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WHITE PAPER

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China Amends Anti-Monopoly Law: What You Need to Know

In late June 2022, the 13th National People's Congress Standing Committee adopted the First Amendments to China's Anti-Monopoly Law ("AML"). The amendments will take effect on August 1, 2022. Although the First Amendments to the AML (the "Amendments") are far from a complete overhaul of China's antitrust laws, they introduce new approaches for resale price maintenance and hub-and-spoke agreements, a market share-based safe harbor for vertical agreements, strengthened enforcement against internet platforms, a "stop-the-clock" mechanism in merger review, a new criminal violation, and increased fines and broadened liability for violations, among others.

This Jones Day *White Paper* details how key changes to the AML could impact businesses operating in China. Among the most significant changes, the Amendments harmonize previously inconsistent rules related to resale price maintenance and introduce a safe harbor for agreements in the vertical supply chain. The Amendments, together with the establishment of the State Anti-Monopoly Bureau ("SAMB") in November 2021, indicate that China will continue to ramp up its antitrust enforcement.

VERTICAL "MONOPOLISTIC AGREEMENTS"

Resale Price Maintenance ("RPM")

The most significant change to the AML is its approach to RPM. RPM, also known as "vertical price fixing," occurs when a supplier of goods or services sets (or attempts to set) a minimum price below which a reseller cannot resell its products. The AML regulates "monopolistic agreements"[1] under the so-called "prohibition + exemption" framework, in which the AML prohibits certain conduct like RPM unless an exemption applies (i.e., by proving that the alleged monopolistic agreement had reasonable justifications, did not severely restrict competition, and benefited end consumers) under AML Article 15, now Article 20 following the Amendments. Exemptions are rare and granted only on a case-by-case basis.

As detailed in our prior *White Paper*, there has long been disagreement about how to apply the "prohibition + exemption" framework for RPM cases. Notwithstanding the view of the State Administration for Market Regulation ("SAMR") (and its predecessors) that the AML prohibited RPM outright (consistent with the European Commission's approach to RPM), in civil cases, the Chinese courts typically required that plaintiffs first prove that the defendant's RPM was anticompetitive, closer to the rule of reason approach under U.S. federal law.[2]

The Amendments adopt a middle ground between SAMR's per se illegal approach and the Chinese courts' rule of reason approach. RPM remains subject to the "prohibition + exemption" framework; however, under Article 18 of the Amendments, RPM will be lawful if a company can prove that the RPM does not have the effect of eliminating or restricting competition. In sum, the AML still presumes that RPM is unlawful, but that presumption is now rebuttable.

The Amendments harmonize China's approach to RPM in public enforcement and private litigation, eliminating divergent standards of proof. Because SAMR treated RPM as per se unlawful, many companies were loathe to adopt RPM, even if it benefitted competition. On the other hand, the Chinese courts' approach to RPM in private litigation might have deterred some plaintiffs from bringing cases in the past. We therefore expect that the Amendments will trigger a new wave of RPM litigation as companies consider whether to adopt RPM under the new shifted-burden framework and private litigants look for new opportunities.

Safe Harbor Rules

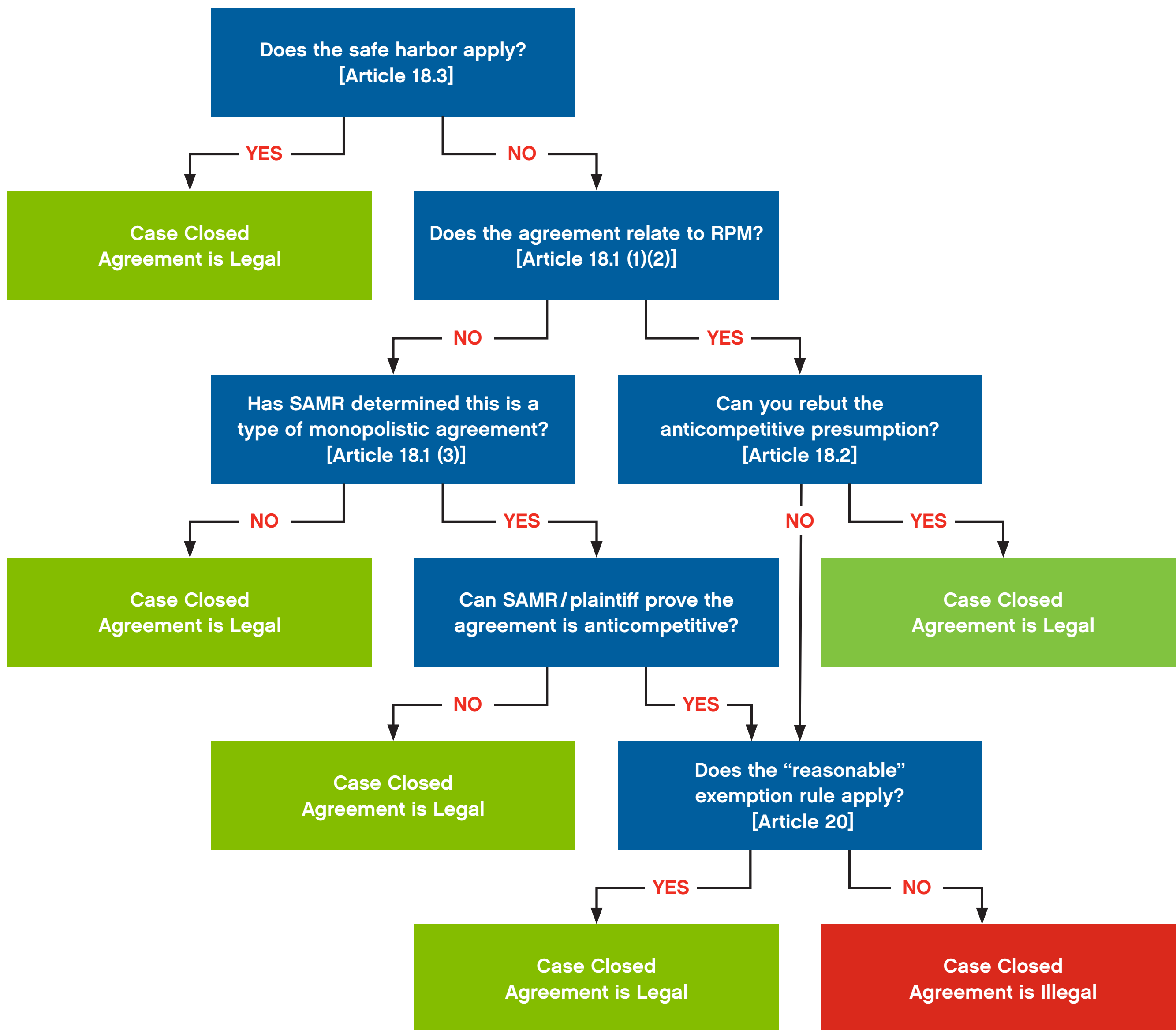
Article 14 of the AML prohibits "vertical monopolistic agreements," including RPM and other such vertical agreements as determined by SAMR. Article 18 of the Amendments introduces a safe harbor for all types of vertical monopolistic agreements. Under the new safe harbor, vertical agreements—including RPM—are not prohibited under the AML if the parties to an agreement establish that their market share in the relevant markets is lower than the threshold(s) prescribed by the enforcement authority.[3]

The safe harbor approach to vertical agreements is similar to the European Commission's Vertical Block Exemption Regulation ("VBER"), updated in June 2022 as detailed in this *Alert*. The VBER establishes a safe harbor for: (i) vertical agreements that are not a "hardcore restriction" (e.g., RPM) and (ii) where neither party's market share exceeds 30%.

Unlike in Europe, the safe harbor in China will apply to RPM, and according to SAMR's draft Rules on Prohibition of Monopoly Agreements, the to-be-established benchmark for the market share safe harbor likely will be lower than the VBER (15% in both the upstream and downstream markets, compared to the European Commission's 30%). Vertical agreements that fall outside the safe harbor will still be subject to the existing "prohibition + exemption" framework. Once implemented, however, the safe harbor will help companies self-assess the risks of a vertical agreement and improve the predictability of SAMR enforcement.

Although the Amendments do not change the overall "prohibition + exemption" framework for vertical agreements, the rebuttable presumption for RPM and the safe harbor rules substantially alter how to assess the risk of certain vertical agreements in China. The flow chart in Figure 1 describes how to analyze the risk of a vertical agreement in China.

Figure 1



HUB-AND-SPOKE AGREEMENTS

Hub-and-spoke agreements refer to a series of agreements in the vertical supply chain that achieve anticompetitive horizontal effects. Under this theory, a buyer or supplier at one level of the supply chain (the "hub") enters into agreements up or down the supply chain with suppliers or customers (the "spokes"). The alleged aim of such a conspiracy is to eliminate competition among the spokes, i.e., horizontal agreement among the spokes that forms a "rim" of the wheel. In some circumstances, the vertical agreement exists to enforce the horizontal agreement (or punish cheaters), reducing the need for horizontal coordination.

To date, there are no published decisions or court judgments in China related to hub-and-spoke agreements, likely owing to the lack of clear rules. Instead, the authorities relied on AML Article 13 (horizontal monopolistic agreements, now Article 17) and AML Article 14 (vertical monopolistic agreements, now Article 18) to characterize the behavior and punish the "hub" and "spokes," respectively. Some commenters have argued that the AML does not sufficiently deter organizers who are not direct parties of, but contribute to, horizontal monopolistic agreements.

Attempting to address that perceived shortcoming, Article 19 of the Amendments provides that "undertakings may not

organize other undertakings to reach monopolistic agreements or offer substantive assistance." That change establishes a more straightforward basis for penalizing hub-and-spoke agreements under the AML. Article 19 therefore makes clear that third parties—including downstream customers, upstream suppliers, and internet platforms, among others—could violate the AML if they facilitate the formation of monopolistic agreements.

REGULATING ABUSIVE CONDUCT IN THE DIGITAL ECONOMY

The changes to the AML regarding unilateral abusive conduct (dominance or monopolization) are small in comparison. However, those changes highlight SAMR's focus on enforcement in the digital economy, consistent with other global antitrust authorities.[4] For example, in late 2020, SAMR raided the offices of Alibaba and launched several other landmark investigations related to internet platforms. In February 2021, the Anti-Monopoly Commission of the State Council issued "Anti-Monopoly Guidelines on Platform Economy," which set forth distinct rules to regulate the practices of online platforms. The enforcement authority also has been strengthening merger review enforcement and supervising compliance work in the tech industry.

With that background, the Amendments introduce new regulations related to data and algorithms, technology, and platforms that, in SAMR's view may be leveraged in abusive conduct by dominant companies.

- Article 9 of the Amendments provides that operators must not leverage data and algorithms, technology, capital advantages, and platform rules to engage in any behaviors violating the AML.
- Article 22 of the Amendments further prohibits companies with a dominant market position from using data, algorithms, technology, or platform rules to abuse their dominant position.

Determining whether a company, particularly a tech platform, has a dominant position has confounded global antitrust enforcers and courts, including those in China. That has particularly been the case for two-sided or bilateral platforms. Two-sided platforms, by definition, operate in at least two markets, and may involve complex analysis of network effects, zero-price services, or so-called lock in effects. At this time, it appears that the enforcement authorities in China are taking a more cautious approach to the digital economy, attempting to balance the need for digital innovation and curbing perceived abusive conduct.[5]

MERGER REVIEW: "STOPPING THE CLOCK"

Article 32 of the Amendments will allow SAMR to "stop the clock" at any point during a merger review if one of the following conditions is met:

- The filing party fails to submit documents and materials as required, which renders the review impossible;
- There are new circumstances or facts that significantly affect the review of the transaction, which need to be verified, otherwise the review cannot proceed; or
- The remedy proposal needs to be further evaluated and the filing party agrees.

The effect of the "stop-the-clock" mechanism will depend upon how SAMR implements it. In some cases, merging parties may actually benefit. For example, in complex merger reviews involving remedies, Phase III sometimes expires before SAMR has time to complete its review of the remedy. In those cases, the parties might have little choice but to withdraw and refile their merger notification following the six-month statutory review period. The stop-the-clock procedure could limit the need to withdraw a filing and may bring matters to resolution more quickly.

On the other hand, there are no restrictions on or appeals of SAMR's discretionary authority to stop the clock. Without guidelines about when or how long it can stop the clock, it may be more difficult for merging parties to predict the length of merger reviews in China. To avoid a stop-the-clock order, parties that have filed a merger notification in China should promptly respond to SAMR requests for information.

SUBSTANTIAL INCREASE IN FINES, ENFORCEMENT MEASURES, AND CRIMINAL LIABILITY

The Amendments substantially increase fines for violating the AML, detailed in Figure 2, below. Although the Amendments increase fines across the board, the increased fines for failure to make a required merger control notification are notable. Historically, a missed merger control filing carried a maximum penalty of ¥500,000, or approximately $75,000. Going forward, SAMR can issue fines of up to 10% of a company›s prior fiscal year revenue for a missed filing if the transaction would have the effect of eliminating or restricting competition. For missed merger control filings in transactions that do not have an anti-competitive effect, SAMR can levy a fine of up to ¥5 million, approximately $750,000.

Figure 2

Violations	Fines in the Previous AML		Fines in Amendments
Monopolistic Agreements (Horizontal or Vertical)			
Not Implemented	Up to ¥500,000		Up to ¥3 million
Implemented	1. Confiscation of illegal gains 2. 1% to 10% of the prior fiscal year revenue		1. Confiscation of illegal gains 2. 1% to 10% of the prior fiscal year turnover (if no revenue or difficult to calculate, then up to ¥5 million)
Representatives, Principals, and Directly Responsible Persons	Not Applicable		Up to ¥1 million
Aiding and Abetting in the Agreements (e.g., Hub-and-Spoke)	Not Applicable		The above penalties applied
Violated by Industry Association	1. Up to ¥500,000 2. Deregistration if particularly severe		1. Up to ¥3 million 2. Deregistration if particularly severe
Concentrations (e.g., mergers, acquisitions, joint ventures)			
With the Effect of Eliminating or Restricting Competition	Up to ¥500,000		Up to 10% of the prior fiscal year revenue
Without the Effect of Eliminating or Restricting Competition	Up to ¥500,000		Up to ¥5 million
Other Provisions			
Obstruct Investigations (Refusal to Provide Material, Provision of False Material, Concealment, Destruction, or Transfer of Evidence)	Individual	Up to ¥100,000	Up to ¥500,000
	Corporation	Up to ¥1 million	Up to 1% of the prior fiscal year revenue (if no revenue or difficult to calculate, then up to ¥5 million)
The Amendments also allow fine amounts to be multiplied by two to five times the base amount when "the circumstances are particularly serious, the impact is particularly severe, and the consequences are especially serious."			

The Amendments also provide new penalties for individuals responsible for monopolistic agreements, noted above in Figure 2, of up to ¥1 million (about $150,000). The fines against individuals includes company senior officers or employees primarily responsible for a monopolistic agreement. In addition, SAMR may summon company representatives to its offices, educate them, and instruct them to correct their alleged wrongdoing. This measure is expected to play a major role in the enforcement authority's efforts to police wrongdoing without launching formal investigations.

Aside from increased administrative penalties and fines, the Amendments also introduce criminal liability for serious antitrust violations, in particular cartels. Prior to the Amendments, criminal penalties existed only for bid rigging and egregious obstruction of an investigation. Monopolistic agreements carried only the risk of administrative penalties, fines, and/or civil liability. Article 67 of the Amendments now states: "where a violation of this Law constitutes a criminal offense, criminal liability shall be investigated pursuant to the law." The Amendments do not specify which monopolistic agreements will receive criminal as opposed to civil treatment, but we expect that such guidance will be forthcoming in future criminal law amendments.

ADMINISTRATIVE CHANGES

Article 13 of the Amendments vests authority for "unified anti-monopoly enforcement" with the anti-monopoly authority of the State Council. For many years following the passage of the AML in 2008, three Chinese central ministries shared the authority to enforce the AML. In early 2018, the Chinese government combined its antitrust enforcement into a single agency, establishing SAMR under the State Council. SAMR subsequently established a department known as the Anti-Monopoly Bureau that enforced the AML in a unified way.

In November 2021, just weeks after the release of the draft Amendments to the AML, the Chinese government again restructured the antitrust enforcement. The government created a new vice-ministerial level agency reporting to SAMR, the State Anti-Monopoly Bureau, or SAMB, with three departments.

- **Anti-Monopoly Enforcement Department I** is responsible for investigation of cartel and abuse of dominance cases (i.e., conduct investigations).
- **Anti-Monopoly Enforcement Department II** is responsible for merger control and guidance for Chinese companies related to overseas compliance and litigation.
- **Competition Policy Coordination Department** is responsible for the fair competition review, which requires authorities to review their own policies to ensure that they are consistent with competition principles. This department also investigates abuse of administrative power cases, conducts internal reviews of cases investigated/reviewed by the other two departments, cooperates with international antitrust authorities, and manages the day-to-day operation of the State Council's Anti-Monopoly Commission.

The Amendments also pave the way for SAMR to delegate merger review tasks to its provincial branches, and per some reports, several provincial branches have been chosen to test this delegation mechanism. Although the administrative shakeup is not likely to result in immediate changes to China's antitrust enforcement, the establishment of departments with distinct missions and greater focus, paired with an increased headcount, is likely to result in more enforcement in the coming years.

CONCLUSION

The Amendments to the AML supply both some good news and potential regulatory risks for companies operating in China, and companies should revisit their antitrust compliance in China based on these updates. The safe harbor for certain vertical agreements and the compromise approach to RPM may expand business opportunities and at least provide more clarity around the antitrust risk of certain vertical agreements. The new "stop-the-clock" procedure in merger reviews will allow SAMR to be more flexible in remedy cases, but also could make the length of merger reviews less predictable. Looking ahead, however, the enhanced fines, increased SAMR headcount and focus, new criminal offenses, and expanded rules related to hub-and-spoke agreements and abusive conduct foreshadow more antitrust enforcement in China.

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ENDNOTES

1 Under the AML, the term "monopolistic agreements" refers to both horizontal and vertical agreements harm competition. Examples of horizontal monopolistic agreements under AML Article 13 include price fixing, agreements to limit volume, or market allocations. Under AML Article 14, vertical monopolistic agreements include RPM, minimum RPM, and any other such agreements as determined by the antitrust authorities.

2 In 2018, China's Supreme People's Court held in the landmark *Yutai* case that plaintiffs in civil cases must first prove that RPM is anticompetitive, where as SAMR could rely on a legal presumption against RPM (see our August 2019 *White Paper*).

3 The Amendments themselves do not exclude RPM from the application of safe harbor rules. And the latest draft Rules on Prohibition of Monopoly Agreements released by SAMR for public comments explicitly indicate that safe harbor rules indeed apply to RPM.

4 Both Anti-Monopoly Enforcement Departments I and II of the newly established State Anti-Monopoly Bureau ("SAMB") have set up divisions targeting the antitrust supervision in digital economy, which shows China's determination to tackle the monopoly issues in this area.

5 That approach might be contrasted with the European Commission, which plans to introduce expansive regulations related to the conduct of certain large digital platforms that it deems to be "gatekeepers." (See our January 2021 *Commentary*).

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