycotts).

The NDRC’s top enforcement focus has been price-related horizontal arrangements. Another important area of the NDRC’s enforcement, though not shown in Table 1 due to the limited num-

23 Investigations involving more than one anticompetitive conduct are counted multiples times in this table.
Figure 2: Parties Involved in a Horizontal Arrangement
Based on Official Releases Between 2013 and May 2018

Our analysis shows that for the horizontal arrangements discussed in the agencies’ decisions, it is not uncommon for more than 10 parties to be involved.

For example, in 2016, the NDRC’s Shanghai branch investigated and penalized a dairy manufacturer for resale price maintenance of its pasteurized milk products.25

For the SAIC, the most heavily investigated areas have been non-price related horizontal arrangements, such as those involving market division, production/capacity restrictions, and trade associations. For abuse of market dominance, the SAIC heavily investigated tying and bundling arrangements.

For the horizontal arrangements investigated by the agencies, in particular, the number of participants in these agreements can vary considerably case by case. Figure 2 below shows the distribution of number of parties involved in the agencies’ decisions regarding horizontal arrangements.

Our analysis shows that for the horizontal arrangements discussed in the agencies’ decisions, it is not uncommon for more than 10 parties to be involved. For example, in an investigation the NDRC closed in 2017, 18 domestic polyvinyl chloride (PVC) manufacturers, including 11 state-owned entities (SOEs), were found to have reached an agreement to increase PVC prices through meetings and WeChat (a popular Chinese social media app) communications.26 In the largest SAIC investigation by number of parties involved, 23 accounting firms in Shandong Province, led by the Tianyuan Tongtai Certified Public Accountant Firm, were found in violation of the AML by dividing the local public accounting service market.

The SAIC also issued six decisions in which only a trade association was investigated (the investigations involving just one entity in Figure 2). For example, in one investigation, the Huainan City Freight Association was found to have violated the AML by restricting its members to exclusively dealing with five designated property insurance companies. According to the SAIC’s decision, the freight association called a meeting with representatives from its 26 members. During this meeting, the members were asked to elect five property insurance companies that they wanted to conduct business with most, and the association asked its members to deal only with these

companies. The investigation concluded that the freight association violated the AML for organizing anticompetitive conduct (i.e., group boycott). However, the individual members were not separately investigated or penalized.27

**Industry Focus.** Our analysis shows that the NDRC’s and the SAIC’s investigations have covered a wide range of industries, particularly those closely related to the welfare of the Chinese people. Table 2 below summarizes the agencies’ investigations by industry.

<table>
<thead>
<tr>
<th>Industry</th>
<th># of Parties Investigated by the NDRC</th>
<th># of Parties Investigated by the SAIC</th>
<th>Combined</th>
</tr>
</thead>
<tbody>
<tr>
<td>Insurance</td>
<td>24</td>
<td>55</td>
<td>79</td>
</tr>
<tr>
<td>Industrial Materials</td>
<td>18</td>
<td>60</td>
<td>78</td>
</tr>
<tr>
<td>Consumer Products and Services</td>
<td>12</td>
<td>38</td>
<td>50</td>
</tr>
<tr>
<td>Professional Services</td>
<td>0</td>
<td>23</td>
<td>23</td>
</tr>
<tr>
<td>Health Care</td>
<td>10</td>
<td>5</td>
<td>15</td>
</tr>
<tr>
<td>Utilities</td>
<td>0</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>Transportation</td>
<td>8</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Information Technology</td>
<td>1</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td>Telecommunication Services</td>
<td>0</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Construction &amp; Engineering</td>
<td>0</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Energy</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>73</strong></td>
<td><strong>214</strong></td>
<td><strong>287</strong></td>
</tr>
</tbody>
</table>

According to our analysis of the agencies’ decisions, the insurance, industrial materials, and consumer products and services industries received top attention from both agencies. The insurance industry has had the largest number of entities investigated, where the NDRC mainly reviewed conduct involving horizontal price fixing. For example, in 2013, Zhejiang Insurance Trade Association as well as a number of individual insurance companies were found to have violated the AML by fixing automobile insurance prices in the local market.28

The SAIC has investigated the industrial materials, insurance, and consumer products and services industries most frequently. Among the most heavily investigated conduct are market division, production and capacity restrictions, and monopolistic conduct by trade associations. For example, in 2015, 10 shale brick manufacturers in Hunan Province were investigated by the SAIC and found to have restricted the production volume of shale brick and divided the local shale brick market.29 In a 2017 Motorcycle Insurance investigation, the SAIC found that the Hechi Insurance Trade Association and nine local insurance companies violated the AML by dividing the local motorcycle insurance market, by organizing meetings among competitors and engaging in market dividing activities.30

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**Types of Entities Under Investigation.** The NDRC’s and the SAIC’s enforcement activities relating to monopolistic arrangements and abuse of market dominance have targeted a range of different entities, among which foreign or foreign-controlled companies account for only a small share. It is reported that between August 2008 and the summer of 2014, only 10 percent of the entities the NDRC and its provincial branches investigated under the AML were foreign or foreign-controlled companies.31

Table 3 below reports the number of entities investigated by the NDRC or the SAIC by type (i.e., foreign entities, SOEs, trade associations, and other domestic companies), as revealed in their published decisions.

<table>
<thead>
<tr>
<th>Types of Entities</th>
<th># of Parties Investigated by the NDRC</th>
<th># of Parties Investigated by the SAIC</th>
<th>Combined</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreign Entities</td>
<td>22</td>
<td>2</td>
<td>24</td>
</tr>
<tr>
<td>SOEs</td>
<td>26</td>
<td>35</td>
<td>61</td>
</tr>
<tr>
<td>Trade Associations</td>
<td>1</td>
<td>15</td>
<td>16</td>
</tr>
<tr>
<td>Others</td>
<td>24</td>
<td>162</td>
<td>186</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>73</strong></td>
<td><strong>214</strong></td>
<td><strong>287</strong></td>
</tr>
</tbody>
</table>

The table shows that according to decisions published between 2013 and May 2018, the NDRC investigated 73 entities, of which 22 (or 30 percent) were foreign or foreign-controlled companies. Importantly, because the decisions made by the NDRC’s local branches are not published on the NDRC’s website and therefore not included in our analysis, our result may overstate the extent to which foreign entities are investigated. The local NDRC branches are often focused more on domestic firms involved in AML violations. Very few foreign entities have been the target of the SAIC’s investigations. To date, of the 214 entities the SAIC has issued a ruling to, only two are foreign entities.

It is worth noting that there are instances where horizontal agreement investigations involved both foreign and domestic companies. For example, in 2013, the NDRC closed an investigation against nine baby formula manufacturers that were found in violation of the AML for resale price maintenance.32 Among the parties the NDRC investigated, seven were foreign brands and two were domestic brands.33

It is also evident that SOEs have not been exempted from NDRC and the SAIC scrutiny. As shown in Table 3 above, according to the decisions issued to date, the NDRC has investigated SOEs in 26 of 73 (or 36 percent) investigations, and the SAIC has investigated SOEs in 35 of 214

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(or 16 percent) investigations. These SOEs are mostly in the financial, industrial material, utility, telecommunication services, or health care industries. They were found to have violated the AML for engaging in horizontal price fixing, market division, and tying.

**Fines and Remedies.** When a company’s anticompetitive conduct is established, the agencies can confiscate the company’s illegal gains and impose a monetary fine ranging from 1 to 10 percent of the company’s revenue in the previous year. The size of the fine is based on the nature, extent, and duration of anticompetitive conduct.

Figure 3 below shows the distribution of fines as a percent of prior year’s revenue, as revealed in the NDRC’s and the SAIC’s decisions.

In the decisions we reviewed, the vast majority of companies investigated by the NDRC were penalized for no more than 1 percent of their previous year’s revenue, and the vast majority of companies investigated by the SAIC were penalized with a fine of no more than 3 percent of their previous year’s revenue.

To date, the largest monetary fine by percent of revenue (i.e., 9 percent) was imposed by the NDRC in 2015 on Eukor Car Carriers, a specialized roll-on/roll-off shipping (RORO) company headquartered in South Korea. According to the NDRC decision, Eukor and seven other RORO companies violated the AML for horizontal price-fixing and market division activities. Eukor received a high percent fine not only because its violation lasted for a long period over a wide range of activities, but also because it played a leading role in some of the anticompetitive activities.

The largest fine percent imposed by the SAIC to date is 8 percent. Seven companies have been subject to this fine percent. For example, three domestic manufacturers of encrypted pay-

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34 See AML arts. 46 and 47.
35 See AML art. 49.
36 Different companies in the same case can be penalized using different fine percents. Trade associations and companies whose fine percent is not specified in the decisions are not included in this figure.
ment devices were found to have engaged in market division. These three companies met and agreed to only sell their products to their respectively designated bank clients. According to the decision, the fine was imposed because these companies violated the AML for five years, during which time they sold a large number of products at high prices and collected large sums of illegal gains.38

Table 4 below summarizes the top 10 monetary fines in terms of amount imposed on a single company by either the NDRC or SAIC.39 The largest monetary fine by amount was imposed by the NDRC on Qualcomm. The fine was RMB 6.09 billion (about USD $975 million, or 8 percent of its 2013 revenue in China).40 The SAIC has also imposed large fines. For example, in 2016 it fined Tetra Pak for illegal tying, exclusive dealing, and offering loyalty rebates in an amount of RMB 667.7 million (about USD $99 million, or 7 percent of its 2011 sales revenue in China)—to date the second largest in the history of China’s AML enforcement.

It is also worth noting that, though not shown here, investigations concluded by the NDRC’s local branches may impose big fines as well. For example, in an investigation conducted by the Shanghai Price Bureau under the NDRC in 2016, General Motors was found to have violated the AML for resale price maintenance and fined RMB 201 million (about USD $29 million, or 4 percent of its 2015 revenue in China).41

<table>
<thead>
<tr>
<th>Party</th>
<th>Agency</th>
<th>Year of Decision</th>
<th>Types of Conduct</th>
<th>Percent</th>
<th>Fine Amount (RMB)</th>
<th>Fine Amount (USD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qualcomm</td>
<td>NDRC</td>
<td>2015</td>
<td>Excessive Pricing Bundling; Unfair Trade Conditions</td>
<td>8%</td>
<td>6,088,000,000</td>
<td>975,000,000</td>
</tr>
<tr>
<td>Tetra Pak</td>
<td>SAIC</td>
<td>2016</td>
<td>Exclusive Dealing; Tying; Loyalty Rebates</td>
<td>7%</td>
<td>667,724,177</td>
<td>99,000,000</td>
</tr>
<tr>
<td>Sumitomo Electric</td>
<td>NDRC</td>
<td>2014</td>
<td>Horizontal Price Fixing</td>
<td>6%</td>
<td>290,400,000</td>
<td>47,073,000</td>
</tr>
<tr>
<td>Eukor Car Carriers</td>
<td>NDRC</td>
<td>2015</td>
<td>Horizontal Price Fixing; Market Division</td>
<td>9%</td>
<td>284,731,338</td>
<td>43,971,000</td>
</tr>
<tr>
<td>Yazaki</td>
<td>NDRC</td>
<td>2014</td>
<td>Horizontal Price Fixing</td>
<td>6%</td>
<td>241,080,000</td>
<td>39,078,000</td>
</tr>
<tr>
<td>NSK</td>
<td>NDRC</td>
<td>2014</td>
<td>Horizontal Price Fixing</td>
<td>4%</td>
<td>174,920,000</td>
<td>28,354,000</td>
</tr>
<tr>
<td>Denso</td>
<td>NDRC</td>
<td>2014</td>
<td>Horizontal Price Fixing</td>
<td>4%</td>
<td>150,560,000</td>
<td>24,405,000</td>
</tr>
<tr>
<td>NTN</td>
<td>NDRC</td>
<td>2014</td>
<td>Horizontal Price Fixing</td>
<td>6%</td>
<td>119,160,000</td>
<td>19,315,000</td>
</tr>
<tr>
<td>Medtronic</td>
<td>NDRC</td>
<td>2016</td>
<td>Resale Price Maintenance</td>
<td>4%</td>
<td>118,520,000</td>
<td>17,200,000</td>
</tr>
<tr>
<td>JTEXT</td>
<td>NDRC</td>
<td>2014</td>
<td>Horizontal Price Fixing</td>
<td>8%</td>
<td>109,360,000</td>
<td>17,727,000</td>
</tr>
</tbody>
</table>

A company found in violation of the AML can be exempted from a monetary fine under certain conditions.42 For example, the NDRC investigated the horizontal price-fixing conduct of eight Japanese auto parts manufacturers. One of the manufacturers, Hitachi, was exempted from mon-

39 The fines discussed in this paragraph and in Table 4 do not include the confiscated income from illegal conduct.
42 See AML art. 46.
etary fines because it was the first to report anticompetitive conduct to the authorities and provided supporting evidence. The other manufacturers received a fine up to 8 percent of their prior year’s revenue.

The agencies can also impose non-monetary remedies instead of or in addition to a monetary fine. For example, the SAIC’s Inner Mongolia Branch started to investigate China Mobile at the Inner Mongolia province for its abuse of market dominance in April 2014. China Mobile’s Inner Mongolia subsidiary was found to have taken away users’ remaining mobile data balance at the end of each month. The company subsequently introduced data rollover and other related services. In December 2017, the SAIC terminated the investigation because China Mobile’s Inner Mongolia branch had fulfilled its remedies in time. The company did not receive a monetary fine.

In contrast, Qualcomm was required to pay a large fine and cease bundling standard-essential patents (SEPs) with non-SEPs in its licensing practice, using the wholesale price of handsets as the royalty base in China, and selling its baseband chips with unreasonable trade conditions.

The Economic Framework of Investigations Against Abuse of Market Dominance

Although a substantial number of cases the agencies have investigated involve cartels and abuse of administrative power, economic analysis typically plays a relatively small role in those types of antitrust investigations. Abuse of market dominance cases, however, are often highly complex and are evaluated by the agencies on a rule-of-reason basis. These cases, though few in number, usually require fact-intensive antitrust analysis.

A review of publicly released rulings suggests that the agencies typically follow a four-step approach in analyzing such cases:

Step 1: define the relevant market;
Step 2: establish market dominance;
Step 3: identify the abusive conduct; and
Step 4: assess business justification and evaluate the competitive effects of the conduct.

In this section, we first summarize the types of abuse-of-dominance conduct that are subject to antitrust scrutiny under China’s AML. We then focus on two of the agencies’ landmark decisions—the NDRC’s investigation of Qualcomm, which concluded in 2015, and the SAIC’s investigation of Tetra Pak, which concluded in 2016—to assess the agencies’ analytical framework from an economic perspective. In these two landmark cases, the agencies generally followed the four-step framework to reach their conclusions.

Types of Abuse of Dominance Conduct Prohibited by the AML. Article 17 of the AML specifies that firms “holding dominant market positions are prohibited from doing the following by abusing their dominant market positions:”

1. selling products at excessive prices or buying products at unfairly low prices;
2. selling products at prices below cost without justification;
3. refusal to deal without justification;

47 See AML art. 17.
(4) exclusive dealing without justification;
(5) bundling or imposing unreasonable conditions without justification;
(6) discriminatory treatments (in terms of prices or other transaction terms) without justification; and
(7) other abusive conduct identified by the AML enforcement authorities.

All of the above identified abusive types of conduct are subject to business justifications, for which the burden of proof rests upon the dominant firm. Establishing market dominance and evaluating the appropriate business justifications for the alleged conduct are often at the center of the agencies’ investigations.

The AML specifies that a dominant market position should be determined on the basis of the following factors:

- market share and competitive conditions of the market;
- ability to control the sales market or the market for raw materials;
- financial strength and technical conditions;
- the extent to which other firms depend on the party under investigation;
- entry barriers to the relevant market; and
- other factors related to the determination of the dominant market position.

It is important to note that a firm with a market share of 50 percent or more is presumptively deemed to possess a dominant market position under the AML.

**Analytical Framework in the NDRC’s 2015 Qualcomm Ruling.** The NDRC launched an investigation into Qualcomm’s licensing and sales practices in November 2013 and concluded, in February 2015, that Qualcomm’s conduct had the effects of restricting competition. The agency issued a fine of RMB 6.09 billion (about USD $975 million, or 8 percent of its 2013 revenue in China), the highest amount in the AML enforcement history to date.

Qualcomm owns a number of SEPs for CDMA, WCDMA, and LTE wireless communication. It also manufactures and sells baseband chips, a smartphone component that supports various wireless communication standards. The NDRC found that Qualcomm abused its market dominance in licensing its SEPs and sales of baseband chips.

In reaching this conclusion, for each of the telecommunication standards at issue, the NDRC first defined the following two relevant product markets: (1) a licensing market for the collection of Qualcomm’s SEPs (since Qualcomm offered portfolio licenses), where each SEP forms a separate relevant market; and (2) a market for baseband chip sales. The agency also found that the relevant geographic market for SEP licensing covers the jurisdictions where Qualcomm has SEPs, due to the territorial nature of patent application and protection. For baseband chips, the agency found that the relevant geographic market should be global because smartphone manufacturers buy chips worldwide and chipmakers compete for the sales of chips globally.

In each of these relevant markets, the NDRC concluded that Qualcomm held market dominance. In particular:
- For the SEP licensing markets, the agency stated that once a patent is adopted in a stan-
standard, it excludes other competing patents and thus has no substitute. The agency also found a lack of demand-side substitution because it is necessary for the device manufacturers to license Qualcomm's SEPs, or otherwise the devices cannot conform to the corresponding standards.

- For the baseband chip markets, the agency examined both demand-side and supply-side substitutability of Qualcomm's products. The NDRC found that device manufacturers had little choice but to use Qualcomm's baseband chips that support a corresponding telecommunications standard. In addition, there is a high technical barrier that prevents other chip producers from quickly adjusting their production and reacting to changes in demand and prices for baseband chips.

The NDRC found that Qualcomm's market share was 100 percent in the relevant markets of SEP licensing, and its market shares in the relevant baseband chip markets exceeded 50 percent, the threshold for presumptive market dominance under the AML. The NDRC concluded that Qualcomm presumptively possessed a dominant position in all relevant markets.

In addition to assessing market share, the agency also considered the following factors in determining that Qualcomm had a dominant market position:

- Qualcomm had a high ability to control both the SEP licensing and baseband chips markets;
- smartphone manufacturers highly depend on Qualcomm's SEPs in order to produce devices that conform to a standard;
- Qualcomm's baseband chip products are also crucial for the device manufacturers due to the limited number of chip suppliers and their relatively high preference for Qualcomm's middle- and high-end baseband chips; and
- entry into the SEP and baseband chip markets is difficult due to high technical barriers.

The NDRC then identified the Qualcomm conduct that violated the AML, including:

- **Excessive Pricing.** The agency concluded that Qualcomm charged excessively high royalties for its SEPs, based on findings that (1) Qualcomm did not provide a list of its patents to licensees and charged royalties based on portfolios that included expired patents; (2) Qualcomm required licensees to grant their patents back to Qualcomm for free; and (3) Qualcomm calculated its royalty on the basis of the price of a smartphone—a price beyond the scope of its SEPs. Qualcomm, in response, argued that it added new SEPs to its licensed portfolio in larger numbers than those that expired. However, the agency found this explanation unconvincing, in part because Qualcomm had not evaluated the value of these new SEPs relative to those that had expired. Qualcomm also provided justifications for the royalty-free grant-back requirement it imposed on some licensees: e.g., obtaining the grant-back would protect itself and its customers from risks of patent infringement, and the free grant-back was part of the total value agreed to by the parties. In the end, the agency was unpersuaded and held that Qualcomm's free grant-back request inhibited the licensees' motivation to innovate, and thereby excluded competition with respect to communication technology.

- **Bundling.** The agency also found that Qualcomm abused its market dominance by bundling the licensing of non-SEPs with SEPs without justification. Qualcomm offered several justifications for its bundling practices during the investigation, but the agency eventually held that (1) Qualcomm did not always offer a licensee a choice to license only its SEPs; and (2) Qualcomm's bundling practice had the effect of depriving a licensee of obtaining alternative technology from Qualcomm's competitors. Thus, the agency found that Qualcomm's bundling of SEPs and non-SEPs limited competition in the market for non-SEPs, hampered technical innovation, and ultimately harmed consumers.
Unreasonable Trade Conditions. The agency also found that Qualcomm abused its market dominance by making its sales of baseband chips conditional on the licensee not challenging the agreement. Should a licensee initiate litigation against Qualcomm, Qualcomm would cease the supply of chips to that licensee. The agency concluded that by imposing unreasonable conditions on its sales of baseband chips, Qualcomm restrained a licensee’s right to dispute its agreement with Qualcomm, and eliminated or restricted competition from licensees that do not accept such conditions.

In addition to the record-setting fine, the NDRC also ordered Qualcomm to cease the abusive conduct discussed above. Shortly after the NDRC ruling, Qualcomm agreed to implement a rectification plan, which included the following key terms:

- Qualcomm will offer licenses to its current 3G and 4G Chinese SEPs separately from licenses for its non-SEPs.
- Qualcomm will provide patent lists during the negotiation process.
- If Qualcomm seeks a cross license from a Chinese licensee, it will negotiate in good faith and provide fair consideration for its rights.
- For licenses of Qualcomm’s Chinese SEPs for devices sold for use in China, Qualcomm will charge royalties of 5 percent for 3G devices and 3.5 percent for 4G devices, in each case using a royalty base of 65 percent of the net selling price of the device.
- Qualcomm will give its existing licensees an opportunity to elect to take the new terms for sales of branded devices for use in China.
- Qualcomm will not condition the sale of baseband chips on the chip customer signing a license agreement with terms that the NDRC found to be unreasonable or on the chip customer not challenging unreasonable terms in its license agreement.

Analytical Framework in the SAIC’s 2016 Tetra Pak Ruling. In November 2016, the SAIC concluded its investigation into some of Tetra Pak’s business practices in China. After four years of investigation, it found Tetra Pak had abused its market dominance, and imposed a fine of RMB 667.7 million (about USD $97 million, or 7 percent of its 2011 sales revenue in China). This is the second largest fine in the history of enforcement under the AML to date.

Tetra Pak produces and distributes liquid food packaging equipment, packaging materials, and associated services for liquid foods, such as milk, fruit juices, and soups. The packaging containers Tetra Pak produces are mostly cartons made from paper. Among Tetra Pak’s portfolio are

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51 In particular, for devices sold for use in China, Qualcomm was ordered (1) to provide licensees a list of patents, and not to charge on expired patents; (2) not to require any grant-back, or grant-back without any reasonable royalty, of non-SEPs possessed by licensees; (3) not to persist in calculating the royalty on the basis of net selling price of the entire terminal device; (4) not to bundle the license of non-SEPs with SEPs without good cause; and (5) not to set unreasonable conditions for potential licensees to purchase its baseband chips.


aseptic packaging solutions intended for products that have especially demanding hygiene requirements, in particular, milk products with long shelf-lives and juice. These aseptic packaging solutions are the focus of the SAIC’s decision.

The SAIC defined three relevant product markets: (1) packaging equipment for aseptic paper packaging (packaging equipment), (2) aseptic paper packaging materials (packaging materials) and (3) technical services related to packaging equipment (services). In defining product markets, the agency considered a number of potential demand-side substitutes. In particular, the SAIC considered whether customers could substitute aseptic cartons with containers made from other materials, including glass, aluminum, and plastic. However, the SAIC found substantial differences between aseptic cartons and other packaging materials in terms of their product characteristics (in particular, the superior aseptic properties of cartons) and associated costs for customers. The agency also found high customer loyalty and high switching costs for customers of aseptic paper-based packaging. Overall, the SAIC concluded that demand-side substitutability was insufficient to justify a market broader than aseptic paper-based packaging. Similarly, the SAIC found that there was no substitutability on the supply side due to the substantial barriers that producers of other packaging materials would have faced when attempting to enter paper-based aseptic packaging markets. As a result of its review of substitution possibilities, the SAIC defined a product market that included only aseptic paper-based packaging. The SAIC defined the relevant geographic market as the mainland of China.

The SAIC found that Tetra Pak possessed market dominance in all three relevant markets. Tetra Pak had market shares exceeding 50 percent in all three markets, and the SAIC also analyzed three additional factors relevant for assessing dominance:

- ability to control the market: the SAIC found that Tetra Pak could impose trading conditions on its customers, indicating a high level of control;
- downstream firms' reliance on Tetra Pak: the SAIC investigation revealed that especially large dairies depended heavily on Tetra Pak to supply its aseptic packaging equipment, materials, and associated services; and
- barriers to entry: the SAIC concluded that there were substantial barriers to entry due to the high level of investment and technology required to enter the market.

The SAIC further noted that Tetra Pak’s prices and margins were higher than its competitors’, that it had advantages in acquiring raw materials, and that its offerings were much broader than its competitors’.

The SAIC concluded that Tetra Pak engaged in three different types of abusive conduct: tying, exclusive dealing, and loyalty rebates.

- **Tying**: The SAIC found that Tetra Pak tied its sales of packaging materials (or services) to the sales of packaging equipment. According to the SAIC, ensuring product quality (i.e., food safety) did not justify tying, mainly because other suppliers adhered to an industry standard that would safeguard product quality. Overall, the SAIC found that Tetra Pak’s tying practice limited its customers’ choice of packaging materials suppliers and, given Tetra Pak’s dominance in the equipment and services markets, restricted competition in the market.

- **Exclusive Dealing**: Tetra Pak signed an exclusive agreement with a subsidiary of Foshan Huaxin Packaging Co., Ltd. (Hongta), which stated that Hongta would supply the raw paper (a key input) used in the production of paper-based aseptic packaging materials exclusively to Tetra Pak. The SAIC found that this practice was not justified. According to the agency, Hongta relied on its own technology for producing paper and there was sufficient capacity to supply Tetra Pak and its competitors. Furthermore, the exclusive supply agreement put
Tetra Pak’s competitors at a disadvantage because they had to resort to inferior alternatives. Overall, the SAIC found that the exclusive supply agreement created entry barriers and restricted competition in the aseptic packaging materials market.

- **Loyalty Rebates:** Tetra Pak offered a number of different rebates to its customers. In its analysis, the SAIC acknowledged that rebates can have procompetitive as well as anticompetitive effects. Focusing in particular on retroactive rebates—rebates that apply to all units a customer buys once a certain threshold has been met—the SAIC found that Tetra Pak’s rebates hurt competition in this case.
  - According to the SAIC, a portion of Tetra Pak’s customers’ demand was non-contestable for competitors (due to Tetra Pak’s product portfolio, production capacity and contractual terms) and Tetra Pak was able to leverage its dominant position in this non-contestable portion of demand to the contestable portion by using retroactive rebates.
  - Competitors found it hard to compete against Tetra Pak, because retroactive rebates applied to all purchases once the threshold had been met, including units that were non-contestable, and competitors could only compete on the contestable units. In order to win a customer’s contestable demand, competitors would have to compensate the customer for forgone rebates on the non-contestable units. This meant competitors would have to offer very low prices.
  - According to the SAIC, such a situation would put competitors at a disadvantage and could have eventually led them to exit the market. The SAIC found that Tetra Pak’s conduct negatively impacted its competitors in the market for packaging materials, as they supplied low volumes, were unable to enjoy economies of scale, and had low margins as a result.

In addition to imposing a large fine, the SAIC issued the following orders regarding Tetra Pak’s illegal conduct:

- Tetra Pak will not tie its sales of packaging materials (or services) to the sales of packaging equipment.
- Tetra Pak will not restrict the trading party to deal exclusively with Tetra Pak without any justifiable reasons.
- Tetra Pak will not implement a loyalty-discount program that could potentially exclude or foreclose the competition in the packaging materials market.

**Formation of the SAMR and Its Implications for Future Antitrust Enforcement in China**

As discussed above, China’s AML enforcement regime is going through a major restructuring, with SAMR taking over antitrust and regulation responsibilities from MOFCOM, the NDRC, and the SAIC.\(^5\)\(^4\) This change of structure will undoubtedly change anti-monopoly enforcement in China. The short-run effects include increased uncertainty in the process and substance of AML enforcement due to changes in organizational structure and leadership. It will take time for law enforcement staff to align their different work styles and enforcement focuses. In the long run, however, we believe these differences will be largely resolved and there will be synergies in enforcement.

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\(^5\)\(^4\) The SAMR will also combine the responsibilities previously held by the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), the Certification and Accreditation Administration (CAC), the Standardization Administration of China (SAC), and the China Food and Drug Administration (CFDA).
practices by combining these authorities. We have considered these likely changes in detail below.

**Short-Term Uncertainties.** Consolidating several large institutions will be a highly challenging task. In the short run, there will be considerable uncertainties in both process and substance, mainly due to the lack of clarity regarding the newly formed SAMR’s organizational structure and leadership. First, it can take time for former officials to adapt to their newly assigned roles and responsibilities. Second, it can take time for officials and case handlers to familiarize themselves with new policy goals, new teams, and new data and tools that become available after consolidation.

In addition, the three authorities might have had separate agreements with other international competition authorities, which may take time to consolidate and renegotiate. Therefore, those complicated conduct investigations or M&A transactions that require more detailed analysis may take longer to be reviewed right after the consolidation.

Furthermore, each of the agencies has drafted and adopted different guidelines and industry regulations. Some of these documents offer different approaches in overlapping areas which may take time to reconcile.

**Long-Run Synergies.** Despite the potential prolonged review process for complicated matters in the short run, there will be synergies in AML enforcement in the long run. In particular, uncertainties will be eliminated due to the resolution of discrepancies in enforcement practices and ambiguities in certain areas of enforcement responsibilities among the three antitrust authorities.

First, bringing all the antitrust authorities under one roof will significantly reduce past regulatory uncertainties and administrative redundancies. For example, even though in the past the NDRC was in charge of investigating price-related conduct while the SAIC was in charge of investigating non-price-related conduct, it was not unusual for a case to involve both price and non-price related dimensions. As a result, abuse of dominance cases could be investigated by both the NDRC and the SAIC. For companies involved in potential enforcement activities, this created administrative uncertainty. Under the new SAMR, companies will be working with a single government agency, thus reducing this uncertainty.

Second, the consolidation will facilitate exchange of information and staff sharing by bringing conduct investigations and merger reviews under the same roof. It would be straightforward for the SAMR to draw on MOFCOM’s considerable experience, accumulated from merger reviews, in conducting and evaluating complex and data-intensive economic analysis in conducting investigations. In addition, the SAMR will also be able to assign resources more flexibly to increase enforcement efficiency.

**Conclusion**

The last ten years of AML enforcement has shined a spotlight on the role of competition in the Chinese economy, which is in a transition from a planned economy into a market economy. Indeed, China’s leadership has recognized that competition policy is one of the most important areas of regulation for the market economy. In particular, the Chinese government has envisioned that “in our economic reforms, we must concentrate on . . . ensuring the market-based allocation of production. . . . [W]e should ensure . . . fair and orderly competition,” and that “business survival is determined by competition.”

Furthermore, AML enforcement has cultivated and enhanced com-

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petition in Chinese society. Under the planned economic system of the past, government agencies, consumers, and companies (particularly SOEs) had little exposure to competition and antitrust principles. Following the introduction of AML enforcement, competition has gradually become a central theme in the economy, which has profoundly impacted stakeholders in a wide range of industries.

The establishment of the SAMR as the single antitrust authority in China is likely to create more opportunities to expand and deepen China’s opportunities for international collaboration. Antitrust enforcement often involves the same parties or the same issues across different jurisdictions around the globe. International collaboration has contributed significantly to the development of China’s antitrust enforcement, including the drafting of the AML and various guidelines and legislation, staff training at the Chinese antitrust agencies, as well as in-depth discussion about specific antitrust issues. In the last decade, there have been numerous collaborations on merger reviews between MOFCOM and other international antitrust agencies. However, collaboration in cases involving monopolistic agreements and abuse of market dominance remains rare. We believe that the creation of the SAMR will strengthen international collaboration in these areas and greatly improve the efficiency and transparency of China’s antitrust enforcement.

The past 10 years have witnessed the birth of China’s AML, an increasingly important role of antitrust enforcement, and the consolidation of antitrust power into a single entity. We expect that a unified, independent, and professional competition authority in China will bring more efficient antitrust enforcement and benefit Chinese economy for years to come.