GIBSON DUNN

Antitrust in China – 2019 Year in Review

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2019 was another busy year of enforcement for China's State Administration for Market Regulation (the "**SAMR**"). On the merger front, the SAMR issued five conditional approval decisions, demonstrating its continued reliance on creative remedies such as hold-separate obligations, commitments to supply products and services on fair, reasonable and non-discriminatory terms and the implementation of antitrust compliance mechanisms. The SAMR's decision in Novelis' proposed acquisition of Aleris demonstrated the risks in opting for the simplified review procedure. On the non-merger side, the SAMR imposed heavy penalties on a number of foreign-invested companies for anti-competitive conduct and launched high-profile investigations involving multinational corporations in 2019. Separately, the Supreme People's Court of China provided valuable insight into the arbitrability of antitrust civil claims and rules on resale price maintenance in two landmark judgments.

2020 is likely to be a very important year for antitrust enforcement China. Since the second half of 2019, the SAMR has been particularly active in publishing new regulations and guidelines, as well as proposing amendments to existing antitrust legislation. In January 2020, the SAMR published proposed amendments to the Anti-Monopoly Law (the "**AML**") for comments. The proposed changes include higher fines for merger-related conduct, in response to long-standing concerns that the current fines are too low, as well as a number of other substantive changes.

This client alert highlights the most significant developments from 2019 and what to expect for 2020.

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1. Legislative/Regulatory Developments

Since its establishment in March 2018, the SAMR has introduced a number of legislative enactments and guidelines, which not only codify the practices of its predecessors, but also introduce notable changes to the interpretation and enforcement of the AML.

New Antitrust Regulations. The SAMR published three antitrust rules on July 1, 2019: (1) Interim Provisions on Prohibiting Monopoly Agreements;[1] (2) Interim Provisions on Prohibiting Abuse of Market Dominant Position;[2] and (3) Interim Provisions on Restraining Abuse of Administrative Power to Restrict Competition.[3] These regulations entered into force on September 1, 2019 (together, the "**Antitrust Regulations**").

The Antitrust Regulations seek to unify the fragmented enforcement scheme that existed in the past by codifying the practice of the SAMR's predecessors while providing more detailed guidance on certain issues. Furthermore, unlike the regulations issued by the SAMR's predecessors, the Antitrust Regulations combine both substantive and procedural provisions. Procedurally, the Antitrust Regulations set out the division of responsibility and working mechanisms between the national level and provincial level

enforcers and also strengthen the SAMR's supervision of the provincial level enforcement activity, to ensure consistent standards across the nation. Provincial anti-monopoly enforcement agencies must report to the SAMR within seven business days of initiating an investigation of an alleged AML violation and notify the SAMR before suspending, terminating, or imposing penalties in an investigation.

The Interim Regulation on Prohibition of Monopoly Agreements (the "**Monopoly Agreement Regulation**") distinguishes between: (1) typical or "core" monopoly agreements, which are *per se* illegal; and (2) non-typical monopoly agreements or "non-core" monopoly agreements, which adopt the rule of reason approach and explicitly require the SAMR to analyse whether competition is restricted or excluded as a result. In addition, the Monopoly Agreement Regulation provides clarity on a number of issues. First, it sets out factors for identifying "non-core" monopoly agreements, such as the parties' market shares and the agreement's impact on prices and market entry. Second, the Monopoly Agreement Regulation explicitly states that the SAMR will suspend investigations on the basis of commitments for all types of AML violations, save for three types of "hardcore" cartel violations (namely, price fixing, output restrictions and market allocation). Previously, it was unclear whether all types of violations qualified for suspensions or only abuse of dominance cases. Third, the Monopoly Agreement Regulation provides guidance for identifying concerted practices: Article 6 states that the SAMR can determine the existence of a concerted practice after taking into account factors such as uniformity in conduct; exchange of communication or info between the parties; justifications for uniform conduct; and changes in market structure and/or competitive conditions.

Lastly, the Monopoly Agreement Regulation adopts a unified leniency framework for all types of monopoly agreements, including non-hardcore cartels and retail price maintenance. The first applicant with important information may be fully exempted or be given a reduction in fines of 80% or greater. The second applicant may receive a reduction in fines of 30% to 50% and the third application may receive a reduction in fines of 20% to 30%. The main change is in regard to the first applicant: unlike its predecessors, who granted a complete exemption, the SAMR has the discretion to award an exemption or a reduction of fines to the first applicant.

The Interim Provisions on Prohibiting Abuse of Market Dominant Position (the "**Abuse of Dominance Provisions**") provides helpful guidance on identifying abuses of a dominant position. In regards to collective dominance, Article 13 of the Abuse of Dominance Provisions states that the SAMR must consider various factors, such as market structure, transparency, homogeneity of the relevant products and uniformity in the conduct of the undertakings. Additional guidance is provided in regards to certain conduct, such as predatory pricing: the SAMR clarified, for the first time, that it will use average variable cost as the appropriate benchmark for predatory pricing. The SAMR will also take into account both paid and complimentary products in predatory pricing cases involving internet companies or new economy ventures. In unfair pricing cases, the SAMR will now also consider as a benchmark the dominant undertaking's own prices in other geographical markets. Lastly, the Abuse of Dominance Provisions contain a number of defences. For instance, an undertaking may argue that the abusive practice is consistent with the industrial norm; that the abuse practice is required for product safety reasons; or that it is not possible to produce or sell the products without the abusive practice.

Undertakings' Anti-Monopoly Compliance Guidelines. In November 2019, the SAMR published its draft Undertakings' Anti-Monopoly Compliance Guidelines (the "**Compliance Guidelines**")[4] for public comment. Composed of 6 chapters and 30 articles, the Compliance Guidelines are non-binding and recommend measures for developing and implementing antitrust compliance programs. Many of the Compliance Guidelines are aligned with international best practices for antitrust compliance and similar guidelines from other regulators, such as the DOJ's July 2019 policy on "Evaluation of Corporation Compliance Programmes in Criminal Antitrust Investigations".

The Compliance Guidelines adopt a risk-based approach to compliance: companies should identify and assess antitrust risks based on their unique "*business conditions, business scale, and industrial features*". The Compliance Guidelines emphasize the importance of instilling a culture of compliance and having senior executives who are openly committed to antitrust compliance. In regards to undertakings that engage in overseas business, the Compliance Guidelines note that these undertakings should understand and abide by the relevant anti-monopoly laws and regulations and obtain advice from antitrust lawyers.

The Compliance Guidelines encourage companies to set up a compliance department that has the resources, independence and capability commensurate with the companies' compliance risks. This department should understand the relevant provisions of domestic and foreign anti-monopoly laws, formulate internal compliance management measures, requirements and processes and mechanisms for supervising and evaluating the compliance status of the undertaking and its employees. Moreover, this department should liaise with human resources to carry out training and incorporate anti-monopoly compliance into performance evaluation and employee incentives and liaise with the regulator in investigations.

Lastly, the Compliance Guidelines note that companies may voluntarily submit progress reports to the SAMR, setting out the "*construction of their anti-monopoly compliance management system*" and "*the implementation effec*t". The benefits of such self-reporting are yet unclear, save for the establishment or maintenance of positive relations with the regulator through open dialogue.

Draft Amendments to the AML. On January 2, 2020, the SAMR released a draft amendment to the AML (the "**Draft Amendment**")[5] for public consultation. The deadline for comments was January 31, 2020. The Draft Amendment introduces changes that affect all aspects of AML enforcement, including merger control, non-merger enforcement and procedural rules.

In regards to merger control, the Draft Amendment seeks to increase penalties for breaches of merger-related conduct, including gun-jumping, failure to notify reportable transactions and breach of commitments in conditionally approved cases. The increased fines for gun-jumping are notable. The current version of the AML imposes a maximum fine of RMB 500,000 (~$70,000) for merger-related conduct. The Draft Amendment proposes to change the maximum fine to 10% of the infringing party's turnover in the previous financial year. Moreover, the Draft Amendment now explicitly defines "control" as the ability to "exert or potentially exert a decisive influence on another undertaking's production and operation activities or other major decisions".

In regards to non-merger enforcement, the Draft Amendment also seeks to increase the penalties for anti-competitive agreements that have been entered into but not yet implemented. The Draft proposes a maximum fine of RMB 50 million (~$7 million), which is a 100 fold increase from the previous penalty of RMB 0.5 million (~$70,000). These fines would be applied to even those companies without any turnover in the preceding year and those companies who assisted others in engaging in anti-competitive agreements. Both categories of undertakings are not subject to any penalties under the current version of the AML. In addition, the Draft Amendment widens the scope of enforcement by explicitly including "concerted practices" in its definition of "agreements" and limits the applicability of efficiency claims to agreements that are "indispensable". Lastly, the Draft Amendment adopts a rule of reason approach for assessing vertical conduct, save for retail price maintenance, which continues to be a *per se* violation of the AML.

The Draft Amendment also introduces a number of procedural changes to the SAMR's enforcement of the AML. The Draft Amendment now allows the SAMR to "stop the clock" during a merger investigation (for instance, if the transaction parties supplement their notification with additional materials) and codifies the SAMR's ability to carry out sub-

threshold merger investigations and to amend the turnover notification thresholds from time to time. The Draft Amendment also notes that the SAMR's investigations into anti-competitive behavior cannot be suspended if they involve hardcore cartel infringements, such as price-fixing, output restriction and market allocation. Finally, under the Draft Amendment, the SAMR may seek assistance from police departments when carrying out an antitrust investigation. This provision is expected to reinforce the SAMR's ability to conduct dawn raids.

Draft Interim Provisions on the Review of Undertakings Concentrations. On January 7, 2020, the SAMR published the Draft Interim Provisions on the Review of Undertakings Concentrations (the "**Draft Merger Review Provisions**")[6] for public consultation. The Draft Merger Review Provisions demonstrate the SAMR's effort to integrate and streamline rules on its review, investigation and enforcement concerning "concentrations of undertakings," which govern the merger of undertakings, an undertaking's acquisition of control over other undertakings by acquiring their equity or assets, and an undertaking's gaining control and decisive influence over other undertakings by contracts or other means.

In addition to consolidating the existing merger rules and regulations, the Draft Merger Review Provisions provide clarification on key issues such as procedures for regular merger reviews, timeline for investigations, and factors that the SAMR would consider when conducting a review, as well as introduce new measures. Examples of substantive changes include the following:

- ***New Market Share Requirement for Simplified Review Procedure*.** Article 18 imposes a new market share requirement for transactions to qualify for the simplified review procedure. It provides that where the transaction will result in a joint venture changing from being jointly controlled by two or more undertakings to being controlled by only one of them, and where the controlling undertaking and the joint venture compete in the same market, the transaction will not qualify for the simplified review procedure if the combined market share of the controlling undertaking and the joint venture in the relevant market exceeds 15%.
- ***Additional Divestiture Requirements*.** Article 47 provides that parties to a proposed concentration should consider naming a specific buyer to purchase assets that they are divesting if the identity of the buyer would have a decisive influence on whether competition in the relevant market could be restored, or if there are circumstances in which the SAMR may consider such proposal appropriate. Article 47 further allows the SAMR to require the undertakings to halt the implementation of the concentration until the divestiture is complete.

The public consultation period for the Draft Merger Review Provisions closed on February 7, 2020, but it is unclear when the Draft Merger Review Provisions will be finalized and come into force.

2. Merger Control

Please refer to the section on China in our Antitrust Merger Enforcement Update and Outlook published on January 29, 2020.[7]

3. Non-Merger

Enforcement

In 2019, the SAMR published 19 enforcement decisions, most of which were issued by provincial Administrations for Market Regulation (the "**AMRs**" or "**AMR**"). These 19 decisions included 14 penalty decisions, three decisions to suspend investigations and two decisions to terminate investigations.[8] Of the 14 penalty decisions, eight involved horizontal monopolistic agreements, two concerned vertical monopolistic agreements, and the remaining four were abuse of dominance cases.[9]

While these enforcement actions concerned undertakings across industries, including pharmaceuticals, construction, public utilities and automobile, 2019 saw heavy penalties imposed on foreign-invested companies. On April 29, 2019, the SAMR published a decision issued by the Shanghai AMR to impose a fine of RMB 24.38 million (approx. USD 3.51 million) on Eastman (China) Investment Management Co., Ltd. ("**Eastman China**"), which is a subsidiary of the New York-listed Eastman Chemical Company, for abuse of dominance.[10] The Shanghai AMR found that Eastman China entered into long-term contracts with its customers that included, among other restrictive terms, a minimum purchase obligation and a take-or-pay clause. The fine amounted to 5% of Eastman China's revenues in 2016.

Two other notable decisions involving heavy fines imposed on foreign-invested companies concerned the automobile industry. In 2019, a Chongqing-based automotive manufacturing company, which is a joint venture between a Chinese company and one of the world's largest automaker that is listed on the New York Stock Exchange, was fined a total of RMB 162.8 million (approx. USD 23.47 million) by the SAMR . The SAMR found that the joint venture company sought to impose minimum resale prices on its dealers in Chongqing since 2013 by, among other conduct, implementing price lists. The fine amounted to 4% of the joint venture company's revenues in 2018.

Towards the end of the year, the Jiangsu AMR issued a decision to impose a fine of RMB 87.6 million (approx. USD 12.63 million) on the Chinese subsidiary of a foreign car manufacturing company for engaging in price-fixing conduct. The fine accounted for 2% of the Chinese company's revenues in 2016. The Jiangsu AMR found that between 2015 and 2018, the Chinese company deprived local car dealers of pricing autonomy by setting minimum resale prices for its cars in Jiangsu Province. The regulators also found that the Chinese company imposed various price-control measures to ensure that the car dealers would abide by the minimum resale prices, including cutting supplies to dealers who sold the cars at lower prices.

In addition to heavy penalties imposed on foreign-invested companies, the SAMR has launched high-profile investigations involving multinational corporations in 2019. These investigations will likely continue through 2020.

4. Civil Litigation

In 2019, The Supreme People's Court of China (the "**SPC**") handed down landmark judgments in cases concerning the arbitrability of antitrust civil claims and rules on resale price maintenance.

Arbitrability of Civil Claims. In China, the arbitrability of private antitrust actions has long been a highly debated topic among practitioners and academics. The controversy largely stems from the fact that both the Arbitration Law and the AML are silent on the matter, and

that Chinese courts have taken inconsistent approaches over the years.

The inconsistency has seemingly been resolved when the SPC handed down the judgment in *Shell (China) Limited v Hohhot Huili Material Co., Ltd.* on August 21, 2019. Hohhot Huili Material Co., Ltd. ("**Huili**"), one of Shell (China) Limited's ("**Shell China**") distributors in China, alleged that Shell China organized several of its other distributors to enter into a horizontal monopolistic agreement and collude in the bidding process. Shell China argued that Chinese courts did not have jurisdiction to adjudicate the matter because Shell China and Huili agreed in their distribution agreement to settle disputes by arbitration.

The SPC rejected Shell China's arguments and held that a contractual arbitration clause cannot exclude the Chinese courts' jurisdiction in adjudicating antitrust civil disputes. The SPC first observed that according to the AML, the question of whether certain conducts are monopolistic should be determined and handled through either administrative enforcement or civil litigation. More importantly, the SPC pointed out that the AML makes no reference to resolving anti-monopoly issues by arbitration.

The SPC then examined the scope of arbitrable disputes under the Arbitration Law. The SPC noted that Article 2 of the Arbitration Law provides that "contractual disputes and disputes arising from property rights may be put to arbitration." According to the SPC, it follows that Chinese courts would have jurisdiction over disputes that do not arise from contractual or other property rights, or ones that involve elements beyond the scope of arbitrable disputes.

Turning to the facts of the case, the SPC noted that the case was an anti-monopoly dispute rather than a contractual dispute. Although Shell China and Huili agreed to resolve disputes by arbitration, the SPC held that the AML falls within the sphere of public law, as the purpose of the legislation is to, among other aims, prevent and halt monopoly behaviour, maintain fair competition in the market and protect consumer interest and public interest in society. As a result of this classification, the determination of whether certain conducts are monopolistic is a matter that goes beyond the rights and obligations of contractual parties. In other words, anti-monopolistic disputes are not within the scope of arbitrable disputes as defined in the Arbitration Law. Therefore, the SPC held that Shell China could not rely on the arbitration clause in the distribution contract to exclude the court's jurisdiction to adjudicate the dispute.

New Analysis Framework on Resale Price Maintenance. On June 24, 2019, the SPC published its December 2018 ruling in *Hainan Provincial Price Bureau v. Hainan Yutai Scientific Feed Company*, which is a judicial review concerning resale price maintenance ("**RPM**"). This landmark decision addressed the longstanding conflicting approaches on RPM analysis taken by the Chinese antimonopoly authorities and the Chinese courts: while antimonopoly authorities treated RPM agreements as illegal per se, Chinese courts adopted a rule of reason approach in cases such as Dongguan Hengli Guochang Electronics Store v. Dongguan Yushi Xinqing Geli Trading Co., Ltd. and Dongguan Heshi Electronics Co., Ltd. (more commonly known as the Gree case).

In February 2017, the Hainan Provincial Price Bureau (the "**Price Bureau**") imposed a fine of RMB 200,000 (approx. USD 28,832) on Hainan Yutai Scientific Feed Company ("**Yutai**") for concluding agreements with its distributors in 2014 and 2015 that required the distributors to follow "guiding prices" set by Yutai in their resale to third parties. Yutai filed for judicial review of the decision and won on first instance. The Price Bureau successfully appealed the first instance decision, and Yutai further appealed to the SPC in July 2018.

The SPC rejected Yutai's appeal and clarified a number of key issues on the enforcement of the rules governing RPM under Article 14 of the AML. The court first provided an overview of Article 13 of the AML, which introduces the concept of a "monopolistic agreement," defined as "agreements, decisions or concerted actions which eliminate or restrict competition" in the AML. The court explained that certain agreements, decisions or

concerted actions, once formed, will necessarily lead to the elimination or restriction of competition, and thus are illegal per se. According to the SPC, price-fixing, output restriction and market-sharing are commonly accepted as unreasonable restrictive behaviours that are harmful to competition. As a result, antimonopoly authorities are entitled to presume such behaviors as unlawful once there is sufficient evidence to prove the existence of such behaviors, without having to engage in a comprehensive analysis on whether they eliminate or restrict competition.

Then SPC then examined Article 14 of the AML, which prohibits three types of agreements between an undertaking and its trade counterparts: (1) agreements that fix the resale price; (2) agreements that restrict the lowest resale price; and (3) other monopolistic agreements identified by the antimonopoly authorities. Noting that the first and second type of agreements are typical vertical monopolistic agreements, which fall within the scope of "monopolistic agreements" as defined in Article 13 of the AML, the SPC held that the Chinese antimonopoly authorities need not prove anticompetitive effects in cases where they have established the existence of such agreements. In other words, there is a presumption that RPM agreements eliminate or restrict competition and are thus illegal. The SPC added that this presumption is rebuttable by the undertaking adducing sufficient evidence to either prove that the RPM agreement does not eliminate or restrict competition, or demonstrate that the agreement falls within one of the exemptions set out in Article 15 of the AML.[11]

In explaining its rationale for placing a presumption of unlawfulness on RPM in favor of the Chinese antimonopoly authorities, the SPC acknowledged that RPM can have both procompetitive and anticompetitive effects. However, given the relatively immature market conditions in China and the relatively weak self-correction tendencies of the Chinese marketplace, it is essential that the antimonopoly authorities are empowered to focus on regulating and penalizing RPM agreements. The SPC determined that it would not be appropriate to require antimonopoly authorities to conduct a comprehensive investigation and engage in complex economic assessment in every RPM case, which would only substantially raise the costs and lower the efficiency of antimonopoly enforcement.

On the facts of the case, the SPC found that Yutai failed to provide sufficient evidence to demonstrate that the RPM agreements that it concluded with its distributors did not restrict or eliminate competition in the relevant market. In particular, the SPC rejected the first instance court's finding that the agreements had no anticompetitive effects due to Yutai's relatively low sales volume and market share. The SPC criticized the first instance court for failing to engage in any comprehensive analysis or examination of evidence to support its conclusion.

Finally, the SPC drew a distinction between administrative enforcement cases, such as the present case, and civil disputes. The SPC held that plaintiffs in civil litigation will not be entitled to the presumption that RPM agreements are unlawful. Instead, in order to recover monetary damages, plaintiffs must prove that they actually suffered harm, which necessarily involves a demonstration of the RPM agreement's anticompetitive effects.

Shortly after the publication of this SPC decision, the SAMR issued the Interim Regulation on Prohibition of Monopoly Agreements (the "**Monopoly Agreement Regulation**") on July 1, 2019. The Monopoly Agreement Regulation provide that agreements specifically enumerated in Article 14 of the AML, namely agreements that fix the resale prices or restrict the lowest resale prices, are deemed illegal per se. Given that the SPC decision has now been enacted into law and that there is little guidance as to the types of evidence that would be considered sufficient to rebut the presumption that RPM agreements are unlawful, undertakings are advised to be very cautious before imposing any pricing requirements on their distributors or retailers.

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[1] SAMR, "Interim Provisions on Prohibiting Monopoly Agreements" (??????????)

(released on July 1, 2019), available at http://gkml.samr.gov.cn/nsjg/fgs/201907/t20190701_303056.html.

[2] SAMR, “Interim Provisions on Prohibiting Abuse of Market Dominant Position” (??????????????) (released on July 1, 2019), available at http://gkml.samr.gov.cn/nsjg/fgs/201907/t20190701_303057.html.

[3] SAMR, “Interim Provisions on Restraining Abuse of Administrative Power to Restrict Competition” (??????????????????) (released on June 26, 2019), available at http://www.gov.cn/gongbao/content/2019/content_5433728.htm.

[4] SAMR, “Announcement of the State Administration for Market Regulation to Seek Public Comment on the Undertakings’ Anti-Monopoly Compliance Guidelines (Draft for Public Comment)” (??????????????????????????????????????) (released on November 28, 2019), available at http://www.samr.gov.cn/hd/zjdc/201911/t20191128_308890.html.

[5] SAMR, “Announcement of the State Administration for Market Regulation to Seek Public Comment on the Revised Draft of the Anti-Monopoly Law (Draft for Public Comment)” (????????<????>???? ?????????????? ?????) (released on January 2, 2020), available at http://www.samr.gov.cn/hd/zjdc/202001/t20200102_310120.html.

[6] SAMR, “Announcement of the State Administration for Market Regulation to Seek Public Comment on the Interim Provisions on the Review of Undertakings Concentrations (Draft for Public Comments)” (??????????????????????????????????????) (released on January 7, 2020), available at http://www.samr.gov.cn/fldj/tzgg/zqyj/202001/t20200107_310322.html.

[7] Gibson, Dunn & Crutcher, “Antitrust Merger Enforcement Update and Outlook” (released on January 29, 2020), available at https://www.gibsondunn.com/antitrust-merger-enforcement-update-and-outlook-january-2020/.

[8] SAMR, “Administrative Penalty Cases” (??????), available at http://www.samr.gov.cn/fldj/tzgg/xzcf/.

[9] SAMR, “Administrative Penalty Cases” (??????), available at http://www.samr.gov.cn/fldj/tzgg/xzcf/.

[10] SAMR, “The State Administration for Market Regulation Published Administrative Penalty Decision Against Eastman Corporation for Abuse of Market Dominance” (??????????????????????????????) (released on April 29, 2019), available at http://www.samr.gov.cn/fldj/tzgg/xzcf/201904/t20190429_293241.html.

[11] Article 15 of the AML provides for exemptions where the objective of the monopolistic agreement is to, among other societal benefits, improve technology, enhance the competitiveness of small and mid-sized enterprises or achieve public interests.

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