金杜律师事务所
KING&WOOD
MALLESONS

At a Glance: China's Antitrust Enters Its 15th Year

2022 witnesses China's antitrust law enters its 15th year. Since the effectiveness of the Anti-monopoly Law ("**AML**") in 2008, China's antitrust agencies have been fairly active to enforce the law. While respecting the international experiences in antitrust enforcement and embracing the global trends such as shifting focus on technology companies and digital economy, the Chinese regulators have not been shy to maintain its own gesture to continue to shape China as one of the most important antitrust regimes in the world.

This article will highlight some key achievements and trends of China's anti-competitive conducts enforcements, with review of relevant cases as illustrations.

Institutional Upgrade – A Revamped Antitrust Enforcement Agency

In November 2021, China's State Council announced the establishment of the State Admiration for Anti-Monopoly ("**SAMA**"), which elevated the previous antitrust enforcement unit under the State Administration for Market Regulation ("**SAMR**") to the deputy ministerial-level, symbolizing a major development in China's antitrust enforcement landscape.[1] SAMA is composed of three bureaus, Bureau I for antitrust investigations (monopoly agreements and abuse of dominance), Bureau II for merger control, and Bureau III for policy making. In the two enforcement bureaus, there are divisions specifically for digital/platform companies.

With elevated seniority and added resources, it is expected that SAMA will be more active in its enforcement, emphasizing China's growing commitment to its antitrust regulatory regime.

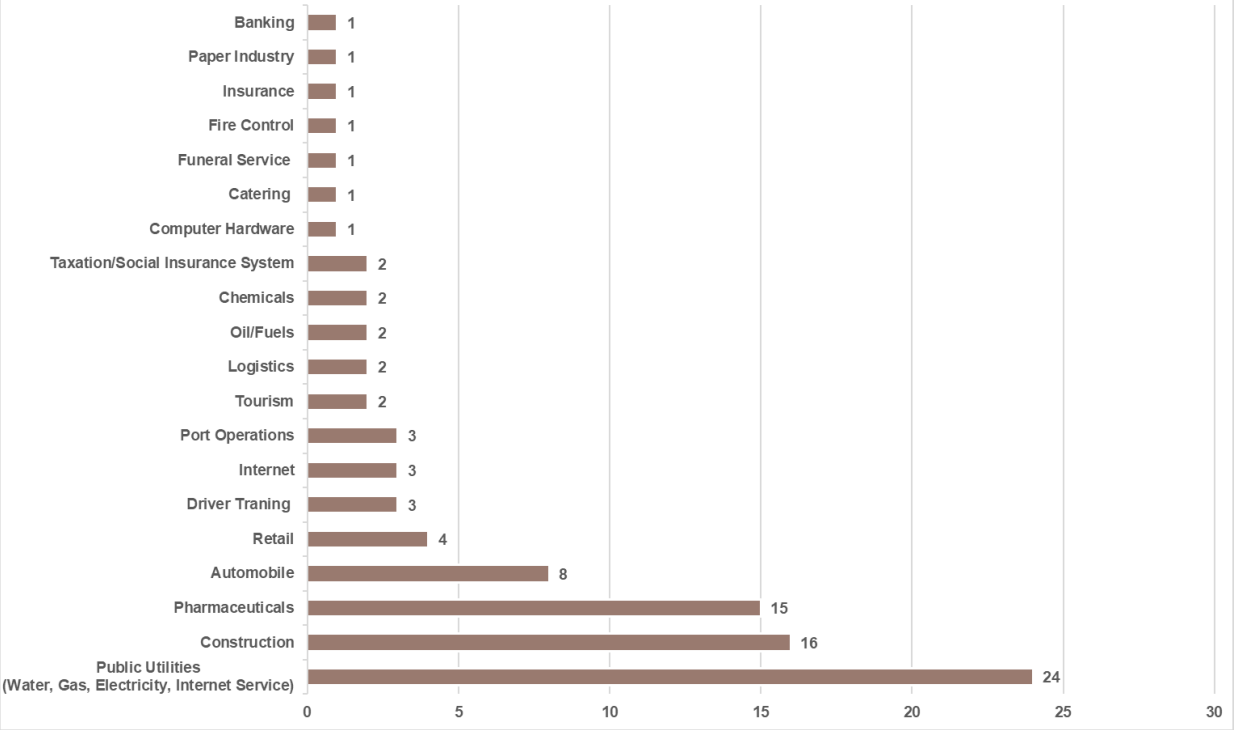
Provincial AMRs have also been active in enforcing against cases that influence their own administrative areas. In December 2018, SAMR issued a notice to grant an umbrella authorization to provincial AMRs to carry out antitrust enforcement at the local level, which further incentivized the local regulators. In recent years, we have witnessed more frequent and intensified antitrust enforcement by the local AMRs. Taking year 2021 as an example, among 37 cases concluded, only 4 cases were investigated by SAMR directly, i.e. around 89% of the cases were handled by provincial AMRs.

China's Antitrust Enforcement at a Glance

As of 31 December 2021, the Chinese regulators have concluded 181 decisions, 97 of which were related to horizontal monopoly agreements, 20 were related to vertical monopoly agreements, and 64 were related to abuse of dominance.

[1] Before 2018, China's antitrust enforcement was performed by three antitrust agencies, i.e. merger review under the Ministry of Commerce ("**MOFCOM**"), price-related antitrust investigations under the National Development and Reform Commission ("**NDRC**"), and non-price related investigations under the State Administration for Industry and Commerce ("**SAIC**"). In 2018, China consolidated their functions into a newly established government agency, i.e. SAMR.

Sector-wise, for the past 5 years (2017-2021) public utilities, constructions, pharmaceuticals (especially API), automobile, and sectors which may affect people's daily lives are under intensive enforcement.



Horizontal Monopoly Agreements:

To date, horizontal agreements involving price-fixing, market allocation, output restrictions and joint boycotting, which are explicitly prohibited under Article 13 of the AML, have been an enforcement priority. Typical cases include the *LCD Panels Case* (involving price-fixing cartel) [2], the *Cement case* (involving price-fixing and agreement on production quantity) [3] and the *Payment Encryption Device Case* (sales market segmentation)[4]. Some other key features of the horizontal monopoly agreement enforcement include:

- **Concerted practice and algorithm conspiracy under spotlight:**

In addition to traditional horizontal monopoly agreement, concerted practice have also been caught by the enforcement authority,

The Estazolam case:

On 22 July 2016, the National Development and Reform Commission ("**NDRC**", the predecessor before SMAR which was responsible for price-related antitrust investigations) sanctioned three pharmaceutical companies for engaging in price fixing and joint boycotts in relation to estazolam tablets and active pharmaceutical ingredients (API) in breach of Articles 13(1)(1) and 13(1)(5) of the

[2] See ***Chuyun Xiao***, *The Chinese NDRC imposes significant fines on overseas manufacturers of LCD Panels (Samsung / LG / AU Optronics / Chunghwa / Chimei InnoLux / HannStar), 4 January 2013, e-Competitions China & Anticompetitive practices, Art. N° 50529.*

[3] Decision available at https://www.samr.gov.cn/fldj/tzgg/xzcf/202102/t20210209_326018.html.

[4] See ***Andy Huang, Adrian Emch***, *The Chinese SAIC fines three payment encryption device suppliers for market partitioning, 4 November 2016, e-Competitions China & Anticompetitive practices, Art. N° 82381.*

AML. The three companies were the only active licensed producers of estazolam, a drug used to treat insomnia. Estazolam is strictly controlled by the state and is listed on the National Essential Medicines List and the National Low-Cost Medicines List. According to the NDRC, after the introduction of the low-cost medicines policy in 2014, the three companies agreed to stop selling estazolam API to external parties and to increase the price of estazolam tablets. As a result, the vast majority of the estazolam tablet manufacturers stopped production due to shortage of supply of estazolam API. Since December 2014, the price of estazolam tablets produced by the three companies increased significantly, with the magnitude and timing of the price increases being uniform across the companies. This greatly increased patients' financial burden and harmed the interests of consumers.[5]

In this case, the NDRC found that two companies (among the three) communicated with each other through meetings, phone calls and text messages to effectuate the cessation of supply and the price hike. The third company (Changzhou Siyao) did not actively participate in the conspiracy. However, it did not object to the collusion and later followed the lead of the other two companies. The NDRC concluded that three companies' highly consistent market actions (while lacked proper justification) constituted a concerted practice.

The *Anti-monopoly Guidelines of the Anti-monopoly Commission of the State Council on Platform Economy* ("**Guidelines on Platform Economy**") point out companies with competing relationship may collect and exchange sensitive information such as price, sales volume, cost, and customers in use technical means such as data, algorithms and platform rules to achieve collusive behaviours[6], which means that algorithm conspiracy is also under the enforcement radar.

- **Widened scope of enforcement:**

In addition to the traditional hard-core violations such as price fixing, market allocation and RPM, several antitrust guidelines have also highlighted the risks for joint procurement, joint sales, joint R&D etc.

Industry-Specific Regulations	Automobile Industry	Pharmaceutical Industry
Joint Production and Joint Procurement	The **Anti-monopoly Guidelines on Automobile Industry** ("**Automobile Industry Guidelines**") adopts a case-by-case assessment framework analysis, while pointing out that joint production agreements and joint procurement agreements are generally conducive to the improvement of efficiency and competition and these agreements contribute to the increase	Given the high market concentration in the pharmaceutical industry, the *Anti-monopoly Guidelines on Active Pharmaceutical Ingredients* ("**API Guidelines**") clearly states that companies should avoid entering into agreements with competing pharmaceutical manufacturers, such as joint production and joint procurement, etc[8].

[5] See ***Xiaoye Wang, Allan Fels, Wendy Ng, Adrian Emch***, *The Chinese NDRC sanctions three pharmaceutical companies for price fixing and joint boycotts (Huazhong Yaoye / Shandong Xinyi / Changzhou Siyao), 22 July 2016, e-Competitions China & Anticompetitive practices, Art. N° 88619.*
[6] See Article 6 of the Guidelines on Platform Economy; No.1, Article 1, Section 1, Chapter 2 of the Beijing Platform Guidelines.
[8] See Article 3 of the Active Pharmaceutical Ingredients Guidelines.

Industry-Specific Regulations	Automobile Industry	Pharmaceutical Industry
	of consumer welfare. Therefore, companies may claim exemption on this basis. [7]	
Joint Sales	/	The API Guidelines provides that companies should avoid exchanging sensitive information, such as the sales price and production and sales plan of pharmaceuticals through third parties, such as pharmaceutical distributors and downstream manufacturers.[9]

Shanghai Administration of Industry and Commerce ("**Shanghai AIC**", as the local counterpart of SAIC, now Shanghai AMR) have also investigated the first case regarding joint procurement under a group purchasing organization ("**GPO**") arrangement in the pharmaceutical industry. It was decided that the GPO itself was not illegal, especially considering the potential efficiency that a GPO could generate. Nevertheless, joint procurement may run the risk of constituting a monopoly agreement and "jointly boycotting transactions", if the agreement would have the potential effect of eliminating or restricting competition in the market.[10]

Vertical Monopoly Agreements:

The enforcement efforts have also actively targeted RPM agreements. For instance, as early as in 2013, NDRC has decided *Liquor Case* and *Milk Powder Case*, in which infringing companies were sectioned significant fines for implementing RPM restrictors on downstream distributors.[11]

- **Divergence between administrative enforcement and court decision with respect to RPM**

In China, there was a notable trend for the divergence in the approach to RPM between the administrative investigation and private litigations. The administrative enforcement has been applying a "prohibition + exemption" approach, i.e. RPM is in principle prohibited, unless the company under investigation is able to demonstrate that is eligible for an exemption under Article 15 of the AML, which sets a very high bar and there has been no successful precedent to date for relying on this exemption.

[7] *See* Article 5 of the Automobile Industry Guidelines;
[9] See Article 6 of the Active Pharmaceutical Ingredients Guidelines.
[10] Decision available at https://www.samr.gov.cn/fldj/tzgg/xzcf/201807/t20180717_301600.html.
[11] See ***Richean Li***, *The Chinese Competition Authorities impose hefty fines on two State-owned liquor distillers for resale price maintenance (Kweichow Maotai / Yibin Wuliangye), 22 February 2013, e-Competitions China & Anticompetitive practices, Art. N° 51456*; ***Susan Ning***, *The Chinese NDRC imposes fines on several foreign infant milk formula companies for price fixing (Nestlé, Abbott Laboratories), 7 August 2013, e-Competitions China & Anticompetitive practices, Art. N° 55065*.

In contrast, in *Rainbow v. Johnson & Johnson* (2013)[12] and *Gree* (2016 first instance judgment), the court required the plaintiff to not only prove the existence of RPM conduct, but also that such conduct had restricted competition.

Yutai case (first instance by Hainan High Court in 2017 and appellant decision by the Supreme People's Court in 2019) provided long-awaited clarity – the courts held that as the administrative enforcement is for preventative purpose, the antitrust agencies are not required to bear the burden to prove that the alleged RPM would cause actual harm or restrict competition.[13] In 2018, during the final appeal of *Gree*, the Guangdong High Court further recognised the view taken in the *Yutai case* – while a plaintiff in private litigation needs to prove the anticompetitive effect of alleged RPM conduct and further prove the resulting losses, the antitrust authorities are not required to bear such evidentiary burdens in an administrative investigation.[14]

It is also notable that the Draft Amendments emphasized that an agreement involving RPM will not be prohibited if the company concerned can prove that such agreement does not have the effect of eliminating or restricting competition. Nevertheless, in light of previous cases, in an administrative investigation, it may still be very difficult to prove that the RPM practice does not have anti-competitive effects.[15]

- **High lightened risk with respect to non-pricing vertical agreement**

With respect to the non-pricing vertical agreement, the Automobile Industry Guideline took the attitude that geographical restrictions and customer restrictions carried out by companies without significant market power are generally presumed not to have the effect of eliminating or restricting competition. However, specific types of geographical restrictions and customer restrictions (such as restrictions on passive sales and restrictions on cross-supply between distributors, etc.) may weaken the intra-brand competition, divide the market, and form price discrimination, thus are in general not allowed. [16.]

Abusive Behaviors:

To date, abuse of a dominant market position has been subject to fewer enforcement activities in compared with monopoly agreements. However, we witnessed that the agency's experience have significantly grew by deciding landmark cases (such as Tetra Pak below) and the enforcements against

[12] See ***Susan Ning***, *The Chinese Shanghai Higher Court renders final judgment in first antitrust private action* (Rainbow / Johnson & Johnson)*, 1 August 2013, e-Competitions China & Anticompetitive practices, Art. N° 54937*; ***Zhan Hao***, *The Shanghai Higher Court decides on the first private antitrust action involving vertical agreements (Rainbow / Johnson & Johnson), 1 August 2013, e-Competitions China & Anticompetitive practices, Art. N° 66633.*

[13] See ***Gao Liang***, *The Chinese High People's Court in Hainan fines a company for anticompetitive distribution agreement and affirms the principle of prohibition to be applied on a case-by-case basis (Hainan Yutai), 21 December 2017, e-Competitions China & Anticompetitive practices, Art. N° 86245*.

[14] No. (2016) Yue Min Zhong 1771, Judgment available at http://wenshu.court.gov.cn/content/content?DocID=c511ba00-956c-4d2c-ae2f-a97a00be5dbe&KeyWord=东莞市横沥国昌电器商店.

[15] See the case of implementation of a monopoly agreement by a pharmaceutical company (Administrative Penalty Decision Guo Shi Jian Chu [2021] No.29). In this case, the investigated business operator argued that the market share of its product was relatively low and the relevant conduct would not affect market competition. However, the SAMR deemed that the defense was not established based on the following reasons: (i) after an expert demonstration meeting convened by members of the expert advisory group of the Anti-monopoly Commission of the State Council, the experts unanimously agreed that the purpose of a RPM is to eliminate competition; and (ii) the monopolistic conduct of the business operator directly or indirectly raised the prices of relevant products, resulting in retail prices and hospital prices not being reduced to the competitive level they should have been, thus damaging the interests of consumers.

[16] No.4, Article 6 of the Automobile Industry Guideline.

abusive behaviours have become more complex and sophisticated. We expect that the enforcement in this area will gain momentum.

Tetra Pak

On 9 November 2016, the SAIC imposed a fine of RMB 668 million (approximately USD 100.6 million) against Tetra Pak for abuse of dominance. A ground-breaking feature of the Tetra Pak decision is that for the first time loyalty rebates have been condemned as a form of abusive conduct under the catch-all provision of Article 17 of the 2007 AML. The SAIC found that Tetra Pak had abused its dominance by imposing a loyalty rebate policy for its packaging materials. The rebates provided included retroactive cumulative rebates, i.e. after customers reached certain thresholds, additional discount percentages/rebates would apply to the entirety of the volume purchased during certain periods, not just the increment above the relevant threshold; and individualised target rebates where the rebates were conditional on customised targets for different customers. The SAIC considered under the specific market conditions, this policy in essence induced customers to purchase more than otherwise they would do from Tetra Pak and foreclosed competitors from the market[17] .

- **Increased enforcement against Internet platform companies**

In November 2020, SAMR published its draft *Platform Economy Antitrust Guidelines* for public consultation ("**Draft Platform Guidelines**") (the effective version was then promulgated on February 7, 2021[18]). This signaled that SAMR is poised to take a hard stance on antitrust enforcement in the digital space. About six weeks after the publication of the Draft Platform Guidelines, SAMR launched an antitrust investigation into Chinese internet giant Alibaba over alleged monopolistic behavior.

Alibaba exclusive dealing case:

In the end of 2020, SAMR initiated an investigation against Alibaba. SAMR targeted Alibaba's practice of forcing merchants to enter into exclusive deals with Alibaba, i.e. "choose one from two". In April 2021, SAMR imposed a fine on Alibaba of RMB 18.2 billion (approximately USD 2.9 billion). This figure, which represents approximately four percent of Alibaba's annual sales in China in 2019, constitutes the largest fine ever imposed by the Chinese antitrust agencies.

SAMR found that Alibaba abused its dominant market position by (i) prohibiting certain merchants on its platform from participating in its competitors' promotional activities, and (ii) implementing a reward and penalty framework for merchants based on their degree of loyalty. In its decision, SAMR noted that Alibaba applied certain technical measures to control search rankings, manipulate sales promotions and downgrade online ratings of non-complying merchants. Along with the fine, SAMR issued an unprecedented "administrative instruction" to Alibaba that required the company to submit annual compliance reports to SAMR for the next three years. [19]

[17] Decision available at https://www.samr.gov.cn/fldj/tzgg/xzcf/201703/P020190529595834177232.pdf.
[18] See https://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207_325967.html
[19] See***Cheng Liu, Nick Torres, Yang Jingru, Audrey Yumeng Li****, The Chinese State Administration for Market Regulation and Shanghai SAMR issue two administrative decisions punishing two Internet platform companies for engaging in "either-or choice" practices on their in-platform merchants (Alibaba / Shanghai Food Paishi Trade Development), 10 April 2021, e-Competitions China & Anticompetitive practices, Art. N° 100851.*

It is clear that China is stepping up its scrutiny of high-tech/platform companies. More monopolistic conducts in this sector, such as data enabled discrimination, excessive data collection, refusal to deal, may be under the agency's radar.

- **Private litigation in Internet sector in relation to abusive behaviors are heating up**

In recent years, we also witnessed a booming trend for civil litigations in Internet sector. Relevant cases mainly focus on whether the emerging business models constitute abuse of market dominance. The landmark civil litigation, *Qihoo v Tencent* (the so-called "3Q war", held by the Supreme People's Court in 2014) illustrates the difficulties in establishing dominance in the Internet market; however, shadowing the significant change of the competition landscape and also a change of attitude of closer scrutiny in Internet industry, how the judicial will decide in the recent Internet companies' disputes (e.g. *J.D.com v Taobao* for exclusive dealing[20], and *Doyin v Tencent* for platform foreclose[21]) are yet to be seen.

Qihoo v Tencent

On 16 October 2014, the Supreme People's Court dismissed the abuse of dominance claims brought by Qihoo 360 against Tencent, concluding that Tencent does not hold a dominant market position despite the fact it has a market share of over 80% in both the PC and mobile instant messaging markets. Instead, the court found that the market for instant messaging was a competitive one and Tencent did not have sufficient control over sales prices or other trading conditions to harm competition.

The court also adopted an effects-based approach to abuse of dominance, but concluded that Tencent's conduct did not cause a noticeable impact on competition, as at that time, there were sufficient alternatives in the instant messaging market for consumers to choose from[22].

Distinct from the focus on dynamic competition during the "3Q war" era, the market structure of platform economy in certain areas has been relatively stable and gradually solidified in recent years. The top competitors in these markets have already acquired a large number of users and their data by taking advantage of their competitive advantages. When determining the market dominant position, the authorities may be more inclined to focus on the changes of market structure over a period of time, while reducing the weight of consideration of dynamic competitive factors, which have great uncertainty.

Procedural-wise: leniency and commitment mechanism

In 2019, SAMR release the *Guidelines on Application of Leniency Program in Horizontal Monopoly Agreement Cases* ("**Leniency Guidelines**") and the *Guidelines on Undertakings' Commitments in Anti-Monopoly Cases* ("**Commitment Guidelines**"). The Leniency Guidelines provide more clarity about the criteria that SAMR uses to rank leniency applicants and assess penalties in cartel cases. Companies may submit a leniency application before the SAMR gathers sufficient evidence. [23] Typically, up to three applicants may receive certain reductions in fines and illegal gains, depending on their place in the queue for leniency applications, and the degree of cooperation in providing key evidence. [24]Under the Commitment Guidelines, if the investigated company offers sufficient remedial measures to correct its

[20] See https://www.thepaper.cn/newsDetail_forward_10152878.
[21] See https://www.163.com/tech/article/G69BUNB400097U7R.html.
[22] (2013) Min San Zhong Zi No. 4, Judgment available at https://www.court.gov.cn/zixun-xiangqing-6765.html.
[23] See Article 4 of the Leniency Guidelines;
[24] See Article 11 of the Leniency Guidelines;

behaviour and to rectify adverse impacts to the market before SAMR gathers sufficient evidence of a violation, SAMR may decide to suspend the investigation. [25] The Commitment Guidelines also clarifies that the commitments mechanism applies to all anticompetitive conduct, except the typical hard-core cartel practices, i.e., price fixing, output restrictions, or market segmentation.[26]

The enforcement actions have demonstrative that a proactive approach and full cooperation are important for companies to take advantage of leniency and commitment mechanism. For instance, in the *Milk Powder Case*, the infringing companies were granted full immunity or imposed fines ranging from 3% to 6% of their sales turnover in the previous year. The result depending on the varying extent to which each company provided important evidence, cooperated with the investigation and carried out self-rectification. [27] *Lenovo case* clarified that the commitment/suspension mechanism may also be applied to RPM cases. In addition to the usual commitment measures, such as cessation of conduct, self-examination and strengthening of compliance training, the commitment measures in the *Lenovo case* also included price reductions for downstream dealers or sharing of benefits with consumers through promotions. [28]

Looking forwards: Amendments to the AML and a New Norm of Enforcement

On October 23, 2021, the Standing Committee of China's National People's Congress published a second draft of amendments to the AML ("**Draft Amendments**"). The Draft Amendments follow an earlier draft released by SAMR in January 2020. It is the first time that the AML is being amended since its promulgation in 2008. It is expected that the amendments to the AML will be formally adopted in late 2022.

Excepted those illustrative above, some other key changes in the Draft Amendments in relation to conduct enforcement include:

- Formalizing "safe harbour" rules for monopoly agreements: The Draft Amendments, for the first time, provides the "safe harbour" for determination of monopoly agreements at the legislation level, i.e. if a company can prove that its market share in the relevant market is lower than the threshold set out by the antitrust enforcement authority under the State Council, the agreements it entered into shall not be regarded as monopoly agreements, unless there is evidence which demonstrates that the monopoly agreement eliminates or restricts competition.[29] However, whether the safe harbour rules can be formally adopted is under great debate, considering the monopoly agreement explicated prohibited under the AML are mostly viewed as hard-core or per-se illegal under the rules in U.S. and EU.
- Regulating the hub-and-spoke agreement: Article 18 of the Draft Amendments provides that an undertaking shall not organize other undertakings to reach monopoly agreements or substantially facilitate others to reach monopoly agreements. The article is widely viewed as aiming to regulate

[25] See Article 1 of the Commitment Guidelines;
[26] See Article 2 of the Commitment Guidelines;
[27] See ***Michael Gu***, *The Chinese Competition Authority announces penalties of CNY 668 million imposed for resale price maintenance on the market for baby milk formula (Baby formula cartel), 7 August 2013, e-Competitions China & Anticompetitive practices, Art. N° 58766*.
[28] Decision available at https://www.samr.gov.cn/fldj/tzgg/xzcf/202003/t20200309_312674.html.
[29] See Article 19 of the Draft Amendments.

"hub-and-spoke" arrangement by legal practitioners, which would fill the gap for current antitrust legislation and enforcement. [30]

- The Draft Amendments also increase penalties for anti-competitive behaviours and introduce individual liabilities. Under the Draft Amendments, SAMR can impose an aggravated fine of up to two to five times the statutory fine (which is 1%-10% of the sales revenue in the last fiscal year) when it finds that the party's merger violation was "extremely serious," "caused extremely adverse impacts," and "resulted in extremely serious consequences." [31] Individuals who are directly responsible for concluding monopolistic agreements may face fines up to RMB 1 million (approximately USD 156,000), or even criminal liability if it is also a violation of criminal law.[32]

Looking forward, China's AML will continue to play a significant role in the field of global competition law. More than a decade into its antitrust regime, China is signalling a commitment expand its enforcement efforts and to increase further the penalties associated with antitrust non-compliance. AML enforcement will in no doubt become a new norm in China.

Authors: Cheng LIU (partner), Audrey Yumeng LI (counsel) and Shiwei XU (lead associate) from King & Wood Mallesons.

Contacts

For further information, please contact:

Cheng LIU
Partner, Beijing
+86 10 5878 5170
liucheng@cn.kwm.com

[30] See Articles 18 and 56 of the Draft Amendments.
[31] See Article 63 of the Draft Amendment.
[32] See Article 62 and 67 of the Draft Amendments.

Mr. Liu is a partner at King and Wood Mallesons. His areas of practice includes antitrust and competition law, cross-border M&A and corporate investment, and international trade.

Mr. Liu has more than 15 years working experience in antitrust and competition law since 2005. He regularly advises clients on Chinese antitrust and competition matters and has represented numerous multinational companies and Chinese companies in their merger filings at Chinese authority, including a number of high profile transactions. He also provided advice on antitrust compliance for the clients' business model, and delivered antitrust trainings. He also advised clients in dealing with antitrust investigations by the authorities. In the past years, Mr. Liu has been recognized by many global famous legal media as one of the leading competition lawyers in China, such as IFLR 1000 (2013-2021), Global Competition Review and Asialaw Profiles, and so on. He has been ranked as one of the highly recommended lawyers in both of Antitrust and Competition, and WTO/International Trade in China by The Legal 500 in its 2016 Asia Pacific rankings. In 2016, Mr. Liu has been ranked as a "Leading Individual" by Chambers Asia Pacific Guide. Cheng is also appointed as the competition law expert by Hubei Province Administration for Market Regulation.