

YEAR 2020 IN REVIEW: A NEW WAVE OF CHINA'S ANTI- MONOPOLY LAW

2020 was a year clouded by COVID-19 and world trade tensions, which have certainly reshaped everyone's life. Despite the disruption, the Chinese government articulated its intent for the future of antitrust in China.

YEAR 2020 IN REVIEW

• Legislation: 2020 appeared to be the most active year in history:

- The draft amendments of the Anti-Monopoly Law ("Draft Amendments to the AML") were announced for public consultation in early 2020, and have been identified as one of China's key legislative task for 2021.¹
- The long-awaited guidelines, i.e. the *Anti-monopoly Guidelines for Automobile Industry* ("Automobile Industry Guidelines"), the *Anti-monopoly Guidelines for Intellectual Property Rights* ("IP Guidelines"), the *Guidelines for Application of the Leniency Regime to Cases of Horizontal Monopoly Agreements* ("Leniency Guidelines"), and the *Guidelines on Commitments Made by Undertakings in Antitrust Cases* ("Commitments Guidelines") were publicly released;
- The *Antitrust Guidelines for the Platform Economic Industry (draft for comments)* ("Platform Guidelines") and the *Antitrust Guidelines for Active Pharmaceutical Ingredients (draft for comments)* ("API Guidelines") were publicly released for comments. The Internet industry and pharmaceutical industry will continue to be enforcement priorities;
- Consolidation of previously issued regulations/provisions continued. *The Interim Provisions on the Review of*

Concentration of Undertakings and the Provisions on Prohibition of Abuse of Intellectual Property Rights to Exclude and Restrict Competition ("Provisions on Abuse of IPs") were promulgated and became effective in 2020;

- In addition, State Administration for Market Regulation ("SAMR") and its local counterparts issued antitrust compliance guidelines for companies to establish sound compliance systems. SAMR has also issued the *Guidelines for Undertakings' Overseas Antitrust Compliance (draft for comments)* to emphasize the importance for compliance of antitrust rules in other jurisdictions.
- ## • Enforcement: Merger control review and antitrust investigations in China were conducted in an efficient manner:
- Unlike its peers in some other jurisdictions, which adopted a "stop-the-clock mechanism" in responding to the COVID-19 impact, SAMR introduced the "e-filing" system in the early stage of the pandemic, which improved the efficiency of its merger control review. In 2020, SAMR concluded 473 cases in total, among which 4 transactions were cleared conditionally. SAMR also adopted a hard stance against gun-jumping by punishing parties in 13 cases.²

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¹ For details, see a speech of the spokesperson for the Legislative Affairs Commission of the NPC Standing Committee, located at https://www.sohu.com/a/439535076_115479.

² On January 28, 2021, SAMR published its fail-to-file decision regarding Xinjiang Xuefeng's acquisition of Yuxiang huyang. Its decision was actually made on December 30, 2020.

- Regarding the investigations towards anti-competitive conduct, the Chinese authorities have published penalty decisions to a record high of 20 cases (administrative monopoly conducts excluded),³ among which 13 cases were related to horizontal agreements, 7 cases were related to abuse of dominant market positions. In the beginning of 2021, SAMR published another pharmaceutical company for refusal to deal. In addition, 2 investigations in 2020, 1 related to vertical agreement and 1 related to abuse of dominance, were terminated based on the parties' fulfilling commitments.⁴

• **Litigation: Private actions are becoming an effective tool for companies to achieve their commercial goals:**

- The dynamics between judicial proceedings and law enforcement are evolving. In 2020, we witnessed the first domestic follow-up litigation raised from international antitrust investigation and appeals against administrative decisions continue;
- Regarding the Internet industry, the Supreme People's Court called for strengthening judicial scrutiny on antitrust;⁵ some provincial People's Congress authorized its local Public Prosecutor's Office to conduct public interest litigation in relation to anti-competitive conduct and personal information infringement.⁶ In 2020, a number of antitrust litigations between Internet companies have emerged, and developments within these litigations will be particularly noteworthy.

At the beginning of 2021, Chinese authorities have re-emphasized the "strengthening of antitrust law enforcement."⁷ In this article, we will review China's antitrust regime in 2020, summarize noteworthy highlights and predict the trend of China's antitrust law developments from the following eight aspects.

³ According to the *2019 Annual Report of Antitrust Enforcement in China*, in year 2018, SAMR and local antitrust enforcement authorities closed 16 cases of anti-competitive conducts (administrative monopoly conducts excluded); and for 2019, 16 cases as well.

⁴ In addition, according to the annual work review published by SAMR, the Chinese antitrust authorities concluded 108 cases in relation to anti-competitive conducts. See http://www.samr.gov.cn/xw/zj/202102/t20210205_325918.html. We understand that some of the 108 cases may involve administrative monopolies, which have not publicly released their decisions.

⁵ See *The Supreme People's Court Proposes to Strengthen Judicial Scrutiny on Antitrust and Unfair Competition Regulation*, located at http://www.xinhuanet.com/legal/2021-01/11/c_1126968393.htm.

⁶ See *Supreme People's Procuratorate: Procuratorial Organs Authorized by 18 Provincial People's Congress to Explore Public Interest Litigation in the Internet Sector*, located at https://www.spp.gov.cn/spp/zd gz/202101/t20210125_507510.shtml.

⁷ See *Another Antitrust Signal Issued by the CPC Central Committee! The Political and Legal Working Conference requires the Strengthening of Competition Law Enforcement and Judicial Administration*, located at <http://cinic.org.cn/xw/zcdt/1014342.html?from=singlemessage>.

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01 I. More Frequent Enforcement based on Industry Characteristics

1. Overview of Enforcement in 2020

In 2020, SAMR and its local branches ("Local AMRs") collectively closed 22 cases of penalizing monopolistic practices (including 2 cases of termination of investigation and exemption of punishment), which include horizontal monopoly agreements, minimum resale price restriction and abuse of dominance. Local AMRs have become increasingly active by handling 21 cases (out of 22 published cases in total) in 2020. The sole case SAMR directly handled was one concerning abuse of dominance in relation to active pharmaceutical ingredient ("API") product.¹

In 2020, SAMR also launched several investigations against Internet companies for abuse of dominance. Please refer to Section II for more information.

2. More Enforcement under Sector Specific Antitrust Guidelines

SAMR has long focused its enforcement efforts on the automobile and pharmaceutical industries. In 2020, this

patterned continued. For automobile industry, Local AMRs imposed penalties mainly for monopolistic agreements of price-fixing and market segmentation between car dealers,² price fixing agreement among car testing companies organized by a trade association³, and price fixing agreements reached among car driving training schools.⁴ In the area of APIs, SAMR imposed penalties of RMB 325 million on three manufacturers of calcium gluconate APIs for abuse of dominance by unfairly overpricing and imposing unreasonable conditions.⁵ Zhejiang Administration for Market Regulation imposed penalties on medicine distribution companies for imposing unreasonable conditions.⁶ Meanwhile, in the beginning of 2021, SAMR imposed a penalty of RMB 100.7 million to an API manufacturer for refusal to deal.⁷ In terms of legislation, SAMR released the Automobile Industry Guidelines and the API Guidelines,⁸ which in addition to the traditionally regulated behaviours, highlight the risks of potential industry-specific anti-competitive practices.⁹ Due to the differences between the competition structures in these two industries, the guidelines each provide a different framework to assess prohibited practices. The following chart below summarizes some of the guidelines' industry-specific regulations:

Industry-Specific Regulations	Automobile Industry	API Industry
Joint Production and Joint Procurement	The Automobile Industry Guidelines adopt a case-by-case assessment framework, while pointing out that joint production agreements and joint procurement agreements are generally conducive to the improvement of efficiency and competition and these agreements contribute to the increase of consumer welfare. Therefore, undertakings may claim exemption on this basis.	Given the high market concentration in the pharmaceutical industry, the API Guidelines clearly state that companies should avoid entering into agreements with competing API manufacturers, such as joint production and joint procurement, etc. ¹⁰

¹ This case involves the Chinese market of calcium gluconate pharmaceutical active ingredients for injection. The three companies involved were fined a total of RMB 325.5 million by SAMR. See Administrative Penalty Issued by the State Administration for Market Regulation (Guo Shi Jian Chu [2020] No.8), located at http://www.samr.gov.cn/fldj/tzgg/xzcf/202004/t20200414_314227.html.

² See E Shi Jian Chu Zi [2020] No. 2-4; Penalty Decision [2020]No.11 – 21 issued by Ningxia Autonomous Region AMR; Zhe Shi Jian An [2020] No.9-13; Zhe Shi Jian Zi [2020] No.15-24.

³ See Yue Shi Jian Fan Long Duan Xing Chu [2020] No.1-32.

⁴ See Qian Shi Jian Chu Fa [2019] No.26-42; Wuan Shi Jian Jing Zheng Chu Zi [2020] No.1-4; Su Shi Jian Fan Long Duan [2020] No.8-16.

⁵ See Guo Shi Jian Chu [2020] No.8.

⁶ Zhejiang AMR's Penalty Decision Regarding the Abuse of Dominance by Wanbangde Pharmaceutical Group Zhejiang Pharmaceutical Sales Co., Ltd. (See Zhe Shi Jian An Zi [2020] No.14).

⁷ SAMR's Penalty Decision Regarding the Abuse of Dominance by Simcere Pharmaceutical Group Limited, see Guo Shi Jian Chu [2021] No.1.

⁸ In addition, the *Antitrust Compliance Guidelines for Undertakings in Shanghai Municipality* and the *Antitrust Compliance Guidelines for Undertakings of Zhejiang Province* also raised concerns over new types of monopoly agreements.

⁹ For example, the Automobile Industry Guidelines point out that, with regard to the automobile after-sale business, given the lock-in effects, the automobile brand is a factor for defining the automobile after-sale market, and on a case-by-case basis, this may lead to the conclusion that the automobile supplier (who does not possess a dominant position in automobile supply market sector) may have a dominant position in brand-specific after sales marketing sector. Accordingly, the supplier with a dominant position shall not restrict the production and circulation of after-sale components and the availability of maintenance information, testing instruments and maintenance tools. As another example, the API Guidelines point out that exclusive sales by one distributor and refusal to sell API to counterparties may constitute to abuse of dominance, because there are normally few competitors in the Chinese API market and the pharmaceutical producers are highly dependent on API suppliers.

¹⁰ Paragraph 1, Article 5 of the Automobile Industry Guidelines; Paragraph 2, Article 3 of the API Guidelines.

Industry-Specific Regulations	Automobile Industry	API Industry
Joint Sales	Not specified.	The API Guidelines provide that joint sales are generally not allowed and undertakings should avoid exchanging sensitive information, such as the sales price and production and sales plan of pharmaceuticals through third parties, such as pharmaceutical distributors and downstream manufacturers.
Geographical and Customer Restriction	The Automobile Industry Guidelines point out that in the automobile distribution field, for automobile suppliers that do not possess significant market power, there is a presumption that geographical restrictions and/or customer restrictions imposed on dealers do not have the effect of restricting or eliminating competition. However, passive sales restrictions should generally be prohibited.	For the API industry, geographical and customer restriction are likely to eliminate competition, adversely affecting other API distributors. Therefore, API manufacturers and distributors should avoid geographical or customer restriction. ¹¹

We expect that non-hardcore monopoly agreements will be subject to stricter scrutiny, and SAMR will conduct a more dedicated assessment when determining whether relevant arrangements constitute horizontal or vertical monopoly agreements by taking into account various factors, such as market competition, price of products and behavior of consumers.¹²

In addition, the promulgation of the Platform Guidelines indicate that the antitrust enforcement in Internet industry has become the top priority. Please refer to Section II for more information.

3. Increasing Cooperation between Industry Regulators and SAMR.

In 2020 and early 2021, the competent authorities in aviation industry and finance industry have stated their intent to cooperate with SAMR to strengthen antitrust law enforcement in their respective fields.

- **Aviation industry:** On December 18, 2020, SAMR and the Civil Aviation Administration of China jointly issued the *Notice on Establishing a Cooperation Mechanism for the Regulation of Civil Aviation Price*,¹³ announcing that the two authorities will strengthen cooperation in eight aspects including regulatory duties, law enforcement cooperation, credit rating and joint punishment, and they will strengthen the law enforcement against relevant civil aviation undertakings engaging in monopolistic practices.

- **Non-bank payment industry:** On January 21, 2021, the People's Bank of China promulgated the *Regulations on Non-bank Payment Institutions (Draft for Public Comments)* ("**Non-bank Payment Institutions Regulation**"),¹⁴ which emphasise that relevant undertakings should not abuse their dominance.¹⁵ The Non-bank Payment Institutions Regulations also provides an "early-warning mechanism" that when the market share of an undertaking meets or surpasses the threshold to constitute a dominant position standards, the People's Bank of China may give a warning to the Chinese authorities.¹⁶ As reported in mid-2020, the Chinese authorities are also considering launching an antitrust investigation into an Internet payment platform.¹⁷

Outlook 2021

Moving forward in 2021, it is expected that the SAMR and its local branches will actively continue to enforce antitrust law thoroughly and joint antitrust enforcement by various departments may become more commonplace. In addition, as non-hardcore monopoly agreements are expected to be subject to stronger regulation as antitrust enforcement intensifies, undertakings should prudently assess their commercial arrangements in the context of their own industry, their situation, and their market's overall structure.

¹¹ Paragraph 2, Article 4 and Paragraph 2, Article 5 of the Automobile Industry Guidelines; Paragraph 3, Article 4 of the API Guidelines.

¹² Article 13 of the Interim Provisions on Anti-Monopoly Agreements.

¹³ The State Administration for Market Regulation and the Civil Aviation Administration of China jointly issued the *Notice on Establishing a Cooperation Mechanism for the Regulation of Civil Aviation Price*, located at http://www.samr.gov.cn/xw/zj/202012/t20201224_324672.html.

¹⁴ *Circular of the People's Bank of China on Seeking Public Comments on the Regulations on Non-banking Payment Institutions (Draft for Comment)*, located at http://www.gov.cn/xinwen/2021-01/21/content_5581574.htm.

¹⁵ Article 57 of the Non-bank Payment Institutions Regulations.

¹⁶ Article 55 of the Non-banking Payment Institutions Regulations.

¹⁷ See WeChat Payment, Alipay or Under an "Anti-Monopoly" Investigation. How to Talk about Monopoly?, located at <https://www.mpaypass.com.cn/news/202007/31183326.html>.

02 II. Closer Scrutiny on the Internet Sector

On November 10, 2020, SAMR promulgated the Platform Guidelines,¹ which demonstrates SAMR has prioritized increasing its regulation of the Internet industry.

The Platform Guidelines pay particular attention to specific business models and possible antitrust behaviors in the platform economy. This section highlights some of the high-risk behaviors specific to the platform economy.

1. Algorithms Conspiracy

With the development of computer science and Internet technology, monopoly agreements are no longer limited to written agreements or secret meetings. Advanced technologies, data and algorithms are also likely to be used to reach monopoly agreements, i.e. algorithm conspiracy. The Platform Guidelines clarify that undertakings operating on a platform may reach monopoly agreements through algorithms, technical means, etc. Undertakings operating on a platform may also reach a hub and spoke agreement under the organization or coordination of the platform. At the same time, in response to the disguised nature of using algorithms to achieve concerted action,² the Platform Guidelines state that the existence of concerted action can be determined based on logically consistent indirect evidence of the undertakings' knowledge of relevant information. It is not clear whether this means that even price synergies formed through autonomous machine learning will be included in the regulation of AML enforcement. This point is still an area that needs to be clarified. We expect clarity in the final version of the Platform Guidelines.

2. Abuse of Dominance by Platforms Undertakings

With regard to the definition of relevant markets for Internet platforms, the Draft Amendments to the AML clarify the factors to be taken into account to determine whether an Internet undertakings has a dominant position should include network effects, economies of scale, locking effects, the ability to master and process relevant data and among other factors.³ The Platform Guidelines further add that the definition for relevant

product markets should not be solely based on the underlying services of the platforms, but also needs to consider the possible cross-platform network effects to determine whether to define the platform as a distinct market or as a number of related markets. The Draft Guidelines provide that in certain cases, if direct factual evidence is sufficient, and the behaviors that can only be carried out by relying on market dominance have been carried out for a long time with obvious damaging effects, the antitrust enforcement authorities can determine that an undertaking engaged in platform economy conducted monopolistic behaviors without defining the market.⁴

If an undertaking possesses a dominant position, some commonly seen business models including the following may constitute an abuse of dominance:

- **Either-or-Choice:** "Either-or-Choice" arrangement may constitute an abuse of dominance by exclusive dealing. "Either-or-Choice" arrangement not only includes requiring merchants (i.e. undertakings on the platform) to choose one platform from other competitive platforms by entering into a contract, but also includes imposing restrictions through punitive measures, such as searching downgrade, traffic restriction, technical barriers and deduction of deposits or by taking incentive measures, such as subsidies, discounts, preferences and traffic resource support.⁵
- **Refusal to deal:** If a platform is regarded as an essential facility, refusing other market players' access to the platform may constitute refusal to deal. Factors to be considered to determine if the platform is essential should include the substitutability with other platforms, the potential availability

¹ According to a speech of the spokesman of SAMR, vigorous development of online economy in China has played an important role in promoting positive and high-quality development and meeting the people's needs for a better life. However, at the same time, the online economy is showing a trend of increasing market concentration, and more complaints are being received regarding platform monopoly issues, indicating there are competition risks and hidden dangers in the development of the online economy. See *SAMR: Existing Competition Risks and Hidden Dangers with Increasing Concentration of Online Economic Markets*, located at <https://baijiahao.baidu.com/s?id=1686028258379979861&wfr=spider&for=pcc>.

² Article 6 of the Platform Anti-monopoly Guidelines.

³ Article 21 of the Draft Amendments to the AML.

⁴ Article 4 of the Platform Guidelines.

⁵ Article 15 of the Platform Guidelines.

of other platforms, the feasibility of developing competitive platforms, the extent of reliance by transaction counterparties on such platforms, and the possible impact of opening the platform on the platform undertaking.⁶

- **Tying:** Tying, for instance, by means of forcing counterparties to accept other products from the same ecosystem by imposing restrictive measures within the Internet platform, such as searching downgrade, traffic restriction and technical barriers, may raise competition concerns.⁷
- **Discriminatory treatment:** The implementation of differentiated transaction conditions, rules or algorithms may constitute discrimination.⁸ Platform undertakings implement preferential treatment for their own products displayed in the same ecosystem may also raise concerns from a discriminatory perspective.

3. Potential Competition Concerns Arising from Data

Due to the nature of data, an undertakings' access to data does not necessarily constitute a dominant position. Nevertheless, as processing or owning a scale of data may lead to certain competitive advantages, the Platform Guidelines highlight the risks of possible monopolistic practices regarding improper data collection, as illustrated below:

- **Improper collection of users' data:** If a platform has a dominant position and requires the mandatory collection of users' personal data, this conduct may constitute abuse by imposing unreasonable conditions.⁹
- **Big data discrimination:** An undertaking in the platform economy with a dominant position may be deemed as abusing its dominance through discrimination if it implements differentiated transaction prices or other transaction conditions based on big data and algorithms and the consumer's consumption preference, use habits, among other consumer habits. For example, on 22 December 2020, in conjunction with the Ministry of Commerce, SAMR organized an administrative guidance session on the regulation of community group purchases, which explicitly required Internet platforms to refrain from conducting discriminatory practices by taking advantage of data in their business to the detriment of consumers' welfare.¹⁰
- **Data may constitute an "essential facility" and must be shared:** Based on the Draft Guidelines, data may be regarded as an essential facility, in which case, the undertaking, which holds such data, will be required to unlock or open the data. Factors for assessing whether the data is essential includes

whether the data is indispensable for other undertakings to participate in market competition, whether the data can be obtained through other channels, the technical feasibility of opening such data, and the possible impact of the data opening on the data possessing undertakings.¹¹ Currently, there has been no precedent (court decision or administrative penalty) in China in which data is regarded as essential facility. Issues, such as in which case the data will actually become essential and how the authority will impose an obligation to "open" the data, will need to be clarified in further versions of the guidelines and the Chinese authorities' implementation of the rules in practice.

In addition, with regard to the concentration of undertakings engaged in Internet industry, the Platform Guidelines particularly point out that undertakings using a VIE structure are subject to merger filing obligations, and the Platform Guidelines also contain a provision for "Killer Acquisitions". For details, please refer to Section V.

Outlook 2021

Some common practice in the Internet industry in the past years may raise competition concerns. The cutting-edge concepts, such as algorithms and data have entered into the scope of antitrust regulation. As reported, Chinese authorities are currently investigating certain Internet undertakings. For example, with regard to the practice of "Either-or-Choice", SAMR launched an official investigation in December 2020 based on a complaint against the suspected monopoly practice of an e-commerce platform.¹² In addition, the Shanghai Municipal Administration for Market Regulation disclosed its "Work Summary for 2020 and Work Idea for 2021", which involved the first case of an abuse of dominance by an Internet platform in China that has entered into the administrative penalty procedure.¹³ It is clear that now and in the near future, the Internet industry will continue to be the focus of antitrust regulation.

Antitrust litigation is becoming a powerful weapon for Internet undertakings to achieve their commercial objectives. Presently, there are some noteworthy lawsuits in the Internet industry under way. For a summary and brief interpretation of relevant cases, please refer to Section VII.

⁶ Article 14 of the Platform Guidelines.

⁷ Article 16 of the Platform Guidelines.

⁸ Article 17 of the Platform Guidelines.

⁹ Article 16 of the Platform Guidelines.

¹⁰ See the Administrative Guidance Meeting on Regulating the Community Group Buying Order Convened by the State Administration for Market Regulation and the Ministry of Commerce, located at http://www.samr.gov.cn/xw/zj/202012/t20201222_324567.html.

¹¹ Article 14 of the Platform Guidelines.

¹² For the Implementation of "Either-Or Choice" and Other Suspected Monopoly, the State Administration for Market Regulation Has Filed a Case for Investigation Against Ali in accordance with the Law, located at <https://baijiahao.baidu.com/s?id=1686923018603425162&wfr=spider&for=pc>.

¹³ Work Summary for 2020 and Work Ideas for 2021 issued by the Shanghai Municipal Administration for Market Regulation.

III. More Guidance for Antitrust Disputes Involving Intellectual Property Rights

1. More Detailed Rules for Analyzing Antitrust Issues Involving Intellectual Property

In 2020, SAMR promulgated the Anti-monopoly Guidelines for Intellectual Property Rights, i.e. IP Guidelines,¹ which provide a more detailed analytical framework for monopoly agreements and abuse of dominant market position involving intellectual property:

- **Definition of relevant market:** The IP Guidelines provide that if it is difficult to assess the adverse impact of an ant-competitive conduct by only defining the relevant product market, the authorities may define the relevant technology market. To define the technology market, the authorities would assess factors, such as the technology's properties, purpose of use, license fee, compatibility, duration of the intellectual property rights involved, the possibility and costs for its users to switch to other substitutable technologies, as well as the territoriality of the intellectual property rights.² In terms of calculating the market share of the undertakings in the technology market, the IP Guidelines would consider the market share of the goods produced, the proportion of the license fee of the technology compared to the total license fee in the technology market, and the number of substitutable technologies.³
- **Circumstances that may constitute a monopoly agreement when licensing the intellectual property rights:** The IP Guidelines analyze six types of intellectual property right arrangements that may constitute a monopoly agreement, namely joint R&D, cross licensing, exclusive grant-back, non-challenging clause, setting of standards and other restrictions in intellectual property right licensing agreements. The above agreements, usually have the effect of stimulating innovation and promoting competition; however, different types of agreements have different positive effects, and companies must conduct an analysis according to specific factors to determine whether their arrangement could have the effect of excluding or restricting competition in their market.⁴

Meanwhile, the IP Guidelines provide "safe harbor" for undertakings, which do not have significant market positions. For example, if the undertakings can satisfy the following

criteria, the agreements that undertakings enter into involving IP rights would not be presumed to be monopoly agreements:

- i. The total market share of competing undertakings in the relevant market does not exceed 20%;
 - ii. The market share of non-competing undertakings in any market does not exceed 30%; or
 - iii. When it is difficult to determine the undertakings' market shares in the market, but there are four or more alternative technologies.⁵
- **Refusal to license and other abuses of dominant market position:** The authorities may consider the intellectual property rights that an undertaking possesses when assessing whether an undertaking has a dominant market position, but intellectual property rights would not raise any definitive presumption.⁶

The IP Guidelines analyze five typical abuse of dominance practices, i.e. unfair high licensing fees, refusal to license, tying, unreasonable conditions and discriminatory treatment involving intellectual property rights.

It is noteworthy that the IP Guidelines recognizes that, undertakings are not obliged to trade with competitors when analyzing refusal to license. With regard to whether undertakings have an additional obligation to provide intellectual property rights, it would be necessary to analyze

¹ In September 2020, the finalized IP Guidelines were released by SAMR in the form of book collections.

² Article 4 of the IP Guidelines

³ Article 5 of the IP Guidelines

⁴ Articles 7-12 of Chapter II of the IP Guidelines

⁵ Article 13 of the IP Guidelines.

⁶ Article 14 of the IP Guidelines.

whether the refusal to license has the effect of excluding or restricting competition. In this scenario, the authorities would consider “whether it is necessary for other undertakings to obtain the license to enter the market”.⁷ This standard seems to put forward higher requirements than the standard of the Provisions on Prohibition of Abuse of Intellectual Property Rights to Exclude and Restrict Competition (“IP Provisions”), which stipulates “the intellectual property right concerned cannot be reasonably substituted in the relevant market and is necessary for other undertakings to participate in the competition in the relevant market”.⁸

2. Increased Anti-Monopoly Litigation Concerning Intellectual Property

Antitrust litigations concerning intellectual property rights increased in 2020. Among notable cases, the case of eight KTV v. China Audio Video Copyright Association (“CAVCA”) for its abuse of dominance⁹ attracted particular attention.

Case Study

- **Background:** In this case, the plaintiffs of eight KTV enterprises claimed that CAVCA required them to sign licensing agreements with an agent designated by CAVCA, but the agent attached unreasonable conditions to the license agreements. Therefore, the plaintiffs alleged that CAVCA engaged in abuse of dominance.
- **No “Abuse” of Dominance:** Beijing Intellectual Property Court ruled in favor of the defendants, although the court held that CAVCA had dominant position, from the perspective of evidence, the plaintiffs failed to prove that the defendant engaged in “abuse” of its dominant position by engaging in refusal to deal and imposing unreasonable conditions.¹⁰ Therefore, the court did not support the plaintiffs’ claim about CAVCA’s abuse of dominance. In this case, the following aspects are particularly noteworthy:
- **The licensing market for intellectual property rights can be subdivided based on the license application in different scenarios:** The relevant product market in this case is defined as the “service market for licensing film works or audio-visual products in the KTV operation”. The court subdivided the relevant products market from the perspective of demand substitution, holding that the occasions for using film works or audio-visual products include network play, KTV operation,

live play in other public places, etc. Considering that there is no substitution between the use of film works or audio-visual products in the KTV operation, the court defined the relevant market as the “service market for licensing film works or audio-visual products in the KTV operation”.

- **Consider various factors when determining the dominant market position:** In this case, the court does not clearly explain how it calculated the market share. However, the court determined that CAVCA had a dominant market position by considering the following factors: (1) CAVCA is currently the only collective management organization of the copyrights of film works and audio-visual products in China; (2) the quantity of film works and audio-visual products under CAVCA’s management (over 110,000 units); (3) the reliance of downstream undertakings on CAVCA; and (4) the difficulty for other undertakings to enter into the market.
- **A “quasi-governmental” organization can be sued:** This case also demonstrates that a “quasi-governmental” organization is also regulated by the AML as an undertaking and may be sued in court. This rule was clarified in the case of Netcom v. Internet Center¹¹ and Xiangshan Jieda v. Internet Center¹² as well.

In the field of AML enforcement for intellectual property rights, it is reported that at the beginning of 2020, SAMR suspended its antitrust investigation into the exclusive licensing agreement for music copyrights concluded by Tencent Music with three major international record companies, but no investigation results have not been released yet.¹³

Outlook 2021

There is no doubt that the authorities will continue to focus on regulating intellectual property and enforcement towards abuse of dominance position by taking advantage of IP rights. The IP Guidelines assessment are more refined and detailed, and this indicates that we can anticipate more AML enforcement cases and increased litigation moving forward.

⁷ Article 16 of the IP Guidelines.

⁸ Article 7 of the IP Provisions, SAMR Order No. 31 in 2020, promulgated by SAMR on October 23 2020 and became effective on the same date.

⁹ Beijing Intellectual Property Court (2018) Jing 73 Min Chu No. 775 issued a judgment on 3 June 2020.

¹⁰ Specifically, the plaintiff did not meet its burden in proving that collecting commissions, signing fees, among other activities were conducted based on CAVCA’s instruction or command.

¹¹ The Beijing Intellectual Property Court issued a judgment on 23 December 2016: Jing Zhi Min Chu Zi [2015] No.1842.

¹² The Beijing Intellectual Property Court issued a judgment ([2017] Jing 73 Min Chu No. 203) on 14 April 2020.

¹³ See “What does Means of Suspending the Anti-monopoly Investigation into Tencent Music?” located at <https://baijiahao.baidu.com/s?id=1660744408311340394&wfr=spider&for=pc>.

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IV. Detailed Procedural Rules during Antitrust Enforcement

1. Streamlined Antitrust Investigation Procedures

During the COVID-19 pandemic, Chinese authorities have adopted measures including establishing an online platform to facilitate the submission of materials and virtual meetings to replace on-site meetings. In April 2020, the SAMR issued the *Announcement on Anti-monopoly Law Enforcement in Respect of Supporting Pandemic Control and Production Resumption*, clarifying that agreements, which are conducive to technological progress, consumer benefits and social welfare may be exempted, and undertakings may apply for above exemption.

In 2020, the SAMR officially released the *Leniency Guidelines and the Commitment Guidelines*, which refined its enforcement procedural rules to promote a more efficient process.

2. Encouraging Enterprises to Cooperate with Investigations through a Leniency Regime

Based on the past enforcement experience, the Leniency Guidelines now provide more clear guidance on the application of the leniency regime in horizontal monopoly agreement cases, giving additional incentives for enterprises to apply for leniency. The following highlights the main sections of the Leniency Guidelines:

• Clarifying the applicable scope of the leniency regime

The Leniency Guidelines further clarify that if an application for leniency concerning a horizontal monopoly agreement is successful, the penalty reduction applies to not only fines but also confiscation of illegal gains. The Leniency Guidelines also point out that where an undertaking organizes or coerces other undertakings to participate in a monopoly agreement or hinders other undertakings from remedying any preexisting illegal practices, the authorities shall not give this undertaking a full exemption, although reducing penalties might be possible.¹

• Clarifying the time limit for applying for leniency

The Leniency Guidelines clarify that undertakings can apply for leniency any time before a case is formally filed or an investigation is initiated, as well as any time after the case filing, but an undertaking must apply before a prior notification of administrative penalties has been issued.

• Establishing a tiered penalty reduction and marker system

One of the core mechanisms of the leniency regime is to establish a “marker system” for leniency applicant based on their sequence of application.² In a situation where there are multiple applicants, the Leniency Guidelines refine the tiered penalty reduction mechanism based on chronological order (first leniency applicant, second, third, etc.) of the undertakings who submit an application. This encourages undertakings to apply quickly for leniency:³

Sequence	Penalty Reduction
First Leniency Applicant	Full immunity or no less than 80% reduction of all fines; the first leniency applicant who applies for leniency before the case is accepted or investigation is initiated will obtain a full exemption
Second Leniency Applicant	30-50% reduction of the fine
Third Leniency Applicant	20-30% reduction of the fine
Subsequent Applicants	<ul style="list-style-type: none"> • Generally, leniency will be granted to maximum three undertakings in a same case, which may be subject to increase under specific circumstances • Subsequent undertakings may be granted a reduction of no more than 20% of the fine

¹ See Articles 14 and 10 of the Leniency Guidelines.

² See Article 7 of the Leniency Guidelines.

³ See Article 13 of the Leniency Guidelines.

In 2020, two companies under investigation in two separate cases successfully obtained full exemption by applying for leniency. The companies concerned submitted evidence certain important evidence that played a key role in proving the contents, methods, and implementation of the monopoly agreements,⁴ as well as certain important evidence regarding profit distribution.⁵

3. Encouraging the Companies under Investigation to Offer Commitments

SAMR also released Commitment Guidelines to encourage enterprises to offer commitments. Based on Article 45 of the AML, the Commitment Guidelines provide more operational guidance, which will be helpful to improving the standardization and transparency of antitrust enforcement. The main highlights of the Commitment Guidelines are summarized as follows:

- **Clarifying the applicable scope of the commitment**

The Commitment Guidelines make clear that the commitment regime⁶ can apply to horizontal monopoly agreements except hardcore cartel,⁷ vertical monopoly agreements and abuse of dominant position.

- **Clarifying the time limit for offering commitments**

The Commitment Guidelines explicitly state that if the authorities determine that a suspected practice constitutes a monopolistic behavior, they will no longer accept any commitment made by the undertakings. The Commitment Guidelines also encourage undertakings to offer commitments before a prior notification of administrative penalties is issued.⁸

- **Refining the commitment measures**

The Commitment Guidelines provide that commitment measures include behavioral measures, structural measures and comprehensive measures. In particular, behavioral measures include adjustments of pricing strategies, cancellation or change of various transaction restrictions, opening of networks, platforms and other infrastructure, licensing of patents, know-how or other intellectual property rights, etc. Structural measures include divestiture of tangible assets, intangible assets such as intellectual property rights, etc.

Based on the past enforcement practices, behavioral measures appear to be more common. The commitment measures for the two cases where the SAMR terminated its investigation in 2020 are summarized as follows:

Commitment Measures Imposed on an IT Company ⁹	Commitment Measures Imposed on a Gas Company ¹⁰
<ul style="list-style-type: none"> • Comprehensively investigate whether there is any illegal monopolistic practice in the existing documents on sales and services and correct such practices; • Reduce the price of the relevant products and spare parts for maintenance services sold to the authorized service station, enhance the customer experience and simplify its internal business process; • Organize and strengthen internal training on AML. 	<ul style="list-style-type: none"> • Modify contract template and revise and rectify the related clauses; • Post notices in the business premises to correct improper practices and accept regulatory supervision; • Sign the supplementary agreement with the industrial and commercial group users to amend the related clauses; • Publish an announcement in the newspapers as a form of social supervision.

With the release of the Leniency Guidelines, SAMR clarified the rules regarding its leniency regime for horizontal monopoly agreements. It can be expected that there will be more opportunities to apply leniency regime in the future. Due to the establishments of the marker system, we suggest the undertakings seek a professional, comprehensive assessment as soon as possible to take advantage of the proactive reporting and possibly full exemption and immunity.

The release of the Commitment Guidelines will undoubtedly make the application of commitment regime more standardized and transparent. There will be more opportunities to apply for commitments moving forward. When undertakings are facing an antitrust investigation for possible monopolistic conducts other than hardcore cartels, we suggest such undertakings quickly undergo a comprehensive and professional assessment on whether the commitment regime is applicable to avoid severe penalties. In the event of an antitrust investigation, we also suggest undertakings to consider conducting an internal self-examination, and to determine reasonable commitments measures in light of their potential impact on the undertaking's business operation.

Outlook 2021

⁴ See Xiang Shi Jian Fan Long Duan Chu Zi [2020] No.2.

⁵ See Ning Shi Jian Chu [2020] No.21.

⁶ See Article 2 of the Commitment Guidelines.

⁷ A hardcore cartel is a horizontal monopoly agreement providing for the fixing or changing prices, limiting production or sales volumes, or dividing sales or raw material procurement markets. This principle is also consistent with the provisions of Article 50 of the Draft Amendments to the AML.

⁸ See Article 4 of the Commitment Guidelines.

⁹ See Jing Shi Jian Jia Zhong Zhi [2020] No.1.

¹⁰ See Su Shi Jian Fan Long Duan Zhong Zhi [2020] No.1.

V. VIE Structures Required to File and Hard-Stance towards Gun-jumping

1. Review of the Merger Filing in 2020

In 2020, responding to the COVID-19 pandemic, SAMR established an online filing system, which optimized SAMR review procedures and review efficiency. In 2020, 481 filings were accepted and 473 filings were cleared. As for simplified cases, the review period has been actually shorten, with the average review period of only 13.17 days,¹ around 20%² shorter than the average review period of the previous years.

In 2020, SAMR imposed 13 penalties for fail-to-file and, at the start of 2021, imposed one additional penalty.³

2. Breaking through the Filing Dilemma of a VIE structure

As the legality of variable-interest-entity ("VIE structure") has always been in a "gray area", in practice, transactions involving VIE structures have encountered difficulties in completing merger filings. In 2020, a major breakthrough was made to solve this dilemma:

- On July 16, 2020, SAMR approved the filing in relation to the establishment of a joint venture between Shanghai Mingcha Zhegang Management Consulting Co., Ltd. and Huansheng Information Technology (Shanghai) Co., Ltd. This was the first

time SAMR publicly accepted and unconditionally approved a filing for VIE structure.

- Thereafter, the Platform Guidelines point out that the transactions involving VIE structures fall within the scope of merger filing review. If a transaction involving a VIE structure meets the filing threshold, the parties must file with the SAMR in advance and the parties should not close the transaction prior to the clearance.
- Currently, various transactions involving VIE structures have been approved unconditionally, and the review time and procedures do not differ other transactions.⁴ Meanwhile, for transactions that have attracted attention from the public, the VIE structure has not been an obstacle for merger filing review. Based on publicly available information, merger filings involving VIE structures, including the filing in relation to Guangzhou Huya Technology Co., Ltd. and Wuhan Doyu Culture Network Technology Co., Ltd.⁵ are currently under review.

In addition, on December 14, 2020, SAMR issued three administrative penalty decisions on fail-to-file transactions involving VIE structure, which include the following scenarios: (1) where acquirers participating in the concentration involved a VIE structure;⁶ (2) where the target controlled the domestic

¹ The sources of data are as follows: In the first quarter of 2020, there were 95 simplified cases concluded within an average review time of 12.79 days. See <https://app.parr-global.com/intelligence/view/prime-3020665>; in the second quarter of 2020, there were 88 simplified cases concluded with an average review time of 12.59 days. See <https://app.parr-global.com/intelligence/view/intelcms-mtc4tq>; in the third quarter of 2020, there were 91 simplified cases concluded with an average review time of 13.35 days. See <https://app.parr-global.com/intelligence/view/intelcms-4hwgww>. According to publicly available information, we estimate that in the fourth quarter of 2020, there were 98 simplified cases concluded with an average review time of 13.89 days. Therefore, it is estimated that the average time for review of simplified cases in 2020 was 13.17 days.

² Based on publicly available information, we estimate that the average time for review of simplified cases in 2019 was 16.4 days.

³ According to the statistics of cases published by SAMR as of January 31, 2021.

⁴ For example, the acquisition of equity of CAR Inc. by MBK Partners Fund IV was approved on January 21, 2021.

⁵ See http://www.samr.gov.cn/xw/zj/202012/t20201214_324336.html.

⁶ The acquirers in three cases, i.e. Alibaba Investment Limited's acquisition of equity in Intime Retail (Group) Company Limited, China Literature Limited Company's acquisition of equity in New Classics Media Limited ("China Literature/New Classics") and Shenzhen Hive Box Technology Co., Ltd.'s acquisition of entity in China Post Smart Logistics Technology Co. Ltd., all involve a VIE structure.

operating entities through VIE structure;⁷ and (3) where the target may enter into industries restricted for foreign investment through VIE structure.⁸ These three penalty decisions indicate that transactions involving VIE structures that failed to file before the promulgation of the Platform Guidelines may be penalized.

3. Scrutiny towards Below-Threshold Transactions in Certain Industries Including “Killer Acquisitions”.

Under the existing regulatory framework of the AML, SAMR retains the authority to investigate below-thresholds transactions if they may have the effect of eliminating or restricting competition. However, in practice, there was no public case where SAMR investigated or penalized below-thresholds transaction.

In 2020, with specific rules being provided respectively in the Platform Guidelines and the API Guidelines in industry-specific context, it is expected that SAMR will scrutinize below-thresholds transactions in these two industries.

- Given the unique nature of the business model of platform economy, it is possible that transactions that could eliminate or restrict competition in their markets, even if they fail to meet the filing thresholds due to its limited turnover. To address this issue, the Platform Guidelines specify that, in the field of platform economy, the authorities will investigate below-thresholds transactions that have or may have the effect of eliminating or restricting competition, in the following circumstances: (1) the undertaking is a start-up or emerging platform; (2) the undertaking adopts a business model of free or low price, resulting in a limited turnover; or (3) the relevant market is highly concentrated with limited number of competitors.⁹
- In the field of APIs, the API Guidelines points out that, in certain API markets with small size, limited competitors, relatively high market shares and concentrated structure, the authorities may investigate those below-thresholds transactions that have or may have the effect of eliminating or restricting competition.¹⁰

4. Hard Stance towards Gun-jumping of Transactions with Multiple Steps

In practice, if a transaction is divided into multiple steps and such steps are mutually dependent on each other, SAMR may deem this a multiple step transaction as one, single concentration and require the parties to file the transaction and obtain clearance before the first step of the transaction is closed.

Case Studies

According to a gun-jumping decision in the Internet industry in December 2020,¹¹ the acquisition of the controlling shares in the target was divided into the following three steps: (i) in March 2014, the acquirer subscribed to 9.9% of the new shares and convertible bonds; (ii) in June 2016, the acquirer converted the bonds into shares, and thereafter held 27.83% of the shares in the target; and (iii) in March 2017, the target went private, and the acquirer's shareholding ratio increased to 73.79%.

Although the three-step transaction spanned over three years, the SAMR deemed this transaction as one, single transaction to obtain controlling shares through various means. The SAMR fined the acquirer for its failure to file.

Similarly, in March 2020, in the acquisition of an agricultural products e-commerce platform company by a BVI company,¹² a transaction to acquire 60.49% equities in the target by two steps spanning nearly two years. The SAMR deemed this multiple step transaction as one transaction and the SAMR imposed a fine on the acquirer for its failure to file.

Outlook 2021

It can be expected that SAMR will continue to maintain a relatively short reviewing time for filings under simplified procedure and without any major competition concerns.¹³ Meanwhile, SAMR will likely continue to take a hard stance towards fail-to-file transactions and impose heavy penalties, among which multiples-step transactions will still be closely examined. It is anticipated that the SAMR will impose higher regulatory compliance requirements on transactions involving the VIE structure and killer acquisitions in the Internet industry.

⁷ The China Literature/New Classics also involves the control of domestic operating entities by the target company through the VIE structure.

⁸ As of the *Special Administrative Measures on Access to Foreign Investment (2020 edition)* promulgated by the National Development and Reform Commission and the Ministry of Commerce in June 2020, companies producing and operating radio and television programmes (including introduction of businesses), film production companies, distribution companies have long been the fields in which foreign investment is prohibited. New Classics Media Limited mainly engages in the production of television drama, film, web drama, and global program distribution, entertainment marketing, and artist brokerage.

⁹ See Article 19 of the Platform Guidelines.

¹⁰ See Article 15 of the API Guidelines.

¹¹ See Guo Shi Jian Chu [2020] No. 26.

¹² See Guo Shi Jian Chu [2020] No. 7.

¹³ On August 17, 2020, the Shanghai AMR had proposed to launch a pilot concentration review in the Lingang New Area of the Shanghai Free Trade Zone. With the implementation of the pilot, it is expected to further increase the regulatory authorities review powers and improve their review efficiency.

VI. Conglomerate Mergers and Behavioural Remedies

1. Conglomerate Mergers under a Microscope

In conglomerate mergers and acquisitions, SAMR tends to consider that due to the complementary relationship between the products or the likelihood that the products involved may have the same user group, the merged entity may use its market position in one market to obtain competitive advantages in related markets. In 2020, SAMR continued to demonstrate this remains an area of concern in SAMR's review of conglomerate mergers:

Case Studies

- In the acquisition of Mellanox Technologies, Ltd. by Nvidia Corporation, SAMR found that the merged entity would be capable of bundling GPU accelerators with special network interconnection devices, or with high-speed Ethernet adapters, resulting in incompatibility with network interconnection equipment.
- In the acquisition of Cypress Semiconductor Corporation by Infineon Technologies AG, SAMR found that after the concentration, the merged entity could bundle its automotive-grade IGBT or automotive-grade NOR

flash with automotive-grade MCU, resulting in reducing the compatibility between MCU and other flash products.

Particularly, we notice that the above cases were unconditionally cleared in other jurisdictions. However, SAMR is more cautious in their review of conglomerate mergers. For example, SAMR is more inclined to consider that the merged entity has an incentive to impose foreclosure in the case of a post-merger dominant market position. At the same time, some of the reasons recognized by the European Commission in its review procedure are not accepted by SAMR, such as significant bargaining power of customers and the fact that the parties to the transaction do not have the same user's base.¹

2. Relying on Behavioral Remedies, Securing Supply to the Chinese Market

For remedies imposed, SAMR is inclined to impose behavioral remedies to address the concerns of tying and bundling that may arise from conglomerate mergers, such as "no tying and bundling" and "maintenance of interoperability/compatibility", etc.

In addition, for products on which the Chinese market and customers are more dependent, especially in cases where an input foreclosure may arise, SAMR may impose conditions in accordance with the fair, reasonable, and non-discriminatory (FRAND) principle.

Case Studies

- In a case conditionally cleared at the beginning of 2021, Cisco Systems

Inc. sought to acquire Acacia Communication Inc. SAMR required that the merged entity continue to supply coherent DSPs to Chinese customers on FRAND principles.

- In ZF Friedrichshafen AG's proposed acquisition of Wabco Holdings, SAMR required that the merged entity should, in accordance with the FRAND principles, continue to supply Chinese clients with AMT controllers to ensure the supply of the products will not be compromised. The terms of the arrangement would be compared to the terms the undertaking had agreed to with its existing clients, in terms of price, quality, quantity, delivery time, technology and after-sales services.

3. Protecting Innovation and Research and Development

In addition to the above cases, in the acquisition of GE's biopharma business by Danaher Corporation, it is noteworthy that SAMR specifically examined competition in the market for hollow fiber filter modules for tangential flow filtration, which Danaher did not manufacture only conducts R&D on this product. Thus, Danaher did not compete directly with the acquired business. However, SAMR considered that the proposed transaction would reduce Danaher's incentive to invest in innovative products of the same type and may have adverse effect on competition and on technological progress. As such, Danaher was required to provide the buyer of its divested business with relevant tangible assets, as well as non-exclusive licensing of know-how and trade secrets. Danaher was also required to continue to be involved with the relevant project for a two-year transition period.² This case reflects China's continuing interest in protecting innovation and R&D.³

Outlook 2021

In 2021, SAMR will likely continue to scrutinize merger transactions involving industries of significant strategic importance to China. In particular, dealmakers should further assess the transaction's impact on Chinese consumers.

¹ The notion was reflected in the *Nvidia* and the *Infineon* case.

² See the *Announcement of the SAMR on Conditional Approval for the Acquisition of GE's biopharma business by Danaher Corporation*, located at http://www.samr.gov.cn/fldj/tzgg/fjtjgz/202101/t20210119_325338.html.

³ In the acquisition of Monsanto by Bayer, MOFCOM paid similar attention to product R&D.

Appendix: Concentrations of Undertakings Conditionally Approved in China during the period from 2020 to January 2021

Cases	Competition Harm	Remedial Measures
The acquisition of GE's biopharma business by Danaher Corporation ¹	<p><u>Horizontal:</u></p> <ol style="list-style-type: none"> 1. Strengthen the parties' dominance or increase their combined market share in the certain relevant markets. 2. Reduce the R&D investment and commercialization incentives for innovative products of the same type, delay the market launch of new products that possibly adversely affect market competition and technological progress. 	<ol style="list-style-type: none"> 1. Divest relevant businesses; 2. Provide the divestiture buyer with the assets and technologies of relevant R&D projects.
The acquisition of Wabco Holdings by ZF Friedrichshafen AG ²	<p><u>Vertical:</u></p> <ol style="list-style-type: none"> 1. The merged entity may implement inputs foreclosure on Automated Manual Transmission (AMT) controller, which is the core component of AMT. 	<ol style="list-style-type: none"> 1. Continue to supply AMT controllers to existing clients, and ensure the supply of the products will not be compromised; 2. Continue to supply Chinese clients with AMT controllers in accordance with the (FRAND) principles; 3. Continue to provide Chinese clients with the opportunity to develop AMT controllers to facilitate future supplies in accordance with the FRAND principles.
The acquisition of Mellanox Technologies, Ltd. by Nvidia Corporation ³	<p><u>Conglomerate:</u></p> <ol style="list-style-type: none"> 1. The merged entity may conduct tying regarding GPU accelerators and special network interconnection devices or GPU accelerators and high-speed ethernet adapters; 2. The merged entity may reduce the interoperability between GPU accelerators and network interconnection devices. <p><u>Horizontal:</u></p> <ol style="list-style-type: none"> 1. The merged entity may use competitively sensitive information obtained during the hardware adaptation process to exclude and restrict market competition. 	<ol style="list-style-type: none"> 1. No tying/bundling, and no imposing of unreasonable transaction conditions; 2. Maintain supply in accordance with FRAND principles; 3. Ensure the interoperability and compatibility; 4. Continue to maintain the commitment to Open Source; 5. Establish firewalls to prevent the exchange of competitively sensitive information.
The acquisition of Cyprus Semiconductor Corporation by Infineon Technologies AG ⁴	<p><u>Conglomerate:</u></p> <ol style="list-style-type: none"> 1. The merged entity may conduct tying regarding automotive-grade IGBT and automotive-grade NOR flash; 2. The merged entity may reduce product interoperability regarding MCU and storage devices. 	<ol style="list-style-type: none"> 1. No tying/bundling, and no imposing of unreasonable transaction conditions; 2. Maintain supply each of the products individually; 3. Ensure the interoperability and interoperability; 4. Maintain supply in accordance with FRAND principles.
The acquisition of Acacia Communication Inc. by Cisco Systems Inc. ⁵	<p><u>Vertical:</u></p> <ol style="list-style-type: none"> 1. The Chinese optical transmission system market relies on external supply for coherent Digital Signal Processors. After the merger, the merged entity may impose inputs foreclosure; 2. The merged entity may eliminate or restrict competition by raising coherent Digital Signal Processors and increase the production cost of other downstream optical transmission system manufacturers. 	<ol style="list-style-type: none"> 1. Continue to perform existing client contracts; 2. Maintain supply in accordance with FRAND principles; 3. No tying/bundling, and no imposing of unreasonable transaction conditions; 4. Conduct training sessions for the management staff and employees, and take necessary measures to ensure the implementation of the remedies offered.

⁴ See the *Announcement of the SAMR on Conditional Approval for the Acquisition of Acacia Communication Inc. by Cisco Systems Inc.*, located at http://www.samr.gov.cn/fldj/tzgg/ftjpz/202101/t20210119_325338.html.

⁵ See *Id.*

⁶ See the *Announcement of the SAMR on Conditional Approval for the Acquisition of Mellanox Technologies, Ltd. by Nvidia Corporation*, located at http://www.samr.gov.cn/fldj/tzgg/ftjpz/202004/t20200416_314327.html.

⁷ See the *Announcement of the SAMR on Conditional Approval for the Acquisition of Cyprus Semiconductor Corporation by Infineon Technologies AG*, located at http://www.samr.gov.cn/fldj/tzgg/ftjpz/202004/t20200408_313950.html.

⁸ See *supra* note 74.

07 VII. Evolving Dynamics Between Private Actions and Administrative Enforcement

1. Review of Anti-Monopoly Civil Proceedings in 2020

According to Wolters Kluwer's statistics on civil rulings and judgments,¹ in 2020, there were 86 monopoly dispute cases in total. Among the concluded civil cases that have been publicly ruled and judged, 23 cases were related to abuse of a dominant market position and 22 cases were related to monopoly agreements.

2. Relevant Evidence in an Administrative Penalty Proceeding May be Used as Evidence for Subsequent Civil Proceedings

Case Studies

In a vertical monopoly agreement dispute case involving automobile tires companies,² the Shanghai High People's Court held that the court may rely on evidence of a related administrative penalty decision to ascertain certain facts as long as the evidence are related to the same dispute at issue.³

In a Shanxi concrete monopoly dispute case,⁴ the Intermediate People's Court of Xi'an City of Shanxi Province held that, in the absence of evidence to the contrary, the parties involved in the horizontal monopoly could be found guilty based on the administrative penalty decision issued by the provincial Administration for Market Regulation.⁵

The above-mentioned two cases, to some extent, recognize that evidence relating to administrative penalties may be admitted as evidence in following-up civil lawsuits. Moving forward, this emerging rule of evidence may encourage plaintiffs to file civil claim based on the administrative penalty decisions.

3. The First Following-up Domestic Civil Proceeding based on an International Anti-Monopoly Investigation

The Shanghai Intellectual Property Court accepted the first antitrust follow-up private action case based on an international anti-monopoly investigation.

Case Study

In this case, a domestic electricity company claimed that an overseas high-voltage cable manufacturer reached a horizontal monopoly agreement with other high-voltage cable manufacturers, which damaged the electricity company during the purchase of high-voltage cable products. As a result, the electricity company filed for declaratory relief to declare that the high-voltage cable manufacturers reached a horizontal monopoly agreement. Previously, the European Commission held that the high-voltage cable manufacturers, including the defendants, conducted a cartel of price fixing, market division and customer division, and imposed a penalty amounting to 302 million Euros. The case was brought to an upper-level trial in the Shanghai High People's Court on 7 March 2020.⁶ This case is still pending trial.

¹ See statistics of Wolters Kluwer, Cause of Action: "civil" and "antitrust disputes", statistics updated as of January 31, 2021.

² See Wuhan Hanyang Guangming Trade Co., Ltd. and Shanghai Hankook Tire Sales Co., Ltd.'s Dispute over a Monopoly Agreement (Hu Min Zhong [2018] No. 475).

³ In this case, the court held that "during the hearing of a case, the court may adopt evidence of related administrative procedures as evidence on the basis of ascertained facts; however, the court will not necessarily recognize evidence irrelevant to the dispute or evidence that cannot be supported by ascertained facts."

⁴ See Yan'an Jiacheng Concrete Co., Ltd. v. Fujian Sanjian Engineering Co., Ltd., (2020) Shan 01 Zhi Min Chu No.509.

⁵ In this case, the court held that "Yan'an Jiacheng Concrete Co., Ltd. did not apply for administrative reconsideration or file an administrative appeal within the statutory time limit after the Provincial Administration for Market Regulation issued a penalty for its participation in the implementation of the horizontal monopoly agreement, the aforementioned penalty decision therefore is binding. Consequently, in the absence of evidence to the contrary, the court held that Yan'an Jiacheng Concrete Co., Ltd participated in the horizontal monopoly during the period from July to August 2018."

⁶ [2020] Hu Min Xia [2020] No. 83.

With regard to the international antitrust investigation, domestic litigation in Chinese courts may become an important method to achieve relief for enterprises to safeguard their interests.

4. Administrative Appeals Against Anti-Monopoly Administrative Decisions

According to publicly available information,⁷ in respect to anti-monopoly lawsuits, in 2020, there were seven subsequent administrative appeals arising from SAMR administrative penalty decisions, mainly in Beijing. Notably, on 9 April 2020, the SAMR rendered an administrative penalty decision for abuse of dominance against three enterprises engaged in the distribution of calcium gluconate active pharmaceutical ingredients. The defendants disagreed with the penalty decision and filed an appeal before the court. This is the first time that SAMR acted as a defendant in the court. This case is still pending trial.⁸

5. Anti-Monopoly Lawsuits in the Internet Industry Increase

Recently, Supreme Court has emphasized the necessity to strengthen judicial scrutiny on unfair competition conduct. The Supreme Court conducted an in-depth study on issues, such as findings of anti-competitive behaviors of platform enterprises, data collection, usages and management, as well as consumer protection in the digital field.⁹ In 2020, antitrust lawsuits in the Internet field in China have been on the rise.

Case Study

In August 2020, the first antitrust ruling on a dispute in the online gaming industry, which involved a live video platform versus a large-scale computer game company, was released.¹⁰ This case discussed whether the computer game company's prohibition of rebroadcasting a game on a live video platform and bundling and installing the game with its own live software constituted an unreasonable trading conditions and tying. The court held that the relevant market should be defined as a relatively broad "online computer game service market", and the court held that the defendant did not possess a market dominance and rejected the plaintiff's claims.

Meanwhile, the following ongoing cases are also worthy of attention:

1. The first lawsuit related to "Either – or Choice" arrangement between a Chinese major e-commerce platform and a large Chinese retail shopping platform;¹¹
2. An individual, Zhang, sued a Chinese multinational social network service company, in which the ruling mainly discussed whether a company forbidding its users from sending Taobao and Tik Tok links on its social network platform constitutes a refusal to deal,¹² and
3. An individual, Wang, sued a domestic consumption platform, which mainly discussed whether the cancellation of Alipay payment channel in its mobile software constitutes the abuse of dominance.¹³

In addition, by the end of 2020, Standing Committees of 18 Provincial People's Congress adopted decisions or resolutions to authorize Public Prosecutor's Offices to explore the practice of public interest litigations in areas such as antitrust violation and personal information protections in the Internet sector. For example, a Public Prosecutor's Office in Guizhou Province issued a pre-litigation procuratorial suggestion on administrative public interest litigation to the relevant department in a case of an unfair competition of an online catering platform, and urged the online catering platform to cancel the "Either – or Choice" arrangement.¹⁴

Outlook 2021

In 2021, the dynamics between private actions and administrative enforcement is likely to continue to evolve. Disputes in the Internet field are on the rise, and antitrust litigation is likely to play an important role in enterprises' business strategies.

⁷ Source: China Judgments Online; Case Type: "Administrative Case"; Cause of Action: "Administrative Cause of Action"; Year of the Judgment: "2020"; Full Text Search: "Anti-monopoly Law". First instance and appeal cases that have been consolidated for the same cause of action.

⁸ See Weifang Puyunhui Pharmaceutical Co. v. SAMR (2020) Jing 01 Xing Chu No. 459; Shandong Kanghui Pharmaceutical Co., Ltd. v. SAMR (2020) Jing 01 Xing Chu No. 461.

⁹ For the Opinions of the Supreme People's Court on Strengthening Judicial Scrutiny on Antitrust and Unfair Competition, located at http://www.xinhuanet.com/legal/2021-01/11/c_1126968393.htm.

¹⁰ See Determination (2018) Yue Min Zhong No. 552.

¹¹ See Determination (2019) Zui Gao Min Zhong No. 130.

¹² The case was withdrawn in December 2020 due to insufficient evidence, see the Judgment (2019) Jing 73 Min Chu No. 754. According to relevant news reports, the plaintiff is preparing to file a new lawsuit, see https://www.sohu.com/a/445203465_161795.

¹³ The case was accepted in December 2020. See the Notice on Acceptance of Civil Case (2020) Jing 73 Min Chu No. 888.

¹⁴ See Supreme People's Procuratorate: Procuratorial Offices Authorized by 18 Provincial People's Congress to Institute Public Interest Litigations in the Internet Area, located at <http://www.chinanews.com/gn/2021/01-25/9395832.shtml>.

VIII. Increased Penalties for Antitrust Violations

In 2020, heavier penalties have been reflected in antitrust legislation and enforcement, and therefore increased penalties for antitrust violations are expected in the future.

1. Legislation Perspective

From the legislative perspective, the Draft Amendments to the AML released at the beginning of 2020 raised the standards of fines for various violations to a large extent:

Violations	Existing AML	Draft Amendments to the AML
Concentration in violation of AML (including failure to file, gun-jumping, violation of a decision imposing restrictive conditions or prohibiting the transaction)	No more than RMB 500,000	No more than 10% of the sales revenue in the preceding year
Refusing or obstructing regulatory investigation/review (including the refusal to provide information, false information, concealment and destruction of evidence, threat to personal safety, etc.)	<ul style="list-style-type: none">• <u>Enterprises</u>: No more than RMB 200,000, and RMB 200,000 to RMB 1 million for serious violations• <u>Individuals</u>: No more than RMB 20,000 to RMB 100,000 for serious violations	<ul style="list-style-type: none">• <u>Enterprises</u>: No more than 1% of the sales revenue in the preceding year or no more than RMB 5 million (where there is no sales revenue in the preceding year or it is difficult to calculate the sales revenue);• <u>Individuals</u>: RMB 200,000 to RMB 1 million
Monopoly agreements, which have not been implemented	No more than RMB 500,000	No more than RMB 50 million
Monopoly agreements concluded by undertakings having no sales revenue in the preceding year	Not Specified	No more than RMB 50 million
Industry associations organizing undertakings to reach monopoly agreements	No more than RMB 500,000	No more than RMB 5 million

Moreover, the Draft Amendments to the AML point out that monopolistic conduct constituting a crime shall be subject to criminal liabilities, which is expected to greatly deter illegal practices. However, the Draft Amendments to the AML do not specify which specific monopolistic conduct may constitute a crime or whether senior management may face criminal liabilities. This two points remain to be further clarified in the final amendments.

2. Enforcement Perspective

From the perspective of enforcement, the authorities have significantly increased the penalties imposed on serious illegal conducts, and imposed several maximum penalties, which was quite rare in the past.

Case Studies

In the calcium gluconate APIs case,¹ given that one API enterprise's conduct was of serious nature, the SAMR confiscated the illegal gains and imposed a maximum fine of 10% of its sales revenue in 2018, amounting to RMB 252.7 million in total. This was the first time SAMR ever imposed a maximum fine. Furthermore, in December 2020, the SAMR also imposed a fine of the statutory maximum amount RMB 500,000 on each of three internet enterprises for fail-to-file.²

The authorities have also cracked down on the conduct of refusing or obstructing an investigation in two ways. First, in addition to fining the involved enterprises, the authorities will impose penalties on the main personnel in charge of the decision-making and implementation of refusing or obstructing the investigation. For example, in the aforementioned calcium gluconate API case, in addition to a fine of RMB 1 million on each of the two investigated enterprises, the authority also imposed a fine of RMB 100,000 on their respective legal representatives.³ Second, individuals suspected of committing a crime by obstructing the investigation may be transferred to judicial authorities for a criminal prosecution. In a monopoly case of a natural gas company in Qinghai province,⁴ three people were transferred to judicial authorities for concealing and destroying evidence.

Outlook 2021

Amendments to the AML and the current enforcement trend both indicate increasingly larger penalties for violations of the AML in the future, which in turn impose higher requirements on enterprises' antitrust compliance. We suggest undertakings to strengthen their antitrust compliance and assess internal business decisions that may incur risks. At the same time, when facing an investigation, we also suggest undertakings to maintain a cooperative attitude and avoid obstructing the authorities' investigation.

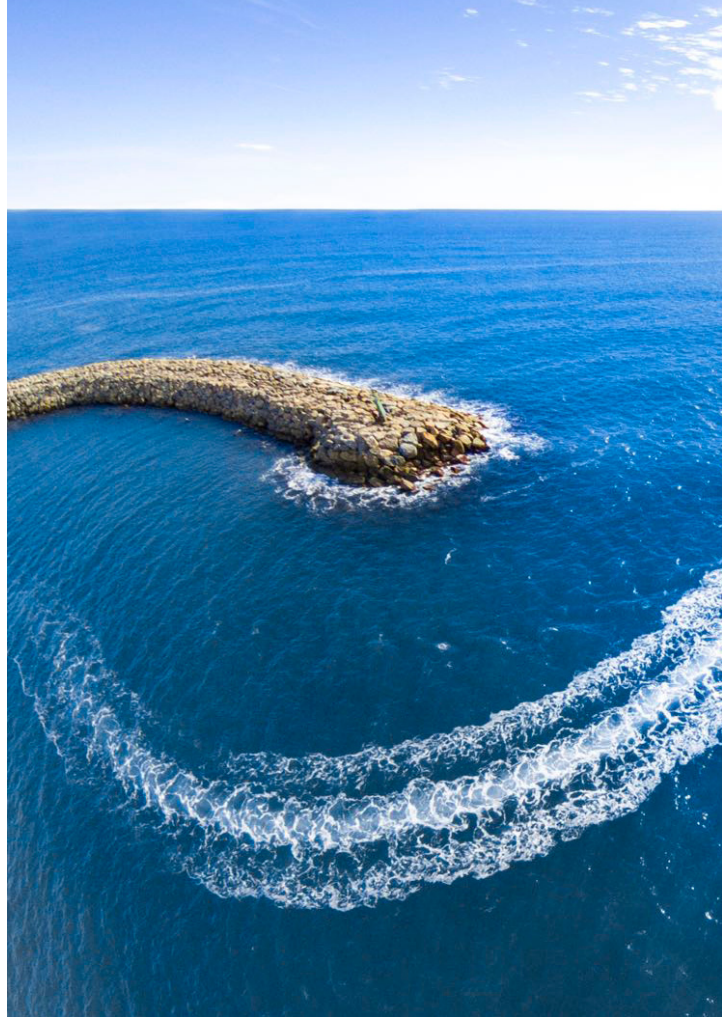
¹ See Guo Shi Jian Chu [2020] No.8.

² See Guo Shi Jian Chu [2020] No.26, Guo Shi Jian Chu [2020] No.27, and Guo Shi Jian Chu [2020] No.28.

³ See Guo Shi Jian Chu [2019] No.21, Guo Shi Jian Chu [2019] No.22, Guo Shi Jian Chu [2019] No.23, and Guo Shi Jian Chu [2019] No.24.

⁴ See Qing Shi Jian Long Duan Zi [2020] No.01.

In the End: Establishing Compliance System to Cope with the New Wave of Antitrust Law Enforcement



Looking back at 2020, the introduction of a series of regulations and guidelines at the legislative level will lay a solid foundation for the next phase of China's antitrust law enforcement. A new wave of antitrust law enforcement has come in the form of SAMR authorizing local authorities to enforce laws, strengthening regulation over major industries and focusing on law enforcement.

At the beginning of 2021, Chinese regulators have re-emphasized the need to strengthen antitrust enforcement.¹ The amendments of the AML has also become a clear legislative priority for the National People's Congress in 2021.

To encounter increasingly stringent antitrust law enforcement, SAMR and 10 Local AMRs² have issued compliance guidelines to encourage companies to build compliance an internal system. Hence, below, we highlight some main points for companies to consider:

• **Establishing Anti-Monopoly Compliance System**

At the institutional level, companies should establish and implement an antitrust compliance management system, develop an internal compliance management measures, and carry out compliance inspection, supervision and review.

At the personnel level, senior management is encouraged to make and fulfil clear and open antitrust compliance commitments, and employees of the enterprise are encouraged to make and fulfil corresponding compliance commitments.

• **Identifying Antitrust Compliance Risks**

In response to antitrust compliance risks, companies should assess their market practices carefully by taking into account the competition structure and industry characteristics. Companies in Chinese API sector and Internet sector will continue to be scrutinized closely.³

Companies are encourage to establish a risk management system to take appropriate control and response measures against antitrust risks, and proactively report and cooperate with the authorities.

• **Internal Assessment and Responding Mechanism**

In order to ensure the effective operation of the companies' compliance management system, companies are encouraged to establish and improve their internal assessment. Companies should also provide regular training on antitrust compliance to their employees.

¹ See "Another Antitrust Signal Issued by the CPC Central Committee! The Political and Legal Working Conference Requires the Strengthening of Competition Law Enforcement and Judicial Administration", located at <http://www.cinic.org.cn/xw/zcdt/1014342.html?from=singlemessage>.

² SAMR promulgated the Antitrust Compliance Guidelines for Undertakings on September 18, 2020. At the local level, the Administration for Market Regulation of Zhejiang Province and Shanghai Municipality have issued their antitrust compliance guidelines in 2019. By 2020, the Administration for Market Regulation of eight provinces and municipalities, including Heilongjiang, Jiangxi, Jilin, Shandong, Henan, Hebei, Hubei and Shanghai, have issued local compliance guidelines.

³ For example, Article 14 of the Anti-monopoly Compliance Guidelines for Undertakings of Hubei Province, located at https://scjg.hubei.gov.cn/zfxxgk/fdzdgknr/qtzdgknr/qtgg/202010/t20201023_2970130.shtml.

Team Articles of 2020

- 01 China Releases National Security Review Rules Version 2.0, in China Law Insight
- 02 10 Highlights of the Antitrust Guidelines for Platform Economy, in China Law Insight
- 03 “Conglomerate Mergers are Facing Heightened Scrutiny in China”, November 2020, in Concurrences
- 04 China's Auto Antitrust Guidelines Released to the Public, in China Law Insight
- 05 China's IP Antitrust Guidelines Released to the Public, in China Law Insight
- 06 A Chance to Solve the “VIE Dilemma”!, in China Law Insight
- 07 The Chinese State Administration for Market Regulation Clears an Acquisition in Auto Parts Sector Subject to Conditions (ZF/WABCO), May 2020, in Concurrences;
- 08 China's Anti-Monopoly Law Enters its Second Decade, in China Law Insight

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