

A photograph of a hand holding a ping-pong paddle and another hand holding a ping-pong ball on a table. The image is overlaid with a dark purple, semi-transparent geometric shape that covers most of the frame. The text is white and positioned on the left side of the image.

SLAUGHTER AND MAY

Competition law in China

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1. Introduction

- 1.1 The People's Republic of China (PRC) has a comprehensive system of competition law, largely under its Anti-Monopoly Law (AML) which came into effect on 1 August 2008. It applies throughout the PRC with the exception of the two Special Administrative Regions of Hong Kong¹ and Macau.
- 1.2 The AML prohibits monopolistic conduct, which can be divided into the following broad headings²:
- Anti-competitive (“monopoly”) agreements between undertakings;
 - Abuse of a dominant position; and
 - Mergers that may have the effect of eliminating or restricting competition.
- 1.3 In early January 2020, a set of official proposed amendments to the AML was first announced since it took effect 11 years ago. These aim to refine the three broad headings outlined above and to streamline enforcement bringing Chinese antitrust law closer to those in the U.S. and the EU. When and how those amendments will be implemented remain to be seen.
- 1.4 In addition to the AML itself, implementing rules and guidelines play a crucial role in the application of the AML. Importantly, the key guidance currently available is set out in a set of interim rules promulgated in June 2019. However, available guidance is still limited and there remain areas of uncertainty over the application of the AML. Reliance is therefore placed on the practice of the Chinese authorities, which may change from time to time.
- 1.5 Whilst merger control was the initial focus in the PRC, recent years have seen a rapid increase in investigations for anti-competitive behaviour by the relevant authorities, as well as private actions being brought before the courts. Although the staffing of the PRC competition agencies remains limited, the increase in the number of investigations and significant fines recently reflect a more proactive attitude towards enforcement.
- 1.6 In addition to merger review, transactions in certain sectors may be subject to a separate national security review process for the acquisition of domestic PRC companies by foreign investors (pursuant to Article 31 AML) (see [Chapter 8](#)).
- 1.7 Although outside the scope of this publication, it is worth noting that the PRC has a separate Price Law and Anti-Unfair Competition Law, the latter of which was amended in November 2017 in part to remove certain provisions that overlapped with the AML (for example in ensuring that a business operator shall not, for the purposes of driving out

¹ This Hong Kong Competition Ordinance came into full effect on 14 December 2015. More information can be found in the Annex to this Publication.

² In addition, the AML also prohibits the abuse of administrative powers to restrict competition

competitors, sell their goods or services below cost) and in April 2019 to broaden the protection of trade secrets and increase penalties for trade secret infringement.

- 1.8 In addition, the PRC State Council has implemented a nationwide Fair Competition Review System since 2016. The Fair Competition Review System is intended to curb anti-competitive behaviour of government agencies. As a matter of policy, this Fair Competition Review is an active step by the PRC Government to create a unified national market and a level playing field for businesses, with the aim of allowing the market - rather than Government policies - to determine resource allocation. In this regard, the Fair Competition Review has some parallels to the free movement provisions and State aid rules of the European Union. In October 2017 the relevant agencies jointly published an Interim Notice on the Implementation of the Fair Competition Review System. The Notice sets out detailed implementation rules requiring government departments to, inter alia, follow a “review workflow mechanism” including preparation of written reports based on a detailed competitive assessment template and consultation of interested parties and the general public. In July 2019, a set of Interim Provisions for Prohibiting the Abuse of Administrative Power to Eliminate or Restrict Competition was published to define certain competitive abuses by Chinese government agencies. In recent years, there has been an increasing number of cases examined under the Fair Competition Review System. For example, a transport authority in Beijing abolished a policy which favoured one particular bank as a “default” bank for payment of traffic fines without any tendering process or indication about alternative channels of payment, and a Xi’an housing authority rectified its violation of the AML by removing notices that restricted customer choice for housing repair services providers after being investigated by the Shaanxi Provincial Price Bureau. The Chinese government’s efforts in curbing anti-competitive policies are expected to increase, as four central government departments jointly launched a campaign against anti-competitive government policies in December 2019 and the proposed amendments to the AML include a provision formally establishing the Fair Competition Review System under the AML.

2. Enforcement structure

2.1 The AML introduced two new regulatory agencies:

- the Anti-Monopoly Committee under the State Council, which is responsible for developing competition policy, conducting market investigations, publishing guidelines and coordinating the competition administrative enforcement work³; and
- the Anti-Monopoly Enforcement Authority (AMEA) designated by the State Council, which is responsible for the enforcement of the AML.⁴

2.2 Since March 2018 the State Administration for Market Regulation (SAMR) was established, the antitrust functions of the three previous agencies, namely, the National Development and Reform Commission (NDRC), the State Administration for Industry and Commerce (SAIC) and the Ministry of Commerce (MOFCOM), have been consolidated into one single agency, such that the enforcement powers of the AMEA are now held by SAMR.

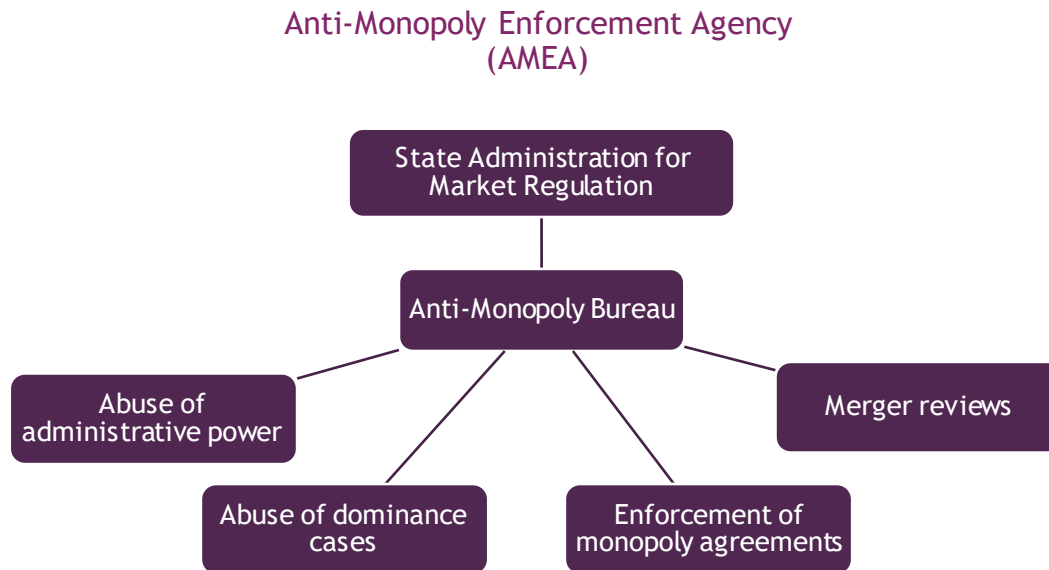
2.3 According to the Rules on SAMR's functions, structure and personnel issued by the State Council in September 2018, the Anti-Monopoly Bureau (AMB) is the division that is primarily responsible for the enforcement of the AML.⁵ There are altogether 10 divisions in the AMB. Three of them are responsible for merger reviews, while the remaining seven divisions are each responsible for, enforcement of monopoly agreements, abuse of dominance cases, abuse of administrative power, supervision of conditionally approved cases, general operations of the AMB, legislative work and international exchange, and daily operation of the State Council's Antimonopoly Commission office. The Price Supervision and Inspection and Anti-Unfair Competition Bureau is responsible for, among others, enforcement of the Anti-Unfair Competition Law.

³ Art. 9, AML.

⁴ Art. 10, AML.

⁵ Other non-antitrust divisions within SAMR have responsibility for, among others, drafting and implementation of laws, regulations, policies and standards to regulate and maintain an orderly market, monitoring the quality and safety of goods, equipment and food products, setting common national standards in light of international standards, and management of the National Medical Products Administration and the National Intellectual Property Administration.

Figure 1: The enforcement agency of the AML



The Anti-Monopoly Bureau is also responsible for, amongst others, supervision of conditionally approved cases, legislative work and international exchange, and daily operation of the State Council's Antimonopoly Commission

- 2.4 Following a smooth consolidation of the enforcement agencies in 2018, the new regime has improved the efficiency of enforcement of the AML and reduced the overlapping functions between the three agencies. For instance, under the new regime, SAMR has sole responsibility for all antitrust investigations regardless of whether there is a price or non-price element; this has removed uncertainty under the previous regime on the allocation of enforcement powers between agencies under which NDRC was responsible for enforcing the price related rules whereas SAIC was responsible for enforcing the non-price related rules.

3. Implementing rules

- 3.1 The vast majority of the secondary legislation to date has been in relation to merger control, including guidance and rules on the documents required for merger notifications, conduct of merger reviews, market definition, the filing and review of merger notifications, substantive assessment and divestiture remedies. SAMR (and previously MOFCOM) has provided some clarification on certain key issues, such as the circumstances that constitute the acquisition of “control” and the treatment of joint ventures under the AML. Whilst some uncertainties remain in the guidance and rules, SAMR has developed its own practice in the years since the AML came into effect. Notably, in contrast to the EU regime, there is no distinction (comparable to that made in the EU Merger Regulation) between full-function and non-full-function joint ventures and SAMR takes a somewhat broader approach than the European Commission to the definition of “joint control” (as demonstrated by MOFCOM’s prohibition decision of the P3 alliance in June 2014).
- 3.2 As a result of the allocation of enforcement powers between the NDRC and SAIC under the previous regime (for price related and non-price related matters respectively), there is considerable overlap between these rules, which however are not entirely consistent. For example, leniency is covered in both sets of rules enforced by the agencies respectively, but the extent of the penalty reduction differed between the agencies. A new set of interim rules came into effect in September 2019 that unified the authority’s leniency policy, stipulating that the first leniency applicant may receive full immunity or no less than 80% reduction in fines; the second applicant may receive a reduction of 30-50%; and 20-30% for the third.
- 3.3 Certain sector-specific guidelines on the application of AML to certain markets and sectors have also been issued, including:
- NDRC’s Guidelines on the Pricing Conduct of Undertakings in Scarce Active Pharmaceutical Ingredients and Pharmaceutical Products, published in November 2017; and
 - NDRC’s Draft Auto Industry Antitrust Guidelines, published in March 2016. SAMR is expected to finalise these Guidelines imminently.
- 3.4 In June 2019, SAMR promulgated three interim rules consolidating guidance instruments on prohibitions of monopolistic agreements, abuses of dominant market positions and abuses of administrative power to restrict competition previously published by the NDRC and the SAIC, namely:
- Interim Provisions on the Prohibition of Monopolistic Agreements;
 - Interim Provisions for Prohibiting the Abuse of Administrative Power to Eliminate or Restrict Competition; and

- Interim Provisions on the Prohibition of Abuse of Dominant Market Position.

4. Anti-competitive (“monopoly”) agreements

- 4.1 Anti-competitive agreements are referred to in the AML as “monopoly agreements”. The basic principles in this area are comparable to Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Prohibition

- 4.2 Monopoly agreements are defined in Article 13 AML as agreements, decisions or other concerted behaviour that eliminate or restrict competition. Articles 13 and 14 provide a list of monopoly agreements between competing undertakings that are automatically presumed to be illegal, such as price-fixing agreements or arrangements limiting production or sales volumes, dividing sales or procurement markets, restricting the purchase of new technology or new products, or involving resale price maintenance.

Exemption

- 4.3 As with the EU and US regimes, exemption from the prohibition is available in certain circumstances. Article 15 AML allows undertakings to rebut the anti-competitive presumption. In order to benefit from the exemption, the undertakings must show all of the following:
- the agreement(s) in fact had a qualifying purpose, such as to upgrade technology, research and development, improve product quality, reduce cost, improve efficiency, enhance the competitiveness of small and medium-sized enterprises, maintain public welfare, or be for the purposes of international trade and foreign economic cooperation;
 - the agreement(s) will not substantially restrict competition in the relevant market; and
 - consumers will receive a fair share of the resulting benefits.

Enforcement action

- 4.4 Initially, most enforcement action was carried out at a local level. Under the previous regime, the SAIC and NDRC delegated their enforcement powers to their local departments (the local AIC and the local price authority respectively) to carry out investigations of anti-competitive conduct. These investigations were often concluded with the relevant undertaking offering to take corrective measures (without the imposition of a fine), and might not even be reported by the press. These local units are expected to be consolidated with the local branches of SAMR. On 3 January 2019, SAMR published a notice announcing the authorisation of its provincial units to carry out antitrust enforcement within their specific administrative areas. The provincial SAMR units may further delegate the investigation to lower-level units.

4.5 Over the past few years, there have been a number of high profile investigations on a national level, focusing on cartels and resale price maintenance. Local departments are also beginning to impose larger fines. The penalty of RMB 457 million in total on polyvinyl chloride manufacturers in September 2017 represents one of the largest fines imposed on state-owned and domestic companies to date. In July 2018, 23 Tianjin container yard operators were fined RMB 50 million for price fixing conduct in the container handling services market. Notably, the NDRC relied on evidence of WeChat (a popular instant messaging service in China) group conversations in establishing price-fixing agreements. Table 1 below summarises some of the key cases to date.

Table 1: Key investigations into monopoly agreements to date

Case description	Fines imposed
Resale price maintenance involving the local company of Toyota in December 2019	Fines totalling RMB 87.6 million were imposed by the Jiangsu Administration for Market Regulation on the company representing 2 per cent of the company's annual sales in the PRC
Price fixing and output restriction of baked bricks in Yunyang County involving six local baked brick firms in August 2019	Fines totalling RMB 1.9 million were imposed by the Chongqing Administration for Market Regulation on six baked brick firms and three individuals - representing 1 to 10 per cent of the firms' annual sales in the PRC
Market sharing of the premixed concrete market in Quzhou involving eight local concrete firms in May 2019	Fines totalling RMB 7.7 million were imposed by the Zhejiang Administration for Market Regulation on seven of the eight companies representing 1 per cent of their annual sales in the PRC
Price-fixing of acetic acid active pharmaceutical ingredients involving three producers in December 2018	Fines totalling RMB 6.2 million were imposed by SAMR on the three companies representing 4 per cent of their annual sales in the PRC
Price-fixing of container handling services involving 16 Tianjin container yard operators in November 2018	Fines totalling RMB 50 million were imposed by the Tianjin branch of the NDRC on the 16 operators ranging from 2 to 5 per cent of each company's annual sales in the PRC
Resale price maintenance involving two natural gas units of PetroChina in July 2018	Fines totalling RMB 84 million were imposed by SAMR on the two units representing 6 per cent of their annual sales in the PRC
Price-fixing of container handling services involving 23 Tianjin container yard operators in July 2018	Fines totalling RMB 50 million were imposed by the Tianjin branch of the NDRC on the 23 operators ranging from 1 to 10 per cent of each company's annual sales in the PRC

Case description	Fines imposed
Price-fixing of tugboat involving four Shenzhen tugboat companies in June 2018	Fines totalling RMB 13 million were imposed by SAMR on the four companies representing 4 per cent of their annual sales in the PRC
Price-fixing of civil air defense doors involving 13 civil air defense equipment companies in March 2018	Fines totalling RMB 2.2 million were imposed by the Shaanxi Price Bureau on the 13 companies ranging from 1 to 3 per cent of each company's annual sales in the PRC
Resale price maintenance involving the local company of GN Communications in January 2018	Fines totalling RMB 2.3 million were imposed by the Shanghai Price Bureau on the company representing 3 per cent of the company's annual sales of the relevant products in the PRC
Resale price maintenance involving two local subsidiaries of Eastman Chemical in January 2018	Fines totalling RMB 2.4 million were imposed by the Shanghai Price Bureau on the two subsidiaries representing 5 per cent of the subsidiaries' annual sales of the relevant products in the PRC
Price-fixing involving 18 polyvinyl chloride manufacturers in September 2017	Fines totalling RMB 457 million were imposed by the NDRC on the 18 companies ranging from 1 to 2 per cent of each company's annual sales in the PRC
Resale price maintenance involving sales subsidiary of smartphone manufacturer Vivo in August 2017	Fines totalling RMB 6.9 million representing 1 per cent of the subsidiary's annual sales of the relevant product in Jiangsu province were imposed by the Jiangsu branch of the NDRC
Resale price maintenance involving medical device manufacturer Medtronic in December 2016	Fines totalling RMB 118.5 million representing 4 per cent of Medtronic's annual sales from relevant products in the PRC were imposed by the NDRC
Resale price maintenance involving three dealers of Haier household appliances in August 2016	Fines totalling RMB 12.3 million were imposed by the Shanghai Price Bureau on the three household appliance dealers

Case description	Fines imposed
Market allocation and price-fixing involving five PRC pharmaceutical companies in January 2016	Fines totalling RMB 4 million were imposed by the NDRC on the five pharmaceutical companies
Bid-rigging involving eight roll-on/roll-off shipping companies in December 2015	Fines totalling RMB 407 million were imposed by the NDRC on the eight companies ranging from 4 to 9 per cent of each company's annual sales in the PRC
Resale price maintenance in relation to certain car models and auto components by Mercedes-Benz (China) Ltd and certain dealers in April 2015	A fine of RMB 350 million was imposed by the Jiangsu Price Bureau on Mercedes-Benz, representing 7 per cent of its 2014 revenues; Mercedes-Benz dealers involved in the resale price maintenance agreements were also fined a total of RMB 7.9 million
Price-fixing of car parts involving eight Japanese car parts makers and price-fixing of bearings involving four Japanese bearings suppliers in August 2014	Fines totalling RMB 832 million were imposed on seven of the eight car parts makers and fines totalling RMB 403 million were imposed on three of the four bearings suppliers, resulting in a combined total fine of RMB 1.2 billion. Hitachi, Ltd and Nachi-Fujikoshi Corp. were exempted from fines for being the first car parts maker and bearings supplier respectively to report the conduct to the NDRC
Resale price maintenance involving nine international infant formula manufacturers in August 2013	Fines totalling RMB 669 million were imposed on six companies by the NDRC; three companies were granted immunity from fines - see more on leniency below
Resale price maintenance involving Kweichow Moutai Co., Ltd and Wuliangye Yibin Co., Ltd, two state-owned producers of premium liquor, in February 2013	Fines of RMB 247 million and RMB 202 million were imposed on Kweichow and Wuliangye respectively, with a combined total of RMB 449 million
Price-fixing by six foreign LCD panel manufacturers in January 2013	Fines totalling RMB 353 million and a number of behavioural commitments were imposed, with Samsung Electronics Co., Ltd and LG Display Co., Ltd receiving the highest fines of RMB 101 million and RMB 118 million respectively

- 4.6 We have also seen some cases in which the NDRC conducted a lengthy investigation but was willing to accept a behavioural commitment without the imposition of a fine. For example, 18 liner shipping companies voluntarily reduced their terminal handling charges in March 2017 resulting in the NDRC concluding its 16-month long probe into the sector; the NDRC also did not appear to have fined port operators that charged excessive fees and imposed loyalty discounts and non-compete obligations, after they committed to rectify their anti-competitive behaviour in November 2017 by implementing requisite measures, including lowering loading and unloading charges.
- 4.7 In May 2018, in *Shanghai Haijiye Hi-tech v. Anhui Administration for Industry and Commerce*, the Beijing No.2 Intermediate People's Court for the first time confirmed that monopoly agreement may be established through concerted practice and laid down the relevant principles. The court would consider, amongst others, whether objectively the undertakings were acting in concert on the market, whether subjectively the undertakings engaged in any exchange of intentions or information, and whether there is any reasonable explanation for the concerted actions. The case concerned the sale of security devices to 20 financial institutions in the Anhui province. The court dismissed the appeal by Shanghai Haijiye High technology Company Limited, and found that the undertakings concerned engaged in market sharing and price fixing.
- 4.8 In December 2017, in *Hainan Yutai Scientific Feed v. Hainan Price Bureau*, the Hainan Higher People's Court upheld the NDRC's "per se" approach in ruling that antitrust agencies may establish the existence of vertical monopoly agreements (including resale price maintenance agreements) without needing to demonstrate anti-competitive effects in administrative enforcement, whereas, in private actions, claimants need to establish both anti-competitive effects and actual loss resulting from a vertical monopoly agreement. In September 2018, Hainan Yutai applied to the First Circuit Court of the Supreme People's Court in Shenzhen to re-examine the Hainan Higher People's Court ruling. This application was dismissed in June 2019, as the court held that (1) enforcement agencies can rely on the presumption of illegality for resale price maintenance restrictions to establish a prima facie case for enforcement purposes, whereas civil litigants are not entitled to rely on the same presumption in private actions; (2) companies subject to such a prima facie case established by an antitrust enforcement agency can present evidence to show that the restriction does not meet the standard of "eliminating and restricting competition" or that the conditions for the economic efficiency exemption under Article 15 of the AML are met; and (3) Hainan Yutai failed to provide sufficient evidence to rebut the case against it.
- 4.9 In July 2017 the NDRC published the Guidelines on Pricing Conduct of Industry Associations. These Guidelines list various types of conduct as "high-risk", including: price monopoly agreements between undertakings; exchange of pricing information between members via an industry association; issuing pricing guidance (including on recommended, benchmark, and reference prices); publication of price calculation formulae; issuing rules, decisions, notices or benchmarks which have the effect of preventing or restricting pricing competition; and facilitating the implementation of pricing monopoly agreements through industry disciplinary mechanisms.

Leniency

- 4.10 As indicated above, leniency is available under the AML. Since September 2014, when the NDRC started to publish its penalty decisions, there has been more clarity on its calculation of fines and use of leniency in cartel cases. The published cases show that the NDRC tends to grant full immunity from fines to the first undertaking that self-reports and impose fines of a varying extent (between 4 to 8 per cent) according to the order of self-reporting.
- 4.11 We understand that leniency was applied in the LCD panel case. Reportedly, AU Optronics Corp. was exempted from administrative fines (which, for the other LCD makers, ranged from 50 per cent to 200 per cent of their illegal gains) because it was the first participant to confess to the NDRC. We note, however, that this case was decided under the Price Law and not the AML as the illegal behaviour occurred between 2001 and 2006, before the AML came into effect. Unlike the AML, the Price Law does not contain specific provisions on leniency but gives the NDRC discretion to take into account confessions and cooperative behaviour in deciding the administrative fine payable.
- 4.12 More recently, leniency was applied in the Japanese car parts and bearings cases. According to the published decisions, Hitachi and Nachi were fully exempted from penalties for being the first in line to confess to the NDRC and provide important evidence. Denso Corporation and NSK Ltd., being second in line, were fined 4 per cent of their respective 2013 revenues in the PRC. Yazaki Corporation, Furukawa Co., Ltd., Sumitomo Corporation and NTN Corporation were fined 6 per cent of their 2013 revenues in the PRC, taking into account mitigating circumstances. Aisan Industry Co., Ltd., Mitsubishi Electric Corporation and Mitsuba Corporation were fined 8 per cent of their 2013 revenues in the PRC for reaching price-fixing agreements in relation to more than two products. JTEKT Corporation was also fined 8 per cent for suggesting price-fixing meetings specifically targeting the PRC market. Fines of 8 per cent of revenue mark the highest level of penalty imposed by the NDRC to date.
- 4.13 This case sheds more light on the NDRC's investigation methods, use of leniency procedure and calculation of fines. Mitigating circumstances which the NDRC has taken into account include confession, cooperation and voluntary termination of anti-competitive conduct.
- 4.14 The NDRC published its draft Leniency Guidelines for Horizontal Monopoly Agreements in February 2016. The draft Guidelines set out, among other things, the requirements that leniency applicants should satisfy in order to qualify for leniency, and explain in detail the procedure for applying for leniency, the queuing system and the reduction in fines that each leniency applicant would receive according to their position in the leniency queue. The requirements and procedures for leniency set out in the NDRC's draft Guidelines were referred to in SAMR's draft Guidelines on Anti-monopoly Compliance for Operators published for consultation in November 2019.
- 4.15 SAMR published Interim Regulations on Procedures for Imposition of Administrative Penalties and Interim Measures for Administrative Punishment Hearings on 23 December and 24 December 2018 respectively. The Interim Regulations and Interim Measures set out, among other things, the procedures for investigations and administrative penalties. SAMR further released Guiding Opinions of SAMR for Proper Exercise of Discretion in Administrative

Penalty by Market Regulators in December 2019, setting out guidelines for Chinese market regulators exercising their powers to impose administrative penalties.

5. Abuse of a dominant position

5.1 The basic AML principles on abuse of dominance are comparable to Article 102 TFEU.

Dominant position defined

5.2 A dominant market position is defined in Article 17 AML and clarified to some extent by SAMR's Interim Provisions on the Prohibition of Abuse of Dominant Market Position published in June 2019. It refers to a market position held by one or more undertaking(s) that enables it/them to:

- control the price, volume or other trading terms in the relevant market. "Other trading terms" refers to factors which can have a material impact on market purchases, including product grade, payment terms, method of delivery, after-sales services, trading options, technical constraints etc.; or
- block or affect the ability of another undertaking to enter the relevant market, for example by delaying another undertaking's entry into the market or increasing its entry cost so that it cannot compete effectively.

5.3 The dominance assessment will depend on a number of factors, including the relevant undertaking's market shares and the competitiveness of the relevant market, the ability of the undertaking to control the sales or input market, the financial strength and technical resources of the undertaking, the extent to which other undertakings rely on the relevant undertaking and the ease of market entry⁶.

Market share presumption

5.4 Unlike Article 102 TFEU, the text of the AML specifies in Article 19 certain market share thresholds which give rise to a presumption of dominance, as set out in Table 2 below.

Table 2: Market share thresholds in Article 19 AML for the presumption of dominance

Number of undertakings	Combined share of the relevant market to create a presumption of dominance
1	Half
2	Two-thirds
3	Three-quarters

5.5 Presumptions of a dominant position can be rebutted by evidence to the contrary.⁷

⁶ Art. 18, AML.

⁷ Art. 19, AML.

- 5.6 Furthermore, an exception is available where the presumption of dominance is created on the basis of the combined market share of two or more undertakings: if any such undertaking has a market share of less than 10 per cent, it will not be presumed to have a dominant position.
- 5.7 The decision by the Supreme People's Court (SPC) in *Qihoo v Tencent* demonstrates that it is possible to rebut the above presumptions of dominance. Tencent Inc. was held not to have a dominant position despite having a market share exceeding 80 per cent in the instant messaging (IM) service market. In reaching this conclusion, the SPC considered factors such as the rapidly developing and constantly changing competitive landscape of the IM service market in the PRC, Tencent's inability to control price, quantity or other trading terms in that market, the existence of credible competitors who can affect Tencent's leading position, and evidence of low barriers to entry. The SPC was therefore willing to look beyond Tencent's high market share and rebut the presumption based on evidence of Tencent's market power and the dynamics of the IM service market.
- 5.8 Strict reliance on market shares in creating a presumption of collective dominance is unusual. For example, US antitrust laws do not recognise the concept of collective dominance at all. As regards the position in the EU, complex evidence is required to prove collective dominance under Article 102 TFEU, including evidence that the undertakings are linked economically (such as through contractual agreements or structural market factors). There is, however, no mention of similar requirements in either the AML or the relevant implementing rules. The authorities may find it impractical to adhere too strictly to these market share tests for collective dominance.

Abuse

- 5.9 Article 17 AML and the implementing rules set out a non-exhaustive list of the types of behaviour that, without justification, would be considered abusive and therefore prohibited. These can be split broadly into:
- *Exploitative abuses*: the dominant company abuses its position by exploiting its customers or suppliers, for example, by selling at unfairly high prices or buying at unfairly low prices; and
 - *Exclusionary abuses*: the dominant company abuses its position by excluding its competitors, for example by selling below cost, refusing to trade (including, without objective reasons, reducing existing transaction volumes, delaying or suspending an existing transaction, imposing prohibitively restrictive conditions, denying access to essential facilities), requiring exclusivity, implementing tie-in sales or imposing other discriminatory or unreasonable trading terms.

Noteworthy cases

- 5.10 There have been relatively few high profile abuse of dominance investigations on a national scale. Noteworthy cases include the following:

- *Er-Kang/ Jiushi Pharma*: in January 2019, SAMR imposed RMB 10.04 million in fines against Hunan Er-Kang Medical Operation and Henan Jiushi Pharmaceutical for abuse of dominance, representing 8 per cent and 4 per cent of their respective turnover in China. Er-kang is the only qualified importer of chlorpheniramine maleate active pharmaceutical ingredients into China, whereas Jiushi is the largest domestic supplier. Together, the two firms had combined market shares of 96.38% in 2017 and 88.55% in the first half of 2018. SAMR found that the two pharmaceutical companies (jointly) had a dominant market position and had abused their market dominance through excessive pricing, tying and refusal to supply. This was the second case where a theory of abuse of collective dominance had been pursued by a Chinese antitrust authority.
- *Tetra Pak*: on 16 November 2016 the SAIC imposed on Tetra Pak, a Swedish food processing and packaging solutions company, penalties totalling RMB 668 million for abuse of dominance, representing 7 per cent of its turnover in the relevant aseptic packaging markets in China. The SAIC found that Tetra Pak tied the sale of its raw materials to its equipment, imposed exclusivity restrictions and offered retroactive and targeted loyalty discounts and rebates to customers. This represents the largest fine the SAIC has imposed since the AML came into effect in 2008 and marks the end of an investigation that has lasted over four years. This was the first decision in which loyalty rebate was found to constitute an abuse, as the AML does not explicitly address this issue;
- *Qualcomm*: in February 2015 the NDRC imposed a fine of RMB 6.1 billion on Qualcomm Incorporated, a technology company, for charging Chinese companies excessive royalty fees, as well as for other practices such as bundling and requiring licensees to cross-license their patents for free, after 15 months of investigation. The fine represented 8 per cent of Qualcomm's 2013 revenue in the PRC;
- *Microsoft*: in July 2014 the SAIC conducted dawn raids at Microsoft Corporation's offices in the PRC as part of an investigation into Microsoft's alleged abuse of dominant position through imposing compatibility restrictions on its Windows operating system and software and tying arrangements. The SAIC indicated in November 2017 that the investigation is currently ongoing;
- *Shuntong/ Huaxin*: in November 2011 two pharmaceutical companies, Shandong Weifang Shuntong Pharmaceutical Co. Ltd. and Weifang Huaxin Medicine Trading Co. Ltd., were fined a total of RMB 6.9 million by the NDRC for unlawfully controlling the supply of promethazine hydrochloride in the PRC by entering into exclusive sales agreements with the only two manufacturers of the ingredient and subsequently driving up prices; and
- *China Unicom/ China Telecom*: on 9 November 2011 the NDRC initiated an investigation into China Unicom (Hong Kong) Limited and China Telecom Corporation Limited over alleged monopolistic price discrimination in the market for broadband Internet service. This was the first time in which a regulator has targeted large state-owned enterprises in relation to antitrust enforcement in the PRC. China Unicom and China Telecom undertook to lower prices and applied for adjournment of the investigation on 2 December 2011. Both companies also submitted improvement reports to the NDRC in February 2012. No fine has been imposed so far. However, the NDRC urged China Unicom

and China Telecom to carry out rectification of their monopolistic behaviour which could take up to three to five years to complete.

Intellectual property rights

- 5.11 The interplay between competition law and protection of intellectual property rights (IPRs) has, in recent years, been a focus of enforcement activity in many jurisdictions globally, including in the PRC. Remarkably, both the courts and the regulators have demonstrated a willingness to engage with difficult issues regarding IPRs in complex and high-profile cases such as *Huawei v. InterDigital* and the NDRC's investigations into the licensing practices of InterDigital, Inc. and Qualcomm.
- 5.12 In *Huawei v. InterDigital* the Shenzhen Intermediate People's Court found that InterDigital had:
- abused its dominant position by: (a) making proposals for excessive royalties; (b) tying its standard-essential patents (SEPs) with non-SEPs during licensing negotiations; (c) insisting on Huawei Technologies Co. Ltd.'s cross-licensing of all its own patents on a royalty-free basis; and (d) seeking injunctive relief before the US District Court for the District of Delaware and before the US International Trade Commission while still in negotiations with Huawei to force it to accept unreasonable licensing terms, including excessive royalties; and
 - failed to comply with fair, reasonable and non-discriminatory (FRAND) commitments by commencing injunction proceedings and requiring Huawei to pay significantly higher royalties (in some instances, 100 times higher) than those paid by Apple and Samsung despite Huawei's lower global sales.
- 5.13 The Shenzhen Court became the first court to determine a FRAND royalty rate. The Shenzhen Court's decision was subsequently affirmed on appeal by a higher court although a petition for leave to appeal has since been submitted to the SPC with respect to the calculation of the royalty rate. If allowed, a SPC decision on this issue could provide clarity on the approach to be followed by Chinese courts when determining a FRAND royalty rate.
- 5.14 Separately, the NDRC has investigated both Qualcomm and InterDigital for charging PRC companies excessive royalty fees, as well as for other practices such as bundling and requiring licensees to cross-license their patents for free. InterDigital agreed to abide by certain commitments and Qualcomm was fined RMB 6.1 billion. Qualcomm is currently facing a lawsuit brought by Apple before the Beijing Intellectual Property Court filed in January 2017, alleging Qualcomm refused to license SEPs to Apple on FRAND terms. The SAIC, on the other hand, is continuing its abuse of dominance investigation into Microsoft regarding interoperability and other competition concerns related to the Windows operating system and Office software.

- 5.15 Chinese courts and regulators have also been proactive in developing guidance on the assessment of IPRs under the AML. Prior to the establishment of SAMR, the three antitrust agencies were formulating IPR-related antitrust guidelines separately.
- 5.16 The SAIC for its part was engaged in a lengthy process of developing and consulting on guidelines regarding its approach to IPRs in antitrust enforcement. After more than five years of preparation and many rounds of consultation, the Regulation on the Prohibition of Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (IP Regulation) came into effect on 1 August 2015.
- 5.17 The IP Regulation addresses intellectual property-related abusive conduct and (to a lesser extent) anti-competitive agreements, and covers specific issues such as exclusive dealing, tying, imposition of unreasonable conditions, differential treatment, patent pools and standard setting. The provision which has given rise to the most concerns among companies (both PRC and foreign) and foreign competition agencies (including the US Department of Justice) is the introduction of the essential facilities doctrine into an analysis of the exercise of IPRs under the AML. In particular, the IP Regulation provides that a dominant undertaking is prohibited from refusing, without justification, to license its IPRs on reasonable terms where such rights constitute essential facilities for manufacturing and operating activities. The SAIC has taken on board some of the concerns raised during the public consultation. As a result, the IP Regulation sets out a number of conditions which must be satisfied in order for IPRs to be considered essential facilities. Nonetheless, the adoption of such a doctrine, and the scope for the SAIC to adopt a wide approach in interpreting such criteria, results in considerable uncertainty for intellectual property holders.
- 5.18 Separately, the NDRC published its own IPR-related antitrust guidelines in December 2015 and MOFCOM drafted a reference framework for reviewing mergers involving IPRs in October 2015. Given the significant overlap between these guidelines, the Antitrust Committee of the State Council published a consolidated set of draft guidelines for public comment in March 2017. The final guidelines recently approved by the Antimonopoly Commission of the State Council are expected to be published in due course.
- 5.19 The SPC has been actively consulting and publishing judicial opinions on the trial of patent cases. In early 2015 the SPC published the Interim Provisions of the Supreme People's Court on Issues Concerning the Participation of Technical Investigators of Intellectual Property Courts in Litigation Activities, which allows intellectual property courts to appoint technical investigators when hearing cases involving highly technical subjects such as patents, new plant varieties, integrated circuit designs, technical secrets and computer software. In the same period the SPC also published the revised Several Provisions of the Supreme People's Court on Issues Concerning Applicable Laws on the Trial of Patent Controversies, which came into effect on 1 February 2015. The revisions relate to articles on infringement, the extent of protection of patent rights, the application of Chinese Patent Law, patent counterfeits, and the calculation of loss and income as a result of infringement.
- 5.20 In March 2016 the SPC published the Judicial Interpretation (II) on Certain Issues Concerning the Application of Law in the Trial of Patent Infringement Cases, which came into effect in April 2016. The interpretation sets out rules that ensure licensing terms and conditions of SEPs are to be determined under FRAND principles. It also specifies that infringement

claims from patentees which violate FRAND principles upon failing to negotiate in good faith with licensees will generally be rejected by the courts.

- 5.21 Since 1 January 2019, a new intellectual property tribunal has been established at the SPC to hear direct appeals of patent-related cases against court decisions of specialised intellectual property courts in Beijing, Shanghai and Guangzhou, and other intermediate-level court decisions in first-instance trials. In March 2019, the court issued its first ruling on a patent dispute *Valeo Systemes D'Essuyage v Lukasi Car Accessories and Fuke Car Parts*. In April 2019, the court announced that it accepted an unfair competition lawsuit in relation to the “red packet” feature of Tencent’s mobile app WeChat against the developer of Hong Bao Kuai Shou, a mobile app, and the operator of wandoujia.com, an app administration and download platform. The dispute relates to, among others, the effect of the defendant’s app on the “red packet” function on WeChat (which allows users to send digital cash gifts) and privacy concerns about the monitoring activities of the app.
- 5.22 In April 2019, SAMR, along with the Ministry of Public Security, the Ministry of Agriculture and Rural Affairs, the General Administration of Customs, the National Copyright Administration, and the National Intellectual Property Administration, jointly published the Measures for Implementation of Strengthening IPR Law Enforcement in Online Shopping and Import and Export Sectors. The new Measures are aimed at facilitating ministerial coordination, improving law enforcement on IPRs, and ensuring fair competition in the market.

6. Merger control

6.1 From an enforcement perspective, merger control is currently by far the most advanced of the three types of monopolistic conduct, not least because merger filings were required under a different set of rules, the Provisions on the Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (M&A Rules), in the PRC before the implementation of the AML. The M&A Rules were subsequently revised in June 2009 to bring them in line with the AML jurisdictional thresholds.

Jurisdictional thresholds

6.2 The turnover thresholds are as follows (see Figure 2 below for flowchart):

- **either** the combined global turnover of all the undertakings concerned (e.g. the purchaser group and the target) exceeds RMB 10 billion (c. EUR 1.3 billion) or the combined turnover within the PRC of all the undertakings concerned exceeds RMB 2 billion (c. EUR 260 million), in the preceding financial year; **and**
- the turnover within the PRC of each of at least two of the undertakings concerned in the preceding financial year exceeds RMB 400 million (c. EUR 53 million).⁸

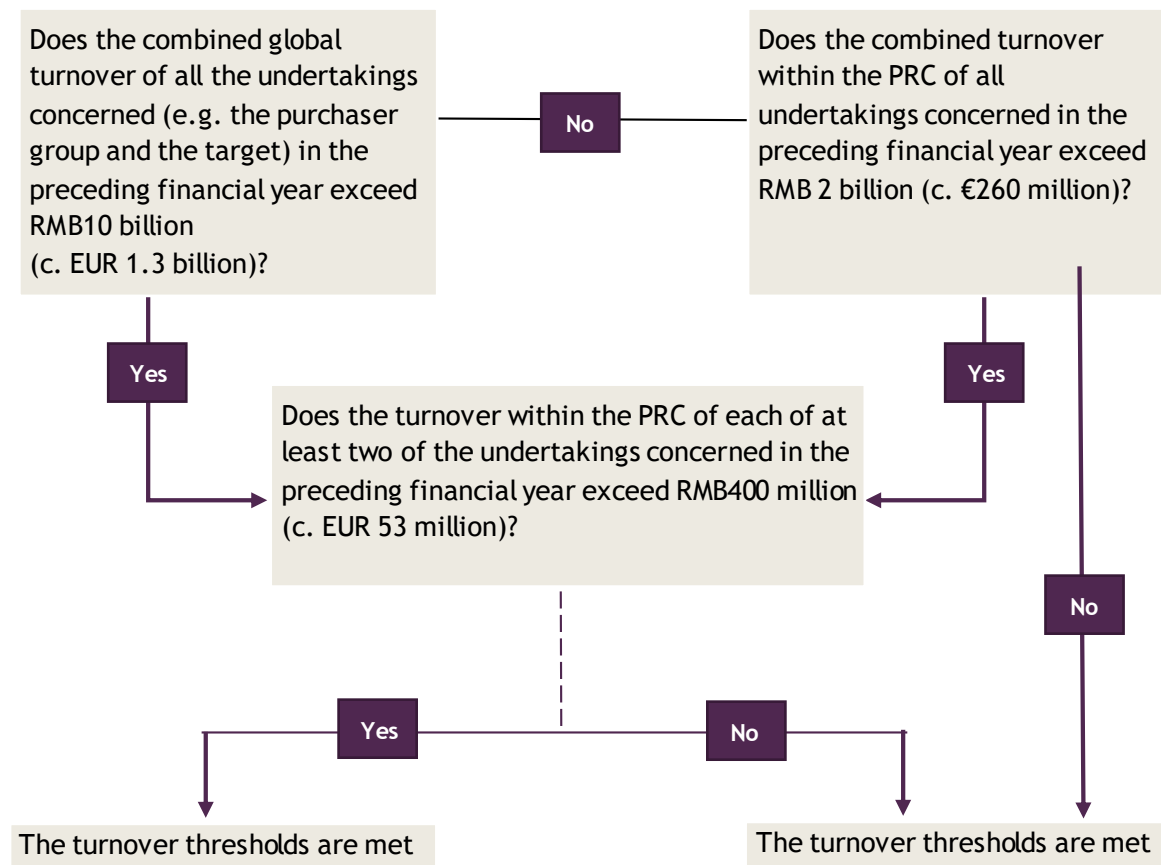
6.3 As in the EU and US, there are special turnover threshold rules in the PRC for financial institutions, such as banks and insurance companies, which are already regulated by other agencies (e.g. the China Banking and Insurance Regulatory Commission). The AML rules state that, once all the various income items belonging to the financial institution have been aggregated, only 10 per cent of the aggregate will be taken into account for the purposes of the turnover thresholds.

6.4 In addition, SAMR has the right to investigate a merger not exceeding the turnover thresholds where “facts and evidence collected in accordance with prescribed procedures establish that such concentration effects, or is likely to effect, the elimination or restriction of competition”⁹. It remains unclear under what circumstances SAMR will exercise this power, but some guidelines have been provided in MOFCOM’s Interim Provisions on Assessment of the Impact of Concentration of Undertakings on Competition. There have been no such reported cases to date and SAMR is likely to do so only in cases where serious competition concerns are expected to arise or in high-profile product markets.

⁸ The Euro figures in this publication have been calculated by reference to the average 2018 exchange rate.

⁹ Art.4, Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings (Decree of the State Council of the PRC No. 529) (taken from official English translation on MOFCOM’S website).

Figure 2: Turnover thresholds in the AML



Notification of concentration of undertakings

- 6.5 In June 2014 MOFCOM revised the Guideline for Notification of Concentration of Undertakings to clarify what types of transaction require merger control clearance. The Guideline explains for the first time what constitutes control and clarifies the situation for joint ventures and calculation of revenues. This Guideline was adopted by SAMR in a series of Guiding Opinions published in September 2018.
- 6.6 According to Article 1 of SAMR’s Guiding Opinion on the Notification of the Concentration of Undertakings (Guideline), “concentration of undertakings” means the circumstances stipulated in Article 20 AML, including merger of undertakings, acquisition of control over other undertakings by acquiring their equity or assets and gaining control or decisive influence over other undertakings by contracts or other means. Control can be acquired either by the undertakings themselves directly or by their controlled undertakings indirectly. Article 3 of the Guideline states that control of a concentration includes sole control and joint control. It also notes that transaction documents and constitutional

documents (e.g. bylaws) are relevant evidence in assessing whether an undertaking is acquiring control.

- 6.7 The Guideline does not specify any percentage threshold for establishing control. It recognises the possibility of acquiring *de facto* control through acquisition of a small stake due to reasons such as fragmented ownership.
- 6.8 The Guideline also lists seven non-exhaustive factors that SAMR will take into consideration when deciding whether a transaction entails the acquisition of control. These include:
- the objectives of the transaction and relevant future plans;
 - the change in the shareholding structure;
 - the voting agenda and voting mechanism of shareholders' meetings, past attendance rate and resolutions;
 - the structure and voting mechanism of the board of directors and board of supervisors;
 - the appointment and dismissal of senior executives;
 - the relationship between shareholders and directors, and whether there are any proxy votes or persons acting in concert; and
 - whether there is a significant commercial relationship or a cooperation agreement between the undertakings.
- 6.9 The Guideline makes it clear that the merger notification obligation applies to joint ventures. According to Article 4, newly established joint ventures should only be notified where two or more undertakings acquire joint control. If only one undertaking controls the joint venture, this will not be considered a concentration of undertakings.
- 6.10 It is important to bear in mind that, unlike the EU, SAMR does not distinguish between full-function and non-full-function joint ventures. Close-knit alliances may also attract regulatory scrutiny under merger control in the PRC. A striking example is the proposed P3 alliance between AP. Møller-Maersk A/S, Mediterranean Shipping Company S.A. and CMA- CGM S.A. The proposed alliance was considered to be a relevant concentration under the AML and thus notifiable to MOFCOM, but it was not a full-function joint venture and thus not notifiable under the EU merger control regime.
- 6.11 The Guideline further clarifies the calculation of turnover. Under Article 5 of the Guideline, the turnover "within China" refers to the turnover generated from sales to customers located within the PRC and therefore includes overseas imports into the PRC, but not exports from the PRC.

Merger notification process

- 6.12 According to Article 25 AML, the initial merger review period (Phase I) is 30 days¹⁰. In practice, this period does not start as soon as the parties submit the notification to SAMR but only after SAMR accepts the notification as complete. During the period between submission and acceptance (often referred to as the pre-acceptance period), SAMR is almost certain to request supplementary documents and information. This delay can be reduced to some extent by preparing as complete a notification as possible from the outset and by responding to SAMR's (often very lengthy) information requests as quickly as possible, but it can be difficult to predict with any certainty when the review period will start. Notifying parties should generally allow at least 2 to 4 months for this process (although this varies according to SAMR's workload).
- 6.13 After the initial review period, SAMR can extend its review by a further 90 days if a more detailed investigation is required (commonly referred to as Phase II), which in turn can be further extended by up to 60 days in specific circumstances, e.g. if the merging parties agree (Phase III). Unlike the EU, there is no substantive threshold for SAMR to commence a Phase II review; it may do so simply because it does not have sufficient time to complete its review in the initial 30 days. In cases where SAMR requires additional time beyond Phase III, the notifying parties may withdraw and re-file the notification to restart the timetable (as was the case in *KLA-Tencor/Orbotech*, *United Technologies/Rockwell*, *Linde/Praxair*, *Essilor/Luxottica*, *Bayer/Monsanto*, *Siliconware Precision Industries/Advanced Semiconductor Engineering*, *Maersk/Hamburg Südamerikanische*, *Agrium/Potash Corporation of Saskatchewan*, *HP/Samsung Electronics*, *Dow/DuPont*, *Dell/EMC*, *Hitachi Metals/Zhong Ke San Huan*, *NXP Semiconductor/Freescale Semiconductor*, *MediaTek/Mstar*, *Marubeni/Gavilon*, *Glencore/Xstrata*, *Western Digital/Hitachi and AMAT/Tokyo Electron*).

The simplified procedure

- 6.14 On 11 February 2014 MOFCOM announced its long-awaited fast-track simplified procedure for simple cases that do not raise competition concerns in the PRC.¹¹ The aim of the simplified procedure was to speed up the merger review process which could see “60 per cent of notified transactions” cleared within Phase 1.¹² The simplified procedure has two key advantages: it significantly shortens the time taken to obtain merger approvals and reduces the administrative burden on notifying parties for simple cases.

¹⁰ The AML and the implementing rules are silent as to whether this refers to calendar or working days, but SAMR's practice is to use calendar days.

¹¹ The Interim Provisions on the Standards Applicable to Simple Cases of Concentration of Undertakings, effective from 12 February 2014. This was followed on 18 April 2014 by Guidance on the Notification Procedure for Simple Cases.

¹² Shang Ming, Director General of MOFCOM's Anti-Monopoly Bureau (16 September 2013).

- 6.15 The simplified procedure has been adopted by SAMR in its Guiding Opinion on the Notification of Concentration of Undertakings Subject to Simplified Procedure in September 2018 and is available for the following types of transactions:¹³
- off-shore joint ventures with no activities in the PRC;
 - changes from joint to sole control of a joint venture (except where the sole parent and the joint venture compete in the same market); or
 - transaction where the parties have a combined market share of less than 15 per cent if they compete in the same market; and each have market share of less than 25 per cent if they are active in any vertically related or neighbouring markets.
- 6.16 In our experience, the simplified procedure has been a positive development with the vast majority of cases being cleared within Phase I. The first case to take advantage of the simplified procedure was Rolls-Royce Holdings plc's acquisition of Daimler AG's 50 per cent shareholding in their 50:50 joint venture, Rolls-Royce Power Systems (which we acted on). It was cleared by MOFCOM only 19 days after formal acceptance.
- 6.17 For simple cases, SAMR publishes a notice on its website for consultation with third parties for ten calendar days. Whilst the simplified procedure facilitates speedy review, it also increases transparency and may attract complaints more easily. As of 31 December 2019, 1,615 simple cases have been published for review.
- 6.18 SAMR (and previously MOFCOM) has unconditionally cleared 2,944 cases since the implementation of the AML (as of 31 December 2019). These have been made public since 15 November 2012 pursuant to the Regulation on the Disclosure of Government Information. As of 31 December 2019, SAMR has yet to prohibit any merger transaction, whereas the MOFCOM has prohibited two transactions: The Coca-Cola Company's proposed acquisition of Chinese juice producer China Huiyuan Juice Group Ltd (prohibited in March 2009); and the proposed P3 alliance by the AP. Møller-Maersk Line, MSC Mediterranean Shipping Co and CMA-CGM (prohibited in June 2014). As of 31 December 2019, 44 clearance decisions have been made subject to conditions (often involving a mixture of behavioural and structural remedies).

Substantive assessment

- 6.19 In assessing mergers, SAMR considers whether the merger will or may eliminate or restrict market competition. Even if this test appears to be met, it remains open to the parties to prove that the advantages of the merger outweigh the disadvantages or that it is in line with the public interest.¹⁴
- 6.20 In August 2011 MOFCOM published its Provisional Rules on the Assessment of Competitive Effects of a Concentration which sets out the factors that MOFCOM will consider when making its substantive assessment. This includes concepts that are familiar to the EU and

¹³ Art.2, Guiding Opinion on the Notification of Concentration of Undertakings Subject to Simplified Procedure.

¹⁴ Art.28, AML.

other competition regimes (market shares, degree of concentration by reference to the Herfindahl-Hirschman Index and the Concentration Ratio, barriers to entry, technological barriers, production capacity in the market etc.). In addition, it identifies certain possible defences, including public interest, economic efficiency, undertakings on the verge of bankruptcy and countervailing buyer power. However, MOFCOM has not adopted the same terminology in respect of the theories of harm - for example, the rules do not refer to “coordinated” or “unilateral” effects - thereby enabling MOFCOM to retain a greater degree of flexibility when assessing transactions.

- 6.21 MOFCOM’s conditional approval of the Bayer/Monsanto merger on 13 March 2018 illustrates the factors considered by MOFCOM in its substantive assessment of concentrations under the AML. Among other things, MOFCOM took into account: the merger parties’ market shares relative to their competitors, the concentration levels of the relevant markets, barriers to new entry, and the relative bargaining positions of downstream clients. Similar to the European Commission, MOFCOM raised concerns about adverse impact on innovation due to elimination of competition between “important innovative forces”.

Overview of conditional clearances and prohibition decisions to date

- 6.22 SAMR has imposed both structural and behavioural conditions on merging parties. In appropriate cases, companies are able to propose behavioural remedies to address SAMR’s competition concerns as an alternative to structural remedies which tend to be preferred by the EU and US antitrust agencies. It is also worth noting that, as in other jurisdictions, customer or third party concerns can play a significant role in SAMR’s assessment of a proposed merger.
- 6.23 Recent cases have highlighted the fact that the outcome of investigations can sometimes be unpredictable and uncertain, even where market shares may appear to be relatively low. In some international mergers, MOFCOM has intervened by imposing conditions even where a transaction has already received unconditional clearances in other jurisdictions, or by going beyond the conditions that have been imposed in other jurisdictions.¹⁵ This can be the case even where the market shares might not, prima facie, appear to raise competition concerns. For example, the markets in which MOFCOM expressed concerns in *Glencore/Xstrata* involved market shares of less than 18 per cent; similarly, in *Marubeni/Gavilon*, MOFCOM had concerns about Marubeni’s 18 per cent share of the imported soybean market in China.
- 6.24 MOFCOM has also prohibited transactions which were cleared or not prohibited elsewhere. For example, the proposed P3 alliance, which was cleared by the US Federal Maritime Commission and in respect of which the European Commission decided not to initiate proceedings, was prohibited by MOFCOM on 17 June 2014 as MOFCOM considered that it may have an anti-competitive effect on Asian-European shipping routes. Similarly, in

¹⁵ For example, see *Western Digital/Hitachi*, *Google/Motorola Mobility*, *Glencore/Xstrata*, *Marubeni/Gavilon*, *Baxter International Inc/Gambro AB*, *Essilor/Luxottica*, *United Technologies/Rockwell Collins*, and *KLA-Tencor/Orbotech*.

Google/Motorola, Microsoft/Nokia and Nokia/Alcatel-Lucent, MOFCOM imposed behavioural remedies and required the relevant undertakings to continue observing their FRAND obligations notwithstanding that no other competition authority (including the European Commission and the US authorities) required any commitments from the notifying party. In contrast, SAMR has yet to prohibit any mergers, but has imposed behavioural remedies in a number of cases. For instance, in *Essilor/Luxottica*, SAMR imposed behavioural remedies addressing potential vertical effects of the transaction, while other regulators approved the transaction after finding that the companies' products were mainly complementary and would not have enough market power to engage in vertical foreclosure.

- 6.25 MOFCOM has shown a willingness to accept a “hold-separate” remedy, whereby the merging parties would commit to hold and operate (i.e. not integrate) their overlapping businesses separately for a period of time post-closing. This has proved to be somewhat controversial and difficult to implement, as illustrated by MOFCOM's administrative penalty in December 2014 on Western Digital for failing to comply with its hold-separate commitment. Despite not having accepted this remedy for four years (since *MediaTek/Mstar*), MOFCOM recently accepted it again in November 2017 in *Siliconware Precision Industries/Advanced Semiconductor Engineering*, requiring the merging parties to hold and operate their overlapping businesses separately for two years, after which the remedy will automatically lapse. SAMR appears to have continued this tradition of using hold separate remedies in merger control, as shown in *TTS/Carçotec* (July 2019) and *II-VI/Finisar* (September 2019).

Merger Remedies Regulation

- 6.26 On 4 December 2014 MOFCOM published the Interim Regulations on Imposing Restrictive Conditions on Concentrations of Undertakings (Remedies Regulations). According to MOFCOM, the Remedies Regulations aim at improving the enforcement and monitoring of merger conditions as well as reducing any negative impact on competition brought by concentrations.
- 6.27 The Remedies Regulations set out the process for negotiation and determination of remedies. SAMR requires remedy proposals to be submitted within 20 days before the end of Phase II.¹⁶ The Remedies Regulations also contain a ‘crown jewel’ provision under which SAMR may require the undertakings concerned to provide an alternative proposal that contains stricter conditions and may include core tangible and intangible assets.¹⁷ SAMR may market test the remedy proposals by way of (i) questionnaire; (ii) hearings; (iii) consultation with experts; or (iv) other means.¹⁸
- 6.28 The Remedies Regulations prescribe detailed requirements for the implementation of remedies, including the criteria for choosing suitable purchasers, monitoring trustees and divestiture trustees, the duties of monitoring trustees and divestiture trustees and the duties of the undertakings subject to the divestment commitments. The Remedies Regulations provide that SAMR may require an upfront buyer where (i) the viability and

¹⁶ Art. 6, Remedies Regulations

¹⁷ Art. 7, Remedies Regulations

¹⁸ Art. 8, Remedies Regulations

marketability of the business to be divested is at risk; (ii) the identity of the purchaser of the divestment business is critical to the effectiveness of the remedies in restoring competition; or (iii) third parties assert rights over the divestment business.¹⁹

Gun-jumping/Failure to notify

- 6.29 In 2012 MOFCOM published the Interim Measures on Investigation of Failure to Notify Concentrations of Undertakings. As of 31 December 2019, SAMR (and MOFCOM previously) has published 48 penalty decisions for gun-jumping or failures to notify since 2014, 19 of which involved the formation of joint ventures and 29 concerned share acquisitions (three of which were acquisitions of minority stakes). In recent years, MOFCOM penalised companies for gun-jumping in “multi-step” transactions (*Canon/Toshiba*, *Meinian Onehealth/Ciming Health* and *Paper Excellence/Eldorado Brasil Celulose*).
- 6.30 SAMR (and MOFCOM previously) may impose a penalty of up to a maximum of RMB 500,000 and the penalties to date have ranged from RMB 150,000 to RMB 400,000. The director-general of the Anti-Monopoly Bureau in MOFCOM had previously warned that a failure to notify could lead to the transaction being unwound if it is a case which raises competition concerns. In the draft amendments to the AML published for consultation in January 2020, one of the proposed changes was to increase the maximum fine for gun-jumping or failure to notify reportable transactions to 10% of the infringing party’s turnover in the previous financial year.

¹⁹ Art. 14, Remedies Regulations

7. Private action

- 7.1 Private claims for damages resulting from anti-competitive conduct is a growing area in the PRC, not least because customers have been quick to rely on Article 50 AML, which entitles individuals and companies to bring private actions against undertakings that have engaged in monopolistic conduct. The courts have been remarkably willing to hear such cases, despite the lack of implementing rules or any historic expertise or experience in conducting the necessary competitive assessment.
- 7.2 The first court decision on an Article 50 private damages claim was handed down on 23 October 2009. The Shanghai No.1 Intermediate People's Court rejected the claim on the basis that the claimant, Beijing Sursen Electronic Co Ltd, had failed to produce sufficient evidence that the defendants, Shanda Interactive Entertainment Limited and Shanghai Xuanting Entertainment Information Technology Co., Ltd, were dominant. Sursen alleged that the defendants had abused their dominant positions by pressurising two authors not to write a sequel to a novel series that was originally published by the defendants. The value of the claim was RMB 9,800. In addition, the Court held that the defendants were justified in their actions as they were entitled to enforce their IPRs. This decision was upheld by the Shanghai Higher People's Court.
- 7.3 Follow-on damages claims are also being brought in China. In August 2016 the Beijing High People's Court upheld a first instance decision by the Beijing Intellectual Property Court rejecting an antitrust follow-on claim brought by a private Chinese individual against Abbott Laboratories Trading (Shanghai) and Beijing Carrefour Commercial (Shuangjing Store) over alleged resale price maintenance, which was the subject of an administrative penalty decision imposed by the NDRC in 2013 (See [Chapter 4](#) above). The Court's decision (published online in November 2016) ruled that insufficient evidence had been provided to prove the existence of a vertical-restraint agreement between Abbott and its retailer Carrefour. The ruling suggests that plaintiffs in follow-on claims bear a high evidentiary burden of proof. In particular, the Court ruled that the NDRC's penalty decision could only support the claim that Abbott had engaged in resale price maintenance with its retailers, but was not sufficient to prove a restraint agreement between Abbott and Carrefour as the NDRC's penalty decision did not mention any counterparty (whether wholesaler or retailer) to Abbott's resale price maintenance agreements. As such, the plaintiff failed to establish a causal link between his purported loss (being merely RMB 10.44 plus legal costs) and the conduct identified in the NDRC's 2013 decision.
- 7.4 In August 2018, the Beijing High People's Court accepted an antitrust follow-on claim brought by Greatview Aseptic Packaging (a Hong Kong listed company), a provider of aseptic packaging, against Tetra Pak over alleged abuse of dominance, which was the subject of an administrative penalty imposed by the SAIC in 2016 (See [Chapter 5](#) above). A hearing of the case was scheduled for 8 August 2018 but was subsequently cancelled due to a jurisdictional challenge filed by Tetra Pak. In 2018, the Shanghai Intellectual Property Court reportedly accepted a complaint lodged by an individual against SAIC-General Motors Sales. The individual alleged that SAIC-General Motors Sales breached certain provisions of PRC antitrust law relating to vertical constraints. This complaint is a follow-on claim of the NDRC's fine on SAIC-General Motors Sales in 2016 for resale price maintenance.

7.5 Furthermore, companies are increasingly using competition law as a “sword” in stand-alone private actions, including challenging large multinational companies on abuse of dominance grounds. For example, in August 2017 Guangdong Pisen Electronics filed suit against Apple before the Beijing Intellectual Property Court in relation to Apple’s licensing practices on grounds of refusal to deal and exclusive dealing. Motorola is facing an antitrust lawsuit from Hytera Communications, a Chinese communication equipment manufacturer, in relation to exclusivity and excessive pricing allegations. In September 2017 the Yunnan High People’s Court dismissed an abuse of dominance claim against Sinopec by a local biodiesel manufacturer Yunnan Yingding Bio-energy Co. in relation to refusal to deal allegations. In December 2019, the Beijing Haidian District Court accepted a lawsuit filed by Baidu against ByteDance (the owner of TikTok) for allegedly abusing its dominance by favouring ByteDance’s own product “Xigua Video” when users search for Baidu video products on ByteDance’s popular news and content aggregating platform, “Toutiao”.

7.6 Other high profile cases include:

- *Hohhot Huili Materia v Shell (China)*: in a private antitrust suit involving allegations that Shell had organised price fixing and bid-rigging arrangements with its distributors, on 26 August 2019, the Chinese Supreme Court held that arbitration clauses cannot exclude the Chinese courts’ jurisdiction to adjudicate disputes concerning allegations of monopoly agreements;
- *Luckin Coffee v. Starbucks*: on 15 May 2018 Luckin Coffee, a Chinese start-up coffee-shop chain, announced its antitrust lawsuits against Starbucks in Chinese courts, accusing Starbucks of engaging in monopoly agreements and abuse of dominance;
- *Huawei v. Samsung*: on 11 January 2018 the Shenzhen Intellectual Property Tribunal issued its first ruling since its establishment. It awarded injunctions in favour of a standard-essential patent holder (Huawei) and ordered the defendant (Samsung) to cease its infringing behaviour in the production and sale of the relevant products. The awarding of injunctions in this case may set precedent for future IP cases in the PRC;
- *Ningbo Ketian Magnet, Ningbo Permanent Magnetics, Ningbo Tongchuang Strong Magnet Material and Ningbo Huahui Magnetic Industry v. Hitachi Metals*: on 17 and 18 December 2015 the Ningbo Intermediate People’s Court heard an abuse of dominance case in relation to the licensing of rare earth magnet patents. The case is pending judgment. The judgment is expected to set a precedent in the PRC as to whether sanctions can be imposed for refusing to license a non-essential patent (in particular, whether the PRC courts will adopt an essential facilities doctrine);
- *Qihoo v. Tencent*: on 16 October 2014 the SPC decided on its first competition case which involved complex issues of market definition and expert evidence from international competition economists;
- *Huawei v. InterDigital*: on 4 February 2013 the Shenzhen Intermediate People’s Court determined the level of royalties payable for use of InterDigital’s essential patents. Its

decision was later affirmed by the Guangdong Higher People's Court on 28 October 2013; and

- *Rainbow Medical Equipment & Supply Company v Johnson & Johnson*: on 1 August 2013 the Shanghai High People's Court reversed a lower court's decision and appeared to have adopted a "rule of reason" approach to the question of resale price maintenance. This case was the first time the court decided on issues of resale price maintenance.

7.7 In a step which has been applauded for introducing greater transparency in the country's legal system, the SPC began publishing rulings online in July 2013. However, the degree of disclosure remains uneven; decisions are published intermittently in batches, and cases involving national security, commercial secrets and individual privacy will not be posted.

8. National security review

- 8.1 Pursuant to Article 31 AML, a separate national security review, with a separate review process and timetable, might be necessary if a transaction involves the acquisition (including of de facto control) of a domestic PRC company by a foreign investor in certain sectors. This includes military industrial enterprises and enterprises located near key and sensitive military facilities, national defence enterprises, enterprises with a bearing on national security in areas including important agricultural products, energy and resources, infrastructure facilities, transportation services, key technologies and manufacturing of major equipment. Provisional rules were issued in March 2011, which were superseded by a new set of rules issued in August 2011.
- 8.2 National security reviews fall within MOFCOM's jurisdiction (this is still the case after the establishment of SAMR). Local commerce departments are responsible for screening - during the foreign investment approval process - whether the relevant transaction requires a national security review. In addition, third parties such as other governmental agencies, industry associations and enterprises in the same or upstream/downstream industries can also trigger this process by proposing to MOFCOM that a review be conducted. Alternatively, parties may make a voluntary filing to MOFCOM for a national security review.
- 8.3 MOFCOM has an initial 15 working days to determine if the transaction falls within the scope of a national security review. If so, the case is passed on to the ministerial joint committee co-chaired by MOFCOM and NDRC, which then has up to 90 working days (30 working days for a "general" review period, followed by a further 60 working days of a "special" review period) to issue a decision. If a case requires both a national security review and a merger review, MOFCOM is likely in practice to postpone acceptance of the merger notification until the joint committee has issued its decision on the national security aspects of the transaction.
- 8.4 In April 2015 the State Council promulgated the Pilot Measures on National Security Review of Foreign Investments in Pilot Free Trade Zones. One key aspect of the Pilot Measures is that it widens the scope of potentially reviewable transactions by stipulating that where a foreign investor, alone or jointly with other investors, establishes a new enterprise (i.e. including greenfield joint ventures) with a bearing on national security (such as the areas referred to in paragraph 8.1 above) within a free trade zone, national security reviews may be carried out. Currently, there are 12 free trade zones in Shanghai, Guangdong, Fujian, Tianjin, Liaoning, Zhejiang, Henan, Hubei, Chongqing, Sichuan, Shaanxi and Hainan. The national security review procedure will be similar to that referred to in paragraph 8.3 above.
- 8.5 On 15 March 2019, the National People's Congress of the PRC passed the Foreign Investment Law (FIL), which came into effect on 1 January 2020. The new legislation provides that a security review system shall be established to review any foreign investment, including acquisition of a domestic PRC company and greenfield investment, that affects or may affect national security. Implementing rules are expected to be enacted in future that will

likely impact the existing regime on national security review. One of SAMR's proposed amendments to the AML published in January 2020 was to expand the scope of national security review to cover all transactions that may have national security implications, rather than limiting the review to transactions involving foreign investors.

Annex: Hong Kong

Introduction

It has been four years since the Hong Kong Competition Ordinance (Ordinance) came into full effect on 14 December 2015, which marked the first cross-sector competition law in Hong Kong. Previously, only the telecommunications and broadcasting sectors were subject to competition law. The coming into effect of the Ordinance has aligned Hong Kong with the more than 100 other jurisdictions around the world with competition law regimes in place.

The Competition Commission (Commission) was established under the Ordinance as Hong Kong's competition regulator and is empowered with broad investigative powers to enforce breaches of the Ordinance. Unlike in certain other jurisdictions, the Ordinance follows a prosecutorial model of competition enforcement. The Commission must bring enforcement actions before the Competition Tribunal (Tribunal), the specialist court tasked with deciding competition cases arising from the Ordinance, in order to seek pecuniary penalties and other sanctions.

In the run-up to December 2015 the Commission published a number of guidelines and policies which provide guidance on how the Commission and the Communications Authority (which has concurrent jurisdiction with the Commission in respect of competition matters relating to telecommunications) would interpret and give effect to the provisions of the Ordinance. These include the Guidelines under the Ordinance (Guidelines), which cover six substantive and procedural topics, namely: (i) the First Conduct Rule (prohibiting anti-competitive agreements and concerted practices); (ii) the Second Conduct Rule (prohibiting abuses of substantial market power); (iii) the Merger Rule (prohibiting mergers that substantially lessen competition, applying only to the telecommunications sector); (iv) complaints; (v) investigations; and (vi) applications for decisions and block exemption orders.

The first enforcement cases were brought to the Tribunal in 2017. The first case concerned bid-rigging conduct in the technology sector, whereas the second case concerned price-fixing and market sharing conduct in the home decoration sector. Trials were heard in 2018 and judgments were handed down in 2019, mostly in favour of the Commission.

The Commission brought its third and fourth enforcement cases, also concerning similar price-fixing and market sharing conduct in the home decoration sector, in 2018 and 2019 respectively. In January 2020, the Commission brought its fifth enforcement case concerning exchange of competitively sensitive information in the context of an IT tender.

What does the Ordinance cover?

The Ordinance prohibits the following three types of anti-competitive practices:

- anti-competitive agreements: agreements, concerted practices or decisions between undertakings with the object or effect of preventing, restricting or distorting competition in Hong Kong (the First Conduct Rule);
- abuse of market power: abuse by undertakings with a “substantial degree of market power” by engaging in conduct with the object or effect of preventing, restricting or distorting competition in Hong Kong (the Second Conduct Rule); and
- telecommunications mergers: with respect to telecommunications licensees, any merger that has, or is likely to have, the effect of substantially lessening competition in Hong Kong (the Merger Rule). The current intention is not to extend the merger regime to other sectors, although the Government has indicated that this position may be reviewed in the next few years.

The Ordinance further defines certain hardcore activities as “serious anti-competitive conduct” in relation to the First Conduct Rule. These consist of: price-fixing, bid-rigging, market allocation and output control. They are considered to be particularly serious offences and will be subject to a stricter enforcement regime as set out below.

First conduct rule: anti-competitive agreements

What does this catch?

The First Conduct Rule prohibits any agreement (or concerted practice) which has an anti-competitive object or effect in the Hong Kong market. The following are four basic “don’ts” in relation to conduct with competitors:

- don’t discuss prices, discounts, rebates, supply terms, profit margins or any other terms of business or exchange any commercially sensitive information;
- don’t agree to limit production, markets, technical development or investment;
- don’t agree to share markets, territories, customers or sources of supply; and
- don’t engage in bid-rigging (e.g. agreeing on the terms of the bid, agreeing not to submit a bid or agreeing to withdraw a bid).

In the Commission’s first case before the Tribunal, the Commission alleged that five information technology companies engaged in a bid-rigging arrangement in relation to a tender for the supply and installation of a new server system. The alleged bid-rigging conduct was a typical example of “cover bidding” consisting of an agreement for some bidders to submit fake “dummy bids” to make the chosen winner appear to have submitted the lowest bid.

The Commission’s second case before the Tribunal involved allegations of price-fixing and market sharing. Ten home decorating firms allegedly jointly produced and used a promotional flyer in their supply of decoration services to housing tenants of a particular estate, in addition to agreeing among themselves to allocate specific floors of the estate to each of them.

- **Price-fixing:** it was alleged that ten home decorating firms jointly produced and used a promotional flyer in the supply of decoration services to public housing tenants. The flyers contained prices for different packages for decoration works services. The Commission alleged that this was anti-competitive for two reasons. First, where prices were not further negotiated, these flyer prices effectively determined the transaction price. Second, in other cases, these flyer prices influenced the transaction price in two ways: (i) they were used as the starting or reference point for negotiations; (ii) they gave the impression that these prices were indicative of “standard pricing” or that all contractors charged similar prices.
- **Market sharing:** it was alleged that ten home decorating firms agreed to allocate amongst themselves specific floors of a housing estate project. Specifically, they allegedly agreed not to actively seek or accept business from tenants on floors which have been allocated to another contractor and/or, if approached by such a tenant, would direct him/her to the allocated contractor of that floor.

The facts of the Commission’s third and fourth cases before the Tribunal are substantially similar to the second case in that both involved allegations of price-fixing and market sharing. The fifth case concerns exchange of competitively sensitive information, which the Commission categorises as tantamount to price fixing. In all these three cases, the Commission is seeking individual liability against individuals for their involvement in alleged conduct.

Are “vertical agreements” caught?

The Guidelines indicate the Commission’s approach that vertical agreements (agreements between businesses at different levels of the supply chain) are, as a general matter, unlikely to be considered “serious anti-competitive conduct”, and are generally less harmful to competition compared to horizontal agreements. The Commission has however not granted any exemption for vertical agreements, but provides in the Guidelines that they may have the object or effect of harming competition, particularly where they have foreclosure effects or facilitate horizontal coordination. The Guidelines, however, acknowledge that they are unlikely to give rise to competition concerns unless there is market power, and that they offer greater scope for efficiencies.

How does the First Conduct Rule apply to trade associations?

It is generally recognised that trade associations can be beneficial in improving standards and ensuring better service to customers. However, they also provide the opportunity for competitors to discuss various issues that fall on the wrong side of the line. Therefore, trade associations must be careful to ensure that any exchange of information is compliant with competition law.

Are there any other exclusions?

The Ordinance contains a *de minimis* exclusion from the First Conduct Rule for all agreements between undertakings with a combined annual global turnover not exceeding HK\$200 million, provided such agreements do not constitute serious anti-competitive conduct. In respect of corporate groups, the Commission’s guidance note, How to Assess “Turnover” for Exclusions from

the Competition Ordinance Conduct Rules, makes it clear that the turnover assessment would cover all companies that form the same economic unit (i.e. are controlled by the same ultimate parent).

In addition, there are certain exclusions for agreements which enhance economic efficiency, which are undertaken to comply with legal requirements or are undertaken by undertakings entrusted by the Government with the operation of services of general economic interest. On 8 August 2017 the Commission issued the first block exemption order for vessel sharing agreements between liner shipping companies. The overall review process lasted over one and a half years, following submission of the application on behalf of the Hong Kong Liner Shipping Association three days after the Ordinance coming into full effect in December 2015. The Commission granted an exemption for vessel sharing agreements but not for voluntary discussion agreements. This decision provides helpful insight into the Commission's approach, in particular, its narrow interpretation of the criteria for the economic efficiency exclusion and emphasis on empirical evidence.

On 19 October 2018, the Commission published its decision that the Code of Banking Practice (Code) is not excluded from the First Conduct Rule by or as a result of the legal requirement exclusion. The overall review process lasted over ten months, following submission of the application by 14 authorised institutions under the Banking Ordinance. Nevertheless, the Commission confirmed that it has no current intention to investigate or pursue enforcement action in respect of the Code in its present iteration. This decision shows the Commission's narrow interpretation of the legal requirement exclusion.

On 22 October 2019, the Commission published its decision in respect of a proposed pharmaceutical sales survey by the Hong Kong Association of the Pharmaceutical Industry. The Commission decided that the proposed survey is not excluded from the First Conduct Rule by the economic efficiency exclusion. The Commission considered that the applicant failed to provide sufficiently compelling economic evidence to substantiate the claims of economic efficiency arising from the proposed survey. This decision reaffirms the Commission's narrow interpretation of the criteria for the economic efficiency exclusion and emphasis on empirical evidence.

Second conduct rule: abuse of market power

What constitutes a “substantial degree of market power”?

An undertaking that does not face sufficiently effective competitive constraints on a relevant market (i.e. the ability to price above competitive levels or restrict output or quality below competitive levels) is likely to be found to have a “substantial degree of market power”. In practice, a substantial degree of market power may arise where an undertaking has a significant proportion of the business in a relevant market.

Note that this is a different threshold than the “dominance” test adopted in the EU, China, Singapore and other jurisdictions. In drafting the Ordinance, the Government was concerned to ensure that the Second Conduct Rule should be capable of applying to the many sectors in Hong Kong that have two or three big players, none of which would be dominant.

The Guideline on the Second Conduct Rule does not refer to any indicative threshold for a substantial degree of market power to arise, although the Government has previously indicated that an undertaking with a market share of less than 25 per cent is unlikely to have a substantial degree of market power.

What conduct would be caught?

The Ordinance confers on businesses with a “substantial degree of market power” a special responsibility not to engage in behaviour that is considered abusive and which has an anti-competitive object or effect on the Hong Kong market. Conduct will be abusive where it is “exclusionary”, i.e. it prevents competitors from competing effectively or drives them out of the market.

Examples of “abuse” could include predatory pricing (i.e. pricing below cost so as to drive a competitor out of the market), loyalty enhancing rebate schemes, exclusive dealing, tying/bundling and a refusal to supply an essential input to an actual or potential competitor.

What about “exploitative” conduct?

Exploitative conduct is conduct which is unfair to customers (typically excessive pricing).

The Ordinance does not distinguish between “exclusionary” and “exploitative” conduct but the Commission has indicated in its Enforcement Policy (published in November 2015) that its focus is on the former.

Are there any exclusions?

The Ordinance contains a *de minimis* exclusion from the Second Conduct Rule for all undertakings with annual global turnover not exceeding HK\$40 million. Again, in respect of corporate groups, the Commission’s guidance note on How to Assess “Turnover” for Exclusions from the Competition Ordinance Conduct Rules makes it clear that the turnover assessment would cover all companies that form the same economic unit (i.e. are controlled by the same ultimate parent).

In addition, as with the First Conduct Rule, there are certain exclusions for conduct undertaken to comply with legal requirements or undertaken by undertakings entrusted by the Government with the operation of services of general economic interest.

What powers will the authorities have to investigate a potential breach?

The Commission is given a full range of powers in the Ordinance to investigate suspected breaches. These powers include the power to require production of documents and information, to require individuals to attend interviews before the Commission and, if armed with a court warrant, to enter and search premises (i.e. a dawn raid).

Members of the Commission and the Tribunal

On 27 April 2018, the Government announced the reappointment of six prior members of the Commission and the appointment of nine new members (a total of 15 members) for a two-year term beginning 1 May 2018. Anna Wu, a former chairperson of the Consumer Council, has been reappointed as chairperson. The other members represent sectors such as law, economics, consumer protection, financial services, commerce and industry. In addition to its members, the

Commission is also operated by its executive arm. The current Chief Executive Officer of the Commission is Mr. Brent Snyder, previously Deputy Assistant Attorney General in the Antitrust Division of the Department of Justice of the United States.

Mr. Justice Godfrey Lam and Madam Justice Queeny Au-Yeung were reappointed as President and Deputy President, respectively, of the Tribunal, each for terms of three years with effect from 1 August 2019. Every judge of the Court of First Instance will, by virtue of his or her appointment as such, be a member of the Tribunal.

What penalties can be imposed on a business that breaches the Ordinance?

Warning notices and infringement notices

If the alleged breach of the First Conduct Rule does not amount to “serious anti-competitive conduct” (discussed above), then the Commission **must** issue a “warning notice” requesting the relevant undertaking to cease the relevant conduct within a specified period before instituting proceedings in the Tribunal. Only if the undertaking fails to comply with the warning notice, or repeats the anti-competitive conduct after initial rectification, may the Commission bring proceedings against that undertaking.

If the alleged breach amounts to “serious anti-competitive conduct” or a breach of the Second Conduct Rule, no warning notice can be issued. The Commission may instead choose to bring proceedings in the Tribunal straight away, or it may issue an “infringement notice” which would describe the alleged infringing conduct, set out the evidence on which the Commission formed its view and state the terms on which the Commission would be willing to settle the matter without bringing proceedings in the Tribunal. In January 2020, the Commission issued its first infringement notice, which included a set of commitments offered by the relevant company, in connection with the fifth enforcement case.

Commitments

At any stage of the Commission’s investigation, the relevant undertakings can offer commitments to take certain action or refrain from taking action to address the Commission’s concerns in lieu of further investigation or formal proceedings in the Tribunal.

Leniency

The Commission issued its Leniency Policy for Undertakings engaged in Cartel Conduct (Leniency Policy) in November 2015. The Commission’s Leniency Policy is to provide immunity from pecuniary penalty to the first cartel member who reports the cartel conduct to the Commission. The fifth enforcement case in 2020 saw the first proceedings following a successful leniency application.

With respect to subsequent members who come forward with information on the cartel, the Commission recently published a Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct in April 2019, under which the Commission may agree with such cartel members to apply a discount to the pecuniary penalty it would otherwise recommend to the Tribunal. While it is

the Tribunal that determines the final pecuniary penalty, the Commission expects the Tribunal to take into account the Commission's recommendations.

Sanctions available to the Tribunal

If proceedings are brought in the Tribunal and a breach of the First or Second Conduct Rule is found, the Ordinance gives the Tribunal the power to apply a full range of remedies, including:

- financial penalties of up to 10 per cent of Hong Kong turnover for a maximum of three years of the breach;
- disgorgement orders (i.e. to pay back the illegal profits made from the breach);
- damages awards to aggrieved parties;
- injunctions; and
- disqualification orders against directors.

Follow-on actions for damages

If the Tribunal (or other court) finds that an undertaking has breached the First or Second Conduct Rule, or the undertaking makes an admission of breach in its commitments to the Commission, a third party which has suffered loss as a result of the breach is able to bring a private action for damages against the relevant undertaking before the Tribunal.

The ruling of the Tribunal (or the relevant appeal court) as to liability in respect of proceedings brought by the Commission will be binding in any follow-on action. The claimant would need to prove only causation and quantum.

The limitation period for follow-on actions is three years from the expiry of the appeal period following a court decision that the Ordinance has been breached.

The Ordinance does not provide for a standalone right of action (i.e. where the Tribunal or relevant appeal court has not found a breach).

Conclusion

The coming into effect of the Ordinance has been a significant step towards enhancing competition and consumer welfare in Hong Kong, but it also presents a big challenge for the business community. Businesses have to embark on a journey of understanding and implementing competition law principles, which may in some cases require fundamental changes to the way business is done in Hong Kong.

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