

A background image of a city skyline at sunset, with several skyscrapers visible against a warm, orange and pink sky. The image is partially obscured by a dark red rounded rectangle that contains the title text.

# 企业经营中的反垄断问题介绍

## Overview of Anti-Monopoly Issues in Company Business

王钊 合伙人  
George Wang, Partner

2017-03

 JUNHE | 君合律师事务所

# 中国法律禁止的垄断行为

Monopoly Behaviors Prohibited by PRC Law

&

# 反垄断执法机构

Anti-Monopoly Enforcement Agencies

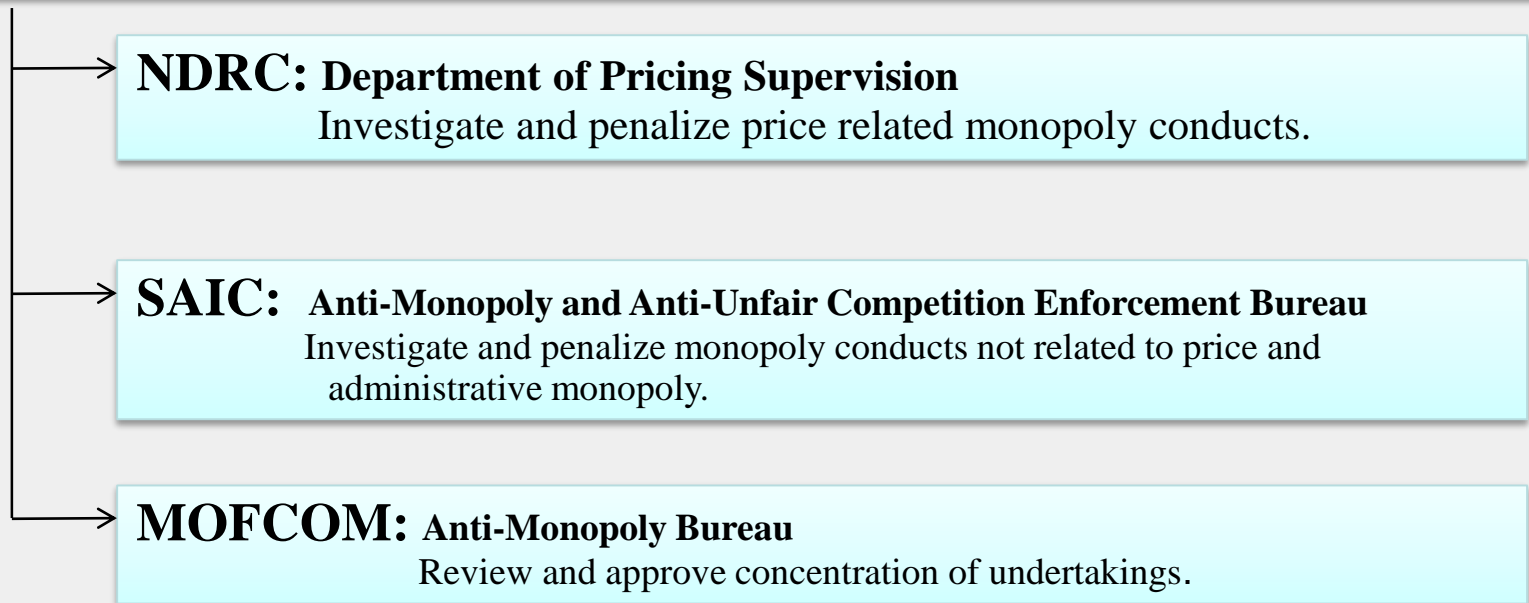


- 垄断协议（横向与纵向）  
Monopoly Agreements (Horizontal and Vertical)
- 滥用市场支配地位  
Abuse of Dominant Market Position
- 排除、限制竞争效果的经营者的集中  
Concentration of Undertakings with Effect of Excluding or Restraining Competition
- 行政垄断  
Administrative Monopoly



## Anti-Monopoly Commission of State Council

Research and draft relevant regulations; launch investigations and assessments on market competition status and release relevant reports; draft and release guidelines; coordinate administrative enforcement of AML, etc.



# 横向垄断协议的法律限制

## Horizontal Monopoly Agreement



# 被禁止的横向垄断协议的类型

## Types of Prohibited Horizontal Monopoly Agreement



1. 固定或者变更商品价格;  
Fix or change product price;
2. 限制商品的生产数量或者销售数量;  
Limit the production quantity of products or the sales quantity of products;
3. 分割销售市场或者原材料采购市场;  
Divide sales market or raw material procurement market;
4. 限制购买新技术、新设备或者限制开发新技术、新产品;  
Limit the purchase of new technologies and new equipment or limit the development of new technologies and new products;
5. 联合抵制交易;  
Collectively boycott transactions; and
6. 国务院反垄断执法机构认定的其他横向协议  
Other horizontal monopoly agreements as determined by the anti-monopoly law enforcement agency of the State Council.

对于垄断协议(无论横向或纵向), 根据《反垄断法》, 执法机构可以责令:

For monopoly agreements (horizontal & vertical), AML empowers AMEAs to order:

1. 停止违法行为;  
cessation of unlawful conduct;
2. 没收违法所得;  
confiscation of illegal gains;
3. 处上一年度销售额百分之一以上百分之十以下的罚款。  
a fine between 1% and 10% of the sales amount for the previous year.

经营者主动向执法机构报告达成垄断协议并提供重要证据的, 可以减轻或免除处罚(予以宽大)。

An undertaking who reports to AMEA about its monopoly agreement and submits important evidence may be mitigated or exempted from punishment (leniency).

尚未实施垄断协议的, 可以处五十万元以下罚款。

Undertakings who have not yet implemented the monopoly agreement can be fined for no more than RMB 500,000.

**汽车零部件案(2014) (卡特尔)** - 2014年8月20日，八家日本企业为减少竞争和提高零部件订单价格，在日本进行多次会谈，互相协商价格，多次达成汽车零部件价格垄断协议，被国家发改委罚款人民币12.35亿元。

**The auto parts case (2014) (Cartel)** – On August 20, 2014, NDRC announced its punishments against 8 Japanese automobile parts manufacturers, which organized discussions in Japan and negotiated a price cartel for automobile parts. NDRC issued penalties totaling RMB 1.235 billion against these 8 undertakings.

**0%**

无处罚 (予以宽大): 日立 (“第一家主动报告达成垄断协议有关情况并提供重要证据”)  
No penalty (leniency granted): Hitachi (for “being the first to report, on its own initiative, the relevant information on reaching monopoly agreements and providing important evidence”)

**4%**

上一年销售额的4%: 电装 (“第二家主动报告达成垄断协议有关情况并提供重要证据”)  
4% of the sales amount for the previous year: Denso (for “being the second to report, on its own initiative, the relevant information and providing important evidence”)

**6%**

上一年销售额的6%: 矢崎、古河和住友 (“只协商过一种产品”)  
6% of the sales amount for the previous year: Yazaki, Furukawa and Sumitomo (for “being involved in the agreement for only one product”)

**8%**

上一年销售额的8%: 爱三、三菱电机和三叶 (“协商过两种以上产品”)  
8% of the sales amount for the previous year: Aisan, Mitsubishi Electrics and Mitsuba (for “being involved in the agreement for two or more products”)



**轴承案(2014) (卡特尔)** - 国家发改委于2014年8月20日公告四家轴承生产企业，它们在日本和上海分别组织召开研究会议，讨论亚洲地区乃及中国市场的轴承涨价方针、涨价时机和幅度。并按照这些信息，实施了涨价行为。

**The bearing case (2014) (Cartel)** - NDRC announced its punishments against 4 bearing manufacturers which organized conferences in Japan and Shanghai, discussing strategy, timing and range to raise bearing product prices in Asia and China market. They executed price lifting plans in accordance with such discussion.

**0%**

无处罚(予以宽大): 不二越 (“第一家主动报告达成垄断协议有关情况并提供重要证据” )  
No penalty (leniency granted): Nachi (for “being the first to report, on its own initiative, the relevant information on reaching monopoly agreements and providing important evidence”)

**4%**

上一年销售额的4%: 精工 (“第二家主动报告有关情况并提交涉及中国市场所有证据和销售数据” )  
4% of the sales amount for the previous year: Seiko (for “being the second to report, on its own initiative, the relevant information and providing all evidence and sales data relating to the Chinese market”)

**6%**

上一年销售额的6%: NTN公司 (“2006年9月退出亚洲研究会但继续参加中国出口市场会议” )  
6% of the sales amount for the previous year: NTN (for “withdrawing from the meetings for Asian studies in Sept. 2006 but continuing to participate in the Chinese export market meetings”)

**8%**

上一年销售额的8%: 捷太格特 (“提议专门针对中国市场召开出口市场会议” )

2017/3/3

8% of the sales amount for the previous year: JTEKT (for “having specifically proposed to convene export market meetings with respect to the Chinese market”)

<p>液晶面板案 LED Case 2013</p>	<p>包括LG、三星在内的六家液晶面板生产商达成固定价格的横向协议，并执行了该协议。 Six LED manufacturers, including LG and Samsung, reached a horizontal agreement on price fixing and performed the agreement</p>	<p>发改委罚款合计人民币3.53亿（注：该案件的处罚适用《价格法》） NDRC fine: totaling RMB 353 million (note: NDRC applied the <i>PRC Price Law</i> in its punishment decision on this case)</p>
<p>上海克莱斯勒三家经销商 Three dealers of Chrysler in Shanghai 2014</p>	<p>召开会议,签订并执行就统一同城经销商克莱斯勒、JEEP、Dodge品牌车辆维修保养价格的协议 Held meetings and executed an agreement on unifying the maintenance and repair prices charged by the dealers in the same city for Chrysler, JEEP and Dodge</p>	<p>发改委罚款合计人民币214万 NDRC fine: totaling RMB 2.14 million</p>
<p>浙江汽车保险商及湖北保险协会案 Automobile Insurance (Zhejiang &amp; Hubei) 2014 &amp; 2016</p>	<p>浙江保险行业协会召开行业会议，固定手续费和新车折扣系数，根据市场份额统一商业车险代理手续费；湖北保险行业协会召开行业会议，划分市场； (Zhejiang) Insurance Association arranged industrial meeting to fix prices among competitors, and negotiated agent's fee for commercial automobile insurance in accordance with market share; (Hubei) Insurance Association arranged industrial meeting to divide market.</p>	<p>浙江案：发改委对参与公司罚款合计1.1亿元，并对行业协会罚款50万元；湖北案：工商局对行业协会罚款16万元； (Zhejiang) NDRC fine: RMB 110 million against participating companies, and RMB 500,000 against Zhejiang Insurance Association; (Hubei) AIC: 200,000 RMB against Hubei Insurance Association</p>
<p>八家滚装货物国际海运企业实施价格垄断案 RoRo Cargo Shipping Cartel 2015</p>	<p>包括日本邮船、威克滚装在内的八家滚装货物国际海运企业达成横向垄断协议并进行串标。 Eight roro cargo companies, including NYK and Eukor, reached price monopoly agreements (by conducting bid rigging behaviors) in providing international rolling goods ocean transportation</p>	<p>发改委罚款合计人民币4.07亿 NDRC fine: totaling RMB 407 million</p>

目前为止，现行中国反垄断法律法规并未就企业间的信息交换行为进行明确的限制。但竞争者之间涉及价格、产量和商业计划等敏感信息的交换，可能会成为引发调查及认定协同行为的重要因素。根据国家发改委以及工商总局所发布的相应法规，其将根据下列因素决定哪些行为可能构成反垄断协同行为。

Up to date, the PRC Anti-Monopoly Law and relevant regulations do not set out specific requirements on information exchange among undertakings. However, information exchange among competitors involving sensitive information such as price, production volume and business plans may be **an important factor in triggering investigations and in determining concerted practices**. According to relevant provisions promulgated by the NDRC and the SAIC, the authorities will determine whether there exists any concerted practice based on relevant factors.

“协同行为”的认定因素 Factors for determining “concerted practices”:

- 行为的一致性 Consistency in practice;
- 意思联络或者信息交流 Communication of intention or information;
- 一致性的合理解释 Reasonable explanation of consistency;
- 市场结构/竞争状况/市场变化情况/行业情况 Market structure/competition status/changes in market/industry status.

**国内首例经营者协同行为处罚案：艾司唑仑原料药和片剂联合抵制交易和价格垄断案。** 2016年7月27日，国家发展改革委对艾司唑仑原料药、片剂垄断协议案依法作出处罚，对另两家达成并实施限定价格和联合抵制交易垄断协议的企业进行处罚。常州四药虽未参与上述垄断协议，但参与了事前沟通联络，并且在后续的经营过程中，在涨价的幅度、节奏和供应策略上，也采取了与其他公司具有一致性(其他公司分别涨价3倍和2倍，而常州四药涨价1.6倍，且前述各家拒绝交易行为均相继发生在6个月内，首轮价格调整均相继发生在1个月内)的相应行为，因此被一并进行处罚。

**The First Concerted Practice Case: Boycott and Price Cartel Case regarding Estazolam Raw Materials and Pills:** On July 27, 2016, the NDRC issued a decision in the Estazolam Raw Materials and Pills case involving a price cartel and boycott action concluded by two other undertakings through a horizontal monopoly agreement. Chang Zhou No.4 Pharmaceutical Ltd. did not participate in such horizontal agreement, but was fined for its concerted practice, because (i) it engaged in the previous communication with the other undertakings; and (ii) its rhythm in adjusting product price and supply strategy suggested a pattern similar to the horizontal monopoly agreement reached by the two other pharmaceutical undertakings (the other two companies raised their prices by 300% and 200% respectively, while Chang Zhou No. 4 Pharmaceutical Ltd. raised its price by 160%, and the above boycotting all happened within 6 months and price adjustments all happened in 1 month).

## 纵向垄断协议的法律限制

# Vertical Monopoly Agreement



纵向垄断协议(“纵向协议”),是指经营者与交易相对人(如客户、经销商、供应商等)之间的排除、限制竞争的协议、决定或者其他协同行为。包括:  
The term “vertical monopoly agreement” refers to an agreement, decision or other concerted practice between an undertaking and its counterparty (e.g., customers, distributors and suppliers) to exclude and restrain competition, including:

1. 固定向第三人转售商品的价格(“转售价格固定”或“RPF”);  
Fixing a product’s resale price to a third party (“resale price fixing” or “RPF”);
2. 限定向第三人转售商品的最低价格(“最低RPM”);  
Maintaining a product’s minimum resale price to a third party (“minimum RPM”);
3. 中国反垄断执法机构认定的其他纵向协议。  
Other vertical agreements determined by Chinese anti-monopoly enforcement agencies.



我国纵向垄断协议的处罚与横向垄断协议相同，包括宽恕制度。

The punishments against vertical monopoly agreements are same as those against horizontal monopoly agreements, including the leniency program.

**奔驰案:** 2015年4月23日，江苏省物价局认定北京梅赛德斯-奔驰销售有限公司通过电话、口头通知或者召开经销商会议的形式，限制江苏省不同区域内E级和S级整车的最低转售价格，违反《反垄断法》，作出了对奔驰公司人民币3.5亿元罚款的处罚。

**The Mercedes-Benz Case:** On April 23, 2015, Jiangsu Price Bureau determined that Mercedes-Benz restricted minimum resale prices for its E-class and S-class sedans in different areas in Jiangsu Province by phone calls, verbal notices and distributor meetings, which violated the AML. The Bureau fined Mercedes-Benz RMB 350 million.

**上汽通用案:** 2016年12月19日，上海市物价局认定上汽通用汽车销售有限公司在分销汽车过程中，相关营销部门存在与上海地区经销商达成并实施“限定向第三人转售商品最低价格”垄断协议的事实，违反《反垄断法》，作出了对上汽通用汽车销售有限公司约人民币2.017亿元罚款的处罚。

**The SGM Case:** On December 19, 2016, Shanghai Price Bureau determined that Shanghai General Motors (“SGM”), in distribution of products, allowed its sales department to reach and execute a monopoly agreement with distributors to control the minimum resale prices of its automobile products to third parties. The Bureau fined SGM RMB 201.7 million.

<p>美敦力价格垄断行为案</p> <p><b>Medtronic Case</b></p> <p><b>2016</b></p>	<ul style="list-style-type: none"> <li>通过经销协议、邮件通知、口头协商等方式，与其交易相对人达成垄断协议，限定相关医疗器械产品的转售价格、投标价格和到医院的最低销售价格。</li> <li>Reached monopoly agreements with its counterparties through distribution agreements, email notifications and verbal communications for the purpose of setting lower limits on resale prices, bidding prices and minimum resale prices to hospitals</li> <li>通过制定下发各经销环节的产品价格表、内部考核、撤销经销商低价中标产品等措施，实施价格垄断协议。</li> <li>Enforced such monopoly agreements by issuing price lists for the whole distribution process, implementing internal assessment and revoking distributor's products whose bidding prices were lower than the prices set by Medtronic.</li> <li>采取纵向限制销售对象和销售区域、限制经销竞争品牌产品的措施，进一步强化纵向价格垄断协议的实施效果。</li> <li>Adopted other vertical control measures against distributors to strengthen the effect of the above price monopoly agreements, such as restrictions on target customers and sales regions, as well as restrictions on distribution of competing products.</li> </ul>	<p>发改委罚款人民币1.185亿元</p> <p>NDRC fine: RMB 118.5 million</p>
---	---	--



<p>茅台案和五粮液案 Maotai and Wuliangye</p> <p>2013</p>	<p>转售价格维持 (RPM) 行为, 对违规低价销售经销商进行处罚</p> <p>Minimum resale price maintenance, punishing distributors whose resale prices were lower than the prices set by the manufacturer</p>	<p>发改委分别处罚人民币2.47亿元和2.02亿元</p> <p>NDRC fine: RMB 247 million &amp; 202 million respectively</p>
<p>奶粉案 Milk powder case</p> <p>2013</p>	<p>合生元、美赞臣、多美滋、雅培、富仕兰(美素佳儿)、恒天然等转售价格维持行为</p> <p>RPM involving Biostime, Mead Johnson, Dumex, Abbott, Friso, etc.</p>	<p>发改委共计处罚人民币6.69亿元</p> <p>NDRC fine: RMB 669 million in total</p>
<p>Contact lens and frame glasses lens case 隐形眼镜和框架眼镜镜片案</p> <p>2014</p>	<p>依视、尼康、豪雅、强生、博士伦等设定经销商最低转售价行为</p> <p>Involving Essilor, Nikkon, Hoya, Johnson &amp; Jonson, Bausch &amp; Lomb, etc., setting minimum resale prices for distributors</p>	<p>发改委罚款人民币1,900万</p> <p>NDRC fine: RMB 19 million</p>
<p>海尔家电纵向价格垄断案 Haier case</p> <p>2016</p>	<p>发布销售政策、向经销商发送市场秩序管理公函、与经销商签订含有限价要求的经销协议。通过收取经销商乱价罚款、对屡次乱价的经销商暂停供货、停止合作等方式实施了垄断协议</p> <p>Released sales policy, market order management and distributors agreement with terms of setting minimum resale price against distributors. Punishing distributors whose resale prices were lower than the prices set by Haier, including cash penalty, ceasing supply or terminating cooperation</p>	<p>发改委罚款人民币1,234.80万元</p> <p>NDRC fine: RMB 12.3480 million</p>

# 滥用市场支配地位的法律限制

## Abuse of Dominant Market Position



推定具有市场支配地位的情形：

An undertaking may be presumed to be in a dominant market position, if:



一个经营者在相关市场的市场份额达到二分之一；  
the undertaking holds a market share of one half or above;



两个经营者在相关市场的市场份额合计达到三分之二；  
the aggregate market share of it and another undertaking accounts for two thirds or above; or



三个经营者在相关市场的市场份额合计达到四分之三；  
the aggregate market share of it and another two undertakings accounts for three fourths or above.

有后两项规定的情形，其中有的经营者市场份额不足十分之一的，不应当推定该经营者具有市场支配地位。

In the latter two cases, if any one of those undertakings holds a market share of less than one tenth, that undertaking shall not be presumed to be in a dominant market position.

1. 以不公平的高价销售商品或者以不公平的低价购买商品；  
Selling goods at an unfairly high price or purchasing goods at an unfairly low price;
2. 没有正当理由，以低于成本的价格销售商品；  
Selling goods at prices below cost without any justification;
3. 没有正当理由，拒绝与交易相对人进行交易；  
Refusing to trade with relevant counterparties without any justification;
4. 没有正当理由，限定交易相对人只能与其进行交易或者只能与其指定的经营者进行交易；  
Requiring its counterparties to deal only with it or its designated undertakings without any justification;
5. 没有正当理由搭售商品，或者在交易时附加其他不合理的交易条件；  
Tying any goods or imposing any other unreasonable terms and conditions in relation to a transaction without any justification;
6. 没有正当理由，对条件相同的交易相对人在交易价格等交易条件上实行差别待遇；  
Discriminating between equivalent counterparties in respect of transaction conditions (e.g., price) without any justification;
7. 中国反垄断执法机构认定的其他滥用市场支配地位行为。  
Other abuse of dominant market position determined by Chinese anti-monopoly enforcement agencies.

对于滥用市场支配地位行为，执法机构可以责令：

In case of abuse of dominant market position, the enforcement authorities may order:

1. 停止违法行为；  
cessation of unlawful conduct;
2. 没收违法所得；  
confiscation of illegal gains;
3. 处上一年度销售额百分之一以上百分之十以下的罚款。  
a fine between 1% and 10% of the sales amount for the previous year.



合法合规  
Legal compliance

<p><b>高通案</b> <b>Qualcomm</b></p> <p>发改委 <b>NDRC</b></p> <p><b>2015</b></p>	<p>高通公司具有在无线标准必要专利许可市场的支配地位，并(a)收取不公平的高价专利许可费，(b)在无线标准必要专利许可中，没有正当理由搭售非无线标准必要专利许可；(c)在基带芯片销售中附加不合理条件。</p> <p>Qualcomm possessed a dominant market position in the market of SEPs for code division multiple access and abused its dominant market position by (a) charging unfairly excessive patent royalties by using the wholesale net selling price of the device as its royalty base; (b) tying non-SEPs for wireless communication to SEPs without justification; and (c) attaching unreasonable terms in baseband chip sales.</p> <p>罚款人民币60.88亿元 Fine of RMB 6.088 billion</p>
<p><b>Tetra Pak</b> <b>利乐案</b></p> <p>国家工商总局 <b>SAIC</b></p> <p><b>2016</b></p>	<p>凭借在设备市场、技术服务市场和包装用纸材料的支配地位，通过搭售、限制原料纸供应商与其竞争对手合作、实施追溯性累计销量折扣和采购量目标折扣等忠诚折扣行为，排除、限制竞争。</p> <p>Tetra Pak possessed dominant market positions in relevant equipment, tech-support and packaging paper markets, and abused such market power by means of tying sales, limiting the cooperation between its raw material suppliers and its competitors, implementing loyal discount mechanisms such as retrospective accumulative sales discount and procurement target discount, for the purpose and having the outcome of restraining and excluding competition.</p> <p>罚款上一年度销售额7%，人民币6.68亿元 Fine of 7% of the sales amount for the previous year, i.e., RMB 668 million</p>
<p><b>微软案</b> <b>Microsoft</b></p> <p>国家工商总局 <b>SAIC</b></p> <p><b>Ongoing</b></p>	<p>国家工商总局于2013年约谈微软，就其未完全公开Windows系统和Office、浏览器、播放器等软件的销售信息，以及其中存在的兼容性、搭售和文件验证系统等问题进行反垄断调查。2014年7月28日和8月6日工商总局先后突击检查了微软在全国范围内的数个办公室。2016年1月5日，工商总局发布公告，表示其将对微软展开新一轮反垄断调查，并就其在早先调查收集的电子数据中所发现的重大问题对微软大中华区负责人进行反垄断询问和要求提交完整说明。</p> <p>The SAIC launched an AML investigation against Microsoft due to its failure to fully disclose the sales information related to the Windows operating system, browser, media-player and Office software, including issues of compatibility, tying sales and document verification system. SAIC questioned the senior management of Microsoft in 2013, and dawn-raided several Microsoft China offices on July 28, 2014 and August 6, 2014. On January 5, 2016, SAIC announced that the AML investigation against Microsoft would roll on, requiring further inquiries and explanations from Microsoft, as key evidence was said to be found in previous dawn-raid action.</p>

## 反垄断调查近期趋势

# Recent Trend of Anti-Monopoly Investigation



1. 主管机构对各个行业的行动更加积极。对那些想要参与中国市场的公司而言，在中国的整体反垄断战略变得至关重要；  
The authorities have become much more active in various industries. An overall anti-monopoly strategy for China becomes essential for those companies who want to do business in the Chinese market.
2. 近期被调查的行业包括：汽车行业、日常消费品制造业、电子产品制造业以及IT业等；  
The industries targeted by the recent investigations include IT and the manufacturing of automobiles, consumer goods, and electronic products.
3. 近期被调查的垄断行为类型包括；横向垄断协议、纵向垄断协议、滥用支配地位；同时也出现了横向和纵向垄断协议混合(例如：奔驰案)；  
The types of monopoly conducts targeted by the recent investigations include horizontal monopoly agreements, vertical monopoly agreements, and abuse of dominant position; and mixture of horizontal and vertical monopoly agreements (e.g., the Mercedes-Benz case).



4. 可能成为反垄断调查对象的当前热门行业/领域包括：医药、制药、医疗器械、航空、日化、电信、汽车零配件和在线零售；  
The hot industries/businesses that may be targeted in future anti-monopoly investigations include medicine/pharmaceuticals, medical devices, aviation, household chemicals, telecommunications, automobile parts and online retail.
5. 主管机构倾向于扩大“宽大处理”的申请范围，甚至用于某些纵向案件中。因此，如何在第一时间发现反垄断问题并配合主管机构调查非常重要，将有助于获得豁免/降低罚款数额；  
The authorities tend to expand the scope of “leniency”, even in some cases involving vertical monopoly agreements. Therefore, it is quite important to know how to identify anti-monopoly concerns in the first instance and how to cooperate with the authorities so as to secure the exemption/reduction of fines.
6. 据我们所知，主管机构非常希望参与国际性的调查，并像其他国家的主管机构一样发挥重要作用。  
Based on our experience, the authorities are eager to participate in global investigations and to play a significant role, similar to their counterparts in other jurisdictions.

# 谢谢 Thanks

## 联系方式 Contact Details



王钊 律师  
**George Wang**

合伙人  
君合律师事务所(上海分所)  
Partner, JunHe Shanghai

Tel: (86-21) 22086243

Email: wangz@junhe.com