环球反垄断法律专递
（第九期）

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北京市朝阳区建国路81号华贸中心
1号写字楼15层&20层 邮编: 100025
15 & 20/F Tower 1, China Central Place,
No. 81 Jianguo Road Chaoyang District,
Beijing 100025, China
电话/T. (86 10) 6584 6688
传真/F. (86 10) 6584 6666

上海市黄浦区湖滨路150号企业天地
5号楼26层 邮编: 200021
26F, 5 Corporate Avenue,
No. 150 Hubin Road, Huangpu District,
Shanghai 200021, China
电话/T. (86 21) 2310 8288
传真/F. (86 21) 2310 8299

深圳市南山区铜鼓路39号大冲国际中心
5号楼26层B/C单元 邮编: 518055
Units B/C, 26F, Tower 5,
Dachong International Center, No. 39 Tonggu Road,
Nanshan District, Shenzhen 518055, China
电话/T. (86 755) 8388 5988
传真/F. (86 755) 8388 5987

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➢ 立法及修法建议

《反垄断法》修订建议：经营者集中申报（一）

作者：任清 | 朱群飞

国家市场监督管理总局（“市场监管总局”）日前印发 2019 年立法工作计划，将《反垄断法》修订列为第二类立法项目，将“积极推进”、“高质高效推进”。[1]该计划提出 2019 年的立法工作“要坚持问题导向，切实解决市场监管执法实践中的困难和问题，提高立法的精准度、实效性和可操作性，立良善之法、立管用之法”。

笔者将结合办理经营者集中申报案件的实务经验和体会，对《反垄断法》修订的经营者集中申报部分提出几点粗浅建议。本文分为两部分：一是对于《反垄断法》中涉及经营者集中申报的现有条款的修订建议，二是对于解决经营者集中申报实务中遇到的其他问题的立法建议。后一部分有的可以考虑在修订过程中纳入《反垄断法》，也可以考虑采取修改或制定行政法规、规章、规范性文件或指南等其他形式。限于篇幅，本文对修订建议仅简要说明理由。

一、对于《反垄断法》现有条款的修订建议（共 13 条）

《反垄断法》中涉及经营者集中申报的条款既包括第四章（经营者集中）共 12 个条款，也包括第一章（总则）、第六章（对涉嫌垄断行为的调查）、第七章（法律责任）和第八章（附则）中的有关条款。

[1] 见中央人民政府网站：市场监管总局印发 2019 年立法工作计划，链接：http://www.gov.cn/xinwen/2019-02/05/content_5364002.htm。

（一）对第四章的修订建议

现有条文	修订建议
第二十条 经营者集中是指下列情形： （一）经营者合并； （二）经营者通过取得股权或者资产的方式取得对其他经营者的控制权； （三）经营者通过合同等方式取得对其他经营者的控制权或者能够对其他经营者施加决定性影响。	**建议 1**：增加一项作为新的第（三）项，内容为：“经营者新设合营企业且设立后两个以上经营者共同控制该合营企业”。 **理由**：现有条文对于新设合营企业是否属于经营者集中缺乏明确规定。有的观点认为新设合营企业被现有条文的第（二）项涵盖，另有观点则认为被第（三）项涵盖[2]。实践中，新设合营企业一直是经营者集中申报的重要类型之一。以 2018 年第四季度为例，市场监管总局无条件批准的经营者集中案件共 125 件，其中新设合营企业案件为 40 件，约占 1/3。鉴于此，有必要在法律中予以明确规定。
第二十一条 经营者集中达到国务院规定的申报标准的，经营者应当事先向国务院反垄断执法机构申报，未申报的不得实施集中。	**建议 2**：将“国务院规定的”修改为“国务院发布或者批准发布的”。建议增加一款作为第二款，对“实施集中”加以界定。 **理由**：制定和修改行政法规须遵守严格程序，不利于申报标准的及时调整。《国务院关于经营者集中申报标准的规定》（国务院令第 529 号）自 2008 年 8 月公布以来已超过十年，迄今未曾修订。可参考外商投资准入负面清单（及以前的外商投资产业指导目录）由国家发改委和商务部经国务院批准后发布的做法，规定申报标准可以由国务院发布（不一定采取行政法规形式），也可以由国务院反垄断委员会或者市场监管总局经国务院批准后发布。

[2] 反垄断执法机构似乎持此种观点。在青岛港招商局国际集装箱码头有限公司、青岛新前湾集装箱码头有限责任公司设立合营企业涉嫌未依法申报违法实施经营者集中案的行政处罚决定书（商法函[2018]130 号）中，反垄断执法机构认为该设立合营企业的交易“属于《反垄断法》第二十条第（三）项规定的经营者集中，即经营者通过合同等方式取得对其他经营者的控制权或者能够对其他经营者施加决定性影响”。

	《反垄断法》及配套法规对于何为“实施集中”缺乏界定。目前已公布的35件未依法申报案件行政处罚决定书涉及的违法情形主要是取得营业执照、完成股权变更登记等明显的“抢跑”情形。实务中倾向于认为参与经营管理、交换敏感信息甚至支付股权购买价款等行为也可能构成“实施集中”，但同时有观点认为应当将实施集中与履行集中协议相区分、将实施集中与为实施集中所做的准备工作相区分。鉴于“实施集中”对于企业反垄断合规和反垄断执法机构执法的重要性，建议对其予以界定。
第二十二条 经营者集中有下列情形之一的，可以不向国务院反垄断执法机构申报： （一）参与集中的一个经营者拥有其他每个经营者百分之五十以上有表决权的股份或者资产的； （二）参与集中的每个经营者百分之五十以上有表决权的股份或者资产被同一个未参与集中的经营者拥有的。	**建议3**：删除本条。（如果保留本条，其中的“百分之五十以上”建议修改为“超过百分之五十”） **理由**：适用本条的前提是一项交易属于经营者集中。换言之，应当先依照第二十条判断一项交易是否属于经营者集中，然后再看是否符合本条所规定的两种情形之一。如果不属于经营者集中，则当然地不需要进行申报，也就无需适用本条。如果属于经营者集中，但符合本条规定的两种情形之一，则可以豁免申报。例如，交易前，A公司和B公司分别持有C公司51%和49%有表决权的股权且A、B共同控制C；交易之后，A持有的有表决权的股权增至70%，B持有的有表决权的股权降至30%，且A取得对C的单独控制权。鉴于参与集中的经营者为A和C，且A在交易之前即持有C 51%有表决权股权，依照本条第（一）项可以豁免申报。我们认为，似无充分理由支持对类似交易豁免申报。 或许有观点认为，本条的立法本意是将所列两种情形不视为经营者集中。这一理解与现有条文的表述不符。更重要的是，将所列两种情形一概不视为经营者集中（见上例），缺乏法理基础。当然，所列两种情形中确有不属于经营者集中的，例如A公司在交易前持有C公司51%股权，在交易后持有C公司60%股权，且C公司在交易

	前后均由A公司单独控制。但是，对于此种情形依照第二十条即可认定其不属于经营者集中从而无需申报，无需另行豁免申报。
第二十四条 经营者提交的文件、资料不完备的，应当在国务院反垄断执法机构规定的期限内补交文件、资料。经营者逾期未补交文件、资料的，视为未申报。	**建议4：**将第一句修改为：“经营者提交的文件、资料不完备的，国务院反垄断执法机构应当在五日内一次告知经营者需要补正的全部内容；逾期不告知的，视为经营者提交的文件、资料符合本法第二十三条规定。经营者应当在国务院反垄断执法机构规定的期限内补交文件、资料。” **理由：**《反垄断法》对于初步审查、进一步审查及其延期均规定了明确的时限，但对于从经营者提交文件、资料到国务院反垄断执法机构认为经营者提交的文件资料符合本法第二十三条规定这一阶段（被称为立案前审查阶段，其起始标志是执法机构出具材料接收单，结束标志是执法机构出具立案通知书）却没有规定时限。实践中，该阶段短的约为两周左右，长的可能达到2个月。尤其对于简易案件而言，这一阶段的时间在不少案件中超过了立案后审查的时间。而且，在一些案件中，执法机构以书面和/或口头形式多次要求申报方提交补充材料。鉴于此，建议参考《行政许可法》第三十二条作出如上修改。当然，相对于普通的行政许可，经营者集中反垄断审查涉及的问题更为复杂。如有必要，可以将“五日”改为更长的期限。有意见可能认为难以做到“一次告知”。对此，我们认为，在“一次告知”中遗漏的待补正材料可以在立案之后再要求申报方提交。
第二十五条 国务院反垄断执法机构应当自收到经营者提交的符合本法第二十三条规定的文件、资料之日起三十日内，对申报的经营者集中进行初步	**建议5：**将第二十五条的“自收到经营者提交的符合本法第二十三条规定的文件、资料之日起三十日内”修改为“在收到经营者提交的符合本法第二十三条规定的文

审查，作出是否实施进一步审查的决定，并书面通知经营者。国务院反垄断执法机构作出决定前，经营者不得实施集中。 国务院反垄断执法机构作出不实施进一步审查的决定或者逾期未作出决定的，经营者可以实施集中。	件、资料后三十日内”；如果在本法中引入“立案”这一概念，则可以修改为“立案后”。[3] **理由**：以上修改并非完全必要，但鉴于有观点认为“自收到经营者提交的符合本法第二十三条规定的文件、资料之日起三十日内”或实务中的立案之日起三十日内应当以立案之日作为第一日，且这可能导致意想不到的严重后果，故提出上述修改建议。举例来说，如果某案件于 2018 年 10 月 1 日立案，按照上述观点：（1）初步审查阶段的第一日为 2018 年 10 月 1 日，最后一日为 2018 年 10 月 30 日结束，反垄断执法机构最晚应当在 2018 年 10 月 30 日作出是否实施进一步审查的决定；（2）如进一步审查决定确系 2018 年 10 月 30 日作出，则根据第二十六条，进一步审查阶段的第一日为 2018 年 10 月 30 日，最后一日为 2019 年 1 月 27 日（不考虑延长期限的情况）。这首先会造成两个问题：（1）2018 年 10 月 30 日既是初步审查阶段的最后一日，也是进一步审查阶段的第一日，两个阶段在这一天重合；（2）初步审查阶段和进一步审查阶段加起来只有 119 天，而不是公认的 120 天。按照这种观点，实现 120 天“满额”的可能途径是进一步审查决定在 2018 年 10 月 31 日作出，但这将违反在“三十日内”作出决定的要求。实际上，参照《民事诉讼法》第八十二条的规定，“期间开始的时和日，不计算在期间内”。因此，按照现有条文，第二十五条和第二十六条中的三十日和九十日也均不包括立案之日或“决定之日”。为了进一步避免歧义，我们建议将“之日”改为“后”。
第二十六条 国务院反垄断执法机构决定实施进一步审查的，应当自决定之日起九十日内审查完毕，作出是否禁止经营者集中的决定，并书面通知经	**建议 6**：将“自决定之日起九十日内”修改为“在作出决定后九十日内”。 **理由**：见对第二十五条的修改建议。

[3] 是否需要将“日”（指自然日）改为“工作日”，也可探讨。

营者。作出禁止经营者集中的决定，应当说明理由。审查期间，经营者不得实施集中。 有下列情形之一的，国务院反垄断执法机构经书面通知经营者，可以延长前款规定的审查期限，但最长不得超过六十日：（略）	
第三十条 国务院反垄断执法机构应当将禁止经营者集中的决定或者对经营者集中附加限制性条件的决定，及时向社会公布。	**建议 7：**增加审查透明度，尤其是就无条件批准的非简易案件公布更多信息。 **理由：**审查透明度的意义既在于权力的公开运行，还能增强反垄断审查的一致性、确定性和可预见性，提高申报和审查工作的质量和效率。目前，禁止和附条件批准的审查决定全文公开，各界可以比较全面了解禁止和附条件批准案件的实体和程序性信息；简易案件公示表也公开了简易案件的基本信息。对于无条件批准的非简易案件，只有在每个季度结束后通过执法机构公布的审结案件列表了解案件名称、参与集中的经营者和审结时间三项信息。建议至少增加相关市场、立案时间等信息。更理想的方案可能是：对于每起案件（无论是简易案件还是非简易案件），在接收案件材料后即应公布最低限度的信息，然后在立案、作出不进一步审查决定或进一步审查决定、延长进一步审查期限、作出最终审查决定以及撤回并重新提交（如有）等重大节点均公布消息；在审结后，每起案件均应公布最终审查决定。可借鉴欧盟委员会竞争总司的做法，建立案件数据库，便于公众查询。当然，增强透明度需要投入更多的行政资源，反垄断执法机构有必要增加审查官员和/或辅助工作人员。

第三十一条 对外资并购境内企业或者以其他方式参与经营者集中，涉及国家安全的，除依照本法规定进行经营者集中审查外，还应当按照国家有关规定进行国家安全审查。	**建议 8**：将“按照国家有关规定”修改为“依法”。 **理由**：全国人大新通过的《外商投资法》第三十五条将此前以“国家有关规定”形式初步建立的外商投资国家安全审查制度上升为了法律。

（二）对其他章节有关条款的修订建议

现有条文	修改建议
第一章 总则 **第二条** 中华人民共和国境内经济活动中的垄断行为，适用本法；中华人民共和国境外的垄断行为，对境内市场竞争产生排除、限制影响的，适用本法。	**建议 9**：考虑删除“排除、限制”，并在第二十一条增加一句：“经营者集中达到国务院发布或批准发布的申报标准的，视为对中国境内市场产生影响。” **理由**：根据《反垄断法》第三条，本法所称的垄断行为不仅包括垄断协议和滥用市场支配地位，还包括了“具有或者可能具有排除、限制竞争效果的经营者集中”。从经营者集中申报和审查的角度而言，目前经营者集中只要达到国务院规定的申报标准，就应当向国务院反垄断执法机构申报。换言之，暂不考虑第二十二条的豁免申报情形，经营者集中申报采取“两要件说”（一是属于经营者集中申报，二是达到申报标准），而不存在第三个要件即经营者集中对中国境内市场竞争产生排除、限制竞争影响。其基础在于，目前的申报标准包含了参与集中的至少两个经营者在中国境内的营业额均超过 4 亿元人民币这一要求，这被拟制为该集中会对中国境内市场产生影响。尽管如此，仅从第二条的现有表述来看，似乎存在前述第三个要件。为避免疑问甚至潜在的行政诉讼，建议对此予以明确。另外，第二条目前规定为产生“排除、限制”影响，可能有所不妥。因为达到申报标准的经营者集中虽然应当申报，但绝大多数不对中国境内市场竞争产生排除、限制影响，从而被无条件批准。

	即使对于垄断协议和滥用市场支配地位而言，是否需要“排除、限制”中国境内市场竞争作为管辖权要件，似乎也可探讨——如果不排除、限制中国境内市场竞争，在结果上可以不处罚，但是否仍可启动调查。
第六章　对涉嫌垄断行为的调查 第三十八条 反垄断执法机构依法对涉嫌垄断行为进行调查。 对涉嫌垄断行为，任何单位和个人有权向反垄断执法机构举报。反垄断执法机构应当为举报人保密。 举报采用书面形式并提供相关事实和证据的，反垄断执法机构应当进行必要的调查。 第三十九条 反垄断执法机构调查涉嫌垄断行为，可以采取下列措施：（略） 第四十条 反垄断执法机构调查涉嫌垄断行为，执法人员不得少于二人，并应当出示执法证件。 执法人员进行询问和调查，应当制作笔录，并由被询问人或者被调查人签字。 第四十一条 反垄断执法机构及其工作人员对执法过程中知悉的商业秘密负有保密义务。 第四十二条 被调查的经营者、利害关系人或者其他有关单位或者个人应当配合反垄断执法机构依法履行职责，	**建议 10**：梳理本章的哪些条款适用或不适用于于经营者集中，在本章相关条款中予以明确。 **理由**：根据《反垄断法》第三条，本法所称的垄断行为不仅包括垄断协议和滥用市场支配地位，还包括了“具有或者可能具有排除、限制竞争效果的经营者集中”。就此而言，第六章的规定似乎都可以适用于经营者集中。但是，对于经营者集中，第四章采用的是“审查”一词；而第六章的标题（对涉嫌垄断行为的调查）和各条款中均使用“调查”一词。从表面上看，关于“调查”的规定似乎不适用于“审查”。而且，第六章的某些条款就其性质而言难以适用到经营者集中案件。因此，有必要梳理本章的哪些规定适用于或不适用于经营者集中，并在相关条款中予以明确。 我们初步认为： 第一，审查是相对于依法申报的经营者集中案件而言，对于未依法申报的经营者集中案件或者国务院反垄断执法机构认为有必要主动调查的未达到申报标准（即没有申报义务）的经营者集中案件[4]，国务院反垄断执法机构开展的是调查。初步看，本章的大多数条款（第三十八条至第四十四条）基本上都可适用于这两类调查。目前，《未依法申报经营者集中调查处理暂行办法》第九条至第十二条、第十九条等条款对于未依法申报案件的调查也做了类似规定。

[4] 《国务院关于经营者集中申报标准的规定》第四条：“经营者集中未达到本规定第三条规定的申报标准，但按照规定程序收集的事实和证据表明该经营者集中具有或者可能具有排除、限制竞争效果的，国务院商务主管部门应当依法进行调查。”

不得拒绝、阻碍反垄断执法机构的调查。 第四十三条 被调查的经营者、利害关系人有权陈述意见。反垄断执法机构应当对被调查的经营者、利害关系人提出的事实、理由和证据进行核实。 第四十四条 反垄断执法机构对涉嫌垄断行为调查核实后，认为构成垄断行为的，应当依法作出处理决定，并可以向社会公布。 第四十五条 对反垄断执法机构调查的涉嫌垄断行为，被调查的经营者承诺在反垄断执法机构认可的期限内采取具体措施消除该行为后果的，反垄断执法机构可以决定中止调查。中止调查的决定应当载明被调查的经营者承诺的具体内容。 反垄断执法机构决定中止调查的，应当对经营者履行承诺的情况进行监督。经营者履行承诺的，反垄断执法机构可以决定终止调查。 有下列情形之一的，反垄断执法机构应当恢复调查： （略）	第二，对于依法申报的经营者集中案件的审查，本章的某些条款（包括但不限于包括但不限于第四十一条、第四十二条和第四十三条。）也可以适用。 第三，本章的个别条款（例如第四十五条关于中止或终止调查的规定）似乎不能适用于经营者集中的审查或调查。
第七章 法律责任 **第四十八条** 经营者违反本法规定实施集中的，由国务院反垄断执法机构责令停止实施集中、限期处分股份或者资产、限期转让营业以及采取其他必要措施恢复到集中前的状态，可以处五十万元以下的罚款。	**建议 11**：分成两种情况规定：一是集中尚未实施完毕的，二是集中已经实施完毕的。对于前者，应当责令停止实施集中，并可以处以罚款；对于后者，应当处以罚款，同时根据情况可以责令限期处分股份或者资产、限期转让营业以及采取其他必要措施恢复到集中前的状态（以下简称“恢复原状”），还可以附加限制性条件。此外，提高罚款额度。

	理由：从文本上看，本条主要存在两个问题。第一，责令停止实施集中和“恢复原状”被“一刀切”的规定为应当（即必须）采取的措施，在实践中很难实现。从迄今公布的 35 起未依法申报处罚决定书来看，没有任何一起案件采取了这类措施。第二，规定的罚款上限仅为 50 万元，对于未依法申报行为的威慑力不足。 关于前者，我们认为，对于集中尚未实施完毕的，反垄断执法机构原则上应当责令停止实施集中，等待调查处理结果；对于已经实施完毕的，则应采取审慎态度，只有在调查认为该集中具有或可能具有排除、限制竞争效果时，才考虑责令“恢复原状”。此外，鉴于“恢复原状”相当于依法申报案件中的禁止决定，本条可以增加一种措施，即不责令“恢复原状”而是对集中附加限制性条件。 关于罚款的适用，对于开始实施集中但尚未实施完毕且情节轻微的，可以不处罚款；对于已经实施完毕的，则应当处以罚款。 关于罚款金额，可以考虑借鉴欧盟立法例，规定罚款上限为申报义务人上一年度营业额（或中国境内营业额）的某个比例。如果要规定下限，则下限可以规定为较低的数额，以具有足够的弹性。
第五十三条 对反垄断执法机构依据本法第二十八条、第二十九条作出的决定不服的，可以先依法申请行政复议；对行政复议决定不服的，可以依法提起行政诉讼。 对反垄断执法机构作出的前款规定以外的决定不服的，可以依法申请行政复议或者提起行政诉讼。	**建议 12**：将第一款和第二款合并，对反垄断执法机构的各类决定统一规定为“可以依法申请行政复议或者提起行政诉讼”。如果继续保留第一款，则将“可以先依法申请行政复议”修改为“应当先依法申请行政复议”；此外，对于反垄断执法机构主动调查未达申报标准案件然后作出责令“恢复”原状的决定（相当于禁止决定，但区别在于集中已经实施）或附加限制性条件的决定，建议也规定为应当先申请行政复议。 **理由**：是否有必要区分经营者集中的禁止决定、附条件决定与其他决定例如对于垄断协议、滥用市场支配地位

	作出的决定作出不同规定，可以结合《反垄断法》实施十年以来的经验重新思考。如果继续保留现有规定的精神，则建议将“可以”改为“应当”，因为“可以”隐含的意思是也可以不先申请行政复议而直接提起行政诉讼，使得该条成为倡议性条款。此外，对于反垄断执法机构主动调查未达申报标准案件或调查未依法申报案件[5]后作出的“恢复原状”或附加限制性条件决定，应予以一致性的处理。
第八章 附则 **第五十六条** 农业生产者及农村经济组织在农产品生产、加工、销售、运输、储存等经营活动中实施的联合或者协同行为，不适用本法。	**建议 13**：建议对何为“农业生产者”、“农村经济组织”、“农产品”、“联合”等予以界定。 **理由**：一般来说，从事农业经营的公司之间的合并、收购和新设合营企业等有可能属于经营者集中并应当依法进行申报。为避免疑问，有必要对相关概念予以界定。当然，该条与垄断协议更为密切相关，需要结合垄断协议的适用范围来修订本条。

（未完待续）

[5] 《未依法申报经营者集中调查处理暂行办法》第十八条也规定：“经营者对商务部依据本办法做出的决定不服的，可以先依法申请行政复议；对行政复议决定不服的，可以依法提起行政诉讼。”

➢ 反垄断专论

未依法申报的经营者集中协议之法律效力分析

作者：万江 | 郭程

根据《反垄断法》的规定，经营者集中达到国务院规定的申报标准的，应当向国务院反垄断执法机构申报。长久以来，对于未依法申报的经营者集中协议的法律效力问题，业界讨论不多，实务中目前也未见有相关案例，本文拟就此展开探讨，以期抛砖引玉，并尝试提供一个可行的分析思路。

一、未依法申报的经营者集中协议的范畴

根据《反垄断法》第 21 条的规定，“经营者集中达到国务院规定的申报标准的，经营者应当事先向国务院反垄断执法机构申报，未申报的不得实施集中。”达到申报标准的经营者集中未向反垄断执法机构申报，实务中俗称“应报而未报”，属于未依法申报的经营者集中行为之一。此外，《反垄断法》第 25 条和第 26 条规定，已经申报的经营者集中在审查期间，不得实施。申报后未获得批准即实施的经营者集中协议，实务中俗称“抢跑”，也属于未依法申报的经营者集中行为。然而，《反垄断法》并未明确上述经营者集中的行为或协议的法律效力，从而引发人们的疑问。归纳而言，这些疑问至少包括：1、经营者未履行《反垄断法》规定的强制性程序义务的情况下，那些应当经过反垄断执法机构审查且批准的经营者集中协议是否具有法律效力？2、经营者集中协议是否具有排除、限制竞争的效果会不会对协议的效力产生影响？3、如果经营者实施或部分实施了上述协议，将会产生什么样的法律后果？ 4、如果反垄断执法机构对经营者未申报的行为做出了经济处罚，但没有要求经营者恢复集中前的状态，是否意味着协议有效？等。

二、国外反垄断法的相关规定

从国外的立法例来看，有相当一部分国家的反垄断法中明确规定未依法申报的经营者集中无效，但也有一部分国家对此没有做明确规定。作为我国《反垄断法》重要参考蓝本的日本和德国反垄断法都对未依法申报的经营者集中协议的效力做了明确规定。日本《禁止垄断法》第 18 条第 1、2 款规定，公司违反合并申报制度或合并申报等待期内禁止实施的规定而实施合并的，公正交易委员可以提起公司合并无效之诉。德国《反限制竞争法（2013）》第 41 条[合并禁令、禁令的接触]对未依法申报的集中的效力规定，“在第 40 条第 1 款第 1 句和第 2 款第 2 句（主审查程

序）规定的期限届满之前，企业不得实施未获联邦卡特尔局准许的合并或参与此类合并的实施。违反该禁令的法律行为无效。”当然，德国对此设置了一些例外豁免。[6]

欧盟通过《欧盟企业并购控制条例》和《欧盟运行条约》第101条规制未依法申报的集中行为。《欧盟企业并购控制条例》禁止在获得批准（实际批准或由于有关等待期届满而被视为批准）之前实施应申报的交易。任何违反第 7 条第 1 款所规定的暂停义务进行的交易，其效力取决于“欧盟委员会遵循共同市场原则就该交易做出的裁决”，也就是说不具有反竞争效果的经营者集中协议及其实施行为仍是有效的。此外，在并购交易获得反垄断监管批准之前，竞争者之间就交易所达成的关于价格、投资、产量限制，以及分配客户或地域的约定，可能被视为是违反《欧盟运行条约》第101条的横向垄断协议行为。

美国法中，“未依法申报的集中协议的效力”是“抢先合并”（gun jumping）行为中的一个问题。美国有三部成文法可适用于抢先合并行为：《哈特-斯科特-罗迪诺法》（HSR 法）的第 II 章第 7 条第 1 款；《谢尔曼法》的第 1 条；以及《联邦贸易委员会法》的第 5 条。HSR 法规定“任何一方不得直接或间接获得它方的有表决权证券或资产，除非双方……依据规定提交了申报……且规定的等待期……已届满。”但对于抢先合并行为，HSR 法只规定了民事罚款。而无论是依据《谢尔曼法》第1条还是《联邦贸易委员会法》第5条，都是针对可能构成反竞争性协同共谋的逻辑所做的救济，由此可见美国与欧盟的模式类似。

综合来看，对于未依法申报的经营者集中的效力问题，各国的反垄断立法例基本可以分为两类，一类是直接宣布其为无效行为，一类是认为违反程序性规定应当做出相应处罚，但是并不直接认定集中无效，除非其具有反竞争的效果。后者的情况似乎占据了大多数。

[6] 德国法直接明了对未依法申报的集中给予无效的法律评价，不过无效评价受到以下限制：1、不适用于三大领域：已经登记生效的土地行为、企业设立变更合同行为、与合并无关的其他法律行为。2、如果禁止实施合并对参与合并企业或第三人造成严重损害，可以解除禁止实施合并的命令。3、合并行为须产生或加强市场支配地位且未得到联邦经济与技术部长的颁布的特别批准，该合并应当被宣布无效。

三、违反《反垄断法》未依法申报的集中协议效力的实务分析

（一）未依法申报的经营者集中协议不必然无效

经营者集中协议本质上是并购交易合同，其效力判断应当适用《合同法》的规则。《合同法》第 52 条规定，“有下列情形之一的，合同无效：……（五）违反法律、行政法规的强制性规定。”2007 年 5 月 30 日，时任最高人民法院副院长在题为《充分发挥民商事审判职能作用为构建社会主义和谐社会提供司法保障》的讲话中提出：“只有违反法律和行政法规的强制性规定才能确认合同无效。而强制性规定又包括管理性规范和效力性规范。管理性规范是指法律及行政法规未明确规定违反此类规范将导致合同无效的规范。此类规范旨在管理和处罚违反规定的行为，但并不否认该行为在民商法上的效力。……效力性规范是指法律及行政法规明确规定违反该类规范将导致合同无效的规范，或者虽未明确规定违反之后将导致合同无效，但若使合同继续有效将损害国家利益和社会公共利益的规范。此类规范不仅旨在处罚违反之行为，而且意在否定其在民商法上的效力。因此，只有违反了效力性的强制规范的，才应当认定合同无效。”2009 年，最高人民法院发布了《合同法司法解释二》，其中第 14 条明确规定“合同法第 52 条第（五）项规定的‘强制性规定’，是指效力性强制性规定。”最高人民法院《关于当前形势下审理民商事合同纠纷案件若干问题的指导意见》（法发〔2009〕40 号）第 15 条进一步指出：“违反效力性强制规定的，人民法院应当认定合同无效；违反管理性强制规定的，人民法院应当根据具体情形认定其效力。”第 16 条指出“如果强制性规范规制的是合同行为本身即只要该合同行为发生即绝对地损害国家利益或者社会公共利益的，人民法院应当认定合同无效。如果强制性规定规制的是当事人的‘市场准入’资格而非某种类型的合同行为，或者规制的是某种合同的履行行为而非某类合同行为，人民法院对于此类合同效力的认定，应当慎重把握，必要时应当征求相关立法部门的意见或者请示上级人民法院。”按照最高人民法院知识产权法庭副庭长王闯法官的意见，如果规制的对象是行为本身，则是管理性的强制规定；若规制的规定是行为背后的目的，则是效力性强制规定。2015 年最高人民法院审理的珠海市盛鸿置业有限公司、珠海祥和置业有限公司股权转让纠纷再审审查与审判监督一案的民事判决书（（2015）民抗字第 14 号）中，指出“管理性规定旨在管理和处罚违反规定的行为，以禁止其行为为目的，但并不否认该行为在民商法上的效力。效力性规定以否定法律效力为目的，作用在于对违反者加以制裁，以禁遏其行为，此类规范不仅旨在处罚违反之行为，而且意在否定其民商法上的效力。”2016 年最高人民法院审理的大连顺达房屋开发有限公司与瓦房店市泡崖乡人民政府土地租赁合同纠纷申诉、申请一案的民事裁定书（（2016）最高法民申 1223 号）中，则指出“判断某项规定属于效力性强制性规定还是管理性规定的根本在于违反该规定的行为是否严重侵害国家、集体和社会公共利益，是否需要国家权力对当事人意思自治行为予以干预。”

那么，《反垄断法》第 21、25、26 条的规定属于效力性强制性规定还是管理性强制性规定呢？依据最高人民法院采取的标准看，首先，《反垄断法》第 21、25、26 条并没有明确规定违反的协议无效。其次，向反垄断执法机构申报并获得批准是履行集中协议的行为之一，未申报或未获批准的经营者集中不得实施的规定本身并不涉及对协议目的的评价，即《反垄断法》第 21、25 及 26 条是针对经营者的申报义务的强制性规定，是对集中协议行为本身的一项强制性规定，而并不是对集中协议内容或目的的强制性规定；最后，只有那些具有排除、限制竞争效果的经营者协议属于违反反垄断法目的的行为，应予禁止，而十年来反垄断执法机构审查的几千件申报案件中仅有两件被禁止，绝大多数集中案件都获得批准（包括附条件批准），截止目前反垄断执法机构查处的未依法申报的集中案件中也没有被认定为具有排除、限制竞争效果的案例，这些不具有排除、限制竞争效果的集中行为并没有真正损害国家、集体或社会公共利益，如果仅因未依法申报就认定协议无效，显然不足以尊重当事人意思自治、保障市场交易安全。综上所述，《反垄断法》第 21、25 及 26 条的强制性规定属于管理性强制性规定，经营者违反上述规定并不导致集中协议的必然无效。

（二）未依法申报的集中协议处于效力未定状态

虽然未依法申报的集中协议不必然无效，但也不意味着其当然有效。在实务中面临不同的情形，其效力认定的结果是不同的。需要明确的是，《反垄断法》禁止排除、限制竞争的行为，那些具有排除、限制竞争效果的经营者集中协议属于违反《反垄断法》的效力性强制性规定的协议，依据《合同法》第 52 条规定以及目前中国法院采取的司法审判观点，应当是无（民商法上）效力的协议，其无效性的法律救济可以依据《合同法》的相关规定处理。

应当申报的集中协议在《反垄断法》框架下被视为可能具有排除、限制竞争效果的协议，但需要经由有权机关（包括反垄断执法机构或司法机构）的审查评估而确定。我们说未依法申报的集中协议效力处于未定状态，是指协议未经有权机关审查认定是否违反了《反垄断法》中的效力性强制性规定，由于没有明确的结论，而可能是有效的协议，也可能是无效的协议。

（三）未依法申报的集中协议的可能面临的法律后果

鉴于目前已有的实务案例，未依法申报的集中协议可能面临以下法律后果：

1、经有权机关审查认定，协议不具有排除、限制竞争的效果的情况下，反垄断执法机构依法可以采取罚款、以及一系列要求恢复到集中前状态的强制性措施。目前反垄断执法机构查处的应报未报案件中，所有集中协议都被最终认定不具有排除、限制竞争效果，反垄断执法机构都仅给予申报义务人 50 万元以下的罚款，而没有再采取其他更为严厉的处罚措施。

2、经有权机关审查认定，协议具有排除、限制竞争效果的情况下，首先，依据《反垄断法》，反垄断执法机构有权责令停止实施集中、限期处分股份或者资产、限期转让营业以及采取其他必要措施恢复到集中前的状态，以及处以 50 万元以下的罚款。我们相信，鉴于集中协议的反竞争效果，执法机构会采取较为严厉的处罚措施，要求恢复集中前的状态，而不仅限于罚款。其次，由于协议未经反垄断审查，相关当事方有权依据《反垄断法》第 50 条的规定向法院起诉，请求认定协议具有排除、限制竞争效果，并主张民事赔偿，在此情况下法院必然需要审查协议是否属于违反《反垄断法》的经营者集中协议（并非是垄断协议），或者若协议已经反垄断执法机构调查认定具有排除、限制竞争效果的，无论反垄断执法机构采取了何种救济措施，相关当事方均有权向法院提请认定协议无效。

此外，如果集中协议一直处于未经反垄断审查的状态，虽然其未申报的程序违法行为可能因超过追溯失效而免于行政处罚，[7]但是考虑到如果集中协议本身就具有排除、限制竞争效果从而违反了《反垄断法》，只要该反竞争的效果持续存在，集中协议无效的风险敞口实际上也是持续的，因此，即便该协议早已履行完毕，当事人也可能因为协议的反竞争性被反垄断执法机构严厉处罚，同时也因协议无效而面临巨大的民事索赔风险。

综上所述，我国《反垄断法》采取了类似于欧盟和美国等为代表的立法模式，没有直接规定未依法申报的经营者集中协议的（民商法）效力，而依据司法裁判实践标准推论，也基本采取了欧盟和美国对此问题的态度，即：未依法申报的经营者集中协议并不会导致民商法上当然无效的法律后果，相关当事人不能以未依法进行反垄断申报为由主张并购行为无效，但是可以向反垄断执法机构或法院申请进行合法性审查，也就是评估集中行为是否会产生排除、限制竞争的效果，如果不具有反竞争性，则申报义务人仍然可能受到反垄断执法机构的行政处罚，如果具有反竞争性，则集中将被视为违法行为，集中协议也将被判定无效。

[7] 目前有案例显示执法机构对于两年前甚至更早之前应报未报的集中行为仍做出了处罚，但可能是因为执法机构在两年内启动了调查，但做出处罚的时间较为拖延之故。

➢ The Legal 500 & The In-House Lawyer Comparative Legal Guide China: Cartels

By Jiang Wan / Qing Ren / Shujun Liu / Lili Wu

Global Law Office is invited by The Legal 500 to write the China's chapter for *The Legal 500: Cartels Country Comparative Guide*. Jiang (John) Wan and Qing Ren, who are both The Legal 500's recommended antitrust lawyers, as well as Shujun Liu and Lili Wu are co-authors for the chapter.

环球律师事务所受 The Legal 500 之邀为其独家撰写《中国地区卡特尔指引》。合伙人万江、任清作为 The Legal 500 特别推荐的反垄断法与竞争法律师，与合伙人刘淑珺、顾问律师吴丽丽共同撰写了此篇指引。

In 2019, The Legal 500 is actively promoting *The Legal 500: Cartels Country Comparative Guide* to over 4.6 million online users on a global basis. For each jurisdiction, The Legal 500 only selects top-tier law firm in antitrust area as an exclusive contributor to the guide.

2019 年，The Legal 500 推出“The Legal 500: Cartels Country Comparative Guide ”系列文章，旨在为全球超过 460 万的读者提供不同司法辖区/国别的卡特尔法律规制指引。针对不同的司法辖区，The Legal 500 只会选择 The Legal 500 排行中排名领先的律所来撰写。

In China's chapter, Global Law Office provides a landscape for legal and regulatory aspects of Cartels, including legislations, conduct of cartel investigations, leniency, settlement, inter-agency cooperation, sanctions, private actions, the appeal process and practitioner points specific to China.

此次中国地区卡特尔指引主要概述了中国卡特尔的相关行政法体系及最新立法动态，具体包括卡特尔的调查程序、宽大制度、中止调查程序、申诉救济途径、处罚后果以及对近年市场执法行动趋势的观察等。

This chapter provides the latest guidance by shedding lights on the institutional reform in China and upcoming regulations and administrative guidelines. With the promulgation of the *Regulation on Prohibition of Monopoly Agreements*, the *Anti-Monopoly Guidelines on the Abuses of Intellectual Property Rights*, the *Anti-Monopoly Guidelines on the Automobile Industry*, the *Guidelines on the Commitment of Undertakings in Anti-Monopoly Cases* and the *Guidelines on the Application of the Leniency Program in Horizontal Monopoly Agreements*, we will see a rise in enforcement cases and undertakings will be facing higher requirements in regard of corporate antitrust compliance.

该篇概述结合当前及待出的国家机构改革系列行政规章和相关指南提出了新的指引。随着《禁止垄断协议行为的规定》、《关于滥用知识产权的反垄断指南》、《关于汽车业的反垄断指南》、《反垄断案件经营者承诺指南》、《横向垄断协议案件宽大制度适用指南》的颁布，相关执法案件会越来越多，对市场主体的反垄断合规工作提出更高要求。

1. What is the relevant legislative framework?

The Anti-Monopoly Law (AML) provides clear and detailed provisions for cartels. In the meantime, The Price Law, The Law on Tendering and Bidding and other laws are also applicable to special types of cartel. The Law on Tendering and Bidding stipulates criminal acts such as collusive bidding. Prior to 2017, The Anti-Unfair Competition Law also contained provisions relating to cartels, but these provisions were deleted in the 2017 revision.

The four Anti-Monopoly Guidelines on the Automobile Industry, on the Abuses of Intellectual Property Rights, on the Leniency System and on the Commitment drafted by the Anti-Monopoly Commission (AMC) of the State Council have completed internal procedures and will be announced in 2019 spring. These guidelines contain a large number of cartel's new regulatory policy. In addition, the newly established State Administration for Market Regulation (SAMR) is drafting The Regulation on Prohibition of Monopoly Agreements and other regulations, in order to replace the previous regulations issued by the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC). If successful, it will be promulgated in 2019. According to the draft published recently, it includes some new regulations such as the Safe Harbor.

2. To establish an infringement, does there need to have been an effect on the market?

The AML stipulates that 'monopoly agreement refers to an agreement, decision or other coordinated action that eliminates or restricts competition.' According to previous cases, AML enforcement authorities (AMEA) tend to consider any conduct listed in Article 13 and Article 14

of the AML causes damage to the market and is illegal per se, but at the same time allows it to be exempted if it meets certain conditions presented in Article 15. However, in view of the definition of a monopoly agreement (cartel) in the AML, the courts tend to analyze the illegality of cartel, i.e., whether it has the effect of eliminating or restricting the competition case by case.

3. Does the law apply to conduct that occurs outside the jurisdiction?

Article 2 of the AML stipulates jurisdiction over extraterritorial monopolistic conducts, but only if it eliminates or restricts the market competition within China. In the past decade, there have been a large number of cases showing that despite the conducts happened outside the territory of China, it is still subject to the regulation of Chinese AMEA.

4. Which authorities can investigate cartels?

Before 2018, NDRC and SAIC took charge of price-related cartels and non-price-related cartels respectively. After the implementation the Chinese government's institutional reform in 2018, SAMR is responsible for AML enforcement, which is specifically assumed by its anti-monopoly bureau.

At the local level, according to the Notice on Anti-Monopoly Enforcement Authorization issued by SAMR on January 3, 2019, provincial Administrations for Market Regulation (AMRs) are authorized to take charge of the AML enforcement work within their administrative regions and deal with it in the name of their own authority. The Notice also requires that the provincial AMRs to report to SAMR within 10 working days after a case is filed. Before the decisions made in regard of case cancellation, prior notice of administrative penalty (Statement of Objection), final decision, suspension of an investigation (Commitment decision), resumption of an investigation, termination of an investigation, and proposed administrative advice on a treatment of an abuse of administrative power to eliminate or restrict competitions, provincial AMRs shall accept the guidance and supervision of SAMR. They shall submit the relevant documents to SAMR within 5 working days after making the final decision, suspending and terminating the investigation decision, and proposal on a treatment of an abuse of administrative power. SAMR and provincial AMRs shall simultaneously announce law enforcement information to the public.

SAMR may entrust provincial AMRs to conduct case investigations. Similarly, provincial AMRs may also commission other provincial or subordinate AMRs to conduct case investigations. The

commissioned authorities can only conduct investigations in the name of the commissioning authority, and cannot investigate and handle the case in its own name.

5. What are the key steps in a cartel investigation?

The investigation of a cartel case mainly includes steps as finding clues, filing a case, investigating, making preliminary conclusions, and making final conclusions.

Firstly, an AMEA searches for clues of the monopolistic conduct ex officio, through people's reports, assignment by higher authorities or case transferring from other agencies. After necessary investigation, it will decide whether to file the case.

Secondly, the AMEA conducts investigations according to law, and the investigated parties have the obligation to cooperate with the investigation.

Thirdly, the AMEA makes a preliminary conclusion based on the evidence obtained from the investigation, and issues an Administrative Penalty Prior Notice (Statement of Objection) to the investigated party. The investigated party has the right to state opinions, make defenses, and apply for a public hearing if necessary.

Lastly, after considering the facts of the case and the opinions of the investigated party, the AMEA makes a final punishment decision and issues an Administrative Punishment Decision (Final Decision) to the investigated party.

6. What are the key investigative powers that are available to the relevant authorities?

According to Article 39 of the AML, the AMEA have following investigative powers:

1. conducting on-premise inspections of the place of business of the investigated undertakings or other relevant places;

2. questioning the undertakings, interested parties or other relevant entities or individuals, and asking for information about the situation;

3. inspecting and duplicating related documents, contracts, account books, business correspondences, electronic data and other relevant documents or materials of the undertakings, interested parties or other relevant entities or individuals under investigation;

4. sealing up and detaining relevant evidence;

5. enquiring bank accounts of the undertakings.

In case the investigated party refuses to provide relevant materials, information, or provide false materials, information, or conceal, destroy, transfer evidence, or other refusing or obstructing conduct with respect to the investigation conducted by the AMEA, the AMEA may require corrections, and impose a fine up to 20,000 yuan to individuals and up to 200,000 yuan to undertakings. In case of serious circumstance, the individual shall be fined not less than 20,000 yuan but not more than 100,000 yuan, and an entity shall be fined no less than 200,000 yuan but no more than 1 million yuan; if criminal violation occurs, they would be subject to investigation and prosecution according to law.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

The investigated party has a duty to cooperate with the AMEA, unless the AMEA have procedural defects in the investigation process, such as less than two law enforcement officers are presented, or the law enforcement officer cannot verify his identity. In addition, the investigated party may require registering and copying documents obtained by the AMEA. For some documents that are not suitable for submission, they have the right to submit legitimate copies or request the AMEA to return the pieces when necessary.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

According to the previous cases and the regulations of NDRC and the former SAIC, the undertakings with the first proactive report can be exempted from penalty. At the same time, the undertaking must: (1) proactively provide the AMEA with relevant information on the monopoly agreement; (2) provide important evidence; and (3) comprehensively and proactively cooperate with the investigation. Evidence is important if it is essential in initiating the investigation by the AMEA or essential in determining the monopoly conduct, including the identities of other

involved undertakings, the scope of goods involved, the content of such an agreement, the method of reaching the agreement, specific implementation status of the agreement and so on. The upcoming Guideline on the Application of the Leniency Program drafted by AMC of the State Council is believed to have clearer regulations.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

According to the former standards of NDRC, for the undertaking with the second proactive report on the relevant situation of the monopoly agreement and who provides important evidence, the penalty may be mitigated by more than 50%; for other active reporter who provides the relevant situation of the monopoly agreement and provides important evidence, the penalty can be reduced by no more than 50%. Meanwhile, undertakings have to cooperate with the investigating authority comprehensively and proactively.

10. Are markers available and, if so, in what circumstances?

At present, the AMEA have not yet established the clear and transparent marker system. However, it is said that the forthcoming Guidelines on the Application of the Leniency Program would make clearer provisions on the marker system.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

The Guideline on the Application of the Leniency Program in Horizontal Monopoly Agreements (Draft for Comment), drafted and published by NDRC stated that undertakings must cooperate with inspections from the AMEA in a prompt, continuous, comprehensive and sincere manner. After the undertaking submits the preliminary report, if the AMEA believe supplemental materials are necessary, the undertaking shall submit the requested materials within 30 days, and within 60 days in special circumstances. Failure to supplement, it will be deemed as no lenient application has been filed. The Guideline also stipulates that applicants may not disclose any information regarding the application without consent of AMEA. In addition, the AMEA may also impose other possible confidentiality obligations on applicants on the ground of the cooperation requirements. More specific criteria have yet to be determined after the official publication of the Guideline.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

The AML does not provide criminal liability (neither individuals nor undertakings) for cartels, so there is no criminal exemption for related individuals.

13. Is there an 'amnesty plus' programme?

According to relevant law and previous cases, there is no 'amnesty plus' programme.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

In China, there is no settlement or plea-bargaining system equivalent to those in European Union and the United States. However, under the PRC law, the AMEA may suspend the investigation upon acceptance of commitments of the undertaking under investigation, and may thereafter terminate the investigation after the undertaking fulfilled the commitments.

Article 45 of the AML provided legal basis for acceptance of commitments, while Article 15 through 19 of the Regulation on the Procedures for the AIC to Investigate Cases Concerning Monopoly Agreements and Abuses of Dominant Market Positions (Order of SAIC, which has entered into force since July 1, 2009) and Articles 15 through 18 of the Regulations on Procedures for Administrative Law Enforcement on Anti-Price Monopoly (Order of NDRC, which has entered into force on February 1, 2011) stipulate detailed rules and procedures. The draft Regulation on Prohibition of Monopoly Agreements published SMAR largely maintained the existing rules and procedures on commitment without substantial changes.

It should be noted that although it may be applied to both monopoly agreements and abuse of dominant market position, the commitment system, in practice, is mainly used in cases of abuse of dominant market position. In this respect, the draft of the Guidelines for Commitments of Undertakings in Anti-Monopoly Cases (Draft Guidelines on Commitments), published by the NDRC for soliciting comments on February 3, 2016, expressly provides that in cases of horizontal monopoly agreements to fix or change prices, limit volumes of production or sales, or divide sales markets or the raw material procurement markets, the AMEA shall not accept commitments.

To date, the vast majority of measures committed are behavioral measures, while it cannot be ruled out that the AMEA may require the structural measures to be committed in the future. The

Draft Guidelines on Commitments stipulates that 'The measures can be behavioral measures, structural measures or a hybrid of the two. Behavioral measures include opening up infrastructure such as networks or platforms, licensing patent, technical secrets or other intellectual property rights, and terminating exclusive agreements. Structural measures include divest tangible assets, intangible assets including intellectual property rights, or related rights and interests.'

Finally, the decisions of suspension and termination of investigation do not require approvals from courts. Accordingly, the said decisions may not impede other undertakings or consumers from filing civil suits upon the suspected monopoly conducts, and should not serve as evidence to demonstrate the existence of monopoly conducts. This is also stipulated in the Article 3 of the Draft Guidelines on Commitments.

15. What are the key pros and cons for a party that is considering entering into settlement?

The benefits for undertakings to voluntarily makes commitments to the AMEA include:

1. avoiding administrative penalties: the decision on suspension of investigation is not an administrative penalty decision, so the undertaking under investigation can temporarily avoid the economic penalty stipulated in the Article 46 of the AML (See Question 6.1 below). If the undertaking fulfills its commitments, the AMEA may decide to terminate the investigation, and the undertaking will thus avoid administrative penalty definitely.

2. ending the investigation procedure as quickly as possible: in cases where it is controversial as to the existence of monopolistic conducts and the consequence caused by such conducts, commitments made by the undertaking may suspend and terminate the investigation procedure soon, so as to reduce the uncertainty and avoid the continuous impact on the operation and management of the undertaking, or even its contemplating mergers and acquisitions or capital market operation.

3. tailoring to undertakings' own capabilities: the committed measures are proposed by the undertaking itself according to its own conditions, which would be more practicable.

Depending on the circumstances of individual cases, the possible disadvantages may include:

1. the application for suspension of investigation and the decision to suspend the investigation shall set forth the facts of suspected monopoly conducts and the possible effects thereof.

Notwithstanding Article 3 of the Draft Guidelines for Commitment intends to clarify that none of the decisions to suspend or terminate investigation serves as the determination on whether or not the conducts of undertaking constitute monopolistic conducts nor be taken as evidence for making such a determination, the commitment, in which the undertaking admit the existence of suspected monopoly conducts, may trigger or inspire other undertakings or consumers to lodge a civil lawsuit.

2. the AMEA's acceptance of the commitments and decisions to suspend and terminate the investigation shall not serve as the determination on whether or not the conducts of undertaking constitute monopolistic conducts. The AMEA may conduct investigations as to other similar conducts of the undertakings and impose administrative penalties according to law.

3. the application for suspending the investigation is voluntarily submitted by the undertaking. Therefore, the undertaking cannot apply for administrative reconsideration or file administrative litigation against the specific measures it proposed in the application and committed thereafter.

4. the decision to suspend the investigation, including the contents of the commitment, will be made public. The undertaking will thus be subject to public supervision in addition to the supervision of the AMEA.

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

1. Inter-agency cooperation

The AMEA may cooperate with other government agencies. In general, other government agencies which find clues or receive materials about suspected monopoly conducts should transfer the clues or materials to the AMEA, and evidence and materials collected by the other government agencies can be used by the AMEA as evidence. For example, in 2012 the Public Security Bureau of Wuxi County transferred clues of a suspected monopoly conduct to the AIC of Wuxi County. The latter then reported to the AIC of the Chongqing Municipality, which, after having been authorized by the SAIC, conducted the investigation and finally made an administrative punishment decision.

During the process of investigations, the AMEA may seek opinions from relevant authorities in charge of the industry concerned, such as the Ministry of Industry and Information Technology, Ministry of Transportation, People's Bank of China, Sino Intellectual Property Office, China Banking Regulatory Commission and China Insurance Regulatory Commission.

2. Cooperation with other investigating authorities from other jurisdictions

Since the entry into force of the AML in 2008, China has entered into more than 50 cooperation agreements or memorandums of understanding ('MOUs') with competition authorities of about 30 countries and regions, including the US, the EU, the UK, Korea and Australia. For example, NDRC, SAIC and MOFCOM signed MOUs with U.S. Federal Trade Commission and the U.S. Department of Justice in July 27, 2011.

Article 2 of the AML stipulates that 'this Law shall apply to monopolistic acts outside the People's Republic of China that have the effect of eliminating or restricting competition in the domestic market.' The AMEA investigates and punishes monopoly conducts independently from foreign authorities. An undertaking who has submitted leniency applications or reached settlement agreements outside China would not automatically be exempted from investigations or punishment in China. It should submit leniency applications or propose to make commitments to the AMEA separately.

17. What are the potential civil and criminal sanctions if cartel activity is established?

Article 46 of the AML, the first paragraph, provides 'where an undertaking, in violation of the provisions of this Law, concludes and implements a monopoly agreement, the authority for enforcement of the AML shall order it to discontinue the violation, confiscate its unlawful gains, and, in addition, impose on it a fine of not less than 1% but not more than 10% of its sales achieved in the previous year. If such monopoly agreement has not been implemented, it may be fined no more than 500,000 yuan.' The above administrative penalties all target the undertaking under investigation rather than the management team or the persons directly responsible for the conclusion and/or implementation of monopoly agreements.

It should be noted that monopoly agreements which are concluded by collusion bidding would also be subject to sanctions under the Law on Tendering and Bidding and the Criminal Law. Specifically, according to Article 53 of the Law on Tendering and Bidding, the collusion bidder shall be fined not less than 0.5% but not more than 1% of the value of the bid it won, and the persons who are directly in charge and the other persons who are directly responsible shall be fined not less than 5% but not more than 10% of the fine imposed on the bidder. In serious situations, the bidder may be disqualified for one to two years from taking part in bidding for projects for which bid invitation is required by law, and its business license may even be revoked. Further, according to Article 223 of the Criminal Law, bidders who act in collusion with one another may be sentenced to a fixed-term of imprisonment of not more than three years or

criminal detention. They may also be fined only or together with the foresaid imprisonment or criminal detention.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

As mentioned above, whether the monopoly agreement has been implemented would significantly impact the amount of fine. If the monopoly agreement has been implemented, the undertaking may be fined not less than 1% but not more than 10% of its sales achieved in the previous year. If such monopoly agreement has not been implemented, it may be fined not more than 500,000 yuan. At the same time, the AMEA will consider the duration, degree and nature of the illegal conduct when determining the amount of fine. NDRC published a draft of Guidelines on Calculation of Illegal Gains and Penalties for Monopoly Conducts (Draft Guidelines on Calculation) in June 2016, with an aim to provide specific guidance on how to determine the amount of fine. It is, however, reported that the legislative process of the Draft Guidelines on Calculation has been slow given the existence of certain divergence.

So far, the maximum amount of the penalty for domestic enterprises conducting monopoly agreement is 457 million yuan in the case of PVC in 2017. This case involved 18 companies, including state-owned enterprises and private companies. With consideration of the extent of the violation and its duration as well as the industry situation that the PVC industry was suffering recession, the 18 companies were imposed a fine from 1% to 2% of their 2016 sales.

The highest percentage of sales that has been imposed as fine for monopoly agreement cases is 9%, in a case where eight international ro-ro cargo shipping companies implemented a monopoly agreement by collusion bidding in 2015. Considering, inter alia, that the monopoly agreement lasted for a long time (no less than four years), and resulted in a wide range of influence (covering various main ship routes including North America-China, Europe-China and South America-China), NDRC imposed fines ranging from 4% to 9% of the sales of international shipping services of ro-ro cargo related to the Chinese market in 2014, i.e. 407 million yuan in total.

In another case involving domestic companies, the Allopurinol case in 2016, Chongqing Qingyang and its affiliated company Chongqing Datong were fined 8% of their sales in the previous year, while the other companies were fined 5% of their sales in the previous year.

In December, 2018, SAMR announced the first monopoly agreement case after its establishment, i.e. the Tianjin port storage yard case, where Tianjin Development and Reform Commission (TDRC) made administrative penalty decisions against 17 companies. Having taken into account the circumstances of each company, including the degree of cooperation, the cessation of illegal conducts and the duration of the illegal conducts, TDRC imposed fines on the 17 companies in five tiers, namely 5%, 3%, 2.5%, 2% of the respective sales in the previous year and an exemption from penalty.

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

No law expressly requires that a parent company shall be jointly and severally liable for the monopoly conducts of its subsidiary, nor there has been any case where a parent company was so hold liable for the monopoly conducts of its subsidiary.

Article 19 of the Draft Guidelines on Calculation provides that, 'although as a rule the AMEA shall impose punishment against the undertaking that directly carries out monopolistic acts, it may punish the parent company of the undertaking if the parent company has a decisive influence on the implementation of monopolistic acts by the undertaking'. It remains unclear whether the foregoing provisions will be maintained in the final text.

20. Are private actions and/or class actions available for infringement of the cartel rules?

It is provided in Article 50 of the AML that the undertakings which commit cartels and cause losses to others shall bear civil liability according to law. According to the Regulations of the Supreme People's Court Concerning the Application of Several Legal on Civil Disputes Relating to Monopoly Conducts (Judicial Interpretation Concerning Monopoly Disputes), a natural person, corporation, or other organization, which suffers from losses caused by monopoly acts or is involved in disputes related to the AML breaches arising from contracts, the articles of associations of industrial associations, may bring a civil law suit in court.

In 2014, Shuangjing branch of Carrefour Beijing Co., Ltd. and Abbott Trading (Shanghai) Co., Ltd. were suspected of being involved in monopoly agreement conspiracy, against which Tian Junwei, as a customer, initiated a legal proceeding. In 2018, Wuhan Hanyang Sunshine Trading Co., Ltd. brought a lawsuit against Shanghai Hantai Tyre Selling Co., Ltd. for a suspected monopoly agreement and market dominance abuses. Plaintiffs fail in both cases.

The Representative Action System of China stipulated in the Civil Procedure Law of China is relatively similar to the class action in the United States of American. However, there are great differences between the two systems in terms of appointment and scope of authorization of the representative of litigants, and whether or not the judgment rendered by courts is binding on the parties.

According to the Civil Procedure Law in China that institutions and relevant organizations appointed by law may initiate legal actions in court when environmental pollution, customers' rights infringement or harms to public interests occurs. While the Law on the Protection of the Rights and Interests of Consumers also provides that China Consumers Association and its branches at provincial level may file a lawsuit at court against the conducts which harm mass consumers' legitimate interests and rights.

Yet, no anti-monopoly class action lawsuit has been brought up in China.

21. What type of damages can be recovered by claimants and how are they quantified?

According to article 50 of the AML and Judicial Interpretation Concerning Monopoly Disputes, for the defendant who commits monopoly conducts and cause losses to the plaintiff, the court may make judgement, ordering the defendant to assume civil liabilities such as ceasing the infringing act and making compensation on the basis of the claims made by the plaintiff. Accordingly, the AML formulates a supplementary damage compensation system. No law nor regulation empowers the infringed party with legal rights to claim a reward beyond its actual damage.

According to Judicial Interpretation Concerning Monopoly Disputes, courts may credit the reasonable costs arising from investigation and prevention of monopoly conducts to the scope of indemnification. For example, the court of Shanghai second instance trialed a dispute over vertical monopoly agreement between Beijing Ruibang Yonghe Technology & Trade Co., Ltd. (Rui Bang) and Johnson & Johnson Medical (China) Co., Ltd. (Johnson & Johnson) in 2013, and held that Johnson & Johnson to compensate Rui Bang the economic losses directly arising from the monopoly agreement.

22. On what grounds can a decision of the relevant authority be appealed?

According to the AML, where a party challenges the administrative penalty decision made by the AMEA concerning monopoly agreement, he may apply administrative reconsideration or file an administrative litigation. However, implementation of the administrative penalty decision shall continue during the period of administrative reconsideration or administrative litigation.

23. What is the process for filing an appeal?

As for administrative reconsideration, a party shall submit an administrative reconsideration application within 60 days after receiving the administrative penalty decision rendered by the AMEA. The administrative reconsideration authority must render decisions within 60 days after accepting the application. The term of hearing may be extended up to 30 days upon approval. The party still has the opportunity to file an administrative litigation if it is unsatisfied with the decision made by administrative reconsideration authority.

The party challenging an administrative penalty decision made by SAMR must submit the application for administrative reconsideration to SAMR, which shall act as the administrative reconsideration authority. If the challenged administrative penalty decision is made by provincial AMRs, the application for administrative reconsideration may be submitted to the provincial government or to SAMR, subject to the discretion of the applicant.

In 2016, Shanxi Price Bureau made administrative penalties to Shanxi Vehicle Inspection Association and more than 30 vehicle inspection agencies for monopoly conspiracy and implementation pricing monopoly agreement. Some of the agencies involved challenged the decision and made application for administrative reconsideration to Shanxi government. The administrative reconsideration authority heard the case and decided to uphold the original administrative penalty decisions.

As for administrative litigations, the party may file an administrative suit in court within six months after receiving the administrative penalty decision. If the party apply for administrative reconsideration at first but disagrees with the administrative reconsideration decision, the party may file a suit in court within 15 days after receiving the decision. In case the administrative reconsideration authority affirms the original administrative penalty decision, the party may bring a lawsuit, listing the AMEA making the previous penalty decision concerning monopoly agreement and the administrative reconsideration authority as co-defendants.

When applying ordinary procedures to hear an administrative case at first instance, the court must make judgment within six months after case acceptance. If the time limit for case hearing shall be extended under special circumstances, an approval must be obtained from the High Court. Time limit extension for hearing first-instance administrative case by the High Court is subject to the approval from the Supreme Court. Where the court hears a first-instance administrative case by applying summary procedure, the case shall be closed within 45 days after the acceptance of the case. Time limit for hearing case in summary procedure shall not be extended.

When challenging the first instance judgment rendered by court which has not come into force, the party shall appeal to the upper level court within 15 days after receiving the judgment; and the time limit for appealing to the upper level court against a first instance decision made by court which has not become effective shall be 10 days after receiving the written verdict. The court, when hearing second-instance administrative case, shall make final judgment within three months after receiving the appeal, which is also extendable similar to the above procedures under special circumstances.

In February 2017, Hainan Price Bureau made administrative penalty on Hainan Yutai Technology Feed Company in respect of vertical price-related cartel. The company refused to accept the penalty and brought a lawsuit in the court. The court abrogated the administrative penalty decision in the first instance. Hainan Price Bureau made appeal and eventually win the case in the second instance.

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

In March 2018, the duties of the three former AMEA (SAIC, NDRC and the Ministry of Commerce) were integrated into the newly established SAMR. In August 2018, SAMR established a new anti-monopoly bureau.

At the end of December 2018, SAMR authorized its provincial branches to take charge of AML enforcement within their respective administrative region.

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, etc.)?

Public utilities, medicines (especially drug substances), building materials, day-to-day consumer goods, and other areas which affect people's livelihood and national economy, remain as the focus of AML enforcement.

In 2018, the AMEA further probed into the medicine sector. one of the penalty cases involving monopoly agreements in this field was one involving three pharmaceutical ingredient manufacturers of glacial acetic acid, who were punished by SAMR for reaching and implementing monopoly agreements to fix or change commodity prices. Their illegal gains were confiscated and were fined 12.8338 million yuan in total. The fine is the highest in the pharmaceutical ingredient field since the implementation of the AML a decade ago.

In 2018, the shipping and port industry is another focus of AML enforcement. There are three cases involving monopoly agreements in this field: four tugboat companies in Shenzhen were punished by SAMR for reaching and implementing monopoly agreements of 'fixing or changing commodity prices,' with a total fine of 12.8576 million yuan; two freight forwarding companies in Shenzhen were punished for reaching and implementing monopoly agreements to 'divide sales markets' and 'fix or change commodity prices,' with total fines of 3.1631 million yuan; 16 freight yard companies in Tianjin Port were punished by the TDRC for reaching and implementing monopoly agreements of 'fixing or changing commodity prices' (another such company was exempted from punishment), with total fines of more than 45.1 million yuan.

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

(a) Amendment of the AML

According to the Legislation Plan of the Standing Committee of the 13th National People's Congress, the AML will be reviewed and amended as a priority in the next five years. In 2018, the AMC of the State Council drafted a study report and a draft revision of the AML.

(b) Formulating and perfecting relevant anti-monopoly measures and guidelines

Planning to introduce the "safe harbor system"

In January 2019, SAMR promulgated the Regulations on the Prohibition of Monopoly Agreements (Draft for Comments). The "safe harbor system" was introduced into the draft for consultation. After the adoption of this system, the risk of anti-monopoly compliance of the types

of agreements other than hard-core cartels will be significantly reduced for enterprises with small market power.

Adoption of four anti-monopoly guidelines

In addition to the published Guidelines on the Definition of Relevant Markets, as of December 2018, the AMC of the State Council has adopted four anti-monopoly guidelines, namely, the Anti-Monopoly Guidelines on the Abuses of Intellectual Property Rights, Anti-Monopoly Guidelines on the Automobile Industry, Guidelines on the Commitment of Undertakings in Anti-Monopoly Cases and Guidelines on the Application of the Leniency Program in Horizontal Monopoly Agreements. The guidelines, which are expected to be formally promulgated and become effective in 2019, will provide more guidance for enterprises to comply with the AML, and will also make law enforcement procedures clearer.

Amendment of procedural regulations

On April 1, 2019, the Interim Provisions on Procedures for Administrative Penalties Regarding Market Supervision and Administration and the Interim Measures for Hearings of Administrative Penalties Regarding Market Supervision and Administration promulgated by SAMR will be formally implemented. In the future, special provisions will be issued for the administrative penalty procedure of the AML to provide more specific guidance. The above-mentioned provisions and measures provide a guarantee for the unification and standardization of anti-monopoly administrative investigation and punishment procedures, and for enhancing the openness and transparency of AML enforcement.

Enforcement of the AML will be further tightened.

In 2019, SAMR will continue focusing on public utilities, drug substances, building materials, day-to-day consumer goods and other areas relating to the people’s livelihood, and intensify efforts to investigate and punish monopoly agreements and abuse of market dominance.

As of January 2019, 34 provincial AMRs have been listed and established, while local market supervision departments have also been clearly granted the power of AML enforcement within their jurisdictions. Chinese AMEA, especially at provincial level, will be more active in investigating and dealing with monopoly agreements.

本期作者简介

万江律师为环球律师事务所常驻北京的合伙人。万江律师自 2005 年开始执业。曾长期就职于国家发改委反垄断局，主要从事反垄断执法、立法和国际交流工作，先后主办、承办数十起反垄断案件，主笔起草关于反垄断宽大制度、承诺和解制度的反垄断指南草案。2012 年 2 月至 7 月期间万江律师获派赴欧盟竞争总司及爱尔兰竞争局实习工作。万江律师著有《中国反垄断法——理论、实践与国际比较》（第二版，中国法制出版社 2017 年 6 月出版）、《<企业国有资产法>释义》、《劳务派遣法律实务操作指引》等专著。

邮箱：wanjiang@glo.com.cn

Dr. Wan is a partner of Global Law Office in Beijing. Dr. Wan has extensive experience with complex antitrust and competition law issues. Prior joining Global Law office, he served as a senior case handler at Price Supervision and Anti-monopoly Bureau(PSAB) of National Development of Reform Commission(NDRC) participating in a number of significant anti-trust & cartel investigations and leading the draft of Leniency Program and Commitment Rules under China's Anti-monopoly Law. Dr. Wan received an intensive training in both DG Competition of the European Commission and Irish Competition Authority in 2013. He acquired Ph.D. in law in 2010 at China University of Political Science and Law.

Email: wanjiang@glo.com.cn

任清律师为环球律师事务所常驻北京的合伙人，主要执业领域为反垄断、国际争议解决、WTO/国际贸易。任律师代表国内外企业办理了数十起经营者集中申报案件，涉及非简易案件、简易案件和未依法申报案件等。任律师还代理反垄断调查和民事诉讼，并提供反垄断合规服务。任律师受聘为北京仲裁委、上海国际经贸仲裁委、重庆仲裁委仲裁员，并代理投资仲裁和商事仲裁案件。任律师担任中国世贸组织法研究会常务理事，在 WTO 法、301 调查、出口管制、经济制裁等领域具有丰富的实务经验。

邮箱：renqing@glo.com.cn

Mr. Ren is a partner of Global Law office and specialized in anti-trust, dispute resolution and international trade. Mr. Ren has represented international and domestic clients in dozens of merger filings, including simple cases, non-simple cases and "gun jumping" cases. He also represents clients in anti-trust investigations and litigations, and provides anti-trust compliance advices. Mr. Ren is arbitrator of Beijing Arbitration Commission, Shanghai International Arbitration Center and Chongqing Arbitration Commission, practicing investment arbitration and commercial arbitration. Mr. Ren is member of the board of executive directors of China WTO Law Society, with rich experiences in WTO disputes, Section 301 investigations, export control and economic sanctions.

Email: renqing@glo.com.cn

刘淑珺为环球律师事务所常驻北京的合伙人，同时也是所内日本业务团队的负责合伙人。刘律师除了长年为众多在华投资的日本企业和赴日投资的中国企业提供外商投资和并购、公司重组和解散清算、劳动、外汇、海关、争议解决等全方位的法律支持之外，主要专注于反垄断和反不正当竞争、网络安全及数据、环境、广告等监管合规以及危机处理业务。

邮箱：liushujun@glo.com.cn

Shujun Liu is a partner of Global Law Office based in Beijing, as well as the partner in charge of the Japanese practice. For more than a decade Shujun has been providing to a large number of Japanese companies in China and Chinese companies in Japan a comprehensive range of legal services regarding foreign investment, mergers & acquisitions, corporate restructuring, dissolution and liquidation, labor, foreign exchange, customs, dispute resolution, etc. Shujun also specializes in antitrust, anti-unfair competition, cybersecurity and data, environment, advertisement, and other regulatory compliance and risk management.

Email: liushujun@glo.com.cn

吴丽丽为环球律师事务所常驻北京的顾问律师。吴律师的主要执业领域为反垄断，主要专注于经营者集中申报案件和反垄断调查。吴律师为众多客户提供经营者集中申报案件的法律支持。吴律师为多个跨国企业、国有企业、私营企业、和部分电商客户提供反垄断方面的法律支持，同时为客户开展反垄断培训。

邮箱：wulili@glo.com.cn

Lili Wu is an of-counsel at Global Law's Beijing Office. Her practice area specializes in competition law, including merger control filing and antitrust investigation. She has led several merger control filings, and also assists clients including multinational companies, private and state-owned enterprises, e-commerce platform, as well as provided antitrust trainings to clients.

Email: wulili@glo.com.cn

环球反垄断招募信息

环球反垄断团队近期拟招募以下人员：

1、高级律师

要求：国内外知名大学法学院研究生毕业，从事反垄断法律实务工作 3 年以上，具有中国律师执业资格，可以英文为工作语言，男女不限。

2、初级律师

要求：国内外知名大学法学院研究生毕业，通过司法考试或已经取得律师执业资格，具有 1-2 年反垄断法律实务工作经验，英文流利，30 岁以下，男女不限。

3、实习生

要求：国内外知名大学法学院竞争法方向研二、研三年级硕士研究生，通过司法考试，英文流利者优先，要求每周至少保证三天以上工作时间。

有志加入环球反垄断团队者，可将个人电子简历等资料投递到环球人力资源部电子邮箱：hr@glo.com.cn，并注明“反垄断业务申请”。

环球简介

环球律师事务所（“我们”）是一家在中国处于领先地位的综合性律师事务所，为中国及外国客户 就各类跨境及境内交易以及争议解决提供高质量的法律服务。

历史. 作为中国改革开放后成立的第一家律师事务所，我们成立于 1984 年，前身为 1979 年设立的中国国际贸易促进委员会法律顾问处。

荣誉. 作为公认领先的中国律师事务所之一，我们连续多年获得由国际著名的法律评级机构 评选的奖项，如《亚太法律 500 强》（The Legal 500 Asia Pacific）、《钱伯斯杂志》（Chambers & Partners）、《亚洲法律杂志》（Asian Legal Business）等评选的奖项。

规模. 我们在北京、上海、深圳三地办公室总计拥有近 300 名的法律专业人才。我们的律师 均毕业于中国一流的法学院，其中绝大多数律师拥有法学硕士以上的学历，多数律师还曾学习或工作 于北美、欧洲、澳洲和亚洲等地一流的法学院和国际性律师事务所，多数合伙人还拥有美国、英国、德 国、瑞士和澳大利亚等地的律师执业资格。

专业. 我们能够将精湛的法律知识和丰富的执业经验结合起来，采用务实和建设性的方法解决法律问题。我们还拥有领先的专业创新能力，善于创造性地设计交易结构和细节。在过去的三十多年里，我们凭借对法律的深刻理解和运用，创造性地完成了许多堪称“中国第一例”的项目和案件。

服务. 我们秉承服务质量至上和客户满意至上的理念，致力于为客户提供个性化、细致入微 和全方位的专业服务。在专业质量、合伙人参与程度、客户满意度方面，我们在中国同行中名列前茅。在《钱伯斯杂志》举办的“客户服务”这个类别的评比中，我们名列中国律师事务所首位。

环球反垄断团队介绍

环球反垄断团队由十余名合伙人和律师组成，其中一些合伙人和律师既有实务操作经验也有丰富的执法经验，已为医药、互联网、汽车、电器、IT、食品、化工、航运、零售等行业的众多境内外客户提供一站式反垄断专业服务，服务范围包括经营者集中申报、反垄断调查、反垄断诉讼、反垄断风险防范与合规等。我们对中国反垄断法律法规及其实践具有深刻认识和专业理解。我们的主要服务内容包括：

- 为客户提供关于垄断、不正当竞争的风险防范以及合规审查的法律咨询；
- 就境内外经营者集中起草反垄断申报报告；
- 代表客户进行反垄断申报；
- 代表客户应对反垄断部门发起的反垄断调查；
- 代表客户进行反垄断民事和行政诉讼等。

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联系我们. 如您欲进一步了解本报告所涉及的内容，您可以通过下列联系方式联系我们。

环球律师事务所（北京总部）

北京市朝阳区建国路81 号华贸中心1 号写字楼15 层&20 层 邮编：100025

电话：(86 10) 6584 6688

传真：(86 10) 6584 6666

电邮：global@glo.com.cn

环球律师事务所（上海）

上海市黄浦区湖滨路150 号企业天地5 号楼26 层 邮编：200021

电话：(86 21) 2310 8288

传真：(86 21) 2310 8299

电邮：shanghai@glo.com.cn

环球律师事务所（深圳）

深圳市南山区铜鼓路 39 号大冲国际中心 5 号楼 26 层 B/C 单元 邮编：518055

电话：(86 755) 8388 5988

传真：(86 755) 8388 5987

电邮：shenzhen@glo.com.cn

环球律师事务所

北京市朝阳区建国路81号华贸中心
1号写字楼15层&20层 邮编: 100025
15 & 20/F Tower 1, China Central Place,
No. 81 Jianguo Road Chaoyang District,
Beijing 100025, China
电话/T. (86 10) 6584 6688
传真/F. (86 10) 6584 6666

上海市黄浦区湖滨路150号企业天地
5号楼26层 邮编: 200021
26F, 5 Corporate Avenue,
No. 150 Hubin Road, Huangpu District,
Shanghai 200021, China
电话/T. (86 21) 2310 8288
传真/F. (86 21) 2310 8299

深圳市南山区铜鼓路39号大冲国际中心
5号楼26层B/C单元 邮编: 518055
Units B/C, 26F, Tower 5,
Dachong International Center, No. 39 Tonggu Road,
Nanshan District, Shenzhen 518055, China
电话/T. (86 755) 8388 5988
传真/F. (86 755) 8388 5987