



Asia Pacific Antitrust & Competition

Client Alert | July 2019

China's SAMR Ramps Up Antitrust Enforcement

Since September 2018, the State Administration for Market Regulation ("**SAMR**"), the consolidated Chinese competition authority, has strengthened its enforcement of the China Anti-Monopoly Law (the "**AML**"). Given the increasing importance of antitrust law compliance in China, business operators should:

- ensure there is a compliance program in place and that it extends to all necessary areas of the business;
- check that the compliance program has been reviewed recently and, if not, see if it needs to be refreshed, particularly in view of new enforcement developments; and
- prepare in advance in order to help the business team avoid or mitigate the antitrust risk in daily operations, particularly given current US-China trade tensions.

1. Increasing costs for violating the AML

- **Expanding the fine calculation basis.** The Director General of the Anti-Monopoly Bureau of SAMR, Wu Zhenguo, has now said publicly that fines would be based on the **total revenue of the liable party/parties in China** (and not, as before, the revenues of the product(s) affected by the infringement).¹ This approach has been reflected in two recent enforcement cases.
- **Clarifying the criteria of identifying liable entities.** If the parent company of a group engages in determining the sales activities of a certain subsidiary, the revenue of the whole group may be used as the basis of fine calculation even if the other subsidiaries are not involved in the concerned conduct.
- **Potentially more "confiscating illegal gains".** SAMR will likely impose the "confiscating illegal gains" penalty more often in future, even in cases where the monetary fine is already high.
- **Potential individual enforcement and criminal sanctions for serious AML violations.** Some members of China's central-level antitrust advisory board and competition regulator have proposed that at least for serious violations of the AML, such as hard-core cartels, the AML should provide for individual liability for senior management and potentially even criminal sanctions.

2. Engaging active local enforcement networks and furthering international cooperation

- **Broad delegation of antitrust investigation powers to local bureaus.** The SAMR adopts a "general delegation" approach, as opposed to a "case-by-case" approach, as provided in a notice published by the agency in January 2019. The "general delegation" approach means more active local enforcement and will in practice increase the number of cases taken nationwide, given the limited manpower at the central level.
- **Further cooperation with the European Commission ("EC") in probing antitrust violations.** In April 2019, SAMR signed two cooperation agreements with the EC regarding competition policy. The new cooperation framework may facilitate closer communication between SAMR and the EC and coordination of enforcement activities, which will help both agencies in investigations involving concurrent jurisdictions.

3. More sophisticated approach towards abuse of dominance cases

- In recent cases, SAMR has analysed minimum purchase requirements, most favoured nation clauses, discount/incentive schemes etc. and to what extent such factors by themselves and/or together with other factors could be seen as "abuse of dominance".

- **Greater involvement of economic analysis.** In a recent exclusivity case, SAMR adopted the Lerner Index, a measure of the market power of a firm, to try to further prove that the problematic behaviours not only resulted in foreclosure effects, but might also have strengthened the dominant market position and reduced price competition among the leading suppliers of the relevant products in the China market.
- **Adopting the concept of collective dominance.** In another abuse of dominance case in the pharma sector, SAMR found close ties between the two parties to be a key factor in finding collective dominance. The draft 'Guidelines against Abuse of Dominance' provides a list of non-exhaustive factors for determining collective dominance, namely characteristics of the relevant commodity, transparency of the relevant market and consistency of conduct of operators.

4. Introducing consolidated antitrust enforcement guidelines

- On 1 July 2019, SAMR published three interim antitrust rules addressing anti-competitive agreements, abuse of dominance and abuse of administrative power. These interim rules signal a key step forward for the SAMR in harmonising enforcement rules and practices under the consolidated agency.
- The Interim Rules against Monopoly Agreements confirm that the imposition of minimum or fixed resale price (i.e., resale price maintenance or RPM) is considered per se illegal, which has been the approach taken by the SAMR and its predecessor agencies in past enforcement cases. The proposal on safe harbour provisions (which were proposed in the earlier consultation draft) are deleted from the current version. Also, the interim rules clarify important aspects of the leniency programme, namely that
 - first-in will be eligible for full immunity or at least an 80% reduction in fines,
 - second-in will be eligible for a 30% to 50% fine reduction; and
 - third-in will be eligible for a 20% to 30% fine reduction.
- The Interim Rules against Abuse of Dominance imply that in "new economy" markets such as the internet sector, market share alone may not accurately reflect the market strength of an operator. They list a number of additional factors to be taken into account to determine whether an undertaking operating in the "new economy" possesses a dominant market position, including the relevant industry's competition characteristics, number of users, business model, network effects, lock-in effects, technological characteristics, market innovation, possession of and the ability of processing relevant data and the power of the operator on the associated markets. It remains to be seen from future enforcement activities or judicial decisions how these factors are evaluated and applied in specific cases.
- Also, the Interim Rules against Monopoly Agreements and the Interim Rules against Abuse of Dominance clarify the requirements and procedures for suspending an antitrust investigation. For a company under an antitrust investigation, it may be able to apply to SAMR for suspending the ongoing antitrust investigation if the case satisfies the following requirements:
 - The suspected unlawful behaviours under investigation are not hardcore cartels (including price fixing, output restriction and market sharing); and
 - The investigation is ongoing and SAMR has not been able to identify illegal behaviour.

We will further elaborate the developments reflected in these guidelines in later alerts.

¹ See *Interview with the Director General of Anti-Monopoly Bureau of SAMR WU Zhenguo*, China Market Regulation Newspaper, 22 May 2019.

Baker McKenzie has formed a multidisciplinary and multijurisdictional team to assist clients with these issues. If you have any questions, please reach out to any of the individuals listed below, or your primary Baker McKenzie contact.

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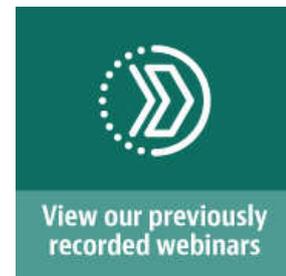
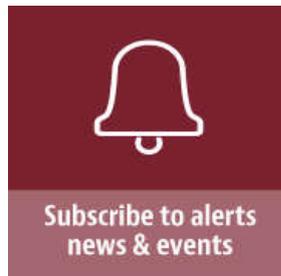
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