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Antitrust in China – 2022 Year in Review

Client Alert | March 1, 2023

In 2022, China has finally amended its Anti-Monopoly Law. This has been more than two years in the making: the State Administration for Market Regulation ("**SAMR**") first proposed amendments in early 2020 and a formal draft amendment was submitted to the Standing Committee of the National People's Congress for a first reading in October 2021. In an effort to support and clarify the amended law, the Government released draft amendments to a number of antitrust regulations and rules for public consultation in June 2022. The Government also published its draft amendments to the Anti-Unfair Competition Law for comment consultation in November 2022.

This client alert provides an overview of China's major antitrust developments in 2022.

1. Legislative / Regulatory Developments

Amendments to the Anti-Monopoly Law. In 2022, China finally amended the Anti-Monopoly Law ("**Amended AML**") for the first time, 14 years after its introduction. The Amended AML came into force on August 1, 2022. It emphasizes the fundamental role of competition in China's market economy and introduces substantial changes to the country's merger review process and rules on anticompetitive agreements. It also substantially increases fines for violating the Amended AML and introduced, among other new penalties, liabilities on individuals. Here are some of the key substantive provisions included in the Amended AML:

- Review of non-threshold transactions: The Amended AML enables SAMR to require parties to a concentration (where the concentration does not otherwise trigger mandatory reporting obligations) to notify the transaction where "the concentration of undertakings has or may have the effect of eliminating or restricting competition."
- Introduction of the stop-the-clock system: The Amended AML grants SAMR the power to suspend the review period in merger investigations under any of the following scenarios: where the undertaking fails to submit documents and materials leading to a failure of the investigation; where new circumstances and facts that have a major impact on the review of the merger need to be verified; or where additional restrictive conditions on the merger need to be further evaluated and the undertakings concerned agree. The clock resumes once the circumstances leading to the suspension are resolved.
- Abandoning per se treatment for resale price maintenance ("**RPM**"): The Amended AML introduces a provision which states that a monopoly agreement between parties fixing the price or setting a minimum price for resale of goods to a third party "shall not be prohibited if the undertaking can prove that it does not have the effect of eliminating or restricting competition." This means where a plaintiff alleges breach of the Amended AML by way of an RPM agreement, it is open to a defendant to prove that the RPM agreement does not eliminate or restrict competition and therefore is not unlawful.
- Safe harbors for vertical monopoly agreements: The Amended AML introduces a "safe harbor" for vertical monopoly agreements, which presumably include RPM agreements, in circumstances where "undertakings can prove that their market share in the relevant market is lower than the standards set by the anti-monopoly

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law enforcement agency of the State Council and meet other conditions set by the anti-monopoly law enforcement agency of the State Council shall not be prohibited." This provision authorizes SAMR to determine the threshold for the safe harbor, which we can expect in due course.

- Cartel facilitators: The Amended AML provides that undertakings "may not organize other undertakings to reach a monopoly agreement or provide substantial assistance for other undertakings to reach a monopoly agreement." This provision fills an arguable gap in the AML, as cartel facilitators e.g., third parties that aid the conclusion of anticompetitive agreements or cartels, may now be found in breach of the Amended AML.
- Increased and new penalties: The Amended AML substantially increases fines that could be imposed and creates new fines. These include:
    - Penalties on cartel facilitators: SAMR may impose a fine up to RMB 1 million (~USD 147,000) on cartel facilitators.
    - Increased penalties for merger-related conduct: Where an undertaking implements a concentration in violation of the Amended AML, SAMR may impose a fine of less than 10% of the undertaking's sales from the preceding year. Where such concentration does not have the effect of eliminating or restricting competition, the fine will be less than RMB 5 million (~USD 727,000).
    - Superfine: Where the violation of the Amended AML is "extremely severe," its impact "extremely bad" and the consequence "especially serious," SAMR can multiply the amount of fine by a factor between two and five.
    - Penalties for failure to cooperate with investigations: Where an undertaking fails to cooperate in anti-monopoly investigations, SAMR may impose a fine of less than 1% of the undertaking's sales from the preceding year or, where there are no sales or the data is difficult to be assessed, a maximum fine of RMB 5 million (~USD 727, 000) on enterprises and RMB 500,000 (~USD 72,700) on individuals involved.
    - Penalties on individuals: The Amended AML introduces individual liability of a fine up to RMB 1 million (~USD 147,000) for legal representatives, principal person-in-charge or directly responsible persons of an undertaking if that individual is personally responsible for reaching an anticompetitive agreement.
    - Public interest lawsuit: Public prosecutors can bring a civil public interest lawsuit against undertakings that have acted against social and public interests by engaging in anticompetitive conduct.

For more detail on the Amended AML, please refer to our client alert, China Amends Its Anti-Monopoly Law, published on June 29, 2022.

Proposed Amendments to six antitrust regulations and rules. On June 27, 2022, SAMR published draft amendments to the following six antitrust regulations and rules for public consultation, which aim to support and clarify the Amended AML (together, the "**Proposed Amendments to the Implementing Rules**"):

- Regulations on Filing Thresholds for Concentrations of Undertakings
- Provisions on Prohibition of Monopoly Agreements
- Provisions on Prohibition of Abuse of Dominance
- Provisions on Prohibition of Elimination and Restriction of Competition Through Intellectual Property Rights
- Provisions on Prohibition of Elimination and Restriction of Competition Through

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Abuse of Administrative Powers

- Provisions on Concentration of Undertakings

Among other draft amendments, SAMR proposed to revise the merger filing thresholds through first, increasing the existing thresholds and second, introducing a new threshold that aims at catching so-called "killer acquisitions," where an established undertaking acquires a nascent competitor to preempt potential future competition. Specifically:

- The Proposed Amendments to the Implementing Rules provide that undertakings must obtain merger clearance from SAMR if:
    - The undertakings' combined worldwide turnover is more than RMB 12 billion (~USD 1.78 billion) (an increase from RMB 10 billion (~USD 1.48 billion)) and the Chinese turnover of each of at least two of the undertakings involved is more than RMB 800 million (~USD 118 million) (an increase from RMB 400 million (~USD 59 million)); or
    - The undertakings' combined Chinese turnover is more than RMB 4 billion (~USD 592 million) (an increase from RMB 2 billion (~USD 296 million)) and the Chinese turnover of each of at least two of the undertakings involved is more than RMB 800 million (an increase from RMB 400 million).
- If the above thresholds are not met, undertakings are still required to obtain SAMR's merger clearance if:
    - One undertaking's Chinese turnover is more than RMB 100 billion (~USD 14.8 billion); and
    - The other undertaking has a market value (or valuation) of RMB 800 million or more and that it generated more than one third of its worldwide turnover from China.

There is currently no indication on when these Proposed Amendments to the Implementing Rules may come into effect.

Proposed Amendments to the Anti-Unfair Competition Law. On November 22, 2022, SAMR released draft amendments to the Anti-Unfair Competition Law for public consultation ("**Proposed Amendments to the AUCL**"). The Anti-Unfair Competition Law (the "**AUCL**"), which came into effect in 1993 and was revised in 2017 and 2019, addresses unfair and anticompetitive practices, such as misappropriation of trade secrets, trademark infringement, commercial bribery and false advertising. Consistent with China's legislative focus in recent years, the Proposed Amendments to the AUCL expressly bring the digital economy within the ambit of the AUCL by adding a new Article 4 that expressly prohibits undertakings to take advantage of data and algorithms, technologies, capital advantages and platform rules to engage in unfair competitive behavior. The Proposed Amendments to the AUCL also include new types of prohibited conduct that concern the digital economy, such as:

- Carrying out malicious transactions that obstruct or undermine another undertaking's normal operations, including deliberately entering into large volume or high frequency transactions with another undertaking so as to trigger the online transaction platform's disciplinary actions for countering fake transactions against the latter, maliciously ordering a large volume of goods from another undertaking within a short period of time without paying and maliciously returning or refusing to accept the goods after a bulk purchase from another undertaking (Article 14).
- Using technological means or platform rules to improperly exclude or hinder the access to and transaction of goods or services lawfully provided by another undertaking (Article 17).
- Improperly obtaining or using another undertaking's commercial data (Article 18).

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- Using algorithms (e.g. by analyzing user preferences and transaction behavior) to impose unreasonable differential treatment or other unreasonable trading conditions (Article 19).

Another key feature of the Proposed Amendments to the AUCL is the reintroduction of the concept of a "position of relative advantage," which was included in previous draft amendments to the AUCL that were released in 2016 but was not adopted in the current version of the law. Under the Proposed Amendments to the AUCL, "position of relative advantage" is defined to include advantage based on technologies, capital, number of users, industry influence or the degree of the transaction counterparty's reliance on the undertaking in transactions. The Proposed Amendments to the AUCL set out a number of prohibited conduct that effectively extend the Amended AML's rules governing the abuse of a dominant position to undertakings with a "position of relative advantage," but without including the defence of procompetitive effects. Thus, an undertaking with a "position of relative advantage" is prohibited from, for example, coercing its transaction counterparty to bundle goods or sign exclusive agreements.

Like the Amended AML, the Proposed Amendments to the AUCL introduce increased and new penalties for violations. For example, undertakings could face penalties of up to 5% of its revenue if the violations are found to involve circumstances or damages deemed particularly serious to fair competition or public interest, and individuals who are found responsible for the violations may be fined up to RMB 1 million (~USD 147,000).

There is currently no indication on when the Proposed Amendments to the AUCL may come into effect.

Pilot Program on the Review of Simplified Procedure Merger Filings. In July 2022, SAMR announced a three-year pilot program to take place from August 1, 2022 to July 31, 2025, during which SAMR would delegate the initial review of certain simplified procedure merger filings to five provincial Administrations for Market Regulation ("provincial AMRs") in Beijing, Shanghai, Chongqing, Shaanxi and Guangdong. Parties to transactions that require merger clearance would continue to submit the filings to SAMR, but SAMR may delegate cases to the provincial AMRs at its discretion and inform the filing parties of the delegation. While the provincial AMRs would review cases assigned to them, SAMR remains the final decision maker on all merger filings. Given that provincial AMRs are relatively inexperienced in merger control, it is expected that the review of delegated filings may take longer than usual to complete.

2. Merger Control

In 2022, SAMR unconditionally approved more than 99% of approximately 750 deals it reviewed and imposed conditions in only five transactions.

SAMR took on average 18 days to complete its review of cases under the simplified procedure, an increase from 2021's 14-15 days, and an average of over 450 days to complete its review of conditionally approved cases, an increase from 2021's 288 days. The delay is likely a result of China's surge in COVID-19 cases since the first quarter of 2022 and the geopolitical climate that has affected the review of deals involving US tech companies.

Separately, SAMR announced that they penalized parties in 45 transactions for failure to notify, most of which received the maximum fine of RMB 500,000 (~USD 72,700). While this is less than the 107 transactions that SAMR penalized in 2021, over 50% of the cases in 2022 involved internet platforms.

2.1 Conditional Approval Decisions

GlobalWafers Co., Ltd. ("GlobalWafers") / Siltronic AG ("Siltronic"). In January 2022, SAMR conditionally approved the Taiwanese silicon-wafer manufacturer GlobalWafers'

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acquisition of its German rival Siltronic. SAMR raised a number of competition concerns regarding the transaction. Among other findings, SAMR noted that the transaction would likely result in the combined entity holding 55-60% and 30-35% market shares globally and in the Chinese market, respectively, and that the reduced number of competitors would likely increase the risk of coordination. To resolve these competition concerns, SAMR imposed both structural and behavioral remedies on the parties, including: (1) to divest GlobalWafer's zone melting wafer business within six months; (2) to continue supplying wafer products to Chinese customers on fair, reasonable and nondiscriminatory ("FRAND") terms; and (3) not to refuse customer requests to renew contracts without reasonable justification and to ensure that the renewal conditions are not inferior to terms in the original contracts.

Advanced Micro Devices ("AMD") / Xilinx, Inc. ("Xilinx"). In January 2022, US chipmaker AMD received conditional approval from SAMR for its acquisition of its peer, Xilinx. SAMR had competition concerns over the impact that the transaction may have on the global and Chinese markets for central processing units ("CPUs"), graphics processing units ("GPUs") and programable gate arrays ("FPGAs"), as (1) Xilinx ranked first in the global and domestic markets for FPGAs in 2020 with a market share of 50-55%, such that the combined entity would have a dominant position in the market; (2) CPUs, GPUs and FPGAs are core components that determine the performance of servers in data centers; as such, incompatibility and insufficient interoperability among these components may lead to performance issues for servers; and (3) the combined entity would become the sole supplier in the world capable of providing CPUs, GPUs and FPGAs.

To remedy these concerns, the parties offered a number of commitments, to which SAMR agreed, including the following: (1) to refrain from bundling or imposing unreasonable condition when supplying CPUs, GPUs and FPGAs in China; (2) to continue supplying CPUs, GPUs and FPGAs on FRAND terms; (3) to ensure that the parties' CPUs, GPUs and FPGAs sold in China are interoperable with those from third-party manufacturers; (4) to ensure the flexibility, programmability and availability of Xilinx's FPGAs; and (5) to keep third-party manufacturers' competitive sensitive information strictly confidential.

II-VI Incorporated ("II-VI") / Coherent, Inc. ("Coherent"). In June 2022, II-VI, an optoelectronic components maker, received conditional approval from SAMR for its acquisition of Coherent, a lasers supplier. SAMR found competition concerns resulting from the vertical relationship between the parties, namely II-VI being in the upstream markets for supplying components and Coherent being in the downstream markets for producing and selling laser devices. To remedy these concerns, SAMR imposed behavioral conditions on the parties, which will expire automatically in five years. These conditions include: (1) to continue performing all existing contracts; (2) to continue supplying CO2 laser optics to Chinese customers on FRAND terms; (3) to continue sourcing glass-based laser optics for excimer lasers from multiple suppliers on a non-discriminatory basis; not to reduce the number of suppliers without reasonable justification or increase II-VI's current share of supply to Coherent unless other suppliers are unable to fulfil demands in terms of quantity and quality; and (4) to keep third-party manufacturers' competitive sensitive information strictly confidential.

Shanghai Airport Group ("Avinex") / Eastern Air Logistics ("EAL"). In September 2022, SAMR conditionally approved the proposed joint venture ("JV") between Avinex and EAL. This is China's first merger control remedy case that involves purely domestic entities. Avinex operates two international airports in Shanghai, Pudong Airport and Hongqiao Airport, and provides ground handling, supply chain management and logistics services for air freight. EAL offers air express shipping services and integrated ground handling and logistics solutions. The JV would provide smart airport cargo terminal services at Pudong Airport.

SAMR identified a horizontal overlap as Avinex, EAL and the JV provide air cargo terminal services at Pudong Airport, and a vertical overlap with Avinex and the JV's upstream air cargo terminal services and EAL's downstream air freight services. SAMR found that the

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JV would obtain a dominant position at the upstream air cargo terminal services market at Pudong Airport, in view of Avinex and EAL's combined market share of over 70% and the market's high entry barriers. SAMR also expressed concerns that China Eastern Airlines, the ultimate controller of EAL, could strengthen its market power in the downstream air freight services market by leveraging the JV's dominance in the upstream market for air cargo terminal services. To ease competition concerns, SAMR imposed a range of behavioral remedies, including requiring the parties to provide air cargo terminal services on FRAND terms, keep separate their cargo terminal businesses at Pudong Airport and compete fairly as independent entities.

Korean Air Co., Ltd. ("Korean Air") / Asiana Airlines, Inc. ("Asiana Airlines"). In December 2022, SAMR conditionally approved Korean Air's proposed acquisition of Asiana Airlines. SAMR found that the transaction may restrict competition in the market of passenger air-transport services on 15 routes between China and South Korea. The parties offered a number of commitments to ease SAMR's competition concerns, to which SAMR agreed, including the following: (1) to transfer takeoff and landing slots at specified airports to airlines seeking to commence air services on certain routes; (2) to maintain services of the Seoul-Guangzhou and Seoul-Dalian routes at the 2019 level in terms of flight frequency and number of passenger seats; and (3) to provide passenger ground services at South Korean airports to new Chinese market entrants on FRAND terms.

3. Non-Merger Enforcement

With regard to non-merger enforcement actions, SAMR and its local bureaus continue to target public utilities, healthcare, construction and platform companies. Two of the cases stood out in particular due to the scale of the business and the significant amount of fine:

Geistlich Pharma AG ("Geistlich") – Resale Price Maintenance ("RPM"). In February 2022, the Beijing Administration for Market Regulation ("Beijing AMR") fined Geistlich, a Swiss-owned pharmaceutical company specializing in regenerative medical devices, RMB 9.12 million (~USD 1.45 million) for engaging in RPM practices between 2008 and 2020. The fine represented 3% of the company's revenue in China in 2020. The Beijing AMR found that the company included a resale pricing clause in distribution agreements and explicitly required, through in-person meetings, WeChat and other verbal communications, that distributors sell specified products at a price no lower than a certain percentage of its recommended prices. According to the Beijing AMR, Geistlich monitored the resale prices closely, rewarded distributors that complied with the resale price requirements and penalized those who did not follow the requirements by temporarily raising the purchase price of its products. The Beijing AMR noted that Geistlich's conduct restricted competition in a market with high entry barriers, highlighting the fact that Geistlich is a global market leader with no local competition and thus creating an imbalance of bargaining power with distributors.

China National Knowledge Infrastructure ("CNKI") – Abuse of Dominance. In December 2022, SAMR imposed a fine of RMB 87.6 million (~USD 12.6 million) on CNKI, which is China's most renowned online academic database service provider, for abuse of dominance. The fine represented 5% of CNKI's revenue in 2021. In concluding that CNKI is in a dominant position, SAMR emphasized CNKI's market share (over 50% in the market of online database for Chinese-language academic literature), scale and coverage of users (cooperates with over 90% of universities in China) and volume and quality of content (possesses the largest number of high-quality academic journals). SAMR found that between 2014 and 2021, CNKI abused its dominant position by (1) imposing a price hike of over 10% of its average annual fees, which SAMR viewed as unreasonably excessive; and (2) signing exclusive cooperation agreements with academic journals and universities, which restricted the latter from cooperating with other academic databases.

Gibson Dunn lawyers are available to assist in addressing any questions you may have

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