

## SAIC publishes substantive Regulations on enforcement of the Chinese Anti-Monopoly law.

On 7 January 2011, the State Administration for Industry and Commerce (“SAIC”) published three substantive Regulations on enforcement of the Anti-Monopoly Law (“AML”), regarding Monopolistic Agreements, Abuse of Dominance and Abuse of Administrative Powers. In May 2009 and May 2010, SAIC twice published drafts on Monopolistic Agreements and Abuse of Dominance for public consultation. SAIC already issued its Procedural Provisions in June 2009. Highlights of these new Regulations, including a comparison with the equivalent provisions recently promulgated by the National Development and Reform Commission (“NDRC”), are set out below:

Click here for a link to the SAIC website for the original Chinese versions of the new Regulations:

[http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104\\_103266.html](http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103266.html) (Monopolistic Agreements)

[http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104\\_103267.html](http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103267.html) (Abuse of Dominance)

[http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104\\_103268.html](http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103268.html) (Abuse of Powers)

and here for a working English translation prepared by Linklaters:

<http://www.linklaters.com/pdfs/mkt/london/1a.pdf> (Monopolistic Agreements)

<http://www.linklaters.com/pdfs/mkt/london/1b.pdf> (Abuse of Dominance)

<http://www.linklaters.com/pdfs/mkt/london/1c.pdf> (Abuse of Powers)

Click here for a link to the SAIC website for the original Chinese versions of the earlier Procedural Regulations:

[http://www.saic.gov.cn/zwgk/zyfb/qt/fld/200906/t20090605\\_61123.html](http://www.saic.gov.cn/zwgk/zyfb/qt/fld/200906/t20090605_61123.html)  
(Procedural Regulations: Monopolistic Agreements and Abuse of Dominance)

[http://www.saic.gov.cn/zwgk/zyfb/qt/fld/200906/t20090605\\_61125.html](http://www.saic.gov.cn/zwgk/zyfb/qt/fld/200906/t20090605_61125.html)  
(Procedural Regulations: Abuse of Powers)

And here for a working English translation prepared by Linklaters:

<http://www.linklaters.com/pdfs/mkt/london/1d.pdf>  
(Procedural Regulations: Monopolistic Agreements and Abuse of Dominance)

<http://www.linklaters.com/pdfs/mkt/london/1e.pdf>  
(Procedural Regulations: Abuse of Powers)

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## Monopolistic Agreements

While NDRC issued their substantive and procedural provisions at the same time, SAIC had already issued their Procedural Provisions in June 2009.

### Concerted practice

Given the difficulty in obtaining sufficient evidence to prove an agreement (or meeting of minds), both NDRC and SAIC attach importance to the definition of concerted practice. When drafting their enforcement regulations, the two authorities have tried, but failed, to agree an identical definition. Under the NDRC's regulations, there will be a concerted practice if (i) the prices of the competing companies appear to have risen in parallel and (ii) the companies have communicated with each other (although NDRC will also take into account market conditions when making its decision). In contrast, SAIC will take into account (i) the parallel market behaviours of the competing companies, (ii) any communication or exchange of information between the competing companies, and (iii) whether a company can provide a reasonable explanation of its behaviour (Article 3). As international experience shows, the ability to provide an alternative plausible explanation for parallel conduct is an essential protection, and the fact that this is missing from the NDRC rules is a significant gap.

### Monopolistic agreements

Except for an agreement by competitors to fix prices, the provisions on Monopolistic Agreements cover all the other prohibited horizontal agreements under Article 13 of the AML, including (i) restricting the quantity of production or sales of commodities (Article 4); (ii) market sharing (Article 5); (iii) restricting the purchase of new technology or new equipment, or restricting the development of new technology or new products (Article 6); and (iv) collective boycott (Article 7). SAIC can determine other forms of non-price related monopolistic agreements (Article 8).

As expected, contrary to the 2009 draft which prohibited vertical agreements containing exclusivity or territorial restrictions, vertical agreements are not prohibited by the SAIC regulations. This addresses the concerns expressed by the business community on this point.

### Leniency

SAIC regulations differ from the NDRC regulations in the following important respects: (i) leniency does not apply to ring-leaders (Article 20 of the SAIC Procedural Provisions); (ii) the first leniency applicant that provides important evidence will be granted immunity (Article 12 of the SAIC's provisions on Monopolistic Agreements) whereas under NDRC regulations it may be granted immunity; (iii) there is no specific reference to the second leniency applicant, nor reference to the percentage reduction for other leniency applicants; (iv) there is a definition of important evidence ; and (v) there is a clarification as to what type of sanctions are exempted or reduced under the leniency rule (see Sanctions below). The SAIC regulations thus appear to give more certainty to the first leniency applicant, but less for subsequent leniency applicants. Unless further clarification is provided, such

discrepancies between NDRC and SAIC will create uncertainty and encourage forum shopping when applying for leniency.

## **Sanctions**

The provisions on Monopolistic Agreements contain certain provisions on sanctions which are neither in the AML nor in NDRC's regulations.

Article 10 contains a new provision, which is not found in the previous drafts, that the business operator which voluntarily brings to an end its monopolistic agreement may be granted a reduction or exemption from sanction by SAIC, i.e. without the need to "blow the whistle". But unlike the first to blow the whistle, such leniency is discretionary. It is not clear whether the cessation of the agreement would still be "voluntary" if it only takes place after a complaint or the initiation of inquiries by the authorities.

Where there has been "collusion" but no monopolistic agreement has yet been entered into, Article 10 imposes an obligation on SAIC promptly to stop the parties entering into such agreement. This provision is unlikely to have much practical application, since it is difficult to envisage circumstances where SAIC becomes aware that collusion is taking place in time to prevent the parties entering into an agreement.

Article 13 provides that the sanction which is to be reduced or exempted under the leniency rule is the fine only (i.e. a fine of no less than 1% but no more than 10% of the annual turnover of the business operator for the preceding year). This is in contrast to its previous 2010 draft, where the sanctions to be reduced or exempted included both the fine and "confiscation of illegal gains". Confiscation of illegal gains is a common administrative sanction under PRC law (such as the Price Law and the Anti-Unfair Competition Law) and it is often used by the authorities in addition to fines, as fines are typically very low. In contrast, the potential for much higher fines under the AML should reduce the need for confiscation of illegal gains in most circumstances. In its Q&As, also available on its website, SAIC explains that it is necessary to maintain confiscation of illegal gains even for leniency applicants due to the need to prevent "undue enrichment".

## **Abuse of Dominance**

### **Abuse of a dominant market position**

The provisions on Abuse of Dominance prohibit dominant business operators from engaging in the following activities without reasonable justification: (i) refusal to deal (Article 4); (ii) exclusive dealing (Article 5); (iii) bundling or imposing other unreasonable transaction terms (Article 6); and (iv) discrimination (Article 7). SAIC may determine further non-price related abuses of dominance (Article 9). Under each heading, the provisions describe the prohibited conduct in more detail. There is, for instance, a specific reference to use of essential facilities under the heading of refusal to deal.

Although there is a division of jurisdiction under the AML, that NDRC will be responsible for price-related infringements and SAIC for non price-related infringements, this line has not been clearly drawn in their respective

regulations. For example, the NDRC regulations appear to catch all the traditional abuses so long as there is an element of pricing. SAIC, on the other hand, according to its Q&As mentioned above, considers that, other than excessive pricing and predatory pricing, everything else under Article 17 of the AML should fall within its own jurisdiction. Clearly the potential overlap in jurisdiction gives rise to uncertainty.

### **Justifications**

According to SAIC's Q&As, abuse of dominance under the AML is subject to a rule of reason analysis. SAIC will make a comprehensive analysis of the specific circumstances of each case and the relevant conditions in the market. Instead of providing any examples of "reasonable justification" as in the NDRC regulations, SAIC's regulations provide that SAIC will consider two elements: (i) whether the act is taken by the business operator as part of its own normal commercial activities and efficiency, and (ii) whether the act would affect economic efficiency, social and public interests and economic development (Article 8).

### **Determination of dominance**

Similar to the NDRC regulations, the presumption of dominance is rebuttable with evidence. The SAIC regulations go further by setting out the evidence required. However, we do not expect this to make much difference in practice.

### **Sanctions**

In the same way as for Monopolistic Agreements, a business operator which voluntarily brings to an end its abuse of dominance may be granted a reduction or exemption from sanction by SAIC at its discretion (Article 14). The comments above apply equally here.

## **Procedural Provisions**

### **Delegation of enforcement**

Unlike NDRC, the Procedural Provisions of SAIC do not make a general delegation of law enforcement to all the provincial level administrative bodies for industry and commerce (the "AICs"). Although SAIC may authorise a provincial AIC to handle an AML investigation, this authorisation is made on a case by case basis, and no further delegation of investigation power to the next lower level AICs is allowed (Article 3). Even for cases handled by a provincial AIC upon authorisation, the provincial AIC must report to SAIC before it makes its formal decision (Article 23). In contrast to NDRC, SAIC still retains a high degree of control over AML enforcement and can ensure consistency between SAIC and the provincial AICs.

## Conclusion

The new substantive Regulations of SAIC will come into force on 1 February 2011, the same day when NDRC's substantive and procedural provisions for the AML enforcement will enter into effect.

NDRC and SAIC have engaged in extensive consultation and coordination with each other when drafting their respective regulations, which made it possible for the two authorities to promulgate them at roughly the same time. Still, there are many inconsistencies. The two authorities have not reached agreement on a number of important issues. The overlap in jurisdiction and inconsistency creates unnecessary uncertainty for business.

Generally speaking, the SAIC regulations contain more detailed provisions and guidance. In some areas, they appear more flexible. Examples include allowing for plausible explanations for parallel conduct, the approach to justifications for abuse of dominance and leniency for voluntarily bringing to an end infringing conduct.

Notwithstanding the above-mentioned deficiencies, the fact that both NDRC and SAIC have now issued their long-awaited regulations is an important step forward. As a result, we should expect more active AML enforcement in the near future by both NDRC and SAIC.

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

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