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SAMR Enacts Final Implementing Regulations for Amended Anti-Monopoly Law

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Introduction

On 24 March 2023, China's antitrust authority – the State Administration for Market Regulation ("**SAMR**") – issued four regulations implementing the recently amended Anti-Monopoly Law ("**AML**"):

- Regulation Prohibiting Monopoly Agreements ("**Agreements Regulation**");
- Regulation Prohibiting Conduct Abusing a Dominant Market Position ("**Abuse of Dominance Regulation**");
- Regulation on the Review of Concentrations between Business Operators ("**Merger Review Regulation**");
- Regulation Preventing Conduct Abusing Administrative Powers to Eliminate or Restrict Competition ("**Administrative Monopoly Regulation**").

The new regulations will come into force on 15 April 2023.

The enactment of the four new regulations completes part of the process that started when the first amendment of the AML was passed by the legislature in June 2022. Just a few days after the amendment, SAMR published six draft implementing regulations for public comment.

Following the process of consulting on the draft implementing regulations, two of them were dropped (or postponed): the Draft Regulation Prohibiting Conduct Abusing Intellectual Property Rights to Eliminate or Restrict Competition and the Draft Regulation on the Notification Thresholds for Concentrations between Business Operators have not yet been enacted. The reason may be that the former needs to be aligned with China's IP regulator and the latter needs to be passed by the State Council. In either case, it appears SAMR is not the (only) decision-maker, hence more time is needed for coordination and enactment.

The four regulations are largely in line with the prior June 2022 drafts. Few if any breakthrough additions have been made. In contrast, a few important clarifications from the June 2022 drafts disappeared in the final regulations as enacted. Most notably, the numeric safe harbour for resale price maintenance ("**RPM**") and the definition of a "*controlling right*" in the merger control context was dropped.

In this blog post, we will take a look at two of the enacted regulations – the Agreements Regulation and the Merger Review Regulation – in some detail. (The changes to the Abuse of Dominance Regulation and the Administrative Monopoly Regulation may be more minor.) At the end of the alert, we will also discuss some of the new rules applicable to digital platforms, which run across the new regulations.

Agreements Regulation

The biggest impact of the Agreements Regulation is probably what it does not contain: a clear-cut numeric market share safe harbour for RPM and other vertical agreements.

What (then) appeared as a major policy change, the amended AML stipulated that vertical agreements would not be unlawful if entered into by companies below a market share threshold to be determined by SAMR and if other conditions stipulated by SAMR are fulfilled. This provision gave SAMR a mandate to fix the threshold and any other conditions through implementing rules. The June 2022 draft proposed a 15% market share threshold and several other (seemingly onerous) conditions.

Now, the Agreements Regulation as enacted does not put forward any threshold but simply repeats the language of the amended AML. In other words, SAMR decided to forego the opportunity to set the market share threshold, at least for the time being. As a result, companies probably have few choices other than to continue treating RPM as a per se prohibition – which would seem to contradict the spirit of the AML amendment.

In terms of horizontal agreements, following the AML amendment to outlaw activities by third parties to organize anti-competitive agreements (in particular, cartels) or provide material assistance to the members of the agreements (cartelists), the Agreements Regulation provides guidance on these concepts: "*organizing*" means playing a decisive or main role for concluding or implementing the anti-competitive agreement (in terms of its subject matter, key content, and implementing clauses) or acting as the hub in a hub-and-spoke constellation, allowing the spokes to achieve a meeting of minds or exchange information; in turn "*material assistance*" means providing the necessary support or creating the key facilitation conditions.

Interestingly, the Agreements Regulation extends the leniency regime to certain company employees – namely those who face personal liability for anti-competitive agreements under the amended AML (i.e., the legal representative, the major responsible person, and the directly responsible person for the anti-competitive agreements). This extension of the leniency benefits has the potential to revitalize SAMR's leniency program. Like in other jurisdictions, the Chinese leniency program has probably not led to as many applications as the authority had hoped for. Facing potential civil damages claims as a result of leniency applications, in the case of doubt, companies may decide against applying for leniency.

Now, the Agreements Regulation injects an important level of uncertainty into the mix of considerations. The above-mentioned employees face the risk of personal liability (including fines) in China but do generally not need to be concerned with civil damages claims or personal liability in many jurisdictions outside China. Against this background, it is possible that the employees have a much stronger incentive to seek leniency. In turn, this "asymmetry" (between employees and the company's incentives) may impact the company's decision on whether or not to seek

leniency: knowing that some employees could act as whistle-blowers have the potential to impact the company's assessment.

Against this background, it will be very interesting to see how the leniency program for employees will be applied in practice going forward.

Merger Review Regulation

Among the four enacted regulations, the Merger Review Regulation probably brings about the most significant changes as compared to past practices.

Most importantly, the Merger Review Regulation does not include the provision in the prior draft which laid out a relatively straight-forward definition of what right may amount to a "controlling right" – which is one of the two key merger filing criteria (the other being the numeric filing thresholds). In the prior draft, a "controlling right" was defined as the right to decide or veto the appointment/dismissal of senior management, the financial budget, or the business plan – which would have put China in line with key international antitrust practices (in particular, EU antitrust rules). Providing a relatively straightforward definition would have been a major benefit for companies.

Given that the Merger Review Regulation as enacted does not feature this definition, the ambiguous and only slightly revised high-level list of factors to consider for finding a "*controlling right*" (i.e., transaction purpose, changes in shareholding structure, voting rights, appointment of senior management, agreements to act in concert, material commercial relationships and cooperation agreements, and other factors) in the Merger Review Regulation, as well as SAMR practice, will continue to be the benchmark going forward. This means that companies face considerable uncertainty as to whether their transactions give rise to the acquisition of a "*controlling right*" and are notifiable. In practice, many companies will probably err on the side of caution and, in the case of doubt, decide to file with SAMR.

In addition, the Merger Review Regulation contains rules on how to operate the "*stop-the-clock*" mechanism introduced by the AML amendment in case the merging parties do not provide the information requested by SAMR, new circumstances/new facts appear, or SAMR needs more time to assess the parties' remedies proposal. However, the rules do not put many constraints on SAMR's use of the "*stop-the-clock*" mechanism – for example, there are no maximum time limits, so it will ultimately be in SAMR's hands to decide when the ticking of the clock resumes.

Compared to the prior draft, the Merger Review Regulation also goes further in laying out the procedure for SAMR to examine transactions below the filing thresholds – which the amended AML incorporated into law. If SAMR has evidence to indicate that a transaction could have anti-competitive effects, it can request the parties to notify. If the transaction has not yet been implemented, then the standstill obligation automatically kicks in. Even if the transaction has been implemented, the parties need to file a notification within 120 days and "*take necessary measures to reduce the negative impact the concentration has on competition such as temporarily stopping the implementation of the concentration*".

This clause brings considerable uncertainty for deal-makers – for example, how to stop implementing a deal that has already been implemented? The concern is even more serious, as the

Merger Review Regulation does not contain any temporal limit for SAMR to exercise the below-thresholds jurisdiction. This deviates from the prior draft which seemed to limit SAMR's powers to 180 days, presumably after closing.

On the upside, the Merger Review Regulation contains guidance on what "*implementation*" of a transaction means: corporate registration or shareholder rights change; dispatch of senior managers; actual participation in business decisions and management; exchange of sensitive information; and substantive business integration. These clarifications will help companies reduce gun-jumping risks.

Separately, the Merger Review Regulation contains a relatively murky provision allowing SAMR to strengthen the merger review "*information system*" and to make full use of technical means to promote "*smart supervision*". At present, it is not entirely clear what this provision refers to.

However, it is possible that SAMR aims to automate part of its merger control work. In early February 2023, there were news reports that SAMR's Zhejiang branch had a pilot project to test an online-monitoring system running with its data and data from the tax administration to detect transactions by companies above the filing thresholds (reportedly with a possible pre-warning merger notification alert to companies) and possibly some problematic transactions below the thresholds. These are early days, but an automated filing detection system could be a game-changer in merger control in China and possibly beyond.

Digital platforms

Across the enacted regulations, there is more guidance on how to implement the AML in the digital platforms space.

As such, the Agreements Regulation contains a new provision to prohibit concerted practices between competitors by way of the meeting of minds or exchange of sensitive information through the use of data, algorithms, technology, or platform rules. Another new provision prohibits RPM through the same means.

Further, both the Agreements Regulation and the Abuse of Dominance Regulation put forward quite open-ended guidance on market definition, allowing the regulators to look at only one side or at multiple sides in a multi-sided market context, or even to define the platform as a whole as the relevant market.

The Abuse of Dominance Regulation then contains new guidance on the factors to consider for finding dominance of digital platforms: the characteristics of competition in the industry; the business models; the size and volume of transactions; user numbers; network effects; foreclosure effects; technical features; market innovation; ability to control traffic; and the holding and handling of data.

In addition, the Abuse of Dominance Regulation contains (somewhat unclear) guidance on how to assess costs in multi-sided markets for assessing whether prices by dominant digital platforms are excessive or predatory. In contrast, the regulation dropped the prior prohibition of self-preferencing that was contained in the prior draft but retained a provision that prohibits the abuse of dominance by way of using data, algorithms, technology and platform rules (which could

potentially be interpreted as including self-referencing).

At a high level, this added language in several of the enacted regulations suggests that the antitrust regulators' focus on the platforms industry is not yet completely over.

Takeaways

All in all, the four enacted regulations do not go significantly beyond the content of the amended AML and the prior SAMR implementing regulations and represent thus a conservative approach on the part of SAMR.

In that sense, the regulations may come across as a missed opportunity to provide additional guidance on key aspects of Chinese antitrust law and practice. The absence of a safe harbour for vertical agreements and the insufficient guidance on the "*controlling right*" concept speak to this point in particular.

Hopefully, SAMR's established and now relatively mature case-handling practice will provide the additionally needed guidance for companies on how to comply with the amended AML going forward.

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