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The jurisdictional delimitation in the Chinese Anti-Monopoly Law public enforcement regime: the inevitable overstepping of authority and the implications

Xingyu Yan*

ABSTRACT

Following the adoption of the Anti-Monopoly Law (AML) in 2007, China established a public enforcement regime that has three equal-ranking authorities. The legislative history of the AML suggests that this was a backward-looking compromise reached between the three central administrative agencies (the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), and the State Administration for Industry and Commerce (SAIC)), instead of a forward-looking design choice. This article focuses on the jurisdictional delimitation between the NDRC and the SAIC, a delimitation assigning the enforcement responsibilities based on whether an allegedly anticompetitive conduct is price related or not.

This article first describes the jurisdictional delimitation as defined in the relevant legal documents. On that basis, it examines the legal and the economic rationales behind this delimitation. Subsequently, this article investigates to what extent this delimitation has been adhered to in practice, and there it identifies three problematic scenarios, which indicate the inevitability of the two agencies overstepping their respective authority in practice. This article finds that this delimitation is likely to induce the following problems: uncertainty on supplementary enforcement and follow-on civil actions, uncontrolled agency discretion, and distortive theories of harm. Therefore, it suggests that this jurisdictional delimitation should be removed.

KEYWORDS: jurisdictional delimitation, anti-monopoly law, public enforcement, China, the National Development and Reform Commission, the State Administration for Industry and Commerce

JEL CLASSIFICATIONS: K21

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I. INTRODUCTION

It is not strange that public enforcement of competition law within one jurisdiction can be multi-headed, as exemplified by the US antitrust regime.¹ Another example would be the Chinese tripartite regime. After the adoption of the Chinese Anti-Monopoly Law (AML) on 30 August 2007 and before its coming into force on 1 August 2008, the State Council designated three central administrative agencies for public enforcement. It distributed the enforcement responsibilities as follows:

- The Ministry of Commerce (MOFCOM) is exclusively responsible for merger review;²
- The National Development and Reform Commission (NDRC) is responsible for regulating *price-related* anticompetitive agreements and abuse of dominant position;³
- The State Administration for Industry and Commerce (SAIC) is responsible for regulating anticompetitive agreements and abuse of dominance that are *not price related*.⁴

While the MOFCOM's responsibilities are relatively clear, the division of labour between the NDRC and the SAIC raises doubts immediately. According to the Three-Designation Orders that empowered the NDRC and the SAIC, a jurisdictional line is drawn between the two agencies based on the proclaimed criterion of whether an anticompetitive conduct is price related or not. However, neither the AML nor these Three-Designation Orders issued by the State Council provided any explanation on this delimitation criterion.

The AML has been in force for more than nine years now. In the beginning five years, the NDRC and the SAIC were rather inactive, until in 2013 when both agencies started to become increasingly committed to the AML enforcement. This change of attitude has generated worldwide discussions as regards to how the AML public enforcement would evolve and what factors could be relevant to that evolution.⁵

1 At the federal level, the US Federal Trade Commission and the Antitrust Division of the Department of Justice share the competence to review mergers and to bring antitrust lawsuits to courts. See Harry First and others, 'The United States: The Competition Law System and the Country's Norms' in Eleanor M Fox and Michael J Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP 2013) 329–83, 334–36.

2 Art 15 of pt I and Art 11 of pt III of the Notice of the General Office of the State Council on the Principal Responsibilities and Staffing of the Ministry of Commerce ((《国务院办公厅关于印发商务部主要职责内设机构和人员编制规定的通知》(国办发〔2008〕77号))), issued by the State Council on 15 July 2008.

3 Art 3 of pt II and Art 23 of pt III of the Notice of the General Office of the State Council on the Principal Responsibilities and Staffing of the National Development and Reform Commission ((《国务院办公厅关于印发国家发展和改革委员会主要职责内设机构和人员编制规定的通知》(国办发〔2008〕102号))), issued by the State Council on 15 July 2008 (hereinafter, 'the NDRC Three-Designation Order').

4 Art 6 of pt II and Art 3 of pt III of the Notice of the General Office of the State Council on the Principal Responsibilities and Staffing of the State Administration for Industry and Commerce ((《国务院办公厅关于印发国家工商行政管理总局主要职责内设机构和人员编制规定的通知》(国办发〔2008〕88号))), issued by the State Council on 11 July 2008 (hereinafter, 'the SAIC Three-Designation Order').

5 For examples of such discussions, see Changqi Wu and Zhicheng Liu, 'A Tiger Without Teeth? Regulation of Administrative Monopoly under China's Anti-Monopoly Law' (2012) 41 Rev of Industrial Organization

This article is intended to contribute to that discussion, by identifying the problems relating to the jurisdictional delimitation between the NDRC and the SAIC, and analysing how those problems have affected and would continue to affect the AML enforcement.

To that end, this article is structured as follows. Section II provides a historical account for the formation of this tripartite public enforcement regime, and describes exactly how the jurisdictional delimitation was drawn between the NDRC and the SAIC according to the relevant legal and official documents. Section III uses standard economic theories to examine the rationality of this delimitation, and discusses the legal challenge of adhering to this delimitation. Based on the case records from 2008 to 2016, Section IV identifies three scenarios where this jurisdictional delimitation was not properly followed. Section V analyses how, in each of these scenarios, this delimitation functions as a negative impact factor on the AML public enforcement. Section VI draws the conclusion.

II. THE TRIPARTITE PUBLIC ENFORCEMENT REGIME

Formation

The MOFCOM

In 1994 when the central government of China initiated the AML legislative process, it assigned the drafting responsibility to two agencies: the former State Economic and Trade Commission and the SAIC.

As the State Economic and Trade Commission was dissolved in the 2003 governmental restructure,⁶ its drafting responsibility was re-assigned to the newly established MOFCOM,⁷ which immediately seized this opportunity and joined the race of becoming an AML enforcement agency. In 2004, the MOFCOM submitted its first AML legislative draft to the State Council. And according to the scholars participated in the drafting process, the MOFCOM proposed to name itself as the sole enforcement agency in that draft, but that proposal was scratched out in later versions due to strong oppositions from other agencies.⁸ Nonetheless, the MOFCOM managed to secure its long-standing authority on merger control.⁹

133 (discussing the prospects of the AML enforcement against administrative monopolies); Angela Huyue Zhang, 'Taming the Chinese Leviathan: Is Antitrust Regulation a False Hope?' (2015) 51(2) *Stanford J Intl L* 195 (discussing the prospects of the AML enforcement against state-owned enterprises); Wendy Ng, 'The Independence of Chinese Competition Agencies and the Impact on Competition Enforcement in China' (2016) 4(1) *J Antitrust Enforcement* 188 (discussing the influence of the AML institutional settings on the enforcement outcomes); Adrian Emch, 'Effects Analysis in Abuse of Dominance Cases in China – Is *Qihoo 360 v Tencent* a Game-Changer?' (2016) 12(1) *Comp L Intl* 11 (analysing the developments of court judgments on abuse of dominance cases in China).

6 The MOFCOM, 'The History' (2010) <<http://english.mofcom.gov.cn/column/history.shtml>> accessed 24 September 2017.

7 Ming Shang, 'China's Developing Competition Policy and Legislation (发展中的中国竞争政策与立法)' (2005) (in Chinese) <<http://tfs.mofcom.gov.cn/article/bc/200504/20050400081489.shtml>> accessed 24 September 2017.

8 Bruce M Owen and others, 'China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond' (2008) 75(1) *Antitrust LJ* 231, 261.

9 Qian Hao, 'The Multiple Hands: Institutional Dynamics of China's Competition Regime' in Adrian Emch and David Stallibrass (eds), *China's Anti-Monopoly Law: The First Five Years* (Kluwer Law International 2013) 15–34, 32.

The SAIC

Being an equal-ranking ministry as the MOFCOM since 2002,¹⁰ the SAIC also made the claim to be an AML agency, based on its experience in enforcing the antitrust-related Anti-Unfair Competition Law since 1993.¹¹ Before the AML was enacted, many monopolistic conducts were regulated under the Anti-Unfair Competition Law.¹² In fact, even after the AML has entered into force, the SAIC can still apply the Anti-Unfair Competition Law to those monopolistic conducts, as long as such applications do not contradict the AML.¹³

Moreover, the SAIC's participation in the early stage of the AML drafting process also supported its claim. Back in 1994, when the central government decided to add the AML to the legislative agenda, it was the SAIC being entrusted with the drafting task, along with the former State Economic and Trade Commission. Since then, the SAIC had played a main role in the drafting process, until in 2003 when the drafting task was mostly taken over by the MOFCOM.¹⁴

The NDRC

Finally there was the NDRC. As the successor of the State Planning Commission, which used to manage virtually every aspect of the nation's macroeconomy from 1952 to 2003, the NDRC had the ace card of being the long-standing authority on price regulation.¹⁵ Two characteristics should be noted about the NDRC. The first one is its omnipresent influence as a policymaker over a wide range of policy areas. Known as the mini State Council and the super ministry, it was observed that the NDRC is capable of overriding other ministries when it comes to macro-level

10 Ruiping Zhang (张瑞萍), 'The Ideological Analysis of the Institutional Design of Anti-Monopoly Agencies (《反垄断机构设置理念分析》)' (2008) 1 *Econ L Stud* (《经济法研究》) 117, 124, (in Chinese) <<http://www.competitionlaw.cn/info/1128/1673.htm>> accessed 24 September 2017 (noting that in 2002, the State Council decided to upgrade the SAIC's authority to the ministerial level, directly subordinate to the State Council).

11 Hao (n 9) 20 (noting that the enforcers of the Anti-Unfair Competition Law have always been the SAIC and its local agencies).

12 Examples of such conducts include abuse of dominant position by public undertakings, abuse of administrative power by governmental departments, undocumented loyalty rebates, pricing below costs in the aim of excluding competitors, bundling, and collusive tendering. See Arts 3(2), 6, 7, 8, 11, 12, and 15 of the Anti-Unfair Competition Law (《中华人民共和国反不正当竞争法》), adopted by the Standing Committee of the National People's Congress on 2 September 1993 (effective on 1 December 1993) <<http://www.lawinfochina.com/Display.aspx?lib=law&Cgid=6359>> accessed 24 September 2017 (hereinafter, 'the Anti-Unfair Competition Law'). Currently this law is under revision.

13 Art 3(2) of the Anti-Unfair Competition Law stipulates that the local agencies of the SAIC (namely AICs) above the county level shall supervise and regulate conducts of unfair competition, unless laws and regulations have assigned this responsibility to other agencies. However, as the AML did not specify any enforcement agencies, there is no legislation providing otherwise. The State Council, which was supposed to adjust the SAIC's overall responsibilities after the AML was adopted, made no change either. Therefore, the overlap between the AML and the Anti-Unfair Competition Law still remains.

14 Owen and others (n 8) 236.

15 Peter Martin, 'The Humbling of the NDRC: China's National Development and Reform Commission Searches for a New Role Amid Restructuring' (2014) 14(5) *China Brief* 14, 14, <https://jamestown.org/wp-content/uploads/2014/03/China_Brief_Vol_14_Issue_5_-_Copy_2_01.pdf> accessed 24 September 2017.

policymaking and strategic economic control, despite having the same administrative ranking.¹⁶

The second feature is its strong interventionist approach as a top-level regulator. The NDRC has inherited from its predecessor many interventionist mandates, primarily price control. In 1997 when the Price Law was enacted, the State Planning Commission was appointed as the sole enforcer. Aimed at regulating improper pricing conducts and controlling the prices of strategically important industries, the Price Law contains some antitrust-related provisions, most notably Article 14(1) concerning price-fixing.¹⁷ It was observed that, even after the AML became effective, the NDRC and its local agencies still relied on the Price Law to tackle cartel cases.¹⁸ In that sense, the NDRC's claim to be an antitrust enforcer was actually stronger than those of the MOFCOM and the SAIC, because price control of certain industries remains strategically crucial in the blueprint of the socialist market economy, and no other agency is more experienced or more authoritative than the NDRC when it comes to price control.¹⁹

The establishment of the tripartite regime

Since the State Council did not wish to create any new agency for the AML, the best solution turned out to be also accepting the NDRC's claim, and that was how the State Council eventually decided to distribute the AML responsibilities across the three agencies.²⁰ When adopted in 2007, the AML did not appoint any enforcement agency; instead it delegated the appointment task to the State Council,²¹ just as how administrative legislation in China usually goes.²² At the eve of the AML's entering

16 *ibid* 14–15; Hao (n 9) 28.

17 See Art 14(1) of the Price Law of the People's Republic of China (《中华人民共和国价格法》), adopted by the Standing Committee of the National People's Congress on 29 December 1997 (effective on 1 May 1998) <<http://en.pkulaw.cn/display.aspx?cgid=19158&lib=law>> accessed 24 September 2017 (hereinafter, 'the Price Law').

18 Yichen Yang, 'Price-Related Cartels under the Chinese Anti-Monopoly Regime: The Need to Clarify Four Substantive and Procedural Issues' (2016) 39(3) W Comp 479, 484–85. This could probably be explained by the fact that the AML had not come into effect when these conducts were carried out. See Thomas K Cheng, 'The Meaning of Restriction of Competition under the Monopolistic Agreements Provisions of the PRC Anti-Monopoly Law' (2017) 40(2) W Comp 323, 341.

19 Angela Huyue Zhang, 'Bureaucratic Politics and China's Anti-Monopoly Law' (2014) 47 Cornell Intl LJ 671, 696 (describing the importance of price control as a political matter and the NDRC's authority in that regard).

20 Yong Huang, 'Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law' (2008) 75(1) Antitrust LJ 117, 126.

21 The AML only referred to 'Anti-Monopoly Enforcement Agencies', and mandated the State Council to appoint the enforcement agencies before the AML came into force. See Art 10 of the Anti-Monopoly Law of the People's Republic of China (《中华人民共和国反垄断法》), adopted by the Standing Committee of the National People's Congress on 30 August 2007 (effective on 1 August 2008) <<http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml>> accessed 24 September 2017.

22 This is in line with the conventional Chinese legislative process of administrative laws. Normally, the Chinese legislature does not specify any enforcement agency for the law, but assigns that task to the State Council. Before a law enters into force, the State Council will issue one or more Three-Designation Orders (三定方案), a kind of internal document stipulating each enforcement agency's main responsibilities, internal structure, and staffing. See Hao (n 9) 19–20.

into force, the State Council issued three Three-Designation Orders, conferring on each of the three agencies' part of the AML enforcement power. Eventually, a tripartite AML enforcement regime was established.

Currently, the SAIC has 15 internal departments,²³ and the one responsible for competition regulation is the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau.²⁴ The actual number of employees handling antitrust enforcement in the SAIC is said to be no more than 15.²⁵ Within the NDRC, the department responsible for antitrust enforcement is the Bureau of Price Supervision and Anti-Monopoly, which has no more than 46 employees,²⁶ and the number of employees responsible for antitrust is about the same as that of the SAIC.²⁷

The jurisdictional delimitation between the NDRC and the SAIC

The Three-Designation Orders

As laid down in the State Council's Three-Designation Orders, the NDRC and the SAIC share the power to regulate anticompetitive agreements and abuse of dominance, and are supposed to divide their responsibilities according to whether a monopolistic conduct is price-related or not.²⁸ To understand this delimitation would essentially come down to understanding what price-related monopolistic conducts mean.

Unfortunately, the State Council provided no clarification on that point. The Three-Designation Orders empowering the NDRC and the SAIC simply presumed the concept of price-related monopolistic conduct and used it to draw the line. This taking-it-for-granted attitude was passed on to the implementation regulations.

The implementation regulations

As secondary laws under the AML, the implementation regulations were supposed to clarify the concept of price-related monopolistic conduct in their efforts to enrich the AML legal framework, but they failed to do so. For example, in the Regulation on Anti-Price Monopoly, the NDRC's first substantive regulation for implementing the

23 The SAIC, 'Departments of the SAIC' <<http://www.saic.gov.cn/english/aboutus/Departments/>> accessed 24 September 2017.

24 The Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of the SAIC, 'Bureau Introduction (反垄断与反不正当竞争执法局 司局介绍)' (in Chinese) <<http://www.saic.gov.cn/fldyfbzdz/sjjs/>> accessed 24 September 2017.

25 This number was revealed in an anonymous interview in 2014. See Zhang (n 5) 215 ('In particular, the NDRC and SAIC have, respectively, 15 and 8 people in Beijing who are responsible for antitrust enforcement'). Judging by the usual size of such a department inside the central government, the staff number is not likely to exceed 15 at any point in time. See Hao (n 9) 31.

26 Business Sohu, 'The Antitrust "Hunter" (反垄断猎人)' (2014) (in Chinese) <<http://business.sohu.com/s2014/jrzj328/>> accessed 24 September 2017.

27 Zhang (n 5) 215.

28 See the NDRC Three-Designation Order (n 3) and the SAIC Three-Designation Order (n 4).

AML, the NDRC interpreted price-related monopolistic conducts as ‘agreements, decisions or other collusive practices that exclude or restrain competition from the aspect of price’²⁹ and ‘abuse of dominance carried out through price manipulation’.³⁰ This interpretation was accepted by the SAIC in its implementation regulations, where the SAIC took on whatever leftovers the NDRC had, and elaborated them into various kinds of monopolistic conducts but refrained from speaking of any price-related conduct.³¹

In light of this obscurity, Tables 1 and 2 try to sketch out the jurisdictional borderline between the NDRC and the SAIC, by distilling the two agencies’ listings of price-related and non-price-related conducts in their respective implementation regulations. The conducts falling under the NDRC’s jurisdiction are extracted from the NDRC’s Regulation on Anti-Price Monopoly. The conducts under the SAIC’s jurisdiction come from the SAIC’s Regulation on the Prohibition of Monopoly Agreement Conduct, the Regulation on the Prohibition of Conduct Abusing a Dominant Market Position, and the Regulation on the Prohibition of Excluding or Restraining Competition by Abuse of Intellectual Property Rights.

Table 1 is about anticompetitive agreements and Table 2 about abuses of dominance. These conducts are listed in a way that comparisons can be drawn between the two agencies. Where an allegedly non-price-related conduct belonging to the SAIC matches with a price-related conduct belonging to the NDRC, they are listed side by side; where there is no match, the corresponding space is left blank.

III. EXAMINING THE JURISDICTIONAL DELIMITATION IN THEORY

The economic misconception in this delimitation

This section uses standard economic theories to demonstrate that this borderline has failed to provide thorough delimitation, in the sense that it is essentially impossible to separate price-related monopolistic conducts from non-price-related ones.

29 Arts 3 and 5–9 of the Regulation on Anti-Price Monopoly (《反价格垄断规定》), promulgated by the NDRC on 29 December 2010 (effective on 1 February 2011) (in Chinese) <http://www.gov.cn/flfg/2011-01/04/content_1777969.htm> accessed 24 September 2017 (hereinafter, ‘the Regulation on Anti-Price Monopoly’).

30 *ibid.*, Arts 3 and 11–16.

31 Arts 4–8 of the Regulation on the Prohibition of Monopoly Agreement Conduct (《工商行政管理机关禁止垄断协议行为的规定》), promulgated by the SAIC on 31 December 2010 (effective on 1 February 2011) (in Chinese) <http://www.saic.gov.cn/zw/wjfb/zjl/201101/t20110104_213202.html> accessed 24 September 2017 (hereinafter, ‘the Regulation on the Prohibition of Monopoly Agreement Conduct’); Arts 4–7 of the Regulation on the Prohibition of Conduct Abusing a Dominant Market Position (《工商行政管理机关禁止滥用市场支配地位行为的规定》), promulgated by the SAIC on 31 December 2010 (effective on 1 February 2011) (in Chinese) <http://www.saic.gov.cn/zw/wjfb/zjl/201101/t20110104_213203.html> accessed 24 September 2017.

Table 1. Conducts of anticompetitive agreements governed respectively by the SAIC and the NDRC

The SAIC	The NDRC
<ul style="list-style-type: none"> • Horizontal agreements, including: <ul style="list-style-type: none"> ■ Quota restriction³² ■ Market sharing³³ ■ Restriction of technological innovation³⁴ ■ Concerted refusal to deal³⁵ • Non-price-related monopoly agreements by means of exercising intellectual property rights (IPRs),³⁹ including: <ul style="list-style-type: none"> ■ Monopoly agreements by members of a patent pool⁴⁰ • Other unspecified non-price-related monopoly agreements⁴¹ 	<ul style="list-style-type: none"> • Horizontal price-fixing agreements³⁶ • Vertical price-related agreements, including fixed-resale price maintenance, and minimum-resale price maintenance³⁷ • The organization and implementation of price-related monopolistic agreements or concerted practices by trade associations³⁸

32 The Regulation on the Prohibition of Monopoly Agreement Conduct (n 31), *ibid*, Art 4.

33 *ibid*, Art 5.

34 *ibid*, Art 6.

35 *ibid*, Art 7.

36 The Regulation on Anti-Price Monopoly (n 29) Art 7.

37 *ibid*, Art 8.

38 *ibid*, Art 9.

39 Art 4 of the Regulation on the Prohibition of Excluding or Restraining Competition by Abuse of Intellectual Property Rights ((《关于禁止滥用知识产权排除、限制竞争行为的规定》)), promulgated by the SAIC on 7 April 2015 (effective on 1 August 2015) (in Chinese) <http://www.saic.gov.cn/zw/wjfb/zjl/201504/t20150413_213223.html> accessed 24 September 2017 (hereinafter, 'the Regulation on the Prohibition of Excluding or Restraining Competition by Abuse of Intellectual Property Rights').

40 *ibid*, Art 12.

41 The Regulation on the Prohibition of Monopoly Agreement Conduct (n 31) Art 8.

Table 2. Abuses of dominance governed respectively by the SAIC and the NDRC

The SAIC	The NDRC
<ul style="list-style-type: none"> ● Refusal to deal in general⁴² ● Restrictive dealing,⁴⁴ including: <ul style="list-style-type: none"> ■ Exclusive dealing with the dominant undertaking ■ Requiring the trading counterparties to deal exclusively with the business operators designated by the dominant undertaking ■ Requiring the trading counterparties not to deal with the competitors of the dominant undertaking ● Applying non-price discriminatory trading conditions⁴⁶ ● Tying and bundling, or imposing other unfair trading conditions;⁴⁸ 	<ul style="list-style-type: none"> ● Refusal to deal in the forms of overpricing and underpricing⁴³ ● Restrictive dealing by means of price discounts,⁴⁵ including: <ul style="list-style-type: none"> ■ Requiring exclusive dealing with the dominant undertaking by means of price discounts ■ Requiring the trading counterparties to deal exclusively with the business operators designated by the dominant undertaking by means of price discounts ● Price discrimination⁴⁷ ● Imposing price-related unfair trading conditions, including: <ul style="list-style-type: none"> ■ Selling at a unfairly high price or buying at a unfairly low price by a dominant undertaking;⁴⁹ ■ Selling below costs without justification;⁵⁰ ■ Charging unreasonable fees in addition to a price;⁵¹

(Continued)

42 Art 4 of the Regulation on the Prohibition of Conduct Abusing a Dominant Market Position (《工商行政管理机关禁止滥用市场支配地位行为的规定》), promulgated by the SAIC on 31 December 2010 (effective on 1 February 2011) (in Chinese) <http://www.saic.gov.cn/zw/wjfb/zjl/201101/t20110104_213203.html> accessed 24 September 2017 (hereinafter, 'the Regulation on the Prohibition of Conduct Abusing a Dominant Market Position').

43 The Regulation on Anti-Price Monopoly (n 29) Art 13.

44 The Regulation on the Prohibition of Conduct Abusing a Dominant Market Position (n 42) Art 5.

45 The Regulation on Anti-Price Monopoly (n 29) Art 14.

46 The Regulation on the Prohibition of Conduct Abusing a Dominant Market Position (n 42) Art 7.

47 The Regulation on Anti-Price Monopoly (n 29) Art 16.

48 The Regulation on the Prohibition of Conduct Abusing a Dominant Market Position (n 42) Art 6.

49 The Regulation on Anti-Price Monopoly (n 29) Art 11.

50 *ibid*, Art 12.

51 *ibid*, Art 15.

Table 2. (continued)

The SAIC	The NDRC
<ul style="list-style-type: none"> ● Abuse of dominance in the course of exercising IPRs, including: <ul style="list-style-type: none"> ■ Refusal to provide essential facilities;⁵² ■ Restrictive dealing (including exclusive dealing and requiring the trading counterparties to deal exclusively with the designated business operators);⁵³ ■ Tying and bundling;⁵⁴ ■ Imposing unfair trading conditions;⁵⁵ ■ Applying discriminatory trading conditions;⁵⁶ ■ Abuse of dominance by a patent pool management organization by imposing restrictive conditions on the members of the patent pool or licensees in the relevant market;⁵⁷ ■ Abuse of dominance in the course of setting and implementing standards.⁵⁸ 	

Conducts in a perfect monopoly situation

A monopoly can be defined, in a nutshell, as a single firm facing no actual or potential competition in a market with high entry barriers.⁵⁹ In a perfect monopoly situation, pricing practices are inherently related to the monopolistic status, as the latter being a sufficient condition for the former. Namely, after an undertaking has achieved (no matter how) monopoly, it would be strongly motivated to recoup all the costs it has incurred in the process of achieving the monopoly; such costs may come from, *inter alia*, capacity-building, excessive advertising, loyalty rebates, and lobbying

52 The Regulation on the Prohibition of Excluding or Restraining Competition by Abuse of Intellectual Property Rights (n 39) Art 7.

53 *ibid*, Art 8.

54 *ibid*, Art 9.

55 *ibid*, Art 10.

56 *ibid*, Art 11.

57 *ibid*, Art 12.

58 *ibid*, Art 13.

59 Stephen Martin, *Industrial Economics: Economic Analysis and Public Policy* (2nd edn, Macmillan 1994) 23.

efforts.⁶⁰ The most effective way of recoupment would be exploiting its monopolistic position.⁶¹ This way of recoupment will eventually transform into price increase, because in a monopolized market, the monopoly has the sole power to set price and price is directly linked to marginal revenue.⁶²

Besides recouping previous costs, a monopoly also tends to use its position to extract profits that it would otherwise not be able to extract. Namely, under the presumption that every firm seeks to maximize its inter-temporal profits, a firm preserving a monopoly will most definitely be motivated to extract the producer surplus, which is the transform of consumer surplus.⁶³ This directly results in overpayment by consumers.

Conducts in imperfect monopoly situations

In situations where imperfect monopoly and strategic interactions exist, monopolistic conducts are also always connected to price, in the sense that they are bound to induce the *effect* of price distortion. This can be proved by taking a closer look at some of the anticompetitive conducts listed under the SAIC's authority, including quota restriction, market-sharing, and tying and bundling.

Firms may compete on quantity instead of price. According to the Cournot competition model, in a market where output capacity is difficult to adjust and there are duopoly firms, the firms will compete on output quantity instead of price, because price-cuts cannot be compensated by sale increase, and therefore each firm reacts to its opponent's output strategy in order to maximize profits.⁶⁴ Eventually, the outputs of the two firms will reach the Cournot equilibrium. If there were more than two firms, as the number of firms approaches infinity, the price would approach marginal costs.⁶⁵ Consequently, firms in the Cournot model will be incentivized to form an alliance to self-restrain their output—namely quota restriction—in order to preserve the monopoly profits.⁶⁶ This circles back to the perfect monopoly situation, where consumer surplus is transformed into producer surplus. Therefore, a quota restriction agreement may appear in the form of output collusion, but it has the effect of raising price above the competitive level.

Market-sharing has the same effect as quota restriction. It splits the market into geographical fragments whereas quota restriction carves up the output demands of the customers. Both conducts have the aim to create monopoly or significant market power in the fragmented market.⁶⁷ Therefore, as a means of monopolization, market-sharing will also result in price manipulation.

60 Roger Van den Bergh, 'The Economics of Competition Policy and the Draft of the Chinese Competition Law' in Thomas Eger and others (eds), *Economic Analysis of Law in China* (Edward Elgar 2007) 77–111, 81.

61 Lynne Pepall and others, *Industrial Organization: Contemporary Theory and Empirical Applications* (5th edn, Wiley 2014) 35.

62 *ibid* 31.

63 *ibid* 31.

64 Stephen Martin, *Industrial Organization in Context* (OUP 2010) 64–65.

65 *ibid* 76–77.

66 Pepall and others (n 61) 235.

67 Francesco Russo and others, *European Commission Decisions on Competition: Economic Perspectives on Landmark Antitrust and Merger Cases* (CUP 2010) 43.

The same is true for tying and bundling. As a conduct that can be justified by efficiency, tying should be anticompetitive only if the firm has a dominant position in the tying product market. The anticompetitive concerns are: (i) The dominant firm may use tying to price-discriminate customers who only want part of the bundling package; (ii) The dominant firm may use tying to leverage its dominant position in the tying market to the tied market to carry out further exploitative abuses.⁶⁸ Both concerns are essentially price related.

Other conducts, such as refusal to deal and restrictive dealing, are also impossible to be divided into price-related ones and non-price-related ones. This is evidenced by the two agencies' own conceptions. As the SAIC claimed to regulate refusal to deal and restrictive dealing in general⁶⁹ and the NDRC claimed to regulate refusal to deal in the forms of overpricing and underpricing and restrictive dealing by means of price discounts,⁷⁰ the line started to become extremely blurry. It is questionable as regards to (i) whether there is any other way to refuse a deal besides making the price unacceptable for the counterparty, and (ii) whether a restrictive dealing scheme can be sustained on a long run without any financial incentive being offered to the restrained party at all.

Conducts involving intellectual property rights

Finally there are anticompetitive conducts involving the use of IPRs, the authority of which was claimed by the SAIC in its Regulation on the Prohibition of Excluding or Restraining Competition by Abuse of Intellectual Property Rights. The exploitation of IPRs by the licensor is normally legitimate, but it is possible that the IPRs are used by the licensor to carry out exclusionary abuses, such as input and output foreclosure, and establishing entry barriers.⁷¹ Therefore, the reason why IPRs-related conducts are distinguished from generic anticompetitive conducts should be their intersection of antitrust intervention and intellectual property rights protection, instead of the proximity to price.

In that light, it is not surprising that IPRs-related anticompetitive conducts have already fallen into a grey area in the AML legal framework. Currently, the SAIC's Regulation on the Prohibition of Excluding or Restraining Competition by Abuse of Intellectual Property Rights is the only secondary law dedicated to regulating IPRs-related anticompetitive conducts. There, the SAIC did not make any reference to the 'price-related and non-price-related' delimitation. Meanwhile, the NDRC does not have any implementation regulation on IPRs-related conducts yet. What happens in practice is that the jurisdictional delimitation has been deliberately set aside when it comes to IPRs-related conducts. For example, the two agencies have been working together to draft guidelines on how to assess the anticompetitiveness of IPR-related

68 *ibid* 149.

69 The Regulation on the Prohibition of Conduct Abusing a Dominant Market Position (n 42) Arts 4–5.

70 The Regulation on Anti-Price Monopoly (n 29) Arts 13–14.

71 William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard UP 2003) 396–97.

conducts,⁷² without addressing the jurisdictional issue first. Another example is the *Qualcomm* case, in which the NDRC prohibited conducts belonging to the SAIC (according to the relevant implementation regulation). This case is described in Section ‘The inevitable overstepping of authority: three scenarios’.

The legal challenge of adhering to this delimitation

The need to sever various conducts in one case

Even if price-related conducts and non-price-related ones could somehow be distinguished in theory, there would still be a practical problem on how to sever different conducts in one case. It is a common situation that the undertaking(s) in question may have committed multiple anticompetitive conducts simultaneously. There, strictly complying with the jurisdictional delimitation would require a separation of the conducts in question and the launch of parallel proceedings by the NDRC and the SAIC.⁷³ However, the logistics of meeting those requirements can be quite daunting. The two agencies would have to figure out, eg whether they should work together or conduct separate investigations to find a dominant position, and whether they should impose a joint sanction or separate sanctions if a cartel agreement triggers both jurisdictions.⁷⁴

The ‘first discovery, first investigation’ principle?

The above-mentioned challenge demands formal coordination mechanisms, which are unfortunately missing in the AML legal framework. So far the NDRC and the SAIC have not come up with a systematic solution. Instead, they have been trying to sidestep the jurisdictional delimitation. According to Kunlin Xu, the former director of the NDRC’s Bureau of Price Supervision and Anti-Monopoly, the NDRC and the SAIC have been coordinating with each other under the principle of ‘first discovery, first investigation’ when it comes to the issue of case allocation.⁷⁵ In other words, there is no separation of price-related and non-price-related conducts under this principle; instead, whichever agency that first becomes aware of the undertaking(s)

72 Under the guidance and coordination of the Anti-Monopoly Commission (AMC) of the State Council, four central administrative agencies, including the NDRC, the SAIC, the MOFCOM, and the State Intellectual Property Office, produced respectively their versions of the antitrust guidelines on IPRs-related conducts. After consolidating these four versions, the AMC formulated a new version that was open for comments until 21 April 2017. This consolidated version was published on the MOFCOM website. See the MOFCOM, ‘Openly Soliciting Comments on Antitrust Guidelines on Abuse of IPRs (公开征求《关于滥用知识产权的反垄断指南（征求意见稿）》的意见)’ (2017) (in Chinese) <<http://fdj.mofcom.gov.cn/article/zcfb/201703/20170302539418.shtml>> accessed 24 September 2017.

73 Adrian Emch, ‘Chinese Antitrust Institutions—Many Cooks in the Kitchen’ (2014) 10(1) *Comp Pol Intl* 217–46, 222 (‘conflicts could arise in cases that have several different elements (not a single action) which each fall under the jurisdiction of a different authority’).

74 Angela Huyue Zhang, ‘The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective’ (2011) 56(3) *Antitrust Bulletin* 631–63, 641, 643.

75 China Net (中国网), ‘Director of the NDRC’s Anti-Monopoly Bureau: Petroleum, Telecommunication, and Banking Industries Are All within the Investigatory Horizon (发改委反垄断局局长：石油电信银行都在调查视野内)’ (2013) (in Chinese) <<http://finance.sina.com.cn/china/hgjj/20130917/115716786283.shtml>> accessed 24 September 2017 (‘先发现先查处的原则’).

infringing the AML should be responsible for applying the AML to all the identified anticompetitive conducts by the undertaking(s) in question.

The problem is that it is difficult to find legal grounds for this proclaimed coordination mechanism. The AML provides no legal basis for this principle, nor do the Three-Designation Orders that established the tripartite regime. The only thing that comes close is a legislative interpretation from the Legislative Affairs Commission of the National People's Congress (NPC) Standing Committee, which, in an effort to uphold the principle of *ne bis in idem*⁷⁶ when it comes to the overlapping authority of the Anti-Unfair Competition Law⁷⁷ and the Price Law⁷⁸ on the conducts of overpricing, stated that an overpricing conduct shall be subject to only one administrative fine by whichever authority that first initiated the investigation on the conduct.⁷⁹

In that sense, one could say that this 'first discovery, first investigation' principle is just an analogical application of that legislative interpretation. However, it is questionable whether this analogy is applicable in the AML context: The legislative interpretation by the NPC Standing Committee was based on the premise that both authorities have jurisdiction on one conduct, but in situations where the NDRC and the SAIC are expected to launch parallel enforcement proceedings, that premise no longer stands, because supposedly the Three-Designation Orders and the implementation regulations have already designated a particular agency to handle a particular conduct. Therefore, this principle is an expedient for case allocation at best, and it shows how impractical the jurisdictional delimitation is.

IV. EXAMINING THE JURISDICTIONAL DELIMITATION IN PRACTICE

Section III demonstrated how difficult it is to adhere to this jurisdictional delimitation from both an economic perspective and a legal perspective. This section investigates how this delimitation has been complied with in actual cases.

An overview of the enforcement decisions from 2008 to 2016

Over the past nine years, the number of enforcement decisions under the AML has been gradually increasing. By 31 December 2016, there are 7 case decisions published by the NDRC and 46 by the SAIC. These case decisions are listed in Table 3 according to the year they were made in.

76 This principle is provided in Art 24 of the Administrative Penalty Law: 'For the same illegal act committed by a party, the party shall not be given an administrative penalty of fine for more than once.' See Art 24 of the Law of the People's Republic of China on Administrative Penalty (《中华人民共和国行政处罚法》), adopted by the National People's Congress on 17 March 1996 (effective on 1 October 1996) <http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383613.htm> accessed 24 September 2017 (hereinafter, 'the Administrative Penalty Law').

77 See n 12. This law is applied by the SAIC and its local agencies.

78 The Price Law (n 17). This law is applied by the NDRC and its local agencies.

79 The Legislative Affairs Commission of the NPC Standing Committee, 'Reply to the Question of How to Apply the Relevant Rules of the Anti-Unfair Competition Law and the Price Law (全国人大常委会法制工作委员会对《反不正当竞争法》和《价格法》有关规定如何适用问题的答复 (行复字〔2007〕6号))' (2007) (in Chinese) <<http://www.xzgsj.gov.cn/baweb/show/shiju/bawebFile/551464.html>> accessed 24 September 2017.

Table 3. The number of AML enforcement decisions issued by the NDRC and the SAIC from 2008 to 2016

	2008	2009	2010	2011	2012	2013	2014	2015	2016	In total
The NDRC	0	0	0	0	0	1	1	2	3	7
The SAIC	0	0	1	1	7	4	6	14	13	46

The numbers counted here refer only to the case decisions published on the official websites of the two agencies.

The contrast of quantity can be partly explained by the different working methods of the two agencies when dealing with local agencies. The SAIC seems to prefer delegating the decision-making power to local agencies on a case-by-case basis. This is consistent with the observation that, because its responsibilities mainly involve regulating national economy at a micro level,⁸⁰ the SAIC relies heavily on local agencies (namely AICs) for law enforcement.⁸¹ Accordingly, although the SAIC personally handled only two cases (respectively in 2015 and 2016), as the delegator it also took credit for the other 44 cases handled by provincial AICs. The NDRC works closely with local agencies as well, but it gives general authorizations to local agencies under the *Regulation on the Administrative Enforcement Procedures of Anti-Price Monopoly*.⁸² Therefore, it took credit only for the seven cases it handled personally.

Another explanation for this contrast is the lack of disclosure by the NDRC. According to the officially disclosed information, the NDRC have completed at least nine cases by 2016, but the official decisions of the other two cases were never made public. Both cases were completed in 2013, and only case summaries were available to the public.⁸³ Local agencies (namely DRCs) also completed cases, but unlike the SAIC, the NDRC never systematically published those local case decisions. Unofficial sources revealed that by April 2015, at least 16 cases were completed by provincial DRCs.⁸⁴

80 The SAIC, 'Mission' <<http://www.saic.gov.cn/english/aboutus/Mission/index.html>> accessed 24 September 2017.

81 Hao (n 9) 31.

82 Art 3 of the Regulation on the Administrative Enforcement Procedures of Anti-Price Monopoly (《反价格垄断行政执法程序规定》), promulgated by the NDRC on 29 December 2010 (effective on 1 February 2011) (in Chinese) <<http://jjs.ndrc.gov.cn/zcfg/201101/W020110104343453311990.pdf>> accessed 24 September 2017.

83 For reports of the NDRC on closing these two cases, see The NDRC, 'Six Foreign Undertakings Were Punished for Conducting Price Monopolies of LCD Panels (六家境外企业实施液晶面板价格垄断被依法查处)' (in Chinese) <http://jjs.ndrc.gov.cn/gzdt/201301/t20130117_523203.html> accessed 24 September 2017; the NDRC, 'Baby Formula Producers Were Fined ¥668.73 million for Violating the Anti-Monopoly Law (合生元等乳粉生产企业违反《反垄断法》限制竞争行为共被处罚6.6873亿元)' (in Chinese) <http://www.ndrc.gov.cn/xwzx/xwfb/201308/t20130807_552991.html> accessed 24 September 2017.

84 The US-China Business Council, 'Update: Competition Policy & Enforcement in China' (May 2015) 18 <<https://www.uschina.org/sites/default/files/2015.05%20USCBC%20Update%20on%20Competition%20Enforcement%20in%20China.pdf>> accessed 24 September 2017.

The inevitable overstepping of authority: three scenarios

By crosschecking the anticompetitive conducts identified in each of the 53 decisions and these conducts' supposed handling authority as listed in Tables 1 and 2, we can identify at least 8 cases as cases not being allocated in accordance with the jurisdictional delimitation.⁸⁵ These eight cases include five AIC decisions, one SAIC decision, and two NDRC decisions. Should the jurisdictional delimitation be applied strictly, all eight cases could be argued as misallocated. These cases can be categorized into three scenarios, where the inevitable overstepping of authority unfolds:

- Scenario (1): The case-handling agency identified the existence of conducts that supposedly belong to the other agency in its factual description, but excluded them completely from its legal analysis;
- Scenario (2): The case-handling agency identified the existence of conducts that supposedly belong to the other agency in the factual description, dedicated specific parts of the legal analysis to those conducts, and eventually ruled on the legality of those conducts;
- Scenario (3): The case-handling agency identified the existence of conducts that supposedly belong to the other agency in factual description, and took them into account in the legal analysis, but only as background circumstances; therefore, not ruling on their legality.

Scenario (1)

Scenario (1) consists of five cases, all of which are regional cases handled by provincial AICs under delegation. These five cases are listed in Table 4. All of them are cartel cases that contain—but not limited to—price-fixing clauses. When describing the facts of the case, all of the AICs identified the existence of price-fixing clauses, but they refrained from performing any legal analysis on those clauses.

Scenario (2)

Scenario (2) consists of two cases—*Qualcomm* handled by the NDRC and *Tetra Pak* by the SAIC. These two cases are presented in Table 5. Both are abuse of dominance cases at the national level. In both cases, the handling agency made legal rulings on the conducts that supposedly belong to the other agency, but they found a common way to avoid direct jurisdictional confrontations: when stating the grounds of decision, the two agencies referred only to the provisions stipulated in the AML, without any reference to their own implementation regulations, which laid down more specifically the types of conduct belonging to them. This essentially means the jurisdictional delimitation was breached, despite the consistency with the AML.

In *Qualcomm*, the abusive conducts identified by the NDRC include charging unfairly high license fees, tying and bundling, and imposing unfair trading conditions in

85 These are 8 cases out of 53 published ones. Possibly, there are more than 8 cases like this, but due to the lack of systematic information disclosure (mainly by the NDRC), that possibility is yet to be ascertained.

Table 4. Enforcement decisions in Scenario (1)

Reference number	Handling authority	Time of decision	Conducts identified	Conducts addressed	Online link
1 The SAIC Competition Enforcement Announcement [2013] No 3	Henan AIC	4 January 2012	Horizontal agreements on market sharing and price fixing	Market sharing	http://www.saic.gov.cn/fldyfbzdzjz/jzzfgg/201703/t20170309_232248.html (accessed 24 September 2017)
2 The SAIC Competition Enforcement Announcement [2013] No 4	Liaoning AIC	Between March and August in 2012	Horizontal agreements on quota restriction and price fixing	Quota restriction	http://www.saic.gov.cn/fldyfbzdzjz/jzzfgg/201703/t20170309_232249.html (accessed 24 September 2017)
3 The SAIC Competition Enforcement Announcement [2013] No 9	Zhejiang AIC	14 December 2012	Horizontal agreements on market sharing and price fixing	Market sharing	http://www.saic.gov.cn/fldyfbzdzjz/jzzfgg/201703/t20170309_232254.html (accessed 24 September 2017)
4 The SAIC Competition Enforcement Announcement [2013] No 12	Yunnan AIC	7 April 2013	Collusion organized by trade associations on restrictive dealing and price fixing	Unspecified ⁸⁶	http://www.saic.gov.cn/fldyfbzdzjz/jzzfgg/201703/t20170309_232257.html (accessed 24 September 2017)
5 The SAIC Competition Enforcement Announcement [2016] No 9	Anhui AIC	18 September 2016	Horizontal agreements on market sharing and price fixing	Market sharing	http://www.saic.gov.cn/fldyfbzdzjz/jzzfgg/201703/t20170309_232288.html (accessed 24 September 2017)

the course of exercising IPRs. The latter two conducts were claimed authority by the SAIC in the relevant implementation regulations,⁸⁷ but the NDRC took the entire case under its wings. The NDRC based the grounds of decision on Article 17(1)(e)

86 This decision referred only to the general rules prohibiting trade associations from organizing anticompetitive agreements and concerted practices, namely Art 16 of the AML (n 21) and Art 9(2) of the Regulation on the Prohibition of Monopoly Agreement Conduct (n 31). Based on the case circumstances, this article presumes that the AIC of this case did not conduct any legal analysis on the price-fixing clauses and therefore puts it in Scenario (1). However, if that presumption turns out to be untrue, this case should be put in Scenario (2).

87 'Tying and bundling' was stipulated in Art 9 of the SAIC Regulation on the Prohibition of Excluding or Restraining Competition by Abuse of Intellectual Property Rights (n 39), and also in Art 6 of the SAIC Regulation on the Prohibition of Conduct Abusing a Dominant Market Position (n 42). 'Imposing unfair

of the AML, which stipulates the general prohibition on tying and bundling, and the imposition of other unfair trading conditions, without any mentioning of its own Regulation on Anti-Price Monopoly.

The SAIC did the same in *Tetra Pak*. It identified three abusive conducts in that case: tying and bundling, exclusive dealing with the supplier, and loyalty rebates. The former two may very well belong to the SAIC, as provided in the SAIC's Regulation on the Prohibition of Monopoly Agreement Conduct and the Regulation on the Prohibition of Conduct Abusing a Dominant Market Position, but the last one is questionable. The SAIC qualified *Tetra Pak*'s discount schemes as loyalty rebates, and found them to be illegal, notwithstanding the fact that the AML and the implementation regulations did not stipulate the concept of loyalty rebates. Within the current AML legal framework, the only spelt out term that comes close to the concept of loyalty rebates is 'restrictive dealing by means of price discounts', which was stipulated by the NDRC in the Regulation on Anti-Price Monopoly.⁸⁸ Even if that term did not apply here, as price discounts, loyalty rebate schemes would be obviously price related. In that light, one can easily argue that loyalty rebate cases should go to the NDRC.

Nonetheless, the SAIC took the loyalty rebates in question under its wings by invoking Article 17(1)(g) of the AML, the catch-all clause governing the types of abuse to be prohibited.⁸⁹ Just like the NDRC in *Qualcomm*, the SAIC in *Tetra Pak* did not refer to any of the implementation regulations either. Consequently, the SAIC successfully established its authority on loyalty rebates, at the possible expense of marginalizing the NDRC's authority on restrictive dealing by means of price discounts.

Scenario (3)

As listed in Table 6, Scenario (3) consists of one case, namely the *Medtronic* case handled by the NDRC. In this case, *Medtronic* was fined for committing fixed and minimum resale price maintenance (RPM) with downstream distributors. Besides fixed and minimum RPM, the NDRC in the factual description also acknowledged the existence of non-RPM vertical restrictions, which, according to the mutually agreed jurisdictional delimitation, should belong to the SAIC. The NDRC incorporated those non-RPM vertical restrictions into its legal analysis, but what is novel here is that the NDRC viewed them only as circumstantial evidence that supports the legal analysis of the RPM schemes in question.⁹⁰ This case is further examined in Section 'Implications in Scenario (3)'.

88 The Regulation on Anti-Price Monopoly (n 29) Art 14.

89 This clause provides that, in addition to the abusive conducts by dominant undertakings listed in the previous clauses, other abusive conducts identified by the AML enforcement agencies should also be prohibited. See the AML (n 21) Art 17(1)(g).

90 Those non-RPM vertical restrictions were identified by the NDRC when analysing the effects of the fixed and minimum RPM on the competition between distributors ('由于当事人严格设定了涉案产品各转售环节的价格或最低价格, 与其交易相对人达成并实施了垄断协议, 并且通过限制销售对象、销售区域、禁止销售竞争性产品等措施, 进一步强化了固定转售价格和限定最低转售价格的效果, 排除、限制了经销商之间的竞争。'). See the NDRC, 'The NDRC Administrative Penalty Decision [2016] No 8 (国家发展和改革委员会行政处罚决定书[2016]8号)' (2016) (in Chinese) <http://jjs.ndrc.gov.cn/fjgld/201612/t20161209_829716.html> accessed 24 September 2017 ('the *Medtronic* decision').

Table 5. Enforcement decisions in Scenario (2)

Reference number	Handling authority	Time of decision	Conducts described and addressed	Rules applied	Online link
1 The NDRC Administrative Penalty Decision [2015] No 1 (The <i>Qualcomm</i> case)	The NDRC	9 February 2015	Abuse of dominance by- (1) charging unfairly high license fees,- (2) tying and bundling, and- (3) imposing unreasonable trading conditions	— Article 17(1)(e) of the AML (on tying and bundling, and imposing unreasonable trading conditions)	http://www.ndrc.gov.cn/fzgggz/jgdyfld/fjgld/201503/t20150302_666176.html (accessed 24 September 2017)
2 The SAIC Competition Enforcement Announcement [2016] No 10 (The <i>Tetra Pak</i> case)	The SAIC	9 November 2016	Abuse of dominance by- (1) tying and bundling,- (2) exclusive dealing with the supplier, and- (3) loyalty rebates	— Article 17(1)(d) of the AML (on restrictive dealing)- Article 17 (1)(e) of the AML (on tying and bundling)- Article 17(1)(g) of the AML (<i>the catchall clause</i>)	http://www.saic.gov.cn/fldyfbzdjz/jzfgg/201703/t20170309_232289.html (accessed 24 September 2017)

Table 6. Enforcement decisions in Scenario (3)

Reference number	Handling authority	Time of decision	Conducts identified and analysed	Rules applied	Online link
The NDRC Administrative Penalty Decision [2016] No 8 (The <i>Medtronic</i> case)	The NDRC	5 December 2016	— Vertical agreements on fixed and minimum RPM;- Vertical agreements restricting the customers to sell to;- Vertical agreements restricting the territory to sell in;- Vertical agreements prohibiting the sales of competitive products.	— Article 14(1) of the AML (on fixed PRM); - Article 14(2) of the AML (on minimum PRM)	http://www.ndrc.gov.cn/fzgggz/jgdyfld/fjgld/201612/t20161209_829717.html (accessed 24 September 2017)

V. IMPLICATIONS OF THE JURISDICTIONAL DELIMITATION

As shown in Section ‘Formation’, the jurisdictional delimitation between the NDRC and the SAIC was drawn as a result of turf war and path dependency. This comes at the expense of making it practically impossible to adhere to this delimitation. In that sense, it is inevitable that this delimitation would be circumvented. That inevitability is confirmed in the case record from 2008 to 2016, which shows that the two agencies have found three ways to bypass the delimitation.

One cannot really criticize the two agencies too much for circumventing the jurisdictional delimitation, seeing how their hands are tied. Nonetheless, a question can be raised regarding what implications this circumvention would have on the AML enforcement. So far this delimitation has already failed to provide guidance on case allocation. If it also entails negative implications, this delimitation should be removed and be replaced by one that is more theoretically sound and practically workable. This section discusses the negative implications shown in each of the three scenarios.

Implications in Scenario (1)

In the five cases in Scenario (1), price-fixing conducts were an integral part in each case, but they were artificially isolated from other conducts, presumably because they fall outside the jurisdictional scope of the SAIC. As a result, definitive rulings of legality on those price-fixing conducts were missing.

There could only be two possible explanations for the missing legal analyses: Either these AICs took into account the price-fixing conducts to reach their fining decisions but concealed their lines of reasoning on those conducts, or they did not consider the price-fixing conducts at all, therefore punishing only non-price-fixing cartelistic conducts. The former explanation would be a direct violation of the principle of fairness and openness, as laid down in Articles 4 and 31 of the Administrative Penalty Law.⁹¹ Meanwhile, the latter would mean the legality of those price-fixing clauses was left unchecked.⁹² In that event, if the NDRC ever decides to follow-up on fining the price-fixing conducts, a critical question will arise regarding the appropriate amount of confiscations of unlawful gains and fines to be imposed by the NDRC.⁹³

In a broader context, the lack of definitive ruling on those price-fixing conducts could also jeopardize subsequent civil actions by obscuring the evidentiary value of these administrative decisions. Under the AML, victims of a monopolistic conduct can choose to file either a lawsuit before a court or a report to the enforcement agencies, or both.⁹⁴ It was observed that, although the law does not specify whether a prohibition decision by an enforcement agency can serve as direct proof of an AML violation in follow-on civil litigations, the Chinese courts tend to weigh more on the findings by administrative agencies than other documented evidence.⁹⁵ In that light, where subsequent lawsuits are filed, a prohibition decision like the above-mentioned five is more likely to complicate, as opposed to counseling, a court's assessment,

91 The Administrative Penalty Law (n 76) Arts 4 and 31.

92 Zhang (n 74) 661 (predicting the risk of selective enforcement by the AML agencies, particularly the under-enforcement against state-owned enterprises).

93 These two penalty measures are provided in Arts 46 and 47 of the AML (n 21), and have been repeatedly used by the NDRC and the SAIC. See Xiaoye Wang and Adrian Emch, 'Five Years of Implementation of China's Anti-Monopoly Law—Achievements and Challenges' (2013) 1(2) *J Antitrust Enforcement* 247–71, 260, 263.

94 AML (n 21) Art 50. See also Wang and Emch, *ibid* 263 (describing the dual-track AML enforcement system by the administrative antitrust authorities and the courts).

95 King & Wood Mallesons, 'The Dual System of Anti-Monopoly Law – The Interplay between Administrative Enforcement and Civil Action' (2013) <<http://www.chinalawinsight.com/2013/09/articles/corporate/antitrust-competition/the-dual-system-of-anti-monopoly-law-the-interplay-between-administrative-enforcement-and-civil-action/>> accessed 24 September 2017.

because the court would have to decide to what extent the missing legal analysis should depreciate the evidentiary value of that decision.⁹⁶

This concern is yet to be verified. So far there is only one follow-on civil case, namely *Junwei Tian v Beijing Carrefour Shuangjing Store and Abbott Shanghai*,⁹⁷ in which the plaintiff sued Carrefour and Abbott for damages after the NDRC fined Abbott, along with five other infant formula producers, for vertical RPM.⁹⁸ In the appeal of this case, the Beijing High Court agreed with the Beijing IP Court and rejected the plaintiff's claim, mainly on the grounds that the NDRC decision did not suggest an anticompetitive agreement reached between Abbott and Carrefour, and that the plaintiff failed to provide other evidence to support his allegation that Carrefour as a downstream distributor committed vertical RPM.

Here the important thing is that both the first instance court and the appeal court showed a willingness to defer to the antitrust agencies' findings when establishing the illegality of a conduct, but unfortunately in this case the NDRC's vagueness in specifying the downstream distributors involved in the vertical RPM scheme prevented such deference.⁹⁹

The jurisdictional delimitation did not raise any issue in this case, but only because the litigation followed a NDRC decision concerning vertical RPM, where there was no jurisdictional dispute to begin with. The situation would be very different when a plaintiff wants to litigate following an administrative decision like the above-mentioned five, because in that case it would be unclear whether the price-fixing conducts had been found illegal by the SAIC. Consequently, it would be questionable whether a court should just infer the illegality of the whole cartel agreements (including the price-fixing conducts) from a SAIC decision, or should separate price-fixing conducts from other conducts and launch its own inquisition. In that sense, even if an administrative decision is precise enough to indicate the contracting parties of an anticompetitive agreement, cases like the ones in Scenario (1) will still generate an undeserved uncertainty on a follow-on litigation.

96 Sébastien J Evrard, 'Civil Antitrust Litigation in China' (2016) 5–6 <<http://www.gibsondunn.com/publications/Documents/Evrard-Civil-Antitrust-Litigation-in-China-Competition-Law-International-5-12-16.pdf>> accessed 24 September 2017 (noting that under the current legal framework, it is unclear to what extent the courts will defer to the findings of facts by the enforcement agencies).

97 For the first instance judgment, see *Junwei Tian v Beijing Carrefour Shuangjing Store and Abbott Shanghai* (田军伟诉北京家乐福商业有限公司双井店等垄断纠纷一案) (Beijing IP Court, 31 December 2015) (in Chinese) <<http://wenshu.court.gov.cn/content/content?DocID=d1cf3c53-6ba1-4192-a8e1-9bcb1c96e4&Keyword=反垄>> accessed 24 September 2017. For the appeal judgment, see *Junwei Tian v Beijing Carrefour Shuangjing Store and Abbott Shanghai* (田军伟上诉北京家乐福商业有限公司双井店等垄断纠纷一案) (Beijing High Court, 22 August 2016) (in Chinese) <<http://wenshu.court.gov.cn/content/content?DocID=7ad234f9-cfdc-453a-ae0a-a8f22dc22004&Keyword=垄断纠纷>> accessed 24 September 2017. For an English introduction, see Freshfields Bruckhaus Deringer LLP, 'Private Antitrust Litigation in China – First Court Ruling on a Follow-on Private Action Sets a High Standard and Burden of Proof' (12 January 2017) <<https://www.lexology.com/library/detail.aspx?g=96b1f6cd-3a4f-46ff-a6cc-763f2d4dce88>> accessed 24 September 2017.

98 NDRC, 'Baby Formula Producers' (n 83).

99 Freshfields Bruckhaus Deringer LLP (n 97) ('The particular difficulty faced by the plaintiff in this case was due to the fact that the NDRC's decision did not identify the distributors and retailers to whom the RPM clauses allegedly applied.').

Implications in Scenario (2)

The AML institutional design has been under critical studies from the outset. The primary problem identified by antitrust scholars is the lack of independence of the three agencies, in the sense that all of them implement policies that are not necessarily consistent with their AML responsibilities, and are exposed to political influences from other ministries within the State Council.¹⁰⁰ As the AML enforcement progresses, another issue identified is the lack of real judicial supervision, as evidenced by the fact that so far there has been only one unsuccessful challenge of enforcement decisions before the court.¹⁰¹

The underlying concern is that the lack of independence, coupled with the lack of judicial supervision, would leave too much room for non-competition policy considerations, and consequently would make it impossible for these agencies to overcome selective and opportunistic enforcement.¹⁰² There are fears that this has happened in practice. For example, some suggested that the AML enforcement has been primarily targeted at foreign companies since 2008,¹⁰³ and intentionally conferring advantages on domestic companies.¹⁰⁴ Also, some observed that the AML enforcement showed

- 100 Ng (n 5) 199–206 (demonstrating how the multiplicity of responsibilities and the consultations with other agencies have impacted the enforcement outcomes of the NDRC and the MOFCOM). See also Xiaoye Wang, ‘Comments on the Anti-Monopoly Law of the People’s Republic of China’ (2009) 4(3) *Frontiers L China* 343–75, 371 (‘since their competent departments, especially the National Development and Reform Commission, are important agencies authorized to formulate and implement national macro-economic policies, it is hard for the subordinate anti-monopoly law enforcement agencies to remain independent’).
- 101 This administrative litigation was filed by two concrete manufactures against the Price Bureau of Jiangsu Province, disputing the fine for their price-fixing conducts. Nanjing Intermediary Court dismissed this action for procedural reasons. See the NDRC, ‘Two Concrete Manufactures in Jiangsu Province Lost their Appeal against the Antitrust Penalty Decision (江苏省两家混凝土企业不服反垄断处罚败诉)’ (in Chinese) <http://jjs.ndrc.gov.cn/gzdt/201412/t20141208_651321.html> accessed 24 September 2017. See also Zhang (n 5) 211–12 (‘Since the enactment of the AML in 2008, there has been only one unsuccessful appeal lodged against a local enforcement agency in Jiangsu and no appeal has been lodged against any central enforcement agency.’).
- 102 Zhang, *ibid* 212–15 (suggesting that the AML enforcement outcome is likely to be either delayed or selective, because the demand of regulation exceeds the supply of regulation). See also Qian Hao, ‘An Overview of the Administrative Enforcement of China’s Competition Law: Origin and Evolution’ in Caroline Cauffman and Qian Hao (eds), *Procedural Rights in Competition Law in the EU and China* (Springer Berlin Heidelberg 2016) 39–57, 57 (noting the danger of inconsistencies in the AML enforcement caused by the interference of other policies that these agencies are in charge of and of other government players).
- 103 Thomas J Horton, ‘Antitrust or Industrial Protectionism? Emerging International Issues in China’s Anti-Monopoly Law Enforcement Efforts’ (2016) 14 *Santa Clara J Intl L* 109–42, 138–41 (summarizing the increasing allegations and the proof that the AML enforcement is discriminatory towards foreign companies). See also Samson Yuen, ‘Taming the “Foreign Tigers”: China’s Antitrust Crusade against Multinational Companies’ (2014) 4 *China Perspectives* 53–59, 55 (suggesting that, influenced by the techno-nationalism at the central policy level, the AML enforcement has been discriminating towards foreign companies in order to promote domestic industries); Daniel CK Chow, ‘How China Promotes Its State-Owned Enterprises at the Expense of Multinational Companies in China and Other Countries’ (2016) 41(3) *North Carolina J Intl L* 455–90, 478 (using three merger cases to exemplify the concern that the AML is being used to further China’s industrial policy goals).
- 104 Horton, *ibid* 137 (suggesting that the AML enforcement related to the licensing of intellectual property rights and patents is showing a tendency to ‘help indigenous companies gain favorable access to IPR held by foreign companies’).

particular weakness when investigating state-owned enterprises (SOEs) and administrative monopolies.¹⁰⁵

It should be pointed out that these suggestions and observations might not be consistent with some of the newest developments. Case records of the NDRC and the SAIC show that they and their local agencies have continuously pursued cases against SOEs, although the amounts of fine reached have indeed been relatively small comparing to those on foreign companies and private undertakings.¹⁰⁶ In fact, the NDRC and the SAIC are currently trying to expand the enforcement scope against SOEs. For example, in August 2017, the NDRC fined 23 electricity suppliers and their trade association in Shanxi Province for price-fixing after 568 days of investigation.¹⁰⁷

Moreover, it might be arbitrary to simply characterize selective enforcement as the wrongdoing of the two agencies. There is a larger context to be taken into account. For example, it was appreciated that, in the process of domesticating competition law, the Chinese legislature made the AML highly general and imprecise, because this open-search approach would leave room for future policy sequencing and calibration; it would also allow relevant stakeholders to participate in shaping the competition policy from a bottom-up approach.¹⁰⁸ In that sense, selective and opportunistic enforcement, when resulted from the contestation of various interests and the balancing of multiple objectives by the decision-makers at a certain stage, are both inevitable and desirable for the evolution of a newly established competition regime.¹⁰⁹

That being said, the *Qualcomm* case and the *Tetra Pak* case provided little assurance that the jurisdictional delimitation would play a positive role in steering the AML enforcement towards a brighter future. They showed that this delimitation is not only superfluous, but also undermining.

First, the jurisdictional delimitation appears to be useless for case allocation. In these two landmark cases,¹¹⁰ the fact that both agencies chose to refer only to the AML for grounds of intervention seems to be more than a coincidence. It seems to confirm that the difficulty to separate price-related and non-price-related conducts in one case did not give the two agencies much choice but to overstep their respective authority.¹¹¹ Admittedly, the Three-Designation Orders are just internal

105 Wang and Emch (n 93) 258–59, 266 (attributing the NDRC's failure to reach a decision in the *China Telecom/China Unicom* case to the interference of other governmental bodies, and pointing out the insufficient mechanisms to tackle administrative monopoly in the current legal framework).

106 Xu Liu, 'Whether Mercy outside the Law Should Be Shown to Electricity SOEs Committing Monopolistic Price-Fixing (对电力国企价格垄断能否法外开恩)' (25 May 2017), <<http://www.thepaper.cn/baidu.jsp?contid=1693474>> accessed 24 September 2017.

107 The NDRC, 'The Law Must Apply! The Winding 568 Days of the Case Concerning the Price-Fixing of Shanxi Direct Electricity Supply (法在必行! 山西直供电价格垄断案曲折的568天)' (3 August 2017) <<http://www.weibo.com/ttarticle/p/show?id=2309404136729698297901#related>> accessed 24 September 2017.

108 Yane Svetiev and Lei Wang, 'Competition Law Enforcement in China: Between Technocracy and Industrial Policy' (2016) 79 *L & Contemp Probs* 187–222, 191–94, 197.

109 *ibid* 219–20.

110 Allen & Overy, 'Antitrust in China: 2016 Highlights and an Outlook on 2017' (2017), <http://www.allenoverly.com/SiteCollectionDocuments/Brochure_Antitrust%20in%20China%202016%20highlights%20and%20an%20outlook%20on%202017.pdf> accessed 24 September 2017.

111 Zhang (n 74) 643–44 (predicting the two agencies' unwillingness to adhere to the jurisdictional delimitation).

governmental documents and the implementation regulations are just secondary laws to the AML, so referring only to the AML did not cause any inconsistency. Nonetheless, it raises the question of whether the delimitation set out in these documents should still be kept in place if the agencies have to circumvent it anyway.

Secondly, in their attempts to bypass the jurisdictional delimitation, these two agencies provided no explanation, nor were they subject to any supervision. As a result, the legitimacy of these decisions could be undermined, because the contestation and balancing of various interests were not shown.¹¹² This legitimacy problem could be addressed by the agencies formalizing their case-allocation practices,¹¹³ but as demonstrated in Section III, the messy jurisdictional delimitation provides no basis for formalization. In that sense, it is an institutional factor that could potentially set back the enforcement progress.¹¹⁴ For example, in circumstances where the two agencies want to bypass the delimitation, institutional dynamics between them would become the only mechanism for case allocation.¹¹⁵ In that regard, the proclaimed ‘first discovery, first investigation’ principle may bring certain foreseeability, but it cannot justify why those unsupervised institutional dynamics should prevail over the black-and-white rules defining the jurisdictional scopes of the two agencies.¹¹⁶ The consequence is that the agencies would no longer need to justify their choice of pursuing or not pursuing a case. For a case that is considered strategically important, the NDRC and the SAIC may fight over it, as the messy jurisdictional delimitation could simply be set aside by not referring to the implementation regulations. Meanwhile, for a ‘hot potato’ case, the agencies may not be held accountable for being negligent by using the jurisdictional delimitation as a shield.

Implications in Scenario (3)

Because of the jurisdictional delimitation, an inter-temporal uncertainty persists as regards to which agency gets to handle a particular case: a case containing a particular type of conduct may be handled by one agency this time, but next time, another case containing the same type of conduct could end up in the hands of the other agency. Consequently, as time progresses, the NDRC and the SAIC will end up producing more and more case decisions that contain the same types of conducts.

The underlying worry is that eventually there would be two alternative versions of theory of harm—a NDRC one and a SAIC one—on every type of conduct. A theory of harm is supposed to underpin the conclusion of why a particular conduct is

112 Svetiev and Wang (n 108) 219–21 (arguing that the strength of the AML regime lies at it allowing various stakeholders to contest the scope of rights and responsibilities, and suggesting that the contestation in decision-making is beneficial because it legitimizes ‘either the output or the process of defining the scope of rights’, but such legitimation may be lacking where ‘only the result—and not the manner—of balancing various policy considerations’ is disclosed).

113 Svetiev and Wang, *ibid* 221.

114 Hao (n 9) 19 (pointing out the prevalent problem in China’s administrative law system that ‘agency powers are often not clearly defined or effectively coordinated, leading to inconsistent and even contradictory enforcement by multiple agencies’).

115 Zhang (n 19) 680 (observing that, due to the inadequate judicial supervision on administrative activities, the AML agencies have effectively monopolized public enforcement in China and essentially turned it into a political process).

116 See Tables 1 and 2.

anticompetitive,¹¹⁷ but because of this delimitation, there is a high risk that incoherent theories of harm would emerge and increase.¹¹⁸ Admittedly, the two agencies are not bound by their previous decisions, but in a regime where there are only a very limited number of enforcement guidelines and where judicial oversight on the public enforcement is almost non-existent,¹¹⁹ precedent decisions become a major contributor to legal certainty and substantive law development. In that sense, the jurisdictional delimitation creates a risk of the AML substantive law being distorted in enforcement.

This risk manifested itself in the *Medtronic* decision. Issued by the NDRC, this decision prohibited fixed and minimum RPM between *Medtronic* and its downstream distributors. In this rather brief decision, the NDRC considered three aspects of harm caused by the RPM schemes in question:

- Restriction of intra-brand competition between distributors;
- Restriction of inter-brand competition between different medical equipment producers;
- Harm caused by unfairly high prices on the end-consumers.

This three-fold analytical framework is consistent with a previous NDRC decision on RPM.¹²⁰ However, what is new in the *Medtronic* decision is that, when considering the overall harm caused by RMP, the NDRC stated that:

... In addition, the concerned party adopted measures restricting the customers to which and the territory in which the distributors could resell their products, and measures prohibiting the distributors from selling products of competing brands. These restrictive measures, combined with vertical RPM, further reinforced the effects of resale price fixation and minimum resale price limitation.¹²¹

In other words, the NDRC acknowledged the existence of certain non-price-related vertical restrictions, including the restrictions on the territory to sell in and the customers to sell to, and the prohibition of selling competing products. These restrictive conducts were supposed to be in the SAIC's jurisdiction, but the NDRC took them into the legal analysis, treating them as factors aggravating the harm caused by RPM. No effects analysis was performed on the territorial and customer

117 Hans Zenger and Mike Walker, 'Theories of Harm in European Competition Law: A Progress Report' in Jacques Bourgeois and Denis Waelbroeck (eds), *Ten Years of Effects-Based Approach in EU Competition Law* (Bruylant 2012) 185–209, 186 (describing the supposed characteristics of a well-developed theory of harm in competition law enforcement).

118 Xiaoye Wang, 'Highlights of China's New Anti-Monopoly Law' (2008) 75(1) *Antitrust LJ* 133–50, 145 (predicting that 'having three parallel, competition law enforcement agencies would not only be inefficient, but it may also create conflict and friction among the three agencies').

119 Zhang (n 5) 211–12.

120 It was a case decision issued by the DRC of Sichuan Province under the delegation of the NDRC. No formal decision is disclosed. For a brief news report, see Sichuan DRC (四川省发改委网站), 'Wuliangye Was Fined ¥202 million for Implementing Price-Monopoly (五粮液公司实施价格垄断被处罚2.02亿元)' (2013) <<http://finance.sina.com.cn/chanjing/b/20130222/164314620476.shtml>> accessed 24 September 2017.

121 The *Medtronic* decision (n 90).

restrictions. There was only some brief mentioning of the prohibition of selling competing products in the assessment of inter-brand competition:

...There are only a limited number of brands that sell the same kind of medical equipment in one hospital. Most consumers will only buy and use medical equipment in hospitals, and consumers have limited choices between different brands. Therefore, the competition between different brands of medical equipment is not sufficient. Based on a comprehensive analysis of factors including the party's market share of the relevant product, financial resources, and technical conditions, the party is in an industrial leading position in the fields of cardiovascular medical equipment, medical equipment of restorative therapy, and medical equipment for diabetics. The party restrained the distributors from competing with distributors of other brands through lower price and other means, and prohibited the distributors from selling products of other brands. Consequently it expanded the restriction on competition, and impeded the force of market price from functioning normally.¹²²

In other words, the NDRC observed that inter-brand competition was already insufficient because of the limited number of brands of medical equipment sold in each hospital. It also observed that *Medtronic's* financial resources and technical conditions put it in a leading position in several medical equipment fields. On that basis, the NDRC concluded that the RPM schemes in question foreclosed inter-brand distributional competition, and considered other vertical restrictions to be deteriorating factors of that foreclosure.

What is problematic here is that the NDRC tried to assess the anticompetitiveness of the fixed and minimum RPM schemes in question without properly identifying, let alone analysing, other concurrent conducts. Namely, the NDRC treated other vertical restrictions as additional criteria to be considered when analysing the anticompetitive effects of RPM, without making separate and definitive rulings on the legality of those conducts beforehand. Instead, it chose to attribute all the identified harmful effects, including those caused by other conducts, entirely to the RPM schemes in question.

Consequently, the NDRC constructed a theory of harm on RPM that is arguably far-fetched. For example, when assessing the harm of RPM on inter-brand competition, the NDRC started by examining the competitive situation and *Medtronic's* position in the relevant market. This examination borders on the establishment of dominance, but in that regard the NDRC did not carry out a full-fledged market position examination, nor did it explain why such an examination should be prerequisite for determining the legality of RPM.

Another consequence is that the NDRC effectively marginalized the SAIC's jurisdiction on non-price-related vertical restrictions in this case. If the NDRC keeps on employing this theory of harm on RPM, the SAIC will continue to be marginalized, as long as non-price-related conducts come along with RPM. Admittedly, this decision is rather brief and therefore may be subject to different interpretations in

122 *ibid.*

changed case circumstances, but it should be noted that in the current AML legal framework, there is no enforcement guidance on how to assess RPM.¹²³ Therefore, it falls onto the NDRC, the designated authority to regulate price-related monopolistic conduct, to develop the theory of harm on RPM in practice.¹²⁴ In that light, this distortive theory of harm is likely to persist.

VI. CONCLUSION

In the tripartite public enforcement regime of the AML, the NDRC and the SAIC are supposed to delimit their antitrust responsibilities according to whether an anti-competitive conduct is price-related or not. This delimitation was established in the State Council's Three-Designation Orders and was elaborated in the two agencies' implementation regulations.

A closer look reveals that this delimitation makes little economic sense, because there are very few anticompetitive conducts that are truly non-price related. Even if price-related and non-price-related conducts were theoretically distinguishable, the fact would remain that they usually go hand in hand in real cases. Therefore, complying with this delimitation would require formal and sophisticated coordination mechanisms, which the two agencies do not have. Consequently, it becomes inevitable that in practice the NDRC and the SAIC would overstep their respective authority. From 2008 to 2016, there are at least eight cases exemplifying this inevitability.

These eight cases can be classified into three scenarios. Each scenario shows an aspect of the negative implications resulted from the jurisdictional delimitation. Scenario (1) suggests that this delimitation could cause an uncertainty on supplementary enforcement and follow-on civil actions. Scenario (2) indicates that the jurisdictional delimitation confers on the two agencies an uncontrolled discretion on case picking. Scenario (3) shows that this delimitation induces distortive theories of harm.

Presuming that the AML tripartite regime will persist, this article advocates that the current jurisdictional delimitation between the NDRC and the SAIC should be removed, and a formal coordination mechanism should be established in terms of case handling, thereby fostering a more reasonable division of labour. Otherwise, problematic cases like those described in the three scenarios will keep appearing. To improve the situation, the first step needs to be taken by the State Council by issuing new Three-Designation Orders. Accordingly, the NDRC and the SAIC should revise their implementation regulations. It would also be desirable if the two agencies could adopt some enforcement guidelines concerning case allocation. Before these changes take place, seeing how it would be inevitable to circumvent this delimitation in practice, the two agencies would also need to make their jurisdictional considerations more explicit when deciding cases that fall in between.

123 Yang (n 18) 483–84 (describing the Chinese legal framework on price-related cartels, including RPM).

124 There have been several court judgments on RPM at the regional level, which, to a certain extent, contradicts the NDRC's approach. Nonetheless, so far at the national level, the NDRC's authority on RPM enforcement remains unchallenged, and therefore its decisions on RPM cannot be overlooked. For a comparative analysis of those court judgments and the NDRC decisions, see Shan Jiang and D Daniel Sokol, 'Resale Price Maintenance in China: An Economic Perspective' (2015) 3(Suppl 1) *J Antitrust Enforcement* i132–i154, i147.