

# Compliance with Chinese Antitrust Law

---

Fay Zhou

Linklaters LLP

28 October 2014



# Intensified enforcement action in the automotive sector

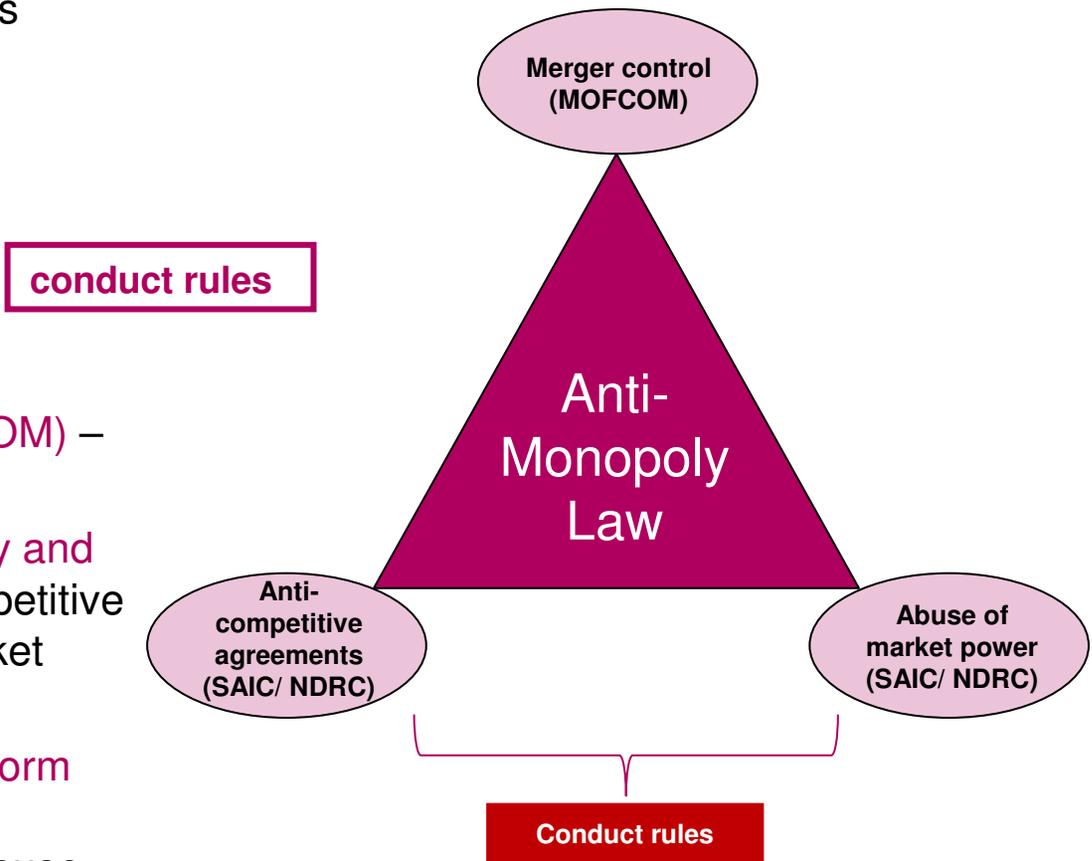
---

- > In August 2014, NDRC imposed **record fines of RMB 1.2 billion on twelve Japanese automotive parts manufacturers** for price-fixing.
- > Over the past few months, **major car manufacturers, including Jaguar Land Rover, BMW, Toyota, Nissan and Honda, announced price cuts** for their cars, parts and after-sale services in response to NDRC's expansive investigations in the automotive sector.
- > In September 2014, NDRC's local offices in Shanghai and Hubei sanctioned **Chrysler** (with fines in total RMB34 million) and **FAW-Volkswagen** (with fines in total RMB279 million) **and their dealers for price-fixing cartel and resale price maintenance arrangements.**
- > NDRC's probe of **Mercedes Benz and its dealers** is ongoing – the companies allegedly engaged in both **resale price maintenance and cartel-like conduct.**



# PRC Anti-monopoly Law and enforcement agencies

- > PRC Anti-Monopoly Law and its implementing rules and regulations (effective 2008)
  - > control of mergers and other business combinations
  - > anti-competitive agreements
  - > abuse of dominance
- > Enforcement agencies:
  - > Ministry of Commerce (MOFCOM) – merger controls
  - > State Administration of Industry and Commerce (SAIC) – anti-competitive agreements and abuse of market power (non-pricing related)
  - > National Development and Reform Commission (NDRC) – anti-competitive agreements and abuse of market power (pricing related)



## Conduct rules – recent enforcement initiatives

---

### **Emergence of an active enforcement regime in China since 2013**

- > Conduct regulators have had a “late start” applying the AML, and internal teams have been slowly built up at both central and provincial levels
- > Targeting a broad range of violations under the AML, including both coordinated and unilateral conduct

### **Agencies increasingly undertaking enforcement initiatives**

- > High-profile enforcement actions have been concluded with substantial fines
- > Multi-national companies have been targets of antitrust and anti-bribery investigations
- > Investigations so far have focused on consumer-related products, including primarily health care, automotive and food/ beverage

# Anti-competitive agreements

---

### **Horizontal monopoly agreements - price-fixing, market/customer allocation, output restriction, joint boycotting**

>Targeted **both foreign and domestic companies**, covering a wide range of sectors: automotive, rice noodle, salt, paper, jewellery, insurance service, tourism service, second-hand car, concrete, etc.

>Most orchestrated by **trade associations**

>More follow-on enforcement for **global cartels** (Japanese auto parts manufacturers; LCD panels)

>**Intra-brand cartel-like conduct** will also be captured in an investigation focusing on RPM

### **Vertical monopoly agreements - resale price maintenance (RPM), etc**

>**RPM** has emerged as particularly active and publicized enforcement area

>NDRC's high profile enforcement cases have raised the international profile

>NDRC has pointed to **indirect mechanisms for implementing RPM**

# Abuse of dominance

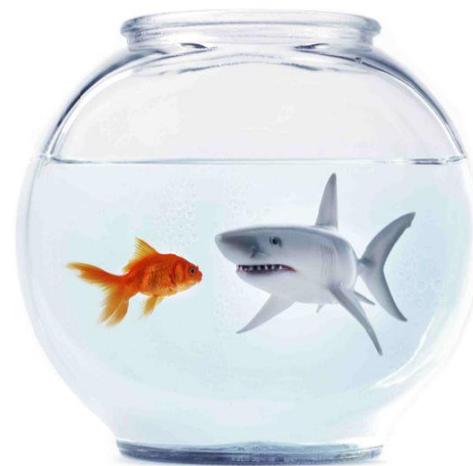
---

### An increasing enforcement focus

- >Excessive pricing, predatory pricing, refusal to deal, exclusive dealing, tying, discriminatory treatment, etc.
- >Conduct rules under the AML overlap with Anti-unfair Competition Law and Price Law in areas such as excessive pricing
- >No longer uncharted enforcement territory (IDC, Qualcomm, Tetra Pak, Microsoft)

### Agencies pursuing several controversial theories of harm

- >Collective dominance
- >Excessive pricing
- After-sale market?** Car manufacturers may be viewed as having a dominant position in the after-sale market



# New rules on automotive repair sector

---

- > On 18 September 2014, nine relevant Chinese ministries (including the **Ministry of Transportation** and **NDRC**) jointly issued a set of new rules in relation to the automotive repair sector - the Guiding Opinions regarding Furthering the **Transformation and Upgrading of the Automotive Repair Sector** and Improving Service Quality (关于促进汽车维修业转型升级、提升服务质量的指导意见)
- > The highlights of the new rules include:
  - > OEMs and authorised dealers/repairers should not restrict or interfere with **customers' freedom to choose repairers and repair services**, or refuse to provide repair services on the grounds that customers have used non-authorised repairing services
  - > As of 1 January 2015, for new (imported) car models, OEMs are required to make **repair technology materials public to repairing companies and independent repairers** in a convenient way, at a reasonable price, without discriminations or delays
  - > Manufacturers of OEM parts are encouraged to provide to the aftermarket OEM parts and independent aftermarket parts bearing own trademarks; authorised parts distributors and authorised repairers should be allowed to **resell OEM parts to non-authorised repairers or end-users**

# Investigative procedures

---

### **Increasing use and sophistication of dawn raids**

- > NDRC and SAIC increasingly developing guidelines and gaining experience in conducting investigations
- > Increasingly sophisticated methods of electronic evidence collection

### **No legal privilege recognized**

- > Attorney-client confidentiality generally not recognised → theoretically all types of evidence are subject to disclosure

### **Investigations often proceed rapidly**

- > Many RPM investigations concluded with admissions in span of weeks
- > All companies must be prepared to respond quickly and effectively



## Potential penalties

---

### **AML provides for fines of 1% to 10% of turnover of preceding year**

- > NDRC is drafting calculation rules, but has suggested that it will apply a range based on the seriousness of the conduct. Fines to date have mostly spanned in the medium to low range of percentage absent leniency or mitigating factors
- > NDRC indicated tendency to applying turnover generated from affected product(s)/service(s) and regions, but possibility of group and cross-segment turnover not ruled out
- > NDRC has stated it is inclined to consider the year before imposing sanctions rather than commencement of investigation
- >Confiscation of illegal gains and injunctive remedies also possible



## Compliance program

---



Review documents and business practice, e.g. **distribution agreements, internal policy and marketing practice**



Consider options to **maintain core value**



Update **internal competition compliance policies** and improve **competition law awareness**, e.g. training sales/marketing teams, preparing/updating company's "**competition dawn raid protocol**"



Compliance: a **global programme** that meets local needs?

Questions?

---



## Your Contact

---



**Fay Zhou**

Linklaters LLP, Beijing

Tel: +86 (10) 6535 0686

Email: [fay.zhou@linklaters.com](mailto:fay.zhou@linklaters.com)