



The beginning of a new era: China amends its antitrust code for the first time

30 June 2022

Speed Read

Amendments to China's Anti-Monopoly Law, together with proposed revisions to various implementing regulations, are set to make substantial changes to both SAMR's antitrust procedures and its substantive assessments. Key takeaways include:

- Merger control:
 - General notification turnover thresholds are proposed to be increased. At the same time, a new notification threshold is proposed to tackle "killer acquisitions". SAMR will also see its ability to review below-threshold transactions formalised.
 - A new "stop-the-clock" mechanism will allow SAMR to suspend the review period in certain circumstances, which will inject flexibility but also likely prolong some reviews.
 - Key sectors in SAMR's sights could be subject to more strengthened review.
 - Fines for failing to file and "gun-jumping" are set to increase substantially.
- Anti-competitive agreements:
 - RPM may fall to be assessed on the basis of an effect on competition, but business operators face a high burden of proof in such cases.
 - Vertical agreements may benefit from a safe harbour, depending on the market shares of the parties and the effect of the agreement on competition.

- Firms found to have facilitated anti-competitive agreements, including in a “hub-and-spoke” arrangement, could be liable for significant fines.
- Abuse of dominance:
 - Changes are proposed to be directed at the digital sector.
 - "Self-preferencing" by dominant platform operators may be caught as a new type of abusive conduct.
- More generally, SAMR will seek to regulate digital sector, protect innovation, reinforce the fair competition review system and ensure data is protected.

Steps towards a new antitrust regime

Summer is usually a quiet season, but not in the Chinese antitrust sphere this year. On 24 June 2022, China’s legislator, the Standing Committee of the National People’s Congress, passed substantial amendments to the country’s Anti-Monopoly Law (2008 AML). These amendments will officially come into force on 1 August 2022 (2022 AML).

It is the first time that any amendments have been made to the 2008 AML since it came into force 14 years ago, although the proposed amendments have been in the making for some time. In the last two years, two draft amendments have been made public (respectively, First Draft AML and Second Draft AML) – see our earlier alerts [here](#) and [here](#) for more details.

As significantly, almost immediately after the decision to amend the 2008 AML had been announced, on 27 June 2022, the Chinese antitrust regulator State Administration for Market Regulation (SAMR) issued a number of draft amendments to the existing implementing regulations to the 2022 AML. SAMR is seeking public comments in particular on:

- *the Draft Amended Regulation of the State Council on the Threshold for Notification of Concentration of Business Operators* (Draft Thresholds Regulation)
- *the Draft Amended Regulation of Review of Concentration of Business Operators* (Draft Merger Review Regulation)
- *the Draft Amended Regulation for Prohibiting Monopoly Agreements* (Draft Monopoly Agreements Regulation)
- *the Draft Amended Regulation for Prohibiting Abuse of Market Dominance* (Draft Abuse of Dominance Regulation)

These draft amendments shed further light on the implementation of the 2022 AML. The 2022 AML, along with, once finalised, its revised implementing regulations, are expected to alter the landscape of China’s antitrust enforcement in various ways.

Merger Control

The Second Draft AML already broadly set out the new merger control regime in China, including the introduction of a “stop-the-clock” mechanism, more stringent enforcements and significantly higher fines for non-compliance. The 2022 AML (together with the Draft Thresholds Regulation and the Draft Merger Review Regulation) confirms most of the Second Draft AML although it also proposes additional changes.

A newly-introduced “stop-the-clock” mechanism

For more than a decade, SAMR (and its predecessor) has had a fixed statutory time period to approve a notified deal after its official review starts: a maximum of 180 calendar days. This fixed term used to offer legal certainty

to notifying parties, but it also raises an acute risk: when the authority is unable to review the deal within the statutory period, notifying parties in practice need to refile and reinitiate the entire review period. This occurs most often in remedy decisions.

To address this concern, the 2022 AML confirms the introduction of a stop-the-clock mechanism. This tool, which exists in many other jurisdictions (including the EU), will allow SAMR to suspend the review period under the following circumstances:

- **Circumstance 1:** where the business operators fail to submit required materials or documents, making it impossible to proceed with the review
- **Circumstance 2:** where there are new circumstances or facts that have a material impact on the review of the concentration and verification becomes necessary
- **Circumstance 3:** where the remedies to potentially be imposed on the business operators require further evaluation for which the business operators have requested a stop-the-clock

For each of the three circumstances, the Draft Merger Review Regulation provides detailed rules on when the clock can be stopped and restarted. Specifically,

- For Circumstance 1, SAMR will first grant an (extendable) time period for the parties to supplement materials or documents as required. However, if they still fail to submit them within the time period given, SAMR can then adopt a decision to stop the clock. The clock will restart after the required documents or materials are submitted.
- For Circumstance 2, the notifying party will be required to proactively report to SAMR when there are material changes to the facts as described in the filing, or when new circumstances or facts that could have a significant impact on the review emerge that the notifying party knows or should know. The clock will restart after SAMR has verified the new circumstances or facts.
- For Circumstance 3, business operators can ask for the clock to be stopped when SAMR informs them that proposed remedies need further evaluation. The decision whether to stop the clock is at SAMR's discretion, and the clock will restart after SAMR completes its evaluation.

Crucially, while the stop-the-clock mechanism gives flexibility to both SAMR and the notifying parties, it may also delay the review process and inject uncertainty into the review timeline. What will happen in practice remains to be seen. Currently, except for Circumstance 1 cases, we do not expect the mechanism to have a significant impact on the majority of merger reviews, especially those reviewed under simplified proceedings.

Strengthened review for key sectors

The 2022 AML introduces the possibility for SAMR to create a new “classification and grading” merger review regime. It emphasises that the review of key sectors – namely those concerning the national economy and people's livelihood – should be strengthened.

Important aspects of this new “classification and grading” regime remain unclear and are likely to be clarified over time. This includes what a “strengthened” review would entail or how the regime would work in practice. As part of the “classification and grading” regime, we anticipate that SAMR may consider delegating part of its currently centralised merger control power to one or more of its local branches (such as Shanghai AMR). On top of the 2022 AML, the Draft Merger Review Regulation further proposes that SAMR may release “specific review rules” in these key sectors. It also requires SAMR to regularly evaluate the implementation of the merger review regime in order to improve its quality and efficiency.

As compared with the Second Draft AML, the 2022 AML removes a specific reference to a list of named key sectors. This leaves SAMR with more discretion to designate key sectors on the basis of the then-current industrial

structure and market conditions. In any event, at this stage, as indicated in the Second Draft AML, we understand that sectors relating to people’s livelihood, finance, technology and media will likely be on SAMR’s radar.

Deals below thresholds can also be reviewed

Investigating transactions below the notification thresholds

SAMR has always had the power to investigate transactions that fall below the notification thresholds if there is evidence that these transactions have or may have the effect of eliminating or restricting competition. This was provided for in existing regulations but not explicitly recognised in the 2008 AML itself.

The 2022 AML now explicitly grants this power to SAMR. It further clarifies that, for a merger falling below the notification thresholds, SAMR can require business operators to notify their transaction if there is evidence that it has or may have the effect of eliminating or restricting competition. SAMR will only initiate an investigation if the business operators fail to notify their merger pursuant to SAMR’s request. This suggests a reinforcement of SAMR’s discretion to review any transaction, possibly with a key focus on the sectors mentioned above.

Change of the notification thresholds

Along with the 2022 AML, SAMR also proposes to revise the existing turnover thresholds. The two main proposed changes in the Draft Thresholds Regulation are:

- *an increase in the general turnover threshold* (as summarised below), which essentially aims to properly reflect China’s economic development since the enactment of the 2008 AML:

| | Under the 2008 AML | Under the 2022 AML |
|------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|
| Limb 1 of the notification threshold: combined turnover of all business operators to the concentration in the last fiscal year, exceeding: | – Either RMB10billion on a global basis (approx. USD1.55bn) – Or RMB2bn in China (approx. USD310million) | – Either RMB12bn on a global basis (approx. USD1.86bn) – Or RMB4bn in China (approx. USD620m) |
| Limb 2 of the notification threshold: turnover in China of at least each of two business operators, exceeding: | – RMB400m (approx. USD62m) | – RMB800m (approx. USD124m) |

- *the introduction of a new threshold for concentrations involving large business operators* (as summarised below), which aims to address a trend of gradually increasing concentration in certain markets in China’s economy (in particular, we understand that to be the digital sector):

| New Notification Threshold (three cumulative limbs) | Under the 2022 AML |
|-----------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------|
| Limb 1 of the New Notification Threshold: large business operator with a turnover in the last fiscal year exceeding | RMB100bn in China (approx. USD15.5bn) |
| Limb 2 of the New Notification Threshold: the market value (or valuation) of the target (or the other merged party) is no less than | RMB800m (approx. USD124m) |
| Limb 3 of the New Notification Threshold: the target (or the other merged party) has generated in the last fiscal year | at least one third of its turnover in China |

Although these proposed revisions to the threshold are still under public consultation, they reflect SAMR’s intention to increase the general threshold level and to focus on transactions involving substantial business operators, and in particular so-called “killer acquisitions”.

Fines to significantly increase

As proposed in the Second Draft AML, the fines provided for in the 2022 AML for implementing a concentration in violation of the 2022 AML, including “gun-jumping”, have been significantly increased. Specifically,

- for concentrations that do not eliminate or restrict competition, the maximum fine will be RMB5m (approx. USD775,000), ie ten times higher than the current maximum fine which is merely RMB500,000 (approx. USD77,500)
- for concentrations that have or may have the effect of eliminating or restricting competition, the maximum fine will be up to 10% of the relevant party’s revenue in the preceding year

Additionally, as will be discussed below, the total amount of fines imposed by SAMR could be increased substantially more, “by 2 to 5 times” where “the violation is extremely serious or produces particularly vile influence or causes extremely serious consequences”. Although technically possible, it is yet to be seen whether or how this provision would be applied in a merger control context in practice.

More detailed changes may be introduced

In addition to the changes highlighted above, the Draft Merger Review Regulation proposes further guidance on the implementation of the 2022 AML including the following notable clarifications.

Notification of mergers

- *Previous year*: a long-debated issue as to how to interpret it, it is now proposed that:
 - for determining if notification thresholds are satisfied, the “previous fiscal year” refers to the fiscal year preceding the year when the transaction agreement is signed
 - for deciding the level of fines to be imposed in case a concentration is implemented in violation of the 2022 AML, the “previous year” refers to the preceding fiscal year in which the illegal implementation of the concentration took place

We remain cautious on the practical implication of these two proposed clarifications - especially for deals signed and closed in two different years, where by referencing the year of signing, the thresholds would not be met, but if by referencing the year of closing, the thresholds would actually be met.

- *Concept of control*: it is now clarified that the following factors need to be taken into consideration when establishing “control” (or “decisive influence”): (i) direct or indirect voting rights or equivalent rights; and (ii) the influential power on the other business operator’s business strategy and management related issues, such as appointment of senior management, financial budget and business plan. These high-level principles help to clarify what amounts to “control” (or “decisive influence”), broadly in line with practitioners’ current understanding.
- *Gun-jumping*: for the first time, SAMR clarified that “implementation of concentration” that requires to be notified in China essentially refers to “having acquired control” or having “exercised decisive influence”. SAMR officially confirms when a concentration will be regarded as “implemented” (of which prior merger control clearance (where applicable) shall be obtained beforehand). The criteria for assessment include: (i) registration of the change of shareholders or rights; (ii) (actual) appointment of senior management; (iii) actual involvement in the business decision-making and management; (iv) exchange of competitively sensitive information with the other business operator; and (v) actual integration of business. This welcome clarification will help guide the notifying parties as to what pre-clearance steps can or cannot be performed.

Review procedure

- *Cooperation of third-parties*: SAMR introduced an obligation on third parties that are related to the suspected illegal implementation of a concentration, including other business operators and individuals, to cooperate with SAMR on investigations into the implementation of concentrations in violation of the 2022 AML.

Remedies and prohibition of mergers

- *Remedies*: the remedy types are proposed to be expanded to cover digital sector-specific measures, such as the inclusion of “divestment of data” as one type of structural remedy, and the inclusion of the following as behavioural remedies: maintenance of independent operations, modification of platform rules or algorithms, and commitment on compatibility or non-reduction of interoperability.
- *Unwinding mergers*: SAMR also clarifies the detailed guiding measures that it can apply in order to unwind a transaction implemented in violation of the 2022 AML.

Anti-competitive Agreements

With the amendment of the 2008 AML, SAMR is currently also in the process of updating the more detailed anti-competitive agreement (or under Chinese antitrust rules, “monopoly agreement”) enforcement rules. Major changes are set out in the Draft Monopoly Agreements Regulation.

RPM may not be *per se* illegal

Resale price maintenance (RPM) has long been perceived as being recognised by the enforcement practice in China as more or less *per se* illegal. Recognising implicitly that RPM may also sometimes promote competition and possibly outweigh its alleged anti-competitive effect, the 2022 AML adds a new paragraph under the vertical monopoly agreement provisions, providing that RPM arrangements are not prohibited under 2022 AML if the business operators concerned can prove that there is no effect of eliminating or restricting competition. This seems to suggest that, going forward, SAMR (including its local branches) may examine RPM based on an effect on competition.

However, since the burden of proof still lies with the business operators, it is yet to be seen in practice how a business operator will be able to persuade SAMR (including its local branches) that its RPM conduct has no anti-competitive effect, or that there are even procompetitive effects associated with it.

Safe harbour for vertical monopoly agreements

The 2022 AML also introduces a new safe harbour provision that seems to apply only to vertical monopoly agreements (not to horizontal monopoly agreements).

Under this safe harbour regime, vertical agreements will not be prohibited if it is proved that the parties’ market share is lower than certain (unspecified) thresholds and if other conditions set forth by SAMR can be fulfilled. In parallel, SAMR further proposes to include in the Draft Monopoly Agreements Regulation the following thresholds and conditions:

- the market share of the business operator and its transaction counterparty (or counterparties combined if there is more than one) in the (corresponding) relevant markets is below 15%
- there is no evidence proving the agreements would otherwise restrict or eliminate competition

In fact, there are already safe harbour clauses in other existing antitrust-related regulations (such as the Regulation for Prohibiting Abuse of IPR (IPR Regulation)) as well as other antitrust guidelines (such as those relating to the automotive sector and IPR fields). However, the criteria set out in the IRP Regulation and these other antitrust guidelines may not be fully compliant with the high-level requirements under the 2022 AML. Notably, SAMR proposes to remove the safe harbour clause in the IPR Regulation, which covers both horizontal monopoly

agreements and vertical monopoly agreements in contrast to the clause set out in the 2022 AML. It is uncertain if the safe harbour clauses provided in the other antitrust guidelines will also be revised to reflect the 2022 AML.

Prohibition of organising and providing substantial assistance to monopoly agreements

The 2022 AML adds a new clause prohibiting business operators from organising other business operators to enter into monopoly agreements or providing substantial assistance in this regard. This means that third parties could be caught if they facilitate the formation of monopoly agreements.

This more or less resembles the concept of a “cartel facilitator” in the EU. It also means that, in a “hub-and-spoke” agreement, the organiser acting as a “hub” could be subject to the same penalty as the “spokes” under the 2022 AML.

Although the 2022 AML does not specify what would amount to “organising” or “providing substantial assistance”, the Draft Monopoly Agreements Regulation provides some additional guidance:

- “organising” refers to situations where:
 - although the business operator is not a party to the monopoly agreement, it has a decisive or leading influence on the parties who can enter into the monopoly agreement, as well as the scope and fulfilment conditions of the agreement, etc.; or
 - the business operator, by entering into agreements with multiple transaction counterparties, intentionally lets competing business operators exchange competitively sensitive information and therefore form horizontal monopoly agreements
- “providing substantial assistance” refers to a situation where, although the business operator does not organise the monopoly agreement, it assists with its completion or implementation, and there is a causal link between its assistance and the anti-competitive effect

Fines for monopoly agreements

Unlike the significantly increased fines in the merger control context (see above), the fines for violating monopoly agreement rules under the 2022 AML in general have not been substantially changed, ie the fine is still ranged from 1% to 10% of the business operator’s revenue generated from the previous year. However, the 2022 AML does increase the fines for certain violations, and also adds some new clauses for scenarios that were not covered by the 2008 AML. In particular:

- for antitrust infringements by parties for entering into monopoly agreements that have never been implemented, the maximum fine would increase from RMB500,000 (approx. USD77,500) to RMB3m (approx. USD465,000)
- for antitrust infringements by trade associations, the maximum fine would increase from RMB500,000 (approx. USD77,500) to RMB3m (approx. USD465,000)
- for antitrust infringements by parties that had no revenue in the previous year, the maximum fine would be RMB5m (approx. USD775,000)
- legal representatives and individuals in charge of or directly responsible for reaching monopoly agreements may face a maximum fine of RMB1m (approx. USD155,000)
- business operators that organise monopoly agreements or provide substantial assistance will be subject to the same penalty rules as the parties actually engaged in monopoly agreements

On top of this, as noted earlier, the 2022 AML also provides that SAMR can multiply “the amount of fine by 2 to 5 times” in cases where the “violation is extremely serious or produces particularly vile influence or causes extremely serious consequences”. With no further explanation, this clause suggests that SAMR will now have substantial

discretionary power to fine companies. It appears that SAMR will be empowered to impose fines way above the current 10% revenue ceiling (ie to 20% – 50%).

More details included in the implementation regulation

The Draft Monopoly Agreements Regulation proposes more detailed guidance on the implementation of the 2022 AML. Notably:

- Business operators are now specifically prohibited from using “data, algorithm, capital advantages and platform rules, etc.” to engage in monopoly agreements – this is in line with the addition of a general provision in the 2022 AML which prohibits business operators from using “data, algorithms, technologies, advantages in capital and platform rules, etc.” to violate the law.
- The term “competing business operators” is officially clarified to refer not only to “actual competitors” but also “potential competitors”. This is in line with local practitioners’ general understanding, but still marks a significant clarification.
- If a business operator is suspected of violating the 2022 AML, SAMR can convene a meeting with its legal representative and request mitigation measures. In return, it seems the business operator may avoid a formal investigation and penalty. However, it is unclear under what kind of circumstances SAMR may opt to follow this process instead of initiating an official investigation.

Abuse of dominance – specific reference to the digital sector

The rules governing abuse of dominance largely remain unchanged. However, as noted above, the 2022 AML not only introduces a general provision which prohibits business operators from using “data, algorithms, technologies, advantages in capital and platform rules, etc.” to violate the law, but also adds a new clause that specifically prohibits business operators from using “data, algorithms, technologies and platform rules” to engage in abuse of dominance conduct.

This is no surprise given the active enforcement taken against digital platform players in the past few years. The 2022 AML reinforces that the digital economy will continue to be a key focus for antitrust enforcement in China.

The Draft Abuse of Dominance Regulation also proposes new provisions dedicated to the regulation of abusive conduct in the digital sector. According to the proposed amendments:

- dominant business operators shall not use “data, algorithms, technologies and platform rules, etc.” to engage in abusive conduct
- “self-preferencing” (its scope being defined as a platform operator favouring its own products “by prioritising their display or ranking” on the platform, or “utilising unpublicised data collected from in-platform operators to develop its own products or to facilitate its own decision-making”) becomes an abuse of dominance conduct, indicating that it could be on SAMR’s radar more than any other abusive conduct in the digital sector
- “transaction amounts” (on the platform) and “power to control internet traffic” are also added as factors to be considered when establishing the dominant position of the business operators in the platform economy

Similar to the proposed change in relation to monopoly agreement investigations noted above, if a business operator is suspected of violating the abuse of dominance rules, SAMR can also convene a meeting with its legal representative and request mitigation measures. As noted above, while it seems the business operator may as a result avoid being formally investigated by SAMR, it is unclear under what kind of circumstances SAMR may opt to take this approach.

Other highlights

There are also some other notable highlights.

Innovation a key strategy

The 2022 AML specifically adds “encouragement of innovation” as one of its legislative purposes. In recent years, innovation has become an increasingly important national development strategy for China. The interplay between antitrust and intellectual property rights, as well as the platform economy, is hotly debated by scholars, law enforcement authorities and practitioners. It is recognised that innovation is the foundation of a prosperous market economy and that competition is the core mechanism to encourage innovation.

SAMR also proposes to amend the IPR Regulation, and in particular to introduce the new concept of “innovation (R&D) market” that can also be analysed as a “relevant market” (next to the traditional market definition concepts of “relevant product market” and “relevant technology market”). The “innovation (R&D) market” is defined as a market where business operators compete with each other on the research and development of future new technologies and new products (ie the technology/product is still being developed).

Fair competition review system reinforced

The 2022 AML adds a new clause on the “fair competition review system” that prevents (local) government bodies from intervening in market competition (eg issuing local regulations favouring local business operators over non-local ones). The fair competition review system was originally introduced in 2016, but was not explicitly referenced under the upper level legislation – at the time, the 2008 AML. Following June 2021 implementation rules for the fair competition review system, the 2022 AML also proposes to make a reference to this review system. This shows SAMR’s determination to further promote fair competition at a nation-wide level.

Data protection on notice

The 2022 AML also emphasises that SAMR (including its local branches) and SAMR officials have an obligation to keep private and personal information obtained from individuals during law enforcement activities confidential. Officials will be disciplined for leaking such information. It is apparent that this links with another key focus for legislators in China – data protection, especially after the new Personal Information Protection Law came into effect on 1 November 2021.

Potential exposure to civil public interest lawsuits

The 2022 AML for the first time makes clear that prosecutor’s offices can initiate civil public interest lawsuits against antitrust violations. In 2021, prosecutors across China opened around 20,000 files for potential civil public interest lawsuits. This number is likely to grow to reflect the expanded coverage that includes antitrust violations. In addition, consumer interest groups, competitors, or even downstream customers/upstream suppliers may attempt to persuade prosecutors to initiate such actions, further increasing the potential risk exposure for antitrust litigation.

Criminal liability uncertain

Under the 2008 AML, only obstructing an investigation could potentially lead to criminal liability.

The 2022 AML appears to attempt to form a further link between antitrust violations and the risk of potential criminal liability by adding a provision, according to which “where the violation of the 2022 AML constitutes a crime, relevant parties shall be held with criminal liability”. The extent to which an antitrust violation can be directly linked to or amount to criminal liability is still unclear – and ultimately it will be a question of Criminal Law instead of the 2022 AML only. We discussed this point in detail when the First Draft AML was published (please see [here](#)).

Publicity another liability

The 2022 AML further provides that administrative penalties will be registered in the social credit record system and published.

This step echoes China's endeavour to build a comprehensive social credit record system and improve the transparency of law enforcement activities. As far as a business operator is concerned, a negative social credit record could potentially impact its access to financial support (such as bank loans) or its beneficial tax treatment etc.

Conclusion

These first ever amendments to the 2008 AML will change the landscape of China's antitrust regime in various different ways. New mechanisms and clarified definitions will be in place very soon, from 1 August 2022. Overall, they reinforce an already clear trend towards more stringent antitrust enforcement. Indeed, a new Chinese antitrust regime is now coming to light.

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