Antitrust v2.0—What Multinational Companies Should Know About China's Amended Anti-monopoly Law

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In recent years, China has reinforced its antitrust regime by enhancing the status of its antitrust authority, promoting new legislation and strengthening enforcement. This trend is consistent with similar efforts in other major antitrust jurisdictions such as the U.S. and the EU. One of the most significant changes took place on August 1, 2022, when China officially amended its Anti-monopoly Law (AML) for the first time since the AML was promulgated in 2008. On June 27, 2022, three days following adoption of the amended AML, the State Administration for Market Regulation (SAMR) released six exposure drafts of AML implementing rules for public comment. These drafts are designed to streamline and harmonize the existing operational rules with respect to merger filing thresholds, joint conduct, unilateral conduct, intellectual property abuse, and administrative monopolies, and four of them were officially issued in final form on March 24, 2023 and became effective on April 15, 2023.

We anticipate that the amended AML, alongside the relevant implementing rules, will have significant implications for multinational companies (MNCs) doing business in China. Of particular relevance are:

- the expanded scope of behavior subject to fines and the increased levels of fines applicable to both enterprises and individuals for failure to notify mergers, "hub-and-spoke" cartels, and other prohibited conduct;
- new merger notification thresholds which may reduce the number of notifiable transactions, but introduce so-called "killer acquisition" criteria that will create more regulatory uncertainties for industry leaders' expansions of business and closing timetables for their deals;
- new "safe harbor" rules which will likely provide greater flexibility for some MNCs' vertical distribution practices in China, although applicable market definition and market share calculations will require careful analysis;
- the codification of expanded liability for assisting in the formation of "hub-and-spoke" cartels, which will likely create risks for MNCs operating in two- or multi-sided markets, especially in data-intensive businesses; and
- fine-tuned intellectual property rights (IPR)-related provisions which could provide some clarity for MNCs' licensing practices, while also expanding the scope of potential liability in certain scenarios, such as standardization and patent pooling.

In this article, we will first survey China's antitrust enforcement trends, then discuss each of the above implications for MNCs, followed by some key takeaways.

Increased Enforcement Trends

In spite of the ongoing COVID-19 pandemic, China's top policymakers have consistently made antitrust enforcement one of their priorities in recent years. Throughout 2021, the SAMR and other

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antitrust authorities in China[1] focused their limited enforcement resources on price-related monopoly agreements (e.g., resale price maintenance, RPM), exclusive dealing and failure-to-notify cases in sectors of critical concern to public welfare and people's livelihood, such as digital platforms, healthcare, building materials and utilities. These trends continued into 2022.

According to the Annual Report of Anti-Monopoly Law Enforcement in China (2021)[2] issued by SAMR on June 8, 2022, SAMR dealt with a total of 175 monopoly cases in 2021 (a year-on-year increase of 61.5 percent). Total fines exceeded RMB 23 billion (approximately USD 3.6 billion). Among them, record fines were imposed on top digital players such as Alibaba (RMB 18.2 billion, the highest in China so far) and Meituan (RMB 3.4 billion), both for abuse of dominance (primarily exclusive dealing through so-called "pick-one-side" practices), on pharmaceutical suppliers such as Yangtze River (RMB 764 million) and electrical device suppliers such as Bull Group (RMB 294.81 million) for RPM, and on cement and concrete cartels in various regional markets (over RMB 500 million in two series of cases). SAMR also maintained its active enforcement stance in merger control in 2021 and 2022 by blocking the merger of two livestreaming gaming platforms controlled by Tencent (DouYu/HUYA), conditionally clearing nine deals (among them, eight concerned international transactions led by MNCs) and probing more than 150 failure-to-notify cases (including Tencent's acquisition of China Music in 2016, where for the first time remedies included the unwinding of existing business arrangements).

Foreign companies (or FIEs) were involved in all but one of the conditional clearances, and half of the failure-to-notify cases.

MNCs continue to be involved in a significant (albeit declining) portion of Chinese antitrust cases. Recent antitrust cases still involved an array of foreign companies (or foreign invested enterprises, FIEs),[3] including a number of record fines. For example, among the published vertical agreement cases[4] (all concerning RPM), roughly 1/3 involved FIEs (including a recent case involving a Swiss firm active in the healthcare sector), and in very exceptional circumstances, leniency was granted to the investigated companies (including MNCs). In merger control, almost half of the transactions reviewed by SAMR in the past twelve months involved at least one foreign company (or FIE). Foreign companies (or FIEs) were involved in all but one of the conditional clearances, and half of the failure-to-notify cases.

Key Highlights of the Amended AML and Implementing Rules

We set forth below certain key highlights which can impact the investments and operations of MNCs in China and beyond.

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[1] On November 18, 2021, the State Anti-Monopoly Bureau (SAMB) was officially announced as a new bureau within SAMR. SAMB shares the same office building with SAMR in Beijing and is led by a vice minister of SAMR. It is reported that SAMB is rapidly expanding its staffing to significantly strengthen the national antitrust enforcement task force. SAMB's creation and staffing signaled a response to the central government's repeated statements of an intent to "strengthen anti-monopoly [laws] to prevent the disorderly expansion of capital" (e.g., the Central Economic Work Conference in 2020 identified "strengthen[ing] anti-monopoly [laws] to prevent the disorderly expansion of capital" as one of eight key government tasks, http://www.gov.cn/xinwen/2020-12/27/content_5573663.htm). Also, Administrations for Market Regulation at the provincial level (e.g., Beijing, Shanghai, Zhejiang, Guangdong) are deemed local counterparts of SAMR and each has the power to enforce the AML against monopolistic behaviors within its jurisdiction (i.e., a province) under the guidance/coordination of SAMR.

[2] SAMR, *Annual Report of Anti-Monopoly Law Enforcement in China (2021)*, (March 24, 2023), https://www.samr.gov.cn/xw/zj/202206/t20220608_347582.html.

[3] An FIE is a company with foreign shareholders that is registered in China under Chinese law. In contrast, a foreign company generally refers to a company registered outside of China under a foreign law.

[4] Antitrust enforcement decisions are generally required to be published on SAMR's website. However, there are a number of unpublished cases, in particular before 2018 when SAMR was created to consolidate the antitrust enforcement powers of NDRC, SAIC and MOFCOM. The exact number of unpublished antitrust cases is not known, but is understood to be small.

Significant hikes in fines for various violations. The amended AML significantly increases legal liabilities for infringers, both at the enterprise and individual levels, by increasing the upper limits of base fines, establishing new punitive fines, and allowing for personal liability of management. For example, the upper limits of base fines are lifted to 10% of the entity-in-question's total turnover (from no more than RMB 0.5 million under the 2008 AML) for a failure-to-notify case with competitive concerns, and to 1% of a company's total turnover (from no more than RMB 1 million) for refusal to cooperate in or obstruction of an investigation. Such levels are comparable to fines for cartels and unilateral conduct. For violations which are particularly serious or have caused significant consequences, the amended AML allows for punitive fines of 2 to 5 times the base fines. This implies that the ceiling for serious violations could be as high as 50% of a company's turnover for the preceding year. Notably, in addition to the corporate-level fines, individuals who are personally liable could be fined up to RMB 0.5 million (for refusal to cooperate in or obstruction of an investigation) or RMB 1 million (for conclusion of a monopoly agreement). The specific amendments are as follows:

<table>
<tr><th rowspan="2">Violations</th><th rowspan="2">Previous Fine Level</th><th colspan="2">Fine Level under the Amended AML</th></tr>
<tr><th>Base Fines</th><th>Punitive Fines</th></tr>
<tr><td>Merger filing related non-compliance, including gun-jumping, failure to notify, violation of clearance conditions or prohibition decision</td><td>Up to RMB 500,000 (approx. USD 75,000)</td><td>For deals with competition concerns: up to 10% of the merging parties' turnover in the preceding fiscal year
For deals without competition concerns: up to RMB 5 million (approx. USD 750,000)</td><td rowspan="6">For violations which are particularly serious or have caused significantly aggravated consequences: 2 to 5 times the base fine</td></tr>
<tr><td>Refusal to cooperate in or obstruction of an investigation or merger review, e.g., refusal to provide requested information, provision of false information, destroying or hiding evidence</td><td>For individuals: up to RMB 100,000 (approx. USD 15,000)
For entities: up to RMB 1 million (approx. USD 150,000)</td><td>For individuals: up to RMB 500,000 (approx. USD 75,000)
For companies: up to 1% of the turnover in the preceding fiscal year or RMB 5 million (approx. USD 750,000) if no turnover</td></tr>
<tr><td>Conclusion of cartel agreement but without implementation</td><td>Up to RMB 500,000 (approx. USD 75,000)</td><td>For individuals: up to RMB 1 million (approx. USD 150,000)
For companies: up to RMB 3 million (approx. USD 450,000)</td></tr>
<tr><td>Conclusion and implementation of cartel agreement</td><td>Up to 10% of the turnover in the preceding fiscal year</td><td>For individuals: up to RMB 1 million (approx. USD 150,000)
For companies: up to 10% of the turnover in the preceding fiscal year or RMB 5 million (approx. USD 750,000) if no turnover</td></tr>
<tr><td>Trade associations organizing undertakings to conclude a monopoly agreement</td><td>Up to RMB 500,000 (approx. USD 75,000)</td><td>Up to RMB 3 million (approx. USD 450,000)</td></tr>
<tr><td>Abuse of dominant position</td><td colspan="2">Up to 10% of turnover in the preceding fiscal year</td></tr>
</table>

In addition, the amended AML requires that antitrust violations be documented on an enterprise's social credit records,[5] which could impact not only such enterprise's goodwill and reputation but also its potential business opportunities, especially for public procurement. For example, a medical enterprise with an antitrust sanction record may be subject to a credit downgrade and restricted or prohibited from participating in centralized medicine procurement.

For certain investors (especially private equity and venture capital firms) that participate in a series of investments in portfolio companies, such a series of investments in a target company may meet the filing threshold even if no single acquisition in isolation would have required a filing. Therefore, it is important to plan early to assess potential filing obligations and avoid exposure to heightened sanctions for failure to notify. Due diligence should also include determining whether there were prior notifiable investments in a company which had not been notified, as that could expose the investors to significant fines.

For MNCs with a sound compliance framework, the increase of potential legal liability may provide a competitive edge against their competitors who have poor compliance standards . . .

For MNCs with leading or potentially dominant market positions or operating in sectors with relatively complex supply chains (e.g., a mechanism of multi-tiered suppliers), it is advisable to enhance compliance regimes, including adopting contingency plans to respond to any potential antitrust investigation. For MNCs with a sound compliance framework, the increase of potential legal liability may provide a competitive edge against their competitors who have poor compliance standards and become subject to antitrust investigations.

Changes to merger control rules. China's merger control regime remains a key regulatory factor for MNCs starting or expanding their businesses in China. The new draft AML implementing rules propose to significantly raise the filing thresholds (e.g., for a target business in a typical acquisition, the threshold revenue in China for a reportable transaction is increased to RMB 800 million from RMB 400 million), making it less likely to require notification of small and medium-sized deals without any competition concerns. This initiative will definitely be welcomed by MNCs (especially private equity and venture capital firms), as it can help to substantially expedite timing and save costs in closing such transactions.

However, one newly-added notification requirement in the draft implementing rules could impose new filing requirements on MNCs with significant operations in China.[6] The draft rules propose that an acquisition by an undertaking with Chinese turnover of RMB 100 billion or more may be required to notify a transaction if another party (usually the target) has a market capitalization (or valuation) of at least RMB 800 million and Chinese turnover accounts for more than one third of its global turnover, even if its turnover is minimal. That is, a large acquiring party may trigger notification requirements even for a relatively small acquisition.

This proposed new notification threshold based on a target's valuation rather than its turnover suggests that SAMR is on heightened alert regarding "killer acquisitions" of start-ups by large

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[5] An enterprise's social credit records in China document such enterprise's records of administrative sanctions, litigation and similar events in the past few years and are generally displayed on the websites of the National Enterprise Credit Information Publicity System, https://www.gsxt.gov.cn/index.html,and of Credit China, https://www.creditchina.gov.cn/home/?navPage=0. Such records may impact an enterprise's normal operation of business in the country. For example, an enterprise with a record of an antitrust sanction may be disqualified from participating in a public procurement process.

[6] Article 4 of Provisions on the Threshold for the Notification of Concentration of Undertakings (Exposure Draft) provides that where a concentration of undertakings fails to meet either of the notification thresholds specified in Article 3 hereof, but concurrently satisfies the following conditions, the concentration shall be notified in advance to the Anti-monopoly Law Enforcement Agency of the State Council, otherwise, the concentration shall not be implemented: (1) where the business turnover within China of one of the undertakings participating in the concentration exceeds RMB 100 billion in the previous accounting year; and (2) where the market capitalization (or valuation) of another merging party is not lower than RMB 800 million, and the turnover generated within China in the previous accounting year is more than one third of its turnover generated worldwide.

enterprises. However, it may be difficult to determine whether the valuation of a start-up meets the threshold, since valuation tends to fluctuate according to industry trends and market conditions. In any case, for a transaction involving a target firm with a valuation in the range of RMB 800 million and an acquirer/investor with RMB 100 billion in Chinese turnover, the parties should proactively and carefully design the transaction structure and assess merger filing obligations at an early stage.

In addition, the amended AML has introduced a "stop-the-clock" mechanism, which is expected to reduce (or even supersede) the need for "pull-and-refile" procedures for complex mergers. Triggers of the "stop-the-clock" mechanism include the notifying parties' failure to provide information requested by SAMR in a timely manner, new facts or circumstances requiring further verification, and the notifying parties' request to "stop the clock" to provide time for them to evaluate alternative remedies. Although the new mechanism is expected to optimize review schedules for complex cases, its use by SAMR in other contexts could create undesired extensions of the review period for ordinary or even simple cases.

The amended AML also introduces a "tiered" review system to prioritize the availability of skilled personnel for mergers in important sectors and to improve the efficiency of merger review. Correspondingly, SAMR announced that, from August 1, 2022, it would delegate five provincial competition authorities (Beijing, Shanghai, Guangdong, Chongqing and Shaanxi) to review a portion of simplified merger filing cases on a trial basis. In 2022, roughly 14% of the merger cases were handled by these local competition authorities. As to the focus of merger reviews, the amended AML provides that important sectors involving "national economy and people's livelihood" are key enforcement fields in respect of which it will strengthen the review of concentrations. While the amended AML does not further clarify the meaning of "national economy and people's livelihood", an earlier exposure draft of the amended AML suggested that antitrust enforcement in respect of finance, science, technology, and media businesses will likely be prioritized. Accordingly, MNCs active in such sectors should be particularly proactive in evaluating merger risks and following enforcement trends.

"Safe harbor" mechanism for vertical restraints. While the 2008 AML did allow for exemptions of certain types of agreements from the AML,[7] the bar was extremely high in practice and we are not aware of any published successful application of such provision. Nor did the 2008 AML even contemplate "safe harbors" until certain IPR-related implementing rules and antitrust guidelines introduced the concept in 2019 by proposing certain market share thresholds (20% for horizontal agreements and 30% for vertical agreements). The amended AML for the first time formalizes a "safe harbor" mechanism for vertical restraints in all sectors: a vertical agreement will not be prohibited if the relevant undertaking can show that its "share in the relevant market is lower than the threshold prescribed by [SAMR] and meets other conditions." SAMR's draft implementing rules proposed to prescribe a 15% market share threshold, although it was deleted in the officially issued version.

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[7] Article 15 of the 2008 AML (Article 20 of the amended AML) provides that a monopoly agreement (including cartels and vertical restraints) can be exempted where an undertaking can prove that the agreement is: (i) for the purpose of technological improvement or research and development of a new product; (ii) for the purpose of product quality improvement, cost reduction and efficiency enhancement, or product specifications, or standards unification, or specialization; (iii) for the purpose of enhancing operating efficiency of small or medium-sized undertakings or strengthening their competitiveness; (iv) for the purpose of furthering public interests such as energy conservation, environmental protection, disaster relief or assistance to the indigent; (v) for the purpose of relieving conditions resulting from serious sales decline or significant overproduction due to economic recession; (vi) for the purpose of safeguarding legitimate interests in the course of foreign trade and foreign economic cooperation; or (vii) within the scope of any other circumstance prescribed by the relevant law or stipulated by the State Council. The parties must also prove that the agreement will not seriously restrict competition in the relevant market, and will enable consumers to share in the benefits derived from the agreement.

The amended AML also attempts to reconcile a long-existing divergence between the Chinese enforcement authority's "per se illegal" approach (or so-called "prohibition in principle with exemptions as exceptions") and Chinese courts' "rule of reason" approach in addressing RPM issues.

Such "safe harbor" rules appear diverge from those in the EU. The EU's "safe harbor" rules cover so-called "minor agreements" from both horizontal (10%) and vertical (15%) perspectives.[8] In addition, the Vertical Block Exemption Regulation[9] provides a 30% market share as safe harbor exemption except for hardcore restrictions such as RPM, and the Horizontal Guidelines provide a safe harbor where parties have market shares below thresholds ranging from 15 to 20%.[10] In contrast, the amended AML limits the scope of "safe harbors" to vertical restraints, and does not appear to distinguish RPM from other provisions. In some respects, however, this difference could provide more space for vertical distribution practices by MNCs in China relative to the EU.

The amended AML also attempts to reconcile a long-existing divergence between the Chinese enforcement authority's "*per se* illegal" approach (or so-called "prohibition in principle with exemptions as exceptions") and Chinese courts' "rule of reason" approach in addressing RPM issues.[11] Under the courts' approach, RPM would not be prohibited unless it has anti-competitive effects, and an undertaking accused of RPM bears the burden to show the absence of anti-competitive effects.[12] The adoption of safe harbors is consistent with the goal stipulated in Article 11 of the amended AML of "improving the interconnection mechanism between administrative law enforcement and judicial practice". This appears to conform with the approach taken by the administrative and judicial authorities in EU.[13]

While the newly added "safe harbor" mechanism should be welcome for providing greater flexibility for MNCs to manage their distribution channels in China, it does not suggest that one can ignore the potential exposure and additional burden of proof in connection with vertical agreement issues. For example, the undertaking bears the burden to rebut the presumption of a vertical restraint's anti-competitive effect, and to demonstrate that its relevant market share does not cross the prescribed threshold, among fulfilling other conditions to be set by the SAMR. In practice, it could become challenging to (i) delineate a proper market definition (as there could exist a number of alternatives), (ii) evaluate a firm's market position and the competitive landscape (as there could exist conflicting market data), and (iii) show an absence of anti-competitive effects (as counterfactual analysis requires convincing hypothesis and evidence), in particular for sectors with relatively complex supply chains and/or an impactful bearing on consumers' livelihood (e.g., information and communications technology, healthcare, and automobiles) where an MNC has a leading position in a niche area (e.g., a premium segment). Accordingly, it may be advisable for

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[8] See Article 8 and Article 9, Eur. Cmm'n Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) of the Treaty on the Functioning of the European Union (De Minimis Notice), 2014 O.J. (C 291) 1.

[9] See Article 3, Eur. Cmm'n, Regulation No. 2022/720, 2022 O.J. (L 134) 4, (on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices).

[10] See, Eur. Comm'n, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011 O.J. (C 11) 1.

[11] See, e.g., the Supreme People's Court's ruling in the Yutai case in (2017) Qing Xing Zhong No. 1180 Administrative Decision; also, see SAMR's sanction decision in the Yangtze River Pharmaceutical case in SAMR Administrative Punishment Decision (SAMR punishment [2021] No.29).

[12] Article 18 of the amended AML provides that: "The agreements . . . will not be prohibited if the undertakings can prove that such agreements do not have effects of eliminating or restricting competition".

[13] For example, para. 195 of the EU Guidelines for Vertical Restrictions, Eur. Comm'n 2022 (C 248) 1, recognizes that RPM may produce efficiencies, so an exemption can be claimed in accordance with Article 101, paragraph 3 of the *Treaty on the Functioning of the European Union*. In addition, the European Court of Justice has also ruled that "RPM will only fall into the prohibition scope . . . if all other conditions stipulated—the purpose or effect of the agreement obviously restricts competition in the common market . . . —are met" in C-260/07, Pedro IV Servicios SL v Total España SA., 2009 E.C.R. I-02437.

MNCs to adopt a conservative stance in utilizing the safe-harbor mechanism, and closely monitor the Chinese antitrust legislative and enforcement activities in this respect.

Assisting "hub-and-spoke" cartels expressly codified as antitrust violation. While "hub-and-spoke" cartels have been subject to enforcement in other jurisdictions such as the U.S. and the EU for years,[14] in a "hub-and-spoke" case in China, the enforcers were able to sanction only the "spoke" parties to the horizontal conspiracy and tackle trade associations which played a facilitating role. They were unable to directly sanction the "hub" entity due to a lack of legislative basis. The amended AML adds a specific provision to expand the scope of liable entities by subjecting any undertakings that play an organizing or substantial assisting role in a cartel to the same level of penalty as those directly participating in the cartel.

SAMR's implementing rules clarify the meaning of "organiz[ing]" and "substantial assist[ing]" as follows:

> "organiz[ing]" occurs where (i) the relevant undertaking is not a party to the cartel agreement, but has a decisive or leading role in the subject scope, substantive content and performance conditions of the agreement in the course of concluding or implementing the monopoly agreement; or (ii) the relevant undertaking signs an agreement with multiple trade counterparties, and intentionally causes the trade counterparties having competing relationships to communicate with each other or exchange information through such undertaking to conclude the monopoly agreement; and
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> "substantial assist[ing]" may be found where the relevant undertaking provides substantial support for the conclusion of the monopoly agreement by other undertakings, including providing necessary support, creating key and necessary conditions or other significant assistance.

Hub-and-spoke arrangements can occur in sectors where downstream third-party distribution channels and/or trade associations are involved. For example, a car maker may organize its dealers to engage in horizontal coordination while taking measures to maintain dealers' resale prices.[15] In another cartel case, an insurance association in Hunan was accused of organizing a number of insurers to collude on vehicle insurance rates with the assistance and coordination of an insurance agent. Such trade associations and all the participating insurers other than the agent were sanctioned.[16] Were the above cases probed under the amended AML, the carmaker and the insurance agent would likely be held accountable for playing substantial assisting roles in the "hub-and-spoke" cartel.

The risk exposure of organizing or assisting a cartel could also be heightened for MNCs operating in two- or multi-sided markets, in particular if data security and digital activities are concerned. For example, the *Anti-monopoly Guidelines on Platform Economy Sector* issued by the State Council Anti-monopoly Commission expressly provide that "[c]ompeting in-platform operators may conclude a hub-and-spoke agreement which has the effect of horizontal agreements by utilizing their vertical relationship with a platform operator, or through organization and coordination by the platform operator".[17] Such practices have already been closely scrutinized outside of China (e.g., the

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[14] For example, hub-and-spoke cartels have been investigated in the US, Canada, Chile, UK, Belgium, and Poland dating back to 1956. See Luke Garrod, Joseph E. Harrington, Jr., and Matthew Olczak, Hub-and-Spoke Cartels: Why They Form, How They Operate, and How to Prosecute Them (2021).

[15] See, e.g., the price monopoly case of FAW-Volkswagen Automobile and 10 Audi dealers (October 8, 2022), http://www.gov.cn/xinwen/2014-09/11/content_2749003.htm (in Chinese).

[16] See the Hunan Insurance Industry Price Monopoly Case (October 8, 2022), http://www.gov.cn/jrzg/2012-12/28/content_2301393.htm (in Chinese).

[17] Article 8 of Anti-monopoly Guidelines on Platform Economy Sector.

Apple e-book case (2015)[18]). In the digital platform economy sector, concerted conduct may be organized and coordinated through information exchanges facilitated by data, algorithms, or platform rules, absent a written or verbal agreement or decision, raising the risk of exposure to a tacit or unspoken monopoly agreement, including hub-and-spoke agreements. With MNCs historically engaging in brick-and-mortar business transitioning to offering their products/services via digital platforms, the captured scope of such rules will undoubtedly continue to expand.[19] For example, if the platform participants are deemed to be indirectly exchanging competitively sensitive information through a platform operator's provision of vertical services, a hub-and-spoke agreement may occur. Accordingly, MNCs operating in the platform economy sector would be well advised to watch out for competitively sensitive information exchanges with other firms realized through data or other digital activities and manage the underlying risk exposure.

For antitrust compliance, it is key to assess the competitive effect of unilateral conduct involving the exercise of IPR, such as licensing and patent acquisitions.

Abuse of IPR to eliminate or restrict competition. As IPR by their very nature constitute the lawful right to exclude, IPR licensing arrangements, by granting access to their use, generally enhance competition. Therefore, Article 55 of the 2008 AML (Article 68 in the amended AML) provides that the AML does not apply to the lawful exercise of IPR, but only to abuses of IPR to eliminate or restrict competition.[20] For antitrust compliance, it is key to assess the competitive effect of unilateral conduct involving the exercise of IPR, such as licensing and patent acquisitions. To build an effective case, the positive impacts of IPR-related conduct on innovation and efficiency (including promoting the dissemination and utilization of technologies, and enhancing the utilization efficiency of resources) need to be fully explained.[21]

Similar to the EU and the U.S. competition authorities which have issued antitrust guidelines with respect to technology transfer or IPR, China has also formulated a set of implementing rules and antitrust guidelines with respect to IPR abuse. For AML purposes, typical IPR-abusive behavior includes excessive pricing, refusal to license, IPR tying and bundling, imposing unreasonable licensing terms (including restrictive clauses), and discriminatory licensing. SAMR's new draft antitrust rules on IPR abuse further clarify the factors to be considered when determining whether an IPR holder is dominant, such as the substitutability of IPR, the dependence of downstream customers on IPR derived commodities, and countervailing buyer power. SAMR's draft rules also propose that problematic IPR restrictive behaviors could include, among other things, prohibiting a licensee from dealing with another licensor, forcing licensees to accept portfolio licensing at the time of IPR licensing, and imposing unreasonable exclusive grant-backs (i.e., a licensee exclusively grants a licensor the right to any improvements or new IPRs obtained by using licensed IPRs) in addition to

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[18] See United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013) and 791 F.3d 290 (2d Cir. 2015). In that case, several major book publishers adopted an agency supply arrangement with Apple in which the publishers set the retail sales prices of e-books on Apple's platform and included most favoured nation clauses to guarantee that the price on Apple's platform would not be higher than that on other platforms (such as Amazon). The publishers also moved Amazon to an agency model. The court found a conspiracy of publishers assembled by Apple to increase the retail sales prices of e-books.

[19] Frank Jiang, Scott Yu, John Jiang, *Platform Players Bracing for Tighter Antitrust Scrutiny in China*, Antitrust Magazine Online (Oct. 2021).

[20] Article 55 of the AML specifically provides that: "[t]his Law shall not apply to the exercise of its intellectual property rights by an undertaking in accordance with the relevant provisions of intellectual property laws or administrative regulations; provided that this Law shall apply to any conduct of an undertaking whereby intellectual property rights are abused to eliminate or restrict competition."

[21] For example, Article 25 of the Working Guidelines on Adjudicating Cases Concerning SEP Disputes issued by Guangdong High People's Court provides that, in adjudicating cases concerning standard essential patent (SEP) related monopoly disputes, the court shall assess the effect of the relevant conduct on market competition, with a focus on the impact of the conduct on innovation, efficiency and consumer welfare, on a case-by-case basis.

sole grant-back clauses (i.e., only a licensee and its designated parties can practice any improvements or new IPRs obtained by using licensed IPRs).[22]

To deal with an emerging trend, SAMR's new draft rules propose to improve the supervision of conduct involving standard essential patents (SEPs) and patent pools. For SEPs, potential abusive behavior includes excluding a specific undertaking from participation in standard setting or implementation, joint boycotting with competitors against another undertaking in standard setting or licensing, unfair excessive pricing and discrimination, and the use of injunctions to force the licensee to accept unfair excessive pricing or unreasonable trade conditions.[23] For patent pools, a "patent pool management entity" is flagged as having possible market dominance, and potential abusive behaviors by patent pool participants include unfair pricing in license fees and exclusive grant-backs.[24]

As an active participant in the dynamic global technology space and in response to the current delicate global geopolitical situations, China is making increasing efforts to encourage investment in innovation. One of its initiatives lies in the intersection of IPR licensing and antitrust, with China growing its antirust regulatory teeth to become one of the major jurisdictions, in line with the goal of transitioning to an innovation-driven economy—it is learning the art of balancing between IPR protection and antitrust regulation in a "glocal" field. IPR intensive industries have also become one of the antitrust enforcement priorities and spotlights in judicial practices in China.[25] For MNCs active in IPR licensing (especially those having significant IPR assets in license-in arrangements), the fine-tuned IPR-related rules could provide more guidance and greater guardrails, but also expand the scope of potential liability in scenarios such as product standardization and patent pooling.

Conclusion

In sum, the amended AML further codifies more instances of anticompetitive behavior to be regulated, while heightening the consequences for a number of violations, including failure-to-notify and refusal-to-cooperate during investigations, which will bring both more clarity and heightened exposure for MNCs' operations and investments in China. ●

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[22] In contrast, see Eur. Comm'n Regulation No. 316/2014, 2014 O.J. (L93) 17 (on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Technology Transfer Agreements), which only provides sole grant-back as one of the exclusive licenses that cannot be directly exempted.

[23] For example, in the *OPPO v Sharp* case, OPPO claimed that Sharp violated an obligation to license its standard essential patents on fair, reasonable and non-discriminatory (FRAND) terms by forcing OPPO to accept unfair and excessive fees after Sharp threatened to seek an injunction. The court ruled that Sharp may not file new injunction applications in other jurisdictions before the court issues its decision on the merits of the claim. ((2020) Supreme Court Zhi Min Xia Zhong, No.517, Civil Ruling).

[24] The U.S. Antitrust Guidelines for the Licensing of Intellectual Property also provide that exclusion of participants from a pooling or cross-licensing arrangement among competing technologies is unlikely to have anticompetitive effects unless (1) excluded firms cannot effectively compete in the relevant market for the good incorporating the licensed technologies and (2) the pool participants collectively possess market power in the relevant market. Those guidelines also state that a pooling arrangement that requires members to grant licenses to each other for current and future technology at minimal cost may reduce the incentives of its members to engage in research and development. (See Section 5.5 of U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (2017), https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf, at 30-31.) EU Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements, Eur. Comm'n, 2014 O.J. (C) 3 also provide that a patent pool will be exempted from the application of Article 101 of TFEU when it is open to all the stakeholders, licensed based on FRAND principles and meets other requirements.

[25] See, e.g. Frank Jiang, John Jiang, *Antitrust Pitfalls In Global Licensing: Perspective From China—A "Glocal" Battleground,* Competition Policy International (Dec. 31, 2019), https://www.competitionpolicyinternational.com/antitrust-pitfalls-in-global-licensing-perspective-from-china-a-glocal-battleground/.