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China Amends Its Anti-Monopoly Law

Client Alert | June 29, 2022

China has finally amended its Anti-Monopoly Law, which will come into force on 1 August 2022 (the "Amended AML").[1] The Amended AML 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 on 19 October 2021 (the "Draft Amendment").[2]

This client alert summarizes the main changes bought into effect by the Amended AML.

1. Changes to the Merger Review Process

Review of non-threshold transactions

Article 19 of 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*."[3] Presumably, the obligation to submit a notification means that parties cannot close the transaction prior to obtaining clearance.

It is hard to say what practical effect Article 19 will have (if any). On the one hand, the introduction of this provision at least signals that SAMR seeks broader powers to review below threshold transactions. On the other hand, SAMR already had the right to *review* (although it did not have the power to require that parties notify) below threshold transactions under the State Council Regulation on the Notification Thresholds for Concentrations of Undertakings, but such power has rarely been exercised. The significance of Article 19 will be directly influenced by both SAMR's appetite to formally review below threshold transactions, and its capacity to deal with such cases over and above its mandatory filing caseload.

Introduction of the stop-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.[4] The clock resumes once the circumstances leading to the suspension are resolved. As noted in our previous client alert, it seems that this mechanism may be used to replace the "pull-and-refile" in contentious merger investigations.

This stop-clock system may lead to significantly longer investigations.

2. Changes to the Rules on Anticompetitive Agreements

Abandoning per se treatment for resale price maintenance ("RPM")

The Amended AML introduces a provision which states that a monopoly agreement between counterparties fixing the price or setting a minimum price for resale of goods to a

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third party "*shall not be prohibited if the undertaking can prove that it does not have the effect of eliminating or restricting competition*."[5] This provision essentially codifies the landmark 2018 decision of the Supreme People's Court of China in *Hainan Provincial Price Bureau v. Hainan Yutai Scientific Feed Company* ("*Yutai*").[6] In that case, the SPC addressed the divergent approaches taken by the Chinese antitrust authorities and the Chinese courts in respect of RPM, whereby the former treated RPM agreements as *per se* illegal, while the latter adopted a "rule of reason" approach. The SPC clarified that although Chinese antimonopoly authorities are able to rely on the presumption that RPM agreements eliminate or restrict competition and thus are illegal, this presumption is rebuttable by the undertaking adducing sufficient evidence to prove that the RPM agreement does not eliminate or restrict competition.

The Amended AML brings the legislation in line with *Yutai*, meaning that where a plaintiff alleges breach of the AML by way of a 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 harbours for vertical monopoly agreements

The Amended AML introduces a "safe harbour" for vertical monopoly 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 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*."[7] This provision authorises SAMR to determine the threshold for the safe harbour, which we can expect in due course. The scope of the safe harbour under the Amended AML is narrower than that proposed under the Draft Amendment, which applied to both horizontal *and* vertical monopoly agreements. By contrast, it is clear from the Amended AML that the safe harbour only applies to vertical agreements, including, presumably, RPM agreements.

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.*"[8] This provision fills an arguable gap in the current AML, which means that cartel facilitators e.g., third parties that aid the conclusion of anti-competitive agreements or cartels, may be found in breach of the Amended AML.

3. Increase in Fines Imposed

The Amended AML substantially increases the potential fines that could be imposed on different parties, and creates new fines. These include:

Penalties on cartel facilitators. As explained above, under the Amended AML cartel facilitators will be liable for their conduct. They risk penalties of not more than RMB 1 million (~$149,000).[9]

Increased penalties for merger-related conduct. One of the commonly cited weaknesses of the current AML is the very low fines for parties failing to file or gun jumping (limited to RMB 500,000). The Amended AML now states that where an undertaking implements a concentration in violation of the AML, a fine of less than 10% of the sales from the preceding year shall be imposed.[10] Where such concentration does not have the effect of eliminating or restricting competition, the fine will be less than RMB 5 million (~$745,000).

Superfine. The Amended AML introduces a multiplier clause, pursuant to which SAMR can multiply the amount of the fine by a factor between 2 and 5 in case it is of the opinion that the violation is "extremely severe", its impact is "extremely bad" and the consequence is "especially serious".[11] There is no definition of what these terms mean

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and this opens the door to very significant and potentially arbitrary fines.

Penalties for failure to cooperate with investigation. Where an undertaking refuses to cooperate in anti-monopoly investigations, e.g. providing false materials and information, or conceals, destroy or transfer evidence, SAMR has the authority to impose a fine of less than 1% of the sales from the preceding year, and where there are no sales or the data is difficult to be assessed, the maximum fine on enterprises or individuals involved is RMB 5 million (~$745,000) and RMB 500,000 (~$75,000) respectively.

Penalties on individuals. The Amended AML introduces individual liability for legal representatives, principal person-in-charge or directly responsible persons of an undertaking if that person is personally responsible for reaching an anticompetitive agreement. A fine of not more than RMB 1 million (~$149,000) can be imposed on that individual.[12] At this stage, however, cartel leniency is not available to individuals.

Public interest lawsuit. Finally, under the Amended AML, public prosecutors (i.e. the people's procuratorate) can bring a civil public interest lawsuit against undertakings they have acted against social and public interests by engaging in anticompetitive conduct.

4. Further Targeting of the Digital Economy

Regulating the digital economy continues to be a focus of China's legislative agenda. In 2021, SAMR published specific guidelines on the application of the AML to platforms. The Amended AML further targets the digital economy by adding language which prevents undertakings from "*us*[ing] *data and algorithms, technologies, capital advantages, platform rules, etc. to engage in monopolistic behaviour prohibited by this Law*."[13] This principle appears to apply to all monopolistic behaviour prohibited by the Amended AML, including monopoly agreements between undertakings, and is not limited to cases of abuse of market dominance.

In respect of abuse of market dominance, the Amended AML specifically adds that "[an] *undertaking with a dominant market position shall not use data, algorithms, technologies, platform rules, etc. to engage in the abuse of a dominant market position as prescribed in the preceding paragraph*", which refers to the full list of acts considered to be abuse of dominant position.[14]

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[1] Decision of the Standing Committee of the National People's Congress on Amending the Anti-Monopoly Law of the People's Republic of China (24 June 2022) available at http://www.npc.gov.cn/npc/c30834/202206/e42c256faf7049449cdfaabf374a3595.shtml.

[2] National People's Congress of the People's Republic of China, "Draft Amendment to the Anti-Monopoly Law" (????????????(????)) (released on October 25, 2021), available at http://www.npc.gov.cn/flcaw/flca/ff8081817ca258e9017ca5fa67290806/attachment.pdf. *See* our client alert, China Publishes Draft Amendment to the Anti-Monopoly Law, published on 27 October 2021.

[3] Amended AML, Article 26.

[4] Draft Amendment, Article 32.

[5] Amended AML, Article 18.

[6] *See* our client alert Antitrust in China – 2019 Year in Review, for more detailed discussion of *Yutai*.

[7] Amended AML, Article 18.

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[8] Amended AML, Article 19.

[9] Amended AML, Article 56.

[10] Amended AMl, Article 58.

[11] Amended AML, Article 63.

[12] Amended AML, Article 62.

[13] Amended AML, Article 9.

[14] Amended AML, Article 22.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition Practice Group, or the following authors in Hong Kong:

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