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Antitrust Investigations in China: Overview

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This Practice Note reviews antitrust enforcement regime in China. It gives an overview on the types of conduct subject to antitrust scrutiny in this region, including a summary of noteworthy cases. The Note explains the procedures on conducting antitrust investigations in China, with a flowchart to illustrate a typical investigation process.

The Anti-Monopoly Law was first enacted in 2007 (2007 AML) and came into force on 1 August 2008. Since then, China (PRC) has quickly established itself as one of the world's major competition regimes. The past decade has seen a rapid increase in investigations for the anti-competitive conduct by the enforcement authorities, which reflects a more proactive attitude toward antitrust enforcement. The 2007 AML was amended on 26 June 2022, with the amendments becoming effective since 1 August 2022.

This Note reviews the legal framework for antitrust investigations in China under the governing Anti-Monopoly Law 2022 (2022 AML) and where possible, discusses facts relating to the cases that are publicly available to assist in illustrating how the antitrust investigations are conducted in this region.

Enforcement Authorities

The Anti-Monopoly Commission (AMC) under the State Council is responsible for developing competition policy, conducting market studies, publishing guidelines and co-ordinating the competition enforcement work.

Since April 2018, the State Administration for Market Regulation (SAMR) has consolidated the antitrust functions of the former three antitrust authorities in China, namely the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC) and the disbanded State Administration for Industry and Commerce (SAIC), following which the Anti-Monopoly Bureau (AMB) under SAMR became responsible for the enforcement of the rules against anti-competitive conduct under the 2007 AML in lieu of the SAIC and NDRC.

> Prior to the agency consolidation, the NDRC was in charge of enforcing price-related anti-competitive conduct while the SAIC was in charge of enforcing the non-price-related anti-competitive conduct. For detailed coverage of the 2018 reform, see Article, Understanding the 2018 Government Institutional Reform: China: Single Antitrust Regulator.

On 3 January 2019, SAMR published the Notice on the Authorisation of Antitrust Law Enforcement 2018 (2018 Authorisation Notice) dated on 28 December 2018, authorising its local counterparts to conduct the antitrust enforcement work within their administrative areas. The notice marks a significant step by SAMR in the process of integrating antitrust enforcement resources in China. The notice clarified the jurisdictions of SAMR and its local counterparts and touched upon the co-operation mechanisms among different levels of agencies. This approach for jurisdictional authorisation and co-operation between central and local SAMR offices has been echoed in SAMR's unified implementing rules effective from 1 September 2019 (see SAMR Implementing Rules).

On 18 November 2021, to facilitate the heightened antitrust enforcement, the AMB, which was under SAMR, has been escalated to an upper level in China's administrative hierarchy becoming the National Anti-Monopoly Bureau (NAMB, official English name not released yet). The new bureau is still under SAMR and consists of three newly established divisions:

- Competition Policy Co-ordination Division, which is tasked with promoting the implementation of competition policies and co-ordination of antitrust-related work.
- Anti-Monopoly Enforcement Division I, which is in charge of monopoly agreements, abuse of market dominance and abuse of intellectual property rights to eliminate and restrict competition.

- Anti-Monopoly Enforcement Division II, which takes responsibility for merger control filings.

This organisational revamp marks China's determination to expand antitrust enforcement manpower in order for further strengthened antitrust clampdown.

For the purpose of this Note, SAMR, the NAMB, the former enforcement authorities (that is, the NDRC and SAIC), and their respective divisions and local counterparts are together referred to as the Enforcement Authorities, and each an Enforcement Authority.

Implementing Rules

Aside from the 2022 AML, several regulations and guidelines govern the enforcement of the rules against anti-competitive conduct, including any implementing rules issued prior to the 2018 agency consolidation remaining effective until repealed and replaced (an on-going normative project that SAMR is intensively working on following the consolidation).

SAMR Implementing Rules

Due to the previous allocation of antitrust enforcement powers between the NDRC and SAIC, there had been considerable overlap (and certain inconsistency) between the implementing rules issued by the NDRC and SAIC respectively.

In response to the call for unified antitrust enforcement rules, SAMR released the following set of implementing provisions to replace the disbanded SAIC's three substantive regulations (promulgated in 2010) and two procedural regulations (promulgated in 2009) on abuse of dominance, monopoly agreements and abuse of administrative powers. The implementing provisions were first introduced in the form of interim provisions in 2019-2020, and were finalised and published in March 2023, with effect as of 15 April 2023.

- Provisions on Prohibiting Abuses of Dominant Market Positions 2023 (2023 Abuses of Dominance Provisions), which:
  - provide detailed guidance on what constitutes a dominant position, with particular recognition of dominance in internet related markets. It is stressed that the value and volume of the online transactions concluded via the platform, and the ability to control the traffic volume may be factored into the assessment of the market dominance in digital economy;
  - for each type of abusive conduct, provide guidance on the specific factors to be considered when identifying an abuse, with a particular focus on what constitutes reasonable grounds that can justify potentially abusive conduct and how to analyse certain types of abuse such as excessive or predatory prices. Specific guidance is also provided for identifying abusive conducts in digital economy. For instance, for predatory pricing, as with cases in traditional sectors, the key to assessing predatory pricing remains the determination of "cost." When calculating the cost in cases involving a multisided platform, the correlation and reasonableness of cost among each relevant market should be holistically considered;
  - clarify how to find "collective dominance." In considering whether two or more undertakings can be deemed as collectively holding a dominant market position, the 2023 Abuse of Dominance Provisions clarify that the foremost factor in the assessment is whether the undertakings act in a uniform way. This refined approach also echoes the judicial practice of the relevant antitrust rules;
  - add a new catch-all clause to prohibit any abusive conducts by utilising data, algorithm, platform rules, and so on, which corresponds to the same emphasis freshly introduced in the 2022 AML; and
  - refine investigation procedure by outlining the three criteria for case establishment, introducing the "scheduled talks" mechanism, safeguarding investigated parties' information rights and other procedural rights, and so on.
- Provisions on Prohibiting Monopoly Agreements 2023 (2023 Monopoly Agreement Provisions), which:
  - provide detailed guidance on the specific forms of each type of monopoly agreements explicitly prohibited under the AML, as well as on the specific factors that need to be taken into account when identifying "other types of monopoly agreements" within the meaning of the catch-all clauses under the AML;
  - provide guidance for horizontal agreements involving "coordinators." The 2022 AML has, for the first time, expressly recognised coordinators' responsibilities in horizontal agreements. The 2023 Monopoly Agreements Provisions give helpful guidance as to the two main forms of coordinating horizontal agreements: horizontal form (where the coordinator is not a party to the agreement but plays a leading role in the conclusion of the agreement) and vertical form (that is, hub-and-spoke agreements, where the coordinator enters into vertical agreements with multiple parties, who are competitors and use the coordinator as a conduit to reach horizontal anti-competitive agreements);
  - clarify that investigations regarding horizontal monopoly agreements relating to fixing price, restricting output or allocating market must not be suspended;

  - expand application of leniency system, not only parties to anti-competitive agreements, but also coordinators of horizontal agreements as well as liable individuals, all can benefit from the leniency system when certain conditions are met. In addition, the leniency system seems potentially not only available to parties to horizontal agreements, as there is no clear exclusion of application to vertical agreements;
  - provide specific guidance on the factors to be considered in applying the legal exemption under the AML;
  - set out detailed rules on leniency procedure, pursuant to which the first, second and third leniency applicants (that offer crucial evidence) are entitled to a fine reduction of 80-100%, 30-50% and 20-30%, respectively; and
  - introduce new soft measure to promote antitrust compliance. The 2023 Monopoly Agreements Provisions introduce "scheduled talks" through which investigators can directly reach out to legal representative/liable persons of the investigated undertakings, in order to send warnings, prevent breach of law, and/or seek remedial measures. This new tool is considered by SAMR as a soft measure to promote antitrust compliance and raise antitrust awareness, but many practical issues would arise as to, for example, at which stage of investigation and to which types of anti-competitive agreements this "soft measure" could apply.
- Provisions to Prevent Abuses of Administrative Powers to Exclude or Restrain Competition 2023 (2023 Abuses of Administrative Powers Provisions), which provide:
  - further clarifications on the AML to facilitate the identification of abuses;
  - detailed procedural guidance on complaints, complaint verification, investigation, and so on;
  - specify the examples of administrative abusive conduct, and unfold investigative measures and procedural protections for investigations on abuse of administrative power; and
  - roll out details of implementing the Fair Competition Review System and promoting the awareness of fair competition.

While SAMR continues to flesh out details of its new antitrust enforcement regime following the consolidation, other previously issued enforcement rules or regulations (such as those issued by the SAIC) are also being fine-tuned to address the institutional changes. For example, the SAIC issued the guidance on the interplay between the AML and intellectual property rights (IPRs) in 2015 (see the Provisions on Prohibiting the Abuse of Intellectual Property Rights to Exclude and Restrain Competition 2015 (2015 SAIC Provisions on Abuse of IPRs)). On 23 October 2020, SAMR published the provisions anew with immediate effect to bring the rules in line with the reformed enforcement regime (Provisions on Prohibiting the Abuse of Intellectual Property Rights to Exclude and Restrain Competition 2020 (2020 SAMR Provisions on Abuse of IPRs)).

Following the adoption of 2022 AML, SAMR released for public comments on 27 June 2022 the Provisions on Provisions on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (Consultation Draft). Once formally promulgated, the 2020 SAMR Provisions on Abuse of IPRs will be superseded. However, the final texts as well as when the new provisions will become effective are still uncertain at the time when this Note was last updated in May 2023.

AMC Implementing Guidelines

In August 2020, SAMR published a book entitled the 2019 Compilation of Antitrust Regulations and Guidelines which includes the texts of the four antitrust guidelines involving IPRs, auto industry, leniency, and commitments respectively. For detailed coverage of the four guidelines, see IPR Guidelines, Auto Guidelines, Leniency and Suspension of Investigation respectively.

In February 2021, the AMC issued the Guidelines of the Anti-monopoly Commission of the State Council on Anti-monopoly in the Field of Platform Economy (Platform Guidelines). For more details, see Platform Guidelines and Enforcement on Platform Companies.

In November 2021, the AMC issued the Antitrust Guidelines on the Active Pharmaceutical Ingredients Sector 2021 (APIs Guidelines). For more details, see APIs Guidelines.

Aside from the guidelines mentioned above, the NDRC had also previously published two draft guidelines for public consultation, respectively relating to the calculation of fines and illegal gains and procedures for exempting potentially anti-competitive agreements. However, they are reportedly never enacted due to certain controversies.

Other Related Laws

Note that besides the 2022 AML, the Price Supervision and Anti-Unfair Competition Bureau under SAMR also

implements the Pricing Law 1997 (1997 Price Law, with effect from 1 May 1998) and the Anti-Unfair Competition Law 2019. Antitrust investigations may be initiated based on the evidence detected during the process of investigations initiated under these laws (such as the commercial bribery investigations). For more information on bribery and corruption investigations in China, see Practice Notes:

- Investigating Corrupt Behaviour: China and Hong Kong.
- What to Do During a Dawn Raid in China.
- Anti-Corruption Due Diligence in Cross-Border Transactions: a Chinese Perspective.

What May Be Investigated?

Monopoly Agreements

According to Article 16 of the 2022 AML, monopoly agreements are defined as agreements, decisions or other concerted practices that eliminate or restrict competition. Articles 17 and 18 of the 2022 AML provide a non-exhaustive list of monopoly agreements that are presumed to be anti-competitive, including agreements:

- Fixing or changing prices.
- Limiting production or sales volumes.
- Dividing sales or procurement markets.
- Restricting the purchase of new technology or new products.
- Jointly boycotting transactions.
- Maintaining resale prices.

Undertakings that organise or provide substantial assistance to the parties of a monopoly agreement can also be held liable under the 2022 AML. Previously, the 2007 AML only prohibited the organisation of monopoly agreements by trade associations. The new provision will empower SAMR to hold liable any organiser/facilitator of monopoly agreements and to tackle the so-called "hub-and-spoke" agreements more effectively.

Article 18 of the 2022 AML provides that resale price maintenance (RPM) will not be prohibited if the undertakings concerned can prove that the RPM agreement has no anti-competitive effects. This is generally considered a more relaxed treatment of RPM compared to the 2007 AML. Article 18 also provides that vertical restraints can benefit from market share-based safe harbour specified by the enforcement authorities under the State Council.

Article 20 of the 2022 AML allows undertakings to rebut the anti-competitive presumption under Articles 17 and 18. To benefit from Article 20, the undertakings concerned must meet all of the following conditions:

- **Qualifying purposes.** The agreement concerned must have a qualifying purpose, such as to:
  - update technology, research and develop products;
  - improve product quality, reduce cost, improve efficiency and implement standardisation;
  - enhance the competitiveness of small and medium-sized enterprises;
  - protect public interests;
  - mitigate economic recession; or
  - protect legitimate interests in international trade and foreign economic co-operation.
- **No elimination of competition.** The agreement must not substantially restrict competition in the relevant market.
- **Pass-on to consumers.** Consumers will receive a fair share of the resulting benefits.

To date, many undertakings have been investigated by the Enforcement Authorities for their cartel or RPM conduct. However, there is no public record that a monopoly agreement has been successfully benefitted from Article 20. Noteworthy cases on monopoly agreements include:

- **LCD panel (cartel).** In January 2013, the NDRC announced that it investigated six Korean and Taiwanese LCD panel manufacturers (Samsung, LG, AU Optronics, Chunghwa Pictures Tubes, Chimei InnoLux and HannStar Display) for exchanging detailed market data and fixing prices for LCD panels in China. The NDRC imposed a total fine of RMB144 million (approximately USD22.9 million) on the companies, with the highest individual fines imposed on LG, Chimei InnoLux and Samsung. The NDRC also ordered the companies to return overpayment of RMB172 million (approximately USD27.4 million) to Chinese colour TV manufacturers that purchased the LCD panels and confiscated illegal gains of RMB36.75 million (approximately USD5.9 million), bringing total economic sanctions imposed to RMB353 million (approximately USD56.2 million). In addition to the economic sanctions, the companies also made several behavioural commitments. This was the NDRC's first crackdown against an international price-fixing cartel and was based on the provisions of the 1997 Price Law.
- **Premium Liquor (RPM).** In February 2013, Guizhou DRC imposed a fine of RMB247 million (approximately USD39.3 million) on Kweichou Moutai and Sichuan DRC imposed a fine of RMB202 million

(approximately USD32.1 million) on Wuliangye Group for RPM. Both Kweichou Moutai and Wuliangye Group are Chinese state-owned manufacturers of premium liquor.

- **Infant formula (RPM).** In August 2013, the NDRC announced that it imposed a total fine of RMB668.73 million (approximately USD108.3 million) on six infant formula manufacturers (Biostime, Mead Johnson, Dumex, Abbott, FrieslandCampina and Fonterra) for RPM. Fines ranged between 3-6% of the companies' sales in the previous year. Companies also announced "rectification measures" to address the perceived anti-competitive effects of the RPM agreements, including price reductions amending distribution agreements and reforming sales models. Three manufacturers (Wyeth, Beingmate and Meiji Dairies) were exempt from fines.
- **Automobiles (RPM).** In August 2014, the NDRC announced investigations against Chrysler, Audi and Mercedes-Benz for RPM and related conduct. In September 2014, Shanghai DRC imposed a fine of RMB31.7 million (approximately USD5.2 million) on Chrysler, and Hubei DRC imposed a fine of RMB248 million (approximately USD40.3 million) on Audi. In April 2015, Jiangsu DRC imposed a fine of RMB350 million (approximately USD57.3 million) on Mercedes-Benz. In September 2015, Guangdong DRC imposed a fine of RMB123.3 million (approximately USD19.3 million) on Dongfeng-Nissan for RPM. Seventeen Dongfeng-Nissan distributors involved were reported to have also been fined an aggregate of RMB19.12 million (approximately USD3 million).
- **Auto parts (cartel).** In August 2014, the NDRC announced that it had fined ten Japanese auto parts manufacturers (Denso, Furukawa Electric, Yazaki, Sumitomo, Asian Industry, Mitsuba, Mitsubishi Electric, NSK, NTN and JTEKT) a total fine of RMB1.24 billion (approximately USD201.4 million) for colluding to set the prices of auto parts and bearings. Fines ranged between 4-8% of the companies' sales in the previous year. Two other Japanese manufacturers (Hitachi and Nachi-Fujikoshi) were exempted from fines.
- **Roll-on/roll-off (Ro/Ro) shipping (cartel).** In December 2015, the NDRC announced that it had fined eight roll-on/roll-off (Ro/Ro) shipping companies (Japan's Nippon Yusen KK, Mitsui OSK lines, Kawasaki Kisen Kaisha and Eastern Car Liner, Korea's Eukor Car Carriers, Norway's Wallenius Wilhelmsen Logistics, Chile's CSAV and CCNI) a total fine of RMB407 million (approximately USD63 million) for entering into and implementing price monopoly agreements. Fines ranged between 4-9% of the companies' sales in the previous year in their respective international shipping sales "concerning transport to and from China". The investigation lasted for more than one year. Japan's Nippon Yusen KK was exempted from fines. The Norway-based Höegh Autoliners was able to defend itself and escaped sanction based on a large amount of evidence.
- **Allopurinol tablets (cartel).** On 15 January 2016, the NDRC fined three allopurinol tablet manufacturers and their exclusive distributors for engaging in cartel conduct in breach of the 2007 AML. The NDRC noted that since 2014, only three manufacturers, that is, Chongqing Qingyang Pharmaceutical (and its affiliate company Chongqing Datong), Jiangsu Tianjie and Shanghai Sine Pharmaceutical, have been active in the allopurinol tablet market. From April 2014 to September 2015, the parties held four meetings and agreed to jointly increase the price of allopurinol tablets. They also allocated provinces to each other and agreed to submit tenders only in their allocated provinces. The NDRC imposed a total fine of RMB1,805,200 (approximately USD275,027.8) on Chongqing Qingyang/Chongqing Datong, equating to 8% of the company's relevant sales. The NDRC took into account the factors that Chongqing Qingyang was the leader in the cartel and did not cooperate during the initial phases of the investigation. The other companies were each fined 5% of the company's relevant sales and their co-operation with the investigation was noted.
- **Estazolam API and tablets (cartel).** On 22 July 2016, the NDRC published its decisions against three local drug makers Huazhong Pharmaceutical, Shandong Xinyi Pharmaceutical and Changzhou Siyao Pharmacy for engaging in cartel conduct. The case concerned an agreement between the only three producers of estazolam API not to supply other manufacturers of tablets form estazolam and to increase the price of the tablets they themselves sold. In this case, the NDRC seems to concede there was no agreement as to increasing prices, but that one company signalled an appropriate price point and others followed. This is the first case in China in which the "agreement" is described more in terms of a "concerted practice". The NDRC imposed a total fine of RMB2.6 million (approximately USD0.39 million) on the three companies, of which nearly RMB1.6 million (approximately USD0.24 million) was imposed on the ringleader, Huazhong Pharmaceutical, equating to 7% of its estazolam tablet sales in 2015.
- **Medtronic (RPM).** On 7 December 2016, the NDRC fined Medtronic (Shanghai) Management in the amount of RMB118.6 million (approximately USD17.2 million) for entering into and implementing RPM agreements for medical equipment supplies used in the treatment of cardiovascular diseases, restorative therapies and diabetes. The fine amounted to 4% of Medtronic's 2015 sales of the relevant products in China. The NDRC found that Medtronic had infringed Articles 14(1) and 14(2) of the 2007 AML

which respectively prohibit vertical agreements to fix resale prices and imposing minimum resale prices. Specifically, the NDRC found that Medtronic had, directly fixed resale prices by sending price lists with fixed resale prices to distributors, indirectly fixed resale prices by fixing e-commerce platform distributors' gross profit margins, fixed minimum bidding prices, and fixed minimum resale prices for sales to hospitals. Medtronic was found to have implemented the agreements by establishing an internal evaluation system and refusing to supply products to distributors that won bids by quoting low prices. In addition, Medtronic sought to strengthen the impact of the RPM by prohibiting cross-regional sales and preventing distributors from selling competing products. It is worth noting that the NDRC's assessment of restrictions on cross-regional sales and non-compete obligations was in the context of RPM (as specific measures which further strengthened the effect of the RPM). The NDRC did not provide an express view on whether the restrictions on cross-regional sales or non-compete obligations in themselves are unlawful.

- **GM/SAIC Motor Corp joint venture (RPM).** On 23 December 2016, the Shanghai Price Bureau, the local counterpart of NDRC in Shanghai, fined General Motors' joint venture with SAIC Motor Corp in China, SAIC-GM, RMB201 million (approximately USD28.9 million) for RPM. Specifically, it found that SAIC-GM had infringed Article 14 of the 2007 AML by setting minimum resale prices for Cadillac, Chevrolet and Buick cars. The fine amounted to 4% of SAIC-GM's 2015 turnover, which was the same percentage fine imposed on Medtronic for RPM infringements.
- **23 power generation companies in Shanxi (cartel).** On 3 August 2017, Shanxi DRC announced its fines on 23 power generation companies in Shanxi Province and Shanxi Electric Power Association for reaching and implementing price-fixing agreements. The 23 power generation companies were found to have attended a meeting organized by the Shanxi Electric Power Association in 2016, where the companies agreed on a minimum price for electricity and a maximum level for discounts. Shanxi DRC imposed a total fine of RMB72.88 million (approximately USD10.84 million) on the 23 companies and a fine of RMB500,000 (approximately USD74,393) on the power association, representing the maximum fine that can be imposed on trade associations under the 2007 AML. Fines on the companies accounted for 1% of their relevant sales in the previous year.
- **18 PVC manufacturers (cartel).** On 27 September 2017, the NDRC published its decisions on 18 polyvinyl chloride (PVC) manufacturers for reaching and implementing price-fixing agreements. The 18 companies were found to have formed the "North-western Chlor-Alkali Union" and held six meetings to discuss market conditions and exchange output and sales information. They entered into 13 price-fixing agreements through WeChat group discussions, which resulted in the increase of PVC prices. The total fine imposed on the 18 companies amounted to RMB457 million (approximately USD69 million), equating to 1% to 2% of their respective turnover in 2016.
- **One of the main distributors of Vivo (RPM).** In March 2018, Jiangsu Price Bureau, the local counterpart of the NDRC in Jiangsu, published its fine on one of the main distributors of Vivo (a top Chinese start phone manufacturer) in the amount of RMB6.98 million (approximately USD1.1 million) for alleged RPM. The agency reportedly commenced the investigation following a complaint about the price restrictions on wholesalers imposed by the Vivo distributor. The fine was equivalent to 1% of the distributor's total revenue in 2016. Notably, this is China's first price-related anti-monopoly case in the smart-phone sector.
- **Four tugboat companies in Shenzhen (cartel).** On 11 June 2018, SAMR imposed a total fine of RMB12.86 million (approximately USD2 million) on four Shenzhen tugboat companies for price-fixing. SAMR found that, since 2010 or potentially even earlier, the four companies held meetings to maintain general pricing patterns and to follow a consistent negotiation strategy with other competitors. The four tugboat companies, Yantian Tugboat, Alliance Tugboat, Chiwan Tugboat, and Dachan Bay Tugboat were each imposed a fine equivalent to 4% of their revenues in the relevant year.
- **Two natural gas subsidiaries of PetroChina (RPM).** On 27 July 2018, SAMR announced an aggregate fine of RMB84.06 million (approximately USD12.37 million) imposed by the NDRC on two natural gas subsidiaries of PetroChina for RPM. The NDRC found that the two state-owned natural gas subsidiaries of PetroChina Group, together set the minimum resale price for compressed natural gas (CNG) sold to downstream CNG companies in Heilongjiang Province from 1 September 2016 onwards. The large fine accounted for 6% of the two subsidiaries' natural gas revenues in 2016. The penalties demonstrate that state-owned entities are also subject to antitrust enforcement in China.
- **Three acetic acid API manufacturers (cartel).** On 5 December 2018, SAMR imposed an aggregate fine of RMB6,251,600 (approximately USD907,450) on three acetic acid API manufacturers, namely Chengdu Huayi, Sichuan Jinshan, and Taishan Xinning, for price-fixing. Acetic acid is an essential input for hemodialysis concentrates, which are used to treat kidney failure and uraemia. The concerned companies are the only three manufacturers in the Chinese acetic acid market. SAMR found that from October 2017 to February 2018, the companies exchanged

competitively sensitive information over an industry conference and other meetings. In addition, they also indirectly exchanged information via Jiangxi Jinhan, whose role was not published. Following the information exchange, the three companies reached an agreement to increase the sales price of acetic acid API to both haemodialysis solution plants and drug manufacturers by approximately 201-255%. The fines imposed accounted for an aggregate of 4% of each infringing company's revenue in 2017. Apart from fines, SAMR also confiscated illegal gains of RMB6,582,200 (USD955,438).

- **Eight concrete firms (cartel).** On 8 May 2019, Zhejiang AMR imposed a cumulative fine of RMB7,708,477 (USD1.12 million) on eight concrete firms in Quzhou for market sharing and output restriction. Following an in-depth probe which commenced in December 2018, Zhejiang AMR found that in May 2018, the eight firms had entered into a market allocation agreement based on market share quotas for each participant. To ensure that the agreement was effectively implemented, the eight firms agreed to meet on a monthly basis to exchange information, and put in place a mechanism of guarantee deposits and incentive and penalty policies. Monthly meetings were held in June, July and August 2018 to monitor compliance with the agreement and to determine penalties for non-compliance. Zhejiang AMR concluded that such conduct constituted a horizontal monopoly agreement through sharing markets and restricting output, and therefore infringed Article 13 of the 2007 AML.
- **Chang'an Ford (RPM).** On 5 June 2019, SAMR announced that a fine of RMB162.8 million (USD23.56 million) had been imposed on Chang'an Ford Automobile Co., Ltd. (Chang'an Ford, a JV between Chang'an Automobile and Ford) for RPM. According to the announcement, SAMR found that Chang'an Ford had been seeking to impose minimum resale prices on its dealers in Chongqing since 2013 by implementing price lists, entering into "price self-discipline" agreements, and fixing the dealers' minimum prices both at automobile exhibitions and on online platforms. Such conduct was considered to have harmed inter-brand and intra-brand competition. SAMR concluded that the conduct of Chang'an Ford infringed Article 14 of the 2007 AML and imposed a fine equivalent to 4% of Chang'an Ford's sales in Chongqing in the preceding year.
- **Toyota Motor (China) Investment (RPM).** On 27 December 2019, SAMR published a decision imposing a large RPM fine on Toyota Motor (China) Investment (Toyota). Following an investigation initiated in December 2017, Jiangsu AMR found that Toyota had reached and implemented agreements with its distributors in Jiangsu (including Suzhou, Wuxi and Changzhou) in relation to their online and offline resale prices of Lexus models from June 2015 to March 2018. More specifically, Toyota required its distributors to strictly follow Toyota's recommended resale price (RRP) when submitting fee quotes for the concerned Lexus models through online platforms. In addition, Toyota also fixed the maximum discount percent (that is, no larger than 6% of RRP) of certain popular Lexus models and thereby fixed the minimum resale prices of these products. To monitor and ensure compliance with the above requirements, Toyota adopted multiple measures, including conditioning regional sales managers' KPI upon distributors' online fee quotes, requiring distributors to submit invoices (Fapiao) to Toyota and provide justifications in case of prices lower than the minimum resale prices set by Toyota and using supply-cuts as threats to warn distributors that sold the concerned models at prices lower than the level set by Toyota. In light of the above, Jiangsu AMR concluded that Toyota infringed Article 14 of the 2007 AML and imposed a fine of RMB87.6 million (USD12.5 million), which accounted for 2% of Toyota's turnover in 2016.
- **Yangtze River Pharmaceutical (RPM).** On 15 April 2021, SAMR published its fine on Yangtze River Pharmaceutical Group (Yangtze) for RPM. SAMR found that from 2015 to 2019, Yangtze reached and implemented multiple agreements with its customers (including distributors, chain drugstores, retail pharmacies and so on) to fix its customers' resale prices and set the minimum resale prices of Yangtze's medicines. Specifically, to ensure effective implementation of its RPM strategy, Yangtze not only reached standard distribution agreements with its first-tier distributors, but also entered into tri-party agreements with both of its first-tier distributors and second-tier distributors/retailers, where the terms of fixed price or minimum resale price were specified. Further, Yangtze took targeted measures, including imposition of incentives and penalties on its sales staff and/or customers in case of compliance and non-compliance with the resale prices (including online prices) set by Yangtze. As a result, retail prices of the concerned products of Yangtze were effectively lifted compared to the price simulated in the economic analysis. SAMR concluded that Yangtze infringed Articles 14(1) and 14(2) of the 2007 AML, ordered Yangtze to cease the infringement and imposed a fine of RMB764,007,948 (USD116.8 million), amounting to 3% of Yangtze's revenue in 2018.
- **Bull Group (RPM).** On 27 September 2021, SAMR published Zhejiang AMR's penalty on Bull Group for RPM. Bull Group is a listed Chinese company engaged in the manufacture and distribution of electrical products with around 3,000 distributors nationwide. Upon investigation, SAMR found that from 2014 to 2020, Bull Group engaged in RPM by entering into distribution agreements which require distributors

to strictly comply with Bull Group's pricing policies, issuing price policies which require distributors to sell at "guide prices" and to fix discount levels and requiring distributors to sign commitment letters, where distributors undertook that they would follow Bull Group's pricing policies. Bull Group also established an internal supervisory body and entrusted third parties to monitor its distributors' compliance of the pricing policies and put in place a punishment mechanism (including monetary penalties and reduced rebates). Zhejiang AMR found that Bull Group's RPM practices violated Articles 14(1) and 14(2) of the 2007 AML and imposed a fine of RMB294.81 million (USD45.63 million) on Bull Group, amounting to 3% of its annual sales in 2020.

- **CollegePre (RPM).** On 12 July 2022, SAMR published Beijing AMR's penalty on CollegePre for RPM. CollegePre is the sole franchisor of Sesame Workshop in China and engages in franchise activities regarding extracurricular English education under the brand of Sesame Workshop in China. Specifically, CollegePre authorises franchises to resell course materials and English education services. Since 2014, CollegePre authorised 455 franchises in China. Upon investigation, SAMR found that from 2014 to 2021, CollegePre engaged in RPM by entering into cooperation and franchise agreements which prohibit franchises from adjusting prices charged to students. CollegePre also established policies supervising franchises' pricing activities and requiring franchises to comply with the prices and discounts set out by CollegePre. Beijing AMR found that non-compliance of CollegePre's pricing policies has led to punishments on the franchises. Beijing AMR ruled that franchisor and franchises are independent from each other and the business relationship between CollegePre and the franchising agreements cannot be exempted under Article 15 of 2007 AML. CollegePre is fined 3% of this annual revenue in 2020 (RMB942,386.47 (USD0.14 million)) by Beijing AMR for violation of Articles 14(1) of the 2007 AML. This is the first time RPM was found illegal in the franchising business model in China.
- **Zhejiang Civil Explosive Materials Trade Association (cartel/RPM).** On 16 December 2022, SAMR published Zhejiang AMR's penalty on Zhejiang Civil Explosive Materials Trade Association (Association), three explosives producers and their distributor for price fixing, sales and output restriction, collective boycotting and RPM. By way of background, the civil explosives industry in China had been under price regulation of NDRC until 2015. The Association, since 2015, has been intervening in the operation of this industry through coordinating the three producers as well as their distributor to both raise prices/restrict output volume at the supply level and restrict resale prices at the distribution level. Further, the Association also led boycotting exercises against a sub-distributor for its not purchasing from the distributor concerned in this case. Zhejiang AMR held that the Association, together with the three producers and their distributor, entered into anti-competitive horizontal and vertical agreements and therefore violated Articles 13 and 14 of the 2007 AML. The Association received a fine of RMB400,000 (USD57,360), whereas the three producers and their distributor were each fined 2% of their 2020 sales (RMB34.2 million (USD5 million)).

According to SAMR's 2021 Antitrust Enforcement Annual Report, during the four-year period from 2018 to 2021, the Enforcement Authorities investigated 97 cases and concluded 50 cases involving monopoly agreements.

Abuse of Dominance

Under Article 22 of the 2022 AML, dominance is defined as a market position where an undertaking has the ability to control price, quantity and other trading terms, or to restrict or foreclose market entry. The assessment of dominance depends on several factors, including the:

- Undertaking's market share and the competitiveness of the relevant market.
- Ability of the undertaking to control the sales or input market.
- Financial strength and technical resources of the undertaking.
- Extent to which other undertakings rely on the undertaking concerned.
- Ease of market entry.

Dominance is presumed where an undertaking has a market share of 50%, and where two undertakings together hold two-thirds of the market, or three undertakings together hold three-quarters of the market. Presumptions of dominance can be rebutted by evidence to the contrary. In addition, an exception is available where the dominance is presumed on the basis of the combined market share of two or three undertakings: if any undertaking has a market share of less than 10%, it will not be presumed to be dominant.

The 2022 AML and the implementing rules set out a non-exhaustive list of the types of conduct that would be considered abusive without justification. These can be categorized broadly into:

- **Exploitative abuses.** The dominant undertaking abuses its position by selling at unfairly high prices or buying at unfairly low prices.
- **Exclusionary abuses.** The dominant undertaking abuses its position by selling below cost, refusing to trade, requiring exclusivity, implementing tie-in sales or imposing other discriminatory or unreasonable conditions.

Article 22 of the 2022 AML also specifies that abuses via the use of data and algorithms, technologies, and platform rules are prohibited.

The application of competition law in the area of abuse of IPRs has been a focus of enforcement in China. The AMC has been proactively developing guidelines on the assessment of abuse of IPRs under the AML. See IPR Guidelines.

On 1 August 2015, the 2015 SAIC Provisions on Abuse of IPRs came into effect but were replaced in October 2020 by the 2020 SAMR Provisions on Abuse of IPRs with the main text staying the same. These provisions provided guidance as to how the AML could be applied to the misuse of IPRs. Notably, this legislation made it clear that the undertaking should not be presumed to have a dominant market position in the relevant market solely based on the fact that it owns the IPR. It also required that certain holders of IPRs license their technology where the IPR is a standard essential patent (SEP) or essential facility. The SAIC however had not issued any decision based on this legislation. The NDRC initiated several investigations into the licensing practices of patent holders such as InterDigital Corporation and Qualcomm.

To date, several undertakings have been investigated or penalised by the Enforcement Authorities for their abusive conduct. Noteworthy cases include:

- **InterDigital Corporation.** In June 2013, the NDRC initiated an investigation against InterDigital Corporation for the alleged abuse of its dominant position by charging excessive prices, bundling patent licenses and imposing unreasonable conditions. In May 2014, InterDigital Corporation agreed to abide by certain commitments and the NDRC suspended the investigation.
- **Qualcomm.** In November 2013, the NDRC launched an investigation against Qualcomm for the alleged abuse of its dominant position in certain 3G and 4G technology and chip markets by charging excessive prices, bundling patent licenses and imposing unreasonable conditions. In February 2015, the NDRC imposed a fine of RMB6.088 billion (approximately USD993.2 million) on Qualcomm, the largest fine imposed by the NDRC since the 2007 AML came into force. The NDRC's decision also required changes to the business practices that Qualcomm has followed for more than 20 years, albeit less significantly than had been suggested in the earlier stages of the NDRC's investigation.
- **Shankai Sports International.** In June 2014, Beijing AIC announced that it had launched an investigation against Shankai Sports International, the authorized vendor of package tours to the 2014 FIFA World Cup in Brazil for China, for bundling various products and services, such as tickets and accommodation. Beijing AIC suspended the investigation in June 2014, stating that Shankai had admitted that its conduct violated the 2007 AML and had taken measures to address the concerns.
- **Microsoft.** In July 2014, the SAIC announced that it has launched an investigation and dawn raided Microsoft for the alleged abuse of dominance regarding interoperability and other competition concerns related to the Windows operating system and Office software. It is reported that around 100 officials across several locations are involved in this case. The investigation is currently ongoing under SAMR.
- **Chongqing Qingyang Pharmaceutical.** In October 2015, Chongqing AIC fined RMB439,308 (approximately USD69,143) on Chongqing Qingyang Pharmaceutical (Qingyang) for the alleged abuse of dominance regarding refusal to deal. Qingyang took the initiative to contact Chongqing AIC for consultation on its potential violation of the 2007 AML. The fine imposed equalled 3% of Qingyang's turnover in the previous year. Mitigating factors were considered; Qingyang was very co-operative during the investigation and resumed supply in time. This is likely the first successful refusal-to-deal case in China, before which several cases had come to court but the plaintiff invoking the refusal-to-deal provision in the 2007 AML lost.
- **Chifeng Salt Industry Company.** On 29 September 2016, Inner Mongolia AIC fined Chifeng Salt Industry Company for abuse of dominance. The company was the only wholesaler licensed by the Chifeng local government to purchase edible salt from manufacturers as well as sell edible salt to retailers in Chifeng. As a result, it had a statutory monopoly for the edible salt market in Chifeng. The AIC found that the company provided different types of edible salt products to different retailers within Chifeng depending on the retailers' location. Therefore, the AIC found the company's conduct amounted to abuse of dominance through discriminatory treatment between different retailers, including refusal to deal. Inner Mongolia AIC confiscated illegal gains of RMB1,940,544 (approximately USD290,936) from the company and imposed a fine of RMB1,047,814 (approximately USD157,093), 2% of the company's annual sales in 2013.
- **Tetra Pak.** On 16 November 2016, the SAIC announced a fine of RMB667.7 million (USD97.3 million) against Tetra Pak for the alleged abuse of dominance. This is the largest ever fine that the SAIC had imposed in an antitrust case. The fine amounted to 7% of Tetra Pak's sales revenue from the relevant products in 2011 (the year preceding initiation of the formal investigation). SAIC found that Tetra Pak had

engaged in a number of forms of abusive conduct, including exclusive dealing, tying and loyalty rebates. It is worth noting that it was the first time that SAIC referred to the "catch-all" clause under Article 17 of the 2007 AML in analysing loyalty rebates. The analysis on retroactively cumulative rebates and target rebates generally mirrored international practice and indicated the Enforcement Authority's willingness to touch upon controversial and complicated antitrust issues.

- **Hubei Yinxingtuo Port.** It was published on 8 February 2018 that Hubei AIC imposed a fine of RMB977,400 (approximately USD155,582) on Hubei Yinxingtuo Port (HY Port) for abuse of dominance. HY Port was found to have treated roll-on/roll-off (RORO) shipping transport companies in a discriminatory way by favouring a related entity, Yichang H Transport. The relevant market was defined as RORO shipping port service for cargo vehicles along Yiyu Route (upbound, or from Yichang to Chongqing) along the Sichuan River. HY Port was found to hold a dominant position in the relevant market as it is the only service provider. The fine imposed by Hubei AIC equalled 6% of HY Port's total revenues in 2016.
- **Two API suppliers.** On 18 January 2019, SAMR published its penalty decision against two chlorpheniramine maleate (CM) active pharmaceutical ingredients (APIs) suppliers Hunan Er-Kang (Er-Kang) and Henan Jiushi (Jiushi) for abuse of dominance, imposing a total fine of RMB10.04 million (USD1.48 million). CM is an API used to produce a wide range of commonly used cold and anti-allergy medicines. Er-Kang is the sole authorized agent to import CM into China and Jiushi is the largest manufacturer of CM in China. SAMR opened its investigation in July 2018 and found the two companies were collectively dominant in the market for CM APIs in China. With respect to specific conduct, SAMR found that the two suppliers had abused their collective dominance through excessive pricing, refusal to supply and tying. The abusive conduct was found to have significantly distorted competition in the CM APIs' downstream drug manufacturing markets and have harmed the interests of end-consumers. Consequently, SAMR imposed fines of RMB8.48 million (USD1.25 million) and RMB1.56 million (USD0.23 million) on Er-Kang and Jiushi, respectively, accounting for 8% and 4% of their revenues in 2017. In addition to the fines, SAMR recovered illegal gains of RMB2.39 million (USD0.35 million) from Er-Kang due to its leading role in the collective abusive conduct.
- **Eastman.** On 16 April 2019, Shanghai AMR imposed a fine of RMB24.38 million (USD3.6 million) on Eastman (China) Investment Management Co., Ltd (Eastman) for abuse of dominance. Following an investigation commencing in August 2017, Shanghai AMR found that Eastman held a dominant position in the market for ester alcohol-12 coalescing agents in China, taking into account its high market share and other factors indicating its substantial market power and absence of sufficient competitive constraints on the market. Shanghai AMR found that, from 2013 to 2016, Eastman imposed the following restrictive clauses in agreements with customers:
  - direct minimum purchase and take-or-pay requirements, pursuant to which customers need to purchase at least 60% or 80% of their actual annual demands of ester alcohol-12 coalescing agents from Eastman and need to pay for the minimum purchase amounts even if the purchase targets are not met; and
  - indirect minimum purchase requirement through the "most-favoured-nation (MFN)" clause and rebate policy, which conditions the entitlement to preferable terms (MFN) and rebates on minimum purchase requirements.

  Shanghai AMR concluded that Eastman had abused its dominant position by unjustifiably imposing de facto exclusivity requirements which had anti-competitive foreclosure effects. The fine imposed by Shanghai AMR accounts for 5% of Eastman's revenue in 2016.
- **Three API distributors.** On 14 April 2020, SAMR published its fines on Shandong Kanghui Pharmaceutical Co., Ltd (Kanghui), Weifang Puyunhui Pharmaceutical Co., Ltd (Puyunhui) and Weifang Taiyangshen Pharmaceutical Co., Ltd (Taiyangshen, together with Kanghui and Puyunhui, the Distributors) for abusing their dominant positions in the market for injection-use calcium gluconate APIs. It was found that Puyunhui and Taiyangshen were acting under the instructions of Kanghui and thus should be considered with Kanghui to be a single undertaking in the infringing conduct. With a combined market share of about 90% in the Chinese market for injection-use calcium gluconate APIs over the last couple of years, the Distributors as a whole were deemed to enjoy a dominant position in this market. More importantly, SAMR upon investigation found that the three entities are not independent of one another, which should therefore be regarded as a single undertaking in this infringement. More specifically, the Distributors sold injection-use calcium gluconate APIs at unfairly high prices and imposed unfair terms which, among other things, forced manufacturers to sell back final products only to them. SAMR concluded that the above conduct constituted abuse of dominance and infringed Articles 17(1) and 17(5) of the 2007 AML. The aggregated fine imposed amounts to RMB204.5 million (USD29.1 million), representing 7%-10% of the Distributors' turnover in 2018. Apart from the fines, SAMR also confiscated illegal gains amounting to RMB121 million (USD17.2 million).

- **Alibaba, Sherpa's and Meituan.** See Platform Guidelines and Enforcement on Platform Companies.
- **China National Knowledge Infrastructure.** On 26 December 2022, SAMR published its penalty on China National Knowledge Infrastructure (CNKI) for abuse of dominance. CNKI is the most renowned Chinese academic platform, which primarily provides online knowledge database services as well as value-added services (for example, plagiarism checking). CNKI was found to be dominant in the Chinese-language academic literature online database services market in China given its >50% market share, its possession of the largest number of high-quality journals, and its co-operation with more than 90% of Chinese universities. Upon investigation, SAMR found that CNKI abused its dominant position from 2014 to 2021 through:
  - exclusive dealing. CNKI imposed exclusivity upon its customers, restricting them from publishing their academic work on CNKI's competing platforms. CNKI also tried to ensure customers' compliance through rewards and penalties; and
  - excessive pricing. SAMR was of the view that CNKI's pricing was unfairly high, representing an increase of more than 10% of CNKI's average annual fees.

  SAMR imposed a fine of RMB87.6 million (USD12.6 million) amounting to 5% of the sales value in 2021 of the three companies that jointly operated CNKI. CNKI immediately announced rectification measures, including cancelling exclusivity agreements and lowering subscription fees by more than 30% within three years.

According to SAMR's 2021 Antitrust Enforcement Annual Report in 2021, the Enforcement Authorities imposed penalties in 11 cases of abuse of dominance, with a total fine amount of RMB21.8 billion (USD3.2 billion).

How Are Investigations Being Conducted?

Antitrust investigations conducted by the Chinese authorities mirror international practice in many respects but have unique traits in keeping with the special China context. At the outset, it is worth noting several characteristics manifested in the investigations conducted by the Enforcement Authorities in China:

- **There is no legal profession privilege in China.** Chinese law does not recognize the doctrine of attorney-client privilege. As a result, any correspondence between a company and its lawyers (including a PRC-licensed lawyer, foreign lawyer in an international law firm, or its in-house counsel) would not be protected by such privilege. Information considered privileged in other jurisdictions could in principle be requested by the Enforcement Authorities in China. For example, memoranda or similar documents prepared by a company summarising oral or written advice provided by these lawyers are also not privileged. (For more information, see Practice Note, Conducting Cross-Border Investigations in China: Attorney-Client Privilege.)
- **There is no privilege against self-incrimination in China.** The Enforcement Authorities could use as evidence supporting an infringement decision any statement which would involve admitting a breach of the 2022 AML obtained from the addressee of the decision using compulsory powers of questioning.
- **Right to legal representation is particularly restrictive in China.** The Enforcement Authorities are not under legal obligation to give the company time to contact its internal or external legal advisers before commencing the investigation. In practice, the Enforcement Authorities may at their discretion wait for some time for internal or external lawyers to arrive, but trying to assert rights of presence of legal advisers may be considered "not co-operative." The notion of having lawyers shadow officials during an investigation or dawn raid in the way a company might do in other jurisdictions (such as the EU) is one that does not work in the same way in China. On the 25th session of the China-US Joint Commission on Commerce and Trade in December 2014, the Chinese government agreed that "under normal circumstances," a foreign company in an antitrust investigation would be permitted to have counsel present and to consult with them during proceedings. Since then, the Enforcement Authorities are becoming more lenient in allowing legal counsel to attend meetings during the investigations or dawn raids.
- **There is no statutory "right of access to the file" in China.** Unlike in some jurisdictions (such as the EU), there is no statutory right of access to the file in the process of the investigations conducted by the Enforcement Authorities in China. The Enforcement Authorities are required by Chinese law to send a draft decision to the undertakings under investigation for review and comment before they adopt the final decision on the investigation. However, they have no obligation to grant access to the file based on which the decision is made, even if the undertakings under investigation so request.

For a flowchart illustrating a typical antitrust investigation case in China, see Investigation Process: Flowchart.

Initiating an Investigation

The Enforcement Authorities may initiate an investigation either on receipt of a formal complaint

or on its own initiative, possibly following receipt of information from an independent source.

The Chinese antitrust investigations are largely complaint driven. There tends to be more of a risk of enforcement if complaints are received from third parties (including suppliers, customers, competitors, trade associations and business partners). When a complaint is made in writing with relevant facts and evidence also provided, the Enforcement Authorities would be legally obliged under the 2022 AML to conduct necessary investigations.

If an Enforcement Authority decides to initiate an investigation, it would issue an official "notice of investigation." The number of officials must not be fewer than two and those officials must produce their "certificate of law enforcement." As in most jurisdictions, the Enforcement Authorities in China have the powers to conduct investigations without prior notice (sometimes referred to as dawn raids (see Practice Note, What to Do During a SAMR or Ministry of Public Security Dawn Raid)). The Enforcement Authorities may sometimes conduct market studies or informal investigations before officially initiating an investigation.

Powers of Investigation

The Enforcement Authorities possess wide-ranging investigative powers, enabling them to:

- Enter any premises, land and means of transport (may extend to private homes and vehicles).
- Require the production of documents.
- Carry out compulsory interviews.
- Examine books and business records.
- Inspect the companies' bank accounts.

The undertakings, the interested parties or other relevant entities or individuals under investigation must co-operate with the Enforcement Authorities, and cannot refuse or hinder the investigation conducted by the Enforcement Authorities.

If an individual or entity refuses to provide relevant materials or information, provides false materials or information, conceals, destroys or removes evidence, or acts in such a way so as to refuse or hinder an investigation, the Enforcement Authorities may both:

- Order the individual or entity to rectify its acts.
- Impose a fine of up to:
  - RMB500,000 on an individual;
  - 10% of the turnover in the last year on an entity (or RMB5,000,000 if no turnover in the preceding fiscal year or the turnover is difficult to determine).

As of May 2023, no fines related to obstruction of investigation has been issued under the 2022 AML. There are however several notable cases penalised under the 2007 AML.

In October 2015, Anhui AIC announced that it had imposed a fine of RMB200,000 (approximately USD31,630) on Sunyard System Engineering Co Ltd for the company's failure to co-operate in an antitrust investigation. The company (and two other companies) was investigated by Anhui AIC. During the investigation, Anhui AIC requested the company to provide various documents, but the company failed to provide the requested documents within the specified period of time. This is the first published case in which a company has been penalised in a separate decision for failing to cooperate in an antitrust investigation.

In September 2018, Guangdong DRC fined two executives of Guangzhou Qingfeng Toyota Motor Sales Services a total of RMB20,000 (approximately USD2,926) for obstructing an antitrust investigation. During an investigation launched by Guangdong DRC, the company's legal representative ordered the company's supervisor to unplug the USB flash disk from which the enforcement officials were retrieving evidence and to instruct other employees to shut down computers to disrupt the investigation. In addition, the legal representative also verbally insulted the officials. Neither individual provided relevant materials as required nor signed the documents sent by the officials. Guangdong DRC found that such conduct amounted to an unlawful obstruction of an antitrust investigation under the 2007 AML and imposed fines of RMB12,000 and RMB8,000 respectively. This marks China's first fine upon individuals for obstruction of antitrust investigations.

In April 2020, in the injection-use-calcium gluconate APIs case (mentioned above), two API distributors, Shandong Kanghui and Weifang Puyunhui with 14 employees were separately penalised by SAMR (with a fine of RMB2.53 million (USD0.4 million) in total) for obstructing the investigation through refusing to provide information, destroying evidence and so on.

Legal Liabilities

The 2022 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 criminalisation of anticompetitive conducts, not just obstruction of antitrust investigations.

If an undertaking implements a monopoly agreement, the Enforcement Authorities may order the undertaking to cease the illegal conduct, confiscate its illegal gains and impose a fine of between 1% and 10% of the turnover of the undertaking in the preceding fiscal year (or RMB5,000,000 if no turnover in the preceding fiscal year or the turnover is difficult to determine). If the monopoly agreement is reached but not implemented, a fine up to RMB3,000,000 can be imposed.

The 2022 AML also provides that legal representatives, principal responsible persons, and directly responsible persons can be fined up to RMB1,000,000 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 arsenal in itself proves China's resolution to enhance deterrence on antitrust violations.

Undertakings that conduct abuse of dominance can be ordered to cease the illegal conduct, confiscate its illegal gains and impose a fine of between 1% and 10% of the turnover of the undertaking in the preceding fiscal year.

Pursuant to Article 63 of the 2022 AML, antitrust fines can be further increased to a range between two and five times 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 2022 AML, but this new rule will open the door to an unprecedented level of monetary antitrust fines (50% of the undertaking's group turnover) in China.

With regard to illegal gains, there are no bright-line rules on how and on what basis illegal gains should be calculated. Article 28 of the Law on Administrative Penalty 2021 (2021 Administrative Penalty Law) defines "illegal gains" as the gains obtained from violation of law, unless otherwise stipulated by relevant laws, administrative regulations or ministerial rules. This appears to suggest that confiscation of illegal gains covers, in principle, all gains obtained without deducting the costs.

Under Article 64 of 2022 AML, antitrust penalties upon undertakings will be reflected in their credit records following relevant national provisions, and will be announced to the public.

The Enforcement Authorities enjoy enormous discretion in setting fines. Factors which the Enforcement Authorities would consider in terms of the specific amount of a fine include the nature, the degree of gravity and the duration of the violation. For example, in the auto parts cartel, when setting the basic amount of the fines, the NDRC took into account the factors such as "repeatedly entered into and implemented monopoly agreements, committed illegal conduct for a long time, and frequently fixed price."

It was not clear under the 2007 AML whether the turnover on the China market or the global market would be used as the basis to calculate the fine. The 2022 AML does not clarify this issue either. It was also unclear whether the turnover would cover the relevant product only (to which the illegal activities are relevant) or all the products of the company. However, on 22 May 2019, WU Zhenguo, Director-General of SAMR's Anti-Monopoly Bureau, remarked in an interview that the base amount of antitrust fines is not limited to the turnover of the products concerned in a particular infringement, but should include the total turnover of an infringing party. WU Zhenguo further stated that such interpretation was confirmed by the Legal Affairs Committee of the Standing Committee of the National People's Congress. WU Zhenguo also indicated that SAMR was in the process of formulating rules on the calculation of fines. However, it remains unclear whether these rules are the draft guidelines on the calculation of illegal gains and fines which were previously published in June 2016 (namely, the Notice on Soliciting Public Opinions on the "Guidelines on Recognizing the Illegal Gains Obtained by Business Operators from Monopolistic Acts and Determining the Amount of Fines" (Draft for Comments) 2016) but later reported to be shelved due to controversy. On 26 January 2022, in a judgement upholding Hainan AMR's decision on a monopoly agreement (*Hainan AMR v Hainan Shenghua Fire Fighting Engineering Co, Ltd,* (2021) SPC Zhi Xing Zhong No. 880), the Supreme People's Court held that the principle that the turnover should cover all the products sales is a reasonable interpretation of Article 46 (1) of the 2007 AML. This is reportedly the first case that endorses the view that turnover of all products should be the fine base.

If the undertaking is determined to conduct anti-competitive conduct, it may also bear civil liabilities if it causes loss to others. To date, most of the antitrust private litigations involve stand-alone action. Among the rare examples of follow-on antitrust private litigations in China, the *Junwei Tian v Abbott and Carrefour* case is the landmark one. The plaintiff's claim followed the 2013 decision of the NDRC to fine six infant formula manufacturers, including Abbott, for RPM. The Chinese consumer claimed that Abbott and Carrefour had engaged in illicit conduct which resulted in him paying a higher price for a tin of infant formula purchased. In August 2016, the Beijing High Court rejected the plaintiff's appeal and found that the NDRC's decision alone was insufficient evidence that Abbott and Carrefour had engaged in the illicit conduct as it did not specify which distributors were involved. As the first court ruling on a follow-on private action, the

judgement set a high burden for plaintiffs to discharge even in circumstances where an administrative decision on violation is in place. (See Practice Note, Private Antitrust Litigation in China: In Monopoly Agreement Litigation.)

Leniency

China's leniency program is set out in Article 56 of the 2022 AML, which provides that if an undertaking takes the initiative to report relevant information in relation to its participation in a monopoly agreement and provide important evidence to the Enforcement Authorities, the Enforcement Authorities may exercise their discretion to reduce the penalties on the undertaking or exempt the undertaking from penalties. As in most jurisdictions, the Chinese leniency program operates a sliding scale for reductions of fines depending on how quickly an undertaking comes forward. The 2023 Monopoly Agreement Provisions published by SAMR sets out detailed rules on leniency procedure, pursuant to which the first, second and third leniency applicants (that offer crucial evidence) are entitled to a fine reduction of 80-100%, 30-50% and 20-30%, respectively. Furthermore, as illustrated above, the application of leniency system is expanded to coordinators of horizontal agreements as well as liable individuals, all can benefit from the leniency system when certain conditions are met.

The NDRC circulated draft leniency guidelines in 2016 (namely, the Guidelines for Application of the Leniency Regime to Cases of Horizontal Monopoly Agreements (Draft for Comments) 2016) which were approved on 4 January 2019 (Leniency Guidelines). The final version of the Leniency Guidelines was published in a book authored by SAMR in August 2020, which is widely thought to have provided helpful guidance to undertakings applying for or considering to apply for leniency.

The Leniency Guidelines only apply to horizontal monopoly agreements provided in Article 17 of the 2022 AML (*Article 3*).

Undertakings can apply for leniency any time:

- Before a case is accepted.
- Before the investigation is initiated.
- After the case acceptance or investigation initiation but in any case before any administrative penalty has been imposed.

(*Article 4, Leniency Guidelines*.)

Conditions for the Application of Leniency

The Leniency Guidelines set forth different conditions for the first leniency applicant and the subsequent applicants in relation to their respective leniency application materials.

The first applicant (who may apply for penalty exemption) should explicitly admit in a report its involvement in concluding the monopoly agreement and provide a detailed description of the conclusion and implementation of such agreement, including:

- Participants to the monopoly agreement and their basic information, including names, addresses, contact information and representatives.
- Details of the monopoly agreement, including relevant time, place and contents of the communication as well as the participants to such communication.
- Main contents of the monopoly agreement, including the concerned products or services, price and quantity and the status on conclusion and implementation of the monopoly agreement.
- Impacted geographic scope and market scale.
- Duration of the implementation of the monopoly agreement.
- Explanatory notes on evidence submitted by the undertaking.
- Leniency applications submitted to foreign Enforcement Authorities, if any.
- Other relevant documents and materials.

(*Article 6, Leniency Guidelines*.)

This first application should also submit "important evidence," that is:

- Evidence not yet obtained by the Enforcement Authorities but which, if obtained by them, would be sufficient for them to accept a case or initiate an investigation.
- If the Enforcement Authorities have accepted a case or started an investigation in accordance with the 2022 AML, evidence not yet obtained by the Enforcement Authorities which allows the Enforcement Authorities to make determination on the monopoly agreement under Article 17 of the 2022 AML.

(*Article 6, Leniency Guidelines*.)

In contrast, the report submitted by the subsequent leniency applicants (who may apply for a reduction of fine) includes a relatively limited scope of information, for example, information on participants of the monopoly agreement, products or services involved, the time of conclusion and implementation of such agreement and region affected. "Important evidence" submitted by such applicants should be those with significant probative force or value for determination of monopoly agreements such as:

- Evidence with significant probative force or supplementary probative value in relation to

conclusion and implementation of a monopoly agreement.

- Evidence with supplementary probative value for the contents of a monopoly agreement, the time of conclusion and implementation of such agreement, products or services involved, and participants.

(*Article 8, Leniency Guidelines*.)

Other Conditions for Leniency to Be Granted

In addition to the voluntary report and "important evidence," the Leniency Guidelines also provide other conditions that need to be met by the leniency applicants, including:

- To immediately stop any alleged illegal conduct after the leniency application, except where the Enforcement Authorities allow such practice to continue in order to ensure the smooth progression of an investigation (in the event that a leniency application has been filed with an overseas enforcement authority and the applicant has been requested to continue the infringing conduct, the undertaking should report this to the Enforcement Authorities).
- To promptly, continuously, comprehensively and sincerely cooperate with the Enforcement Authorities during the investigation in a manner satisfactory to the Enforcement Authorities.
- To properly keep and provide evidence and information, and not to conceal, destroy, transfer or falsify any evidence or information.
- Not to disclose information about the leniency application to external parties without prior approval of the Enforcement Authorities.
- Not to engage in any other conduct that may affect an investigation under the 2022 AML.

(*Article 10, Leniency Guidelines*.)

"Marker System" for the First Applicant

The Enforcement Authorities should issue a written receipt to the undertaking, specifying the time of receipt and a list of the received materials if such undertaking submits the report and "important evidence" meeting the requirements under the guidelines. If the submitted report meets the requirements but the evidence has not been provided or is incomplete, the Enforcement Authorities may "mark" that applicant as the first applicant and issue a written receipt to specify the time of receipt and the list of materials received. That undertaking then will have a period of no more than 30 days (which may be extended to no more than 60 days) to supplement the required evidence. If the evidence can be submitted within the timeframe set by the Enforcement Authorities, the time for leniency application will be the time when the initial report is received. If the applicant fails to submit relevant evidence in time, the leniency marker will be cancelled. (*Article 7, Leniency Guidelines*.)

The "marker system" only applies to the first undertaking applying for leniency. However, if the leniency marker of such undertaking is cancelled, the second applicant will automatically become the first applicant who may be exempted from penalty (*Article 7, Leniency Guidelines*).

Penalty Exemption

The first leniency applicant is entitled to full immunity or no less than 80% reduction of all fines. The second applicant is entitled to reduction of no less than 30% to 50% of the fine. The third applicant is entitled to reduction of 20% to 30% of the fine. (*Article 13, Leniency Guidelines*.)

Generally, leniency will be granted to maximum three undertakings in the same case. However, in major and complicated cases involving a large number of undertakings and the leniency applicants have provided different important evidence, the Enforcement Authorities may consider granting leniency to more than three undertakings. In such circumstances, subsequent undertakings are entitled to reduction of no more than 20% reduction of the fine. (*Article 11, Leniency Guidelines*.)

Suspension of Investigation

During the investigation, the undertaking under investigation may apply for suspension of the investigation, and commits to take measures to eliminate the effects of the anti-competitive conduct within a period recognized by the Enforcement Authorities. However, according to the 2023 Monopoly Agreement Provisions, investigations in respect of horizontal monopoly agreements relating to fixing price, restricting output or allocating market must not be suspended.

The application for suspension of investigation must be made in writing and set forth the facts suspected of violation and their potential effects, the proposed specific measures to eliminate the effects of such conduct and the time schedule to perform the commitments. Upon receipt and review of the application, the Enforcement Authorities may decide to suspend the investigation and issue a decision to suspend the investigation, if the undertaking under investigation commits to take specific measures to eliminate the effects of the suspected anti-competitive conduct within a period approved by the Enforcement Authorities.

The Enforcement Authorities will supervise the performance of the commitments. The undertaking shall submit written reports on the performance of the commitments at the request of the Enforcement Authorities. Where the undertaking has fulfilled its commitments, the Enforcement Authorities may decide to terminate the investigation.

The Enforcement Authorities should resume the investigation in any of the following circumstances:

- The undertaking has failed to perform its commitments.
- There have been material changes to the circumstances upon which the decision to suspend the investigation was made.
- The decision to suspend the investigation was made based on incomplete, incorrect or misleading information provided by the undertaking.

The NDRC circulated draft commitment guidelines in 2016 (namely, the Guidelines on Commitments Made by Undertakings in Antitrust Cases (Draft for Comment) 2016), which were approved on 4 January 2019. In August 2020, the approved guidelines were published in a book authored by SAMR (Commitment Guidelines).

The Commitment Guidelines provide clear guidance to undertakings with respect to commitments such as the relevant procedures, conditions and factors to be considered. The guidelines could help undertakings avoid the investigation and possible penalty by submitting commitments at an early stage.

The Enforcement Authorities should not accept commitment on conduct of hardcore cartel (that is, horizontal agreements for fixing or changing prices, for limiting production or sales volumes or for dividing sales or raw material procurement markets) (*Article 2, Commitment Guidelines*).

Undertakings are encouraged to submit commitments at any time before any administrative penalties have been imposed. Commitments will generally not be accepted after penalty imposition. Undertakings can withdraw their commitments at any time before a decision on suspension of investigation is made. However, such withdrawal will result in resumption of the investigation and any subsequent commitment made by that undertaking will not be accepted. (*Article 4, Commitment Guidelines*.)

Types of Commitment

Undertakings can commit to take remedial measures of a behavioural nature, structural nature or a mix of both. The remedial measures must be clear, feasible and can be implemented without external assistance (*Article 7, Commitment Guidelines*).

The Commitment Guidelines suggest that undertakings communicate with the Enforcement Authorities before proposing their commitments regarding the facts, possible effects of the alleged anti-competitive conduct (*Article 5*).

Factors to Be Considered for the Assessment of Commitment

the Enforcement Authorities may take into account the following factors when assessing the proposed commitments:

- The attitude of the undertaking.
- The nature, duration, effects and social impact of the alleged monopolistic conduct.
- The proposed remedial measures and potential effects of such remedies.

(*Article 11, Commitment Guidelines*.)

Form and Content of Commitment

Commitments should be submitted in writing, covering the following aspects:

- The alleged monopolistic conduct under investigation and its possible effects.
- The remedies to be taken to eliminate the adverse effect of such conduct.
- An explanation of how such remedies eliminate the adverse effects of the alleged monopolistic conduct.
- The timetable and manner of implementation of the commitments.
- Other matters that need to be covered by the commitment.

(*Article 6, Commitment Guidelines*.)

Public Consultation

the Enforcement Authorities can conduct public consultation on the commitments proposed by the undertakings if they believe that the alleged anti-competitive conduct has affected a large number of unspecified undertakings, consumers or the general public. In general, the term of the public consultation shall be no less than 30 days. (*Article 9, Commitment Guidelines*.)

Suspension, Termination and Resumption of Investigation

Once the commitment is accepted, the Enforcement Authorities will issue a written decision on the suspension of investigation, which will allow the undertaking to implement its commitments within a

limited period. During such period, such undertaking should report to the Enforcement Authorities regarding the implementation of the commitments. (*Article 12, Commitment Guidelines*.)

The undertaking may apply to the Enforcement Authorities for modification of the commitments during the implementation due to significant change of the business situation of the undertaking or significant change of competition in the market. The Enforcement Authorities shall decide on such application at its own discretion. (*Article 14, Commitment Guidelines*.)

The Enforcement Authorities may decide to terminate investigation after implementation of the commitments (*Article 15, Commitment Guidelines*). The undertaking may apply for early termination of investigation where the commitments have been fully implemented before the specified deadline or it is no longer necessary to implement the remedies due to significant change of competition in the market (*Article 10, Commitment Guidelines*).

Decisions made by the Enforcement Authorities on the suspension or termination of investigation should not be interpreted as the final determination on whether the alleged conduct constitutes the infringement of the 2022 AML (*Article 3, Commitment Guidelines*).

As per Article 53 of the 2022 AML, the Enforcement Authorities should resume its investigation where any of the following happens:

- The undertaking has failed to perform its obligations.
- A major change related to the grounds for suspending the investigation has occurred.
- The suspension was based on incomplete or inaccurate information provided by the undertaking.

Procedures Prior to a Decision

The procedures to be followed by the Enforcement Authorities in making a decision on imposing administrative penalties are set out in:

- 2022 AML.
- Provisions on Administrative Penalties for Illegal Pricing 2010.
- 2023 Monopoly Agreement Provisions.
- 2023 Abuses of Dominance Provisions.
- 2021 Administrative Penalty Law.

The procedures are as follows:

- **Fact finding.** The 2021 Administrative Penalty Law requires that the administrative authority that has the right to impose administrative penalties must find and establish the relevant facts before it imposes the administrative penalties. Therefore, the Enforcement Authority is required by law, before imposing the penalties on the undertaking, to verify and establish the relevant facts to the effect that the undertaking's activities are in violation of the 2022 AML.
- **Review of investigation results.** Upon completion of the investigation, the officials responsible for the investigation will prepare an internal report setting out the findings of the investigation and the proposed penalties, and the persons-in-charge of the Enforcement Authorities should review the report.
- **Notification to the undertakings.** The Enforcement Authority should, before it makes the decision on imposing penalties on the undertaking under investigation, duly notify the undertaking under investigation of the facts of the violations, and the grounds and the basis of the imposed penalties. The undertaking under investigation is entitled to express opinions. The Enforcement Authority should verify the facts, reasons and evidence asserted by the undertaking under investigation.
- **Public hearing.** According to 2021 Administrative Penalty Law, an undertaking that may be subject to a fine of a relatively large amount has the right to request a public hearing of the case and, with such a request, the administrative authority should arrange the public hearing. The public hearing is accessible to the public unless national secrets, trade secrets or private secrets are concerned. Therefore, if the Enforcement Authority decides to impose a fine, such a fine may usually be large enough for the undertaking under investigation to request public hearing.
- **Making decision on the penalties.** After the review of the results of the investigation, the notification to the undertaking and possibly the public hearing, the persons-in-charge of the Enforcement Authority should discuss internally and make its decision on whether to impose penalties and what penalties to be imposed on the undertaking under investigation.
- **Preparation and service of the decision.** If the Enforcement Authority decides to impose the penalties on the undertaking under investigation, the Enforcement Authority should prepare the decision in writing and duly serve the decision to the undertaking under investigation.
- **Performance of the decision.** Generally speaking, the decision, once served to the undertaking under investigation, should be performed by the undertaking (including the payment of the fine if imposed) within the time limit prescribed in the decision, regardless of whether the administrative review or the administrative litigation proceedings are initiated. According to the Administrative Enforcement Law 2011 (with effect from 1 January 2012), the administrative

authorities are empowered to take enforcement action, if the undertaking fails to perform such decision within the time limit prescribed in the decision. In addition, with respect to monetary administrative penalties (such as fines), the administrative authorities are empowered to impose additional fines or penalties for the delayed payment of such penalties and, if the payment is delayed for more than 30 days, the administrative authorities can enforce such monetary penalties or make an application to request the court to enforce the monetary penalties.

According to the 2023 Monopoly Agreement Provisions, 2023 Abuses of Dominance Provisions, and 2023 Abuses of Administrative Powers Provisions, if the decision is made by a provincial-level Enforcement Authority, that provincial-level Enforcement Authority should submit relevant documents to SAMR for record within seven business days after it makes that decision.

On 2 July 2021, SAMR published the Provisions on Administrative Penalty Procedures in Market Regulation 2021 (2021 Penalty Provisions). Pursuant to the 2023 Monopoly Agreement Provisions and the 2023 Abuses of Dominance Provisions, the 2021 Penalty Provisions apply to matters (other than statute of limitations, case acceptance and jurisdictions) where specific antitrust rules regarding procedures are silent.

Challenging the Enforcement Authorities' Decisions

Decisions of the Enforcement Authorities can be challenged through an administrative review procedure or an administrative litigation procedure in the Chinese courts.

According to the Administrative Reconsideration Law 2017 (with effect from 1 January 2018) and the relevant regulations, if an undertaking decides to apply for the administrative review of an Enforcement Authority's decision, the application should be filed within 60 days after the undertaking receives the Enforcement Authority' decision, and the right authority should conduct the administrative review and give its administrative review decision no more than 90 days after the receipt of the undertaking's application. (For more information on administrative reconsideration in China, see Practice Note, Protecting Commercial Rights and Interests in China: Administrative Reconsideration.)

According to the Administrative Procedure Law 2017 and the relevant regulations, if an undertaking decides to initiate an administrative litigation against the administrative review decision, the undertaking should bring the case to court within 15 days after the receipt of the administrative review decision. If an undertaking directly initiates an administrative litigation against an Enforcement Authority's decision without first going through the administrative review procedure, the undertaking should bring the case to court within six months after the Enforcement Authority's decision is known to the undertaking. The trial court should award its trial decision within six months after the date of acceptance and registration of the case, unless approved to be extended by the superior court of the trial court. The judgment made by the trial court would be appealable to the superior court of the trial court. (For more information on administration litigation in China, see Practice Note, Protecting Commercial Rights and Interests in China: Administrative Litigation.)

An undertaking has the statutory right to choose to either apply for the administrative review or directly initiate an administrative litigation without first going through the administrative review procedure. In practice, however, it might be advisable to go through the administrative review procedure before initiating an administrative litigation in some cases for the following reasons:

- The administrative reconsideration proceeding provides an additional channel to solve the dispute with the Enforcement Authority. If the undertaking is not satisfied with the administrative reconsideration decision, it could still initiate the administrative litigation.
- The administrative litigation proceeding is less flexible than the administrative reconsideration proceeding. In the administrative reconsideration proceeding, the undertaking usually has more opportunities than in the administrative litigation proceeding to further discuss the Enforcement Authority's decision with the Enforcement Authority and the relevant authority conducting the administrative reconsideration. In addition, in the administrative review proceeding, it is possible to settle the dispute with the Enforcement Authority. However, there is no settlement mechanism in the administrative litigation proceeding.

Statute of Limitations

The 2021 Administrative Penalty Law, in general, provides a general statute of limitations of two years. This begins from the time the unlawful conduct occurred, or from the time the unlawful conduct ended in the case of continuing infringements.

Confidentiality

The Enforcement Authorities and their officials are obliged to keep any business secrets that come into their knowledge during the process of investigation confidential.

An undertaking wishing to prevent information from being published or otherwise disclosed will need to provide reasons for the confidentiality claim. The final decision as to whether such information can be regarded as confidential rests with the Enforcement Authorities.

IPR Guidelines

In March 2017, the AMC circulated the draft IPR guidelines (namely, the Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (Draft for Public Comments) 2017) for public comment. The guidelines were approved on 4 January 2019 and finally published in a book authored by SAMR in August 2020 (IPR Guidelines).

The IPR Guidelines are less prescriptive than the other guidelines published in the same book, but instead offer more of a general framework on analysing antitrust problems related to IPRs. The IPR Guidelines are the first anti-monopoly guidelines specialised in the field of IPRs. It is believed that with the publication of the IPR Guidelines, the Enforcement Authorities may strengthen its enforcement with respect to IPRs.

Analysis Approach for IP-Related Anti-Competitive Conduct

The IPR Guidelines provide that the analysis of abuse of IPRs needs to follow the framework provided in the 2022 AML (*Article 1*). More specifically, the first step is to analyse the features of the conduct and consider the type of anti-competitive conduct that the concerned conduct may be categorised into; the second step is to analyse the relevant market and effects on the competition, and finally, on the effect of "promotion of innovation and enhancement of efficiency". (*Article 3, IPR Guidelines*.)

Notably, the IPR Guidelines also provide a list of factors to assess the effect of "promotion of innovation and enhancement of efficiency". More specifically, the conduct must satisfy the following criteria concurrently to be considered having the effect of promoting innovation and enhancing efficiency:

- There is a causal link between the conduct concerned and promotion of innovation and enhancement of efficiency.
- The anti-competitive effect of such conduct is the smallest amongst the innovation-promoting and efficiency-enhancing measures commercially and reasonably available to the undertaking.
- The conduct does not eliminate or seriously restrict competition in relevant markets.
- The conduct does not seriously impede other undertakings' innovation.
- Consumers can share benefits from the promotion of innovation and enhancement of efficiency.

(*Article 6, IPR Guidelines*.)

Monopoly Agreement with Respect to IPRs

The IPR Guidelines list various types of IP-related agreements which may have the effect of eliminating or restricting competition and provide factors to be considered when assessing whether these agreements have anti-competitive effects. Major types of monopoly agreements referred to in the IPR Guidelines are discussed below.

Joint Research and Development

Joint research and development agreements generally save R&D costs and enhance R&D efficiency. Factors to be taken into consideration when assessing whether such agreement has anti-competitive effects include:

- Whether it restricts an undertaking from conducting R&D independently or jointly with a third party in a field unrelated to the joint R&D in question.
- Whether it restricts an undertaking from conducting subsequent R&D after the completion of the joint R&D concerned.
- Whether it restricts the ownership and exercise of the relevant IPR concerning new technologies or new products in a field unrelated to the joint R&D in question.

(*Article 7, IPR Guidelines*.)

Cross-Licensing

Cross-licensing agreements generally reduce IPR licensing costs and facilitate IPR enforcement. Factors to be taken into consideration in assessing anti-competitive effects include:

- Whether the cross-licensing is of an exclusive nature.
- Whether it constitutes a barrier for third parties to enter the relevant market.
- Whether it eliminates or restricts competition in the relevant downstream market.
- Whether the cost of the relevant product has been raised.

(*Article 8, IPR Guidelines*.)

Exclusive Grant-Back and Monopolistic Grant-Back

Grant-back provisions apply to situations where a licensee makes certain improvements on the licensed IP. Exclusive grant-back provisions provide the licensor (or a third party designated by it) and the licensee an exclusive right to use the patented improvement made by the licensee. Monopolistic grant-back provisions, in contrast, do not afford the licensee such rights. Exclusive grant-back and monopolistic grant-back often promote investment in the innovation. Factors to be taken into consideration when assessing anti-competitive effects include:

- Whether the licensor provides substantive consideration for the grant-back.
- Whether the licensor and licensee require mutual monopolistic or exclusive grant-backs from each other in a cross-licensing arrangement.
- Whether the grant-back causes concentration of the improvement or innovation into the hands of a single undertaking, thereby enabling such undertaking to gain or enhance its power in the relevant market.
- Whether the grant-back undermines the licensee's incentive for subsequent improvement.

(*Article 9, IPR Guidelines*.)

The IPR Guidelines also provide that monopolistic grant-back generally is more likely to restrict competition than exclusive grant-back (*Article 9*).

No-Challenge Clause

Under "no-challenge" clause, licensees are required not to challenge the validity of the relevant IPR. Factors to be taken into consideration when assessing its anti-competitive effects include:

- Whether the licensor prohibits all licensees from challenging the validity of its IPR.
- Whether the IPR involved in the no-challenge clause is licensed on a royalty-bearing basis.
- Whether the IPR involved in the no-challenge clause may constitute a barrier to enter into the downstream market.
- Whether the IPR involved in the no-challenge clause impedes the use of other competing IPR.
- Whether the IPR license involved in the no-challenge clause is exclusive.
- Whether licensees suffer significant losses if they challenge the validity of the licensor's IPR.

(*Article 10, IPR Guidelines*.)

Standard-Setting

Standard-setting conduct often facilitates the commonality of different products, reduces costs, enhances efficiency and ensures product quality. Factors to be taken into consideration in assessing its anti-competitive effects include:

- Whether it excludes other particular undertakings without justification.
- Whether it excludes relevant proposals of particular undertakings without justification.
- Whether an agreement is reached to refrain from implementing other competing standards.
- Whether there are necessary and reasonable constraints on the exercise of the IPR incorporated into the standard.

(*Article 11, IPR Guidelines*.)

In addition, the IPR Guidelines provide the safe harbour applicable to the non-hardcore monopoly agreement. Where any of the following conditions is satisfied, the agreement concerned will not be deemed the "other monopoly agreements" provided in Article 17 and Article 18 of the 2022 AML:

- The combined market share of the competing undertakings in the relevant market does not exceed 20%.
- The market share of the non-competing undertakings in the markets related to the concerned IPR agreement each does not exceed 30%.
- If the market share information of the undertakings in the relevant market is unavailable or such information cannot accurately reflect the market position of the undertakings, apart from the technology controlled by the parties to the IPR agreement, there are at least four technologies in the relevant market that are reasonably available and are controlled by other independent undertakings.

(*Article 13, IPR Guidelines*.)

Abuse of Dominance with Respect to IPRs

The IPR Guidelines focus on five types of abuse of dominance conduct and set out the factors to be taken into consideration when assessing the conduct.

Licensing IPRs at Unfairly High Price

The following factors will be considered when assessing the anti-competitive effect of licensing IPRs at unfairly high price:

- Royalty calculation method and the contribution of IPRs to the value of relevant products.
- Commitments made by the undertaking with respect to IPR licensing.
- Licensing history of the IPRs or comparable royalty standard.
- Licensing terms resulting in unfairly high pricing, such as charging royalty beyond the geographic scope or covered product range of the license.
- Whether the undertaking has charged royalty for expired or invalid IPRs when engaging in portfolio licensing.

(*Article 15, IPR Guidelines*.)

Refusal to License

The following factors will be considered when assessing the anti-competitive effects of refusal to license:

- Commitments made by the undertaking in respect of licensing an IPR.
- Whether licensing the IPR is essential for other undertakings to enter into the relevant market.
- The impact of refusal to license the relevant IPR on competition in the market and innovation and the extent of the impact.
- Whether the rejected party lacks willingness and capability to pay reasonable royalties.
- Whether a reasonable offer has been made to the rejected party by the undertaking.
- Whether refusal to license the relevant IPR would harm consumer interests or public interests.

(*Article 16, IPR Guidelines*.)

Tying

The following factors will be considered when assessing the anti-competitive effects of tying:

- Whether it is against the will of the counterparty in the transaction.
- Whether it conforms to trade practices or consumer habits.
- Whether it disregards the differences in the nature of different IPRs or goods or their interrelation.
- Whether it is reasonable and necessary.
- Whether it excludes or restricts the transaction opportunities of other undertakings.
- Whether it restricts the consumers' right of choice.

(*Article 17, IPR Guidelines*.)

Imposing Unreasonable Condition

The conduct of imposing unreasonable conditions may be considered to have an effect of restricting or eliminating the competition where any of the following happens:

- The counterparty to the transaction is required to provide monopolistic or exclusive grant-back.
- The counterparty is prevented from challenging the validity of IPRs or from bringing IPR infringement lawsuits.
- The counterparty is restricted from implementing proprietary IPRs or from utilising or developing competing technologies or products.
- The undertaking imposing unreasonable conditions raised claims on expired or invalid IPRs.
- The undertaking imposing unreasonable conditions requires its counterparty to engage in cross-licensing with it without providing reasonable consideration.
- The undertaking imposing unreasonable conditions coerces its counterparty to deal with certain third party, prohibits its counterparty from dealing with certain third party or restricts the trade terms between the trade counterparty and a third party.

(*Article 18, IPR Guidelines*.)

Discriminatory Treatments

The following factors will be considered in assessing the anti-competitive effects of discriminatory treatments:

- Whether the counterparties are in the substantially same situations.
- Whether the licensing terms are substantially different.
- Whether such discrimination will cause a significant adverse impact on the licensee's market participation.

(*Article 19, IPR Guidelines*.)

Auto Guidelines

The NDRC published draft automobile guidelines in 2016 (namely, the Anti-Monopoly Guidelines for the Automobile Industry (Draft for Comments) 2016). The guidelines were approved on 4 January 2019 and finally published in a book authored by SAMR in August 2020 (Auto Guidelines). The Auto Guidelines are the first anti-monopoly guidelines specialised in the automobile industry. Whiles many of the antitrust issues discussed in the Auto Guidelines are not unique to the auto industry, it is not entirely clear whether and if so in what form the Auto Guidelines will be applied to other sectors.

Relevant Market Definition

In relation to product markets:

- Market for distribution of automobile can be further divided into market for wholesale of automobile and market for retail of automobiles.
- Market for after-sale of automobile can be further divided into market for after-sale spare parts and market for after-sale repair and maintenance.

(*Article 3, Auto Guidelines*.)

In relation to geographic market, the geographical market for manufacturing of passenger vehicles can be defined as a country-wide market; wholesale of passenger vehicles can also be defined as country-wide; but the retail market of passenger vehicles may be defined as a provincial or regional market (*Article 3, Auto Guidelines*).

Monopoly Agreements and Exemptions

The Auto Guidelines mainly focus on vertical monopoly agreements. Notably, the guidelines provide exemptions regarding certain types of vertical monopoly agreements.

For RPM, the Auto Guidelines provide that individual exemption may be applicable in cases concerning:

- Short term RPM for new energy automobiles (currently often within nine months).
- RPM imposed on distributors who only act as an intermediary.
- RPM in government procurement procedure where certain distributors act only as intermediary and agree on a fixed quotation.
- RPM in e-commerce sales where automobile suppliers conclude transactions directly with unspecified end-users via e-commerce platform at a uniform price for a certain period, with automobile distributors involved only in vehicle handover, payment collection and issuance of invoice.

(*Article 6, Auto Guidelines*.)

Article 6 of the Auto Guidelines also states that territorial restriction and customer restriction imposed by undertakings without significant market power (that is, undertaking with a market share of below 30% in the relevant market) will not generate significant anti-competitive effect. Territorial restriction and customer restriction conducted by these undertakings are presumed to be exempted:

- Where the undertakings limit its distributors' sale activities within their business premises, without limit on passive sales and cross-supply among authorised distributors.
- Where the undertakings restrict a distributor's active sales to certain territory or certain group of customers which have been exclusively allocated to another distributor.
- Where the undertaking restricts its wholesalers from selling directly to end-users.
- Where distributors are restricted from selling parts to clients who might produce the same products as those produced by the supplier.

However, territorial restriction and customer restriction should not be exempted in the following circumstances:

- Where passive sales of distributors are restricted.
- Where cross-supply among distributors is restricted.
- Where sales by distributors and repairers of the spare parts necessary for repair service to end-users are restricted.

(*Article 6, Auto Guidelines*.)

Abuse of Dominance

The Auto Guidelines focus on the abuse of dominance in the market for automobile after-sale. Conduct likely to be deemed abuse of dominance in this after-sale market includes:

- Restriction on the manufacturing of dual-branded spare parts.
- Restrictions on distributors and repairers from purchasing outsourced after-sale components.
- Restriction on spare parts suppliers, distributors, and repairers from re-sale of spare parts.
- Restrictions on availability of repair technical information, detecting instruments, and repair tools.
- Setting excessively high price for repair and maintenance technical information.

(*Articles 7-9, Auto Guidelines*.)

Platform Guidelines and Enforcement on Platform Companies

Currently, the Enforcement Authorities are stepping up their scrutiny over platform companies, including by way of promulgating new rules. SAMR circulated the draft platform guidelines on 10 November 2020 (namely, the Guidelines on Anti-monopoly in the Field of Platform Economy (Draft for Comments) 2020). Only four months

later, on 7 February 2021, the AMC released the final version of the Platform Guidelines, which came into force on the same day. The Platform Guidelines sent a clear signal that the Enforcement Authorities intend to put an end to their previous tolerating attitudes towards the presence of powerful big techs in China as well as their potential abuse of market power to the detriment of consumer welfare and long-term innovation and healthy development of the market economy. On a more detailed level, the Platform Guidelines have responded to many hot issues which are most concerning platform users and end consumers.

The Concept of "Platform"

The Platform Guidelines define "platform" as an internet platform, which more specifically is a commercial organisation which, with the support of information technology, enables interdependent entities to interact with each other to jointly create value under its rules and through its matching functions. Accordingly, a "platform operator" refers to an undertaking which provides the premises, transaction matching service, information exchange service and other internet platform services; "undertakings operating on platforms" refer to undertakings which provide products or services on the platforms. (*Article 2, Platform Guidelines*.)

Relevant Market Definition

The Platform Guidelines clarify that the fundamental approach of defining relevant market in relation to platform economy is still substitution analysis, and set out factors to be considered when defining the relevant market. Notably, when defining the product market, the network effects across platforms can be taken into account, and the relevant market may be defined as the market for the products involved in the platform, or even the platform as a whole, if the cross-platform network effect imposes sufficient competition constraints on the platform operators. The Platform Guidelines also indicate that the relevant geographic markets are usually defined as China-wide or regional, but may also be defined globally on a case-by-case basis. (*Article 4, Platform Guidelines.*)

Monopoly Agreement

The Platform Guidelines set out factors to be considered when determining the existence of monopoly agreements, and explicitly provide that horizontal and vertical monopoly agreements facilitated by the use of data, algorithm, platform rules or similar technological means are also prohibited.

In addition, the Platform Guidelines noted that monopoly agreements may be in the form of actual agreements, decisions or any other concerted actions, but exclude parallel conduct made by the relevant undertakings at their sole discretion. When direct evidence is not available, concerted actions may be established based on logically consistent indirect evidence. (*Article 9, Platform Guidelines.*)

Notably, the Platform Guidelines recognise the anti-competitive effects of parity clauses (or MFN clauses) and hub-and-spoke agreements. Parity clauses, where a platform requires undertakings operating on it to offer price, quantity and/or other trading conditions no less favourable than those offered to competing platforms, may constitute vertical monopoly agreements or abusive conduct. (*Article 7, Platform Guidelines*.)

Competing undertakings operating on platforms may, through the platform operator, enter into a hub-and-spoke agreement which has the effect of a horizontal monopoly agreement (*Article 8, Platform Guidelines*).

Abuse of Dominance

The Platform Guidelines recognise six typical conduct in the field of platform economy which, if undertaken by an undertaking with a dominant market position, can constitute abuse of dominance, including:

- Unfair pricing (including both unfairly high and unfairly low pricing).
- Selling below cost.
- Refusal to deal.
- Exclusive dealing.
- Tie-in sales or imposition of unreasonable trading conditions.
- Discriminatory treatments.

The Platform Guidelines provide details on the factors to be considered when assessing the conduct, including potential justifications. But no justifications are specifically provided for unfair pricing.

According to the Platform Guidelines, determination of an undertaking's dominant position is normally required in abuse of dominance cases. Notably, with respect to the assessment of market share, the Platform Guidelines suggest a holistic review of factors such as transaction value and volume, user number, hit volume, usage length and so on. (*Article 11, Platform Guidelines.*)

Other key highlights of the provisions regarding abuse of dominance are set out below.

Selling Below Cost

The key factor in assessing selling below cost remains the determination of "costs." When calculating the cost, the cost correlation among each relevant market in a multilateral market shall be holistically considered. (*Article 13, Platform Guidelines*.)

Refusal to Deal

The Platform Guidelines recognise that it can constitute refusal to deal to set trading hurdles by way of platform rules, data or algorithm. Moreover, the Platform Guidelines refer to essential facility and provide that owners of essential facility may risk abusing market dominant positions if they do not trade with their counterparties on fair terms. A platform may constitute an essential facility, subject to a holistic review of factors such as the data possessed by the platform and the indispensability of the platform. (*Article 14, Platform Guidelines*.)

Exclusive Dealing

The Platform Guidelines expressly provide that the "picking one from two" practice can constitute exclusive dealing. The Platform Guidelines also emphasise that exclusive dealing may be implemented through punitive measures such as lowering search priority and traffic restrictions, or provision of incentives such as subsidy, discount and traffic support. (*Article 15, Platform Guidelines*.)

Tie-in Sales or Imposition of Unreasonable Trading Conditions

The Platform Guidelines note that the collection of non-essential user data may constitute imposition of unreasonable trading conditions (*Article 16, Platform Guidelines*).

Discriminatory Treatment

The Platform Guidelines have a clear focus on the heavily-condemned "big data discrimination" practice of platforms. According to the Platform Guidelines, discriminatory treatment may be established based on customers' purchasing abilities, consumption preference and user habits, or through other discriminatory standards, rules and algorithms. In addition, differences in personal transaction history, individual preference and consumption habits, among others, do not impact the determination that counterparties are under the same conditions.

Notably, discriminatory treatment may be justified if it is a special offer given to new users within a reasonable period of time, or if it is randomly implemented based on fair, reasonable and non-discriminatory terms (*Article 17, Platform Guidelines*).

Enforcement on Platform Companies

SAMR has taken dramatic enforcement actions against platform companies since late 2020. Notably, on 10 April 2021, SAMR imposed a record fine of RMB18.228 billion (USD2.8 billion) on Alibaba Group (Alibaba) for its exclusive conduct, catching worldwide attention. Sherpa's, an English language-based online food delivery platform, was also fined RMB1.2 million (USD0.18 million) on 12 April 2021 for exclusive dealing. In addition, SAMR has announced its formal investigation into Meituan, an online food delivery platform giant.

Alibaba Case

On 10 April 2021, SAMR slapped a record fine of RMB18.228 billion (USD2.8 billion) on Alibaba for abuse of dominance, marking China's first antitrust enforcement in the digital platform sector. The fine amounts to 4% of Alibaba's sales revenue in China in 2019 (the year preceding initiation of the SAMR investigation which was launched in December 2020). SAMR found that Alibaba engaged in exclusive practice (also called "picking one from two" in Mandarin), which violated Article 17(4) of the 2007 AML by significantly restricting competition and harming the interests of both merchants on its platform and end consumers.

The relevant product market recognised by SAMR is online retail platform. Notably, SAMR distinguished the provision of online retail platform services from that of offline retail based on factors, including geographic coverage, length of business hours, cost structure, abilities to meet consumer needs in light of changing market trends, diversity of product offerings, delivery efficiency, barrier to entry and so on. China was considered to be the relevant geographic market.

In finding that Alibaba is a dominant online retail platform in China, SAMR undertook a comprehensive assessment by first considering Alibaba's market share. SAMR found that Alibaba had a share of above 50% on the basis of both its revenue arising from providing platform services and transaction volume on the platform. In addition, SAMR took into account factors, including:

- How competitive the market is.
- Alibaba's strong abilities to control the market.
- Alibaba's solid financial and technical strength.
- Merchants are highly dependent on Alibaba.
- Entry barriers are high.

- Alibaba's significant advantages in associated markets such as logistics/delivery, online payment, cloud computing and so on.

SAMR upon investigation came to the view that Alibaba had abused its dominant position by:

- Prohibiting some of its platform merchants from opening stores and participating in promotional activities on competing platforms, both verbally and explicitly in agreements.
- Putting in place incentive and penalty measures in case of compliance and non-compliance with the exclusivity requirements.

SAMR in its decision highlighted the technical aspects of Alibaba's incentive/penalty measures, which are implemented through online traffic volume control, manipulation of search ranking, supply/refusal to supply promotion resources, with a mixed use of platform rules, data and algorithms.

In general, the SAMR decision on Alibaba is thoughtful, in particular considering that it took the authority only three months to close the investigation. Apart from the details mentioned above, notable aspects of this Alibaba fine in China also include:

- RMB18.228 billion (USD2.8 billion) hits a record high in China's antitrust enforcement (previously the largest was the 2015 Qualcomm fine of RMB6.088 billion (USD930 million)).
- On top of the fine, as part of its decision SAMR also innovatively issued a stand-alone "Administrative Guide Book" (Guide Book) to Alibaba. The Guide Book gives 16 instructions to Alibaba to ensure the effectiveness of the company's future antitrust compliance. These instructions mainly relate to Alibaba's self-review of its antitrust compliance, highlighting its responsibilities as a platform operator to promote fair competition and innovation. In addition, SAMR ordered Alibaba to submit its rectification plan with reference to the Guide Book by 30 April 2021 and submit annual compliance reports in the following three years.
- As the first antitrust decision on big tech's anti-competitive conduct, it evidences again how determined China is to curb the power of digital platforms for the benefit of long-term competition and consumer welfare.
- In contrast with the European Commission which has been mainly targeting US tech firms so far, China appears to focus on homegrown big techs, which inevitably prompts domestic fears as to who is going to be the next.

Sherpa's Case

Sherpa's, an English language-based online food delivery platform, was fined by Shanghai AMR on 12 April 2021 for restricting restaurants from selling on competing platforms of Sherpa's. Designed to attract foreign residents in Shanghai, Sherpa's was found to have a market share of over 50% in the relevant market. Through "picking one from two" Sherpa's has effectively caused 69 out of 72 restaurants to have ceased selling on competing platforms of Sherpa's in Shanghai. Shanghai AMR decided that Sherpa's had violated Article 17(4) of the 2007 AML which prohibits exclusive dealing by dominant players and imposed a fine of RMB1,168,644 (USD182,659), amounting to 3% of Sherpa's revenue in 2018. Also notably, the decision of Shanghai AMR is remarkable in that it contains comprehensive economic analysis, including, among others, how hypothetical monopolist test (that is, the SSNIP test) was applied. This demonstrates that what is escalating in China is not only the authorities' scrutiny over online platforms but also their capabilities to rein in infringing players.

Meituan Case

Meituan, the largest online food delivery platform in China, was fined for abuse of dominance through requiring customers to exclusively deal with Meituan. Based on SAMR's penalty decision published on 15 October 2021, Meituan:

- Urged the restaurants to enter into exclusivity agreements with it: uncooperative restaurants could face higher commission rates (approximately 5-7% higher than the rates for co-operative restaurants) and delay or refusal for listing on the Meituan platform.
- Took various measures to ensure implementation of the exclusivity agreements, including conditioning sales staff's bonus on implementation of exclusive agreements and setting up a monitoring system based on big data, punishing non-compliant restaurants by requesting a punitive charge, lowering their rankings or even delisting them from the Meituan platform.

The fine imposed by SAMR, which is RMB3,442,439,866 (USD540,677,523), accounts for 3% of Meituan's revenue in the financial year of 2020. After the Alibaba and the Sherpa's fines, the Meituan decision marks the third time China has imposed antitrust fines on "choose one from two" by Chinese digital platforms.

APIs Guidelines

On 13 October 2020, the AMC released the draft APIs guidelines for public consultation. A year after, the AMC formally published the APIs Guidelines on 18 November 2021. This is the first set of antitrust guidelines in China focusing on APIs. Up to 2023, there have been more than ten antitrust cases regarding APIs

and this set of guidelines has further reflected China's enduring antitrust enforcement priority towards the pharmaceutical industry.

The Concept of "APIs"

APIs stands for active pharmaceutical ingredients. The APIs Guidelines define "APIs" as raw materials that comply with the relevant laws and regulations on drug administration and are used for drug production (particularly, the active ingredients in the drugs), including both chemical APIs and traditional Chinese medicinal materials (*Article 2, APIs Guidelines*).

Relevant Market Definition

Regarding market definition, the APIs Guidelines provide that the analysis of demand substitutability may be conducted based on the product characteristics, quality standards, purpose, price and other factors of APIs. When necessary, supply substitutability analysis may be conducted simultaneously based on the factors including market access, production capacity and technical barriers. It may be necessary to further segment the relevant product markets into APIs manufacturing markets and APIs distribution markets. The APIs Guidelines further specify that a single type of APIs is generally considered a separate product market, but different types of APIs may also belong to the same market, if they are substitutable. (*Article 4, APIs Guidelines.*)

Regarding relevant geographic market, the APIs Guidelines provide that given that different jurisdictions impose different qualification and regulatory standards for APIs production and distribution, the geographic market is generally defined as a national market. However, certain factors such as characteristics and costs of transportation of certain types of APIs may also render a narrower geographic market. (*Article 4, APIs Guidelines.*)

Monopoly Agreement

The APIs Guidelines specify that the following conduct will constitute a monopoly agreement:

- Discussing and determining production quantity, sales quantity, sales price, customers, sales region and other information of APIs among API manufacturers by way of joint production agreement, joint procurement agreement, joint sales agreement, joint bidding agreement and so on.
- Discussing and coordinating sensitive information such as sales price, production capacity and output, and production and sales plan of APIs among API manufacturers through a third party (such as a distributor or a downstream drug manufacturer) or by way of trade fair or industry conference.
- Agreeing with any competitors not to manufacture or sell APIs and obtaining compensation therefrom.
- Discussing and coordinating in respect of procurement quantity, procurement targets, sales price, sales quantity, sales targets and other information among API distributors.
- Directly fixing the resale price or specifying the minimum resale price of APIs distributors or drug manufacturers by means of written agreements, oral agreements, letters, emails or price adjustment notices, and so on.
- Covertly restricting the resale price of APIs distributors or drug manufacturers by means of fixing the distributors' profits, discounts or rebates, and so on.

(*Articles 6-7, APIs Guidelines.*)

Besides, the APIs Guidelines also provide that the implementation of geographic restriction or customer restriction by a manufacturer may also constitute a vertical monopoly agreement. Moreover, the API Guidelines specifically prohibit undertakings from organising or providing substantial help to others to reach monopoly agreements. (*Articles 7 and 9, APIs Guidelines.*)

Abuse of Dominance

The APIs Guidelines identify five typical forms of conduct in the API field that could be deemed abuse of market dominance if the undertaking concerned has a dominant position:

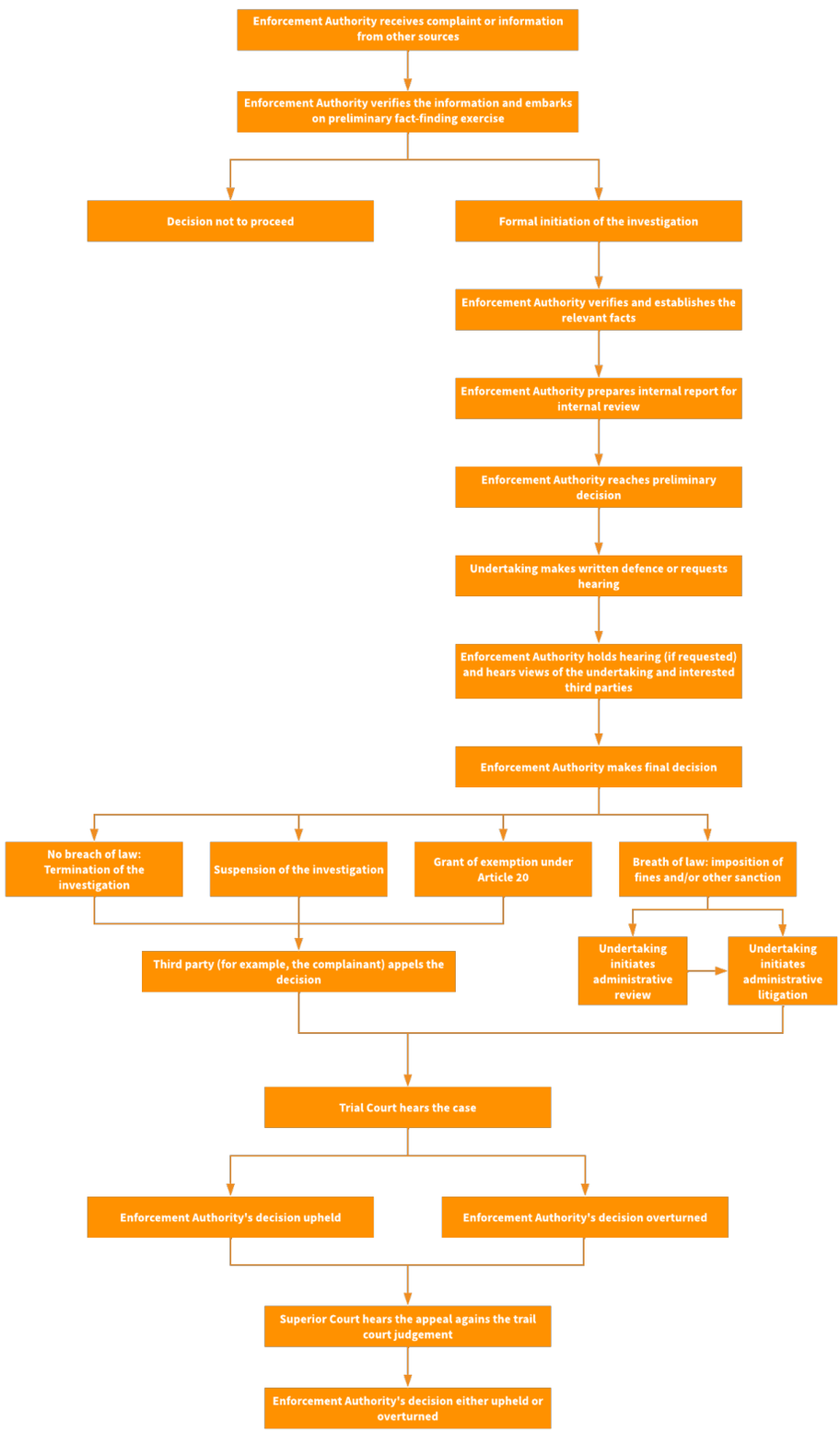
- Unfair pricing.
- Refusal to deal.
- Exclusive dealing.
- Tie-in sales or imposition of unreasonable trading conditions.
- Discriminatory treatments.

(*Article 14, APIs Guidelines.*)

The APIs Guidelines further discuss the determination of collective dominance (two or more undertakings in the same market). The determining factors may include the market structure, degree of homogeneity of the concerned products and degree of co-ordination between the concerned undertakings. Where those undertakings sharing collective dominance in a relevant market cooperate with each other in committing monopoly abusive conduct as prescribed by the APIs Guidelines, such act may constitute abuse of their collective dominance. (*Article 22, APIs Guidelines.*)

Investigation Process: Flowchart

Practical Law China
Investigation Process



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