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New non-merger guidance in China

Adrian Emch (Hogan Lovells, China) · Tuesday, July 16th, 2019

On 1 July 2019, the State Administration for Market Regulation (SAMR) made public three sets of regulations to implement China's Anti-Monopoly Law (AML):

- the Interim Regulation Prohibiting Monopoly Agreements (SAMR Agreements Regulation);
- the Interim Regulation Prohibiting Conduct Abusing Dominant Market Positions (SAMR Abuse of Dominance Regulation); and
- the Interim Regulation Preventing Conduct Abusing Administrative Rights to Eliminate or Restrict Competition (SAMR Administrative Monopoly Regulation).

The three regulations will enter into force on 1 September 2019.

The regulations contain a mix of substantive and procedural rules. In many ways, they represent continuation of the AML implementing rules issued by SAMR's predecessors as antitrust enforcement body, the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC).

A read-through of the three regulations reveals an attempt by SAMR to lay out similar rules for three of the four types of anti-competitive conduct targeted by the AML: anti-competitive agreements; abuse of a dominant market position; and abuse of administrative rights to restrict competition (often dubbed "administrative monopoly" conduct in China). Guidance on the AML's merger control provisions is provided in separate SAMR implementing rules.

Anti-competitive agreements

The SAMR Agreements Regulation contains 36 provisions. The procedural provisions make up the bulk of the regulation. These provisions focus inter alia on SAMR's jurisdiction, case delegation to its local offices, and supervision of the local work; complaints; the commitments process; and the leniency regime.

The substantive provisions in the SAMR Agreements Regulation put forward guidance on the various prohibitions for horizontal agreements listed in the AML – namely, various types of hardcore cartel conduct – and resale price maintenance as the only vertical agreement. The guidance is largely similar to that in the prior NDRC and SAIC regulations, with no big surprises.

Similarly, the SAMR Agreements Regulation restates the prior SAIC guidance on the concept of “concerted practice,” laying out the factors to be considered: unity in market conduct; meeting of minds or information exchange; reasonable (counter-) explanations; and seemingly objective factors such as market structure, status of competition, and market change.

The SAMR Agreements Regulation also contains guidance on how to operate the AML’s “catch-all clause” for finding anti-competitive agreements not explicitly listed in the AML. The regulation sets out a few general factors, such as the degree of competition in the market; market shares; impact on prices, market entry etc. but – unlike an earlier draft – does not provide a market share safe harbour.

Interestingly, the guidance on how to use the AML’s exemption provision is quite limited. The regulation appears to view the exemption as a procedural mechanism (like a defense) rather than as a part of the substantive analysis.

Abuse of dominance

The SAMR Abuse of Dominance Regulation has 39 provisions. On the procedural front, the provisions are very similar to those of the SAMR Agreements Regulation.

From the substantive perspective, the SAMR Abuse of Dominance Regulation puts forward the most detailed guidance among the three regulations. First, it attempts to further flesh out the factors in the AML for finding dominance. For example, the regulation explains that market shares can be measured by reference to sales value, sales volume or “other norms.” Beyond the general guidance on the dominance assessment, the SAMR Abuse of Dominance Regulation contains specific points for the Internet sector and intellectual property rights (IPRs): for Internet and similar businesses, the dominance assessment can look at the industry specificity; business models; user numbers; network effects; foreclosure effects; technological characteristics; market innovation; and data control and processing, and any associated market power. In the IPR space, countervailing power (likely to mean the licensee’s bargaining position in a cross-licensing context) is a relevant factor.

Interestingly, the SAMR Abuse of Dominance Regulation also includes new detail on “collective dominance,” a rarely used concept in the AML. Largely in line with international practice, the regulation proposes to assess the market structure; transparency in the market; the degree of homogeneity of products; and the parallelism of the companies’ conduct as relevant factors in the collective dominance assessment.

Second, the SAMR Abuse of Dominance Regulation goes into quite some detail on the types of abusive conduct. The regulation addresses each of the prohibitions in the AML and – on many aspects – provides additional guidance, going beyond the AML and the prior NDRC and SAIC regulations. For example:

- one of the benchmarks for excessive pricing is the dominant company’s own prices in another geography with the same/similar market conditions (one of the criteria which NDRC had used in the *River sand* case);
- the proposed cost benchmark for predatory pricing is average variable cost;
- a refusal to grant access to an “essential facility” is subject to a somewhat different test than a refusal to supply other products or services;

- “restrictive dealing” (similar to “exclusive dealing” known on an international basis) can be achieved directly or indirectly – in line with SAMR’s sanctioning of the minimum purchasing volumes, take-or-pay clauses, and discounts in the *Eastman* case in April 2019);
- unreasonable charges other than price can amount to unlawful imposition of unreasonable conditions, an offense similar to tying; and
- a long list of items (including for example different warranty periods) can be used to assess whether there is discrimination between two transaction parties.

Third, perhaps most notably, the SAMR Abuse of Dominance Regulation goes at great length to describe the circumstances of “valid reasons” justifying potentially abusive conduct – both in the individual provisions for each type of abuse and in a separate, additional stand-alone provision.

Fourth, similar to the SAMR Agreements Regulation, the SAMR Abuse of Dominance Regulation puts forward criteria for operating the AML’s “catch-all clause” for finding new types of abuse of dominance, explicitly requiring that SAMR prove the anti-competitive effects of the conduct.

Administrative monopoly

With 25 provisions, the SAMR Administrative Monopoly Regulation is the shortest of the three regulations.

On the procedural side, the SAMR Administrative Monopoly Regulation naturally differs from the other two regulations, as the AML does not empower SAMR to impose sanctions on the infringing administrative organ but only to issue recommendations to the organ’s hierarchically superior body on how to rectify the anti-competitive conduct. However, bearing in mind this significant procedural difference, it seems the SAMR Administrative Monopoly Regulation attempts to find as much common ground as possible with the SAMR Agreements Regulation and the SAMR Abuse of Dominance Regulation, on aspects such as jurisdiction, case delegation, complaints and other procedural steps.

The substantive provisions of the SAMR Administrative Monopoly Regulation largely follow the structure of the AML, providing some more detail on what specific government actions can be deemed to be anti-competitive. The main focus of the provisions is to regulate two types of anti-competitive government conduct – exclusivity for certain producers/service providers to the detriment of others, and restrictions to the free movement of goods, services and investment within China.

Perhaps the most interesting feature of the SAMR Administrative Monopoly Regulation is not what it says, but what it does not say: there is no direct reference to the “Fair Competition Review System,” a policy originally established outside the AML framework which aims to screen government rules, policies and actions for their compatibility with market competition.

Takeaways

The procedural aspects in the three regulations are similar. To a large extent, the procedural provisions are not ground-breaking. Admittedly, the rules on jurisdiction by SAMR’s provincial

offices and case delegation between offices are key to future AML enforcement, as the antitrust human resources at central SAMR in Beijing are very limited. However, those rules are not new, but were decided late 2018 when SAMR issued its Notice on Anti-Monopoly Enforcement Delegation.

In contrast, a new feature in the three regulations is the push for additional publicity and transparency in SAMR's decision-making process. In particular, the regulations mandate publication of all final decisions – seemingly including settlement decisions and decisions recommending rectification of administrative monopoly conduct, politically quite a sensitive topic in China.

There is also an attempt at consistency in terms of substantive rules. For example, both the SAMR Agreements Regulation and the SAMR Abuse of Dominance Regulation call for an effects-based analysis for new types of anti-competitive agreements and abuse of dominance under the AML's "catch-all clauses."

However, the attempt to streamline the set of regulations is not present throughout. For example, there is a noticeable difference among the three regulations on how to "justify" potentially anti-competitive conduct: while there is a lot of detail in the SAMR Abuse of Dominance Regulation, the SAMR Agreements Regulation contains very little, and the SAMR Administrative Monopoly Regulation virtually no, guidance (despite the fact that the implementing rules for the "Fair Competition Review System" provide for justification possibilities, by way of exception, for anti-competitive government actions).

Overall, although a different format for the implementing rules – such as guidelines with case studies or hypothetical examples – might have provided more clarity for market players, the three SAMR regulations provide some welcome guidance as to how the authority will interpret and enforce the AML going forward.

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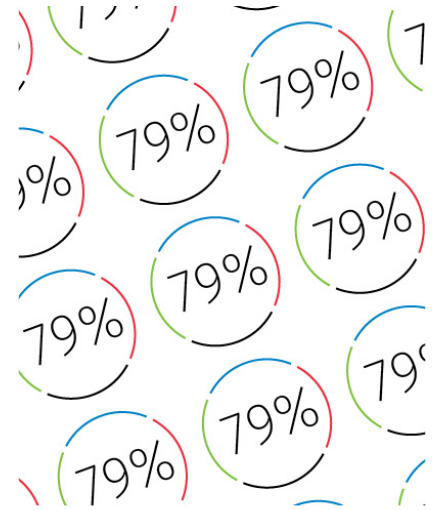
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