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New Implementing Regulations of China's Anti-Monopoly Law: Highlights and Implications

Following last year's **significant amendments to the PRC Anti-Monopoly Law** (2022 AML) the State Administration for Market Regulation (SAMR) has published final versions of the accompanying implementing regulations. Taking effect on 15 April 2023, these regulations clarify various aspects of the 2022 AML, setting out how key concepts in merger control, anti-competitive agreements and abuse of dominance should be interpreted.

Overall, the implementing regulations bring clarity in a number of areas, in particular in relation to actions that might amount to gun-jumping in merger control, SAMR's ability to review below-threshold transactions, coordinator responsibility in horizontal agreements and the identification of abusive conduct. They also have a clear focus on the digital sector, giving more guidance on how to implement the 2022 AML in this area (and confirming that the digital economy remains on the radar for SAMR).

However, a number of questions remain unanswered. Combined with the fact that the implementing regulations in two important areas – merger filing thresholds and abuse of intellectual property rights to eliminate or restrict competition – are still in draft form, this leaves uncertainties for businesses and their advisers.

In this alert, we take you through the key elements of the final implementing regulations, highlighting what has changed from the draft versions and setting out the practical impact of the rules.

Key points

Merger control

- Concept of "control" further refined, but not all proposed criteria adopted
- Actions that can amount to "gun-jumping" explicitly listed
- Calculation of turnover clarified
- Conditions for new stop-the-clock mechanism set out
- Procedure for review of below-threshold transactions further established, including ability of third parties to report deals

Anti-competitive agreements

- Safe harbour rule retained, but market share threshold and scope remain unspecified
- Provisions on coordinator responsibility in horizontal agreements refined
- Scope of leniency regime (potentially) broadened to include vertical agreements

Abuse of dominance

- "Consistency of business operators' conduct" a primary factor for establishing collective dominance
- More guidance on identifying abusive conduct

Merger Control

The *Regulation of Review of Concentration of Business Operators* (Merger Review Regulation) largely adopts the amendments proposed in the draft. However, it also leaves some practical issues unresolved, giving SAMR a degree of discretion.

Concept of "control" refined

The Merger Review Regulation aims to clarify what qualifies as "control" for merger control purposes.

Building on changes proposed in the draft, the final version provides that the composition and voting mechanisms of decision-making bodies or management bodies such as boards of directors should be taken into account when establishing control.

The addition of the term "management bodies" aims to capture the groups within a company that perform management duties, such as the investment committee. The Merger Review Regulation adds that "attendance and historic voting patterns" of such bodies should also be considered.

The draft had also set out other parameters to establish control, such as influential power on the other business operator's business strategy and management-related issues, eg the financial budget and business plan. These criteria are broadly in line with local practitioners' understanding of the concept of control and their explicit inclusion in the Merger Review Regulation would have been welcome. However, they were not included in the final version. In practice this will likely enable SAMR to retain a degree of discretion when assessing control on a case-by-case basis.

The Merger Review Regulation also clarifies the concept of joint control. It provides that joint control can be established only if each of two or more business operators has control over a company. This indicates that parties may have some room to argue that there is no joint control in a shifting alliances scenario where no single shareholder can solely decide or veto the strategic commercial decisions of the target.

Actions that amount to "gun-jumping"

Following the proposed revisions set out in the draft, the final Merger Review Regulation clarifies the meaning of "implementation of [a] concentration".

In particular, the actions that constitute "implementation of [a] concentration" include: (i) registration of a change of shareholders or rights; (ii) (actual) appointment of senior management; (iii) actual involvement in business decision-making and management; (iv) the exchange of competitively sensitive information with other business operators; and (v) essential integration of businesses.

This is a welcome clarification. Implementing a notified transaction before receiving merger control clearance amounts to "gun-jumping", and can be sanctioned with heavy fines. The Merger Review Regulation therefore serves as a useful reference to mitigate "gun-jumping" risks, helping to guide notifying parties as to what pre-clearance (or pre-filing) steps can and cannot be performed. It is also useful to note that in previous penalty decisions, both SAMR and its predecessor MOFCOM has noted that "gun-jumping" takes place when there are actions to *start* implementing the transaction.

Calculation of turnover clarified

The Merger Review Regulation clarifies two important points in relation to the calculation of turnover.

First, it makes clear that the "previous fiscal year" refers to the fiscal year preceding the year when the transaction agreement is signed. This is in line with the general understanding in practice when assessing the notifiability for a contemplated transaction.

Second, the Merger Review Regulation sets out how to allocate turnover for certain joint ventures. It provides that turnover of a jointly controlled entity arising from its business dealing with third parties should be allocated evenly amongst all jointly controlling parties who are the business operators to the concentration, regardless of their level of shareholding. For example, if three parties jointly control an entity with 50%, 30% and 20% shareholdings respectively, one third of the turnover generated by the jointly controlled entity will be allocated to each of the three controlling parties, regardless whether it is a majority or minority shareholder. This methodology is also in line with the EU's specific guidance in calculating turnover.

Conditions for stop-the-clock mechanism

The 2022 AML introduced a "stop-the-clock" mechanism for merger reviews in three scenarios:

i) Where the business operators fail to submit required materials or documents, making it impossible to proceed with the review.
ii) Where there are new circumstances or facts that have a material impact on the review of the concentration and verification becomes necessary.
iii) Where the remedies that could potentially be imposed on the business operators require further evaluation for which the business operators have requested a stop-the-clock.

The Merger Review Regulation clarifies the conditions and procedures for stopping and resuming the clock in each of these situations.

Interestingly, the draft had given notifying parties the right to request an extension of the deadline for submitting required information, with SAMR only having the power to stop the clock if the parties could not meet that extended deadline.

This provision was not included in the final version. In practice, this indicates that SAMR will not hesitate to stop the clock when it deems this necessary. Notifying parties will also be incentivised to provide the required information to SAMR as quickly as possible in order to restart the clock.

Overall, while the new stop-the-clock mechanism will likely give rise to some uncertainties in the review process, it is expected that this mechanism will result in some efficiency benefits.

Review of below-threshold transactions

Building on what was already set out in the 2022 AML and the draft implementing regulation, the final Merger Control Regulation includes clear rules on how SAMR will investigate transactions falling below Chinese merger notification thresholds if there is evidence that the deal may have the effect of eliminating or restricting competition.

SAMR will first send a written notice requesting parties to submit a filing. If the transaction has not yet closed, the parties should halt any implementation until SAMR's clearance is obtained. If the transaction has already been implemented, the parties should file within 120 days of receipt of the notice and take actions such as suspending further implementation in order to mitigate any possible negative impacts on the market.

Notably, the Merger Review Regulation also confirms that third parties have the right to report below-threshold transactions that may have the effect of eliminating or restricting competition.

As a result of these changes, companies asked to file a below-threshold transaction should carefully consider their position. Any review process will likely have a serious impact on the transaction in terms of timing, and potentially the ability to proceed with the deal. Where there is factual basis suggesting from the outset that a below-threshold deal may have adverse impacts on the competition thus be caught by the new rules, companies is recommended to conduct a risk assessment and, if necessary, consider taking proactive actions in order to mitigate future risks of investigation.

Other key highlights

In line with the 2022 AML, the Merger Review Regulation reaffirms SAMR's obligation to create a "classification and grading" merger review regime. This has already resulted in SAMR delegating part of its merger review powers to several of its local offices.

SAMR has also made various changes in the Merger Review Regulation which relate to the platform economy, shedding some light on the authority's recent experience of digital platforms. For example, "ability to master and process data" has been added as a new criterion to determine a business operator's market power. In addition, "divestment of data" is now included as one type of structural remedy and "maintenance of independent operations", "modification of platform rules or algorithms", and "commitment on compatibility or non-reduction of interoperability" are included as possible types of behavioural remedy.

Anti-competitive agreements

The *Regulation for Prohibiting Monopoly Agreements* (Monopoly Agreement Regulation) largely follows the 2022 AML and adopts most of the provisions in the draft implementing regulation. For example, it confirms that RPM arrangements are not prohibited if the business operators concerned can prove that there is no effect of eliminating or restricting competition.

Safe harbour rules: questions remain

Following the introduction of safe harbour rules in the 2022 AML, the draft Monopoly Agreement Regulation used to propose detailed guidance on the provisions. This included a 15% market share threshold and guidelines on the burden of proof and application procedures.

However, all of these provisions were dropped from the final version. We understand it is intended to respond to the questions from the community as to how the proposed 15% market share thresholds could be reconciled with the previous antitrust guidelines issued by the Antimonopoly Committee of the State Council, specifying

certain market share safe harbours see the table below. While these are sector-specific guidelines, the boarder industrial sectors have in the past taken those guidelines into consideration when reviewing their practice for antitrust compliances. Given the absence in the final version, these sectorial guidelines will continue to serve as useful references.

	Relevant safe harbour threshold	Application
Antitrust Guidelines on Intellectual Property	– Horizontal agreement: combined market shares no more than 20% – Vertical agreement: no more than 30% in any affected relevant market – If market share data are hard to obtain or cannot accurately reflect the market position, safe harbour will apply if there are four or more substitutable technologies	– Horizontal and vertical agreements explicitly prohibited in the AML are excluded – Agreements that have anti-competitive effects are excluded
Antitrust Guidelines for Automotive Industry	– Vertical agreement: no more than 30% in any affected relevant market	– Only apply to territorial and customer restrictions in the automobile industry

Another unresolved question is whether the new safe harbour rules can be applied to both horizontal and vertical monopoly agreements.

Unlike the 2022 AML, which seems to limit the application of the safe harbour rules to vertical monopoly agreements, the Monopoly Agreement Regulation refers to the safe harbour rules in the context of general "monopoly agreements", implying that both types of arrangement may be in scope.

Provisions on coordinator responsibility in horizontal agreements

The 2022 AML and the draft Monopoly Agreement Regulation introduced a new provision on the responsibility of businesses for "organising other business operators to enter into monopoly agreements" or "providing substantial assistance", ie for coordinating anti-competitive agreements between rivals.

The final Monopoly Agreement Regulation further refines certain definitions:

- "Substantial assistance" includes "providing necessary support, creating key facilitating conditions, or other important assistance". The condition that assistance must have a causal link with the anti-competitive effect has been dropped, which will give SAMR more flexibility when enforcing these provisions.
- For the scenario of "assisting competitors to communicate or exchange information in order to reach a monopoly agreement", the word "intentionally" is omitted, meaning that a coordinator could be held liable without the need to prove its unlawful intent.

Scope of leniency regime (potentially) broadened

The Monopoly Agreement Regulation sets out how the leniency system applies, including the application deadline, material requirements, evidence standards and procedures.

Notably, suppliers or manufacturers involved in vertical monopoly agreements could potentially benefit from leniency. While previous leniency guidelines applied only to horizontal agreements, the Monopoly Agreement Regulation does not explicitly exclude vertical arrangements from scope. It will be interesting to see how SAMR will apply the leniency rules in vertical cases.

In addition, the Monopoly Agreement Regulation confirms that legal representatives, the principal persons in charge and the directly responsible persons who bear personal responsibility for reaching anti-competitive agreements can also benefit from reduced or waived penalties if they qualify for leniency.

Digital economy guidance

The Monopoly Agreement Regulation offers more guidance on how to address specific issues in the digital platforms sector.

- For horizontal monopoly agreements, for example, it stresses that competitors shall not use data and algorithms, technology and platform rules to reach horizontal monopoly agreements through means of tacit communication, exchanging sensitive information, or coordinating behaviour.
- For vertical monopoly agreements, a specific provision was added requiring operators not to use data, algorithms, technology or platform rules to reach vertical monopoly agreements by means such as automatically setting the resale price.

Abuse of dominance

Consistency of business operators' conduct for establishing collective dominance

SAMR (and its predecessors) in recent years has penalised multiple companies for abusing a position of collective dominance.

In addition to the existing practice of presuming collective dominance based on parties' combined market shares, the *Regulation for Prohibiting Abuse of Market Dominance* (Abuse of Dominance Regulation) further clarifies the framework for assessment by highlighting the "consistency of business operators' conduct", ie whether their actions are aligned, as the primary factor for considering collective dominance.

This approach appears to be aligned with judicial practice. For example, it echoes the Consultation Draft of the Judicial Interpretation of Anti-Monopoly Civil Procedures (2022) (Judicial Interpretation), which notes that collective dominance can be rebutted if there is substantive internal competition between business operators or if the business operators together face effective external competition from the market. This amendment may provide a possible route to enable businesses to rebut a collective dominance claim in administrative enforcement proceedings.

Identifying abusive conduct

Like the Merger Review Regulation and the Monopoly Agreement Regulation, platform economy-specific abusive conduct and additional justifications are also reflected in the Abuse of Dominance Regulation. These largely draw on the wording of the Antitrust Guideline for the Platform Economy[1] (Platform Guidance).

For example, to determine unfair or predatory pricing, the cost correlation across relevant markets concerned in the multi-sided platform and its reasonableness can be considered. In addition, a platform operator's exclusive dealings, either directly or through, eg, punitive or incentive measures, can be deemed abusive conduct.

The Abuse of Dominance Regulation adds that platform operators should not bundle different products by means of, eg, contract clauses, pop-up windows, or operation steps that cannot be skipped, which would be difficult for the customer to choose, change or reject. For discriminatory treatment, it clarifies that legally obtained information on the differences in customers' transaction data, personal preferences and purchasing habits will not affect a determination that they are customers in a comparable situation.

In addition to these digital sector provisions, the Abuse of Dominance Regulation also provides more guidance for the assessment of specific abuses across all economic sectors, including introducing more examples and justifications.

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[1] The Antitrust Guideline for the Platform Economy is a set of rules and principles issued by SAMR in February 2021 to regulate in particular the anti-competitive practices and behaviours of platform operators in the internet and digital economy. It covers various aspects such as monopoly agreements, abuse of dominant market position and merger reviews concerning platform operators.

New examples in particular cover “refusal to trade”, such as setting unacceptable prices, and repurchasing commodities from or conducting other transactions with the trading counterparty.

Additional justifications include:

- Where exclusive dealing is a necessary measure to protect business secrets and data security.
- Where bundling and unreasonable trading conditions are a necessary measure to protect the interests of the trading counterparty and consumer.
- Implications for national security and cyber security – these are additional factors in considering whether any allegedly abusive conduct is potentially justifiable.

General perspectives

Definition of “relevant market” introduced

The definition of the “relevant market” is introduced in both the Monopoly Agreement Regulation and the Abuse of Dominance Regulation. Each adopts the traditional substitutability-based analysis, largely drawing on the wording of the previously adopted Guidance on Market Definition from 2009. For the digital economy, the definition also applies the approach in the Platform Guidance, ie defining the product markets concerned by each side of the platform, or defining the entire platform as one relevant market.

Interestingly, the Monopoly Agreement Regulation and the Abuse of Dominance Regulation depart from the Guidance on Market Definition and the Platform Guidance in that they do not specify that a relevant market “normally should be” defined in monopoly agreements and abuse of dominance cases.

There may be two reasons for this discrepancy. First, SAMR may wish to retain a certain level of flexibility in its enforcement of these cases.

Second, SAMR may be prepared to align with the approach of the courts on this issue if necessary. For example, the Supreme People’s Court in *Qihoo 360 v. Tencent*[2] indicated that a clear and precise relevant market definition may not be necessary if the market position of a business operator and the effect of its conduct in the market can be assessed through direct evidence of excluding or restricting competition. The Judicial Interpretation also appears to reaffirm this view by relieving the plaintiff of the burden of having to define the relevant markets if it can be proved that the defendant’s market position or the effect of eliminating or restricting competition resulted from its alleged monopolistic conduct.

Amended third-party complaints system

Both the Monopoly Agreement Regulation and the Abuse of Dominance Regulation further refine the rules for third-party complaints.

For complaints made on a real-names basis, complainants can request that SAMR disclose the outcome of the investigation after it has been completed.

This amendment safeguards the information rights of third parties and may prompt more complaints. It seeks to address difficulties faced by third-party complainants in the past who, due to the confidential nature of an investigation, were often unable to obtain details of any follow-on action by SAMR.

2 *Qihoo 360 v. Tencent*, (2013) SPC Civil Judgment Minsan Final No. [04]. For the full text of the SPC’s comments and analysis on its judgment in this case, see: **https://www.court.gov.cn/shenpan-xiangqing-37612.html**.

Convening meetings with business operators suspected of antitrust violations

The draft implementing regulations introduced a mechanism enabling SAMR to set up a meeting with the legal representative of a business operator suspected of breaching the antitrust rules and to request mitigation measures.

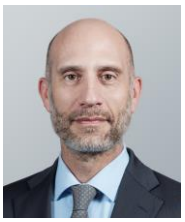
Both the Monopoly Agreement Regulation and the Abuse of Dominance Regulation further specify that SAMR should use these meetings to identify issues with the business operators' conduct, listen to their explanations, give them warnings and request that they propose remedial measures to eliminate the adverse effects of their actions. The operators should comply with SAMR's requirements and take corrective action to eliminate the adverse effects of their behaviour. They should submit written reports about their compliance.

This is a useful alternative channel through which business operators will be able to communicate with SAMR. This will be helped by the fact that SAMR appears keen to use it – in a recent speech on antitrust enforcement in the digital sector SAMR's antitrust head noted that the authority intends to use the mechanism as a regular supervisory measure to prevent anti-competitive practices.

Conclusion

China's antitrust framework has undergone a major overhaul with the adoption of the 2022 AML last year along with the new revised implementing regulations. The new antitrust framework both enhances procedural rules and provides more detail on the substantive aspects. Although there are still unanswered questions, these amendments clearly demonstrate China's commitment to strengthen and streamline its antitrust enforcement regime.

Contacts



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