中倫律師事務所
ZHONG LUN LAW FIRM

北京市朝阳区建国门外大街甲 6 号 SK 大厦 31、33、36、37 层　邮政编码：100022
31, 33, 36, 37/F, SK Tower, 6A Jianguomenwai Avenue, Chaoyang District, Beijing 100022, P.R.China
电话/Tel：(8610) 5957 2288　传真/Fax：(8610) 6568 1022/1838
网址：www.zhonglun.com

China Plans to Strengthen Its Antitrust Regime by Proposed Fine-tuning of the Anti-Monopoly Law

On January 2, 2020, China's State Administration for Market Regulation (**"SAMR"**), officially unveiled a draft amendment to *the Anti-monopoly Law of the People's Republic of China* (the **"Draft"**) for public comments.[1] This is the first published complete official draft amendment since the Anti-monopoly Law ("**AML**") came out in 2008, and following the inclusion of the AML amendment into its legislative agenda by the Standing Committee of the National People's Congress in 2018.[2]

Since its inception as China's super enforcement agency in April 2018, SAMR has become increasingly active in both antitrust enforcement and legislation frontiers. In the past 25 months, it has reviewed and cleared nearly 1000 mergers (including 12 conditional clearances) and closed over 120 investigations involving a variety of sectors, such as pharmaceuticals and healthcare, energy, chemicals, automobile, real estate, FMCG, and ICT.[3] In September 2019, SAMR issued three interim enforcement measures dealing with monopoly agreements, abuse of market dominance and administrative monopoly. In addition, it has been working on several antitrust guidelines on antitrust compliance, leniency and commitment programs, and curbing abuse of intellectual property rights, etc.

The Draft appears to reflect the past enforcement experiences and point to future enforcement trends with closer alignment with other major jurisdictions (such as U.S. and EU) – instead of overhauling the current framework of the AML, it attempts to mostly fine-tune areas such as competition policy, merger control, concerted and unilateral conducts, investigation procedures, legal liability, etc. Below are some highlights which have implications to firms' antitrust compliance effort in China.

Making violators pay heavier prices

- Highlight 1: Significant hike in fines for certain substantive and procedural violations
- Highlight 2: Introducing criminal sanctions against substantive violators

Merger Control

- Highlight 3: Broad language for the concept of "control", reflecting current merger review practice

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[1] See SAMR's notice at http://www.samr.gov.cn/hd/zjdc/202001/t20200102_310120.html. The deadline of submitting comments to SAMR is January 31, 2020. Please contact Frank Jiang at jianghuikuang@zhonglun.com if you would like to discuss, and we welcome any comments that can be incorporated in our submission to SAMR.

[2] See http://www.npc.gov.cn/npc/c30834/201809/f9bff485a57f498e8d5e22e0b56740f6.shtml#.

[3] From the implementation of the AML in 2008 till June 2020, SAMR (and previously MOFCOM) has closed over 3,000 merger filing cases, including 48 conditional clearances, 2 prohibition decisions; 52 failure-to-notify sanctions, 1 gun-jumping sanction, and 2 sanctions for violation of restrictive conditions.

- Highlight 4: SAMR granted power to revise filing thresholds
- Highlight 5: Closing in on anti-competitive below-threshold deals
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- Highlight 7: Heightened sanction for merger control related violations
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Monopoly Agreement

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- Highlight 14: Enhanced enforcement against abuse of administrative power

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- Highlight 15: Availing assistance from police in case of serious obstruction to an investigation
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- Highlight 17: Emerging number of firms invoking hearing rights
- Highlight 18: Potentially enhanced protection of personal privacy

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I Making Violators Pay Heavier Prices

Highlight 1: Significantly increased fines for antitrust violations

(1) As the table below shows, the Draft proposes to significantly increase the upper limit of certain monetary fines (by 10-100 times, or even more), with a view to strengthening the deterrent effect of antitrust penalties against substantive as well as procedural violations.

Violations	Current Fines	Proposed Fines
Merger-filing-related non-compliance (gun-jumping, failure to notify, violation of restrictive conditions or prohibition decision)	Up to RMB500,000 (approx. USD72,000 or EUR65,000)	Up to 10% of the turnover (at the group level) in the preceding fiscal year

Violations	Current Fines	Proposed Fines
Refusal or obstruction of antitrust investigation or merger review (e.g., refusal to provide or providing false materials or information, destruction of evidence, or threating the personal safety of law enforcement officers, etc.)	For individual: up to RMB100,000 (approx. USD14,400 or EUR13,000) For entity: up to RMB 1,000,000 (approx. USD144,000 or EUR130,000)	For individual: RMB200,000 to 1,000,000 (approx. USD28,000 to 144,000 or EUR26,000 to 130,000) For entity: up to 1% of the turnover of the undertakings in the preceding year or up to RMB5,000,000 (approx. USD720,000 or EUR650,000) (if no turnover or difficult to calculate)
Conclusion of monopoly agreement which is not yet implemented	Up to RMB500,000 (approx. USD72,000 or EUR65,000)	Up to RMB50,000,000 (approx. USD7,200,000 or EUR6,500,000)
Participant in monopoly agreement with no turnover in the preceding year	Not provided	Up to RMB 50,000,000 (approx. USD7,200,000 or EUR6,500,000)
An industry association organizing undertakings to conclude a monopoly agreement	Up to RMB500,000 (approx. USD72,000 or EUR65,000)	Up to RMB5,000,000 (approx. USD7,200,00 or EUR6,500,00)

(2) Aligning with turnover-based approach to monetary sanction against monopoly agreements and abuse of dominance, the Draft proposes to subject certain other violations (e.g. gun-jumping, failure to notify, refusal and obstruction in antitrust enforcement) to a ranged fine calculated on certain percentage of an infringer's turnover (at the group level) in the preceding fiscal year. While there have been divergent approaches in past cases, the Chinese antitrust authority has clarified that the base for calculating the fine shall be the revenues from **ALL** businesses at the group level, instead of the portion attributable to the product or business concerned,[4] therefore, an AML infringer, whether substantive or procedural, could face a fine up to millions or billions of Renminbi, should the draft wording on fines be included in the final version.

Examples:

In 2018, SAMR imposed a fine of RMB 8.49 million (approx.. USD1.22 million or EUR1.1 million) on a local pharma company (Erkang Pharma) for abuse of dominance on the market of chlorphenamine maleate. This fine was calculated on 8% of its overall revenue from all businesses (RMB 106 million, approx.. USD 15 million or EUR13 million), instead of the revenue attributed to the concerned business of chlorphenamine maleate.[5]

In 2019, SAMR published a sanction decision adopted by Shanghai AMR against chemical giant Eastman for abuse of market dominance in China. The fine was calculated on 8% of the subject undertaking (Eastman China)'s overall revenue.[6]

[4] Head of Anti-monopoly Bureau Mr. WU Zhenguo confirmed this principle in an interview. See, e.g. http://www.cicn.com.cn/2019-05/22/cms117787article.shtml; Shanghai Anti-Monopoly Compliance Guide for Business Operators also clarifies this enforcement principle , see Page 3 thereof. Please see our highlights on the Shanghai Anti-Monopoly Compliance Guide for Business Operators at http://www.zhonglun.com/Content/2020/01-03/1854355493.html (in English), and http://www.zhonglun.com/Content/2020/01-03/1852560197.html (in Chinese).

[5] See SAMR's sanction decision at http://gkml.samr.gov.cn/nsjg/bgt/201902/t20190216_288679.html.

[6] See SAMR's publication of the decision at http://www.samr.gov.cn/fldj/tzgg/xzcf/201904/t20190429_293241.html.

Highlight 2: Introducing criminal sanctions against substantive violators

(3) The current AML only provides that refusal or obstruction of investigations which constitutes crime is subject to criminal liabilities. The Draft proposes that criminal sanctions could be imposed for a substantive monopolistic conduct which constitutes a crime (Article 57), thereby making the AML generally aligned with the enforcement practice of some other jurisdictions such as the U.S. (for cartel activities). While it remains unclear whether and how the criminal law will be amended/enforced to align with such provision (for example, whether the relevant executive or the firm itself (or both) would be held criminally liable for antitrust violations), under the current PRC criminal law, a small number of monopolistic conducts (such as bid rigging) and procedural violations (such as refusing or obstruction antitrust investigations with aggravating circumstances) have already been criminalized – in 2019 alone, over 500 bid rigging criminal cases were published.[7]

II Merger filing

Highlight 3: Broad language for the concept of "control", reflecting current merger review practice

(4) The Draft attempts to clarify the general concept of "control", which is key to determining whether a transaction is deemed a concentration for purposes of merger filing assessment, and has often been subject to divergent interpretations among practitioners. In the Draft, "control" relationship is defined to include actual exertion or potential exertion, either directly or indirectly, solely or jointly, decisive influence on the production and operational activities or other material decisions of another undertakings (Article 23). In practice, a variety of factors need to be considered in assessing whether "control" can be inferred in light of the specific circumstances of a case. For example, a PE firm's minority investment in a portfolio company (or acquisition of shares on the public market) may or may not be deemed as acquiring control for AML purposes, and often requires a closer look into the governance documents and other transaction arrangements, voting history, and so on. Indeed, we have seen a number of minority investment deals filed with PRC merger control authority,[8] or fined for failure to notify.[9]

(5) On the other hand, while the AML expressly includes "contractual control" as a form of control, the current enforcement sentiments towards merger filing in connection with transactions involving VIE (variable interest entity) structures have remained cautious. For example, the merger between Didi and Uber (both adopted the VIE structure) was probed for its failure to notify and investigation has been pending for years, although the deal has been on public watch from the very beginning. With China's further opening-up to foreign investment, it remains to be seen whether and how the authority will actively tackle this issue.

Highlight 4: SAMR granted power to revise filing thresholds

(6) There has long been criticism that China's relatively low filing thresholds contribute to

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[7] Search results from *China Judgements Online* at http://wenshu.court.gov.cn/website/wenshu/181029CR4M5A62CH/index.html.

[8] See, e.g. the merger filing by Continental AG for acquisition of 12.5% shareholding in EasyMile. See the simple case announcement form at http://fldj.mofcom.gov.cn/article/jyzjzjyajgs/201712/20171202679328.shtml.

[9] See, e.g. SAMR's sanction decision in January 2020 for MBK Partners' failure to notify an acquisition of 23.53% equity interests in the target Siyanli at http://www.samr.gov.cn/fldj/tzgg/xzcf/202001/t20200106_310261.html.

increased compliance burden of firms and the workload of the enforcement authority. Perhaps as an indirect response to such criticism, the Draft authorizes SAMR to formulate and adjust notification thresholds based on the level of economic development and industry scale (Article 24). As such, we anticipate that the filing thresholds may be adjusted upwards in the coming years. On the other hand, SAMR may also formulate more flexible supplementary filing thresholds (such as transaction value, market share, etc. as adopted in other jurisdictions like U.S., Germany, Austria) for transactions that do not meet the turnover thresholds but pose competition issues. Such multi-dimensional thresholds can be especially significant for transactions in the Internet sector, as it is not uncommon for emerging Internet firms to have a significant market share in a traditionally defined relevant market, and under current thresholds rules, rivals can more easily make anti-competitive deals or a dominant firm in one sector can easily acquire an emerging leader in an adjacent sector, as the target will likely not have generated a turnover above the threshold (so called “killer acquisition”).

Highlight 5: Closing in on anti-competitive below-threshold deals

(7) In addition to granting SAMR the power to develop multi-dimensional thresholds to cover more deals with actual or likely anti-competitive effect, the Draft also proposes that anti-monopoly enforcement authorities should investigate deals that fall below the merger filing thresholds but have or will likely have anti-competitive effect, and may take appropriate remedies against such concentration (such as orders to impose restrictive conditions, orders to cease the concentration or restore the pre-deal status) (Articles 24 and 34). If this proposal is adopted, firms adopting new economic modes (such as Internet-driven business models or data-intensive applications) with higher market shares in the emerging sector would face heightened competition regulation, and the relevant transactions (even if they are closed) could be exposed to greater antitrust risks, and firms in such situations are advised to regularly review its transactions to manage the antitrust compliance risks.

Highlight 6: Introduction of stop-the-clock mechanism

(8) For complex merger review cases, the required time for resolution of competition issues often exceeded the 180-day aggregate review period prescribed by the AML. The filing parties had to use the so-called “pull-and-refile” maneuver, i.e. voluntary withdrawal and then re-submission of the merger notification, which technically restart the review period. The Draft proposes a tolling mechanism (commonly referred to as "stop-the-clock", which has been in practice in jurisdictions such as the EU) to help avoid pull-and-refile. The proposed “stop-the-clock” triggers (Article 30) are:

- when the notifying party applies or agrees to suspend the review period;
- when the notifying party is requested to supplement materials or information, and
- when the notifying party and the authority is negotiating restrictive conditions.

(9) On the other hand, there is a concern that this mechanism may result in undesired extension of the review period for ordinary cases (this may happen even in simple cases), casting uncertainty on a transaction with tight schedule. As a backdrop, from 2015 through the end of 2019, around 85% cases in China were cleared under simplified procedure, with average review duration of 21 days.

Highlight 7: Heightened sanction for merger control violations

(10) As noted in Highlight 1 above, the Draft proposes a significant increase of fines for merger-filing related violations (up to 10% of turnover). The current statutory monetary fine for failure to notify is relatively low; in practice, all published merger-related sanction cases involved fines from RMB150,000 to 400,000 (approx. USD21,000 to 57,000 or EUR19,000 to 52,000), and no transaction has been ordered to be ceased or unwound. Therefore, some companies may knowingly refrain from making merger filing for a notifiable transaction, or only notify the transaction after closing. In this respect, the drastically raised upper limit for the fine proposed in the Draft will draw heightened attention to the parties' notification obligations when they are designing or negotiating the transaction structure, terms and timetable. In light of the aggressive fines proposed in the Draft, we anticipate that an increasing number of firms will conduct a self-review or seek professional advice on past merger-filing related non-compliances and weigh the option of making early voluntary report on such failure and make a retroactive filing.

Example:

In 2019, SAMR imposed a fine on New Hope for gun-jumping in connection with its acquisition of a listed company (Xingyuan Environment). In fact, New Hope made an initial filing to SAMR under the simplified procedure, but chose to proceed with closing before the expiration of the 10-day announcement period. The fine was finally determined at RMB 0.4 million (approx. USD 50,000 or EUR52,000), a relatively higher end figure, considering the current fine ceiling of RMB 0.5 million for merger filing related violations.[10]

Highlight 8: Tightened cooperation requirement in merger review and non-compliance investigation

(11) The Draft further emphasizes the obligation of notifying parties or investigated parties to cooperate during a merger review or merger investigation. The Draft allows the antitrust enforcement authority to revoke a clearance decision if it later finds that the review decision is based on inaccurate information submitted by the notifying party (Article 51). As noted above in Highlight 1, the Draft also raises the penalty ceiling for firms which refuses or obstructs merger review or investigation (such as refusing to provide materials or providing false materials, etc.) to 1% of turnover, significantly increasing the cost of non-cooperation (Article 59).

Highlight 9: Alignment with latest legislative trends on national security review (NSR)

(12) The Draft also fine-tunes its wording on the potential NSR requirement for a concentration of undertakings by replacing the concept of "acquisitions" by foreign investors to the broader concept of foreign investment (which in practice could include contractual control, beneficiary ownership, trust, reinvestment, overseas transactions, lease, subscription of convertible bonds, and so on) (Article 36). The proposed revision is in line with the recent legislative trends on NSR. Also, the new Foreign Investment Law generally requires NSR on any foreign investment that may have a bearing on national security. It is also noteworthy that merger control provides a good opportunity for the relevant authorities to assess a specific transaction and its interaction with NSR. Therefore, for transactions involving a Chinese counterpart, it is important to make an early NSR assessment concurrent with merger notification

[10] See SAMR's sanction decision at http://www.samr.gov.cn/fldj/tzgg/xzcf/202001/t20200110_310405.html.

planning, and synchronize the two steps as much as possible.[11]

III Monopoly Agreement

Highlight 10: More nuanced criteria for exemption and suspension of investigation

(13) With respect to grant of exemption, the Draft incorporates an element laid out in the lower-level implementation rules – SAMR's Interim Rules on Prohibition Against Monopoly Agreements ("MLA Interim Rules)[12], that is, *"the agreement is a requisite condition to achieving the relevant circumstances"* (Article 18). With this added element, undertakings seeking to get exemption will bear a heavier burden of proof. With respect to suspension of investigation, same with the MLA Interim Rules, the Draft expressly rules out a suspension of investigation through application by the subject undertaking for three types of "hard-core" cartels – price fixing, production/sales volume restriction and market allocation (Article 50). By implication, firms under investigation for suspected monopoly agreement conducts other than the three enumerated types can apply for suspension of investigation.

Examples:

In May 2019, Shanghai AMR published its suspension of the investigation over Haichang (a Chinese contact lenses distributor) and its affiliates for RPM conducts in its online distribution channel, which was opened in 2017, as Haichang acknowledged the violation and committed to a thorough rectification plan.[13] This was the first suspended RPM investigation publicly reported in China. Later in November 2019, Beijing AMR also published its suspension of the RPM investigation of Lenovo, a Chinese computer manufacturer.[14]

Highlight 11: Organizers/facilitators of monopoly agreements subject to same penalty as participants (up to 10% of turnover)

(14) The Draft stipulates that any organizer of or facilitator for other undertakings to conclude monopoly agreements shall be penalized with reference to the relevant provisions on monopoly agreements (Article 17). This would cover circumstances such as "hub-and-spoke" cartels, and horizontal agreements organized or facilitated by non-trade associations. Under current practice, it is difficult for enforcement authorities to directly impose sanctions on such undertakings (such as network platforms, upstream and downstream undertakings or industry advisory institutions) which do not have direct competitive relationship with the participants in such monopoly agreements. Correspondingly, the Draft revised the relevant language so that organization of monopoly agreements by industrial associations no longer limit the scope to undertakings "in the industry" (Article 17). Platform operators (especially network platforms), information intermediaries, industry consulting institutions or

[11] Please see our highlights on the latest trends on NSR at http://www.zhonglun.com/Content/2019/09-26/1645514465.html (in English) and at http://www.zhonglun.com/Content/2019/09-04/1647363311.html (in Chinese).
[12] Please see our highlights on the MLA and DMP Interim Rules at http://www.zhonglun.com/Content/2019/07-17/1749252335.html (in English) and at http://www.zhonglun.com/Content/2019/07-18/1507462460.html (in Chinese).
[13] See SAMR's investigation termination decision at http://www.samr.gov.cn/fldj/tzgg/xzcf/201905/t20190521_293971.html.
[14] See SAMR's suspension of investigation decision at http://www.samr.gov.cn/fldj/tzgg/xzcf/201911/t20191115_308573.html

conference organizers etc. should stay vigilant about such antitrust exposure.

Examples:

In December 2018, SAMR fined three pharma companies over RMB 15 million (approx. USD 2.1 million or EUR1.95 million) for their collusion on the supply of the ingredients of glacial acetic acid. Based on the investigation, the collusion among these three companies was coordinated and organized by a third-party company, but such third party was not a subject of investigation as there is no competition relationship between such third-party company and other three pharma companies.[15] Similarly, Audi was investigated by Hubei AMR in 2014 for organizing the collusion among ten distributors on pricing; finally, the ten distributors were fined for their horizontal agreement, but Audi was fined for RPM as there is only vertical relationship, instead of competition relationship, between Audi and its distributors.[16]

IV Abuse of Dominance

Highlight 12: Lowered bar to challenge discrimination

(15) Under the current AML, finding of discriminatory treatment as an abusive conduct is premised on the imposition of restrictive conditions against trade counterparties with "same conditions" (which are usually referred to as "similarly situated" trade counterparties). In the Draft, the words "same conditions" are deleted (Article 20). Such revised wording could substantially lighten the burden of proof on enforcement authorities or plaintiffs in civil litigations in connection with a claim of discrimination, as they only need to prove that the trade conditions imposed by the allegedly dominant undertaking are different, without having to prove that they are similarly situated with other trade counterparties. Accordingly, an undertaking defending against the claim of discriminatory treatment shall bear the burden of proving "justifiable cause" for such treatment. Such shift of the burden of proof might be an effective curb on "algorithm discrimination" against users, which generally exist in the Internet-related sector (such as the practice of using big-data analysis to price merchandise to the disadvantage of existing customers). On the other hand, for market leaders which apply differentiated trade terms to their customer segments (e.g. through selective distribution management), such revision could expose them to heightened antitrust risks.

Highlight 13: Increased attention on innovation and Internet sector

(16) Like the U.S. and EU, Internet sector (broadly covering the so-called "new economy modes") has increasingly become one of the enforcement priorities in China. Specifically, the Draft sets out additional factors for finding dominance of Internet related undertakings. By summarizing certain principles in SAMR's Interims Rules on Prohibition Against Abuse of Dominance ("DMP Interim Rules")[17], the Draft provides that factors for finding dominance of Internet-related firms include network effect, economies of scale, lock-in effect and the ability to capture and process relevant data (Article 21)[18]. Nevertheless, the newly added aim of the AML to

[15] See SAMR's sanction decisions at http://gkml.samr.gov.cn/nsjg/bgt/201902/t20190216_288694.html.
[16] See, e.g. http://www.cnautonews.com/cyc/jj/201409/t20140912_324886.htm.
[17] Please see our highlights on the MLA and DMP Interim Rules at http://www.zhonglun.com/Content/2019/07-17/1749252335.html (in English) and at http://www.zhonglun.com/Content/2019/07-18/1507462460.html (in Chinese).
[18] The DMP Interim Rules provides for a number of factors. Its Article 11 provides that "in determining an undertaking's dominant market position in new economy trading modes (such as the internet sector)

"encourage innovation" in Article 1 of the Draft may provide a counter-balance. For firms with new economy modes, antitrust enforcement will likely prudently balance the contribution of new modes/technologies to the industry and to consumer welfare and the likely anti-competitive effect of their practices under current assessment framework. Undertakings in the Internet-related sector which are targets of abuse claims should elaborate on their contribution to innovation as a defense strategy.

Examples:

Competition in an Internet-related sector is highly dynamic, and antitrust assessment of the evolving Internet sector should take into account additional factors.

For example, as early as 2014, the Supreme People's Court ("**SPC**") points out in the landmark *Qihoo 360 v. Tencent Case* that, although Tencent's market share has been over 80% for several years, considering the dynamic characteristic of the relevant market, Tencent does not hold a dominant market position in China's IM software and service market.[19] This means that market share should not be over-weighted on an innovative and dynamic technology market.

In 2017, SPC reaffirmed this position in its ruling of Xu Shuqing v. Tencent case that "[m]arket share is just a relatively rudimentary and potentially misleading factor. If the high market share arises from better products of the relevant undertaking, such high market share cannot naturally lead to the conclusion of a dominant market position."[20]

The more recent dispute between JD.com and Tmall.com will certainly require a close examination of the special characteristics of the relevant e-commerce market involved in the case.[21]

V Antitrust Regulation over Administrative Conducts

Highlight 14: Enhanced enforcement against abuse of administrative power

(17) The Draft provides an explicit legal basis for fair competition review as a competition policy (Article 9) and requires that an administrative body (or an organization empowered by the relevant law or administrative regulations to administer public affairs) to subject itself to fair competition review when formulating any regulation concerning economic activities of market subjects (Article 42). The fair competition review regime was first introduced by a State Council document in 2016, and was

pursuant to Article 18 of the Anti-Monopoly Law and Article 6 through Article 10 hereof, the following factors of the industry concerned may be considered: competitive characteristics, business model, number of users, network effect, lock-in effect, technical features, market innovation, ability to capture and process relevant data, and market power of the undertakings in an associated market(s), etc."

[19] See the SPC ruling at http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=4fe3cab686984f8f91313ec8b921b96c.

[20] See the SPC ruling at http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=b15f063cc0f2423cba5ea9c700c56170.

[21] See the SPC JO ruling at http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=37bfba7eddb44920ab47aae100c0d3d4.

elaborated in the State Council Regulation on Optimizing Business Environment (both effective as of January 1, 2020). It is intended to scrutinize anti-competitive government policy measures for curbing local protectionism, market entry barriers, designated transactions, etc.

(18) In addition to the fair competition review requirement for policy making, the Draft also specifies the cooperation obligation of administrative organs under investigation (Article 52) and the power of antitrust enforcement authority to order rectification by the administrative organs within a specified time limit (Article 58), in a bid to tighten regulation over government's administrative conducts.

VI Investigations

Highlight 15: Availing assistance from police in case of serious obstruction to an investigation

(19) As noted above, the Draft proposes aggravated legal liability for refusing or obstructing investigation or review carried out by the antitrust enforcers. The Draft also expressly allows antitrust enforcement authorities to seek assistance from public security authority (i.e. the police department) during the investigation where necessary (Article 44). This proposal appears to be based on lessons from prior violent confrontations encountered during enforcement actions, particularly during dawn raids, and would help to ensure smooth enforcement activities prescribed in Article 44 (including entering the business premises, interviews, reviewing and copying documents, sealing or seizing evidences, etc.).

Examples:

In September 2015, Anhui AMR (a provincial antitrust authority) fined a listed cryptosystem company RMB 0.2 million (approx. USD 28,000 or EUR26,000) for its refusal to provide relevant materials in an anti-trust investigation. Anhui AMR opened an investigation in February 2015 for suspected cartel activities and issued two information requests to the company respectively in June and July, but the company only provided a statement without submitting any substantive materials. Anhui AMR then determined such refusal as a violation of its cooperation obligation under the AML. In addition to fines for such procedural violation, the company was finally fined over RMB 4 million (approx. USD 580,000 or EUR520,000) for its collusion with its competitors.[22] The Guangdong NDR (another provincial antitrust authority) also sanctioned Guangzhou Toyota for interfering with and obstructing antitrust investigation in 2018.[23]

Before issuance of the Draft, there were already reports of coordination between antitrust authorities and public security organs in antitrust enforcement. In August 2019, Chongqing AMR sanctioned local sintered brick manufacturers for monopoly agreements. In the sanction decision, it was confirmed that the relevant interview transcripts collected and transferred to the antitrust authority by the public security organ can be used as evidence for making the relevant findings.[24] In an earlier Chongqing AIC sanction against sandstone material suppliers in 2014, it was also

[22] See SAMR's sanction decision at http://www.samr.gov.cn/fldj/tzgg/xzcf/201703/t20170309_301560.html.
[23] See report at http://www.sohu.com/a/251917743_629444.
[24] See Chongqing AMR's sanction decision at http://www.samr.gov.cn/fldj/tzgg/xzcf/201908/t20190821_306163.html.

noted that the case clues were provided by the local public security organ.[25]

Highlight 16: Strengthened central and local enforcement network

(20) Under current practice, SAMR has generally authorized its provincial counterparts to conduct enforcement activities within their own regional jurisdictions in respect of cartel and abuse of dominance investigations and sanctions, thereby creating a leveraging effect, and allowing more active enforcement at the local level. The enforcement scope may be further expanded; for example, the newly issued *Shanghai Anti-Monopoly Compliance Guide for Undertakings* sets out Shanghai antitrust authority's supervision authority over non-compliance issues arising from mergers in Shanghai municipal territory.

(21) In addition, the Draft also proposes that SAMR may establish field offices in different regions, which would allow more responsive, closer to the ground enforcement activities in high-profile and complex cases (Article 11).

Highlight 17: Emerging number of firms invoking hearing rights

(22) The Draft keeps intact the language regarding the relevant procedural rights under the current AML (Article 48 and Article 60), where investigated parties could rely on Article 42 of the Administrative Sanction Law to request for a hearing. Many firms were unaware of such hearing rights, or were reluctant to invoke it, given that they may have submitted substantial evidence and admitted relevant suspected violations to show "cooperativeness" in the hope of lessened sanctions. However, recently an emerging number of companies are using the hearing mechanism as a defense tool.

Examples:

A number of companies started evoking their procedural hearing rights to make their voice heard by the authorities and the public. In 2019, in at least five reported sanctions by local authorities, hearings were conducted at the investigated parties' request before final decisions were issued.[26] In January 2020, for the first time SAMR also organized a hearing in connection with an antitrust investigation to hear the investigated party's explanation and statement before issuing the final decision.[27]

Highlight 18: Potentially enhanced protection of personal privacy

(23) While the current AML provides that antitrust enforcement authorities should protect the trade secrets accessed in the course of enforcement activities, the Draft sets out an additional obligation to protect personal privacy of individuals caught in the investigation. (Article 46) This provides additional legal basis for firms to seek safeguarding measures for its (and its employees') lawful rights and is in line with the enforcement trends in other major jurisdictions. However, it is unclear whether and

[25] See Chongqing AMR's sanction decision at http://www.samr.gov.cn/fldj/tzgg/xzcf/201703/t20170309_301548.html.
[26] See, e.g. Chongqing AMR's hearing notice at http://scjgj.cq.gov.cn/c/2019-07-02/490332.shtml; report of first antitrust hearing by Shandong AMR at http://www.samr.gov.cn/fgs/dffzjs/201910/t20191012_307335.html; Guangdong AMR's hearing notice at http://amr.gd.gov.cn/gkmlpt/content/2/2661/post_2661135.html; Shaanxi AMR's sanction decision (with description of the hearing held) at http://www.samr.gov.cn/fldj/tzgg/xzcf/201908/t20190830_306396.html; Hubei AMR's sanction decision (with description of the hearing held) at http://www.samr.gov.cn/fldj/tzgg/xzcf/201904/t20190404_292577.html.
[27] News on SAMR's hearing notice at https://new.qq.com/omn/20200414/20200414A0TJT100.html.

how a subject undertaking or its personnel can practically invoke such provision to refrain from disclosing certain information in the course of investigation, particularly during dawn raids.

Certain Outstanding Issues Remain Unaddressed

(24) The Draft has not exhaustively addressed all the important issues which have emerged in enforcement and judicial practices in recent years. For instance, whether resale-price-maintenance (RPM, a form of monopoly agreement under the AML) shall be assessed on a per-se illegal basis or rule of reason basis (as reflected in current tension between regulatory enforcement and judicial practices), the base for calculating antitrust fines (the standard for identifying the turnover of the undertaking in the preceding year) and identification/calculation of illegal gains, the introduction of a safe harbor rule, legality of non-price vertical restraints and so on. It remains to be seen whether some of the above issues will be discussed in subsequent deliberations of the Draft, or will be clarified through enforcement rules/guidelines.