SAMR PUBLISHES THE LONG-AWAITED IMPLEMENTING PROVISIONS FOR THE AMENDED AML

On 24 March 2023, the Chinese antitrust authority, i.e., the State Administration for Market Regulation ("SAMR"), published the final version of four sets of crucial antitrust provisions, which are in place to ensure smooth implementation of the Amended Anti-Monopoly Law which was adopted on 24 June 2022 and came into force on 1 August 2022 ("Amended AML").

The four sets of provisions address, respectively, merger control, anti-competitive agreements, abuse of dominance, and abuse of administrative dominance ("Final Provisions"). The draft version of these provisions was published for consultation ("Consultation Draft") on 27 June 2022[1], closely following the official publication of the Amended AML.

The predecessors of these Final Provisions were published in around 2019 and 2020 in interim status and will be formally superseded by the Final Provisions from 15 April 2023.

Despite the different areas of focus, common themes across the Final Provisions appear to be addressing antitrust challenges arising from the digital economy, and further enhancing antitrust regulation and enforcement in China. We have set forth below highlights of each set of the Final Provisions, respectively.

Key takeaways

- SAMR published four sets of provisions to ensure smooth implementation of the Amended Anti-Monopoly Law which came into force on 1 August 2022. The four sets of provisions will become effective from 15 April 2023, superseding the relevant interim provisions that currently apply;
- On merger control, key topics including control analysis, turnover calculation, factors for determining "implementation" of the transaction (i.e., gun-jumping), “stop-the-clock” mechanism, and review of below-threshold transactions are further clarified;
- On anti-competitive agreements, the 15% market share threshold which was proposed in the consultation draft provisions for safe harbour rule, is disappointingly dropped; more clarification is provided in regard to hub-and-spoke agreements, definition of competitors, and scope of leniency system's application, and case establishment criteria in investigation; and soft measures to promote antitrust compliance are newly introduced;
- On abuse of dominance, digital economy's rising impact is reflected; and more detailed guidance is provided for the assessment of specific abusive conduct and the identification of collective dominance.

HIGHLIGHTS OF THE FINAL PROVISIONS

1. Provisions on Merger Control Review ("Merger Control Review Provisions")

[1] On 27 June 2022, draft of another two sets of provisions addressing merger filing thresholds and abuse of IP rights, was also published for consultation but has not been finalised as of the date of this briefing.

- *Elucidating the concept of "control"* –
  - The Merger Control Review Provisions shed additional light on the approach to assessing control. The Merger Control Review Provisions, for the first time, mention that historical attendance and voting of the Board meetings are among the relevant factors determining control. This exhibits SAMR's continued emphasis on assessing control both on a *de jure* and *de facto* basis.
  - The Merger Control Review Provisions also officially introduce the concept of "joint control", which, nonetheless, has been long recognised in SAMR's merger review practice.
  - The Final Provisions delete the mention of three typical red-flag items that may confer control, e.g., appointment/removal of senior management, annual budgets, and business plans, which were proposed to be listed in the Consultation Draft. With this, SAMR continues to leave considerable discretion for its review and enforcement. And therefore, the control analysis in China will still need to be done on a case-by-case basis taking into consideration a number of legal and factual factors.
- *Clarification on the turnover calculation* – The Merger Control Review Provisions clarify certain practical questions around the calculation of turnover open for a long time. The Merger Control Review Provisions explain that the turnover in the last fiscal year shall be calculated on the basis of the fiscal year preceding the "date of signature of the concentration agreement".

  For joint ventures, the Merger Control Review Provisions clarify that the turnover of the joint venture shall be allocated equally among its joint controllers that are undertakings to the concentration, rather than being allocated entirely to one undertaking. This new rule answers the question around the turnover allocation approach in the joint venture scenario which was previously lack of specific guidance.
- *Identifying the factors for determining "implementation"* – The Merger Control Review Provisions put forward a non-exhaustive list of typical indicators in assessing if a concentration has been implemented, including the completion of the administrative registration of change of shareholders or rights, the appointment of senior management, *de facto* participation in decision-making and management of target's business operation, exchange of sensitive information, and substantive integration of the business. This list provides useful guidance for undertakings to avoid "gun-jumping" risks.
- *More clarity on the "stop-the-clock" mechanism* – The Amended AML empowered SAMR to suspend a merger review under three enumerated scenarios. For each scenario, the Merger Control Review Provisions provide further clarification on when the clock can be stopped and when the clock should be resumed.

  Notably, the Consultation Draft once proposed a grace period where the notifying parties are entitled to request an extension of the deadline for providing the requested information, and SAMR may stop the clock only if they fail to supply the requested information by the extended deadline. However, this extension is no longer available in the Final Provisions.
- *Spelling out the review procedures for below-threshold transactions* – In terms of SAMR's power to call in below-threshold transactions, the Merger Control Review Provisions provide detailed rules on the procedures:

- if the transaction concerned has been implemented, SAMR can require the parties to supplement a filing within 120 days and require parties to cease implementation of the transaction or take other necessary measures; or
- if the transaction is not implemented, the parties to the transaction cannot implement the transaction before obtaining clearance from SAMR.

  The Final Provisions shorten the time limit for the parties to make the filing after being asked by the SAMR to notify the transaction, i.e., from 180 days to 120 days, which implies that as with other merger cases, SAMR is also inclined to review below-threshold transactions in an efficient manner. This said, parties to a below-threshold killer acquisition have no obligation to file in China unless and until the Chinese antitrust authority requires them to do so.

- *Aiming for improved quality and efficiency for merger control review* –
  - Echoing the Amended AML, the Merger Control Review Provisions reiterate that SAMR will set up a classification system for its merger reviews and strengthen its focus of review on concentrations in important sectors that concern national strategies and people's living. Although specific review guidelines are not yet rolled out in this regard, the message is clear that appropriate priorities should be set for SAMR's merger control regime to achieve greater efficiency.
  - The Merger Control Review Provisions also highlight that SAMR will enhance its information system for merger review. This corroborated SAMR's establishment of its Competition Policy and Big Data Centre in 2021, and its consistent efforts to establish a merger review database.

2. Provisions on Prohibition of Monopoly Agreements[2] ("Monopoly Agreements Provisions")

- *Safe harbour's market share threshold withdrawn* – The Amended AML has, for the first time, introduced a market share-based safe harbour for vertical agreements. Two critical issues left unguided are (i) what is the specific market share threshold, and (ii) whether resale price maintenance (RPM) should be carved out from the application of safe harbour. The Monopoly Agreements Provisions, to our disappointment, fail to provide any guidance on these issues and only repeat the wording of the Amended AML. Therefore, absent market share thresholds, currently it remains difficult for undertakings to benefit from safe harbour rules in practice. Notably, 15% was proposed in the Consultation Draft as the market share threshold of safe harbour rules, but was dropped in the Final Provisions. Despite that 15% has been regarded as a useful reference point since the Amended AML came into force, it remains to be seen how SAMR will respond to the unanswered calls.
- *Guidance provided for horizontal agreements involving "coordinators"* – The Amended AML has, for the first time, expressly recognised coordinators' responsibilities in horizontal agreements. The Monopoly Agreements Provisions give helpful guidance as to the two main forms of coordinating horizontal agreements: (i) horizontal form, where the coordinator is not a party to the agreement but plays a leading role in

[2] I.e., "anti-competitive agreements"; "monopoly agreements" represents a direct translation from the Chinese wording

the conclusion of the agreement; (ii) vertical form (i.e., hub-and-spoke agreements), where the coordinator enters into vertical agreements with multiple parties, who are competitors and use the coordinator as a conduit to reach horizontal anti-competitive agreements. Note that whether the coordinator is "intentional" to facilitate a hub-and-spoke agreement is irrelevant, as the Final Provisions remove the requirement on "intention" which was included in the Consultation Draft.

- *"Potential competitors" formally included in the definition of competitors* – The Monopoly Agreements Provisions clarify that both actual competitors and "potential competitors" need to be taken into account when assessing a competitive relationship. Potential competitors are not defined under the Monopoly Agreements Provisions but described as those undertakings who may enter into the relevant market to compete.
- *"Case Establishment Criteria" are provided for authorities' investigation of anti-competitive agreements* – The Monopoly Agreements Provisions provide that the Chinese antitrust authorities "must" establish a case (relating to investigation of anti-competitive agreements) when three conditions are met: (i) there is evidence which prima facie indicates the conclusion of an anti-competitive agreement; (ii) the subject matter is within the duties of antitrust authorities; and (iii) the investigated conduct is within the legally prescribed limitation period pursuant to administrative penalty rules. It remains to be seen how the "two-year following discovery of breach" rule would be applied in antitrust investigations in the future, but the Monopoly Agreements Provisions send a clear signal that antitrust authorities' discretion in establishing cases needs to be subject to more legal certainty.
- *Expanded application of leniency system* – Based on the Monopoly Agreements Provisions, not only parties to anti-competitive agreements, but also coordinators of horizontal agreements as well as liable individuals, all can benefit from the leniency system when certain conditions are met. In addition, the leniency system seems potentially not only available to parties to horizontal agreements, as there is no clear exclusion of application to vertical agreements under the Monopoly Agreements Provisions.
- *New soft measure introduced to promote antitrust compliance* – The Monopoly Agreements Provisions introduce "scheduled talks" through which investigators can directly reach out to legal representative/liable persons of the investigated undertakings, in order to send warnings, prevent breach of law, and/or seek remedial measures. This new tool is considered by SAMR as a soft measure to promote antitrust compliance and raise antitrust awareness, but many practical issues would arise as to, for example, at which stage of investigation and to which types of anti-competitive agreements this "soft measure" could apply.

3. Provisions on Prohibition of Abuse of Dominance ("Abuse of Dominance Provisions")

- *Specific guidance provided for application in digital economy* –
    - With respect to market definition, the Abuse of Dominance Provisions reaffirm that the approach to be taken in the digital economy is consistent with the position provided in the Antitrust Guidelines for Platform Economy. Notably, network effects across platforms should be taken into account when defining the relevant product market in cases that involve platforms, and the relevant market may be defined as separate market(s) for the product(s)

involved on the platform, or a single market for the platform as a whole.

- With respect to the assessment of dominance, the Abuse of Dominance Provisions stress that the value and volume of the online transactions concluded via the platform, and the ability to control the traffic volume may be factored into the assessment of the market dominance in digital economy. This also reflects the consistent position as in the Antitrust Guidelines for Platform Economy.
- A new catch-all clause is added to the Abuse of Dominance Provisions to prohibit any abusive conducts by utilising data, algorithm, platform rules, etc., which corresponds to the same emphasis freshly introduced in the Amended AML.
- The Abuse of Dominance Provisions also provide more details in identifying specific abusive conduct in digital economy. For instance, for predatory pricing, as with cases in traditional sectors, the key to assessing predatory pricing remains the determination of "costs". When calculating the cost in cases involving a multi-sided platform, the correlation and reasonableness of cost among each relevant market should be holistically considered. For discriminatory treatment, the Abuse of Dominance Provisions reiterate the focus on the widely-condemned "big data discrimination" practice of platforms, highlighting that platforms should not implement discriminatory treatment on different customers based on factors such as the transaction data, personal preference, purchasing habit of each customer.
- The Consultation Draft once expressly recognised "self-preferencing" as a type of abusive conduct, which, however, is dropped in the Final Provisions.

- *Clarify how to find "collective dominance"* – In considering whether two or more undertakings can be deemed as collectively holding a dominant market position, the Abuse of Dominance Provisions clarify that the foremost factor in the assessment is whether the undertakings act in a uniform way. This refined approach also echoes the judicial practice of the relevant antitrust rules. In the Consultation Draft, other factors, such as market structure and transparency of the relevant market, were set out ahead of the factor of uniformity in undertaking's behaviours.
- *More detailed guidance provided for the assessment of specific abusive conduct* –
  - Regarding excessive/predatory pricing – the Abuse of Dominance Provisions make it clear that "*same/comparable products*" should be looked at when assessing whether the undertaking engages in excessive/predatory pricing across regions;
  - Regarding refusal to deal, more forms of conduct are specified, such as refusal through setting unacceptably high prices;
  - Regarding exclusive dealing, it is clarified that both direct and indirect forms (e.g., through punitive or incentive measures) are covered.
- *Investigation procedures refined* – Similar to the Monopoly Agreements Provisions, the Abuse of Dominance Provisions also outline the three criteria for case establishment, introduce the "scheduled talks" mechanism, safeguard investigated parties' information rights and other procedural rights, etc.

4. Provisions on Prohibition of Elimination and Restriction of Competition through Abuse of Administrative Power ("Abuse of Administrative Power Provisions")

The Abuse of Administrative Power Provisions provide amended implementing rules for curbing the abuse of administrative power, corresponding to the Amended AML. The Abuse of Administrative Power Provisions specify the examples of administrative abusive conduct, and unfold investigative measures and procedural protections for investigations on abuse of administrative power. The Abuse of Administrative Power Provisions also roll out details of implementing the Fair Competition Review System and promoting the awareness of fair competition.

LOOKING AHEAD

The texts of the Final Provisions provide that they will take effect from 15 April 2023. The Final Provisions, on the one hand, offer better clarity for companies to comply with the Amended AML, and at the same time, offer the normative guidance for SAMR to enforce the Amended AML. The Final Provisions have also left some important questions, such as the specific market share threshold of the safe harbour applicable to the vertical agreements, remained to be answered in the follow-up implementing rules.

We expect that SAMR will continue its active enforcement, in particular in key areas, such as digital economy and sectors concerning national strategies and people's living. We also anticipate that SAMR will become increasingly experienced (and ideally more efficient) in its merger control review. Considering the broad coverage and extraterritorial applicability of the Chinese antitrust regime as well as the noticeably severe legal consequences under the Amended AML, it is highly advisable for companies to keep abreast of the developments on both normative and enforcement fronts, and recalibrate the antitrust strategies and compliance policies in China where necessary.

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