



## **Antitrust law and practice in China – a snapshot**

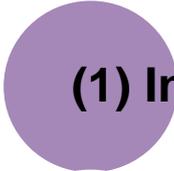
Adrian Emch

**Competition Policy Research Center, JFTC**

October 24, 2014

# Overview

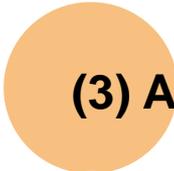
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**(1) Institutions**



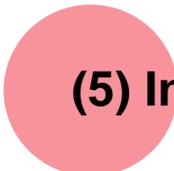
**(2) Agreements**



**(3) Abuse of dominance**



**(4) Merger control**



**(5) International cooperation**

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# **(1) Institutions**

# Institutions

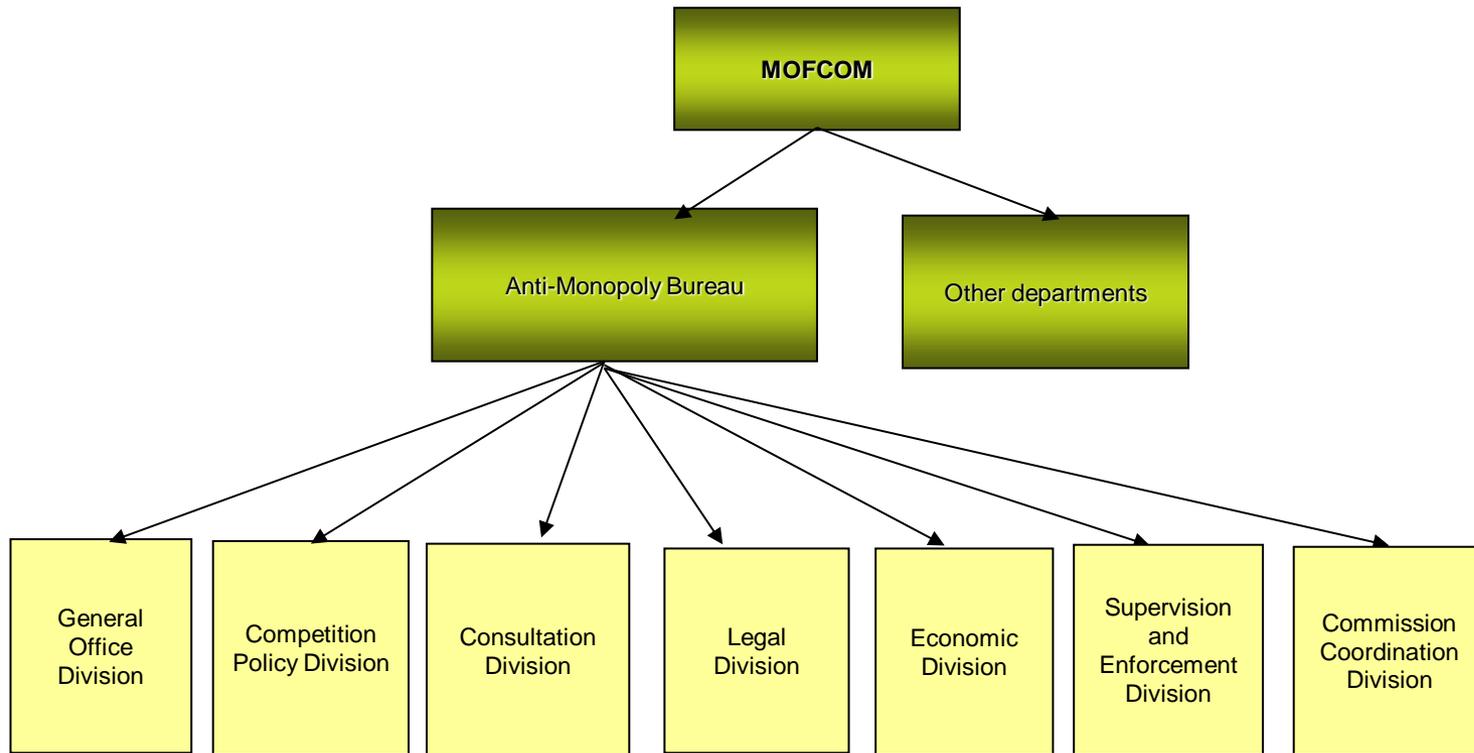
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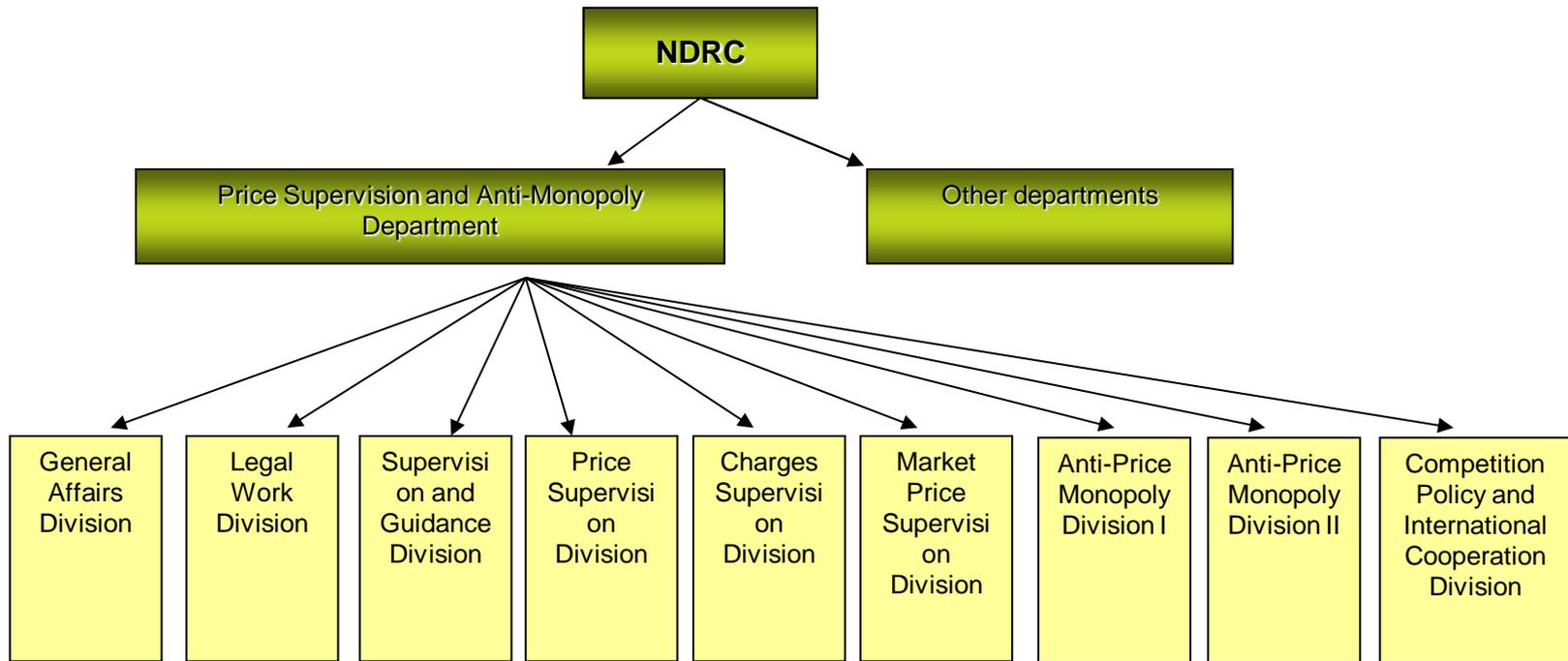




# 中华人民共和国商务部

Ministry of Commerce of the People's Republic of China

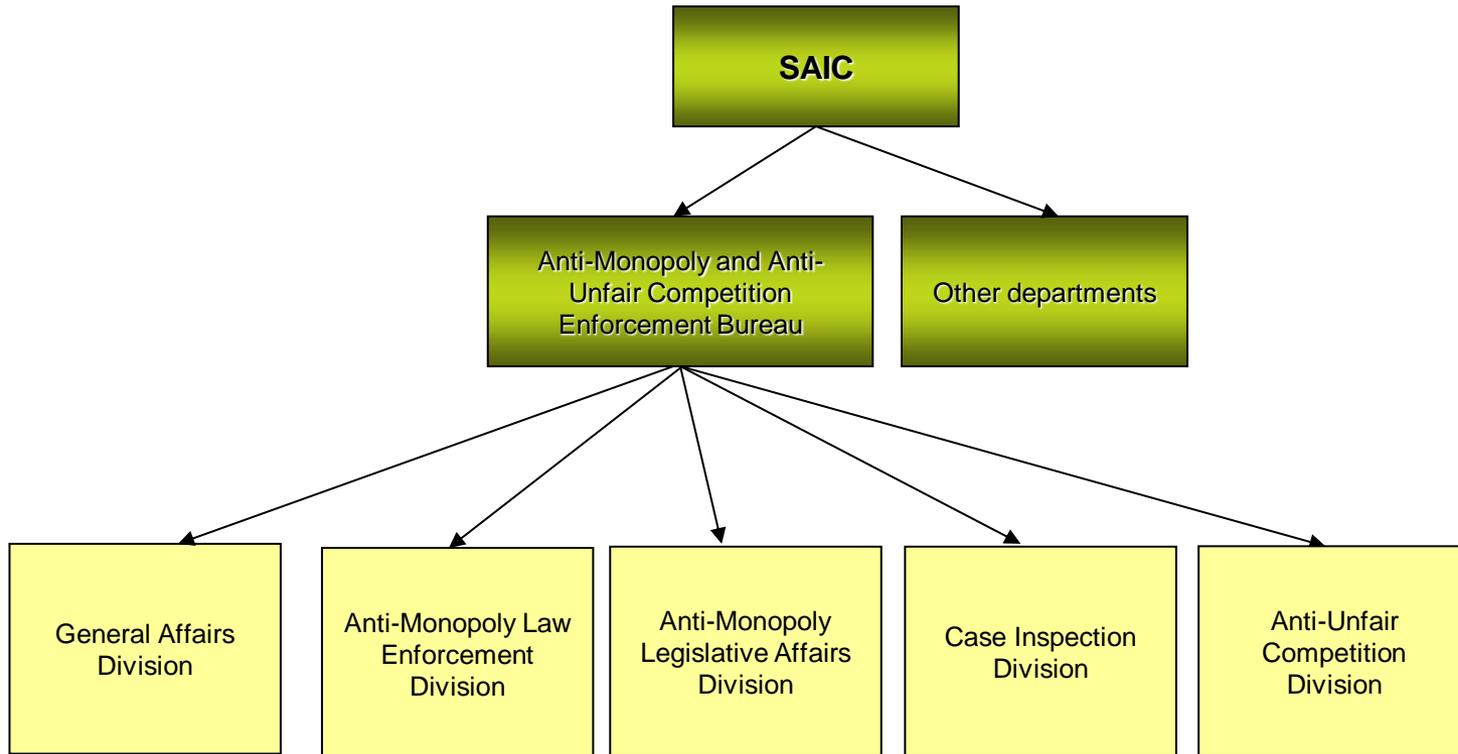






# 中华人民共和国国家工商行政管理总局

State Administration for Industry & Commerce of the People's Republic of China



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## **(2) Agreements**

# Jurisdiction

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## NDRC

- Price fixing
- Resale price maintenance

## SAIC

- Market partitioning
- Output limitation
- Technology restrictions
- Collective boycott

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**NDRC**

# Horizontal agreements

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# Law

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- AML lists prohibited agreements
  - Basically cartel conduct such as price fixing, output reduction, market allocation
  - Catch-all clause for 'other agreements'
- Price Law contains collusion prohibition
- Anti-Unfair Competition Law prohibits bid rigging

# LCD panels

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- In January 2013, NDRC fined six LCD panel makers RMB 353 million (around JPY 6 billion)
- Infringement dated back to 2001-2006
  - Same conduct sanctioned in US and EU
  - In China, Price Law was used
- LCD panel makers required to refund 'overcharge' to TV makers

# Unilever

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- In March 2011, Unilever representative gave interviews, released press statements and sent letters to supermarkets
  - Announcement of price rises on April 1 for shampoo, face-wash and laundry detergent
- Liby and Nice also announced price rises for April 1 and 6
- Announcements led to panic-buying

# Unilever (2)

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- Statements (according to NDRC)

“The everyday chemicals [ie, toiletries] industry is sufficiently competitive, with a great number of brands. Consumers are relatively price-sensitive and competitors are [closely] monitoring each other. One can only make slight adjustments and see whether rivals follow suit.”

“Price rises go through a wait-and-see process [during which] everybody is waiting for the first one to adjust prices.”

”If our rivals do not follow suit, then we will surely suffer. Therefore, we can only make gradual adjustments to product prices.”

”Next month, the prices for everyday chemicals of various manufacturers will be adjusted upward by around 10%. This is mainly because of the recent price rise of around 40% on average of upstream raw materials such as petrochemicals, vegetable oil and inorganic chemical products, which has directly led to a 20% increase in the production costs of everyday chemicals.”

# Zhejiang insurance

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- In September 2014, NDRC announced December 2013 decision against 22 property insurance companies and trade association for pricing fixing
  - Total fines RMB 110 million (around JPY 2 billion)
  - Fixing of "new car discount ratio" and handling fee for commercial car insurance
  - Immunity and fine reductions for some
  - Longish decisions

# Auto parts and bearings

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- In August 2014, NDRC punished 8 auto parts and 4 bearing manufacturers for price fixing
  - All Japanese companies
  - Record-high fines totaling over RMB 1.2 billion (around JPY 20 billion)
  - 'Cooperative companies' were exempted in full or part

# Vertical agreements

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# Law

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- AML only prohibits only RPM, but contains catch-all clause
- Price Law targets predatory pricing, discriminatory pricing and other antitrust-related conduct
- Anti-Unfair Competition Law prohibits tying and "unreasonable conditions"

# White liquor

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- NDRC local offices fined Maotai and Wuliangye RMB 247 / 202 million (around JPY 4.3 / 3.5 billion)
- Wuliangye's RPM policy illegal
  - intra-brand price competition eliminated
  - inter-brand competition restricted ("imitation effect")
  - consumer interests harmed due to "strong market position"

# Johnson & Johnson

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- Suture products distributor sued J&J for RPM practice
- At first instance, Intermediate Court found in favor of J&J
  - Plaintiff had failed to prove anti-competitive effect
- On appeal, Shanghai High Court reversed
  - Similar analysis regarding burden of proof
  - But, different position on impact on competition

# Baby milk formula

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- Investigation against mostly foreign milk formula suppliers
  - By definition, market shares not high
- NDRC press release succinct
  - Absent guidance, assumption of per se illegality may be prudent

# Eye wear

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- In May 2014, NDRC punished eye wear manufacturers
- Various types of RPM conduct
  - RPM on minimum prices
  - Discounts or promotional activities to ensure compliance

# Automobiles

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- In August 2014, Hubei Price Bureau sanctioned 4 BMW distributors for violations of AML and Price Law
  - Charging pre-delivery inspection (PDI) test fees as after-sale services
  - Agreements to fix PDI test fees
- In September 2014, Hubei Price Bureau fined FAW-Volkswagen and 8 Audi distributors
  - FAW-Volkswagen "organized" for distributors to reach agreements on car prices and repair/maintenance fees
  - Fine of around RMB 250 million (JPY 4.3 billion) on FAW-Volkswagen
  - Fine of around RMB 30 million (JPY 522 million) on 8 Audi distributors

# Automobiles (2)

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- In September 2014, Shanghai Price Bureau sanctioned Chrysler and 3 distributors in Shanghai
  - Chrysler found to conclude distribution agreements and commercial policies with RPM provisions
  - 3 Chrysler distributors found guilty of fixing of repair and maintenance fees
  - Fine of around RMB 32 million (JPY 557 million) on Chrysler
  - Fine of around RMB 2 million (JPY 35 million) on 3 Chrysler distributors

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**SAIC**

# Lianyungang construction

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- Association of concrete companies in Lianyungang divided up territories
  - 16 member companies involved
- In 2011, Jiangsu AIC fined association and 5 members
  - Penalties reduced due to cooperation during investigation

# Inner Mongolia fireworks

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- In July 2014, Inner Mongolia AIC fined six fireworks wholesalers
- According to safety bureau requirements, retailers in a district had to buy from a sole wholesaler
- AIC found market partitioning "by means of administrative restriction"

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## **(3) Abuse of dominance**

# Law

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- AML lists types of abusive conduct, subject to the 'legitimate reasons' defense
  - Typical exclusionary abuses, and some exploitative abuses
- Price Law and Anti-Unfair Competition Law do not use dominance as benchmark

# Jurisdiction

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## NDRC

- Excessive pricing
- Predatory pricing
- Margin squeeze
- Loyalty discounts
  
- Unreasonable expenses
- Discriminatory pricing

## SAIC

- Refusal to deal
- Exclusive dealing
- Tying
- Unreasonable conditions
- Discriminatory treatment

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**NDRC**

# Broadband

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- In November 2011, NDRC talked to press about China Telecom and China Unicom investigation
- Companies reacted with "application for suspension" and rectification plans
- Further developments?

# InterDigital

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- In 2013, NDRC investigated InterDigital over SEP licensing practices
- InterDigital settled with NDRC
- Commitments
  - No licensing on discriminatory and excessive basis
  - No bundling of SEPs with non-SEPs
  - No seeking of injunctions, etc.

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**SAIC**

# Guangdong water

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- In December 2013, SAIC fined a local water company in Guangdong for abuse of dominance
  - Dominance in local water supply
  - Tying water supply with installation of water pipes
  - No justification

# Inner Mongolia cigarettes

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- In July 2014, AIC sanctioned Chifeng Tobacco company for abuse of dominance
  - Bundling popular with unpopular brands of cigarettes at wholesale level
- Chifeng Tobacco was the only licensed cigarette wholesaler
- Fine close to RMB 6 million (JPY 104 million)

# Microsoft

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- On July 28, 2014, SAIC raided Microsoft's offices in Beijing, Shanghai, Guangzhou, and Chengdu
- A week later, SAIC conducted follow-up raids on Microsoft's offices
  - Raid of Accenture, Microsoft's accountant
- SAIC issues statement of degree of Microsoft's cooperation during dawnraid
- On September 1, Microsoft was asked to respond to compatibility with Windows and Office software

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# Courts

# 360 v QQ

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- Tencent developed security software, and 360 reacted
- In November 2011, 360 sued – judgment in March 2013
- 1<sup>st</sup> instance court dismissed action
- But court still assessed abuse
- SPC affirmed 1<sup>st</sup> instance judgment on October 16, 2014
- Different market definition
- No Tencent dominance
- Court found no exclusive dealing, and confirmed no tying

# Huawei v InterDigital

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- In December 2011, Huawei sued IDC before Shenzhen court
- Court found AML violations
  - Abuse of dominance by charging unfairly high royalty rates
  - Tying SEP licensing with non-essential patents
- Court held that InterDigital violated FRAND principle
  - Determined a FRAND royalty rate
- Guangdong court dismissed appeals

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## **(4) Merger control**

# Law

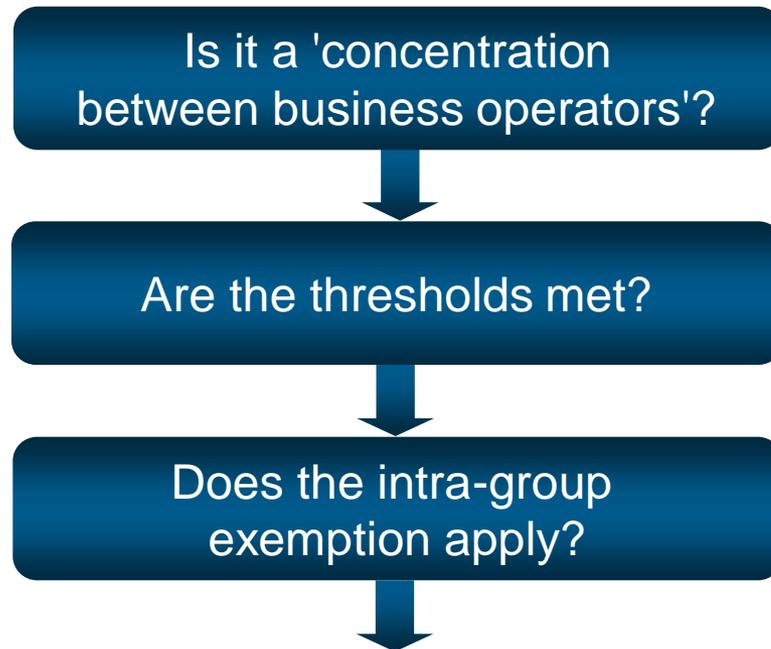
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- Only AML contains merger control rules
- Criterion is elimination/restriction of competition
  - In principle, like SLC test
- AML lists number of factors, which are however not key in day-to-day assessment
- Simple case procedure

# Merger control test

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- Jurisdiction test follows international principles



# Concentration

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- China follows concept of ‘acquisition of a controlling right’
- But, current Chinese rules give little guidance
- Draft rules were not enacted

# Thresholds

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China has clear thresholds, based on sales revenues only

(1) Combined revenues

combined revenues of all parties exceed RMB 10 bln (174 bln) worldwide OR RMB 2 bln (JPY 35 bln) in China

**AND**

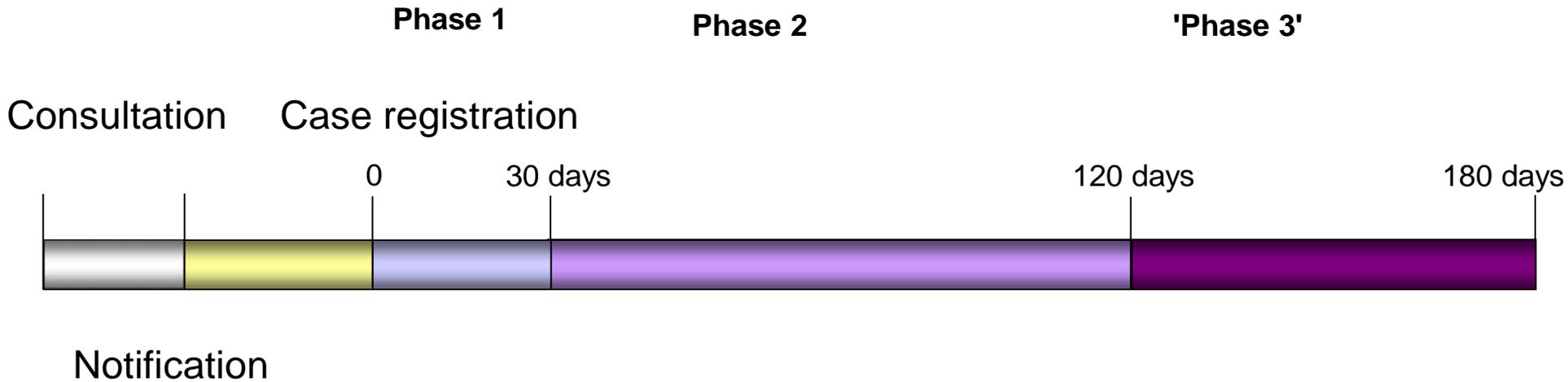
(2) Individual revenues

individual revenues of at least two parties exceed RMB 400 mln (JPY 7 bln) in China

# Outline of procedure

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- Basic timeline



# Simple cases

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- Criteria for "simple case"
  - Horizontal merger: combined market share <15%
  - Vertical merger: market share (upstream/downstream) <25%
  - Conglomerate merger: market share (any market) < 25%
  - Off-shore joint venture: no business in China
  - Acquisition of off-shore entities: target has no business in China
  - Number of controlling shareholders of the joint venture is reduced
- Basics of simple case filing posted on MOFCOM website
- 10-day public notice for comment
- First indications quite positive

# Coca-Cola / Huiyuan

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- Coca-Cola planned takeover of Chinese fruit juice maker Huiyuan
- MOFCOM blocked deal
- Two sets of remedies rejected by MOFCOM
- Reason for block is bundling CSD with fruit juice
- But no information on specifics of anti-competitive conduct
- First-time use of 'other factors' clause

# Panasonic / Sanyo

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- Long procedure
  - But, reportedly hundreds of markets
- Overlap in 3 battery markets, with combined shares of 46.3%, 61% and 77%
  - MOFCOM found worldwide relevant markets
- Remedies in line with int'l practice
  - Divestiture of factories in Japan and/or China – similar to EU and US remedies

# Marubeni / Gavilon & Glencore / Xstrata

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- Two cases in mining and food resources sector
  - Similar in many ways, but different on other aspects – eg, remedies
- Natural evolution of past case practice
  - Wal-Mart case clear indication

# P3 shipping case

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- Alliance not "full function"
- Parties have 46.7% on Asia-Europe route
- Both EU and US competition authorities decided not to challenge alliance

# Corun / Toyota

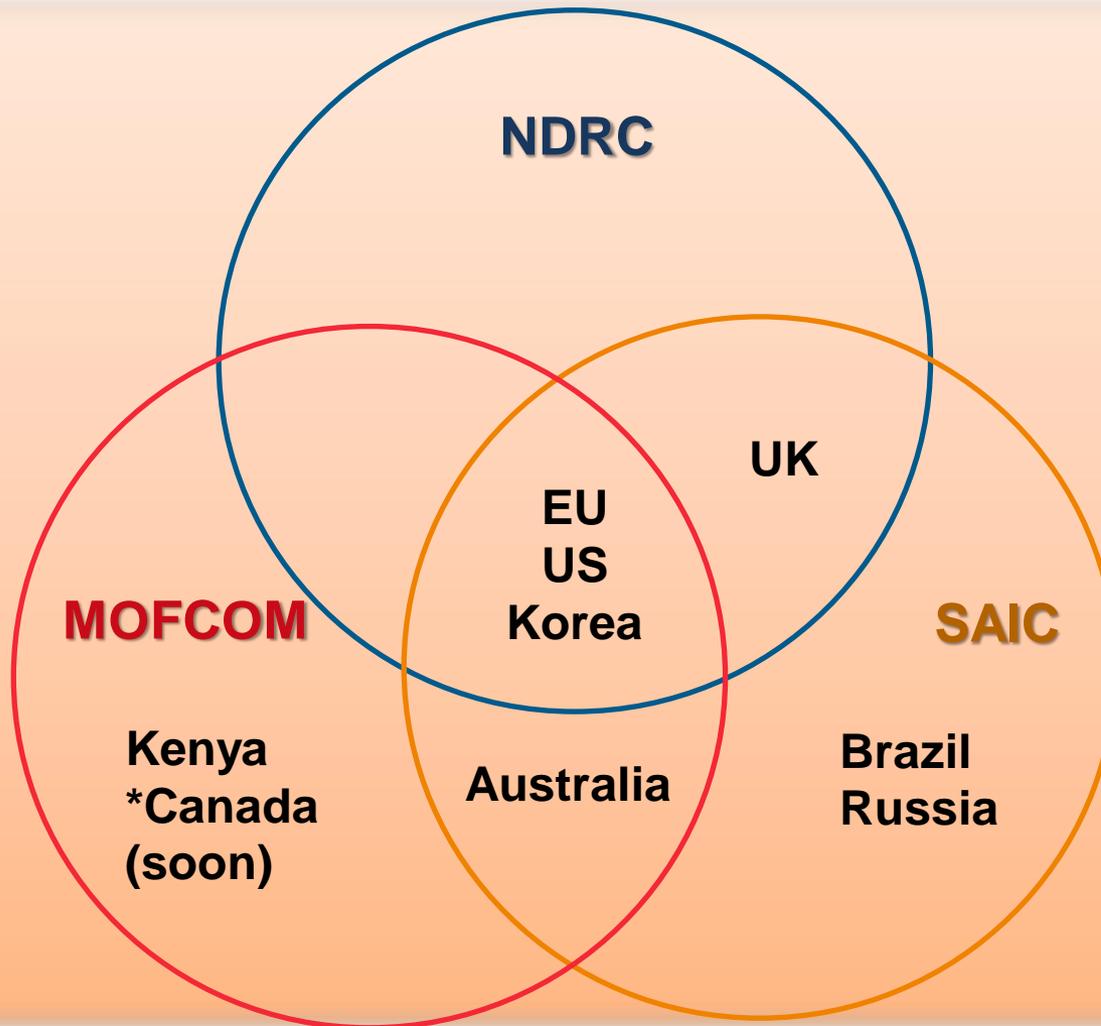
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- In July 2014, MOFCOM granted conditional approval for hybrid car battery JV between Corun and Toyota (including PEVE)
- Relevant market – automotive NiMH batteries and hybrid cars
- Commitments required new JV to
  - Supply products to its customers on FRAND terms
  - Supply to third parties within 3 years once JV is put into production

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## **(5) International cooperation**

# International cooperation overview



# Japan

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- MOFCOM and JICA jointly held AML seminar (2008)
- Delegation of MOFCOM visited Japan for academic exchanges (2012)
  - Promoting bilateral exchanges with JFTC
  - Introducing new developments in China

# Japan (2)

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- JFTC held training course for senior officials (2012)
  - 14 senior officials from MOFCOM and SAIC participated
- JFTC and ADBI organized training course for Asian countries (2014)
  - Sharing knowledge and expertise on Japanese competition law and policy
  - Reviewing existing competition laws and policies

# US

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- **MOFCOM, NDRC and SAIC**

US-China MOU with DOJ and FTC (2011)

- Meetings, exchanges and training workshops
- Written comments on draft implementing rules and guidelines

- **MOFCOM**

Guidance for Case Cooperation between MOFCOM and DOJ and FTC on Concentration of Undertakings (Merger) Cases (2011)

# EU

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## **MOFCOM**

- EU-China Competition Policy Dialogue (2004)

## **NDRC and SAIC**

- EU-China MOU on cooperation in the area of anti-monopoly law (2012)

## **General**

- EU-China Competition Weeks
- EU China Trade Project (EUCTP)

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Thank you!

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**For any questions, please contact:**

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