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China antitrust authority consults on agreements rules

Adrian Emch (Hogan Lovells, China) · Thursday, January 10th, 2019

On 3 January 2019, the State Administration for Market Regulation (**SAMR**) released a draft of the [Regulation on the Prohibition of Monopoly Agreement Conduct \(Draft\)](#) on its website, inviting comments from interested stakeholders. The consultation period ends on 3 February.

The Draft is the first significant normative output in the Anti-Monopoly Law (**AML**) field after the establishment of SAMR and the transfer of antitrust powers from the three prior antitrust units at the National Development and Reform Commission (**NDRC**), the State Administration for Industry and Commerce (**SAIC**), and the Ministry of Commerce to SAMR in Spring 2018.

Layout

The Draft is divided into 5 chapters, and has 44 provisions. Unlike the prior regulations adopted by SAMR's predecessor bodies NDRC and SAIC, the Draft contains both substantive and procedural provisions in the same legal text.

The bulk of the agreements-specific provisions can be found in the second chapter of the Draft. In this chapter, SAMR provides guidance on the concept of "concerted practice," largely reflecting the approach laid out in prior NDRC and SAIC regulations. The chapter also puts forward more details on both the horizontal agreements prohibitions in the AML – price-fixing; output restriction; market partitioning; technology-related restrictions; and collective boycott – and the resale price maintenance (**RPM**) prohibition as the only explicitly outlawed vertical restraint.

Catch-all

At Article 13, the Draft states that agreements not explicitly listed in the AML can be deemed as unlawful monopoly agreements "if there is evidence proving [they] eliminate or restrict competition." Implementing the agreements-related "catch-all clauses" in the AML, this provision lays out a number of factors which SAMR should consider before holding a non-listed agreement to be unlawful.

Article 13 is interesting for several reasons. First, the reference to the evidence on the elimination or restriction of competition could be interpreted as introducing the concepts of "per se" illegality

and “rule of reason” through the backdoor. One interpretation of the provision would be that all types of agreements listed in the AML – basically, cartels and RPM – would be illegal without the need to prove an adverse effect on competition, while a showing of such effect would be required for non-listed agreements. In that sense, this provision is likely to reignite the debate among Chinese courts and academia as to what kind of analysis RPM should be subject to.

Second, Article 13 limits the use of the agreements-related catch-all clauses to SAMR at the national level, excluding local SAMR offices (the AML also excluded the possibility of courts using the catch-all clauses).

Article 14 of the Draft contains a further limit on the use of the catch-all clauses in that it provides market share “safe harbours” for horizontal and vertical agreements not explicitly listed in the AML (15% and 25%, respectively). The safe harbours are drafted as presumptions which can be overturned by evidence to the contrary.

Beyond agreements

Even though the title of the Draft focuses on monopoly agreements, many of its provisions go beyond agreements strictly speaking. As such, the first chapter contains rules on the jurisdictional allocation of work between SAMR and its local offices, while most of the provisions in the third chapter regulate the investigation process, which should in principle be largely the same for both agreements and abuse of dominance cases.

Although not specific to agreements, some of these provisions give interesting insights into the set-up and enforcement structure of SAMR and its offices. For example, the Draft confirms the general delegation of AML enforcement powers to the SAMR offices at the provincial level, as laid out in a [policy document](#) issued at the end of 2018. Given that the antitrust-related manpower of SAMR at the national level is quite limited, the availability of larger teams in the provincial offices will allow the authority to increase its overall workload.

Yet the broad scope of the Draft also provides uncertainty – for example, it remains to be seen if and when there will be an implementing regulation providing guidance on the AML’s abuse of dominance provisions, or what it would look like. Similarly, it is not clear how the Draft will relate to the set of AML implementing guidelines which are reportedly in the process of being adopted and released in the name of the Anti-Monopoly Commission, a not-permanent institution ranked higher than SAMR. These guidelines may deal with similar issues as the Draft, including the substance of the AML’s agreements provisions (such as vertical restraints in the automotive industry) as well as procedural arrangements (such as leniency applications).

In any event, the release of the Draft for public comment is likely just the first step of a series of normative efforts we expect the Chinese authorities to undertake in the coming months.

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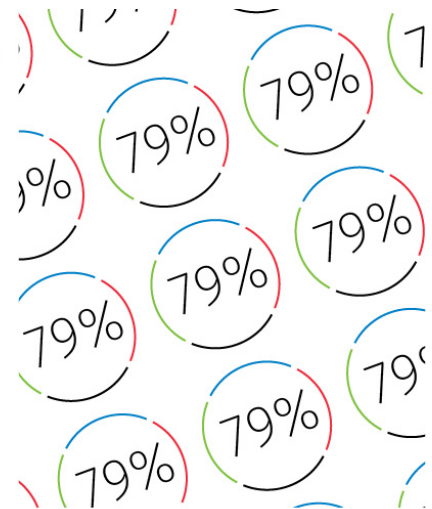
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