

CHINA PASSED AMENDMENTS TO ITS ANTI-MONOPOLY LAW

China's Anti-Monopoly Law ("**AML**") was first introduced in 2008 and has just been amended for the first time since its introduction ("**Amended AML**").

The final text of the Amended AML, which was published on 24 June 2022, emphasizes the fundamental role of competition policy in China's market economy and encapsulates substantial changes such as introduction of a "stop-the-clock" mechanism to merger review, a relaxed approach towards resale price maintenance ("**RPM**"), a safe harbour for certain vertical agreements, and platform-specific rules. Furthermore, the overall antitrust penalty regime has been substantially strengthened, and fines can be imposed on individuals as well as undertakings, if they organise or facilitate the conclusion of monopoly agreements. The Amended AML brings China's antitrust regime into a new era, but uncertainties remain in many critical areas.

To provide clarification on the Amended AML, on 27 June 2022, the Chinese antitrust agency, namely the State Administration for Market Regulation ("**SAMR**"), published six drafts of relevant antitrust regulations and rules for public consultation: (i) Regulations on the Merger Control Filing Thresholds; (ii) Provisions on Prohibition of Monopoly Agreements; (iii) Provisions on Prohibition of Abuse of Dominance; (iv) Provisions on Prohibition of Elimination and Restriction of Competition through Abuse of IP Rights; (v) Provisions on Prohibition of Elimination and Restriction of Competition through Abuse of Administrative Power; and (vi) Provisions on Merger Control Review (collectively, the "**Consultation Draft of Implementing Rules**"). The public

Key issues

- Introduction of stop-the-clock mechanism involving the suspension of the merger process to merger control review in China will put an end to the "pull and refile" practice in complex cases, but may also increase uncertainty of review timeline in less complex cases.
- Failure-to-file/gun-jumping fines will be up to 10 times higher than before, and could potentially reach 10% of an infringer's group-wide turnover in the preceding year if the transaction raises competition concerns.
- The so called "killer acquisitions" of mavericks or nascent competitors by incumbent digital giants and other below-threshold transactions may be subject to Chinese merger control review. New filing thresholds may be introduced to catch "killer acquisitions".
- Organisers and facilitators of anti-competitive agreements will be penalized.
- A more relaxed approach towards RPM will be introduced.
- A market share-based safe harbour will apply to certain vertical agreements.
- Individuals will be fined up to RMB 1 million if they are personally responsible for reaching unlawful horizontal or vertical monopoly agreements.
- Digital economy and competition policy are enshrined in the Amended AML.

consultation period will end on 27 July 2022, without indicating when the final text is to be published.

BACKGROUND

Ten years after the AML came into force, the Standing Committee of the National People's Congress ("**NPC**") announced in September 2018 that the revision of the AML would be on its legislative agenda. The initial proposed amendments were released by SAMR on 2 January 2020 for public consultation with a revised draft submitted to the NPC for the "first reading" in October 2021 and for the "second reading" in June 2022. The final text was passed only three days after the second reading, which was in an unprecedentedly expedited manner. The Amended AML is generally viewed as opportune as SAMR has, over the past 14 years, gained significant experience but has until the Amended AML been challenged by uncertainties in the underlying law and practice.

HIGHLIGHTS OF THE AMENDED AML

1. "Stop-the-clock" for merger control review

The Amended AML allows SAMR to suspend a merger review if:

- (i) The notifying parties fail to provide requested information or materials so that the merger review cannot proceed;
- (ii) new circumstances or new facts that materially impact the merger review occur, and the merger review cannot proceed without examining the new circumstances or facts; or
- (iii) the proposed remedies require further assessment, and the relevant undertakings request for suspension.

The "stop-the-clock" mechanism can provide SAMR with more time when reviewing complex merger cases, in particular those involving remedy negotiations. Under the existing law, SAMR has up to 180 calendar days to clear a merger filing, which, in practice, are usually extended by notifying parties' "pull and refile" when it was not feasible for SAMR to finish its review within 180 days.

A potential downside, however, is that the "stop-the-clock" mechanism may cause uncertainty on timing in less complex cases. To ensure that the "stop-the-clock" power is duly exercised by SAMR in practice, the Consultation Draft of Implementing Rules proposes that once the interrupting factors, as described in (i) – (iii) above, are gone, SAMR shall resume its review. In particular, regarding Scenario (i), parties to a transaction are entitled to request an extension of the deadline, and only if they fail to supply the requested information by the extended deadline, SAMR may stop the clock.

Although many other jurisdictions have similar rules, before seeing how this new tool is used by SAMR, companies are recommended to exert extra care when planning transaction timelines if Chinese merger clearance is required.

2. Below-threshold transactions may be caught

Pursuant to the Amended AML, if there is evidence proving that a transaction that falls below the merger control filing thresholds has or may have the effect of eliminating or restricting competition, SAMR can require the parties to notify the transaction.

Pursuant to the Consultation Draft of Implementing Rules, if the transaction concerned is completed, SAMR can require the parties to supplement a filing within 180 days. If the below-threshold transaction is not completed at the time of filing, the parties to the transaction cannot complete the transaction before obtaining clearance from SAMR. If, however, a transaction is completed at the time of filing, SAMR can require parties to cease implementation of the transaction or take other necessary measures.

If the parties concerned do not follow SAMR's requirement to notify a below-threshold transaction, SAMR will investigate the transaction. Nonetheless, parties to a below-threshold killer acquisition have no obligation to file in China unless and until the Chinese antitrust agency requires them to do so. Failing to meet that requirement will lead to SAMR's investigation into the transaction which, as explained above, will be approved or subject to interim measures.

This new provision grants broad power to SAMR to "call in" below-threshold concentrations, in particular, acquisitions of mavericks or nascent competitors by incumbent digital giants (the so-called "killer acquisitions") which have also attracted antitrust scrutiny in other jurisdictions.

In terms of filing thresholds, the Consultation Draft of Implementing Rules proposes to revise the Chinese filing thresholds through (i) raising the existing filing thresholds and (ii) introducing a new threshold which is considered to catch killer acquisitions by sizable Chinese companies, with more details set out below:

- (i) (a) the combined worldwide turnover test is proposed to raise from RMB 10 billion (c. USD 1.49 billion) to RMB 12 billion (c. USD 1.79 billion); (b) the combined Chinese turnover test is proposed to raise from RMB 2 billion (c. USD 299 million) to RMB 4 billion (c. USD 598 million); and (c) the individual Chinese turnover test is proposed to raise from RMB 400 million (c. USD 59.8 million) to RMB 800 million (c. USD 119.6 million).
- (ii) if the primary test (i) above is not met, (A) one party with more than RMB 100 billion (c. USD 14.9 billion) turnover in China in the previous financial year; and (B) the other party (merging party or target) with (a) market value or valuation of RMB 800 million (c. USD 119.6 million) or more, and (b) more than one third (1/3) of its worldwide turnover generated from China in the previous financial year.

3. Safe harbour for certain vertical agreements

The Amended AML introduces a market share-based safe harbour for vertical agreements in certain circumstances.

The new safe harbour provision in the Amended AML, however, is quite vague as it does not provide specific market share thresholds but states that "*if undertakings can prove that their market shares in the relevant markets are below the standards provided by the State's antitrust authorities, and meet other conditions provided by the same, such vertical agreements will not be prohibited*".

The Consultation Draft of Implementing Rules sheds useful light by proposing that the specific market share threshold is 15%, a standard stricter than the 2022 Vertical Exemption Block Exemption as applied in the EU.

Regarding the scope of application, it is clear in the Amended AML that the new safe harbour rule will not apply to horizontal agreements. However, significant ambiguity lies in whether RPM can benefit from the safe harbour.

The legal text does not expressly limit the safe harbour to non-RPM vertical agreements, but by including the language of "*meeting other conditions provided by the [State's antitrust authorities]*", we are inclined to think that RPM, as a hardcore vertical restraint, may not benefit from the safe harbour. This is consistent with the existing Antitrust Guidelines for Automotive Industry which was published by the State Council's Antitrust Commission in January 2019, where the market share-based safe harbour test only applies to non-RPM vertical agreements, and is also in line with practices in other major jurisdictions such as the EU. But this is to be further clarified by the authorities.

4. Relaxed approach to RPM

Under the Amended AML, RPM remains presumed to be illegal but will not be prohibited if the undertakings concerned can prove the lack of anticompetitive effects.

Previously, China, like the EU and many other jurisdictions, considered RPM to be illegal *per se*, unless exempted by efficiency-related conditions (i.e., the equivalent of Article 101(3) of the Treaty on the Functioning of the EU). In addition, China has also endorsed a bifurcated approach to RPM in public enforcement and private proceedings, as anticompetitive effects need to be proved in court cases by plaintiffs but need not be proved by law enforcers.

The Amended AML clarifies that the lack of anticompetitive effects can serve as a defence against public enforcement. However, it is unclear what level of evidence would be considered by SAMR as sufficient. It remains to be seen whether this seemingly relaxed approach will indeed lead to significant relaxation towards RPM enforcement in practice.

5. Organisers/facilitators held liable for monopoly agreements

The Amended AML provides that undertakings shall not organise or provide substantial assistance to the parties of a monopoly agreement.

Previously, the AML only prohibited the organisation of monopoly agreements by trade associations. The new provision will empower SAMR to hold liable any organiser/facilitator of a monopoly agreements and to tackle hub-and-spoke agreements more effectively. The Consultation Draft of Implementing Rules seeks to clarify that "substantial assistance" means support provided to the conclusion or implementation of monopoly agreements, bearing a causal link with the effect of elimination or restriction of competition where the concerned facilitator's role is significant.

6. Strengthened penalty regime

The penalty regime under the Amended AML has been significantly strengthened given the AML was previously considered to provide insufficient deterrence. Key changes are discussed below:

- **Max failure to file/gun-jumping fines 10 times higher.** For an unreported merger that does not lead to competition concerns, the maximum fine is increased from RMB 500,000 to RMB 5 million. When anticompetitive effects are found, the maximum fine will be further increased to up to 10% of the notifying party's group turnover in the last year. Note also that if SAMR

considers a failure-to-file case as a particularly severe violation, in theory, the fine can be up to 50% of the notifying party's turnover in the last year.

- **Personal liability for monopoly agreements.** The Amended AML introduces personal liabilities for substantive antitrust violation for the first time. Previously, personal liability was only imposed for procedural violations (obstruction of an antitrust investigation). The Amended AML provides that legal representatives, principal responsible persons, and directly responsible persons can now be fined up to RMB 1 million if they are personally responsible for a monopoly agreement. Although it remains to be seen how actively SAMR would exercise such power, adding personal fines to its toolbox in itself proves China's resolution to enhance deterrence.
- **Uplifted fines.** Antitrust fines can be further increased to a range between two and five times of the initial amount if the circumstances of an antitrust violation are "particularly serious", with "particularly egregious impact" and "particularly serious repercussions." These standards are not clarified in the Amended AML, but this new rule will open the door to an unprecedented level of monetary antitrust fines in China.
- **Potential criminal liability.** The Amended AML introduces a new article stipulating that persons committing antitrust infringements may be held criminally accountable, if the infringement constitutes a crime. Previously, the potential to constitute a criminal offence was only connected with obstruction of antitrust investigations. Some commentators consider that this new standalone article leaves room for the criminalization of anticompetitive conducts, not just obstruction of antitrust investigations. However, the implementation of that would require future amendment to China's Criminal Law.
- **Credit records impacted.** Antitrust penalties upon undertakings will be reflected in their credit records following relevant national provisions and will be announced to the public. However, it is unclear what the relevant national provisions refer to and where public announcements will be made. One thing that is certain is that the price of infringing antitrust law in China is becoming higher.

A full comparison table is in **Appendix**, which sets out more details on the antitrust penalty regime before and after the Amended AML.

7. Digital economy

The General Principles chapter of the Amended AML now state that the elimination or restriction of competition through the abuse of data and algorithms, technologies, capital advantage, and platform rules is prohibited. Under the Abuse of Dominance chapter, a new paragraph has been added to prohibit dominant undertakings from using data and algorithms, technologies, and platform rules to impose unreasonable restrictions on other undertakings. Previously, similar wording could only be found in the Antitrust Guidelines for Platform Economy.

The heightened scrutiny of the digital economy has been reflected in the organisational structure of the new National Anti-Monopoly Bureau, which was established in November 2021 to elevate the Anti-Monopoly Bureau's status from a sub-organ of SAMR to be in parallel with SAMR. The new bureau now consists of three sub-bureaus (supervising merger control, conduct and

competition policies), each of which has set up a standalone division to deal with digital economy issues.

The Consultation Draft of Implementing Rules further reflects the features specific to abuse of dominance in the digital economy, e.g., by expressly recognising self-preferencing. It is expected that antitrust enforcement against digital platforms will remain active in China as in other key jurisdictions.

8. Other notable changes

Setting priorities for merger control review. The Amended AML provides through a newly added article that in order to improve review quality and efficiency, SAMR shall set up a classification system for its merger reviews and strengthen its focus of review on concentrations in important sectors that concern national strategies and people's living. The reference to a "classification system" was not seen in previous drafts of the AML amendments circulated for consultation, and according to the Consultation Draft of Implementing Rules, SAMR is expected to lay out specific review guidelines in this regard. Nonetheless, the message is clear that appropriate priorities should be set for SAMR's merger control regime to achieve greater efficiency.

Introduction of public interest antitrust litigation. The Amended AML introduces a new channel of public interest litigation, via which public prosecutors can initiate civil public interest litigation before courts when the concerned anticompetitive conduct harms social welfare. This new procedure has been introduced to facilitate plaintiff's recovery of civil damages in antitrust proceedings. In the private domain, private antitrust litigation in China remains undeveloped and it has been widely recognised that collecting evidence to prove anticompetitive behaviours is notoriously difficult.

Heightened scrutiny over administrative monopoly. The Fair Competition Review System ("FCRS") was established in China in 2016 to specifically curb government organs' administrative monopoly behaviours. The FCRS is now enshrined in the Amended AML which elevates the FCRS's policy status and provides as a fundamental principle that "organisations with public affairs functions shall be screened under the FCRS when forming rules for market players".

WHAT TO EXPECT?

The legal text of the Amended AML provides that the new law will take effect from 1 August 2022. One area of uncertainty is whether the law has retrospective effect. As things stand this is unclear but it appears most likely that historical non-compliance prior to 1 August 2022 would only be subject to the Amended AML if it continues after 1 August 2022. This is however subject to official guidance from future antitrust practice in China.

More generally, the Amended AML seeks to address the most significant substantive and procedural gaps that have been experienced by the Chinese antitrust agencies in the past 14 years. However, new questions arise from the Amended AML and require further clarification. In particular:

- *SAMR is expected to shed useful light upon how the "stop-the-clock" mechanism is used in non-remedy cases in practice.*
- *With respect to the safe harbour, SAMR will clarify, through the final text of the relevant implementing rules, whether the market share test is indeed 15%.*

- *Regarding the relaxed approach to RPM, we anticipate that SAMR will clarify on the level of evidence needed to prove lack of anti-competitive effects in its future RPM enforcement.*
- *Regarding the considerably strengthened penalty regime, clarity is needed on to what extent the intended greater deterrence effects can be achieved, and this will come from SAMR and its local counterparts' future enforcement.*

Irrespective of present uncertainties, it is advisable for companies to revisit their antitrust strategies and compliance policies in China as the Amended AML has been published.

Appendix

Violations	Previous AML	Amended AML
Failure to file / gun-jumping (without competition concerns)	Fine of up to RMB 500,000 (c. USD 75,000 / EUR 71,000); Unwinding transactions;	Fine of up to RMB 5 million (c. USD 747,000 / EUR 708,000); Credit records impacted
Failure to file / gun-jumping (with competition concerns)	Other measures to restore pre-transaction status	Fine of up to 10% of group turnover in the last year; Unwinding transactions; Other measures to restore pre-transaction status; Credit records impacted
Abuse of dominance	Fine of 1% - 10% of group turnover in the last year	Fine of 1% - 10% of group turnover in the last year; credit records impacted
Monopoly agreements concluded and implemented	Undertakings	Fine of 1% - 10% of group turnover in the last year and confiscation of illegal gain Fine of up to RMB 5 million (c. USD 747,000 / EUR 708,000) if an infringing party has no turnover in the last year; credit records impacted
	Trade associations	Fine of up to RMB 500,000 (c. USD 75,000 / EUR 71,000); license revoked in serious violation credit records impacted
	Responsible individuals	No rules Fine of up to RMB 1 million (c. USD 149,000 / EUR 142,000)
Monopoly agreement concluded but not implemented	Fine of up to RMB 500,000 (c. USD 75,000 / EUR 71,000)	Fine of up to RMB 3 million (c. USD 448,000 / EUR 425,000); credit records impacted
Organisers and facilitators of monopoly agreements	No rule	Penalties against monopoly agreements (as above) will apply
Obstruction of investigations	<i>Individual:</i> Fine of up to RMB 100,000 (c. USD 15,000 / EUR 14,000) <i>Company:</i> Fine of up to RMB 1 million (c. USD 149,000 / EUR 142,000) Criminal liability if constituting crime	<i>Individual:</i> Fine of up to RMB 500,000 (c. USD 75,000 / EUR 71,000) <i>Company:</i> Fine of up to 1% of group turnover in the last year; credit records impacted; Fine of up to RMB 5 million (c. USD 747,000 / EUR 708,000) if the company has no turnover in the last year or it is difficult to calculate the turnover in the last year; credit records impacted
Further uplifted (two-five times of) fines	No rule	Two to five times of the initial fine would be imposed if an antitrust violation is "particularly serious", with "particularly egregious impact" and "particularly serious repercussions"
Criminal liability	Limited to obstruction of antitrust investigations, as stated above	Violations to the Amended AML, if amounting to a crime, would be held criminally accountable.

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