Antitrust Chronicle

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Year of the Rat: Antitrust in China

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

We are delighted to release our CPI Antitrust Chronicle for March 2020, ***Year of the Rat: Antitrust in China***, and present thirteen articles from Chinese enforcement officials, law and economics experts, and practitioners.

This China issue starts with two CPI Talks interviews with the senior officials of the antitrust authorities in China and Hong Kong respectively. The first interview is with Mr. Zhenguo Wu, Director General of the Anti-Monopoly Bureau of the State Administration for Market Regulation ("SAMR"). The other interview is with Brent Snyder, Chief Executive Officer of the Competition Commission of Hong Kong.

Prof. Chenying Zhang provides an in-depth analysis of the current antitrust legal framework in China regarding digital competition, as well as the proposed amendments to the Anti-Monopoly Law ("AML").

Prof. Wei Han and Yajie Gao further discuss the AML-related developments, and the relationship between the AML and other laws. They have also looked into the coordination between administrative competition authorities and the courts, as well as coordination between the SAMR and other government authorities.

In 2019, the Shanghai Branch of SAMR completed its years-long investigations against Eastman Chemical, which is one of three completed investigations against multinationals that year. Dr. Vanessa Yanhua Zhang and Prof. John Jiong Gong analyze the decision of the Shanghai authority.

In 2019, SAMR approved five high profile concentrations subject to conditions, namely *KLA-Tencor/Orbotech, Cargotec/TTS, II-VI/Finisar, Garden Bio/DSM and Novelis/Aleris*. John Yong Ren, Wesley Zhining Wang, and Martha Shu Wen analyze the five cases from both procedural and substantial perspectives.

China's administrative agencies and courts have adopted different standards when applying the AML to Resale Price Maintenance ("RPM") agreements. Kate Peng, William Ding, Lingbo Wei, Chi Pan, and Jake Wu analyze the differences between administrative enforcement and judicial practices and the reasons behind them.

China is the largest semiconductor market in the world. Wei Huang and Bei Yin examine recent antitrust enforcements in the semiconductor industry, summarize the characteristics and common concerns of the merger reviews, and discuss the relevant antitrust investigations.

Michael Han and Joshua Seet review another industry in which China has seen high levels of antitrust enforcement activity, the pharmaceuticals and medical products industry.

The chemical industry has also been a focus of vigorous antitrust enforcement in China in recent years. Yi Xue and Yikai Yang review 28 anti-monopoly investigations in the chemical industry in China and observe that there are more abuse of dominance cases in the chemical industry than in others.

As one of the largest expenditures for households in China, automobiles are a focal point of antitrust enforcement. Jet Deng and Ken Dai examine major enforcement decisions and private litigation in the automobile industry in the past few years.

Zhan Hao, Song Ying, Lv Hongjie, and Wei Fei have reviewed the antitrust law framework and the latest developments in the internet industry in China.

China's courts and antitrust authorities have increasingly played active roles in setting FRAND royalty rates for the wireless communication industry. He Jing analyzes the factors that Chinese stakeholders need to consider when dealing with FRAND rate setting cases, particularly in international cases.

We would like to thank our contributors for their efforts and dedication to our March 2020 CPI Antitrust Chronicle, and hope you enjoy reading this special China issue.

Sincerely,

Vanessa Yanhua Zhang, Ph.D.
Global Economics Group and Market & Regulation Law Center, Renmin University

SUMMARIES

CPI Talks…

…with DG Zhenguo Wu

In this month's edition of CPI Talks… CPI's Vanessa Yanhua Zhang has the pleasure of speaking with Zhenguo Wu. Mr. Wu is Director General of the Anti-Monopoly Bureau of State Administration for Market Regulation ("SAMR") of P.R. China.

CPI Talks…

…with Brent Snyder

In this month's second CPI Talks… CPI's Vanessa Yanhua Zhang has the pleasure of speaking with Brent Snyder. Mr. Snyder is Chief Executive Officer at the Hong Kong Competition Commission.

Antitrust Regulation in the Digital Economy: Industry Developments and the Amendment of the Anti-Monopoly Law

By Chenying Zhang

Internet applications are becoming increasingly widespread, Internet-based trading platforms and associated big data have gradually developed. There is worldwide concern about data security. This is increasingly becoming an issue in competition enforcement against big-tech companies. As a country with a large number of Internet users and a huge Internet economy market, China is also facing these problems. This article discusses the principles applicable to these concerns under China's anti-monopoly law, and analyzes possible amendments to the law, which are under discussion.

Enforcement of the AML in China's Digital Economy – From the Perspective of the Overall Regulatory Environment

By Wei Han & Yajie Gao

In order to comprehensively understand how the competition rules are applied to the Chinese digital economy, it is essential to understand China's overall regulatory environment. Aside from relevant official government documents, this paper discusses the relationship between the AML and other laws as well as the connections between different administrative bodies and the courts. This paper also puts forward proposals for promoting the application of the AML to the digital economy.

SUMMARIES

Agency Investigation of Abusive Conduct in China: The *Eastman* Case

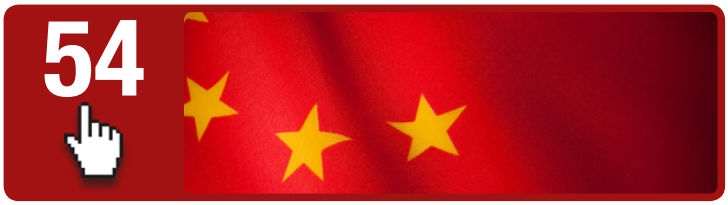
By Vanessa Yanhua Zhang & John Jiong Gong

In this article, we review the antitrust decision of the Shanghai Administration for Market Regulation (Shanghai AMR) against Eastman Chemical (China). After analyzing the administrative ruling, we raise several issues worthy of further discussion. These include market definition, and the assessment of Eastman's market dominance and alleged anti-competitive conduct. This article aims to shed some light on how abuse of dominance cases will be dealt with in agency investigations in China in future.

High-Profile Merger Filings in 2019: An Analysis of Conditionally Approved Concentrations

By John Yong Ren, Wesley Zhining Wang & Martha Shu Wen

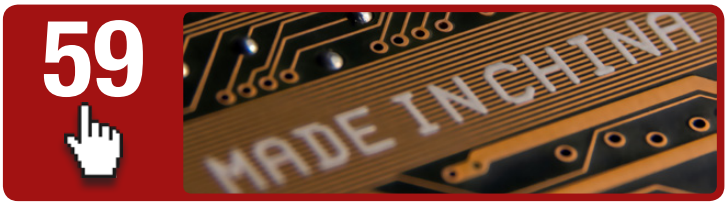
This article focuses on the five conditional approvals issued by the Chinese antitrust authority in 2019. There five such cases, i.e., *KLA-Tencor/Orbotech, Cargotec/TTS, II-VI/Finisar, Garden Bio/DSM and Novelis/Aleris*. This article analyses these cases from both procedural and substantial perspectives. The paper concludes that, in terms of procedure, one of the most significant features is the long and complex review process. In particular, it is important to assess whether a case in fact qualifies for the simplified procedure before filing. From a substantive perspective, the authority tended to adopt tailor-made behavioural remedies. Finally, the paper remarks on the latest legislative developments in merger control in China.



A Brief Analysis of Standards for Resale Price Maintenance Regulations Under the PRC Anti-Monopoly Law

By Kate Heyue Peng, William Ding, Lingbo Wei, Weimin Wu & Chi Pan

Since the promulgation of the Anti-Monopoly Law ("AML") in China in 2008, the administrative agencies and the courts have adopted different standards when applying the AML to resale price maintenance ("RPM") agreements. The administrative agencies have adopted a "prohibition + exemption" principle and presumed RPM agreements to be anti-competitive, while the courts have adopted the "rule of reason" approach. This article aims to explore the reasons behind this difference, summarize the most recent developments, and flag questions in need of further clarifications by legislators, administrative agencies and courts.



Antitrust Enforcement and Litigation in The Semiconductor Industry in China (Patterns and Updates)

By Wei Huang & Bei Yin

Antitrust enforcement in the semiconductor industry in China has focused mainly on merger control, rather than antitrust enforcement. Of the 41 merger cases that have been cleared conditionally, eight involve the semiconductor industry. Based on a review of these cases and combining China's national strategy for the semiconductor industry, this paper reveals the patterns in enforcement activities. The paper further provides updates on the ongoing antitrust investigation against memory chip suppliers. Finally, it briefly discusses antitrust litigation in a related area, namely licensing of standard essential patents.

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Antitrust Enforcement in the Pharmaceuticals and Medical Products Industry in China

By Michael Han & Joshua Seet

The pharmaceutical and medical products industry in China has seen high levels of antitrust enforcement activity from 2015 onwards. This article takes stock of the cases to date, and highlights the most common antitrust issues. Notably, abuse of dominance cases involving excessive pricing and refusal to supply emerge as the most common infringements, and the market for the supply of active pharmaceutical ingredients appears to be the most actively scrutinized market. Antitrust enforcement is expected to continue to play a significant role in the pharmaceutical and medical products industry going forward.

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A Retrospective of Chinese Antitrust Enforcement in the Chemical Industry

By Josh Yi Xue & Yikai Yang

Chemicals, as one of the industries most closely related to people's daily livelihood, have increasingly become one of the focuses of antitrust enforcement in recent years. This article presents a retrospective of Chinese antitrust enforcement in the industry, by reviewing the 28 cases so far. Gas and oil still represent the key area of focus. Not all cases involve confiscation of illegal gains as a remedy, and most cases are initiated by whistleblowing. The authors set out their thoughts regarding these and future enforcement trends.

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Antitrust Enforcement in the Chinese Automobile Industry: Observations and Future Perspectives

By Jet Deng & Ken Dai

The automobile sector has long been a focal point of both public and private antitrust enforcement in China. As one of the largest expenditures for ordinary families in China, anticompetitive practices in this industry can seriously damage consumers welfare. In 2019, Chinese enforcers sanctioned two RPM practices in the automobile industry, among others. This article will provide an update on these cases, and recap past representative cases. Stakeholders will face significant changes as from 2020, including China's further opening-up to foreign investors in the automobile industry, more opportunities in electric vehicles, and more stringent antitrust enforcement, due to the upcoming antitrust guidelines for the industry, and the amendment of the AML.

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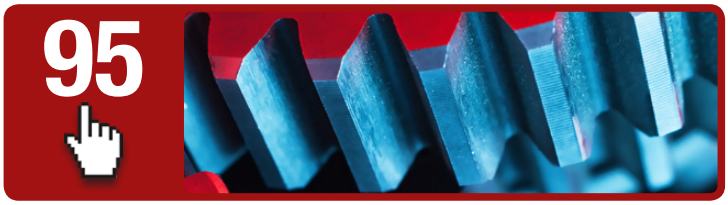
Antitrust Enforcement and Litigation in China's Internet Industry

By Zhan Hao, Song Ying, Lv Hongjie & Wei Fei

As the world's largest internet market and one of the most influential antitrust jurisdictions, China is fast amending its competition laws and strengthening antitrust enforcement to deal with novel challenges posed by the digital economy. This article provides an update on the latest developments in China's antitrust legislation, public enforcement and private litigation as well as an overview of the legal framework in the context of internet innovation. It examines the difficulties in assessing online platforms' competitive impact, illustrates the divergent approaches taken by various authorities and practitioners, and proposes reforms to safeguard the competitive process.

SUMMARIES



The Science of China's Frand Rate-Setting

By He Jing

In recent years China's courts and antitrust authorities have increasingly played significant roles in setting FRAND rates for the wireless communication industry. There are doubts and concerns about the fairness and credibility of the rates determined in China. This article reviews various topics. Such as determining the royalty stack, arbitration, trade policy, comity as well as operative details such as the use of expert witnesses and the protection of confidentiality. The author believes that all stakeholders that are genuinely interested in China's FRAND practices should work together in open and transparent dialogue to minimize risks and unpredictable outcomes.

WHAT'S NEXT?

For April 2020, we will feature Chronicles focused on issues related to (1) **Sports**; and (2) **Remedies**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2020, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES MAY 2020

For May 2020, we will feature Chronicles focused on issues related to (1) **Healthcare**; and (2) **Killer Acquisitions**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

CPI TALKS…

… with Mr. Zhenguo Wu[1]

In this month's edition of CPI Talks… Dr. Vanessa Yanhua Zhang, Special Editor of the Antitrust Chronicle[2] has the pleasure of speaking with Mr. Zhenguo Wu. Mr. Wu is Director General of the Anti-Monopoly Bureau of State Administration for Market Regulation ("SAMR") of P.R. China.

Thank you, Mr. Wu, for sharing your time for this interview with CPI.

1. In 2019, three supporting regulations to the Anti-Monopoly Law ("AML") were issued and implemented, i.e. the Interim Provisions for Prohibiting Monopolistic Agreements, the Interim Provisions for Prohibiting Abuse of Market Dominance, and the Interim Provisions for Prohibiting Eliminating and Restricting Competition by Abuse of Administrative Power. Could you please explain their consequences for enforcement practice?

These three regulations were promulgated on June 26, 2019 and came into effect on September 1, 2019, with important historical and practical significance. Since the implementation of the AML on August 1, 2008, China's antitrust agencies have earnestly performed their duties and effectively enforced the AML, in order to maintain fair market competition, protect consumers' interests, and promote the sustainable and healthy development of China's socialist market economy. After more than ten years of such enforcement, the agencies have accumulated relatively rich experience in the areas of prohibiting monopolistic agreements, prohibiting abuses of market dominance, and prohibiting the elimination or restriction of competition by abuses of administrative power.

At the same time, China's enforcement agencies have been optimized by integrating the former three authorities into one, and SAMR is responsible for a unified approach to enforcement. The three "Interim Provisions" pursue this aim, and their adoption is an important milestone in the development of China's enforcement system.

A. System Design

The three regulations aim to solve the cross functional problems existing in the former agencies. These regulations have unified rules, and clarified standards in terms of prohibiting monopolistic agreements, prohibiting abuses of market dominance, and prohibiting the elimination and restriction of competition by abuses of administrative power. They enhance transparency and predictability for operators by building a unified, standardized, efficient and authoritative anti-monopoly enforcement system. This design is mainly based on three aspects as described below:

1. Optimization of the Enforcement System

Pursuant to the AML, enforcement is primarily central. At the same time, the State Council may authorize the corresponding agencies of provinces, autonomous regions and municipalities to be responsible for enforcement work according to their needs. The three Interim Provisions clarify the system accordingly.

1 Director General of the Anti-Monopoly Bureau of State Administration for Market Regulation (SAMR) of P.R. China.

2 Editor of CPI's Asia Column, Managing Director of Global Economics Group, and Senior Research Fellow of MRLC at Renmin University. We are grateful to Ms. Liyuan Wang and Mr. Yang Gui for coordinating and facilitating this interview.

- **Prioritizing the role of local authorities.** Provincial market regulators are often best placed in terms of responsiveness and familiarity with relevant markets. They have also accumulated more experience in the past ten years. The three "Interim Provisions" authorize provincial administrations to be responsible for enforcement regarding monopolistic agreements, abuses of market dominance, and abuses of administrative power. They also mobilize local law enforcement forces and aim to form a joint anti-monopoly network.

- **Clarifying the scope of SAMR and the jurisdiction of provincial administrations.** SAMR is responsible for investigating and punishing monopolistic agreements and abuses of market dominance across provinces, autonomous regions and municipalities directly under the central government, which SAMR considers necessary to investigate by itself. Such cases are usually relatively complicated or have significant influence in the whole country. SAMR also directly investigates and deals with abuses of the administrative powers of provincial people's governments, where this eliminates and restricts competition, where the facts are relatively complicated or it is considered necessary to directly investigate and punish such conduct. Provincial administrations are mainly responsible for enforcement in their respective administrative regions regarding restrictive agreements, abuses of market dominance and abuses of administrative power that would eliminate or restrict competition. SAMR may also designate provincial regulators to investigate and deal with certain cases.

- **Guidance for provincial authorities.** It is important that at both central and local levels will inevitably require the uniform law enforcement standards, the establishment of fair, open and transparent market rules, and resolute prohibition of local protectionism and market segmentation. Therefore, the three "Interim Provisions" clearly require provincial administrations for market regulation should implement law enforcement in accordance with the relevant regulations of SAMR and SAMR should strengthen the guidance and supervision on the enforcement of provincial administrations for market regulation. The three regulations also regulate a report filing system, and standardize the contents of the administrative punishment decision in order to ensure the orderly implementation of anti-monopoly enforcement and maintain the unified national market.

2. Refinement of the AML

The three regulations refine the corresponding provisions in the AML. The Interim Provisions for Prohibiting Monopolistic Agreements are closely combined with SAMR's enforcement practices against monopolistic agreements, clarifying and refining factors used to identify monopolistic agreements. Specially, the new rules pay more attention to consideration relevant to new technologies and services, strengthen law enforcement relating to "prohibiting and exempting" resale price maintenance, and clarify factors used to identify other monopolistic agreements. At the same time, the regulations set out detailed provisions to govern the commitments, exemption leniency systems, thus further enhancing law enforcement.

- **Dominance.** The Interim Provisions for Prohibiting Abuse of Market Dominance specify the factors to determine the existence of market dominance, set out the considerations to determine "fair prices," and the "cost" standard for predatory pricing rules. They also set out, based on accumulated enforcement experience, a set of possible legitimate defenses. These include defenses for selling goods at a below-cost prices, refusals to deal, restrictive practices, tying, or attaching unreasonable trade conditions, and differential treatment. These all enhance the effectiveness of law enforcement and market expectations. At the same time, the regulations also govern the determination of market dominance in new businesses, such as the online businesses, and the assessment of alleged predatory pricing in such new sectors.

- **Abuses of administrative rules.** The Interim Provisions for Prohibiting Eliminating and Restricting Competition by Abuse of Administrative Power, which sum up existing rules and administrative practices, set out rules concerning the abuse of administrative power and other behavior that eliminates or restricts competition. These rules guide authorities in handling cases in accordance with the law, improve the transparency and predictability of law enforcement, provide guidance for administrations and organizations authorized by laws and regulations with the function of managing public affairs to administer in accordance with the law, and avoid abuse of administrative power which eliminates and restricts competition. At the same time, the regulations distinguish between different situations, and provide four ways to deal with abuse of administrative power which eliminates and restricts competition, further improving the operability of the law.

3. Unified Law Enforcement Procedures

Before the institutional reform, due to cross-functionality, customary practices, and other factors, procedures were governed by different departmental regulations. Following institutional reform, the application of different standards and procedures for the same type of behavior has caused great confusion in law enforcement practices, and does not result in unified enforcement practices. At the same time, considering that different types of conducts are subject to significantly different enforcement procedures under the AML, we take conduct categories as a starting point. As such, we aim to set out targeted regulations for different types of cases, from the reporting, filing, investigation and punishment stages. This will form a more focused and systematic system, and further improve the standardization and transparency of enforcement practices.

4. Changes in Antitrust Enforcement

The three regulations provide for clear and powerful legal supports for anti-monopoly enforcement, and unify enforcement in terms of procedures, standards and ideas.

- **Strengthening the powers of provincial administrations.** "Universal authorization" gives provincial administrations for market regulation more autonomy when investigating and initiating anti-monopoly investigations. As provincial administrations for market regulation have a better understanding of the local situations and are more convenient to mobilize law enforcement forces to conduct field investigations, the "universal authorization" has not only strengthened enforcement, but also facilitated the improvement of law enforcement efficiency. In 2019, 43 cases of monopolistic agreements and abuse of market dominance were filed, 16 were closed, and the amount of fines confiscated was RMB310 million. The number of cases filed in 2019 increased by 19.4 percent compared to that in 2018, and the number of cases closed in 2019 was the same as in 2018. The amount of fines confiscated increased by a 11.9 percent year-on-year growth rate.

- **Further standardizing procedures.** After establishing the principle of universal authorization, in order to strengthen the supervision on enforcement of provincial administrations for market regulation, the three "Interim Provisions" have clearly defined that provincial administrations for market regulation must investigate and deal with monopolistic agreements, abuse of market dominance, and abuse of administrative power which eliminates and restricts competition. A stricter supervision mechanism has been established through the strict implementation of the pre-case reporting system, case filing, and post-case filing mechanisms; the post-case publicity system further enhanced the fairness, standardization, and transparency of enforcement. Enforcement has been carried out in an orderly manner, forming a new and unified enforcement pattern.

- **Gradual unification of enforcement standards.** When determining the amounts of specific fines, the agencies shall take into account the nature, circumstances, degree, duration and other factors of the illegal conducts. In enforcement practice, agencies should take the above factors into consideration when penalizing business operators. At the same time, the pre-case reporting system as determined in the "Interim Provisions" requires provincial administrations for market regulation to report to SAMR before making the decision to suspend the investigation, the decision to terminate the investigation, or the notification of administrative punishment, or before making the proposal to handle the administrative monopoly cases or terminate the investigation, so as to ensure that the law enforcement standards are unified nationwide. In 2019, we carried out centralized enforcement against monopolistic agreements in the field of building materials. We filed 17 cases, investigated and dealt with 4 cases, and imposed a total economic penalty of RMB16.75 million on 33 enterprises involved. In the process of handling these cases, we attached great importance to maintaining the consistency of law enforcement standards and have established unified and clear competition rules for market subjects.

- **Clearer enforcement.** These three regulations provide clearer enforcement priorities. For example, the "Interim Provisions for Prohibiting Monopolistic Agreements" further clarified the analytical thinking of applying "prohibition + exemption" to horizontal monopolistic agreements and resale price maintenance. In administrative law enforcement, we can presume that the relevant behavior meets the criteria for eliminating and restricting competition as stipulated in Article 13 of the AML, and the operator bears the burden of proving that it does not constitute "eliminating and restricting competition" or meets the exemption. The administrative penalty decision against monopoly of Toyota Motor (China) Investment clearly reflects this idea in law enforcement.

Competition is the essence of the market economy. But the rule of law provides for an optimal business environment. The agencies will continue to strengthen and improve their enforcement practices and policies, improve the rule of law, improve procedures, and maintain fair market competition. They will do so while focusing on creating a market and rule-of-law, and internationally-oriented business environment. They will also do so with the aim of building a unified, open and orderly high-standard market system nationwide.

2. What were some of SAMR's enforcement priorities in 2019?

In 2019, the Anti-Monopoly Bureau of SAMR focused on protecting fair market competition and safeguarding the interests of consumers, and steadily promoted antimonopoly enforcement. We filed and investigated 103 cases, imposed 44 administrative penalty decisions, and confiscated RMB320 million. Among these cases, 28 cases concerned investigations into monopolistic agreements and administrative sanctions were imposed in 12 of these. In addition, we investigated 15 cases of alleged abuse of market dominance, and imposed administrative sanctions in 4 of these. Moreover, 24 cases of administrative monopoly were filed for investigation, with corrections of abuse of administrative power imposed in 12. On top of this, we dealt with 36 cases concerning failures to file concentration, and imposed sanctions in 16 of these. We received 503 merger filings, filed 462 complaints, and resolved 465 of those. In this category, 5 mergers were approved subject to conditions. Our enforcement powers have always been a sharp sword, and as such a strong deterrent. We have vigorously promoted the construction of a unified, open, and orderly market system across the country.

In our enforcement priorities, we pay attention to the following considerations:

- **First, we focus on protecting fair market competition.** We conditionally approved five merger cases in the semiconductor, marine, automotive, pharmaceutical and other sectors to protect competition and promote economic development.

- **Second, we enforce in the people's interests.** Our starting and end point is protecting consumer interests, and vigorously promoting enforcement in areas of livelihoods such as raw materials, building materials, and public utilities. We seek to solve the people's troubles, and increase people's happiness.

- **Third, we seek to maintain a unified national market.** Focusing on areas such as bidding, tendering and government procurement, we seek to prevent abuses of administrative power that eliminate or restrict competition. We also seek to reduce improper intervention by government departments in market activities, and promote the construction of a unified, open, and orderly market system across the country.

3. Please describe some of SAMR's key cases and experiences in 2019.

2019 was the first year of unified enforcement after the institutional reform. In this year, we continued to strengthen enforcement, optimize the law enforcement mechanism, unify law enforcement standards, fully mobilize the enthusiasm of law enforcement agencies at the central and local levels, and concentrated our efforts to investigate and deal with a number of major typical monopoly cases. Our enforcement work is remarkable and we have accumulated a lot of good methods and experience.

- **First, we focused enforcement in a centralized way in key industries.** For example, in areas such as building materials and public utilities, which are directly related to the immediate interests of the people and with many monopolies, enforcement has been deployed in a centralized way, with 4 cases of monopolistic agreements in the field of building materials and 4 cases of monopolies in the public utility sector investigated and punished. We also investigated and punished 2 cases of vertical monopolistic agreements in the automotive industry. In response to the public's strong response to monopoly the field of APIs, we have held conferences, and conducted special work across the country to form a comprehensive crackdown on the monopoly behaviors involving APIs. These centralized and special law enforcement actions have achieved very good results, effectively curbing the momentum of monopoly behaviors, protecting fair market competition, and safeguarding the legitimate rights and interests of the people.

For example, in the monopoly agreement case of *Chang'an Ford Automobile*, it has been investigated that since 2013, Chang'an Ford has restricted the minimum resale price of the whole vehicle of the downstream dealers in Chongqing by formulating the Price List, signing the Price Self-discipline Agreement, and restricting the lowest price of the downstream dealers during the auto show and in the online stores, which violates Article 14 of the AML on prohibiting operators from entering into a vertical price monopoly agreement with the trade counterparty. In June 2019, SAMR imposed a fine of RMB162.8 million on Chang'an Ford Automobile according to law. This case carried the highest fine of 2019. Before that, agencies had imposed penalties on auto brands such as Chrysler, Mercedes-Benz, FAW Audi, Dongfeng Nissan, and SAIC-GM for implementing monopolistic agreements.

In the monopolistic agreement case of *Lexus Automobiles*, upon investigation, from June 2015 to March 2018, Toyota asked the dealers in Jiangsu Province to unify the online quotations of Lexus cars and restricted the minimum prices for the dealers to sell Lexus automobiles, which violated Article 14 of the AML on prohibiting operators from reaching a vertical price monopoly agreement with the trade counterparty. In December 2019, Jiangsu Administration for Market Regulation fined Toyota Motor (China) Investment RMB87.613 million. It was the case with the highest fine imposed by provincial administrations for market regulation in 2019. At the same time, we are investigating and dealing with major typical cases of abuse of market dominance in the API industry. At present, we are promoting the handling work in accordance with the law. Once we make an administrative punishment decision, it will be announced on the website of SAMR.

- **Second, we focused on improving the standardization of enforcement.** We focus on strengthening industry research and conducting in-depth economic analysis to provide strong support for scientific and professional anti-monopoly enforcement. For example, in 2019, we approved five cases of concentrations of business operators with additional conditions, in the areas of semiconductor, marine, medicine, automobile, etc. During the review of these cases, we conducted extensive industry surveys, fully listened to the opinions of companies in the relevant industries, thoroughly understood the industry's operating models and competition situation, and commissioned third parties to conduct economic analysis to accurately grasp the competition concerns that may result from the transactions, and formulated practical remedy plans for the competition concerns. The review work effectively protected fair market competition and was fully affirmed in the industry, which played a positive role in promoting the healthy development of the relevant industries. For example:

    - In the case of Eastman's abuse of market dominance, we introduced econometric methods to define the relevant market, identify market dominance, and analyze anti-competitive effects. We also conducted quantitative analysis into the alleged abusive and exclusive dealing behaviors. SAMR concluded that in 2013-2015, Eastman abused its dominant position in the CS-12 market in mainland China, and signed and implemented the "Take-or-pay Agreement" and "Most Favored Nation Treatment Agreement" with downstream paint manufacturers to limit the minimum purchase amount, restricting transactions between trade counterparties and other competitors and eliminating and restricting market competition. A fine of 5 percent of its 2016 turnover in mainland China was imposed on Eastman, totaling RMB24.38 million.

    - In the case of KLA-Tencor's acquisition of Orbotech, it was found that competition in China's semiconductor deposition and etching equipment manufacturing market was different from others. This merger could have eliminated or restricted competition in the deposition and etching equipment market. Approving the transaction subject to commitments maintained fair competition in China.

    - In the case of Cargotec Group's acquisition of certain businesses of TTS Group, both parties were important suppliers of ship supporting equipment in China, and the transaction caused widespread concern in the shipbuilding industry. We focused on the impact of the concentration on competition in China in hatch covers, ro-ro equipment for merchant ships, and cargo cranes. On the basis of those competition concerns, we adopted comprehensive behavioral remedies, such as maintaining the independence of both parties, a firewall, and a commitment to fair supply, which maintained competition in the relevant markets.

    - In the case of Photop Technologies' equity acquisition of Finisar, we commissioned an independent third-party consulting agency to conduct economic analysis, laying a solid foundation for scientifically and reasonably defining the relevant market and clarifying any competition concerns. We believe that the transaction may have had the effect of eliminating or restricting competition in the wavelength selective switch market. We imposed remedies requiring both parties to keep their wavelength selective switch businesses independent of each other, in order to ensure that they would continue to exert sufficient competition.

- In the case of the newly-established joint venture between Zhejiang Garden Biochemical and Royal DSM based on national market conditions and in light of developments in other major jurisdictions such as Europe and the United States, we conducted an in-depth investigation under the AML. We believe that the merger may have had the effect of eliminating or restricting competition in the NF lanolin cholesterol market, which is the upstream of human and animal vitamin D3. In light of the facts, in designing the remedies, we sought to preserve the legitimate trading interests of both parties to the maximum extent. Nonetheless, we ensured Zhejiang Garden's right to supply other downstream competitors as far as possible, and effectively maintained competition.

- In the case of Novelis' equity acquisition of Aleris, we defined the relevant market accurately and obtained first-hand market share data through various ways, such as issuing questionnaires, market research, communications and symposiums with industry authorities, associations and competitors. We also cooperated with authorities in Europe, the U.S., etc., which confirmed that the transaction may have had the effect of eliminating or restricting competition in the markets for automobile body aluminum sheet inner panel and automobile aluminum sheet outer panel in China. The combination of structural and behavioral remedies adopted effectively solved the possible competition concerns in this case.

- **Third, we focused on improving the effectiveness of our enforcement efforts.** We adhere to the combination of laws and regulations and flexible guidance, give full play to the demonstration effect of significant cases, and promote industry-wide standardized production and operation behavior. For example, on the basis of earnestly strengthening anti-monopoly enforcement in the building materials industry, we organized a warning meeting on monopoly behavior, publicized the legal provisions, deployed all participating units to carry out self-examination and submit reports in accordance with the AML, and regulated monopoly behavior in the whole industry, which effectively curbed the trend of monopoly behavior, reduced the cost of law enforcement, and improved the efficiency of law enforcement.

4. Please describe SAMR's main achievements in promoting the fair competition review system in 2019.

2019 was the first year following the institutional reform and the implementation of the fair competition review system, and the first year for the new inter-ministerial joint meeting for fair competition review to be adjusted in place and put into operation. SAMR resolutely implements the decision-making arrangements of the Central Committee of the Communist Party of China and the State Council on fair competition review work, adheres to scientific planning, reform and innovation, and pays close attention to their implementation. SAMR has made progress in various regards to achieve full coverage of the fair competition review system at the national, provincial, municipal and county-level government levels. Further we seek to improve the efficiency of our procedures, so as to optimize the business environment, promote high-quality development, and enhance the modernization of the national governance system.

A. Improving the Enforcement System and its Foundations

The Central Committee of the Communist Party of China and the State Council attach great importance to fair competition review. In March 2019, Premier Li Keqiang and State Councilor Xiao Jie respectively hosted the State Council Executive Meeting and a special meeting of the Function Transformation Coordination Group to listen to the report on the implementation of the fair competition review system, and set out clear next steps. Regulations and documents such as the "Opinions of the Central Committee of the Communist Party of China on Creating a Better Development Environment to Support the Reform and Development of Private Enterprises," "Regulations on Optimizing Business Environment" have set out clear priorities for fair competition review. To this end, we will further improve the system.

- **First, we issued the "Notice on Screening Policies and Measures that Hinder Unified Market and Fair Competition,"** which deploys comprehensive screening for regulations, regulatory documents and other policy measures promulgated before December 31, 2019. We screened many regulations and practices that potentially hinder competition, in order to lay a good foundation for the full implementation of the fair competition review system.

- **Second, we formulated the "Notice on Further Promoting Fair Competition Review Work,"** and improved review rules, and working mechanisms. We also strengthened organizational guarantees, and sped up the establishment of a comprehensive review system with comprehensive coverage, complete rules, clear powers and responsibilities, efficient operation, and effective supervision. We will improve the effectiveness and binding of these measures, and prioritize regulating government behavior and promoting fair competition.

- **Third, we issued the "Implementation Guidelines for Third-Party Evaluation of Fair Competition Review,"** which clarifies the scope of application of third-party evaluation, procedures and methods, the use of evidence, and the evaluation of third-party agencies, so as to provide guidance for policy-making authorities to introduce the third-party evaluation in fair competition review. Currently, Liaoning, Shanghai, Zhejiang, Hubei, Hunan, Chongqing, Hainan, and other provinces (autonomous regions and municipalities) have carried out third-party evaluations and have conducted useful reviews.

- **Fourth, we organized the revision of the "Implementation Rules for the Fair Competition Review System (Interim)"** (the "Implementation Rules"). We took account of institutional experience accumulated during this process in the formulation of the "Implementation Rules" to further refine review standards, optimize the review mechanism, strengthen rigid constraints, and improve the pertinence and operability of the system.

B. Improving Mechanisms and Enhancing Capacity

We actively explore and innovate. We aspire to a high degree of professionalism in our enforcement of the fair competition review system. We focus on mechanism building, with emphasis on capacity improvement.

- **First, we improve our working mechanism.** We have always firmly supported the Inter-Ministerial Joint Meeting System for Fair Competition Review. After the institutional reform, we quickly urged local authorities to adapt in a timely manner. At present, member units of joint meetings and their offices in 31 provinces (autonomous regions and municipalities) are in place, some of which also explore best practices. Liaoning, Jiangxi, Ningxia, and other provinces (autonomous regions and municipalities) have clearly designated the person-in-charge as the convener of the relevant joint meetings. Liaoning has also established a coordination mechanism and a liaison system for member units of the joint meeting. The person-in-charge and the liaison are clearly designated, and their work responsibilities are clearly assigned.

- **Second, we conduct field guidance.** In June 2019, in accordance with the State Council Executive Meeting's requirement to "achieve full coverage at the national, provincial, municipal and county-level governments by the end of the year," we kept an eye on the target and made specific efforts. We went to Inner Mongolia and Liaoning to conduct field surveys and issue guidance and achieved full coverage at the national, provincial, municipal and county-level governments in September 2019, ahead of schedule.

- **Third, we have improved our training procedures.** In addition to the courses provided by SAMR, courses have also been set up for 7 authorities, including the Ministry of Commerce, the State-owned Assets Supervision and Administration Commission of the State Council, Civil Aviation Administration of China, and 15 provinces (autonomous regions and municipalities), including Shanghai, Jiangsu, Chongqing, at which the trainers explain relevant rules, work requirements and typical cases to improve administrative capabilities. More than 4,000 cadres engaged in fair competition review were trained throughout the year.

C. Strengthening Supervision

In order to maintain the authority of the system, we take multiple measures to strengthen supervision and evaluation, and strive to build good working practices.

- **First, we adopted a comprehensive supervision and assessment system.** In 2019, based on a comprehensive self-examination, we organized key inspections in 8 provinces (autonomous regions and municipalities) including Beijing, Shanxi, Shandong, Ningxia, Sichuan, Anhui, Hunan, and Yunnan, covering a total of 420 randomly selected documents. Currently, issues discovered during the inspection are being further checked and any violations will be notified.

- **Second, we announced typical cases.** According to the key supervision situation in 2018, we announced 30 policy documents that violated the review standards, including Liaoning Administration of Housing and Urban Rural Development's documents which designated four agencies to undertake the review of construction drawings, the documents of the Economy and Information Technology Commission of Guangdong which required that insurance premium subsidy should be offered only to enterprises registered in the province, the documents of the Department of Transportation of Heilongjiang which granted toll preferential policies only to passenger transport groups registered in the province, etc.. The typical cases provide a warning and improve the deterrence and transparency of the system.

- **Third, we integrated fair competition review into the relevant assessment and evaluation systems.** The Ministry of Justice has incorporated fair competition review into the demonstration index system of municipal and county-level government governed by the rule of law, as well as the assessment and evaluation system of the administration and government governed by the rule of law in Zhejiang, Guangdong, Guangxi, Guizhou, Chongqing, and Gansu.

D. Public Outreach

In view of the characteristics of the fair competition review system, such as short establishment time, new concept and wide coverage, we actively increase policy publicity, improve the interpretation, focus on competition advocacy, and strive to create a good fair competition atmosphere. In April 2019, Ms. Gan Lin, Deputy Director of SAMR, attended a regular policy briefing meeting of the State Council, detailing the latest progress in the implementation of the fair competition review system and the next steps in its work arrangements to increase its influence. By publishing a series of articles focusing on the fair competition review system and compiling and publishing the *Study Book on the Fair Competition Review System*, we interpreted the fair competition review system to increase social awareness and create a good atmosphere.

E. Deepening Cooperation and Opening the System

Focusing on the overall situation of opening up, we actively strengthened international exchanges and cooperation, deepened the China-EU dialogue on fair competition review and the State aid system, and signed the Memorandum of Understanding on the *Dialogue Mechanism in the Areas of the Fair Competition Review System and the State Aid Control Regime with EU* and the *Directive on Establishing a Steering Group under the Dialogue Mechanism in the Areas of the Fair Competition Review System and the State Aid Control Regime with EU*, successfully held the second dialogue, and jointly hosted the two China-EU Competition Weeks. We have strengthened communication with the United Kingdom, the Economic Cooperation Organization, the World Bank and other countries and international organizations, discussed in depth the issues of cooperation in fair competition review, learned from international experience and promoted the improvement of the system.

5. In the era of the digital economy, various new business modes such as the platform economy and the Internet economy, are emerging one after another. Is SAMR facing new challenges in anti-monopoly enforcement? What is the focus of SAMR's enforcement?

In recent years, the Internet economy has been booming, giving birth to new economies and new forms such as the digital economy, the sharing economy, and the platform economy. This has injected new vitality into China's economy, greatly changed the consumption patterns and lifestyle of the people and provided new growth momentum for economic transformation and upgrading. Competition is the source of power for the rapid development of the Internet economy. In general, competition in the Internet sector in China is relatively adequate and the competition is good. At the same time, there are many responses to the competition in the field of Internet, including responses against the behaviors of some Internet platforms that may eliminate and restrict competition.

At present regulation in the Internet field is a common challenge faced by enforcement agencies in various countries. The basic system and analytical framework of the AML are also applicable to the Internet, but at the same time, the Internet economy has distinct characteristics that are different from the traditional economy, such as multi-sided markets, platform economies, cross-border competition, and dynamic competition.

With regard to relevant market definition, the determination of market dominance, and the analysis of the effects of eliminating or restricting competition, the above characteristics need to be fully considered within the framework of the legal system. At the same time, Internet operators may use technology such as big data and algorithms to carry out behaviors that eliminate or restrict competition, and which also may make it difficult to obtain evidence. SAMR has been paying attention to competition issues in the Internet field and has carried out a large number of investigations and studies. We will adhere to the principle of "prudent tolerance, encouragement of innovation, and specific case analysis," supervise the Internet field in accordance with the law, maintain the competitive vitality and momentum of the Internet industry, and promote the sustainable and healthy development of the Internet industry in China.

CPI TALKS…

…with Brent Snyder

In this edition of CPI Talks we have the pleasure of speaking with Mr. Brent Snyder, Chief Executive Officer of the Hong Kong Competition Commission.

Thank you, Mr. Snyder, for sharing your time for this interview with CPI.

1. Please briefly outline the functions of the Commission, its work focus, and its industry focus in antitrust investigations.

Hong Kong now has its first economy-wide competition law, in the form of the Competition Ordinance (the "Ordinance"), which was enacted in 2012. The Ordinance, which aims to promote competition in the Hong Kong territory, and to prohibit anti-competitive practices by businesses, was implemented on a phased basis, so that businesses would have time to familiarize themselves with the legal requirements, and make necessary arrangements. The Competition Commission (Hong Kong) was established in 2013, as an independent statutory body to enforce the Ordinance, which came into full effect in December 2015.

In safeguarding a level playing field in Hong Kong, the Commission is entrusted with three major functions:

- **Enforcement** – investigating conduct that may contravene the Competition Ordinance and taking appropriate enforcement action to uphold its provisions.
- **Policy Advice** – advising the Government on competition matters both in and outside Hong Kong, and conducting market studies into matters affecting competition in Hong Kong.
- **Advocacy** – promoting public understanding of the value of competition and encouraging compliance by businesses.

The Commission's work focus revolves around these three key functions, which are very much intertwined, informing and supplementing each other to achieve the goals of bringing the many benefits that flow from competition to the people of Hong Kong.

A. Enforcement

1. Complaints, Enquiries, and Investigations

Since the full commencement of the Ordinance in December 2015, the Commission has received and processed over 4,000 complaints and enquiries. About 60 percent related to the First Conduct Rule, which prohibits anticompetitive agreements, with cartel conduct being the major concern. About 20 percent related to the Second Conduct Rule, which prohibits abuse of substantial market power.

In the roughly four years since full implementation of the Ordinance, the Commission has already brought five cartel cases involving bid-rigging, market sharing, price fixing and the exchange of competitively sensitive information before the Competition Tribunal ("Tribunal"). Among them, the first two cases were decided in favor of the Commission in May 2019, marking a key milestone for both the Commission and the Hong Kong competition law regime. The other three cases are pending trial.

As we continue to investigate and bring enforcement actions against anti-competitive conduct, our primary focus will remain on hard-core cartels, which are the cardinal sins of competition law. That said, we certainly will not ignore other anti-competitive agreements or abuses of market power that we uncover through our investigations. As a relatively young agency, the Commission's resources are currently focused on encouraging compliance in the Hong Kong economy as a whole, rather than focusing on specific sectors or industries.

2. Exclusions and Exemptions

In addition to pursuing enforcement actions, the Ordinance also provides for certain exclusions and exemptions which, if applicable, mean that the First Conduct Rule and/or the Second Conduct Rule do not apply. Undertakings wishing to confirm whether their conduct or arrangements are excluded or exempt from the Conduct Rules may choose to apply to the Commission.

To this end, the Commission has so far published a Block Exemption Order for Vessel Sharing Agreements ("VSAs") between liner shipping companies, and two decisions on exclusions and exemptions in the banking and pharmaceutical industries. These are all important sectors of Hong Kong's economy, and the decisions have widespread impact. It is worth noting that following the Commission's decision not to exempt Voluntary Discussion Agreements ("VDAs") among liner shipping companies, all of the VDAs which previously covered Hong Kong have been terminated, including international VDAs, which had been in place for a number of years. In publishing its decisions, the Commission also provided useful guidance on its assessment criteria.

B. Policy Advice

While certain structural defects in markets are beyond the ambit of the competition rules, the Commission has a policy advisory function that allows it to make recommendations to the Government and public bodies on how to advance competition in various markets. The Commission also has a duty to assist the government in articulating its competition policy across public sector activities and functions that affect the daily lives of people in Hong Kong. In fulfilling this function, the Commission has been working on various fronts, including direct engagement with government departments and public bodies on issues relating to competition, the making of submissions, and publication of reports or advisory bulletins that assist policy makers to assess the competition risks and impacts of public policies and initiatives.

Examples of this work by the Commission include two market studies into the residential building maintenance and auto-fuel sectors, which were conducted in response to public concerns over potential anti-competitive conduct in these markets. The Commission has also published an advisory bulletin on liquefied petroleum gas supply for public housing estates, and made submissions on the electricity market and a proposed franchised taxi scheme.

In assisting the public sector and policy makers to assess competition risks and impacts of public policies and programs, the Commission has produced tailor-made guidance and conducted targeted training by leading international competition law experts to facilitate their recognition and assessment of competition issues. With our extensive and proactive engagement over the years, competition considerations are playing an increasingly important role in the formulation and execution of public policies and schemes. Last year, the Commission provided advice on approximately 30 public policies and initiatives which concern Hong Kong's consumers and the business environment.

C. Advocacy

Education and advocacy are just as important as enforcement actions, if not more important, at the introductory stage of a new law. In a new competition regime like Hong Kong's, the Commission's goal is first of all to instill an appreciation of the benefits of competition and educate about the limits of permissible conduct under the Ordinance. It is also particularly crucial for us to build up credibility and rally public support through means other than enforcement at an early stage.

Since the Commission's inception, we have been actively engaging the public and businesses through outreach and educational initiatives in various forms, with the aim of raising community awareness and understanding of the Ordinance as well as encouraging compliance. An average of 80 engagement events have been conducted every year including seminars and meetings for public and businesses, roving exhibitions, school talks and advocacy campaigns on different competition themes and topics. The Commission has also produced a wide range of easy-to-understand publications, educational videos, practical tools and guidance for different stakeholders, in particular the small and medium enterprises.

As a result of our advocacy efforts, there is increasing awareness of the Ordinance, as well as gradual and concrete changes in business practices and culture in Hong Kong. As the Commission develops, advocacy and enforcement will reinforce each other, with advocacy bringing in complaints and cases. This is best exemplified by our first case, which was derived from a complaint filed by a corporate procurement officer who had attended one of our seminars. Enforcement actions also serve as an effective form of advocacy by heightening awareness of and interest in our work thereby enhancing compliance. Advocacy and education will remain a key focus of our work going forward.

2. The Commission has initiated several antitrust investigations against cartel and bid-rigging conduct. Could you please explain to our readers the goals in this enforcement area?

As a young and relatively small agency, it is important to make efficient use of our resources. Guided by the principle that the goal of competition law is to bring the benefits of competition to consumers, the Commission prioritizes investigations and enforcement actions that result in the greatest overall benefit to competition and consumers in Hong Kong.

To this end, hard core cartels have been one of our top priorities, as they are the cardinal sins of competition law, have the greatest potential consumer impact, and attract significant public interest. This is also supported by the complaints and queries we have received from consumers and businesses in the city so far, which predominantly relate to concerns over cartel conduct.

Our first enforcement action was a bid-rigging case in 2017, and brought home the point that bid-rigging is a longstanding problem in Hong Kong. Bid-rigging is perceived to be particularly serious in certain sectors where it affects a wide spectrum of economic activities and consumers, as evidenced by the fact that the Commission receives more complaints about suspected bid-rigging than any other topic.

The Commission's second, third, and fourth enforcement actions involved market-sharing and price fixing by decorating contractors. These cartels were particularly egregious, because they targeted some of Hong Kong's most vulnerable and low-income consumers. These consumers need and deserve the Commission to fight against cartels that harm them, and the Commission will spare no efforts in pursuing them and seeking severe sanctions against not only the corporate cartelists but also the individual executives and employees who carry them out. We are seeking to drive home the deterrent message that not only companies, but also individuals who engage in cartels should expect to face the full force of the law.

Our latest case, filed at the beginning of 2020, involved the exchange of competitively sensitive price information that compromised a procurement exercise by a Hong Kong public body. This case is another important enforcement milestone for the Commission as this is the Commission's first case resulting from a successful leniency application. This is also the first time the Commission made use of an infringement notice as a remedy, which is consistent with the Commission's focus on encouraging compliance in its initial years.

While pursing cartel conduct will continue to be an enforcement priority, the Commission will not shy away from bringing abuse of substantial market power cases under the Second Conduct Rule where the facts support them, and we are actively investigating suspected abuses. This is important not only for the sake of enforcement itself, but also for the purpose of establishing judicial precedents that interpret the Ordinance and provide guidance to the business and legal communities.

3. Compared to other jurisdictions, does the Commission have to deal with different market characteristics and conduct, which might lead to different challenges?

Hong Kong has a long history as a successful and open market economy, yet there are deep-rooted practices that are anti-competitive in nature and the Ordinance imposed a paradigm shift in Hong Kong business culture. While SMEs constitute 98 percent of business establishments and employ 45 percent of the workforce in the private sector, there are also highly concentrated markets in some sectors. Against this background, the Commission is looking at potentially anti-competitive conduct across a wide range of sectors. As a result, the Commission's portfolio of investigations has been increasing in number, variety and complexity.

As for other challenges, for a new jurisdiction like Hong Kong, it takes time for people to grow to understand the law, as well as the nature and permissible extent of our work, which makes managing public expectation a challenge. In the beginning, some businesses had the misconception that competition law is a legislative construct that stifles entrepreneurship and innovation and marks a retreat from Hong Kong's historic laissez-faire approach. Similarly, some SMEs are worried that they may unwittingly contravene the law, or that the competition law may be wielded as a weapon against them by big corporations. And, some of the public expect us to break up conglomerates and regulate prices. We need to manage public expectations about our authority and how we appropriately seek to enforce the law. On-going education and engagement is especially important in this regard, and we have been actively reaching out to the community through targeted advocacy and public engagement campaigns as well as the production of easy-to-understand educational materials and practical toolkits to help businesses to comply.

Secondly, Hong Kong is an import-export hub, and this presents another type of challenge. The First and Second Conduct Rules in the Ordinance apply to agreements and practices by undertakings outside Hong Kong if the conduct affects competition in Hong Kong. The extra-territorial application of the conduct rules means that in our enforcement we need to address, for example, how regional export cartels may impact Hong Kong, and how economic activities across borders should be taken into account. This will present an enforcement challenge, and will raise jurisdictional questions. To this end, the Commission has been establishing bilateral liaisons with its counterparts. In addition to the MOU with the Competition Bureau of Canada, we are in liaison with a few counterparts in the region to ensure an effective, joined-up approach to competition policy and law enforcement through MOUs and partnerships.

4. What is the future development scheme of the Commission?

Going forward, the Commission will maintain its momentum in its enforcement, policy, and advocacy work.

Enforcement of the Ordinance will remain a key focus of the Commission's work. As noted, the Commission's portfolio of investigations has been growing in number, variety and complexity across a wide range of sectors encompassing both the First Conduct Rule and Second Conduct Rule. It is expected that a number of promising investigations will result in various enforcement outcomes, such as issuing warning or infringement notices, as well as accepting commitments, in addition to bringing cases to court. Some of these investigations will set important new precedents for competition enforcement in Hong Kong, and offer guidance to businesses.

Internally, to cope with the growing number and complexity of enforcement and legal actions, our focus is on strengthening our professional staff and raising our level of competition law expertise. This includes leveraging overseas experience as well as providing targeted training and learning opportunities for our staff. As we continue to have more experience with our leniency policy and resulting leniency applications, we are also considering whether any fine-tuning or modifications are necessary.

On the policy front, the Commission will continue to play an active role in assisting the public sector and policy makers assess the competition risks and impacts of public policies and initiatives. To encourage the integration of competition principles into regulations, the Commission is conducting a research project involving academics from Hong Kong, Australia and the Mainland to compare different approaches to the competition impact assessment of policies and their effectiveness, with the aim of producing recommendations and practical guidelines for the public sector in Hong Kong.

As regards advocacy and engagement, we will continue reaching out to various stakeholders in the local community. With good progress in achieving a broad public awareness and understanding of the Ordinance, the Commission has entered another stage of advocacy strategy with more focused and targeted engagement initiatives to help the public and different business sectors to recognize potential competition issues. These include multi-pronged thematic campaigns on specific topics, sectoral business roundtables as well as training to help lawyers with limited competition law experience to advise their clients (in particular SME clients) on matters related to competition law. In the coming year, a particular focus will be on "intermediary" groups such as auditors, lawyers, compliance officers, company secretaries, accountants etc. as these professions are in the best position to advise businesses and companies on risk management and compliance matters. To expand its engagement, the Commission also intends to strengthen the use of social media in the coming year.

Internationally, we will remain actively engaged with our counterparts through participation in and hosting of international and regional conferences, as well as by leveraging our "Competition Exchange" (www.compex.org) online platform, to collaborate and share knowledge, experience and best practices.

ANTITRUST REGULATION IN THE DIGITAL ECONOMY: INDUSTRY DEVELOPMENTS AND THE AMENDMENT OF THE ANTI-MONOPOLY LAW

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I. INTRODUCTION

Internet technology has become increasingly widespread. Over more than 20 years, Internet-based platforms and their associated "big data" have gradually grown in economic importance. The use of big data, moreover, has enhanced cross-border Internet trading, which has aroused worldwide concern about data security. Apart from data protection concerns, an important issue is competition enforcement with respect to big-tech companies. As a country with an enormous amount of Internet users, and thus a huge Internet economy, China is also facing problems related to the supervision of digital markets. The State Administration for Market Regulation ("SAMR"), the top market regulator in China, has made a number of enactments, including its Interim Provisions on Prohibiting Abuse of Market Dominance (the "Interim Provisions") on June 26, 2019.

The Interim Provisions set out nine considerations for determining market dominance on the Internet.[2] On August 8, 2019, the Guiding Opinions of the General Office of the State Council on Promoting the Standardized and Healthy Development of the Platform Economy were released, designating the SAMR as the responsible agency for "formulating and promulgating relevant regulations on the supervision and administration of online transactions, investigating and imposing punishment for illegal acts such as abuse of market dominance to restrict transactions and unfair competition in the Internet field, prohibiting the platform from unilaterally signing exclusive service delivery contracts, to ensure fair participation of relevant market players of the platform economy in market competition."

On January 2, 2020, the SAMR released a revised draft of the Anti-Monopoly Law ("AML"), adding considerations for determining market dominance in the new Internet industry,[3] and it was different from the Interim Provisions noted above.

The concerns are well known. As far back as 2013, Qihoo 360 sued Tencent on the basis that the latter abused its market dominance, and recently, Tmall was sued by JD.com and Galanz, respectively, for the same reason. Further, competition in the so-called "digital economy" is not limited to alleged abuses of market dominance, but also raises challenges with respect to other rules, such as those on anticompetitive agreements and market concentration.

But the characteristics of the "digital economy" undermine the credibility of the traditional anti-monopoly tests. Is anti-monopoly enforcement needed in the field of big data? There are different opinions on different grounds. But what is certain is that the market competition unleashed through the catalytic effect of Internet platforms and big data has had a huge impact. The effectiveness of the current enforcement system in this field needs to be examined.

II. IMPLICATIONS OF THE "DIGITAL ECONOMY" FOR REGULATION

A. Basic Attributes of the "Digital Economy"

Due to the "digital revolution," technologies such as "big data," the Internet of Things ("IoT"), blockchain, and artificial intelligence ("AI") have become more and more widespread. In addition, so-called "big-tech" companies have come into being in many sectors. In 2019, seven of the world's ten largest companies were online "platform" operators,[4] namely Microsoft, Apple, Amazon, Alphabet, Facebook, Alibaba, and Tencent.

The "new economy" is based on new business models based on innovative information technology. It has at least the following five distinct characteristics compared with the "traditional" economy:

- First, the main actors in the "digital economy" are platforms. Platforms, as a new means of cooperation based on new technology, can improve efficiency in resource allocation and reduce transaction costs. Operators of two-sided multi-sided platforms can enhance their overall profitability through cross-subsidies. Unlike the closed systems in the traditional industrial economy, platforms can be open ecosystems, which makes it necessary to re-examine the relationship between the scale and efficiency of a given platform, and the level of the so-called "optimal scale" needs to be reassessed.

2 According to Article 18 of the AML and Articles 6 to 10 of these Provisions, factors such as the competition characteristics of relevant industries, their operating mode, the number of users, network effects, lock-in effects, technical characteristics, market innovation, the ability to grasp and process relevant data, and the market power of operators in related markets may be considered in determining the market dominance of online operators. See http://www.gov.cn/gongbao/content/2019/content_5430507.htm.

3 Paragraph 2 of Article 21 of the AML (Revised Edition) sets out factors such as network effects, economies of scale, lock-in effects, and the ability to grasp and process relevant data that should also be considered in determining the market dominance of online operators.

4 https://www.sohu.com/a/334106021_99960758.

- Second, cross-border platform competition in the "digital economy" makes it necessary to redefine relevant markets. The competitive relationship between players in the "digital economy" needs to be interpreted in a broader sense than in traditional industries. For example, Qihoo 360 (an Internet security service provider) versus Tencent QQ (an instant messaging service provider), and WeChat (an instant messaging service provider) versus toutiao.com (an online news service provider). Traditional demand elasticity analysis may be difficult to apply in online markets. This is due to the similar cost structures of different Internet platform companies and the relative ease of cross-border expansion.

- Third, digital sectors are highly dynamic. Digital sectors are technological and creative. In other words, innovation is a key parameter of competition. This notion of "innovation" includes both technological and business model innovation. For example, Pinduoduo innovates in terms of supplying China's vast "expanding markets" (the third-tier and below cities and rural areas in China). In as little as three years, it has become, in terms of size, a platform comparable to JD.com and also an important rival of Alibaba.[5] Because of the cross-border attributes of the "digital economy," basing antitrust analysis on market shares (as in traditional sectors) is controversial. On the one hand, it is difficult to define relevant markets in digital sectors. On the other hand, even if some companies have a higher market share in particular segments (and would therefore met the normal legal standard for "dominance"), competition has not necessarily been weakened in practice. In fact, it may have become much fiercer than in traditional industries. Under such circumstances, ease of entry becomes a crucial factor in assessing a given company's market strength.

- Fourth, market structures in digital sectors tend to be in oligopolistic. Driven by network effects and the use of big data, oligopolistic market patterns often appear in certain segments. For instance, China has WeChat in the instant messaging field, Meituan and Eleme in the take-out service field, Alipay and WeChat Pay in the electronic payment market, and Baidu in the search engine market. Network effects are often significant in bilateral or multilateral markets, where consumers, merchants and other players are prone to being controlled by the leading platform operators, making these companies even stronger.

- Fifth, data has become one of the most important competitive resources in the "digital economy." On the one hand, through the collection, research and application of big data, enterprises can analyze user preferences and make user portraits, so as to accurately promote their products and improve consumer satisfaction. In addition, with the help of big data, they can also expand their presence to neighboring markets and form a virtuous circle, thus consolidating and strengthening their presence in both the original and new markets. As companies continuously study and analyze a large amount of user data in depth, with the they can grasp information such as user preferences, consumption needs, consumption habits, and consumption levels, and launch, in a timely manner, customized products, place targeted advertisements and innovate in business models. This informational advantage will have a disruptive impact on business models and it can be expected that big data will become the core and most fundamental means of production for operators in the "digital economy."

B. Impact of the "Digital Economy" on Competition

The essence of competition between players in the "digital economy" can be summed up in terms of two key considerations. One is to determine the target group, business model and resource allocation pattern (often based on big data) used by a given player. The other is how a given player realizes its cross-border trade and "network ecosystem." With the continuous growth in scale of the of digital sector, there is a view that platforms are in essence monopolies, due to their use of data.

1. Data Competition

Big data must be assessed in terms of the "6 Vs," namely their volume, velocity, variety, value, veracity, and validation. The mainstream view is that data exhibit the attributes required to be subject to civil rights rules, and can also be classified as intangible property.[6] Intangible assets are characterized by their replicability and low marginal cost. So, are data exclusive? This question is controversial in academic discussions.

Data have now become "resources" in competition analysis, i.e. a key input. In the background of increasingly fierce competition in data-driven industries, competition between operators for the acquisition and utilization of data is becoming more and more intensive. In view of this, some think that data should be considered to be an "essential facility." Competition in and disputes over online data continuously emerge, in cases such as Sina Weibo versus maimai.cn in 2015, Dianping.com versus Baidu in 2016, coomix.com versus chelaile.net.cn in 2017, Taobao versus Meijing Group in 2017, Tencent versus Douyin and duoshanapp.com and Douyin versus shuabaola.cn in 2019.

5 Https://zhuanlan.zhihu.com/p/93384573, On October 24, 2019, Pinduoduo shares raised 12.56 percent to close at USD 39.96 per share and once surpassed JD.com in market value.

6 See CHENG Xiao: *On Personal Data Rights in the Big Data Era*, *Social Sciences in China*, Issue 9, 2016.

2. Ecosystem Competition

The modern Internet revolution has led to new economic and social developments. In the economic field, the "digital economy" has brought about new business models and organizational structures, and has created a large number of new industries, such as take-out, online ride-hailing, home stay, social networking, and e-commerce platforms. So-called "platforms" are designed to mediate the exchange of information between two or more parties in order to optimize the allocation of resources. As such, are platforms "neutral," or do they have the characteristics of a "public good"? Should affiliated companies be protected?

From a practical point of view, competition among leading players is not limited to specific segments. Rather, platform-based companies compete with each other across segments, and display the characteristics of a "network ecology." Examples include Taobao versus ebay, JD.com, Pinduoduo, Vipshop and Galanz; JD.com versus Tmall and dangdang.com; Didi versus Kuaidi and Uber. The services provided by digital platform operators are multifarious and address various user groups. Due to network effects, low marginal costs, and economies of scale, monopolies and oligopolies may be intensified and promoted. On the other hand, the centralization of data achieved through network effects and economies of scale may be to the advantage of users. Digital platform operators build their data-based business models through the accumulation and use of data. By further accelerating their accumulation and utilization of data, a cycle may be created to maintain and enhance their competitive advantages.

III. THE PATH FOR ANTITRUST REGULATION IN THE "DIGITAL ECONOMY"

The "digital economy" has the potential to greatly improve efficient of resource allocation, but it also carries the risk of restricting competition. Specifically, it not only changes the way in which companies compete, but also poses challenges to legal rules and their implementation. The influence of the digital economy on the AML is reflective of a worldwide problem, and also a common concern in major jurisdictions throughout world. Competition law enforcement agencies in the EU,[7] the United States,[8] Germany, Japan and other jurisdictions, as well as the OECD, the ICN and other organizations and research institutions, have launched investigations and published a series of research reports on the digital economy in recent years. The EU, the United States, Germany, etc. have raised their concerns about big-tech companies, such as Google, Facebook, Amazon, and Apple.

A. Chinese Rules for the Regulation of the Digital Economy

In China, the digital economy is supported by two fulcra, namely big data and online platforms. Competition problems arise in the following main forms: (1) Exclusivity conduct in search engines: (i.e. search companies ask content providers for exclusive supply of information); (2) Exclusive transactions by e-commerce platforms (i.e. e-commerce platforms require merchants not to trade with specific operators); (3) MFN (Most Favored Nation) clauses in platform transactions; (4) "swindling" practices relating to big data (i.e. applying different trading conditions to specific counterparties, often in the form of price discrimination); and (5) The price leadership of operators in certain market segments.

Under the current legal framework, there are three laws that regulate these questions.

1. The E-commerce Law and the AML

The E-commerce Law ("ECL") was formally implemented on January 1, 2019, with the purpose of regulating and protecting the rights and interests of parties involved in e-commerce. Article 35 stipulates the rules for platform operators: "E-commerce platform operators shall not use service agreements, trading rules, technology and other means to unreasonably restrict or attach unreasonable conditions to the operators' transactions within the platform, the trading prices and their transactions with other operators, or charge unreasonable fees to the operators within the platform." The players involved in an Internet platform are generally placed in three categories: P2P (platform to platform), P2B (platform to business), and P2C (platform to consumer).

The law's main aim is to prevent the improper use of a platform's advantages to harm the interests of merchants. But it does not concern the relationship between platforms themselves. As a matter of fact, of the above five issues, the first three involve the content of agreements between platforms and the merchants. The fundamental concern is that platforms may use their dominant positions to weaken the competitiveness of rival platforms through exclusive transactions with downstream merchants. Therefore, this clause is not applicable.

7 The European Commission released a research report entitled *Challenges to Competition Policy in the Digital Economy* in July 2015; it launched a survey on the e-commerce industry in May 2015, covering online sales of daily necessities and online distribution of digital content. The final report of the survey was released in May 2017.

8 The United States also expressed its concern about potential algorithmic cartel behavior in its comments on the OECD report on algorithms and collusion in May 2017.

2. Unfair Competition Rules and the AML

Cases concerning disputes over data competition have so far been tried under the framework of the Anti-Unfair Competition Law ("AUCL"), without the application of the AML. Regulation of unfair competition is carried out in two ways, namely applying the rule against infringing on trade secrets[9] and the general clause.[10] One of the major controversies is whether data are in fact "trade secrets." According to Article 9 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases of Unfair Competition, trade secrets are defined as "trade information not known to the public." The dispute in academic discussions is whether, if given data exist in the public domain, whether a dataset formed by their can be regarded as a "secret." Relevant cases include Sina Weibo versus maimai.cn,[11] Tencent versus Douyin and duoshanapp.com,[12] and Dianping.com versus Baidu.[13] User data existed in the public domain, and even though the platforms did not take any technical measures to block web crawling and other data acquisition, third parties still needed to spend time and money to acquiring "big data" by technical means, and to classify and screen that data to produce usable datasets. Therefore, some big datasets can be considered to be "secret" for the purposes of the AUCL.

The right to data is confirmed in all of the above cases. That is, given the efforts required to collect and process information, big data can be considered to be confidential and of economic value. Therefore, legal relief can be available for improper use of data. The AUCL and the AML pursue different goals, apply to different scenarios, and employ different means of protection. On the premise that such rights exist, is behavior prohibiting use of data by other operators in compliance with the law? To take another example, "swindling" through the use of "big data" is a commonly alleged abuse, but such harm to consumers cannot be solved through the AUCL.

B. Basic Principles of Antitrust Regulation in the Digital Economy

1. Modest and Restrained use of the AML

In digital sectors, the key trading partners are typically the "triangle" of platforms, consumers and merchants. Only when the three parties have balanced market strength can this triangle be stable, and can the market develop in an orderly and healthy manner. Each of the three parties has different roles in market, different relative strengths, and different means of relief open to them. The legal rules are subject to a hierarchy. As a "constitution-like" law governing economic regulation, the AML is the last line of defense to solve any alleged market failure. Therefore, priority should be given to more targeted rules.

Specifically, in P2C and B2C relationships, consumers are in a weak position in the absence of collective action. For the moment, even if a platform or merchant is in a dominant position, priority must be given to the application of the Contract Law and the Law on the Protection of Consumer Rights and Interests. In a P2B relationship, if an alleged illegal act ultimately affects the rights and obligations of the two parties, the ECL should in principle apply.

2. Application of the AML

Different laws protect different interests, and the legislative purpose of the AML is to maintain unrestricted competition. If there is a competition dispute between operators, it is necessary to look at the individual case to determine which rule to apply. Article 22 of the ECL stipulates that "e-commerce operators who are with market dominance because of their technological advantages, the number of users, their power to control related industries and the degree of dependence of other operators on them in transactions shall not abuse their market dominance to exclude or restrict competition." For e-commerce operators that intend to abuse their market dominance, transactions between equal market players (which is beyond the scope of the ECL), should be governed by the AML.

9 Article 9 of the Anti-Unfair Competition Law.

10 Article 2 of the Anti-Unfair Competition Law.

11 (2016) J. 73 M.Z. No. 588 Second Instance Civil Judgment.

12 (2019) J. 0116 M.C. No. 2091 Civil Judgment.

13 (2015) P.M.S. (Z.) C.Z. No. 528.

In addition, when it is necessary to restore competition in specific cases, the AML prevails and cannot be replaced by the AUCL. For example, in 2018, the Haiyan County Administration for Industry and Commerce in Jiaxing, Zhejiang Province investigated and dealt with the first case of unfair competition using technological means in China.[14] Specifically, in order to maintain their market share, Jiaxing Dongdongguai Network Technology Co. and Shanghai Youang Investment Co. resorted to improper technical means to narrow the delivery area of merchants on their platforms or set the merchants' delivery area to "no man's land," thus forcing them to close down or stop operation on the "Shandianxiaoge" platform. Doubts about the case lie in that the two companies involved are technically supported by Meituan and Eleme and have no competitive relationship with "Shandianxiaoge" as a take-out platform. As such, how can one characterize their use of improper technical measures as a means "to maintain their market share"? The response is that, as instructed by Meituan and Eleme respectively, or in order to maintain the market share of Meituan and Eleme in Haiyan, and so as to maintain their own market share, Dongdongguai and Youang modified the delivery settings of specific merchants to prohibit them from trading with "Shandianxiaoge." In the former case, it is a typical exclusive transaction and it is improper to apply the AUCL.

IV. AMENDMENT OF THE AML IN RESPONSE TO DIGITAL COMPETITON

When China adopted the AML in 2008, its Internet economy was not as developed as it is today. China's Internet platform economy has entered a new stage of development now, with fundamentally different technologies, a different social basis, and different modes of development. The development of the Internet is characterized by rapidness, iteration and high-frequency innovation. Specifically, such progress includes the development of cloud services, big data, improvements in computing power, and the evolution of algorithms. In this context, regulatory concepts, ideas and technical means need to keep abreast of the times.

A. Digital Competition and Anticompetitive Agreements

1. Horizontal Collusion

In the online world, collusion between operators, such as algorithmic collusion, is more technology-based, secretive, and therefore more difficult to prove than in traditional fields. Although once considered as a way to solve information asymmetry and increase social transparency, big data may also facilitate the development and running of anti-competitive algorithms. As such, it may become the prime tool used by data owners to cause consumer harm. If companies in a competitive relationship agree to use a specific pricing algorithm, this collusive behavior is more difficult to identify than traditional pricing agreements between operators.

2. Collaborative Acts

Collaborative acts refer to acts of coordination between operators, in the absence of a clear agreement or decision.[15] The identification of collaborative acts is difficult. In American Law there are concepts of "conscious parallel acts" and "implied collusion." Article 13 of China's AML 2008 sets out rules concerning "collaborative acts." However, in the past 11 years, this article has never been enforced publicly or in private litigation due to issues of proof. However, in the case of abnormal price increases of chlorpheniramine[16] and isoniazid,[17] the penalty decision mentioned an abuse of "collective dominance" in an attempt to identify collusion between operators in the absence of sufficient evidence. In transparent digital markets, where low-cost automatic monitoring is possible, along with high speed responses, collaboration between operators is more feasible, and may be more difficult to be detected and proved. From a rational perspective, the standard of proof in administrative law enforcement should therefore be lowered in this field.

14 Article 12 of the Anti-Unfair Competition Law: Operators shall not hinder or disrupt the normal operation of network products or services legally provided by other operators by influencing users' choices with technical means.

15 Paragraph 3 of Article 5 of the Interim Provisions on Prohibiting Monopoly Agreements.

16 Administrative Penalty Decisions of National Development and Reform Commission, [2017] No. 1 and 2.

17 Administrative Penalty Decisions of State Administration for Market Regulation, G.S.J.C. [2018] No. 21 and 22.

3. Hub-and-Spoke Conspiracies

The case of insurance companies in Loudi, Hunan[18] involves a typical hub-and-spoke conspiracy. In that case, 11 insurance companies in Loudi signed agreements with Ruite Insurance Brokerage Company to fix prices, boycott transactions, and divide regional markets. The case was filed by a local law enforcement authority and six insurance companies and trade associations were punished. No punishment was imposed on Ruite Company (which was in a pivotal position and regulated and supervised the implementation the agreements). According to the provisions of the AML on anticompetitive agreements, horizontal and vertical agreements should be distinguished from each other. In this case, Ruite Company and the insurance companies were not in a competitive relationship with each other, but rather in a vertical relationship. As such, this did not meet the main requirements for the finding of a horizontal monopoly agreement under the AML. However, this case was not an RPM (resale price maintenance) case by nature. This case illustrates the difficulty of applying the rules to a hub-and-spoke conspiracy.

In the digital economy, if operators share sensitive information, they can similarly engage in a conspiracy, with the platform as the "hub." More importantly, the platform may assist or even organize operators to reach agreements, by relying on its special position in transaction. Examples includes Apple's manipulation of the price of e-books in the European Union and the United States. In order to fix loopholes in the original legal rules, especially in response to illegal acts that are prone to occur on platforms, a proposed amendment to the AML would have prohibited operators from "organizing or helping other operators to reach monopoly agreements."

B. Determination of Dominance in the Digital Economy

1. The Three-Tier Determination of Market Dominance

The determination of market dominance is a very challenging technical issue under the AML. The proposed amendment adopts a progressive model: Paragraph 2 of Article 20 defines a position of market dominance as one held by an operator that has such a position in the relevant market that it can control prices, quantities or other trading conditions, or can hinder or affect other operators' ability to enter the relevant market. However, evaluating whether an operator has market dominance is mainly based on the factors set out in Article 21, and the market share presumption set out in Article 22. Therefore, the system of determining market dominance consists of the following three tiers, namely, (1) the substantive standard (Paragraph 2, Article 20), (3) the factors set out in Article 21, and (3) the presumptions set out in Article 22. Market share is an important indicator for the determination of market dominance. As for the determination of market shares, the Interim Provisions specify that in addition to the amount and volume of sales, there are also other indicators such as the amount of data gathered, which provides a basis for more scientific and effective determination of the market share of online operators.

2. Special Factors for Determination of Dominance Online

Article 21 sets out the factors for determining dominance, and its second paragraph sets out special considerations for determining the dominance of Internet operators. Compared with the provisions of Article 11 of the Interim Provisions,[19] only three factors, i.e. network effects, lock-in effects, and ability to gather and process relevant data, remain (and economies of scale are added). This rule pays specific attention to the characteristics of the digital economy, namely the effects of platform models and big data.

The differences between the two texts concerning the elements to be used to determine dominance does not mean that there has been a significant conceptual change. Under Chinese law, the AML takes priority over the Interim Provisions. The latter are administrative rules and regulations, namely documents for their administrative management of public bodies that apply within their scope of authority. For concepts such as "market dominance," the AML enforcement authority needs a specific, operable standard to make decisions. Such factors should be as detailed as possible, to help limit the discretion of law enforcement authorities and improve the transparency and predictability of law enforcement.

3. Dispute over the Supplementary Determination Standards

Experts have different opinions on whether it is necessary to set out specific considerations to determine the market power of Internet operators. Some hold that the existing analytical framework is sufficient to deal with problems in all fields, including the digital economy, and that the AML is not a special case. Others hold a completely opposite view, stating that if the above-mentioned considerations are specified, the importance, complexity and uniqueness of this field must be highlighted, and special attention must be paid to the need for enforcement in the digital economy.

18 http://news.ifeng.com/gundong/detail_2012_12/29/20653525_0.shtml.

19 See *supra* note 2.

In fact, some uncertainty in the interpretation of the AML is inevitable. First of all, the AML protects diverse interests. How are benefits to consumers to be measured objectively? Second, from a technical point of view, whether a certain act should be governed by a *per se* rule or under a rule of reason is a century-long debate. Third, effects-based analysis is difficult, and conclusions based on mere economic hypotheses are not always reliable. Specifically, in terms of legal liability, sometimes illegal gains cannot be accurately measured.

Specifically, with regard to the source of laws, China only has statutory rules, and does not recognize case law, which means that statutory law must necessarily be abstract and principle-oriented in order to be of universal application. Under such basic principles, it is unrealistic to find a "legal" means that would account for the complexity and variability of the digital economy. A viable option is to set out practical and targeted documents formulated by administrative law enforcement authorities and courts, such as guidelines and judicial interpretations.

C. Market Concentration

As a preventive means of market intervention, examination of market concentration is subject to specific special rules in the digital economy.

1. Increasing the Threshold for Examination

Due to the characteristics of the digital economy, big data are valuable, yet difficult to measure accurately. Sometimes when transaction data are rejected, there is no transaction volume for the relevant part of assets. Therefore, the expected income is often taken as the standard for security issuance and pricing. In the digital economy, the risk of "false negatives" is higher. In the examination of economic concentration, special regulations might also be needed, with the transaction value rather than the sales of the previous year as the threshold standard.

2. Data Blocking and Stifling Acquisitions

Generally speaking, the anti-competitive effects of vertical integration are not as obvious as those of horizontal concentration. However, in the digital economy, special attention should be paid to vertical mergers where there would be a risk that other downstream participants would suffer from lack of access to key data. Although the United States and the European Union hold different views on vertical theories of harm, both raise concerns about possible data monopolization. In addition, stifling acquisition could also damage innovation. As such, behavioral remedies may be an appropriate response.

As the most important factor of production in the "new" or "digital" economy, data flows are necessary to achieve efficiencies and to encourage innovation. As an intangible asset, data can flow across many domains. Due to the different state of development of various data-related industries, the United States, the European Union, and China have shown different approaches towards the digital economy. However, there is no doubt that there will continue to be a trend towards international cooperation in antitrust enforcement in the digital economy.

ENFORCEMENT OF THE AML IN CHINA'S DIGITAL ECONOMY – FROM THE PERSPECTIVE OF THE OVERALL REGULATORY ENVIRONMENT

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I. BACKGROUND

The digital economy has become the key driver of global economic growth. In 2018, the volume of China's digital economy reached CNY 31.3 trillion, accounting for 34.8 percent of GDP.[2] As of June 2019, there are as many as 854 million Chinese netizens (61.2 percent of China's population) and 847 million mobile netizens. 99.1 percent of Chinese netizens access the internet through cellphones. More specifically, the numbers of users of instant communications, internet news, online shopping, online takeaway, online payment, online video, online car hailing and online government services were as high as 825 million, 686 million, 639 million, 421 million, 633 million, 337 million, 339 million and 509 million respectively.[3]

The sound development of the digital economy requires effective market functioning. Since the enactment of the Anti-Monopoly Law of the P.R.C. ("AML") in 2007, the position of competition policy in China has consistently been promoted. The Decisions of the CPC Central Committee on Several Major Issues in Terms of Sticking to and Improving the Socialist System with Chinese Characteristics, Promoting the National Governance System and Modernizing Governance Ability, passed by the 4th Plenary Session of the 19th Central Committee of the Communist Party of China ("CPC") on 31st October 2019, reiterate the importance of *"strengthening the fundamental position of competition policy, implementing the fair competition review system, as well as enhancing and improving enforcement of the AML and the Anti-Unfair Competition Law of the P.R.C. ("AUCL")."*[4] The Guiding Opinions on Promoting the Normative and Sound Development of the Platform Economy ("Guiding Opinions"), released by the Office of the State Council in August 2018, make comprehensive provision for the development of the platform economy at the central government level for the first time.

The Guiding Opinions put forward proposals to investigate and punish abuses of dominant market positions that restrict competition, unfair competition, and other illegal conduct in the internet industry contrary to applicable laws and regulations. They emphasize the importance of prohibiting exclusive service provisions imposed by online platforms and set rules for regulating illegal pricing in the internet industry.[5] In October 2019, the State Council issued the Regulation on Improving Business Environment, stressing the importance of the creation of a market environment for fair competition.[6] During December 20-22, 2019, Mr. Yaqing Xiao, Director of the State Administration for Market Regulation ("SAMR"), the AML enforcement authority in China, conducted a survey of Alibaba, Pinduoduo, Meituan and other online platforms, underlining that:

> *supervision and regulation shall be conducted in accordance with laws and regulations; relevant rules shall be improved; a market-oriented, legalized and internationalized market environment shall be cultivated; while the healthy and orderly competition in the online market shall be promoted; so as to infuse the online market with more vigor and vitality and make consumers benefit more in this regard.*[7]

In order to fully understand how the AML is enforced in the digital economy, it is indispensable to have systematic knowledge of other related Chinese laws, and the regulatory system. In fact, besides the AML and the SAMR, other laws and regulations as well as other authorities, such as the AUCL, the E-Commerce Law of the P.R.C. ("E-Commerce Law"), the Cyber Security Law of the P.R.C. ("Cyber Security Law") as well as the Ministry of Industry and Information Technology ("MIIT") and the Cyberspace Administration of China ("CAC"), also materially affect the development of the competitive order in China's digital economy.

Section II briefly introduces the latest developments in AML enforcement in the digital economy in 2019, including the improvement of the relevant rules, administrative enforcement and judicial practice. Section III discusses some coordination issues, such as those between the AML and other branches of law, administrative anti-monopoly enforcement agencies and other supervision departments, as well as administrative enforcement and judicial practice. Section IV concludes with our proposals for promoting the application of the AML in China's digital economy.

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2 China Academy of Information and Communications, "White Paper on the Management of the Digital Economy," available at http://www.caict.ac.cn/kxyj/qwfb/bps/201912/t20191226_272660.htm.

3 Office of the Cyber Security and Information Committee of the CPC Central Committee & Cyber Space Administration of China, "The 44th Statistical Report on the Internet Development of China," available at http://www.cac.gov.cn/pdf/20190829/44.pdf.

4 Decisions of the CPC Central Committee on Several Major Issues in Terms of Sticking to and Improving the Socialist System with Chinese Characteristics, Promoting the National Governance System and Modernizing Governance Ability, available at http://www.gov.cn/zhengce/2019-11/05/content_5449023.htm.

5 Available at http://www.gov.cn/zhengce/content/2019-08/08/content_5419761.htm.

6 Available at http://www.gov.cn/zhengce/content/2019-10/23/content_5443963.htm?from=timeline.

7 Available at http://www.samr.gov.cn/xw/zj/201912/t20191222_309374.html.

II. PROGRESS OF AML-RELATED LEGISLATION & ENFORCEMENT IN THE DIGITAL ECONOMY

A. Perfection of Supporting Rules for the AML

The powers of the anti-monopoly departments affiliated with the National Development and Reform Commission, the Ministry of Commerce and the State Administration for Industry and Commerce were consolidated in the SAMR in 2018. In 2019, the SAMR revised a series of supporting departmental regulations for the AML, responding to new issues brought by the digital economy.

Against the backdrop of the digital economy, the challenges brought about by algorithmic collusion for the application of the AML include, but are not limited to, the validity of the traditional definition of anti-competitive agreements, and the increasing difficulty in proving their existence. In accordance with Article 13 AML, the term anti-competitive agreement refers to any *"agreement, decision or other concerted practice which eliminates or restricts competition."* In theory, "anti-competitive agreements" could be interpreted broadly, especially if one takes into account all "other concerted practices." Article 6 of the Interim Provisions on Prohibiting Anti-Competitive Agreements, released by the SAMR in June 2019, lists elements to be considered when identifying "other concerted practices," including:

> *1. whether there is any consistency among conducts of relevant undertakings; 2. whether relevant undertakings have communicated intention with each other or exchanged information; 3. whether relevant undertakings could provide reasonable explanation for the consistency; and 4. structure, competition status, changes and others of the market.*[8]

What's clear is that "communication of intention or exchange of information" is one of the pre-conditions. What is not clear, however, is whether "meeting of minds" achieved through algorithm qualifies as one as well.

It is also more difficult than ever before to prove the dominant market position of undertakings in the digital economy.[9] Article 11 of the Interim Provisions on Prohibiting Abuse of Dominant Market Position, published by the SAMR in June 2019, suggests elements to be taken into account when determining whether an undertaking from the internet or other nascent industries has a dominant market position, such as the characteristics of competition in the industry, business models, user volumes, network effects, lock-in effects, technical characteristics, market innovation, the ability to master and process relevant data, as well as the market power of undertaking(s) on related market(s).[10] Article 15 has also revised the predatory pricing rules, stating that "When identifying price under costs, emphasis shall be put on whether the price is below the average variable price. As for the free-of-charge model in the internet and other nascent industries, both free products and products in exchange for monetary payment shall be considered comprehensively."[11]

B. Administrative Enforcement

In August 2019, it was reported that Tencent Music Entertainment Group was investigated by the SAMR for signing anti-competitive exclusive copyright license agreements with record companies, such as Universal Music Group, Sony Music Entertainment and Warner Music Taiwan.[12] However, by the end of December 2019, no case was put on the official record.

With competition between online platforms in the internet era fiercer than ever before, exclusive agreements prohibiting merchants from selling on rival platforms (known as "either-or" agreements in Chinese media), have become common. "Either-or" agreements on online platforms have not only aroused great attention from all walks of life in China in recent years, but have also become one of the most hotly discussed topics in every circle. On November 5, 2019, the SAMR held an Administrative Guidance Symposium for Regulation of Online Business Activities in Hangzhou City, Zhejiang Province, calling for more than twenty online platforms to participate, including but not limited to JD.com, Kuaishou, Meituan, Pinduoduo, Suning, Alibaba, Yunji, and Vipshop.

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8 Available at http://gkml.samr.gov.cn/nsjg/fldj/201907/t20190725_305165.html.

9 Wei Han, Yajie Gao & Ai Deng, "Algorithmic Price Discrimination on Online Platforms and Antitrust Enforcement in China's Digital Economy," *the Antitrust Source*, August 2018.

10 Available at http://gkml.samr.gov.cn/nsjg/fldj/201907/t20190725_305166.html.

11 Available at http://gkml.samr.gov.cn/nsjg/fldj/201907/t20190725_305166.html.

12 Available at https://baijiahao.baidu.com/s?id=1641815998327601484&wfr=spider&for=pc.

The symposium identified key problems in recent online business activities (especially the most typical ones arising from intensive online promotion activities), and set out specific requirements for regulating network operation activities. The symposium explicitly discussed "either-or" clauses in the internet industry, and participants suspected that they breach the AML. The SAMR declared it would pay close attention to "either-or" agreements, and would investigate those that have not only triggered strong opposition from all sides, but also might constitute monopolization. Any abuses of dominance identified would be severely punished under the AML.[13] As of the end of December 2019, the SAMR had not yet released any information on any active case file in this regard.

C. Judicial Practice

In 2019, the most high-profile anti-monopoly litigation in China's digital economy was that initiated by JD.com against Tmall for an "either-or" clause. Based on media reports, JD.com observed that Tmall required its registered online merchants to exclusively sell on Tmall through signing "exclusive agreements," and other means, prohibiting them from selling on JD.com or participating in any promotional activities organized by the latter. In JD.com's opinion, Tmall had infringed its legitimate rights and interests. The court was requested to order Tmall to pay compensation of CNY 1 billion to JD.com. Tmall argued that its practices constituted normal and legal competition, while JD.com alleged that they were illegal.[14] During the procedure, Pinduoduo and Vipshop applied to the Beijing High People's Court to join the litigation as third parties without independent claims.[15] Article 56 of the Civil Procedure Law of the P.R.C. defined "third-party (without independent claim)" as "any third party participating in the proceedings of a case for the reason that the outcome of the case would affect the third party's legal rights and interests, even if having no independent claim to the subject matter of action between both parties." The case is still pending.

In parallel, Galanz Group ("Galanz") declared through its official Weibo account on November 5, 2019 that Guangzhou Intellectual Property ("IP") Court accepted its claim against Tmall for a suspected abuse of market dominance on November 4, 2019. The case was filed on October 28, 2019 and also concerned an "either-or" agreement. Around the time of the shopping festival of June 18, 2019, ever since Galanz began selling on the Pinduoduo platform, abnormalities could be found in search results for Galanz on Tmall from time to time, seriously affecting its normal sales activities.[16] This case is also pending.

It is also worth mentioning the litigation between Luckin Coffee and Starbucks, heard by Shenzhen Intermediate People's Court. Media reports from November 2019 indicated that the case was dropped by Luckin Coffee. In May 2018, Luckin Coffee published an open letter, complaining about Starbucks' practice of signing lease agreements with owners of urban high-end office buildings, which contained exclusive provisions, alleging that this constituted an abuse of dominance. In addition, multiple suppliers of Luckin Coffee were also forced by Starbucks to sign "either-or" agreements.[17]

Moreover, the IP tribunal affiliated with the Supreme People's Court of the P.R.C. ("SPC") heard the dispute between Wende Huang ("Huang"), a lawyer, and Didi Chuxing. In May 2018, the complainant hailed a taxi via Didi Chuxing to travel from JW Marriot Hotel Zhengzhou to Shangdu Road. The 4.2 km mileage cost Huang CNY 18.63. More specifically, the CNY 18.63 consisted of the base price (CNY 7), a mileage fee (CNY 3.63), a low-speed driving fee (CNY 2 for 4 minutes), and a temporary price increase (CNY 6).[18] In the complainant's opinion, the "temporary price increase" violated Article 17(1), which prohibits "selling commodities at unfairly high prices." In March 2019, the case was dismissed by Zhengzhou Intermediate People's Court.[19] Because of relevant judicial reforms,[20] the case was directly appealed to the IP tribunal of the SPC.[21] The case is still pending.

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13 Available at http://sc.people.com.cn/n2/2019/1106/c345167-33511117.html.

14 Available at https://www.thepaper.cn/newsDetail_forward_4831204.

15 Available at http://www.it-times.com.cn/a/hulianwang/2019/1105/30696.html.

16 Available at https://baijiahao.baidu.com/s?id=1649342087713438737&wfr=spider&for=pc.

17 Available at https://tech.qq.com/a/20191115/009427.htm.

18 Available at http://www.ccn.com.cn/html/henan/fangchanqiche/2018/0709/356648.html.

19 Available at http://www.myzaker.com/article/5d8b18da8e9f090a8d5f63a9/.

20 Decisions of the Standing Committee of the National People's Congress on Several Issues Concerning the Litigation Proceedings of Patent and Other Intellectual Property Rights Cases, enacted on October 26, 2018, available at https://www.chinacourt.org/article/detail/2018/10/id/3549380.shtml.

21 Available at https://www.sohu.com/a/342351749_742371.

III. REGULATORY ENVIRONMENT OF THE AML ENFORCEMENT IN CHINA'S DIGITAL ECONOMY

A. Coordination Between the AML and Other Laws

1. Coordination with the AUCL

The amendment of the AUCL was completed in 2017, deleting provisions on conduct that eliminate or restrict competition in the sense of the AML. Since then, the relationship between the AML and the AUCL has been better coordinated. It is worth mentioning that the legislative purposes of the AML and the AUCL partially intersect, such as protection of "fair competition."[22] In this regard, either the AML or the AUCL could be applied to certain market activities. The amended AUCL has a provision (Article 12) specifically targeting unfair competitive conduct in the internet industry. Article 12 of the AUCL prohibits broad range of activities undertaken by an undertaking via technical means which would obstruct or disrupt the normal operations of online products or services lawfully provided by other business operators through affecting users' choices or other means. For the reason of intersection in legislative purposes, with the AUCL also concerning regulation of competition on the market, undertakings concerned are free to choose between the AML and the AUCL in certain cases, such as the "either-or" discussed above in e-commerce.

Probably due to the excessively high burden of proof on the complainant in anti-monopoly litigation, especially market abuse cases, in recent years, the AUCL was more active than the AML in terms of enforcement in the digital economy. Article 2 of the AUCL, a general provision, was referred to the most by Chinese courts when hearing unfair competition cases. According to Article 2:

> *Business operators shall, when conducting production and business activities, abide by the principles of voluntariness, equality, fairness, honesty and good faith, comply with laws and adhere to commercial ethics. For the purpose of this Law, unfair competitive conduct refers to any conduct whereby a business operator violates this Law during the production and operating activities, thus disrupting the order of market competition and undermining the legitimate rights and interests of other business operators or consumers.*

Taking a hot issue in the digital economy, data scraping, as a typical example, theoretically speaking, data controller could file a case in accordance with the AUCL for suspicious unfair competition, while the counterparty could also initiate a litigation on the basis of the AML for refusal to deal (abuse of dominant market position). Accordingly, judgments on data competition made according to the AUCL might potentially affect the application of the AML. For example, in the 2019 *Sina v. Fanyou* dispute,[23] the Beijing Haidian District People's Court made clear the legitimate boundary of data scraping. Roadmap of recognition of unfairness of data scraping in unfair competition cases could provide kind of reference for that of refusal to deal (abuse of dominant market position) cases.

Furthermore, since both the AML and the AUCL were enacted to protect the legitimate rights and interests of multiple parties, including consumers, business operators and the society as a whole, specifically what welfare standard shall be counted on in certain cases determines how both laws shall be applied. In the *World Browser v. Tencent* case, the Beijing IP Court identified unfair competition from perspective of social welfare.[24] What's more, since both monopoly and unfair competition cases are heard by the same batch of judges from the IP courts, understanding of welfare standard in unfair competition cases might also exert influence on that in monopoly cases.

2. Coordination with the E-Commerce Law

The E-Commerce Law, effective as of January 1, 2019, also contains provision(s) in relation to anti-competitive conduct.[25] For example, Article 22 of the E-Commerce Law lists elements to be considered when determining whether an e-commerce business operator has abused a dominant market position, including but not limited to technological advantages, user volume, the ability to control related industries, and the dependence of other business operators on the e-commerce operator in terms of transactions. Besides, Article 35 of the E-Commerce Law prohibits e-commerce business operators from exploiting service agreements, transaction rules, technologies or other means to unreasonably restrict or set

22 Article 1 of the AML, "… protect fair competition on the market …"; Article 1 of the AUCL, "… encourage and protect fair competition …"

23 Available at https://baijiahao.baidu.com/s?id=1638547002789761047&wfr=spider&for=pc.

24 Available at http://www.sohu.com/a/287062165_161795.

25 Wei Han & Yajie Gao, "Promote Openness or Strengthen Protection? Application of Law to Data Competition in China," *CPI Antitrust Chronicle*, May 2018.

unreasonable conditions for registered merchants in terms of transactions, transaction prices and transactions with other business operators, or charge unreasonable fees to registered merchants. The connection between the AML and the E-Commerce Law mainly relates to the interpretation and application of Article 35 of the E-Commerce Law. What is most controversial, currently, is whether market dominance is one of the conditions for applying Article 35 of the E-Commerce Law, even if Article 35 itself does not require the existence of "dominance."

B. The Anti-Monopoly Enforcement Agency and Other Departments

The SAMR, newly established in 2018, is a comprehensive central department equipped with complex competences. Acting as a sub-division, the Anti-Monopoly Bureau ("AMB") must coordinate with other divisions affiliated with the SAMR in law enforcement in the digital economy. In this regard, the Price Supervision & Inspection and Anti-Unfair Competition Bureau ("PSIAUCB"), the Online Transaction Supervision and Management Division ("OTSMD"), as well as the Audit Bureau of Law Enforcement ("ABLE") are the most relevant. Taking the PSIAUCB as a typical example, it is also competent to enforce the Price Law of the P.R.C. ("Price Law"). Article 14(2) of the Price Law prohibits dumping commodities at prices below cost to foreclose other competitors or monopolize the market. It might intersect and/or contradict with Article 17(2) of the AML. In December 2019, it was reported that Xuebing Ma, a first-degree inspector from the ABLE, led a team consisting of civil servants from the AMB, the PSIAUCB and the OTSMD to conduct a survey of Vipshop. As regards "platform competition," "either-or," "exclusive dealing" and other problems in the online business activities, the research team gained a deeper understanding of both the undertaking's confusion in applying the E-Commerce Law, the AML and AUCL, and more details about relevant cases.[26]

Besides coordination among its internal divisions, the SAMR also has to cooperate with other departments from the central level in response to new problems arising from the digital economy, especially the MIIT and the CAC. For example, in order to tackle various prominent social issues, such as illegal collection of personal information, harassment, and infringement of user rights and interests, the MIIT initiated special rectification actions against apps that infringe on user rights and interests.[27] On December 19, 2019, the MIIT circulated a list of the first batch of apps having infringed user rights and interests, including Sina Sports, Sohu News, and Renren TV, all of which are very popular in China.[28] Acting as the leading enforcement department for the Cyber Security Law, the CAC has released series of supporting department regulations, such as the Provisions on Management of Blockchain Information Services[29] and the Provisions on Management of Online Information & Content Ecosystems[30] published in January 2019 and December 2019 respectively, which will exert substantive influence on the development of China's digital economy. Besides the competition order, business operations in the digital economy might also raise other regulatory concerns, which require cooperation between the SAMR and other central departments in certain cases, among which the MIIT and the CAC play a more proactive role.

C. Administrative Enforcement and Judicial Practice

Application of the AML used to be led by administrative enforcement, but Chinese people's courts are increasingly playing a more important role. It is worth noting that there was conflict between the administrative enforcement and judicial practice with respect to interpretation of certain provisions of the AML. Specifically, concerning resale price maintenance ("RPM"), which is prohibited by Article 14 AML, there was a conflict between the Chinese competition agency and the Chinese people's court with respect to whether "elimination or restriction of competition" must be proved. The contradiction was not resolved until the retrial of a case by the SPC in 2019. In this case, Hainan Yutai Science and Technology Fodder Co. appealed against the judgment at the second instance made by Hainan High People's Court. The SPC clarified for the first time that the administrative enforcement agency could make a finding of an anti-competitive agreement as long as relevant conduct was proved to have been undertaken, and does not have to prove the "elimination or restriction of competition." The SPC judgment effectively solved the long-term divergence between administrative enforcement agency and judicial bodies, and will go some way to reduce uncertainties in compliance.[31]

26 Available at http://www.zggpjz.com/domestic/5445.html.

27 Available at http://www.miit.gov.cn/n1146295/n1652858/n1652930/n3757020/c7506353/content.html?&tsrtawbnrcn.

28 Available at http://www.miit.gov.cn/n1146290/n1146402/n1146440/c7575066/content.html.

29 Available at http://www.cac.gov.cn/2019-01/10/c_1123971164.htm.

30 Available at http://www.cac.gov.cn/2019-12/20/c_1578375159509309.htm.

31 Available at http://www.tylaw.com.cn/CN/Index.aspx?Lan=CN&MenuID=00000000000000000001.

As regards anti-monopoly litigation in the digital economy, the most high-profile case is the abuse of dominance dispute between Qihoo 360 and Tencent heard by the SPC and won by Tencent.[32] This case was listed by the Approval Committee of the SPC as guiding case No. 78 in 2017. As summarized by the SPC, several take-aways are: 1. In anti-monopoly cases, the definition of the relevant market is usually an essential step for analysis. Nevertheless, whether the relevant market can in fact be clearly and explicitly defined depends on specific situations of the case. 2. The hypothetical monopoly test ("HMT") is a widely recognized method for market definition. In practice, the HMT can be carried out using either the SSNIP or SSNDQ methods. 3. Considering the characteristics of online instant communication services, such as low cost and high coverage, the relevant geographic market must be defined on the basis of a comprehensive assessment, looking at the actual territories in which users choose certain products, relevant laws and regulations, the existence of foreign competitors, and the promptness with which foreign competitors to enter the market, etc. In the internet sector, market share is only a preliminary and probably misleading indicator of market power. When determining the existence of a dominant position, the importance of market shares might be adapted when necessary.[33] It is undeniable that guiding cases listed by the SPC, including the analysis roadmap, could also exert profound influence over the administrative antitrust enforcement in the digital economy.

IV. OUR PROPOSALS FOR PUSHING FORWARD THE APPLICATION OF THE AML TO THE DIGITAL ECONOMY

A. Consolidate the Fundamental Status of the AML in the Digital Economy

The development of China's digital economy still bears prominent regulatory characteristics. Both the CAC and the MIIT play a critical role in regulating the digital economy. Except in limited special areas, such as cyber security, the development of China's digital economy should have been led by market competition, rather than the authorities' exercise of regulatory power. Accordingly, the fundamental role of the AML in the digital economy should be reflected in effective anti-monopoly enforcement, so as to enable free competition, and drive the sustainable development of China's digital economy. This would raise consciousness of the notion that the foundation for sustainable development of China's digital economy must be effectively functioning market competition, and the maintenance of market dynamics. In such circumstances, nascent undertakings would continue to be cultivated.

In more detail, the fundamental position of the AML in China's digital economy could be established in three ways: First and foremost, the "fair competition review system" should be sufficiently recognized, while side effects of industrial policy on market development should be avoided. In June 2016, the State Council released its Opinions on the Establishment of a Fair Competition Review System in Market System Construction, explicitly requiring all the government policies to be reviewed by the fair competition system as of July 1, 2016.[34] The fair competition review system is designed to regulate government behaviors, prevent policies or measures that would eliminate or restrict competition, and gradually remove rules that obstruct the unification of the national market and fair competition. In recent years, Chinese governments have strengthened the implementation of the fair competition review system, removing a series of government documents that restrict market competition, some of which directly concern the digital economy. For example, the Interim Measures on the Management of Online Car Hailing Companies of Foshan City were released by the People's Government of Foshan City, Guangdong Province, requiring the wheelbase of online cars to be no shorter than 2700mm. After implementation of the rules for a certain period of time, a market investigation and a subsequent assessment found that this rule had restricted competition to large extent, against one of the fair competition review standards – "setting unreasonable and discriminatory conditions for market entry and exit shall be prohibited."[35] In September 2017, the Work Plan for the Preparation of E-Commerce Platforms of Daqing City, Heilongjiang Province, was published, requiring the local authority to choose one e-commerce company to provide government subsidies to. The work plan has been repealed for breaching the review standard that "preferential treatment shall not be illegally provided to specific business operators."[36]

32 Available at http://www.lifanglaw.com/plus/view.php?aid=733.

33 Available at http://www.court.gov.cn/fabu-xiangqing-37612.html.

34 Available at http://www.gov.cn/zhengce/content/2016-06/14/content_5082066.htm.

35 Available at https://baijiahao.baidu.com/s?id=1624085782567199379&wfr=spider&for=pc.

36 Available at https://baijiahao.baidu.com/s?id=1624085782567199379&wfr=spider&for=pc.

Second, when dealing with interactions between different branches of laws concerning market regulation, the rationale behind the market mechanism reflected in the AML should be fully considered. Taking Article 35 of the E-Commerce Law as a typical example, if the prohibition were applied without considering the market power of relevant undertaking, it would neither comply with the law of market development nor be rational. As for the general provision of Article 2 of the AUCL, the Chinese people's courts should be cautious when applying it, so as to avoid over-interference with the market development and potential side effects triggered by judicial evaluation of business ethic in specific cases.

Last but not least, the independence of the AMB should be maintained, while improper interference by other regulatory authorities should be flagged. Currently, the AMB is a sub-division of the SAMR, an organization in which is hard to guarantee independent anti-monopoly enforcement. As mentioned above, anti-monopoly enforcement in the digital economy requires not only coordination between the AMB and other sub-divisions affiliated with the SAMR, but also coordination between the SAMR and other central regulatory departments in certain cases. The independence of anti-monopoly enforcement by the AMB is the key to ensuring free competition and hence the sustainable development of China's digital economy.

B. Apply the AML More Flexibly on a Case-by-Case Basis

As mentioned above, future administrative enforcement and judicial practice should not be excessively constrained by precedent cases, such as *Qihoo 360 v. Tencent*, one of the "guiding cases" listed by the SPC. The time, market environment, product and specific conduct in each case are different, particularly given the nascent mechanisms of the digital economy. Relevant antitrust theories of harm are also evolving against this background. Both the anti-monopoly agency and the people's courts are advised to handle disputes on a case-by-case basis, and to apply the AML flexibly. Moreover, due to the relatively recent enactment of the AML, both the administrative agency and judicial bodies have not yet accumulated sufficient knowledge in the field of antirust. This is especially the case for the Chinese judicial system. It is judges from the IP courts who are competent to hear anti-monopoly cases, but their education and work experience is primarily in IP law and civil law. In this regard, training in anti-monopoly law and economics should be strengthened.

C. Pay Due Attention to the Risks of "False Negatives"

The Government Report for the 2017 Two Sessions proposed speeding up the cultivation and strengthening of nascent industries. The need to encourage innovation, as well as the principles of tolerance and prudence must be adhered to when formulating rules to regulate emerging industries. Against this background, the Chinese authorities have reiterated the importance of "tolerant and prudent regulation" in the last few years, in response to various new business models in the digital economy.[37] In our opinion, this regulatory principle should not be understood dialectically. Any enforcement action should consider costs associated with over-enforcement. Nevertheless, costs associated with under-enforcement should not be ignored either. A cautious and prudent attitude towards monopolistic conduct in the digital economy does not mean no enforcement at all. When it comes to merger control, "mega mergers" in the digital economy, especially those that attract widespread social attention, should receive due attention. This is especially the case for concentrations involving online platforms with significant market power in certain vertical sectors, or those with excessively high transaction value. The competition authority is advised to pay relatively more attention to non-horizontal concentrations, in comparison to previous experience, given the existence of network effects, ecosystem strategies, cross-sector competition, and other characteristics of the digital economy. For certain concentrations under the notification threshold, which might impede effective competition on certain relevant markets, and have attracted significant social attention, the AMB is advised to exercise its residual power under Article 4 of the Provisions of the State Council on Notification Thresholds for Concentrations, and initiate investigation proactively.[38]

D. Development of the Digital Economy in the Amendment to the AML

In May 2019, the China University of Political Science and Law published a set of proposed amendments to the AML ("Amendment to the AML Suggested by Academic Experts"), drafted by relevant Chinese anti-monopoly scholars.[39] The Amendment to the AML Suggested by Academic Experts responds to the development of the digital economy. For example, Article 1 adds "encouragement of innovation" as a new legislative purpose of the AML. In reality, whether the new purpose should be added or not is still a controversial issue among both academics and practitioners.[40] As regards Article 13 (horizontal agreements), a sub-provision concerning protection of privacy is added. More specifically, competitors

37 Available at http://politics.people.com.cn/n1/2017/0718/c1001-29410740.html.

38 Wei Han & Yajie Gao, "Challenges and Prospects for Merger Control in China in the Digital Economy," *CPI Antitrust Chronicle*, March 2019.

39 Available at http://www.competitionlaw.cn/info/1138/26864.htm.

40 Available at http://www.mzyfz.com/cms/faxunkuaibao/xinwenkuaibao/zhengfadongtai/html/1049/2019-11-07/content-1409863.html.

are prohibited from entering into agreements that "fix or exchange quality conditions, such as the level of personal information protection." In addition, Article 15 introduces a legal basis for regulating "hub-and-spoke" cartels, providing that "Undertakings are prohibited from entering into anti-competitive agreement through algorithms or any other technical methods forbidden by this Chapter. Online platform operator is prohibited from organizing or coordinating registered business operators to reach ant-competitive agreement forbidden by this Chapter." Even if the Amendment to the AML Suggested by Academic Experts is only the result of certain Chinese anti-monopoly scholars' research, many of its provisions were met with huge controversy. How the AML should be amended to properly confront novel issues in the digital economy, such as platforms, data, algorithms, privacy, and innovation indeed deserves much attention from both the academics and practitioners.

On January 2, 2020, a draft amendment to the AML was released by the SAMR ("Amendment to the AML Released by the SAMR") to solicit public opinion until January 31, 2020.[41] It marks the initiation of the first official amendment to the AML since it came into effect in 2008. Similar to the Amendment to the AML Suggested by Academic Experts, the Amendment to the AML Released by the SAMR also adds "encouragement of innovation" to the legislative purposes of the AML. It is in line with the relevant principles put forward by the Chinese authorities to encourage the development of nascent industries. As for merger notification thresholds, the SAMR is entitled to set and/or adapt it in accordance with economic developments, industry scale and other elements, which leaves space for the introduction of a transaction-value-based notification threshold. This could screen out problematic concentrations in the digital economy more effectively. A sub-provision explicitly listing elements that help to identify whether an internet company has a dominant market position or not (including but not limited to network effects, economies of scale, lock-in effects, and the ability to process data) was added to Article 21. It corresponds with Article 11 of the Interim Provisions on Prohibiting Abuse of Dominant Market Position released by the SAMR in July 2019. Besides, "personal privacy" should be respected when enforcing the AML.[42]

E. Promote the Application of Digital Technologies in Enforcement

The development of the digital economy has brought changes to antitrust enforcement in almost all jurisdictions. Besides raising new problems with respect to identify anti-competitive conduct, and the design of remedies, data, algorithms, platforms and other elements have also created enforcement difficulties. As for China, its competition authority is also confronted with shortage of manpower, which is unlikely to be solved in the near future. Together with challenges brought about by the digital economy itself, the Chinese competition authority's ability to enforce anti-monopoly law faces significant challenges. In these circumstances, the use of science and technologies by enforcers could be a way out. This would also be in line with the Chinese authorities' encouragement of "intelligent administration," as emphasized in recent years. More specifically, "intelligent administration" was put forward in the Development Plan for the Next Generation of Artificial Intelligence ("Development Plan"), released by the State Council in 2017. The Development Plan proposes to develop an artificial intelligence platform suitable for government services and decision-making. It is also tasked with promoting the widespread application of artificial intelligence in performing complicated social research, policy assessment, risk prevention, emergency responses, and other important matters. It is worth noting that Chinese competition authorities, taking Quanzhou Fujian branch of the SAMR as a typical example, have used cloud algorithms, big data, and other technologies to support enforcement activities since 2019.[43]

It is also suggested that enforcers make better use of blockchain technology. As early as October 2019, the Political Bureau of the CPC Central Committee began to learn about both the *status quo* and future trends in blockchain technologies. President Jinping Xi pointed out that:

> *[t]he integrated application of blockchain technologies plays an essential role in technology innovation and industry evolution. We shall regard blockchain as an important breakthrough for the self-innovation of nuclear technologies. More capital and manpower shall be clearly invested so as to accelerate the growth of blockchain technologies and to promote the development of industry innovation.*[44]

41 Available at http://www.samr.gov.cn/hd/zjdc/202001/t20200102_310120.html.

42 Article 46, "The anti-monopoly law enforcement agency and relevant civil servants shall bear confidentiality obligation with respect to the business secrets and personal privacy obtained from the enforcement activities."

43 Available at http://www.gov.cn/zhengce/content/2017-07/20/content_5211996.htm; available at http://www.cicn.com.cn/2020-01/08/cms123059article.shtml.

44 Available at http://www.xinhuanet.com//2019-10/25/c_1125153665.htm.

Blockchain technologies have been applied in the Chinese judicial system, such as in the consolidation of evidence. Since electronic evidence is so easily falsified, the confidentiality and non-falsifiability of blockchain systems could make up for this deficiency. On September 7, 2018, the SPC released its Provisions on Several Issues Regarding Case Hearing by Internet Courts,[45] acknowledging the legal validity using blockchain for evidence collection and storage.

Besides the innovative judicial attempt noted above, the anti-monopoly agency could explore other areas for the use of blockchain technologies. For example, rather than structural remedies, behavioral remedies, such as standalone hold separate orders,[46] are favored in China. Blockchain technologies might be of use in the supervision and enforcement of behavioral remedies.

45 Available at http://courtapp.chinacourt.org/zixun-xiangqing-116981.html.

46 Han Wei, Yin Ranran & Zheng Xiong, "Standalone Hold Separate Orders as Remedies in Chinese Merger Control," *Wang Xiaoye: The Pioneer Of Competition Law In China - Liber Ami*corum, Concurrences 2019, pp 27-42.

AGENCY INVESTIGATION OF ABUSIVE CONDUCT IN CHINA: THE *EASTMAN* CASE

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I. INTRODUCTION

On April 16, 2019, the Shanghai Administration for Market Regulation (the "Shanghai AMR"), the local counterpart of China's State Administration for Market Regulation ("SAMR") made an administrative penalty decision against Eastman Chemical (China) Co. ("Eastman") for alleged abusive conduct, namely exclusive dealing.[2]

Eastman sells several coalescent and related products to coating manufacturers operating in mainland China, including Texanol CS-12 coalescent, TXIB plasticizer and OE300 CS-16. Coalescent is an important input for coating products. On August 16, 2017, the Shanghai AMR officially initiated its investigation against Eastman for suspected abuse of dominance, and concluded that from 2013 to 2015 Eastman held a dominant position in the relevant market for CS-12 coalescent in mainland China, and abused its dominance through exclusive agreements, with contractual clauses imposing minimum purchase requirements, a so-called "take-or-pay" policy, and Most Favored Nation ("MFN") requirements.

The Shanghai AMR's investigation encompassed Eastman's sales policies and the clauses and terms in Eastman's sales contracts and orders. According to the Shanghai AMR, these exclusive agreements caused Eastman's trading partners to purchase all or most of the CS-12 coalescent they needed from Eastman, which restricted trade between Eastman's trading partners and its competitors, and hampered competition in the relevant market. Eastman's conduct allegedly violated Article 17.1(4) of China's Anti-Monopoly Law ("AML"), according to which "a business operator that has market dominance is prohibited from…restricting trade counterparties from dealing exclusively with it or with business operators designated by it without legitimate reasons."[3] Therefore, the Shanghai AMR ordered Eastman to terminate its illegal conduct and imposed a fine of RMB 24,378,711.35 (approximately US$ 3.48 million), which amounted to 5 percent of Eastman's turnover in 2016. This short article provides a detailed analysis of the case, and some of our own opinions regarding the Shanghai AMR's ruling.

II. THE SHANGHAI AMR'S RULING

Eastman has been operating in China since 1994, and its China businesses covers coating additives and other functional materials such as Texanol CS-12, specialty materials, fibers, and chemical intermediates. Eastman has nine manufacturing bases, two sales offices and one technology center in China. China is one Eastman's most important markets, and its turnover in the Asia-Pacific region accounted for 25 percent of its world-wide revenue in 2018.[4]

A. Market Definition

The Shanghai AMR's decision defined a relevant market for the mainland China market of CS-12 coalescent alone. CS-12 is the most widely used coalescent for water-borne construction-related coating products, such as latex paint, real stone paint, colorful paint, etc., and is an essential raw material for many coating producers for use in film forming. Coalescent includes ester alcohol-based coalescent products such as CS-12 and CS-16, and non-ester alcohol based coalescents such as diisobutyl succinate and diisobutyl glutarate.

The Shanghai AMR analyzed substitution between CS-12 and non-ester alcohol based coalescents. From the demand side, it claimed that compared to non-ester alcohol based coalescents, CS-12 provides more comprehensive functionality, with good hydrolytic stability, and can meet various requirements for coatings for both indoor and outdoor uses. Further, CS-12 is less expensive than most of non-ester alcohol based coalescents, and coasting producers would be subject to high switching costs if they were to change coalescent type. From the supply side, new entrants into the CS-12 market face barriers to entry such as high capital and technology thresholds, difficulties in switching from producing non-ester alcohol based coalescents to producing CS-12, and a long market trial period. Therefore, the Shanghai AMR found that CS-12 and non-ester alcohol based coalescents were not close substitutes.

2 State Administration for Market Regulation, "State Administration for Market Regulation Issues Administrative Penalty Decision against Eastman for Abuse of Market Dominance, April 29, 2019, Chinese version available at http://www.samr.gov.cn/fldj/tzgg/xzcf/201904/t20190429_293241.html.

3 The Anti-Monopoly Law of the People's Republic of China, effective as of August 1, 2008, Chinese version available at http://www.gov.cn/flfg/2007-08/30/content_732591.htm.

4 Eastman, "About Eastman China," available at https://www.eastman.com.cn/Pages/Home.aspx, accessed on December 5, 2019.

Then, the Shanghai AMR analyzed possible substitution between CS-12 and CS-16, and concluded that they were not close substitutes from the demand side perspective due to differences in their overall functions, and coating producers on a given type of coalescent. However, CS-12 and CS-16 can be produced through the same production facilities, and are close substitutes from the supply side.

The authority further engaged in an econometric exercise to ascertain the correct market definition. It adopted a Critical Loss Analysis based on the Hypothetical Monopolist Test ("HMT") or SSNIP test to measure whether a small but significant and non-transitory increase in price would be profitable. Shanghai AMR used the formula below to calculate critical loss, and compared it with actual losses:

$$Critical\ Loss = \frac{x}{x + m}$$

In this formula, m is the gross margin of the target product, and x is the percentage price increase, which is normally 5 to 10 percent.

The Shanghai AMR reached the conclusion that if a hypothetical monopolist supplied all CS-12 from 2013 to 2016, a 5 to 10 percent price increase would be not only profitable, but also sustainable. Therefore, in the Shanghai AMR's view, CS-12 constituted a separate product market.

As (i) there are obvious trade barriers regarding CS-12; (ii) different environmental protection standards for coating products apply in various countries; and (iii) business operators in other jurisdictions do not have production bases or sales teams in China to support a stable and scaled sales channel, the Shanghai AMR defined a geographic market for mainland China only.

B. Dominance

Pursuant to China's AML, dominance is "a market position where a business operator has the ability to control the price or quantity of goods or other trade conditions in the relevant market or to impede or affect the entry of other business operators into the relevant market."[5] Accordingly, in its decision, the Shanghai AMR analyzed not only Eastman's market share, but also the competitive situation in the relevant market, Eastman's market power over CS-12 prices, Eastman's financial and technological advantages, coating producers' dependence on Eastman, and the high entry barriers in the relevant market.

From 2013 to 2015, there were only a few CS-12 producers in mainland China, including Eastman, Runtai Chemical Co. ("Runtai"), Dynamic Chemical Binhai Industry Co. ("Dynamic"), Daqing Tianyuan Chemical Co. ("Tianyuan"), etc. In China, CS-12 producers directly supply large-scale producers of water-borne construction-related coating products and emulsions which have stable demand and development potential ("direct sales clients"), and indirectly supply small-and-medium-sized coating and emulsion producers or distributors ("indirect sales clients") through authorized distributors. CS-12 producers mainly compete for direct sales clients, as they have stronger purchasing abilities and more stable demand. During the investigation period, Eastman essentially maintained a share above 50 percent in the relevant market. Eastman, Runtai and Dynamic jointly accounted for around 95 percent of the market. However, in the area of direct sales clients, Eastman had significantly more clients and larger direct purchase volumes than its domestic competitors, which indicated that Eastman had strong market power, and was not subject to obvious competition constraints from its competitors.

The Shanghai AMR further analyzed the price of Eastman's CS-12 product and found that it was higher than the average price in the CS-12 industry and the average price of other suppliers. Further, when the price of the main raw material for CS-12 ("iHBu") fluctuated, Eastman did not its CS-12 prices, but its competitors did under the similar circumstances.

As regards financial and technological advantages, Eastman had more stable supply capacity, more mature technologies, more reliable raw material supply, and better sales teams due to its earlier entry into the market and self-operated transportation pipelines for iHBu.

Coating producers usually engage in a one-to-two-year inspection period to determine their CS-12 supplier. Once a supplier is determined, coating producers do not switch suppliers frequently, in order to ensure product quality. Eastman established long-term relationships with major coating producers in mainland China before its competitors could, which led to coating producers being strongly dependent on Eastman's CS-12 products.

5 The Anti-Monopoly Law of the People's Republic of China, effective as of August 1, 2008, Chinese version available at http://www.gov.cn/flfg/2007-08/30/content_732591.htm.

According to the Shanghai AMR, Eastman's potential competitors face relatively high entry barriers, in terms of capital requirements, technology, environmental protection approvals, technology supports, etc. More importantly, Eastman could produce CS-12 with purity of over 98 percent, which was generally accepted by coating and emulsion producers, while most of its competitors were not capable of doing so at the time. Therefore, branded coating and emulsion producers preferred Eastman's CS-12 over its competitors' products.

In short, Shanghai AMR not only looked into Eastman's large share in the relevant market, but also analyzed the competitive situation, Eastman's advantages in terms of financial status and technological development, clients' dependence on Eastman's products, the entry barriers, etc. After comprehensively considering all these factors, the Shanghai AMR concluded that Eastman was dominant in the relevant market.

It is interesting to note that the Shanghai AMR looked into Eastman's performance in the sub-market for direct sales, and concluded that Eastman had strong market power in the overall relevant market covering both direct and indirect sales. This is an important signal that the anti-monopoly authority is paying more attention to sub-markets beyond the relevant market definition. If a business operator is not subject to competitive constraints in a sub-market, the authority can still raise competition concerns.

C. Abuse of Dominance

After investigating the case, the Shanghai AMR found that Eastman signed and implemented exclusive agreements with minimum purchase requirements and a "take-or-pay" clause ("take-or-pay agreements") with Chinese coating producers. In addition, Eastman signed and implemented exclusive agreements with MFN clauses, subject to a minimum purchase requirement.

From 2013 to 2015, Eastman signed long-term contracts with six direct sales clients, requiring them to meet minimum purchase quantity requirements with an agreed CS-12 price for the following two to three years. If the clients did not meet these minimum requirements, they could impose the following remedies such as: (a) placing purchase orders covering their purchase shortfall, with full payment within thirty days of the end of each contractual year (the "Remedy Period"); or (b) making full payment for such purchase shortfalls to Eastman within the Remedy Period. The minimum purchase quantity required in each of the six contracts accounted for more than 60 percent of each client's annual demands for CS-12, while for five of the six contracts, the percentage was 80 percent.

In 2013, Eastman Chemical Company signed a global framework purchase agreement with one of its clients and offered world-wide MFN treatment if clients purchased more than a certain percentage of its global demands for coalescent from Eastman Chemical Company from July 2013 to December 2016. Then, from 2013 to 2016, on behalf of Eastman, Qilu Eastman Specialty Chemical ("QESCL"), a joint venture between Eastman and Sinopec Qilu Petrochemical Co., signed and carried out sales incentive agreements with one of its clients, according to which the client would enjoy a certain percentage discount if it met an agreed purchase quantity. In this way, more than 75 percent of that client's CS-12 demands were locked in to Eastman.

The Shanghai AMR considered that the take-or-pay agreement and the MFN treatment jointly compelled clients to purchase most (if not all) of their CS-12 coalescent from Eastman, which restricted and harmed competition in the CS-12 market. According to the Shanghai AMR, the minimum purchase quantity requirements and the take-or-pay clause imposed a heavy obligation on Eastman's clients, as the minimum quantity accounted for a majority of their total demands. Given this lock-in effect, clients would have no incentive to turn to other suppliers. Meanwhile, the take-or-pay agreement exacerbated clients' potential liability for breaches of contract with Eastman, and in turn further enhanced the lock-in effect.

As far as the MFN clause was concerned, the Shanghai AMR noted that a world-wide MFN agreement would not necessarily have restrictive effects in certain geographic markets. However, the addendum agreement on discounts offered extra rebates based on the MFN price if the client could reach the required purchase quantity in certain geographic markets. In this way, Eastman locked-in more than 75 percent of clients' demands in mainland China.

Based on the analysis of Eastman's market power in the sub-market for direct sales, Shanghai AMR concluded that it was easier to lock in the demand of the direct sales clients (for whom most CS-12 suppliers compete), and that Eastman's exclusive dealing conduct had severe a lock-in effect in the relevant CS-12 market.

Aside from the lock-in effect due to the take-or-pay agreement, and the MFN treatment of direct sales clients, Eastman's conduct also indirectly eliminated and restricted competition for indirect sales clients such as distributors. As distributors had fragmented demand, Eastman's competitors could not attract enough demand, even if they offered lower prices, and were therefore passive in terms of price competition.

To assess anti-competitive effects, the Shanghai AMR adopted another economic tool, the Lerner Index, to evaluate Eastman's market power in CS-12. The Lerner Indexes of the CS-12 products sold by Eastman, Runtai and Dynamic were all increasing while Eastman engaged in its alleged anti-competitive conduct, and Eastman's Lerner Index was consistently higher than those of the others. However, when Eastman ceased the take-or-pay clause in 2017, the Lerner Indexes of the CS-12 products of those three companies decreased. These findings indicated that the take-or-pay clause, as well as the other exclusive agreements, had caused actual anti-competitive effects, i.e. they eliminated and restricted competition.

Eastman explained that the minimum purchase quantity requirement was a mechanism to reduce the risks of price and quantity volatility, and let both Eastman and its customers to plan procurement and production more efficiently, and that MFN clauses are a common practice in the raw material and chemical industries. The Shanghai AMR nevertheless considered that the quantity required in the minimum purchase clause was too high, and imposed significant obligations on Eastman's customers, and thus caused further anticompetitive effects. Moreover, the addendum agreement on discounts exacerbated these effects. Therefore, Eastman did not have legitimate reasons to implement the conduct described above.

III. ISSUES FOR FURTHER ACADEMIC DISCUSSION

This article does not seek to challenge the Shanghai AMR's decision. Indeed, we acknowledge that the economic analysis in the decision provides strong evidence for its conclusions. Moreover, it demonstrates the local antitrust agency's willingness to rely on external economic experts, mostly from highly recognized academic institutions in China. Nevertheless, there are several points where we beg to differ with the authority's conclusions, based on our intimate knowledge of the case. This section provides a brief discussion of these issues.

A. Market Definition

The Shanghai AMR used the narrowest possible market definition, i.e. for a single product, CS-12. To correctly define the relevant market, it is necessary to consider the fundamental function of CS-12, which belongs to the broad category of coalescents. Coalescents are a type of paint additive that serve a particular function. The addition of coalescents to water-borne coatings enables better film formation, and thus greatly improves overall paint performance in terms of substrate adhesion and surface durability. But several common types of coalescent serve the same purpose, including ester alcohols, esters, and glycol ethers. It is indeed true that the most widely used coalescent is CS-12, an ester alcohol-based coalescent product. There are also other coalescent types based on alternative chemical formulations, including OE300 (CS-16) and OE400 from Eastman, as well as similar products by other providers. They command slightly different price points for additional features such as low odor and reducing formulated cost by allowing substantial reductions in the amounts of associative thickeners required. Although the prices of the products above are slightly different, they compete in the same market. Based on our demand analysis, for coating producers, they are all considered to be coalescents, and are substitutable for each other. A decision to substitute is usually driven by downstream consumers' demand for coating products, and this type of decision can be made and implemented quite easily. Therefore, we are concerned that the definition of a relevant market for CS-12 only was overly narrow.

B. Economic Analysis of Dominance

When assessing Eastman's alleged dominance, the Shanghai AMR considered several factors including market shares, control over the price of the relevant product, superior financial and technological conditions, other operators' reliance on Eastman's CS-12 product, and entry barriers.

From our point of view, even on a narrowly-defined CS-12 relevant market, an alternative way to look into Eastman's market position could be based on an analysis of concentrated buyer power. If the buyers, i.e. the coating producers, have bargaining power or are free to reject unsatisfactory trading conditions, the market would be more competitive than it would initially be perceived. Therefore, an investigation into the trading history between Eastman and its buyers and an evaluation the facts and evidence as to whether buyers turned down or refused the trading conditions at issue would be necessary.

Another factor worthy of consideration in analyzing market competition is the presence of new entrants. There has been active entry to the CS-12 market. Eastman's major competitors (Runtai and Dynamic) started their CS-12 businesses in 2012, while Puyang Hongye Hitech Co. entered the CS-12 market in 2016. This pattern of active entry indicates that the market was probably more competitive than the agency concluded, and the incumbents, including Eastman, have been facing credible competition from potential entrants over time.

C. Minimum Purchase Requirements and Take-or-pay Clauses in Long-term Contracts

Long-term supply contracts are often used in business dealings. They are a tool used by many large-scale industrial companies in various industries to develop reliable partnerships with their suppliers or clients in order to ensure reliable supply of high-quality materials, as well as an instrument to hedge risks due to price fluctuations. Transaction cost theory suggests that long-term relationships are important in the presence of relationship specific investments ("RSIs"), which also suggests that a long-term contract that specifies the terms and the conditions reduces the potential for an *ex post* hold-up problem.[6] Porteous et al. suggest that offering suppliers long-term contracts and investments can be a potential solution to incentivize suppliers to commit to sustainable practices.[7] Long-term contracts are also designed to manage risk and uncertainty by allocating resources and risk, which minimizes the variability of profits realized on spot sales and the exposure to more volatile real-time market price fluctuations.[8]

A minimum purchase requirement is normally associated with long-term contracts, which provide insurance for both buyers and sellers. It is a common practice in business. It is the most "flexible" commitment for the buyers, which requires them to specify a total minimum quantity to be purchased over the planning period. The buyer guarantees this minimum purchase quantity, and in return, the supplier provides a price discount. Minimum purchase requirements serve as the standard contractual vehicle when buyers and sellers negotiate for large quantities of products.

Take-or-pay clauses are also common practice in the petrochemical industry, as it is uniquely characterized by long-term production planning cycles. Fundamentally, such clauses prescribe a remedial solution intended to protect the seller's interests in the event of the buyer's breach of contract. Whether this is a violation of the Anti-Monopoly Law or merely a contractual matter deserves further analysis and justification.

IV. CONCLUSION

In this paper, we analyzed the recent investigation into Eastman, and find that China's anti-monopoly authorities are now navigating into finding anti-competitive effects in industries with mixed and complicated conducts. The Shanghai AMR's investigation and analysis was thorough and solid, but we also note some additional issues worthy of further academic discussion, and raise some questions for the further debate. There are several additional factors that could have been taken into consideration when analyzing Eastman's alleged market dominance and the alleged anti-competitive effects of its conduct.

6 Klein, B., Crawford, R. & Alchian, A., 1978, "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process," *Journal of Law and Economics* 21, 297-326; Williamson, O., 1979, "Transaction-Cost Economics: The Governance of Contractual Relations," *Journal of Law and Economics* 22, 233-261; Williamson, O., 1985, "The Economic Institutions of Capitalism," *New York Free Press*, New York; Grossman, S. & Hart, O., 1986, "The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration," *Journal of Political Economy* 94, 691-719; Hart, O. & Moore, J., 1990, "Property Rights and the Nature of the Firm," *Journal of Political Economy* 98, 1119-1158.

7 Porteous, A.H. & S.V. Rammohan, H.L. Lee, "Carrots or sticks? Improving social and environmental compliance at suppliers through incentives and penalties," *Production and Operations Management*. 24(9) 1402-1413, 2015.

8 Anna Creti & Federica Manca, Mandatory Electricity Contracts as Competitive Device, May 16, 2005, available as at http://idei.fr/sites/default/files/medias/doc/conf/eem/com/creti_manca.pdf.

HIGH-PROFILE MERGER FILINGS IN 2019: AN ANALYSIS OF CONDITIONALLY APPROVED CONCENTRATIONS

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I. OVERVIEW

For high-profile mergers which may cause anti-competitive effects, according to Article 29 of the Anti-Monopoly Law of the People's Republic of China ("AML"),[2] "restrictive conditions" (or remedies) can be imposed by the competition authority to reduce potential anti-competitive effects.[3] Such decisions are typically called "conditional approvals."

According to Article 3 of the Provisions on Imposing Restrictive Conditions on the Concentration of Undertakings (for Trial Implementation) (the "Remedy Provisions"), three types of remedies can be imposed to address potential adverse impacts on competition: (i) structural remedies, i.e. divestiture of tangible or intangible assets, or relevant interests or rights; (ii) behavioral remedies, i.e. opening networks or platforms, licensing key technologies (including patents, preparatory technologies or other intellectual property), or terminating exclusive agreements; and (iii) hybrid remedies, i.e. a combination of structural and behavioral remedies.

According to the official website of the Anti-Monopoly Bureau of the State Administration for Market Regulation ("AMB"), in 2019, there were five cases that were conditionally approved by the AMB, which increases the total number of conditionally approved cases in China to forty-four as of the end of 2019.

II. KEY LEGISLATIVE DEVELOPMENTS

In terms of legislation, some new developments concerning the merger control should be noted, especially those in relation to conditional approvals. Specifically, on January 2, 2020, the State Administration for Market Regulation of People's Republic of China ("SAMR") released a draft amendment to the AML to solicit public comments (the "Draft AML Amendment"). Among the key proposed changes, there is a "stop-the-clock" clause. Article 30 would add new stop-the-clock rules by setting out three scenarios in which the passage of time would not count towards the review period. These three scenarios reflect practical necessities: the clock can stop (i) "upon application or consent by the notifying parties"; (ii) where "supplementary submission of documents and materials " are required; and (iii) to facilitate "consultation in relation to proposals for restrictive conditions." This could be a solution to the common issue whereby notifications are withdrawn and refiled in conditionally approved cases, where the statutory review period is usually not adequate for the SAMR and the notifying parties to negotiate remedies and for the SAMR to reach a final decision. However, more detailed criteria in this regard are required to prevent the stop-the-clock period from being extended indefinitely, which could increase legal uncertainty.

Another newly released draft regulation is the Interim Provisions on Review of Concentration of Undertakings (Exposure Draft) (the "Interim Provisions"). According to its Article 47, the divesting party must make a proposal to divest to a specific buyer, and the SAMR is allowed to require in its conditional approval decision that the divesting party not implement the concentration before the completion of the divestiture. In addition, Article 50 of the Interim Provisions provides that the SAMR must specify in the conditional approval decision whether the notifying party is required to engage a trustee, and set out any applicable procedures.

2 See Standing Committee of the National People's Congress, *Anti-Monopoly Law of the People's Republic of China (中华人民共和国反垄断法)* (Adopted on August 30, 2007, entered into force on August 1, 2008).

3 *Ibid.* Article 29. Since April 2018, the newly-establisehd State Administration for Market Regulation of the P.R.C. ("SAMR") is responsbile for merger review rather than the Ministry of Commerce of the P.R.C. ("MOFCOM").

III. AN ANALYSIS OF AMB'S CONDITIONAL APPROVALS IN 2019

In 2019, there were five merger enforcement decisions resulting in conditional approvals, namely *KLA-Tencor/Orbotech*,[4] *Cargotec/TTS*,[5] *II-VI Finisar*,[6] *Garden Bio DSM*[7] and *Novelis Aleris*.[8] Pure behavioral remedies were used in four of these (in which a hold-separate remedy was imposed in three), hybrid remedies (a combination of both divestitures and behavioral remedies) were used in one, while pure structural remedies (normally in form of divestures) were not used alone in any. Please refer to Table 1 below for a summary of the five conditionally approved cases.

Table 1: Summary of Five Conditional Approvals in China in 2019

Approved Date	Case Name	Type of Concentration	Remedies	Approval stage	Notifications in the U.S. and the EU?
Feb. 13, 2019	*KLA-Tencor / Orbotech*	Acquisition	Behavioral remedies	Withdraw and re-file; Approved in Phase II	Notified and approved without Conditions
Jul. 5, 2019	*Cargotec / TTS*	Acquisition	Behavioral remedies (hold-separate)	Withdraw and re-file; Approved in Phase III	Notified and approved without Conditions by German Federal Cartel Office
Sept. 18, 2019	*II-VI / Finisar*	Acquisition	Behavioral remedies (hold-separate)	Withdraw and re-file; Approved in Phase I	Notified and approved without Conditions
Oct. 16, 2019	*Garden Bio / DSM*	Joint Venture	Behavioral remedies (hold-separate)	Withdraw and re-file; Approved in Phase III	Notified and approved by Austrian FCA
Dec. 20, 2019	*Novelis / Aleris*	Acquisition	Hybrid remedies	Initiation under simplified procedure and then revoked and re-filed as a normal case; Withdraw and re-file twice; Approved in Phase I	Notified and approved with conditions

This table again demonstrates the long-lasting impression that the AMB prefers behavioral to pure structural remedies, which differs from the practice of its counterparts in the United States and the EU Commission. In addition, 2019 saw an increase in the use of hold-separate remedies. To sum up, with the five new conditional approvals, from 2008 to 2019, the number of cases in which pure behavioral remedies were used increased to 21, accounting for 47.7 percent of the 44 cases, which increased by 4.1 percent compared with 2018. Pure structural remedies and hybrid remedies were used in 11 and 12 cases, respectively. In other words, behavioral remedies were applied in 33 cases, representing 75 percent of all the conditionally approved cases in China.

4 See SAMR Official Websites, *SAMR Public Notice of the Conditional Approval regarding the acquisition of shares of Orbotech Ltd. by KLA-Tencor Corporation* (February 13, 2019) http://gkml.samr.gov.cn/nsjg/xwxcs/201902/t20190220_290940.html.

5 See SAMR Official Websites, *SAMR Public Notice of the Conditional Approval regarding the acquisition of certain business of TTS Group ASA by CargotecOyj* (July 5, 2019) http://www.samr.gov.cn/fldj/tzgg/ftjpz/201907/t20190712_303428.html.

6 See SAMR Official Websites, *SAMR Public Notice of the Conditional Approval regarding the acquisition of shares of Finisar Corporation by II-VI Incorporated* (September 18, 2019) http://www.samr.gov.cn/fldj/tzgg/ftjpz/201909/t20190920_306948.html.

7 See SAMR Official Websites, *SAMR Public Notice of the Conditional Approval regarding the establishment of a joint venture by Garden Bio and DSM* (October 16, 2019) http://www.samr.gov.cn/fldj/tzgg/ftjpz/201910/t20191018_307455.html.

8 See SAMR Official Websites, *SAMR Public Notice of the Conditional Approval regarding the acquisition of shares of Aleris Corporation by Novelis Inc.* (December 20, 2019) http://www.samr.gov.cn/fldj/tzgg/ftjpz/201912/t20191220_309365.html.

Please refer to Table 2 below for a summary of remedy types used the 44 cases as of 2019 and a comparison with the statistics as of 2018.

Table 2: Types of Remedies in Conditional Approvals from 2008 to 2019

Types of remedies	Number (as of 2019)	Percentage (as of 2019)	Number (as of 2018)	Percentage (as of 2018)
Pure structural remedies	11	25.00%	11	28.2%
Pure structural remedies	21	47.7%	17	43.6%
Hybrid remedies	12	27.3%	11	28.2%
Total	**44**	**100%**	**39**	**100%**
Behavioral remedies included	33	75.0%	28	71.8%

Further analysis of the five conditional cases is provided below from both procedural and substantive perspectives.

A. Procedural Perspectives (including Comparison with 2018)

1. Timing of Conditional Approvals

Unsurprisingly, based on the published conditional approval decisions, in all five cases in 2019, the notifying parties experienced withdrawal and refiling, which made the review period longer than the theoretical statutory review period.[9] Please refer to Table 3 below, which illustrates the timeline of the review process for the five conditional approvals in 2019.

Table 3: Timeline of the review process for the 5 conditional approvals in 2019

Case Name	Timeline		Total Months (Approx.)
KLA/Orbotech	Apr. 28, 2018	Submission of the notification	11.5
	Dec. 18, 2018	Withdrawal	
	Dec. 20, 2018	Refile and initiated	
	Apr. 17, 2019	Conditionally approved	
Cargotec/TTS	Jun. 15, 2018	Submission of the notification	12.7
	Jan. 11, 2018	Withdrawal	
	Jan. 14, 2018	Refile and initiated	
	Jul. 5, 2019	Conditionally approved	
II-VI/Finisar	Dec. 29, 2018	Submission of the notification	8.6
	Aug. 14, 2019	Withdrawal	
	Aug. 20, 2019	Refile and initiated	
	Sep. 18, 2019	Conditionally approved	
Garden Bio/DSM	Apr. 12, 2018	Submission of the notification	18.1
	Oct. 24, 2018	Withdrawal	
	Dec. 21, 2018	Refile	
	Oct. 16, 2019	Conditionally approved	

9 According to the AML, the review period after case initiation can be divided into preliminary review period (lasting for 30 calendar days), further review period (lasting for 90 calendar days) and extended further review period (lasting for 60 calendar days).

Novelis/Aleris	Aug. 31, 2018	First-time Submission as a simplified case	15.6
	Oct. 26, 2018	Revocation of the simplified procedure	
	Nov. 1, 2018	Refile as a normal case	
	Dec. 13, 2018	Initiated as a normal case	
	Jun. 6, 2019	Withdrawal	
	Jun. 12, 2019	Refile	
	Dec. 20, 2019	Conditionally approved	
Average	N/A	N/A	13.3

There are two notable takeaways from Table 3:

- First, in *Garden Bio/DSM*, the period between withdrawal and refiling lasted almost 2 months, which is long compared with the period in other conditional approvals. For example, in *KLA/Orbotech*, it only took 2 days for withdrawal and refiling.

- Second, in *Novelis/Aleris*, the authority took a particularly long time (3.4 months) to determine whether to initiate the review process compared with the other four cases with conditional approvals. In *Novelis/Aleris*, the period between the first submission and its withdrawal as a "normal" case was extremely long (i.e. about 10 months). According to the decision, the *Novelis/Aleris* notification was initially filed as a "simplified" case on August 31, 2018 but this notification was refused by the authority. The case then was then re-filed as a "normal" case and the review period was formally initiated on December 13, 2018. *Novelis/Aleris* illustrates the importance of correctly assessing whether a case qualifies for simplified treatment before submission.

  Please see the more detailed timelines of the five conditional approvals in Table 4 below:

Table 4: Timeline of the Conditional Approvals

Case Name	Period between Submission and Initiation (Approx. Month)	Period between 1st Initiation and Approval (Approx. Month)
KLA/Orbotech	2.0	9.5
Cargotec/TTS	1.4	11.3
II-VI/Finisar	1.7	6.9
Garden Bio/DSM	0.7	17.5
Novelis/Aleris	3.4	17.5
Average	1.84	17.5

As illustrated by Table 4, the average period between submission and formal initiation is about 1.84 months, and the average period between initiation and approval is about 11.5 months. Therefore, it is notable that in general, in 2019, the entire period between submission and approval lasted about 13.3 months, while in 2018, the average time for reviewing the five conditional approvals was about 13 months after submission.

2. Submission and Approval of the Remedy Proposals in 2019

In practice, remedy proposals are usually offered after the authority indicates its competition concerns. There can be several rounds of negotiations before the remedy proposals are finally accepted. During the negotiations, in order to solve any competition concerns, the AMB may ask the parties to modify their remedy proposals, issue supplemental questions, and conduct market surveys, etc.

Based on the published decisions of the five conditional approvals in 2019, the following table summarizes the date of acceptance of the proposed remedy and the date of final approval for each case.

Table 5: Date for Accepting Remedy Proposal and Final Approvals

Case Name	Date for Accepting Remedy Proposal	Approval Date	Timing
KLA/Orbotech	Feb. 1, 2019	Feb. 13, 2019	12 days
Cargotec/TTS	Jun. 16, 2019	Jul. 5, 2019	19 days
II-VI/Finisar	Sep. 11, 2019	Sep. 18, 2019	7 days
Garden Bio/DSM	Oct. 11, 2019	Oct. 16, 2019	5 days
Novelis/Aleris	Nov. 26, 2019	Dec. 20, 2019	24 days
Average	-	-	13.4 days

Once the proposed remedies are finally accepted by the authority, the internal approval procedure follows. The supervisor(s) of the case handler will review the internal merger filing report and assessment prepared by the case handler before the written approval is finally signed and issued. As illustrated by Table 5, the internal approval procedure takes 13.4 days on average. Compared with the conditional approvals in 2018, cases in 2019 took less time to obtain approval decisions, from the submission of the final proposed remedies (by contrast, in 2018, this internal approval period could last for months). In this respect, it is fair to say that the authority's efficiency increased in 2019.

B. Substantive Perspectives

1. Related Industry

Each of the five conditional approval decisions concerns a different industry. However, industries relating to semiconductors (and the national economy) remained the AML's focus in 2019. Of the five conditional approvals in 2019, *KLA/Orbotech* and *II-VI/Finisar* are related to semiconductors, illustrating the importance that the antitrust authority attached to the semiconductor industry. Please refer to Table 6:

Table 6: Industry Concerned in the Conditional Approvals in 2019

Case Name	Industry Concerned
KLA/Orbotech	Semiconductor
Cargotec/TTS	Merchant Ship Handling Equipment
II-VI/Finisar	Semiconductor
Garden Bio/DSM	Vitamin, Cholesterol
Novelis/Aleris	Aluminum Sheet for Automobile

2. Types of Remedies

As to the types of remedies imposed in 2019, please refer to Table 7:

Table 7: Types of Remedies in 2019

Case Name	Types of Remedies
KLA/Orbotech	Behavioral
Cargotec/TTS	Behavioral (Hold Separate)
II-VI/Finisar	Behavioral (Hold Separate)
Garden Bio/DSM	VBehavioral (Hold Separate)
Novelis/Aleris	Structural + Behavioral

a. Structural Remedies

Unsurprisingly, the only type of structural remedy used by the authority is divesture, which seeks to eliminate competition concerns with respect to horizontal overlap(s). For example, in *Novelis/Aleris*, the parties had a horizontal overlap in aluminum inner and outer sheet plates for automotive bodies. Since the combination of Novelis and Aleris was deemed to raise competition concerns in those markets in which the parties were the top 1 and top 3 suppliers, respectively, the authority ordered the combined entity to divest the aluminum inner and outer sheet plates for automotive bodies business as a whole in the European Economic Area.

It is notable that in 2019 structural remedies were still not popular compared with behavioral remedies. All of the five conditional approvals in 2019 involved behavioral remedies (including *Novelis/Aleris*), which suggests that behavioral remedies ought to be to the forefront of notifying parties' minds when proposing solutions.

b. Behavioral Remedies

For more details of the behavioral remedies imposed in 2019, please refer to Table 8 below:

Table 8: Summary of behavioral remedies in 2019

Case Name	Relevant Market	Summary of Behavioral Remedies	Period of remedies
KLA/Orbotech	• Semiconductor processing control	• Maintaining the supply of semiconductor process control equipment and service to customers in China under FRAND terms • No tying or bundling • Protecting the information of customers in China (deposition and / or etching M manufacturing equipment suppliers)	5 years
Cargotec/TTS	• Hatch cover • Merchant ship ro-ro equipment • Merchant ship crane	• Hold-separate	2 years
		• No increase of price • No refusal or restriction of the supply to Chinese customers	5 years (SAMR's ex ante permission required)
II-VI/Finisar	• Semiconductors (optical communication devices)	• Hold-separate • Maintaining the supply of wavelength selector switch to customers under FRAND terms	3 years (SAMR's ex ante permission required)
Garden Bio/DSM	• Vitamin • Cholesterol	• Hold-separate	5 years
Novelis/Aleris	• Aluminum inner and outer sheet plates for automotive body	• Not supply steel plate cold commercial to any competitors in the Chinese market of aluminum sheet plates for automotive body	10 years

The behavioral remedies set out in Table 8 display the following features:

First, taking a closer look at the behavioral remedies imposed in 2019, there are two main types: hold-separate and supply maintenance. Of all the five conditional approvals, three contain a hold-separate remedy (i.e. *Cargotec/TTS*, *II-VI/Finisar* and *Garden Bio/DSM*), while three contain a supply maintenance remedy (i.e. *KLA/Orbotech, Cargotec/TTS, and II-VI/Finisar*). These two main remedy types suggest that the SAMR cares about maintenance of market competition following transactions, as well as the welfare of customers in China. For notifying part(ies), it is important to pay attention to potential concerns in relation to consumer welfare.

Second, it is also noteworthy that in *Cargotec/TTS* and *II-VI/Finisar*, the authority explicitly required that the undertaking concerned obtain the SAMR's *ex ante* permission for the disapplication of the behavioral remedies imposed. This is not a new development. In the *Essilor/Luxottica* case in 2018, the SAMR also required the undertaking concerned to apply for *ex ante* permission to remove behavioural remedies.[10] This type of requirement can increase the burden on the undertakings subject to behavioral remedies. On the other hand, in *KLA/Orbotech*, *Cargotec/TTS*, *Garden Bio/DSM*, and *Novelis/Aleris*, the authority agreed that the restrictive conditions could expire automatically when a given time limit expired (though did not do so fr the hold-separate remedies in *KLA/Orbotech* and *Cargotec/TTS*).

Third, although popular, behavioral remedies can in practice be burdensome both in terms of time and expense. Such remedies generate costs, including not only the fees for monitoring trustee services (which are borne by the company subject to the remedy), but also additional legal costs to ensure compliance. These costs can become even more pronounced depending on the length of the remedy period, which last for five or even 10 years (in *Novelis/Aleris*). Especially, in those cases where remedies cannot be lifted if SAMR disagrees, this may create significant burden and uncertainty for the post-closing entities. On the other hand, behavioral remedies do have their advantages. For instance, behavioral remedies at least maintain the integrity of an acquired business to the greatest possible extent.

IV. CONCLUDING REMARKS AND FUTURE TRENDS

2019 was another remarkable year in terms of merger control developments in China. From the legislative perspective, developments in 2019 may have significant impact on future merger control enforcement. The "stop-the-clock" clause proposed by the Draft AML Amendment may give the authority and undertakings concerned more time to process a transaction, but may also introduce legal uncertainty. In addition, the Interim Provisions set out procedural rules for conditional approval cases. Although the two pieces of legislation are not yet formally adopted, they are indicative of future trends in merger control in China.

From a procedural perspective, one of the most significant features of 2019 may be the long review periods. In particular, *Garden Bio/DSM* took 18.1 months to obtain approval. Moreover, experience in 2019 underlines how important it is to correctly assess whether a transaction satisfies the criteria for simplified treatment before submission. In *Novelis/Aleris*, the notification was first filed as a simplified case on August 31, 2018 but later it was revoked by the SAMR. The case then was filed as a normal case and finally initiated on December 13, 2018, which took almost 3.4 months. In order to ensure a smooth review process and to avoid unnecessary delays, experienced local antitrust counsel can play an important role in the preparation and review process. They are familiar with the merger filing procedures and standards, and can help companies to make the right decision at every stage, including but not limited to applying for the right procedures, based on their understanding of the authority's requirements and working style.

From a substantive perspective, it can be summarized that the SAMR paid close attention to the semiconductor industry. In terms of the remedies adopted, the SAMR preferred tailormade behavioral remedies to address competition concerns rather than pure structural remedies. In 2019, all conditional approvals contained behavioral remedies. This trend is not new and is consistent with the authority's practices in 2018. We took a closer look at the behavioral remedies imposed by the SAMR in 2019, and noted three particular features. First, there are two main types of behavioral remedies, i.e. hold-separate obligations and supply maintenance. Second, in some conditional approvals in 2019, the SAMR required that the parties should apply *ex ante* for permission from the SAMR for the removal of the behavioral remedies; while in other conditional approvals, the restrictive conditions can be relieved automatically. Third, behavioral remedies may last for a long time.

We suspect that Chinese merger control in 2020 will be consistent with the 2019 experience, which benefits legal certainty. For instance, we think the industries concerned in 2019 will likely still be the focus in 2020, and that behavioral remedies such as hold-separate obligations and supply maintenance will remain popular. Nevertheless, from a procedural perspective, if the "stop-the-clock" clause is adopted in the revised AML, the review process of merger control in China will be changed.

10 See, SAMR Official Websites, SAMR Public Notice of the Conditional Approval regarding the merger between Essilor International and Luxottica Group S.p.A. (July 25, 2018) http://samr.saic.gov.cn/gg/201807/t20180726_275250.html.

A BRIEF ANALYSIS OF STANDARDS FOR RESALE PRICE MAINTENANCE REGULATIONS UNDER THE PRC ANTI-MONOPOLY LAW

BY KATE HEYUE PENG, WILLIAM DING, LINGBO WEI, WEIMIN WU & CHI PAN[1]





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I. DIFFERENT STANDARDS ARE ADOPTED IN ADMINISTRATIVE ENFORCEMENT AND JUDICIAL PRACTICE ON RESALE PRICE MAINTENANCE ("RPM")

Article 14 of the PRC Anti-Monopoly Law (the "AML"), which came into effect on August 1, 2008, prohibits RPM.[2] Nevertheless, the National Development and Reform Commission (the "NDRC")[3] did not issue its first RPM penalty decision, namely the *Liquor* case against Moutai and Wuliangye, until February 2013. In that case, the NDRC adopted the principle of "prohibition plus exemption," which is similar to the "*per se illega*l" standard. In particular, once a given agreement is deemed constitute RPM, the NDRC presumes it to be illegal without conducting any detailed analysis of its effects on competition, and is illegal unless it qualifies for an exemption under Article 15.[4] After the *Liquor* case, the NDRC continuously paid close attention to RPM agreements and imposed administrative penalties on RPM behavior in various industries such as milk powder, contact lenses, automobiles, household electric appliances and medical equipment. As recently as December 2019, the State Administration for Market Regulation (the "SAMR") imposed an administrative penalty of RMB 87.613 million yuan on Toyota. Based on the penalty decisions issued and published by the enforcement agencies, i.e. the NDRC and the SAMR, RPM agreements are presumed to have the effects of eliminating and restricting competition, and no detailed analysis was carried out.[5]

In contrast to the "*per se illegal*" principle adopted by the enforcement agencies, the "*rule of reason*" approach is adopted by the courts in civil lawsuits involving RPM. The application of the "*rule of reason*" was first established in the final judgment of the Shanghai High People's Court in the case of *Rainbow v. Johnson & Johnson* dated August 1, 2013.[6] In that case, the Shanghai High People's Court ruled that RPM agreements should not be subject to the "*per se illegal*" principle. For the purpose of determining whether the vertical agreement between Johnson & Johnson and Rainbow had the effects of eliminating and restricting competition, the following factors were analyzed in detail by the court: (1) whether the competition in the relevant market is sufficient; (2) whether the defendant has a strong market position; (3) the defendant's motivation to impose RPM; and (4) the anti-competitive effect and pro-competitive effect of RPM agreement.

By referring to the definition of "monopoly agreement" under Article 13 of the AML, the Shanghai High People's Court considered that the effects of "eliminating and restricting competition" are a necessary requirement for a finding of a "monopoly agreement." The court further determined that an RPM agreement would only constitute a monopoly agreement if the effects of eliminating or restricting competition are material and also cannot be offset by its pro-competitive effects. Hence, during the trial, the court made a substantive measurement and comprehensive analysis of the pro and anti-competitive effects of the agreement. In several subsequent civil lawsuits involving RPM agreements, other courts followed the approach established in the *Johnson & Johnson* case.

The discrepancy in the standards for analyzing RPM agreements adopted by law enforcement agencies and courts has aroused heated discussions among scholars and practitioners. Many scholars have called for a unified standard, but so far, administrative enforcement agencies and courts are still following two independent tracks on this issue.

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2 The "Anti-Monopoly Law of the People's Republic of China" was promulgated on August 30, 2007, and came into effect on August 1, 2008. Article 14 of the current AML stipulates that operators are prohibited from entering into monopoly agreements with counterparties, including fixing the price of commodities for resale to a third party and restricting the minimum price of commodities for resale to a third party.

3 NDRC is one of the three predecessors of the current antitrust enforcement agency, the State Administration for Market Regulation. It was in charge of regulating price-related monopoly behavior before April 2018.

4 Article 15 of the AML stipulates that, a monopoly agreement will be exempted from Articles 13 and 14 if the business operators can prove that the monopoly agreement reached falls into the following circumstances: (1) (the monopoly agreement is reached) for the purpose of technologies improvement, and research & development of new products; (2) for the purpose of product quality improvement, costs reduction, efficiency improvement, unifying product specifications or standards, carrying out professional labor division; (3) for the purpose of enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators; (4) for the purpose of realizing public interests such as conserving energy, protecting the environment and providing disaster relief, etc.; (5) for the purpose of mitigating the severe decrease of sales volume or obviously excessive production caused by economic recessions; (6) for the purpose of protecting the justifiable interests of the foreign trade or foreign economic cooperation; and (7) other circumstances prescribed by the law or the State Council.
Where a monopoly agreement falls under any of the circumstances prescribed in items (1)-(5) and is exempted from Articles 13 and 14 of this Law, business operators must also prove that the reached agreement shall not substantially restrict competition in the relevant market and can enable the consumers to share the benefits generated from the agreement.

5 In the *Medtronic* case and a few other cases, the enforcement agencies have conducted a relatively brief analysis of the anti-competitive effects and the effects of harm to consumers caused by the monopoly agreements reached by the parties.

6 Appeal case of vertical monopoly agreement dispute between Beijing Rainbow Science and Trade Co., Ltd. and Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd, by Shanghai High People's Court, (2012) Hu Gao Min San (Zhi) Zhong Zi No. 63. The case was listed by the Supreme Court as one of the top ten antitrust judicial cases announced on the tenth anniversary of the implementation of the AML in 2018.

II. REASONS FOR DIFFERENT STANDARDS FOR ADMINISTRATIVE ENFORCEMENT AND JUDICIAL PRACTICE

A. Differences in Interpreting the Provisions of the AML

The differences between administrative enforcement and judicial practice can be traced back to the AML itself, particularly its provisions on the regulation of vertical "monopoly agreements." This ambiguity at the legislative level allows enforcement agencies and judicial authorities to interpret and apply laws from different perspectives and positions.

In the process of interpreting the law, enforcement officials focused their attention on the word "prohibit" in Article 14 of the AML, and believed that the principle of "prohibition plus exemption" was grounded in the wording of the AML. For example, Xu Kunlin, the former Director General of the NDRC's Price and Antitrust Bureau, stated in an article that "the provisions of China's Anti-Monopoly Law on vertical monopoly agreements are clear and definite. The Article 14 prohibits…vertical monopoly agreements and…Article 15 stipulates the conditions for exemption. There is no other legal interpretation from the legislative intent and textual understanding."[7] Other law enforcement officials such as Xu Xinyu,8 Wu Dongmei,[9] and Wan Jiang[10] also expressed similar views in their respective writings.

Judicial officials, on the other hand, are of the view that a determination of the existence of an actual effect of eliminating or restricting competition is a necessary requirement for finding the existence of a "monopoly agreement," considering that it is stated in Section 2 of Article 13 of the AML that "monopoly agreements as mentioned in this Law refer to… agreements, decisions or other concerted behaviors that may eliminate or restrict competition." Pursuant to Article 7 of "Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct," for the alleged monopolistic conduct that constitutes horizontal monopoly agreement as described in Article 13 of the AML, the burden shall be borne by the defendant to prove that the agreement does not have the effect of excluding or restricting competition.

Based on the above, a finding of the effect of excluding or restricting competition is obviously a necessary element for a horizontal monopoly agreement. Through this provision only directly applies to horizontal agreements, it serves as guidance for vertical agreements. In particular, considering that in contrast to horizontal agreements, vertical agreements are usually less likely to cause anti-competitive effects, it is reasonable to consider the effect of excluding or restricting competition to be a necessary element for prohibiting a vertical agreement. Hence, in several civil lawsuits including the *Johnson & Johnson* case, the courts ruled that the plaintiff not only needs to prove the existence of the agreement, but also needs to prove that the agreement has the effect of eliminating or restricting competition.

B. Considerations Behind the Standard Adopted by Enforcement Agencies

By analyzing articles and discussions published by officials from enforcement agencies, it is not difficult to see that enforcement agencies deliberately chose to adopt more stringent "prohibition plus exemption" standards for enforcement activities, in order to provide for greater deterrence of illegal conduct by enterprises and incentivize operators into strengthening antitrust compliance in future. This is not only a choice based on their understanding of the legislation, but also a choice made on the basis of comprehensive consideration of the current domestic situation in China. Specifically, enforcement agencies take the following elements into consideration when carrying out enforcement activities:

First, the general population's awareness and recognition of the AML is insufficient. Compared with Europe and America where the antitrust regime has been established for a relatively long time, and antitrust compliance awareness is deeply rooted in most enterprises, China's antitrust enforcement system is still in its infancy, and ordinary citizens know very little about the contents of antitrust laws and what they prohibit. In many industries and regions, companies and consumers do not realize that they have suffered losses, even if they are harmed by monopolistic behavior. This also explains why there is limited civil antitrust litigation in China. In the meantime, the implementation of the AML in China mainly depends on administrative enforcement agencies with professional capabilities.

7 Xu Kunlin, "The leniency policy applies to vertical monopoly agreements." China Economic Herald dated October 31, 2013, Section A03.

8 Xu Xinyu, "Research on China's Regulatory Framework of Vertical Monopolistic conduct [D]," (2016) University of Science and Technology of China 51.

9 Wu Dongmei, "Analysis on the Legal Regulation of Vertical Price Monopoly Agreement," Price Supervision and Anti-Monopoly in China, No.1 2014, page 42.

10 Wan Jiang, "Antitrust Law in China: theory, practice and comparison across jurisdictions," China Legal Publishing House, 2015, page 74.

Second, market competition in China is insufficient. Enforcement by administrative agencies has long been "based on the current state of China's socio-economic development as the background, with inadequate market competition and frequent vertical price monopolies being the main colors of the background."[11] In the *Milk Powder* case, the enforcement agencies found that the companies involved, although selling milk powder in China, the United States, and Europe at the same time, only implemented an RPM agreement in China, which reflects that the companies involved have did not pay sufficient attention to China's antitrust rules. On the other hand, it also reflects the insufficient competition in the Chinese market.[12] Similar behavior still exists widely in various industries in China. Therefore, antitrust enforcement agencies believe that market conditions within China are still immature. Given this limited ability to self-correct, the restrictive effects of vertical agreements need to be taken seriously and regulated under a stricter standard.

Third, the "prohibition plus exemption" standard also ensures enforcement efficiency. As stated in the Supreme Court's decision in the *Yutai* case that antitrust enforcement in China is still at an initial stage, if law enforcement agencies are required to conduct full investigations and complex competition analysis of each RPM agreement, it would increase the cost of enforcement and reduce enforcement efficiency, which would not meet China's antitrust enforcement needs at the present stage.[13]

C. Differences in the Judicial Process

As mentioned above, administrative enforcement is pro-active, which is reflected on the legislative level. According to Article 46 of the AML, law enforcement agencies conduct enforcement not only against enterprises who have reached and implemented the RPM agreement (presumably have actually disrupted the order of market competition), but also against the enterprises who have reached but not yet implemented the monopoly agreement.

In contrast, judicial procedures in civil lawsuits follow the principle of "he who asserts must prove" and adopt an adversarial approach. On one hand, the plaintiff needs to prove the existence of a monopoly agreement and the specific damage to the competition it caused; on the other hand, the defendant is allowed to refute and disprove these claims. In many lawsuits, both sides will engage economists to conduct comprehensive analysis, and the court will make a judgment after fully hearing the opinions of both parties.

Jurisprudentially, judicial officers believe that RPM can lead to two-sided effects on competition. The adoption of a "prohibition plus exemption" rule would require empirical evidence to prove that the negative effect of a given RPM practice in fact outweighs its positive effects. However, there exists no generally applicable statistical analysis for all types of RPM. Therefore, as long as no universally applicable conclusion can be drawn with regard to RPM, the application of the AML to RPM still calls for a case by case analysis, under the "*rule of reason*."[14] In addition, judges have recalled in some cases that price competition is only one aspect of competition and although RPM may limit price competition, it may promote non-price competition. In many industries in China, price competition has led to excessive investment and excessive competition.[15]

III. POSSIBLE FUTURE LEGISLATION

At this stage, academics and the practitioners still have not reached a consensus on the question of which principle should be applied to RPM agreements. However, regardless of whether the "prohibition plus exemption" principle or the "*rule of reason*" principle is adopted, differences between the administrative agencies and the judiciary remain to be bridged.

At the end of 2018, the Supreme People's Court's decision in the *Yutai* case attracted much attention from the public. The Supreme People's Court's decision affirmed the standard adopted by the enforcement agencies as well as the agencies' discretion in enforcement. In particular, the Supreme People's Court held that enforcement agencies only need to prove the existence of an RPM agreement and do not bear the burden of proof as to whether a given agreement restricts competition. The court also held that the accused has the right to rebut the presumption of "restriction of competition" by submitting countervailing evidence. In addition, the judgment pointed out that for a plaintiff to prevail

11 Xu Kunlin, "The leniency policy applies to vertical monopoly agreements," China Economic Herald dated October 31, 2013, Section A03.

12 Wu Dongmei, "Analysis on the Legal Regulation of Vertical Price Monopoly Agreement," Price Supervision and Anti-Monopoly in China, No.1 2014, page 42.

13 Administrative Ruling of the Supreme People's Court of the People's Republic of China on *Hainan Yutai Science and Technology Feed Co., Ltd. v. Hainan Provincial Price Bureau* for administrative retrial ruling, the Supreme People's Court (2018), Zui Gao Xing Shen No.4675.

14 William Ding, "Judicial evaluation of restrictions on RPM behavior," (2014) Journal of Law Application, Page 59.

15 *Wuhan Hanyang Guangming Trading Co., Ltd. v. Shanghai Hantai Tyre Sales Co., Ltd.* case, Shanghai Intellectual Property Court (2016) Hu 73 Min Chu No.866.

in antitrust civil litigation, they must prove actual losses and that those losses are in fact a direct result of the anti-competitive effects of an RPM agreement. In other words, in civil litigation, it is not inappropriate for the court to examine whether the RPM agreement has led to the effect of eliminating or restricting competition.

In the *Yutai* case, the Supreme Court hoped to establish guidance that would bridge the long-standing differences between administrative enforcement and civil litigation on the standards to be used for the analysis of RPM agreements under the AML. However, it remains to be seen whether the case can completely resolve these inconsistencies.

The newly published administrative decisions following *Yutai* case are illustrative. At the end of 2019, Toyota was subject to administrative penalties by the SAMR for implementing an RPM agreement. If an enterprise files a civil lawsuit to the court on the basis of those administrative penalties, claiming that Toyota's monopolistic behavior caused them losses, would the plaintiff need to re-prove the anti-competitive effects of the RPM agreement in the litigation process? If the plaintiff is allowed to rely on the existing administrative penalties without proving any anti-competitive effects of the RPM agreement, it would contradict the Supreme People's Court's ruling in the *Yutai* case with respect to the plaintiff's burden of proof; nevertheless, if the plaintiff is still required to prove the anti-competitive effect of the RPM agreement, the plaintiff would lose the opportunity to enjoy the benefits of follow-on litigation. In follow-on litigation, plaintiffs are supposed to be able to rely on administrative decisions to a large extent. However, in the current situation, administrative enforcement and judicial proceedings are implemented in parallel, the plaintiff still has to bear a heavier burden of proof.

It is worth noting that in the current version of the AML, the definition of "monopoly agreement" is set out in Section 2 of Article 13, while Section 1 of the same Article concerns the prohibition of horizontal monopoly agreements. However, in the proposed amendments of the AML (Public Consultation Draft) recently released, the definition of "monopoly agreement" is listed separately, before the articles concerning horizontal and vertical agreements. This draft can be interpreted to mean that both horizontal and vertical agreements caught by the AML need to be in fact anti-competitive, which reflects that legislators have paid attention to concerns arising from practices.[16] However, even with this adjustment to the AML, it would still be unclear how to resolve the differences between administrative enforcement and judicial practice. We expect legislators, enforcement agencies, and judicial authorities to further clarify the standards by modifying the law, formulating judicial interpretations, issuing guiding cases, or issuing guidelines for enforcement against vertical agreements, so as to provide business operators with clearer guidance.

16 King & Wood Mallesons antitrust team (Susan Ning, Kate Peng, Zhifeng Chai, Ruohan Zhang, Tianjie Zhang, Nan Du), "Potential Impacts of the Proposed Anti-monopoly Law Amendments" (Jan. 8, 2020), see https://www.chinalawinsight.com/2020/01/articles/antitrust/%e5%8d%81%e9%97%ae%e5%ae%9e%e7%ad%94%ef%bc%9a%e3%80%8a%e5%8f%8d%e5%9e%84%e6%96%ad%e6%b3%95%ef%bc%88%e4%bf%ae%e8%ae%a2%e8%8d%89%e6%a1%88%ef%bc%89%e3%80%8b%e5%af%b9%e4%bc%81%e4%b8%9a%e7%9a%84%e5%bd%b1/, accessed on Feb. 1, 2020.

ANTITRUST ENFORCEMENT AND LITIGATION IN THE SEMICONDUCTOR INDUSTRY IN CHINA (PATTERNS AND UPDATES)

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I. THE SEMICONDUCTOR INDUSTRY AND ANTITRUST

Semiconductors are materials used to produce integrated circuits ("ICs" or "chips").[2] Many semiconductor products are subject to intellectual property rights ("IPRs") covering both their production and design.

China is the largest semiconductor market in the world. As early as 2015, China's imports of semiconductors had already surpassed its imports of crude oil.[3] According to a McKinsey report, China consumed 45 percent of chips globally, and more than 90 percent of its consumption of chips derived from imports.[4]

Many products (such as smartphones and TVs) are made in China, and are purchased both by Chinese consumers and exporters. Obviously, these products rely on semiconductors for their functionality.[5] On the one hand, China is highly dependent on other countries for ICs, but on the other hand, ICs have a crucial impact on China's economy. China therefore has a strategic interest in the development of the semiconductor industry. To this end, the National Semiconductor Industry Development Guidelines were formulated, the IC Industry Equity Investment Funds were established. And the national strategic plan "Made in China 2025" sets out a clear goal to localize semiconductor production.[6]

The Anti-Monopoly Law ("AML") plays an important role in the development of China's semiconductor industry. This is in part due to the characteristics of the semiconductor industry itself.

First, from a global perspective, the semiconductor industry is no longer growing quickly. It is in a mature period, and players are restructuring and integrating through mergers.[7] Many such mergers have occurred between leading companies, such as *Avago/Broadcom, NXP/Freescale*, and the planned *Qualcomm/NXP* transaction. Accordingly, the number of merger reviews[8] in the semiconductor industry has increased.

Second, as a result of these mergers, only a few undertakings remain in each segment of the semiconductor industry. The market is hence highly concentrated and may display oligopolistic characteristics. Under conventional antitrust economics, such a market structure is conducive to anti-competitive behavior, including collaboration among undertakings.

Third, the semiconductor industry is technology-intensive and IPR barriers are high. New entrants may face the problem of being unable to obtain IPR licenses, or when they are licensed, they may not have strong bargaining power, so may have to passively accept conditions offered by IPR holders. When such IPR holders are deemed to have market dominance, their licensing behavior risks violating the AML.

Therefore, when analyzing antitrust enforcement (both by public bodies and through private litigation) in the semiconductor industry in China, the focus should not only be on the legal analysis under the AML, but also on the specific characteristics of the semiconductor industry and its importance to China's economy.

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2 "Notice of Merger Review Decision on Approval with Restrictive Conditions of Broadcom Ltd.'s Acquisition of Brocade Communications Systems, Inc.," Notice of the Ministry of Commerce, No.46 of 2017.

3 Wen Jing, "How A 'Core' Is Refined: It Requires 5000 Processes," Beijing Youth Daily, April 23, 2018, http://www.xinhuanet.com/fortune/2018-04/23/c_129856744.htm.

4 Gordon Orr & Christopher Thomas, "Semiconductors in China: Brave New World or Same Old Story?," McKinsey, August 2014.

5 Semiconductors have a very wide range of downstream applications, including electronics (computers, etc.), automotive optoelectronics, LED lighting, optical communications, receiving, controlling, and transmitting devices.

6 The goal to localize semiconductor production in the "Made in China 2025" goals is set out as follows: "by 2020, localization rate of 90-32 nanometer process equipment shall reach 50%, localization rate of 90-nanometer lithography machine shall be realized, and localization rate of assembly and testing key equipment shall reach 50%. By 2025, the localization rate of 20-14 nanometer process equipment shall reach 30%, realizing the localization of immersion lithography machine. By 2030, it shall realize the localization of 18-inch process equipment, EUV lithography machine and assembly and testing equipment."

7 Chen Kai, "Why Is Now A Good Time For the Semiconductor Industry?," Jiye Changqing Economic Research Institute, June 16, 2019, https://www.iyiou.com/p/102955.html. As to the reasons for the players in the semiconductor industry choosing M&A to boost growth, see "Recharge Semiconductor Growth with M&A"Accenture, January 4, 2020, https://www.accenture.com/us-en/insights/strategy/semiconductor-mergers-acquisitions.

8 In this article, "merger" and "concentration" are used interchangeably.

II. RECENT ANTITRUST ENFORCEMENT IN SEMICONDUCTORS IN CHINA

A. Merger Review is the Focus of Enforcement

In a total of 41 merger cases approved with conditions, eight involve the semiconductor industry,[9] including the more recent cases of *II-VI/Finisar* ("Finisar"), *KLA-Tencor* ("KLA-Tencor")/*Orbotech*, *Ase Semiconductor* ("ASE")/*Siliconware Precision Industry* ("Spil"), and the earlier cases of *Broadcom/Brocade*, *NXP/Freescale*, and much more earlier cases of *MediaTek* ("MTK")/*MStar*, *Western Digital/Hitachi Storage*, and *Seagate/Samsung Electronics HDD business*. A statistical analysis of those 41 merger cases based on industry categorization show that the semiconductor industry appears to receive more attention as compared to other industries.

B. Enforcement of Abuse of Dominance Rules Occasionally Targets the Semiconductor Industry

China's first investigation into an alleged abuse of dominance involving the semiconductor industry was launched against Qualcomm (the "*Qualcomm* investigation"). Decision found that Qualcomm held a dominant position in the CDMA baseband chip market, the WCDMA baseband chip market and the LTE baseband chip market. It found that Qualcomm abused its position in those markets by requiring standard-essential patent ("SEP") implementers to accept the terms of a non-challenge patent license agreement. Otherwise Qualcomm would refuse to supply chips. The authority found that this amounted to attaching unreasonable trading conditions to a transaction, contrary to the AML. As a result, Qualcomm was fined CNY 6.88 billion.[10]

In May 2018, the enforcement agency again launched an investigation against undertakings in the semiconductor industry, namely Samsung, Hynix and Micron, the three largest memory chip suppliers in the world (the "*memory chips* investigation"). According to publicly available information, the main trigger for this investigation was the increasing prices of DRAMs. Zhenguo Wu, the Director of the Antimonopoly Bureau of the State Administration of Market Regulation ("SAMR") announced, in a progress report to the media, that "the Antimonopoly Bureau will … research …. the relevant market definition … market dominance and [any] abusive behavior engaged [in] by the firms."[11] Based on this, it appears that the investigation is being conducted within the framework of the abuse of market dominance provisions of the AML. According to the *Beijing Business Daily*, the main alleged behavior concerned by the investigation is tying.[12]

C. The Semiconductor Industry is Seldom of Concern in Antitrust Lawsuits, but SEP Licensing Conduct in the Industry has Caused Concerns

So far, the only antitrust lawsuit that has directly involved the semiconductor industry is *Apple v. Qualcomm*. Apple alleged that Qualcomm abused its dominant position in the global baseband chip market and claimed CNY 1 billion.[13] The case eventually ended in April 2019 with a worldwide settlement between the parties.

SEP licensing in the semiconductor industry has triggered numerous antitrust lawsuits in China. Yet, with the exception of the abuse of dominance case of *Huawei v. IDC*, there has been no judgement on the merits in other antitrust lawsuits against SEP licensing practices to date. Most cases have ended with a settlement between the parties following the determination of jurisdiction. These cases include the aforementioned *Apple v. Qualcomm* matter, as well as *Qualcomm v. Meizu*, *ZTE v. Vringo*, *Yulong v. Ericsson*. Currently, OPPO and Xiaomi are involved in antitrust lawsuits that they have filed against Sisvel concerning wireless SEP licensing in Guangzhou and Beijing.[14]

9 Most mergers in the semiconductor industry have been approved, including the *Shenzhen Huiding Technology/NXP* merger, *NXP/Meiman Electronic Technology merger*, *Ziguang Guoxin Microelectronics/Beijing Ziguang Liansheng Technology* merger, *MediaTek Technology/Victronics (Tianjin) Electronic Technology* merger, *Bain Capital/Toshiba Memory* merger, *Microchip Technology/Microsemi* merger, *Marvell/Cavium* merger, *Micron/IM Flash* merger, etc. See Elaine Lin, "ESMC Inventory: 2018 Semiconductor Mergers Total Transaction Volume Exceeded 734.5 Billion (Part 1)," International Electronic Information, January 22, 2019, https://www.esmchina.com/news/4693.html; "ESMC Inventory: 2018 Semiconductor Mergers Total Transaction Volume Exceeded 734.5 Billion (Part 2), International Electronic Information, January 23, 2019, https://www.esmchina.com/news/4689.html.

10 The National Development and Reform Commission, "Fa Gai Jia Jian Chu Fa [2015] No. 1 Administrative Penalty Decision."

11 Han Shengjiang, "SAMR: Significant Progress Has Been Made in the Anti-monopoly Investigation Against Samsung, Hynix and Micron," The Paper, November 16, 2018, https://www.thepaper.cn/newsDetail_forward_2639731.

12 Shi Feiyue, "Samsung, Micron and Hynix Are Under Antitrust Investigation," Beijing Business Daily, June 4, 2018, http://www.sohu.com/a/233925535_115865.

13 "Apple Sues Qualcomm for Abuse of Market Position in China" *ChinaTechNews*, February 7, 2017, https://www.chinatechnews.com/2017/02/06/24737-apple-sues-qualcomm-for-abuse-of-market-position-in-china.

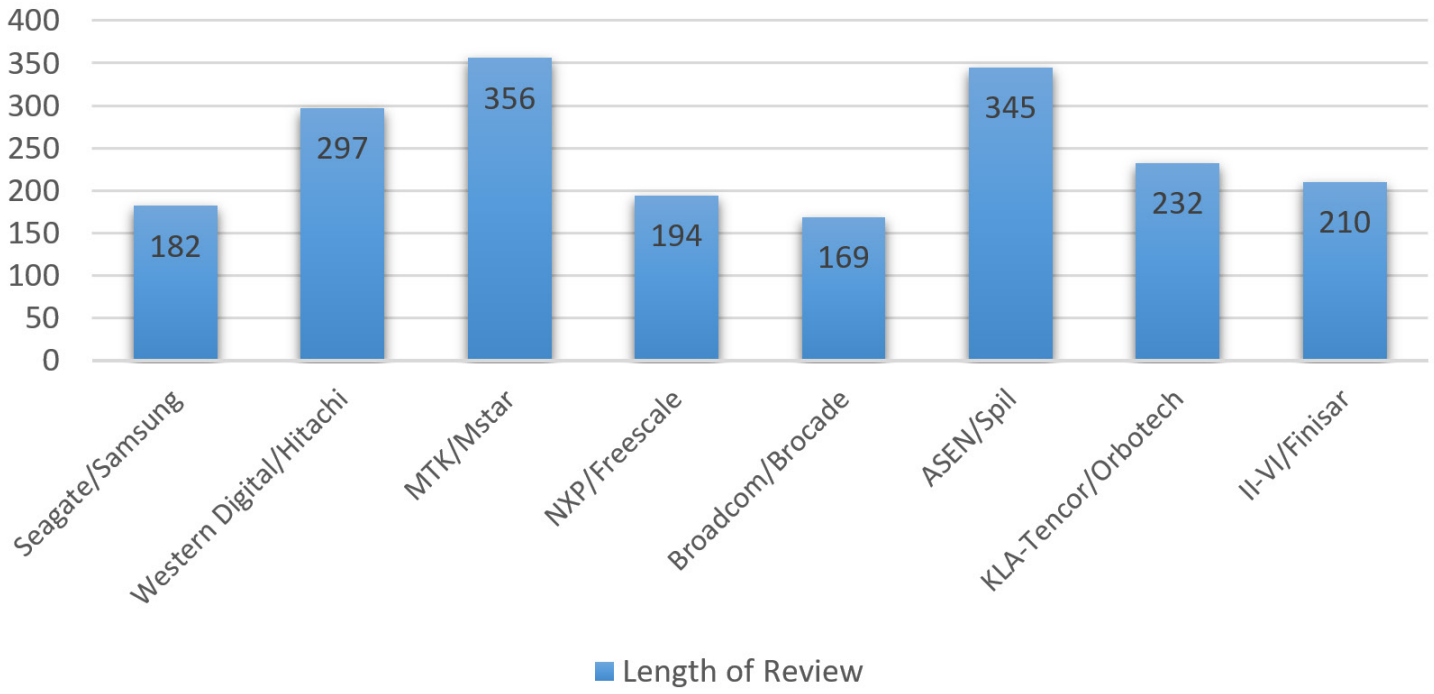
14 Jingqiu Chen, "Xiaomi Sued Sisvel! What Happened?" *China Intellectual Property News*, December 11, 2019, https://tech.sina.com.cn/roll/2019-12-11/doc-iihnzahi6701183.shtml; "OPPO, Xiaomi Sued Sisvel for Not Granting Patents on Fair Terms," December 18, 2019, http://www.sohu.com/a/361241704_99900743.

III. CHARACTERISTICS AND COMMON CONCERNS IN ANTITRUST ENFORCEMENT ACTIONS IN THE SEMICONDUCTOR INDUSTRY

A. Observations on Merger Review Decisions Conditionally Approving Concentrations in the Semiconductor Industry

1. The Time Limit for Reviewing Concentrations is Generally Longer

Based on a review of the eight merger cases noted above, the time spent reviewing these cases is generally above-average. The enforcement agency took an average of 248 days from the beginning of the review to the final decision. The review of *MTK/MStar* took 356 days (the longest case), while *Broadcom/Brocade* took 169 days (the shortest). Compared with the average time spent reviewing conditionally approved merger cases, i.e. 201 days, the time spent reviewing mergers in semiconductor industry is therefore longer than average.



Merger review statistics (days to final decision)

There are two main reasons for which the authority takes a relatively long time to review these cases.

First, in these eight cases, the parties to were often the leading companies in the industry, and had market power in the relevant market(s). The enforcement agency tends to be more cautious in such situations, as such concentrations could result in the removal of close competitors. For example, Finisar and II-VI respectively ranked as the second and third largest players in the global wavelength selective switch market. ASE and Spil were the first and third largest firms in the global semiconductor assembly and packaging service market. Freescale and NXP respectively ranked as the first and second largest players in the global RF power transistor market.

Second, as noted above, semiconductor industry is significant to China's economic development. Therefore, when there are major concentrations, stakeholders and relevant government departments express their concerns about their impact from their respective perspectives. The enforcement agency needs to take more time and energy to listen to relevant opinions, convey those opinions to the undertakings concerned, and wait for their responses.

2. The Main Concerns Reflected in the Eight Merger Cases

a) Main concerns relating to horizontal concentrations

Of the eight cases, five concerned horizontal mergers: *ASE/Spil*, *NXP/Freescale*, *MTK/MStar*, *Western Digital/Hitachi Storage*, and *Seagate/Samsung HDD business*. The *II-VI/Finisar* concentration involved both horizontal overlaps and vertically related and complementary businesses.

Regarding these horizontal concentrations and the *II-VI/Finisar* concentration, the enforcement agency expressed three common concerns. Firstly, the removal of close competitors could have adversely affected effective competition restraints on the post-merger entity. Second, all the concentrations would have resulted in the reduction of alternative suppliers for downstream customers. Third, barriers to entry in the relevant markets were significant, and thus new entry would be difficult.

In terms of theories of harm, coordinated effects were raised in *II-VI/Finisar*, *Western Digital/Hitachi storage*, and *Seagate/Samsung HDD Business*. The unilateral effects theory was applied in *ASE/Spil*. In *NXP/Freescale* and *MTK/MStar*, neither coordinated nor unilateral effects concerns were raised.

The reason unilateral effects concerns were raised in *ASE/Spil* is because the merger concerned outsourced semiconductor assembly and testing services. This market is different from the relevant markets concerned in the other three concentrations, which are highly concentrated, with only a few competitors.[15] Following the *ASE/Spil* transaction, the post-merger entity's market share would only have been 25 to 30 percent, and at least three other competitors would remain on the relevant market.[16] This market structure was therefore not conducive to the implementation of coordinated conduct.

In *NXP/Freescale* and *MTK/MStar*, the main reason for not applying either the unilateral effect or coordinated effects theories was that after the concentrations, the market shares of the post-merger entities would have exceeded 50 percent.[17] According to the AML, these post-merger entities could therefore be presumed to have a dominant market position, which would mean that they could have had the ability to implement unilateral conduct to harm competition. Therefore, the decisions only emphasize that the post-merger entities would enhance their control over the market or have a dominant market position.[18]

Based on these decisions, it appears that the main concerns of the enforcement agency concerning horizontal mergers in the semiconductor industry do not deviate from the concerns normally raised in such cases, i.e. whether the post-merger entity could implement unilateral conduct or coordinate with incumbents to harm competition.

The enforcement agency also takes into account industry features and trends when assessing the competitive effects of concentrations. This is evident in *ASE/Spil* and *MTK/MStar*. Based on the wording of these two decisions, the attitudes of the enforcement agency towards unstable competition and quickly evolving technologies are consistent, even though it has been four years since the enforcement agency considered them for the first time in its review of *MTK/MStar*. Specifically, the enforcement agency recognizes that where competition in the relevant market is not stable, and technologies are evolving quickly, any unfavorable consequences of a merger can be compensated for to some degree. However, any such compensation is not necessarily enough to eliminate the merger's potential to lessen or exclude competition.

15 The Notice of the Merger Review Decision to Conditionally Approving the Stock Acquisition of Spil by ASE, http://fldj.mofcom.gov.cn/article/ztxx/201711/20171102675701.shtml.

16 *Ibid.*

17 The Notice of the Merger Review Decision to Conditionally Approving the Stock Acquisition of Freescale by NXP, http://fldj.mofcom.gov.cn/article/ztxx/201511/20151101196182.shtml, The Notice of the Merger Review Decision to Conditionally Approving the Concentration between MTK and MStar, http://fldj.mofcom.gov.cn/article/ztxx/201308/20130800269821.shtml.

18 *Ibid.*

b) Main concerns relating to non-horizontal concentrations

The key non-horizontal merger cases in this industry are *Broadcom/Brocade* and *KLA-Tencor/Orbotech*. Although the *II-VI/Finisar* concentration also involved businesses that were vertically related and complementary, the enforcement agency did not raise concerns. In *Broadcom/Brocade* and *KLA-Tencor/Orbotech*, there were two concerns in common. First, the improper use of sensitive commercial information by the post-merger entity could have resulted the elimination or restriction of competition. Second, the implementation of conduct such as tying and bundling by the post-merger entity could have resulted in the leveraging of market power, and thus market foreclosure.

Undertakings in the upstream and downstream portions of the semiconductor supply chain cooperate very closely. Upstream semiconductor design companies need to cooperate closely with downstream manufacturing companies, which, in turn, need to maintain close communication with assembly and testing companies. Currently, cooperation is even closer due to the trend of integrating manufacturing, assembly and testing technologies.

This close cooperation leads the enforcement agency to pay close attention to the use of sensitive information when it reviews non-horizontal concentrations. As this close cooperation enables upstream manufacturers to obtain sensitive commercial information from their downstream clients, through improper use of such sensitive commercial information, upstream manufacturers could potentially disadvantage the competitors of acquired downstream undertakings.

A post-merger entity with market power in a relevant market may not be a necessary precondition for raising such concerns. In other words, such concerns appeared to be triggered mainly by the features of the semiconductor industry, rather than any change in market power due to a concentration. Moreover, one should be aware that close cooperation between undertakings in the semiconductor industry is not limited to upstream and downstream manufacturers. Since components used in end-products need to be compatible, suppliers of different components may need to closely cooperate with each other, too. Therefore, the improper use of sensitive commercial information can also lead to the elimination or restriction of competition in adjacent markets. The decision to conditionally approve *Broadcom/Brocade* provides a typical example of such reasoning.[19]

The theories of harm used to assess non-horizontal concentrations are mainly based on possible market foreclosure, and the analysis focuses on whether the post-merger entity would have the ability or the incentive to foreclose competition. In both *Broadcom/Brocade* and *KLA-Tencor/Orbotech* the transactions would have given the post-merger entities dominant market positions. As a result, the enforcement agency considered that the post-merger entities had the ability to implement conduct like bundling and tying to foreclose competition.

With respect to the incentive to foreclose, the decision in *Broadcom/Brocade* does not touch upon this issue. However, in *KLA-Tencor/Orbotech*, the enforcement agency carried out its assessment carefully. It pointed out that, on the one hand, Orbotech had occupied a particular place in the markets for special applications, advanced packaging deposition equipment and special application and advanced packaging etching equipment (the "SAAPDE" and "SAAPEE" markets). The concentration hence created conditions that would enable the post-merger entity to expand its business in these markets. On the other hand, it paid attention to the fact that the SAAPDE and SAAPEE markets are very large, with prospects for future development.[20]

Therefore, although the enforcement agency did not analyze the question further, it is reasonable to conclude that to increase its profit, the post-merger entity in *KLA-Tencor/Orbotech* would have sought to expand its business in the SAAPDE and SAAPEE markets. The post-merger entity would hence have had the incentive to implement conduct such as refusals to deal, discrimination against different customers, imposing unreasonable trade conditions, bundling, and tying, to eliminate or restrict competition in the SAAPDE and SAAPEE markets.

The enforcement agency also believed that the *KLA-Tencor/Orbotech* concentration would have adversely affected competition in the market for frontier application deposition and etching equipment (the "FADEE" market). The basic logic behind this concern was that with the strength of KLA-Tencor, Orbotech could enter into the businesses of producing and selling frontier application deposition and etching equipment.[21]

19 See "Notice of the Merger Review Decision to Conditionally Approving the Broadcom/Brocade Concentration," http://fldj.mofcom.gov.cn/article/ztxx/201708/20170802632065.shtml.

20 See "Notice on the Merger Review Decision to Conditionally Approving the KLA-Tencor/Orbotech Concentration," http://gkml.samr.gov.cn/nsjg/xwxcs/201902/t20190220_290940.html.

21 *Ibid.*

According to this logic, the direct consequence of the concentration would have been the creation of a potential competitor in FADEE. However, the enforcement agency held that KLA-Tencor could have restricted the competitors of Orbotech, which were also clients of KLA-Tencor, from carrying out R&D, by treating them discriminatorily, and tying and bundling products, through using its advantages in the market for process control equipment. Thus, it could have raised barriers to entry in FADEE. As a result, potential competition FADEE could have been affected.[22]

Based solely on the *KLA-Tencor/Orbotech* decision, concerns relating to potential competition as expressed by the enforcement agency appear not to be consistent with the ordinary understanding of potential competition. The theory of potential competition typically cuts two ways in merger review. When a concentration results in the elimination of a potential competitor, the relevant antitrust law enforcement agencies might consider blocking the concentration (or imposing conditions for approval). The existence of potential competition, on the flipside, could lead enforcers to believe that the post-merger entity would remain subject to effective competitive restraints. As a result, even if the post-merger entity might have market power, it could still potentially be approved.[23]

Therefore, the above conclusion of the enforcement agency that potential competition in FADEE could have been harmed does not appear to be based on a finding of any elimination of a potential competitor, but rather on the mere assumption that the *KLA-Tencor/Orbotech* deal would raise barriers to entry in FADEE, even though it could simultaneously have created a potential competitor.[24]

One of the conditions imposed on the *KLA-Tencor/Orbotech* concentration was that both parties and the post-merger entity would be required to follow the fair, reasonable and non-discriminatory ("FRAND") principle, and continue to supply process control equipment and related services to China's manufacturers of disposition and/or etching equipment in a stable manner.[25] The FRAND principle originates from obligations placed on holders of SEPs by standard setting organizations, and aims at restraining the licensing practices of SEP holders. It is quite rare for the FRAND principle to be used outside the area of SEP licensing.

This notwithstanding, the above condition is favorable to Chinese manufacturers of disposition and etching equipment. China is devoting its efforts to boosting growth in the semiconductor industry, and it is not strange for the enforcement agency to consider industrial policy in merger review. As such, the imposition of this condition may be unexpected, yet it is also somehow inevitable.

B. Abuses of Dominance in the Semiconductor Industry: Possible New Moves and Concerns

As noted, the *Qualcomm* case is the most prominent investigation initiated by the enforcement agency against an undertaking in the semiconductor industry concerning a possible abuse of dominance. Not much public information is currently available on the *memory chips* investigation. Thus, unlike in the domain of merger review, synthesizing abuse of dominance investigations in the semiconductor industry and common features and concerns does not seem feasible. Moreover, as the facts involved in the *Qualcomm* investigation and the *memory chips* investigation are different, it is difficult to see how the analysis and rationale in the Qualcomm decision would affect the *memory chips* investigation.

Nevertheless, it is worth noting, in relation to the tying conduct in the *memory chips* investigation, that in 2019, the enforcement agency adopted its Interim Provisions on Prohibition of Abuse of Dominant Market Position, which amended the rules on tying conduct: whether the undertaking has "mandatorily" bundled or combined different product is no longer the key factor to determine whether an undertaking's behavior constitutes illegal tying. The impact of this amendment on the ongoing investigation remain unclear, and further observations are needed.[26]

Since the enforcement agency is investigating Samsung, Hynix and Micron at the same time, it can be reasonably inferred that the investigation may involve allegations of collective dominance. In practice, the enforcement agency has applied the concept of collective dominance in the *Isoniazid* and *Chlorpheniramine* cases, where undertakings involved were subject to antitrust penalties. In the *Chlorpheniramine* case, although only one of the undertakings with collective dominance sold goods at an unfairly high price, this did not affect the enforcement agency's

22 *Ibid.*

23 Mats A. Bergman "Potential Competition: Theory, Empirical Evidence and Legal Practice" Department of Economics, Uppsala University, September 9, 2003.

24 Compare Stephanie Wu "KLA/Orbotech Obtain Conditional Clearance from SAMR," *Competition Law China*, February 25, 2019. http://competitionlawchina.com/2019/02/25/kla-orbotech-obtain-conditional-clearance-from-samr/.

25 *Supra* note 20.

26 The State Administration of Market Supervision, Interim Provisions on Prohibiting Abuse of Market Dominance, Article 18.

finding there was an of abuse of a collectively dominant position.[27] The issues still unresolved in the *Chlorpheniramine* case include: (1) whether one of the undertaking's conduct would play a positive role in maintaining and enhancing the alleged collective dominant market position; and (2) whether that role would constitute a prerequisite to find the behavior of one of the undertakings to be abusive. Whether the investigation of the three major memory chip suppliers can further develop and improve the concept of collective dominance under the AML needs to be further analyzed based on the final decisions.

C. How Potential New Developments in SEP Antitrust Litigation Will Influence the Semiconductor and Related Industries Needs to be Further Observed

After the release of the *Huawei v. IDC* judgment and the administrative penalty decision on Qualcomm, antitrust litigation has become an increasingly important means for China's mobile phone companies to counter SEP holders. This might be attributed to the lower burden of proof borne by mobile phone companies, because both the Guangdong Higher People's Court and the enforcement agency have adopted essentially the same logic in defining relevant markets and determining the existence of a dominant position.

However, regarding the licensing of SEPs, there are still opposing opinions on the determination of the Guangdong Higher People's Court and the enforcement agency. In addition, the Supreme People's Court has granted IDC's motion for a retrial.[28] It is still too early to say whether the findings of the Guangdong Higher People's Court will stand.

Meanwhile, SEP holders are gradually beginning to solicit royalties for automobile chips, automobile parts, and automobiles that use certain wireless communication technology. Already, Daimler has made a complaint to the EU, alleging that Nokia's licensing activities violate competition law.[29] Other entities who joined Daimler's action also brought litigation against automobile-related SEP licensors, such as AVANCI, in other countries.[30] China has been vigorously developing its automobile industry in recent years. As such, it is predicted that automobile companies may become another set of key players who will use the AML to defend their rights and interests.

IV. SUMMARY

In summary, antitrust enforcement in China's semiconductor industry relates, for the most part, to merger review. Other enforcement actions mainly target abuses of dominance. Up to now, based on publicly available information, there has not yet been an investigation targeting anticompetitive agreements in this sector. In addition, there are only a limited number of antitrust lawsuits in the semiconductor industry, but SEP licensing practices this industry are facing much scrutiny, as demonstrated by the amount of SEP-related litigation in recent years. However, since the Supreme People's Court has granted IDC's motion for a retrial, it is possible that SEP antitrust litigation will see new developments in future.

Looking through the merger review decisions that approved concentrations subject to conditions, the agency appears to be more cautious when it comes to reviewing concentrations in this industry, and generally takes a longer time to conduct its review. The main concerns raised generally do not deviate from those normally raised by other concentrations, and the specific characteristics of the semiconductor industry have been considered in some cases. However, as of now, the agency still does not appear to consider that the dynamic market structure and rapid technological developments in semiconductors are sufficient factors to compensate for potential impacts on competition. In addition, the conditions the authority has imposed demonstrate a more and more obvious emphasis on the protection of China's semiconductor suppliers. This clearly reflects the impact of China's overall semiconductor development strategy on merger review.

Looking at the merger and abuse of dominance decisions in the semiconductor industry as a whole, and although the competitive assessment may be different, bundling conduct appears to be the most common concern. Undertakings in this industry should therefore be aware of the potentially high antitrust risk associated with tying in ensuring their businesses comply with the AML.

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27 Administrative Penalty Decision of the State Administration of Market Supervision, [2018] No. 21; Administrative Penalty Decision of the State Administration of Market Supervision, [2018] No. 22.

28 Civil Ruling of the Supreme People's Court [Docket No. (2014) Min Shen Zi No. 677].

29 "Nokia Aims to Settle EU Patent Licensing Row With Daimler" *Zacks Equity Research*, December 1, 2019, https://finance.yahoo.com/news/nokia-aims-settle-eu-patent-130401171.html.

30 *Continental Automotive Systems, Inc. v. Avanci, LLC et al.*, Case: 5:19-cv-02520.

ANTITRUST ENFORCEMENT IN THE PHARMACEUTICALS AND MEDICAL PRODUCTS INDUSTRY IN CHINA

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I. INTRODUCTION

Antitrust enforcement in the pharmaceuticals and medical products industry in China is part of a larger regulatory and policy framework that has developed in recent years to address specific industry issues. For example, in response to high drug prices, measures such as the "two-invoice" system[2] and centralized drug procurement processes[3] have been implemented. To address issues relating to the alleged poor quality of drugs manufactured in China, measures have been introduced that support the emergence of quality generic drugs.[4]

Against this regulatory backdrop, China's Anti-Monopoly Law ("AML") has also been used as another tool to deal with problems in the industry. The pharmaceuticals and medical products industry in China has seen high levels of antitrust enforcement activity from 2015 onwards. The State Council has also issued guidance in September 2018 indicating that China would strengthen antitrust enforcement against anticompetitive conduct and price increases that give rise to drug shortages.[5]

The AML has been used to address various types of anti-competitive conduct in the pharmaceuticals and medical products industry. One is unilateral conduct by dominant undertakings that abuse their dominance in various ways, including through excessive pricing, refusals to supply, and tying practices. It has also been used against horizontal coordination amongst competitors, for example, to divide the market or to fix prices. Anti-competitive vertical agreements involving resale price maintenance ("RPM") have also been caught. The following sections take stock of the cases to date, and highlight the most common antitrust issues that arise.

One key trend worth highlighting at the outset is that the enforcement action appears to be heavily focused on the supply of active pharmaceutical ingredients ("APIs") in China. The vast majority of cases highlighted below relate to API manufacturers, and is a reflection of the supply issues that plague this market, including the persistent shortages and price hikes in the supply of APIs experienced in the past few years. Part of the reason behind this may be the oligopolistic or monopolistic market structures that exist due to the limited number of players licensed to supply APIs in the market - many such cases involve abuses by the only manufacturer of a specific API or coordinated conduct amongst a small handful of API manufacturers. China's antitrust regulator ("SAMR") also reportedly indicated in 2019 that the supply of APIs would be an enforcement priority.

II. ABUSE OF DOMINANCE CASES

There have been seven abuse of dominance cases to date in the pharmaceuticals industry. Save for one, all these cases involve the supply of APIs. The following table summarizes the API cases, and also identifies the abusive conduct involved.

Year	Parties	API	Abusive Conduct
2015	• Chongqing Qingyang Pharmaceutical	Allopurinol	Refusal to supply
2016	• Chongqing Southwest No.2 Pharmaceutical Factory	Phenol	Refusal to supply
2017	• Wuhan Xinxing Jingying Medical	Methyl salicylate	Imposing unfair terms and conditions
2017	• Zhejiang Second Pharma Tianjin • Handewei Pharmaceutica	Isoniazid	Excessive pricing Refusal to supply

2 The two-invoice system set out in the Notice on Implementation Guidelines for Promoting Two-invoice System for Pharmaceutical Procurement among Public Health Institutions limits the number of invoices that may be raised in the course of drug procurement to two – one from the supplier to the distributor and the other from the distributor to the public health institution. It is intended to reduce distribution costs by bringing down the number of parties involved in the procurement process.

3 In late 2018, China's Central Comprehensively Deepening Reforms Commission entrusted the Shanghai City Government to implement a centralized drug procurement program through which the government awards a contract to the lowest bidder with a guaranteed sales volume of 60-70 percent of the total market for a year. The program covers 11 major cities in China (i.e. Beijing, Tianjin, Shanghai, Chongqing, Shenyang, Dalian, Xiamen, Guangzhou, Shenzhen, Chengdu, and Xi'an, which constitutes around 30 percent of the China market).

4 For example, under the Opinions on Reforming and Improving the Policy for Supply Guarantee and Use of Generic Drugs implemented by China's State Council in 2018, public hospitals are required to list high quality generics in their formularies and purchase them through collective tenders; physicians at public hospitals are generally required to prescribe pharmaceuticals using their generic names instead of their brand names, and hospitals will be encouraged to fulfil the prescriptions with generics. Additionally, the government-funded Basic Medical Insurance will reimburse for high quality generics at the same rate as it would for the corresponding brand name drug. This reimbursement policy is designed to encourage medical institutions to switch to and dispense high quality generics.

5 Suggestions for Improving the National Essential Medicines System, State Council Notice (2018) No. 88

2018	• Hunan Er-Kang Medical Operation • Henan Jiushi Pharmaceutical	Chlorpheniramine maleate	Excessive pricing Tying Refusal to supply
2019	• Nantong Jinghua Pharmaceutical (investigation suspended following commitments)	Phenobarbital	Refusal to supply

A. Refusal to Supply

The most common type of abusive conduct relates to refusal to supply. Article 17(3) of the AML prohibits dominant undertakings from refusing to trade with counterparties without a justified reason. Refusals to supply can take many forms beyond an outright refusal, including making false claims of lack of stock, and requiring downstream manufacturers pay excessive deposits (see e.g. the *Hunan Er-Kang* case). Article 9 of NDRC's Price Behavior Guidelines for Operators of Active Pharmaceutical Ingredients and Drugs Prone to Shortages ("Drug Pricing Guidelines") also indicates that charging excessive prices may amount to a constructive refusal to supply.

The *Chongqing Qingyang Pharmaceutica* case is a classic example of how dominant undertakings can benefit from a refusal to supply when they are active in both the upstream and downstream markets. In that case, the infringing undertaking was dominant in the upstream manufacturing of allopurinol API, and was also active in selling allopurinol tablets downstream. It restricted the supply of its allopurinol API to foreclose its competitors in downstream markets for allopurinol tablets, and at one point increased its downstream market share by 47 percent.

However, having a downstream market presence is not a necessary element for finding an abusive refusal to supply. In several other cases (e.g. the *Hunan Er-Kang* case, and the *Chongqing Southwest No.2* case) the Chinese regulator found a refusal to supply notwithstanding the dominant undertakings' lack of economic activity downstream. By artificially creating a shortage downstream, the dominant undertakings benefitted by charging higher API prices to the downstream manufacturers that it supplied.

A separate observation is that, at times, the regulator may not pursue API suppliers for a refusal to supply. For example, in the *Wuhan Xinxing Jingying Medical* case, even though the only two manufacturers of methyl salicylate API entered into an exclusive agreement with a distributor and thereafter refused to supply others directly, the regulator pursued a case against the distributor rather than the manufacturers, for imposing unreasonable trading conditions on counterparties when the distributor resold the API products to its customers.

B. Excessive Pricing

Excessive pricing infringements are also a common infringement amongst the cases involving the supply of APIs. Under Article 17(1) of the AML, dominant undertakings are prohibited from selling products at unfairly high prices. Article 8 of the Drug Pricing Guidelines notes that excessive prices can be determined by:

(1) comparing it with the prices of the same type of drugs sold by other undertakings;

(2) where the market is stable and where costs are not significantly affected, examining whether price increases exceed the usual range;

(3) examining whether increases in drug prices are significantly higher than the increases in costs ("Cost Plus Approach"); or

(4) comparing price differences in the same geographic market over time ("Price Across Time Approach"), or comparing the price differences between different geographic markets during the same period of time.

In practice, SAMR appears to have adopted the Cost Plus Approach when determining that excessive prices were charged in the *Hunan Er-Kang* case. Specifically, the dominant undertaking increased prices of chlorpheniramine maleate API by three to four times the average cost of procuring the products, even though the latter costs were stable. By charging downstream manufacturers RMB 2940/KG, while its average purchase cost was RMB 860/KG, SAMR held that the dominant undertaking's price increase "obviously exceeded the normal range…[which was] obviously unfair."

In *Zhejiang Second Pharma* case, SAMR appeared to adopt the Price Across Time Approach. In finding that there was excessive pricing, SAMR focused on price differences in the same market over time and held that compared to the preceding year, one dominant undertaking had increased its API prices by 3.52 times while another had increased prices by 19 times.

It appears that the threshold for finding an excessive pricing infringement is lower in China compared to various other major competition law jurisdictions. For example, while it is possible to compare the price of the same product over time to determine excessive pricing under the AML, the UK Competition Appeal Tribunal in *Flynn Pharma*[6] did not consider the Price Across Time Approach as a sufficient stand-alone ground for finding an excessive pricing infringement. In particular, it highlighted that many factors affect the "before" price that may render it artificially low and unrepresentative of normal competitive conditions.

As another example, while a Cost Plus Approach may be sufficient to find an excessive pricing infringement under the AML, the UK Competition Appeal Tribunal in *Flynn Pharma* was cautious about solely looking at the amount of mark-up above cost applied by the dominant undertaking to determine excessiveness, especially if there were other methods available that suggested different results. The UK Competition Appeal Tribunal therefore rejected the regulator's assessment that anything above a reasonable rate of return on sales of 6 percent above cost for the sale of phenytoin sodium capsules was evidence of excessive pricing. More generally, even if prices were significantly above costs, competition law in the EU and the UK still requires the regulator to show that prices bear no reasonable relation to the economic value of the product. This element is not required for excessive pricing cases under the AML.

C. Tying

A third type of abusive conduct involves tying. In the *Hunan Er-Kang* case, for example, the dominant chlorpheniramine API manufacturers required downstream customers to purchase medicinal cane sugar, starch capsules and other medical supplements together with chlorpheniramine API. The medical supplements were unrelated to and ordinarily purchased separately from chlorpheniramine API according to customer needs. The tying conduct deprived downstream customers of their right to independent choice, and unfairly extended the manufacturers' dominance in the chlorpheniramine API market to the market for the supply of the various medical supplements.

III. ANTI-COMPETITIVE AGREEMENTS

The AML has also been used against anti-competitive agreements between competitors and anticompetitive vertical agreements containing RPM restrictions.

A. Horizontal Anti-competitive Agreements

Article 13 of the AML prohibits undertakings from entering into agreements with competitors to eliminate or restrict competition in the market. There are four recent AML cases in the pharmaceuticals and medical products industry involving an infringement of Article 13, and all relate to the supply of APIs:

Year	Parties	API	Abusive Conduct
2011	• Shandong Shuntong • Shandong Huaxin	Compound reserpine	Refusal to supply
2016	• Chongqing Qingyang Pharmaceutical • The Place Pharmaceutical Jiangsu, • Shanghai Xinyi United Medicinal Herbs • Shangqiu Huajie Pharmaceutical	Allopurinol	Price fixing and market sharing
2017	• Huazhong Pharmaceutical • Shandong Xinyi Pharmaceutical • Changzhou Siyao Pharmacy	Estazolam API and tablets	Price fixing and joint boycott

6 *Flynn Pharma and Flynn Pharma (Holdings) v. Competition and Markets Authority* [2018] CAT 11. This case is currently on appeal to the Court of Appeal of England and Wales.

2018	• Chengdu Huayi Pharmaceutical Excipients Manufacturing • Sichuan Jinshan Pharmaceutical • Taishan Xinning Pharmaceutical	Acetic Acid	Price fixing and information exchange

The above cases tend to fall within the mold of typical cartel behavior. For example, in *Huazhong Pharmaceutical* case, the infringing parties were found to have agreed amongst themselves to use all their manufactured estazolam API for captive use instead of supplying it downstream, and to fix the price of their downstream estazolam tablets. In the *Chengdu Huayi* case, the parties were found to have shared commercially sensitive information regarding acid market conditions and production volumes, which eventually culminated in an agreement to increase the product prices.

A further observation is that Allopurional API manufacture Chongqing Qingyang Pharmaceutical had been subject to back-to-back infringement findings within the period of a few months by both the Chongqing AIC and the NDRC because different agencies had different enforcement responsibilities. The Chongqing AIC was responsible for non-price related AML infringements and investigated the abuse of dominance conduct; NDRC was responsible for price related AML infringements and investigated the price-fixing conduct. Given that these split responsibilities have now been consolidated under SAMR, future investigations of AML infringements are likely to proceed on a unified basis.

B. Vertical Anti-competitive Agreements

Article 14 of the AML prohibits undertakings from fixing resale prices or setting minimum resale prices (i.e. RPM practices), which ordinarily arises in the context of a vertical agreement between parties at different levels of the supply chain (e.g. manufacturer-distributor). There have been two cases to date involving RPM conduct in the medical products industry:

Year	Parties	API	Abusive Conduct
2016	• Smith & Nephew Medical (Shanghai) Limited • Shandong Huaxin	Over-the counter (OTC) CICA-CARE silicone gel sheets for scar treatment	RPM
2016	• Medtronic (Shanghai) Management	Medical equipment for cardiovascular diseases, restorative therapies, and diabetes	RPM

Both cases involve fairly standard RPM conduct, i.e. imposing resale prices on downstream distributors. In the *Medtronic* case, for example, Medtronic was fined for setting fixed and minimum resale prices for its distributors and e-commerce firms in China, and also restricting the latter from selling directly to end-customers. Among other things, it enforced resale prices by refusing to supply to non-adhering entities, revoking discount rights, imposing fines, and reducing trade credits.

RPM practices have been treated as *per se* illegal by the Chinese antitrust regulator in practice. The Supreme People's Court of China held in *Yutai v. Hainan Provincial Price Bureau* (2019) that once the regulator finds the existence of RPM practices involving fixed or minimum prices, a rebuttable presumption arises that the conduct infringes the AML without having to show anti-competitive effects. This would be the case even if the agreement had not been implemented. Importantly, the approach differs in a civil litigation case, where private claimants are required to show actual losses suffered, which necessitates some examination of effects.

Separately, Article 5 of the Drug Pricing Guidelines expressly prohibits imposing fixed or minimum resale prices for API or drugs that are subject to shortages. If there is evidence to show that the API or drug suppliers are able to exert control over the resale prices charged by third parties and third-party platforms, this would also amount to an infringement.

C. AML Related Court Litigation

The key private enforcement case in the pharmaceuticals and medical products industry is the Shanghai High People's Court decision in *Rainbow v. Johnson & Joh*nson (2013). In that case, Beijing Ruibang Yonghe Science and Technology Trade Company ("Rainbow") had an arrangement to distribute Johnson & Johnson's ("J&J") staplers and sutures to certain hospitals in Beijing, which included a minimum resale price restriction. Rainbow subsequently acquired the right to distribute to another Beijing hospital by submitting bid prices that were lower than J&J's minimum

resale prices. On discovering this, J&J refused to supply its products to Rainbow, and eventually declined to renew its distributorship. Rainbow brought an action against J&J for illegally imposing RPM in breach of Article 14 of the AML. Apart from its significance in clarifying the court's approach to RPM in private enforcement cases,[7] this case demonstrates how private enforcement of the AML has been used as an effective tool in commercial disputes in the medical products sector: J&J was ultimately made to compensate Rainbow for losses amounting to RMB 530,000 for illegal RPM conduct, although this was substantially less than the RMB 14.4 million that Rainbow had asked for in damages.

Apart from private lawsuits, it is noteworthy that market players have sought to pressure the antitrust regulator to take enforcement action against local government agencies for abuse of administrative power (so-called "administrative monopoly" conduct). For example, Guangzhou Pui's Pharmaceutical Factory (Berthelot) in 2018 requested SAMR to investigate the Shenzhen Health and Family Planning Commission for allowing only one group purchasing organization (Shenzhen Quanyaowang Pharmaceutical) to service local hospitals and pharmaceutical manufacturers, on the grounds of abuse of administrative power under Article 32 of the AML. The Beijing Higher People's Court ultimately upheld the lower court's finding that SAMR had no obligation to investigate. While the Beijing Higher People's Court recognized that complainants affected by the complained antimonopoly conduct could challenge the regulator's performance of its duties, the plaintiff in this case was not directly impacted by SAMR's enforcement action (or lack thereof).

Significantly, this development potentially opens the way in the future for private complainants directly affected by anticompetitive conduct to compel SAMR to carry out investigations. Already, there have been several reports in the past year that pharmaceuticals industry players and industry associations have met with SAMR and called for action against anticompetitive conduct by API manufacturers.[8] The possibility of challenging SAMR can have real effects on future enforcement action, and may present an alternative strategy for private parties looking to take action against anticompetitive conduct.

IV. CONCLUSION

Ever since the AML came into effect, China has seen a high level of antitrust enforcement activity in the pharmaceuticals and medical products industry, particularly from 2015 onwards. AML enforcement sits alongside other regulations and policy initiatives to address problems within the industry, in particular, relating to the shortage and high prices of APIs, and RPM practices for certain medical products. At the same time, private parties have also begun to wield the AML as a means to address commercial disputes by bringing private actions, or potentially by challenging a regulator's decision not to commence investigations. AML enforcement is expected to continue to play a significant role in the pharmaceuticals and medical products industry going forward, and it would be prudent for industry players to navigate the regulatory pitfalls when running their businesses.

7 See e.g. Fei Deng, Su Sun, *Rainbow v. Johnson & Johnson: RPM Litigation in China*, Distribution Vol. 18 No. 1 (March 2014).

8 Among others, the Zhejiang Pharmaceutical Industry Association reportedly called for action against API price hikes in September 2019, while the China Pharmaceutical Industry Association reportedly organized a meeting with SAMR in August 2018 to share concerns about API price hikes and shortages.

A RETROSPECTIVE OF CHINESE ANTITRUST ENFORCEMENT IN THE CHEMICAL INDUSTRY

BY YI (JOSH) XUE & YIKAI YANG[1]

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I. BACKGROUND

2019 witnessed significant developments in China's antitrust history. Since the integration and restructuring of the three Chinese antitrust enforcement agencies in April 2018, the Antitrust Bureau of the State Administration for Market Regulation ("SAMR"), together with the provincial market regulation bureau, has committed itself to strengthening law enforcement powers, and promoting antitrust legislation. By the end of 2019, nearly 3,000 mergers had received clearance (including 44 conditional approvals), and nearly 300 antitrust violations had been investigated and punished. In June 2019, the SAMR adopted three sets of interim provisions, which became effective that September, including the Interim Provisions on the Prohibition of Monopoly Agreements, the Interim Provisions on the Prohibition of Abuse of Dominant Market Position, and the Interim Provisions on Prohibiting Acts of Abuse of Administrative Authority to Eliminate or Restrict Competition. On January 2, 2020, the SAMR issued a draft for public comment, namely the Draft Amendment to the Anti-Monopoly Law, which reflects trends in the regulatory framework of Chinese antitrust enforcement.

The chemical industry, as a sector with bearing on the people's daily livelihood, has increasingly become a focus of vigorous antitrust enforcement in recent years. 2019 also witnessed a great transition in the chemical industry in China. In the 2020 China Energy and Chemical Industry Development Report, which was released in December 2019, it was noted that China's needs of petrochemical and chemical industry have entered the "ecological" stage (beyond the "survival" stage). The hierarchy and content of China's needs, the prospects for development, and core values are all changing. The primary goals of China's energy and chemical plan during the "Thirteenth Five-Year Plan" period are expected to be achieved soon. In 2020, China's chemical industry will release new production capacity, unlock intense competition, and become increasingly integrated.

The "chemical industry" is not a single classification under the Industrial classification for National Economic Activities,[2] and there is no common consensus as to its scope. Instead, there is a heated discussion as to its boundaries and subcategories. Based on our best understanding, we have compiled, through (incomplete) publicly available information, and our own knowledge, statistics on administrative enforcement in the chemical industry in the 11 years since the Chinese Anti-Monopoly Law ("AML") came into effect. There have been in total 28 administrative investigations that concern alleged monopolistic practices in chemical industries, making up nearly 10 percent of all cases. Industries involving gas and oil (including natural gas, liquefied petroleum gas, and aviation turbine oil), explosive materials and equipment (including fireworks, firecrackers, and civil explosive equipment), lenses and LCD panels (including contact lenses, spectacle lenses, and LCD panels), chemical substances (including alcohol ester, twelve film-forming auxiliaries, PVC resin, and chlorophenol), and tires have been factored into this analysis.

In our retrospective of Chinese antitrust enforcement in the chemical industry, we set out to describe the era in three steps: (1) by reviewing the specific type of monopolistic practices in these 28 cases and setting out a corresponding statistical summary; (2) by highlighting several "hotspots" for antitrust enforcement history in this industry; and (3) by sharing our views on likely enforcement trends in the near future.

2 GB/T 4754-2017.

II. A STATISTICAL OVERVIEW OF ANTITRUST INVESTIGATIONS IN THE CHEMICAL INDUSTRY

Based on (admittedly incomplete) statistics, by the end of 2019, there were in total 28 anti-monopoly cases that have been investigated by the relevant authorities. These involve horizontal monopoly agreements (including one violation by an industry association), vertical monopoly agreements, abuses of dominance, and failures to notify a concentration. Please find below a table categorizing these cases, and a statistical summary setting out our observations.

A. Information on Decisions in the Chemical Industry

Table 1

No.	Type of Monopolistic Practice	Operators Being Investigated	Violated Provisions of the AML[3]	Governmental Authority	Decision Issuance Date
1	Horizontal Monopoly Agreement	18 PVC resin producers	Fixing or changing the prices of a commodity	National Development and Reform Commission	2017/9/25
2		6 chlorophenol production and sales enterprises in Jiangsu province		Jiangsu Price Bureau, anti-price monopoly branch	Early 2016
3		6 LCD panel enterprises including Samsung, LG, Chi Mei, AUO, CPT, HannStar Display		National Development and Reform Commission	2013/1/17 (Date of news publication)
4		3 fireworks and firecrackers enterprises in Guangxi Qinzhou City	Dividing sales market or material purchase market	Guangxi Administration for Industry and Commerce	2018/7/25
5		5 fireworks and firecrackers enterprises in Henan Gushi County		Henan Administration for Industry and Commerce	2016/12/19
6		6 fireworks and firecrackers enterprises in Inner Mongolia Chifeng City		Inner Mongolia Administration for Industry and Commerce	2014/5/27
7		7 bottled liquefied petroleum gas (LPG) enterprises in Taihe County, Jiangxi Province		Jiangxi Administration for Industry and Commerce	2011/4/1
8		Zhongshan Gas Association	Industry association making arrangements for competitors to market allocation	Guangdong Development and Reform Commission	2018/8/14
9		7 bottled liquefied petroleum gas (LPG) enterprises in Yongding District, Zhangjiajie, Hunan Province	Fixing or changing the prices of a commodity & Dividing sales market or material purchase market	Hunan Administration for Market Regulation	2019/11/22

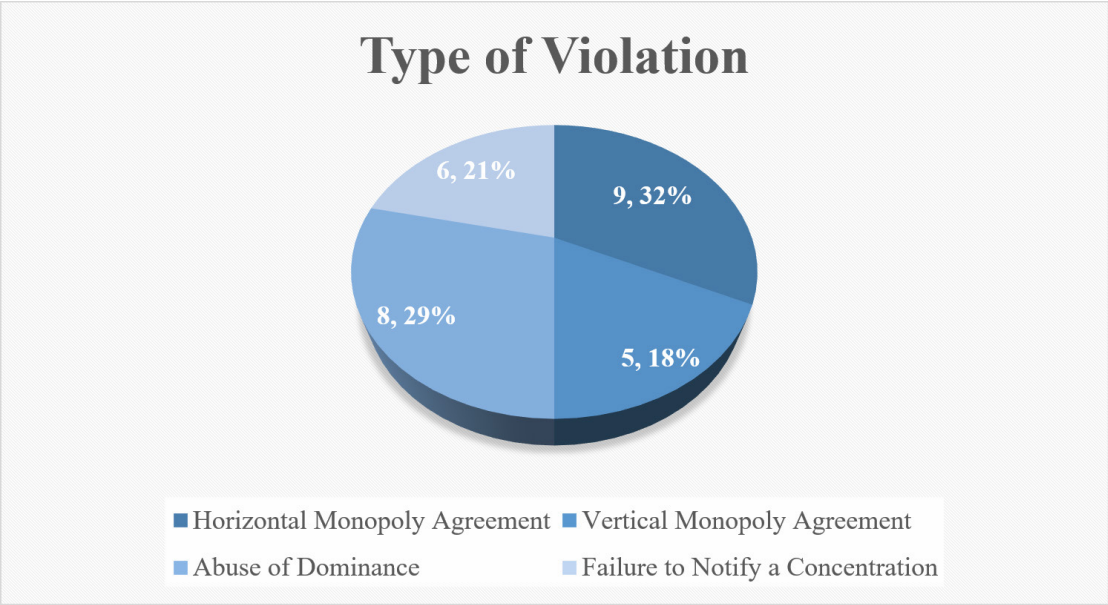
3 The *Anti-monopoly Law of People's Republic of China* (the "AML").

10	Vertical Monopoly Agreement	Haichang Contact Lens Co. Shanghai Branch; Shanghai Horien Contact Lens Optics Co.	Fixing the price for resale of a commodity to a third party (Resale Price Maintenance, "RPM")	Shanghai Administration for Market Regulation	2019/4/24 (Termination of Investigation)
11		PetroChina Company Limited Daqing Oilfield Company Natural Gas Branch & Natural Gas Sales Daqing Branch		National Development and Reform Commission	2018/1/26
12		Eastman (China) Investment Management Co.; Shounuo International Trading (Shanghai) Co.		Shanghai Price Bureau	2017/12/27
13		Shanghai Hantai Tire Sales Co.		Shanghai Price Bureau	2016/4/12
14		7 spectacles lens producers including Essilor, Nikon, Zeiss, Bausch & Lomb, JNJ, etc.		Competent pricing authority in Beijing, Shanghai and Guangzhou	2014/5/29 (Date of news publication)
15	Abuse of Dominance	Eastman (China) Investment Management Co.	Restricting counterparties to trade only with the said operator or its designated operator without justified reasons	Shanghai Administration for Market Regulation	2019/4/16
16		Hubei Lianxing Civil Explosive Equipment Co.		Hubei Administration for Industry and Commerce	2018/11/15 (Suspension of Investigation)
17		Suqian PetroChina Kunlun Gas Co.		Jiangsu Administration for Industry and Commerce	2016/12/30
18		Yancheng Xinao Gas Co.	Adding other unreasonable conditions to the trading without justified reasons	Jiangsu Administration for Market Regulation	2019/2/20 (Suspension of Investigation)
19		Ordos Sanya Liquefied Petroleum Gas Co. and 2 other enterprises		Inner Mongolia Administration for Industry and Commerce	2016/12/14 (Termination of Investigation)
20		Qingdao Xinao New City Gas Co.		Shandong Administration for Industry and Commerce	2016/3/21
21		Chongqing Gas Group Co.		Chongqing Administration for Industry and Commerce	2014/4/28
22		5 pipeline natural gas supply and service enterprises in Hubei	Selling commodities at unfairly high prices	Hubei Price Bureau	2016/6/23
23	Failure to Notify a Concentration	Praxair (China) Investment Co. & Nanjing Refinery Co.	Illegal implementation of the concentration	SAMR	2019/4/28
24		Jiangsu Dewei New Materials Co.		SAMR	2019/2/14
25		Linde Gas (Hong Kong) Co. & Guangzhou Steel Holdings Co.		SAMR	2018/12/4
26		Linde Gas (Hong Kong) Co. & Dahua Group Co.		SAMR	2018/10/10
27		Linde Gas (Hong Kong) Co. & Shanghai Huayi Energy Chemical Co.		SAMR	2018/9/11
28		Korea Osia Co.		The Ministry of Commerce	2017/4/21

B. Statistical Summary and Observations on the Above Cases

From Table 1, it can be seen that 9 cases concerned horizontal monopoly agreements, including one case where Zhongshan Gas Association made arrangements for competitors in the gas industry to engage in an agreement to allocate sales, and 5 cases concerning vertical monopoly agreements. These account for 32 percent and 18 percent respectively of the total, and together account for 50 percent of all antitrust investigations in the chemical industry. There have been eight abuse of dominance cases, which account for 29 percent of the total. There were six cases in which a concentration met the notification thresholds, but the parties failed to notify, which accounts for 21 percent of the total. There appears to be no noteworthy or significant trend favoring any specific type of case in the industry.

Table 2



Looking at antitrust enforcement overall, based on our incomplete summary of the statistics, as of the end of 2019, there had been in total 184 cases relating to (horizontal and vertical) monopoly agreements, 65 abuse of dominance cases, and 45 cases where parties failed to notify a concentration.

Table 3

	Chemical Industry	Overall Industry
Monopoly Agreement (Horizontal and Vertical)	14	184
Abuse of Dominance	8	65
Failure to Notify a Concentration	6	45
Total	28	294

From Table 3, it appears that the ratio of monopoly agreement to abuse of dominance cases in the chemical industry is relatively small compared to overall enforcement. In other words, there are relatively more abuse of dominance cases in Chinese antitrust enforcement history in the chemical industry than it in others. One reason for this might because that many enterprises in the chemical industry, like gas, fireworks and firecrackers, need special administrative licenses, and permits or involve franchises, etc. This scenario might have resulted in market power or leverage for certain enterprises, allowing them to control prices, volumes or other transaction conditions, leading to dependency on the part of upstream or downstream companies, or the creation of entry barriers.

Looking at the nature of the investigated parties listed in Table 1, there are various types: wholly foreign-owned companies, foreign-investment companies, Taiwanese companies, Sino-foreign joint ventures, state-owned companies (holding and joint-stock), companies invested in by natural persons, and industry associations. And there seems to be no noteworthy or significant tendency to enforce against any particular type of company.

III. ENFORCEMENT "HOSPOTS" IN THE CHEMICAL INDUSTRY

Based on Table 1, by analyzing the business areas of the investigated parties, their business models, and the logic, analysis and results of the administrative decisions, there are several "hotspots" worth noting, that could provide valuable guidance to enterprises in the chemical industry in terms of compliance. We draw attention to those hotspots in the sections below, and contribute our thoughts and insights.

A. Gas and Oil have Been the Focus of Enforcement

Gas and oil, being important energy sources, are closely related to people's livelihood and everyday lives, especially pipeline supplies of natural gas and liquefied petroleum gas ("LPG"). Partially for this reason, gas and oil have been key areas of focus for antitrust enforcement in the chemical industry.

According to the statistics in Table 1, 10 out of the 28 cases involve gas and oil (including natural gas, LPG, and aviation turbine oil). There have been three horizontal monopoly agreement cases involving market allocation, one resale price maintenance ("RPM") case, six abuse of dominance cases (four relating to unreasonable transaction conditions, one restricting transactions, and one excessive pricing case), and one case of failing to notify a concentration.

Abuse of dominance cases make up the majority. By way of illustration, enterprises providing natural gas supply services in cities have all the characteristics of a *per se* monopoly. In a suspected abuse of dominance case, when defining the relevant market, authorities take into consideration (1) the characteristics of the gas supply industry; and (2) the fact that an enterprise must receive a franchise from the competent governmental authority in order to provide the service in question. This franchise agreement specifies the exact geographic areas in which the enterprise is allowed to conduct business:

(1) Concerning product characteristics, gas is a clean energy source, i.e. it is more environmentally friendly than others like coal or refined oil. As such, it meets requirements for the prevention and control of atmospheric pollution. It also has advantages in terms of price and efficiency. Thus, the substitutability between gas and coal or refined oil is relatively weak.

(2) Due to certain administrative measures[4] and the characteristics of the unified transmission of urban public gas through municipal pipeline networks, certain gas enterprises are by definition the sole operator in certain specified geographic regions, and there is no competition from similar operators.

As a sole operator in a given geographic region, gas enterprises have control over gas supply, methods of supply, and other relevant trading conditions. Users in a given region are completely dependent: they can only choose to purchase the gas supply services provided by those enterprises and cannot turn to others. The difficulties facing other gas operators in entering the relevant market is another factor to consider when determining whether a given gas enterprise is dominant.

Thus, urban gas supply enterprises normally have a relatively large market share, a certain degree of control over transaction conditions, and can obstruct or affect other operators' ability to enter the relevant market. Once a given enterprise is found to have a dominant market position, any restrictions it imposes on upstream or downstream enterprises or users need to be evaluated extremely prudently and cautiously.

4 For example, in the case against Qingdao Xinao New City Gas, according to the Regulations on the Management of Urban Gas, the gas management department of the local people's government at or above the county level must formulate a gas development plan for its own administrative area. The Administrative Measures for Gas Business Licenses in Shangdong Province prescribe that only one gas enterprise is allowed to provide related services in a given geographic region.

B. Enterprises in Fireworks and Firecrackers Similarly Conclude Horizontal Monopoly Agreements to Divide Markets

Of the nine horizontal monopoly agreement investigations summarized in Table 1, three relate to the fireworks or firecrackers area, and all resulted in penalties for dividing markets. These decisions concern three enterprises in Guangxi Qinzhou City, six in Inner Mongolia Chifeng City, and five in Henan Gushi County.

1. *Guangxi Qinzhou City* Case

On April 12, 2012, Qinzhou Municipal Safety and Production Supervision and Administration Bureau issued the Qin'an Supervision [2012] No. 55 Notice, which provided that: (1) fireworks and firecrackers wholesale enterprises must only engage in business activities within their territories, and must not operate across jurisdictions; (2) fireworks and firecrackers retail enterprises must purchase from prescribed wholesale enterprises and are forbidden to purchase from other sources; and (3) the notice be sent to all wholesale and retail enterprises in the jurisdiction and implemented accordingly.

Based on this notice, three fireworks and firecrackers wholesale enterprises in Qinnan District, out of their own interests, entered into the Qinnan District Fireworks and Firecrackers Wholesale Market Operation and Management Agreement, dividing the operational management area, setting up execution dates and terms, adding anti-counterfeiting marks to their products to implement market partitioning, and allocated regional purchases, sales, distribution and tracking services. Enterprises would be penalized and fined if found to be selling products to retailers beyond their designated regions, or assisting retailers not in designated regions to apply for licenses.

These enterprises also, by virtue of being delegated the responsibility of assisting in "safety production knowledge training and assessment" and uniformly setting up the pre-conditions for retailers to apply the Fireworks and Firecrackers Retail License in their designated regions, required retailers to pay certain sums in advance. Otherwise, they would refuse to deal with their license application or would punish them by restricting the supply volumes.

2. *Inner Mongolia Chifeng City* Case

Since 2006, the Songshan and Hongshan District Safety and Production Supervision and Administration Bureau, has divided the sales region of wholesale enterprises (i.e. each designated region would be supplied by only one wholesaler, retailers in this region can only purchase products from such sole wholesaler, and wholesalers' cross-supplying is strictly prohibited). This was done ostensibly to prevent accidents caused by product quality degradation out of malicious competition, and to guide fireworks and firecrackers enterprises to actively participate in market management.

Very similar to the above *Guangxi* case, though six fireworks and firecrackers enterprises in Songshan and Hongshan District did not enter into any specific agreement, they strictly implemented the above policy by adding anti-counterfeiting marks and confiscating products with no such marks, inspecting products sold by retailers in order to avoid cross-supplies, and requiring retailers to pay a certain amounts in advance (or otherwise they would refuse to deal with their license application, or would sanction them by restricting supply volumes).

3. *Henan Gushi County* Case

In March 2015, in order to "[regulate] the production, operation, storage, sales, safety operation and management of fireworks and firecrackers as well as [eliminate] hidden dangers," five enterprises entered into a joint operation agreement, whereby (1) a joint distribution center would be established, (2) the previous operational situation and inventory of all enterprises would be accounted for and checked, (3) sales channels would be unified and any purchase without permission would be fined RMB 2 million, (4) storage, management, sales and prices would be unified, and (5) total revenues would be divided based on agreed proportions.

After implementing this joint operation, by changing outer packaging without changing purchase prices, the participants made sales prices to retailers uniform for the fireworks and firecrackers of the same specifications, and in fact increased that price by 15-20 percent, forcing customers to passively accept corresponding increases in retail prices.

The Regulations on the Safety Management of Fireworks and Firecrackers in and of themselves did not prohibit wholesalers from supplying products to retailers in other administrative regions, or stipulate that retailers could only purchase products from wholesale enterprises in their administrative regions. In the above three cases, wholesalers were independent legal entities in the same market. They should have competed accordingly, and in accordance with the rules of the market economy and other relevant laws and regulations.

However, they actively organized and implemented a division of wholesale sales, and formed an alliance, which relied on agreed *pro rata* plan, and they lost the incentive to compete. This prevented enterprises and consumers in the fireworks and firecrackers retail industry from enjoying the benefits of effective competition at the wholesale level, and thus objectively led to wholesalers enjoying monopoly profits.

It is worth noting that in the first two cases, even though the relevant local safety and production supervision and administration bureau set up certain administrative restrictions, entering into and implementing monopoly agreement among competitive enterprises would still not be immune under the AML. Enterprises are still prohibited from concluding horizontal monopoly agreements, and are subject to administrative penalties according to the relevant interim provisions.5

If the enterprises in question had evidence showing that the conclusion of the agreement was caused by their "passive" compliance with administrative orders, they could have been given a lighter or mitigated punishment.6 Interestingly, however, the investigated parties were given heavy punishments:

- In the *Guangxi* case, the enterprises were given heavier administrative penalties, i.e. 5 percent, and 8 percent of their overall revenue from the previous year, due to the fact that they refused to acknowledge their participation in the wholesale market operation and management agreement.

- In the *Inner Mongolia* case, the enterprises were also given heavier penalties, i.e. 7 percent and 8 percent of the previous year's overall revenue, due to the fact that they continued to divide the wholesale sales market on the basis of administrative limitations for five years, and took advantage of the safety management activities of the local bureau to respect and check whether there were any violations of their market division policy. They knew or ought to have known that these acts constituted an infringement.

Another interesting fact is that the enterprises in all three cases violated more than one provision of the AML, yet were penalized only under one provision:

- In the *Inner Mongolia* case, the Inner Mongolia Administration for Industry and Commerce, in its administrative decision, recognized that there were four enterprises who abused a dominance by attaching unjustified transaction conditions. However, it did not elaborate in detail on the definition of the relevant market, or the determination of dominance, and only punished the participants for violation of Article 13 of the AML (horizontal monopoly agreements) instead of both Article 13 and 17 of the AML (abuse of dominance).

- In the *Guangxi* case, though it had very similar facts to the *Inner Mongolia* case, especially insofar there were compulsory requirements for retailers to pay in advance, the Guangxi Administration for Industry and Commerce did not allege any abuse of dominance in its administrative decision.

- In the *Henan* case, though the prices for retailers were fixed and unified by joint decisions, the Henan Administration for Industry and Commerce did not impose administrative penalties for violation of Article 13 (1) of the AML.7 Instead, it only imposed a penalty for violation of Article 13 (3) of the AML.

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5 *Interim Provisions on the Prohibition of Monopoly Agreements,* Article 32, section 4, Operators that conclude monopoly agreements due to abuse of administrative authority by administrative authorities and organizations authorized by laws and regulations to manage public affairs shall be subject to the preceding paragraph. Operators which have evidence to prove that the conclusion of the monopoly agreement was caused by passive compliance with administrative orders may be given a lighter or mitigated punishment in accordance with the law.

6 *Id.*

7 Article 13 The following monopoly agreements are prohibited from being made between operators which are in competition: (1) Those on fixing or changing the prices of a commodity … (3) Those on dividing a sales market or material purchase market…

One possible reason for this is that the administrative penalty would have been the same regardless of whether the investigated party were found to have been in violation of one, two or even more provisions of the AML. The different types of violation only affect the percentage of the revenue to be used as a basis for the fine, and one type of violation can also be considered as an aggravating factor in assessing another violation.

Clearly, enterprises in the fireworks and firecrackers industry should pay more attention when implementing certain administrative requirements or limitations that might be questioned or challenged from an antitrust perspective. They should not take it for granted that they would not be punished for such violations. Due to certain limitations or specifications in their business licenses or permits, they should be more prudent when trading with upstream or downstream entities, taking into consideration whether they might be found to be dominant.

C. Administrative Punishment in Horizontal Monopoly Agreement Cases Involving Market Allocation is More Likely to Include Confiscation of Illegal Gains

In the 11 years since the Anti-monopoly Law came into effect, the penalty of "confiscation of illegal gains" should have received more attention both in research and Chinese law enforcement practice. The AML and the Administrative Penalties Law of the People's Republic of China only set out the general principles for the confiscation of illegal gains, and lack detailed, clear, and specific instructions or guidelines on how illegal gains should be quantified, and on what occasions this remedy should be used.

The AML provides that the remedy of confiscation of illegal gains can be applied in monopoly agreement and abuse of dominance cases, but does not mention it in relation to mergers, or abuses of administrative power. But the AML does not specify whether the confiscation of illegal gains is compulsory in any given case. Given that the definition of "illegal gains" is vague, the lack of any unified and clear standard, and the difficulty of calculating and accounting for such gains, the application of this remedy is subject to problems that need constructive and expeditious solution.

The general principle is that the calculation of illegal income should be based on the income obtained by the parties from the illegal production or sales, minus appropriate and reasonable expenses directly related to the parties' business activities. However, the scope of "appropriate and reasonable expenses" is modulated by several factors, such as labor costs, the cost of raw materials, the length of the accounting period, etc., and its implementation raises great difficulties in practice. In most cases, enforcement authorities tend not to confiscate illegal gains, and instead adjust the penalty upwards to compensate for this.

Of the 22 cases concerning monopoly agreements and abuses of dominance in Table 1, there are four cases that were terminated or suspended, and one case concerns an industry association. Besides those five cases (in which confiscation of illegal gains would not be applicable), only 7 out of 17 cases even mentioned the term "confiscation of illegal gains," regardless of whether the antitrust authority actually calculated or confiscated them. Of these seven cases, five concern dividing sales markets (with one also involving price fixing), one concerns price fixing alone, and one concerns an abuse of dominance by attaching unjustified transaction conditions.

Of these seven cases, four specified the exact amount of illegal gains and confiscated them accordingly, taking up to only 23.5 percent of the relevant revenue. In three cases (involving market allocation), the authority was unable to calculate the amount of illegal gains because the investigated parties either: (1) were small or micro enterprises with incomplete financial data whose "normal" income or expenditure under competitive circumstances could not be reasonably calculated; (2) had not established complete financial accounts; or (3) could have realized some income through retailers' voluntary actions due to those retailers' dependency on the parties, and certain delivery conditions.

From the above, it can be seen that in horizontal monopoly agreement cases involving market division, illegal gains tend to be easier to calculate and account for than in other cases, provided that the parties have complete financial data and accounts. One possible reason for this is that in many cases involving market division, the parties divide overall income on an agreed *pro rata* basis. As such, any income after the implementation of the agreement would largely be considered to be illegal. If the alliance decides to divide overall revenue to each party according to some agreed proportion, it must by necessity set up a financial system to keep sales records and accounts. Thus, the illegal gains are likely easier to calculate.

As antitrust enforcement becomes more sophisticated, there will be more and more arguments concerning whether it is compulsory to confiscate illegal gains, and, if so, how to calculate them in a legitimate and feasible way. Such confiscation is not only a means to prevent profits from illegal acts, but also a deterrent in addition to fines based on revenues. In June 2016, the National Development and Reform Commission

issued a draft for comment concerning Guidelines on the Identification of Illegal Gains Derived by Operators from Monopolistic Practices and the Determination of Fines. However, it raised many heated discussions, and the official guidelines were never enacted. It is speculated that the SAMR and the State Council Anti-Monopoly Committee are actively discussing a draft set of such guidelines, and are considering making this a significant part of the reform of Chinese antitrust legislation and enforcement.

D. Administrative Investigations into Suspected Monopolistic practices in the Chemical Industry are mostly Initiated by Third Party Report or Whistleblowers

According to Article 15 of the Interim Provisions on the Prohibition of Monopoly Agreements, and Article 23 of the Interim Provisions on the Prohibition of Abuse of Dominant Market Position, antitrust enforcement authorities may discover suspected illegal acts through their own powers and functions, or through whistle-blowing, assignment by high-level organs, transfer from other organs, report from low-level organs, reports from operators on their own initiative, and other means.

Thus, there are three primary ways for the antitrust enforcement authorities to initiate an investigation: (1) an operator itself; (2) the authority's active discovery; and (3) whistleblowing from third parties. In Table 1, of the first 22 cases concerning monopolistic agreements and abuses of dominance, 13 decisions specify the origin of the case. Twelve of them were initiated due to third party whistle-blowing, i.e. about 55 percent.

IV. ANTITRUST ENFORCEMENT TRENDS IN THE CHEMICAL INDUSTRY

Due to the integration and restructuring of the enforcement authority, enforcement power has been greatly strengthened, and the impetus for legislative reform and improvement has grown. The SAMR and local market regulation bureaus are eager to ensure competition review across all industries, especially those most closely related to people's livelihood, like the chemical industry. They have started to launch specific enforcement actions against administrative monopolies, strengthened anti-monopoly review of mergers, and stepped up enforcement against monopoly agreements and market abuses.

The challenges faced by enterprises in the chemical industry are not limited to the issues discussed above. The antitrust authority tends to embrace more and more comprehensive and logical analysis against suspected monopolistic practices, such as using economic tools (e.g. the critical loss analysis and Lerner Index methods used in the recent abuse case against Eastman), and tends to place more attention on new types of monopolistic conduct in order to prevent "legal business activities in disguise." Innovation and technological development are important for the chemical industry, yet would simultaneously bring more complex issues on the boundaries of intellectual property protection and monopolistic conduct.

It is to be expected that antitrust and competition issues in the chemical industry will become increasingly prominent, and it is advisable for enterprises in the sector to self-assess their compliance on a regular basis. In this way, they can advance their businesses while saving themselves from potential legal risks.

ANTITRUST ENFORCEMENT IN THE CHINESE AUTOMOBILE INDUSTRY: OBSERVATIONS AND FUTURE PERSPECTIVES

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I. INTRODUCTION

The automobile sector has always been a focal point of both public and private antitrust enforcement in China since the country's Anti-Monopoly Law ("AML") came into force in 2008. As one of the largest items of expenditure for ordinary families in China, automobiles can have substantial impact on resource allocation between different products and services. Thus, artificially high prices (or low-quality automobiles and after-sales services) can do significant harm to consumer welfare. In 2019, antitrust enforcement in the Chinese automobile industry penalized two RPM practices, among other things. This article will provide an update on these new cases, and recap other recent representative cases in the Chinese automobile industry. The authors aim to assist stakeholders in the Chinese automobile industry to be better prepared to handle antitrust matters, especially because, as of 2020, there will be several significant developments, including further opening-up to foreign investors in the Chinese automobile industry, more opportunities in the electric vehicle business, and more stringent antitrust rules due to upcoming guidelines for the automobile industry and amendments to the AML.

II. PUBLIC ENFORCEMENT: IS THE NEXT WAVE OF ENFORCEMENT COMING?

Nearly six years has passed since China fined four BMW dealers and twelve Japanese auto parts makers for price fixing in August 2014. These were the first two enforcement cases by Chinese antitrust authorities in the automobile industry (one relating to a domestic cartel and the other to a global cartel). The latter case involved a staggering fine of CNY 1.24 billion, which set a record for Chinese antitrust enforcement at that time. The following two years witnessed aggressive enforcement by Chinese antitrust authorities in the industry, penalizing dozens of companies. Since then, it seems that the automobile industry has become less high-profile in terms of public enforcement. Yet, recent practice shows that the authority may have the automobile industry on its radar again, hence sparking the question: is the next wave of enforcement approaching?

III. 2019 HAS SEEN INTENSE ENFORCEMENT IN THE AUTOMOBILE INDUSTRY

In 2019, three major decisions were issued by the Chinese antitrust authorities in the sector. This shows that the automobile industry is still one of the main areas of focus for the Chinese regulator.

A. The Toyota Case (2019)

On December 27, 2019, in what was perhaps the final enforcement action of the year, China's top antitrust authority, the State Administration for Market Regulation ("SAMR"), issued a decision against Toyota Motor (China) for resale price maintenance ("RPM") agreements operated between 2016 and 2018. Specifically, the SAMR's Jiangsu branch found that the undertaking concerned restricted the displayed prices of Lexus cars on online platforms, and limited the sales prices of certain models. These practices prevented intra-brand competition, restricted dealers' rights to set prices independently, and as a result impeded inter-brand competition in the car market, damaging consumer welfare. In light of the anti-competitive effects of the practices, and the undertaking's cooperation during the investigation, the regulator imposed a fine of CNY 87.6 million, 2 percent of the company's 2016 sales in the Jiangsu area.

B. The Changan Ford Case (2019)

In June 2019, the SAMR imposed a penalty on Changan Ford, as the undertaking concerned restricted the minimum resale price of vehicles by downstream dealers in the Chongqing area since 2013 by formulating price lists, signing price discipline agreements, and restraining dealers' minimum sales price in auto exhibits (as well as on the online market). According to the SAMR's decision, the alleged conduct prevented franchises from setting prices independently, eliminated and restricted intra-brand competition, damaged fair competition in the relevant market, and prevented consumer benefits. The SAMR therefore imposed a penalty of CNY 162.8 million, 4 percent of Changan Ford's 2018 sales in the Chongqing area.

C. The Heze Automobile Industry Association Case (2019)

Also in 2019, the SAMR's Shandong branch closed an antitrust case relating to monopolistic conduct carried out by the Heze City Automobile Industry Association. The regulator received a tip-off claiming that the association monopolized the local motor show market, restricted competition and damaged the business environment. After inspections, the local authority found that the association concerned restricted its members' rights to take part in auto shows, and prevented them from competing against each other, through a commitment letter. In its decision, the authority

determined that given that the members of the associations concerned are also competitors in the Heze auto resale market, such a commitment letter constituted a monopolistic agreement containing a boycott provision. As a social organization with wide influence in the local market, the association played a role in arranging and implementing the boycott. Based on the facts and evidence, the local authority fined the association CNY 300,000.

In addition to these three cases, an investigation against three German carmakers for restrictions on new emissions cleaning technology is still ongoing.

D. Recap of the Last Wave of Public Enforcement

Apart from the above cases in 2019, Chinese competition regulators have closed 5 cases relating to RPM in the motor resale market between 2014 and 2016:

Year	Auto Makers	Conduct	Amount of Fine	Percentage of Sales
2014	Chrysler	RPM	CNY 31.7 million	3%
2014	FAW-Volkswagen	RPM	CNY 248.6 million	6%
2015	Mercedes-Benz	RPM	CNY 350.0 million	7%
2015	Dongfeng Nissan	RPM	CNY 123.3 million	3%
2016	SAIC General Motors	RPM	CNY 201.8 million	4%

In addition, RPM practices in the auto parts market were also investigated. In 2016, Hankook was fined CNY 2.2 million (1 percent of its relevant sales) for restricting resale prices of auto tires.

It is noteworthy that there is a significant difference between these 2014-2016 cases and the 2019 cases in terms of the basis for the fine. In the past, Chinese antitrust authorities took the "relevant sales" (namely, impacted sales) of the undertakings concerned as a starting point. However, as from late 2018, it used "all sales," which can lead to heavier penalty.

IV. PRIVATE LITIGATION: FOCUS ON ABUSIVE CONDUCT AND RPM

Private antitrust litigation in the automobile industry frequently involves abuses of dominant positions and RPM practices. In 2016 and 2017, General Motors and Ford both faced allegations of abuse of market power in the after-sale market. In a major follow-on litigation, Shanghai Hankook was sued in 2018 regarding RPM practices between the tire dealer and its distributors.

A. Major Cases in the Past Few Years

The *General Motors case* (2016) and the *Ford case* (2017). In the ***General Motors case***, Shenzhen Autel Intelligent Technology Company, an auto after-sale service company, and its affiliate brought a suit against General Motors and its three subsidies, claiming that General Motors strictly selected trading parties in the after-sale market for General Motors cars and refused to license essential technical information to the plaintiff on FRAND terms. According to the plaintiff, given General Motors' dominant position in the relevant after-sale market, and the irreplaceability and essentiality of the information concerned to other business operators in the same market, General Motors' conduct was an abuse of market dominance. On the ground that the defendant's conduct damaged competition, obstructed other competitors' from operating in the relevant market, and caused significant damage to them, the plaintiff claimed compensation of CNY 98 million. Subsequently, the defendant filed a petition to challenge the jurisdiction of the first trial court, the Shenzhen Intermediate People's Court, and argued that the case should be handled by the Shanghai Intellectual Property Court. However, this petition was rejected on first instance and appeal. According to reports, the suit has been closed through a settlement between the parties.

In 2017, the claimants in the *General Motors* case raised similar arguments against Ford, claiming that the U.S. carmaker's refusal to license essential technical information to the plaintiff constituted an abuse, and claimed compensation. Generally, only carmakers hold the

complete set of essential technical information needed for repair and maintenance. Therefore, they may face significant risks of being deemed to hold a dominant position. Refusing to license such information on FRAND terms could render carmakers in violation of the antitrust laws. This case also ended with settlement.

The *Hankook Follow-on* litigation (2018). After being sanctioned by the Shanghai Price Bureau in 2016, Hankook's RPM practices became the target once again in civil antitrust litigation before the Shanghai Intellectual Property Court in July 2018. The Plaintiff, Wuhan Hanyang Guangming Trading, one of Hankook distributors in mainland China, alleged that Hankook implemented RPM within its distribution network from 2012 to 2016, and abused its dominant market position by charging above-market prices, taking price discrimination measures, and imposing unfair dealing conditions, etc. Hankook responded that evidence submitted by the claimant was weak, since provisions to restrict minimum resale prices had been deleted in later versions of the agreement. It also denied that it had a dominant position in the relevant market. After defining the relevant market as passenger car tire replacement market in mainland China, the court held that Hankook did not have a dominant position given its low market share, and the characteristics of the relevant market for tires. As to the RPM allegation, though the plaintiff presented the Shanghai Price Bureau's decision as a piece of evidence to prove the existence of an RPM agreement and its adverse effect on competition, the court determined it was insufficient, as the plaintiff and defendant only signed an RPM agreement in 2012, yet had not performed. Given the level of competition in the relevant market, the defendant's market position, its motive to implement RPM agreement, and its effects, the court deemed that the agreement did not produce anti-competitive effects, or impede either intra-brand or inter-brand competition. In light of the above analysis, the court dismissed the case. The plaintiff has appealed the judgment to the Shanghai High People's Court.

B. Plaintiffs Face Grave Difficulty in Winning Antitrust Litigation

Despite the vigorous public enforcement, there has been no case in which a plaintiff has won in antitrust litigation against an automobile company. With an eye to the contradictory approaches adopted by courts and the administrative watchdog concerning RPM agreements, it is not surprising that in the *Hankook* case the first instance court rejected the claims, stating that no RPM agreement was implemented, and no restrictive effects were generated. It has been well-known that when tackling RPM conduct in practice, the administrative authority prefers *per se* rules, yet the courts insist on a rule of reason principle. At the end of 2018, China's Supreme Court ("SPC") closed the remarkable *Yutai* case, taking the view that the antitrust authority's approach should be respected by courts in administrative litigation, but that the judicial branch still needs to analyze the competitive effects of RPM agreements in civil antitrust litigation. Though concluded earlier than the *Yutai* case, the *Hankook* judgment is consistent with the SPC's opinion on RPM agreements.

In addition to the inconsistent approach adopted by the courts and antitrust authorities toward RPM, more potential conflicts are expected to follow. It has been reported that China's Anti-Monopoly Committee under the State Council will soon release long-awaited antitrust guidelines, including guidelines for the automobile industry. According to the draft version, certain types of territorial and customer restrictions in the automobile industry (such as restrictions on distributors' passive sales and restriction on distributors' sales of auto parts to consumers) are deemed to have strong anti-competitive effect and might thereby be reviewed under the per se illegal approach by the antitrust authorities. However, the courts might continue to adopt the rule of reason toward these non-RPM vertical agreements.

V. MERGER CONTROL: A "BEACH LANDING" IN THE EVE OF A RELAXED INVESTMENT POLICY

Recently, mergers in the auto sector, especially among carmakers, have become common. While China has committed to a wider "opening-up" policy aiming at attracting more foreign investment since 2018, the frequency of merger cases seems to suggest that a "beach landing" battle among car makers has started quietly.

A. China has Adopted a Wider "Opening-up Policy"

Chinese President Xi announced, in a speech at the opening ceremony of the 2018 China International Import Expo ("CIIE"), that China will continue to take measures to open its agriculture, mining, manufacturing and service industries by shortening the so-called "negative list" set out in its foreign investment regulation. The 2018 and 2019 versions of the "negative list" issued by NDRC and MOFCOM both clearly indicate that China plans to remove its limitation on the number of shares held by foreign carmakers in Sino-foreign equity joint ventures, and the amount of joint venture companies set up by foreign carmakers, by 2022. In addition, with China's new Foreign Investment Law coming into effect on January 1, 2020, China has made moves to further open its market and level the playing field for foreign businesses competing with Chinese companies.

It used to be that foreign carmakers were not allowed to hold more than 50 percent of shares in joint ventures with Chinese automakers. This restriction will be lifted soon. In response, significant mergers emerged to embrace the new, friendly investment environment. In 2018, BMW announced that it plans to increase its shareholding in BMW Brilliance, and subsequently submitted a merger filing with the Chinese antitrust authorities. BMW will enjoy a 75 percent shareholding in the new ownership structure. The transaction is scheduled to be completed in 2022, and has been approved by the SAMR. This makes BMW the first car maker to take majority control of its Chinese JV.

B. Transactions Related to EVs are Booming in China

With China's policy to promote electric vehicles ("EVs"), more foreign automobile brands are coming to operate in China.

In 2018, BMW and Great Wall Motor received clearance from the Chinese antitrust authority to set up a local JV producing EVs. This is the first Sino-foreign joint venture transaction concerning EVs since the Chinese investment reform. In 2019, we have seen a boom in concentrations related to EVs. Of nearly 30 car-related transactions, approximately 11 transactions concern EVs, i.e. batteries or power systems, navigation systems, etc. For example, Daimler and Geely recently announced a new joint venture to build electric Smart cars in China. The transaction received clearance from the SAMR in March 2019.

C. BAIC and Hyundai Fined for Gun-jumping

Although China's auto industry and market may become more open under the new policy, this does not mean that the antitrust authority will loosen its enforcement policies. In 2019, BAIC and two Hyundai companies were fined CNY 300,000 respectively for gun-jumping. The decision relates to a JV transaction between these companies in 2018. The parties signed the JV contract on December 29, 2018, and the new company obtained a business permit on January 29, 2019. According to the decision, the parties' 2018 turnover met the notification threshold yet was not reported to SAMR. Therefore, the parties failed to fulfill the notification obligation.

Though China plans to remove the cap on foreign investment in the motor industry, regulation of mergers and acquisitions will not be loosened. For foreign carmakers preparing to adjust their ownership in their Chinese companies, the merger control notification obligation should be considered as early as possible in the process. It should be particularly noted that the maximum fine for gun jumping will be significantly increased from the current CNY 500,000 to 10 percent of the violators' turnover according to the draft amendment to the AML.

VI. ADMINISTRATIVE MONOPOLY: EMPHASIZING NEUTRALITY IN SUBSIDIES AND PUBLIC PROCUREMENT POLICY

Recent developments concerning administrative monopolies in the auto industry are also worth analyzing and discussing. Two policies relating to new energy cars ("NEVs") merit highlighting. One development is that, in 2019, China adopted new financial subsidy strategies to promote NEVs, namely vehicles powered by fuels other than petrol (gasoline) or diesel, mostly EVs, which focused more on competitive neutrality. Another development is that a new policy emphasizing the establishment of a fair competition environment for foreign and home-made NEVs in public procurement markets has been implemented.

A. A "Competition-friendly" Subsidy Policy for NEVs

In 2009, the Chinese government implemented a subsidy policy to promote domestic NEVs. Under that policy, consumers could enjoy a discount ranging from CNY 3,000 to 60,000 per car when purchasing a NEV, as the government would grant NEV makers a corresponding subsidy. Such a policy had encouraged more sales of NEVs, and resulted in great development in the relevant industry. Nevertheless, the subsidies also raised serious competition concerns, as (i) only cars using batteries produced by specific undertakings could qualify for the subsidy; and (ii) the subsidies might discourage NEV makers' motivation to compete with each other, resulting in less efficiency and less incentives for R&D.

In light of the concerns noted above, the government adopted a new policy in 2019, (i) abolishing the official list of recommended automobile battery suppliers, thus boosting competition in NEV battery markets; and (ii) adopting stricter technical specifications to qualify for a subsidy. It is to be expected that the new policy will bring more opportunities for foreign carmakers, under more competitive market conditions. In the list of companies receiving subsidies published by the Chinese government in December 2019, Tesla features, alongside Chinese companies, which may signal the beginning of new era for foreign NEVs in China.

B. Improvement of the Business Environment Promotes Competition in the Public Procurement of NEVs

In November 2019, the State Council issued its "Opinions on Further Effectively Using Foreign Investment." This government document seeks to, among other things, optimize policies on the utilization of foreign investment in the automobile sector. One of the undeniable headline-grabbers among those measures is that the central government requires all regions across the whole country to ensure that NEVs produced by either Chinese- or foreign-funded motor manufacturers enjoy the same market access. Moreover, the government will create a level playing field in government procurement, and specifically will not discriminate against foreign entities when releasing public procurement information, setting supplier conditions, and elaborating bid evaluation standards.

Back in 2014, the Chinese government enacted a policy encouraging all levels of government to give NEVs priority over other types of vehicles. However, foreign automakers complained that the 2014 policy set an overly strict threshold for them to participate in public procurement opportunities for NEVs. Under the new 2019 policy, foreign automakers are likely to enjoy a fair opportunity to compete with domestic NEV makers in future public procurement processes.

VII. CLOSING REMARKS

The prospects for the business environment, and opportunities in the Chinese automobile industry have become brighter for both domestic and foreign automobile companies. On the other hand, public antitrust enforcement and private litigation in this industry have kept up their momentum in recent years. Enforcement activities indicate the determination and efforts taken by the Chinese antitrust authority to maintain competition and protect consumer welfare in the context of a further opening-up of industrial policy. As to EVs, whether competition policy will yield to industry policy remains to be seen. One example of the conflict is that in the draft Antitrust Guidelines on the Automobile Industry, it permits RPM for NEVs during a 9-month promotional period. To better comply with the AML, stakeholders may refer to the existing case law, which has revealed some risky practices, such as RPM, cartels, refusal to provide technical information, and restrictions on sales of spare parts in the after sales market. In this regard, the upcoming antitrust guidelines on the automobile industry will provide further guidance.

ANTITRUST ENFORCEMENT AND LITIGATION IN CHINA'S INTERNET INDUSTRY

BY ZHAN HAO, SONG YING, LV HONGJIE & WEI FEI[1]

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I. INTRODUCTION

After more than two decades of rapid development, China's internet industry boasts the largest number of netizens, and the most extensive broadband network in the world today. According to the China Internet Network Information Center, by the end of June 2019, the number of Chinese internet users had surpassed 854 million, and the internet penetration rate had reached 61.2 percent, a rise of 1.6 percent over the previous year. Chinese netizens are active in a variety of internet segments, such as instant messaging, social networking, online shopping, mobile payment, video and music streaming, mobile ride hailing, and online education.

While the explosive growth of China's internet industry has given birth to some of the world's largest internet companies, including Alibaba, Tencent and ByteDance, it has posed new challenges for China's legal and regulatory framework, particularly in terms of the antitrust laws and regulations. Adopted in 2008, the Anti-Monopoly Law of China ("AML") is in need of amendment not only to keep pace with new market dynamics, but also to safeguard and facilitate open and fair competition online.

II. THE ANTITRUST LAW FRAMEWORK FOR THE INTERNET INDUSTRY

Unlike in the automotive, pharmaceutical and intellectual property sectors, China's antitrust enforcers have not issued stand-alone regulations or guidelines specifically for the internet industry, probably due to the complexities in internet competition. Instead, China's antitrust enforcers have maintained that the basic framework of antitrust laws applies to the internet industry while acknowledging the special characteristics of internet competition by adding new, internet-specific rules to general regulations.

In its first move, the State Administration for Market Regulation ("SAMR"), China's top antitrust enforcer, adopted Interim Provisions on Prohibition of Abuse of Market Dominance, which went into effect on September 1, 2019, to address internet competition issues in three aspects.

First, in determining the market shares of undertakings, sales values, volumes, and "other indicators" may be considered. The head of the SAMR Anti-Monopoly Bureau clarified at a press conference on August 30, 2019 that the addition of "other indicators" is to make room for scientifically determining the market shares of internet companies. Indeed, industry practitioners have suggested multiple methods of market share calculation to reflect the dynamics of internet competition, such as the number of active users, time spent on applications, gross merchandise value, and platform fee revenues.

Second, factors in assessing the market dominance of an internet undertaking include competitive dynamics, business models, number of users, network effects, lock-in effects, technological features, market innovation, the ability to access and process relevant data, and each undertaking's market power in related markets. It should be noted that network effects, lock-in effects, data processing capacity, and leverage from related markets are factors specific to the internet sector and subject to ongoing debate among scholars and practitioners as to their true significance.

Third, dominant undertakings are prohibited from selling products and services below cost. Where the free-of-charge business model commonly seen in the internet economy is concerned, both free-of-charge and chargeable products and services must be taken into account to determine whether sales are truly below cost. This provision apparently recognizes the two-sidedness of platform economies, and attempts to allow for a comprehensive assessment of the impact of relevant business models.

In its second legislative move, the SAMR published a draft amendment to the AML on January 2, 2020 for public comment, which reiterated its stance on the assessment of the market dominance of internet companies. Article 21, paragraph 2 of the draft amendment provides that in determining the market dominance of internet undertakings, network effects, economies of scale, lock-in effects, and the ability to access and process relevant data must be considered. The proposed date for the adoption of the amended AML has not yet been determined.

III. CHINA'S ANTITRUST ENFORCEMENT IN THE INTERNET INDUSTRY

Although China's antitrust regulators are actively amending existing laws and regulations to keep pace with developments in the internet economy, how the new regulations should be interpreted and enforced in practice is yet to be tested. At a regulatory guidance symposium held on November 5, 2019, the deputy head of the SAMR Anti-Monopoly Bureau affirmed that the internet industry has been a priority on the antitrust agenda over the past few years, and that the SAMR has devoted ample resources to researching and analyzing the internet economy. However, the SAMR has yet to issue its first infringement decision in the internet sector. This is not because the internet is immune to abusive conduct. Rather, competition in the internet sector is allegedly fierce, and competition issues in this sector are particularly complicated and worthy of careful examination.

In the past, the SAMR has taken a prudent and inclusive approach towards internet competition, with a view to encouraging innovation in the "new economy." However, as the internet economy has grown, to the point that it now affects almost every aspect of daily life, calls for more stringent regulation are on the rise. The special "internet" provision in the draft AML amendment, as previously mentioned, has been interpreted as paving the way for increased enforcement in coming months or years.

A. Either-Or Arrangements

One particular behavior that has garnered much attention in China is the "either-or" tactics allegedly engaged in by certain internet platforms.

People increasingly place orders for almost everything through mobile apps. Over the past few years, there have been reports that some online platforms request partner merchants to sign exclusivity contracts that require merchants to commit all their business to one platform. This kind of arrangement has been termed the "either-or clause."

Whether this "either-or" tactic infringes antitrust rules has been subject to heated debate. Some argue that exclusivity requirements that are not reasonably necessary to achieve business objectives could hinder market entry by potential rivals and raise the operational cost of small competitors.

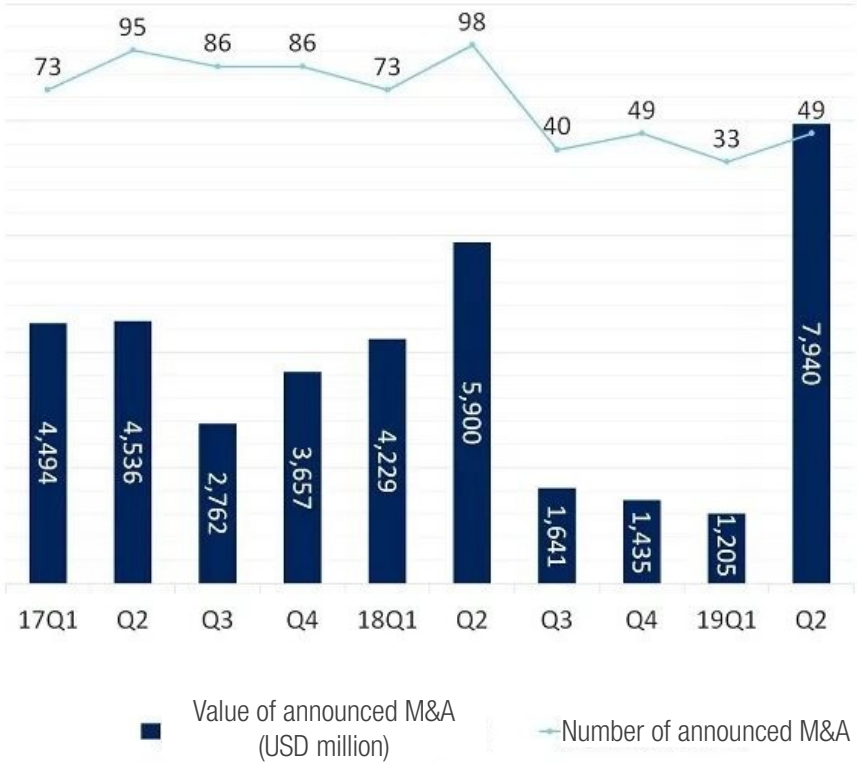
Other economists and lawyers point out that exclusivity arrangements could reduce transaction costs and eliminate free-riding problems, thus incentivizing relationship-specific investments. These benefits would be particularly significant where internet platforms do not have substantial market power. This camp of scholars and lawyers further contend that, online, where competition is dynamic and multi-homing is prevalent, platforms do not have as much market power as on traditional markets, because switching costs between different platforms are negligible, and innovative business models can disrupt the entire ecosystem in short order. Online, exclusive dealing is likely to be pro-competitive on balance, particularly when it is engaged in by companies without substantial market power.

At the above-mentioned regulatory guidance symposium, SAMR officials voiced their opinion that either-or clauses may be in violation of antitrust rules, and that the SAMR would examine conduct more closely, or open formal investigations where appropriate to safeguard the proper functioning of the internet economy. However, due to the complexity of business models in the real commercial world, some critical issues, such as whether a specific arrangement is in fact an "either-or clause," and whether it is pro- or anti- competitive under the rule of reason, are subject to specific assessment.

B. Merger Review in the Internet Sector

Although China is home to some of the world's largest internet companies, their M&A activities have not been subject to much review by the country's antitrust regulator. As the chart below shows, internet-related M&A activities have continued unabated over the past three years. It has thus puzzled many practitioners that internet companies have not appeared frequently in public merger control filings.

M&A Trends in the Internet Sector 2017 – 2019Q2



Source: CVSource

In August 2016, Didi Chuxing announced its acquisition of Uber China, and became the largest mobile ride-hailing company in the country. Shortly afterwards, the Ministry of Commerce ("MOFCOM") disclosed that it had launched an antitrust investigation into Didi's failure to make a pre-notification to MOFCOM – so-called "gun jumping." In November 2019, the SAMR confirmed at a press conference that the probe was still ongoing. However, the case has dragged into its fourth year without any progress being disclosed.

Various reasons have been cited for the lack of merger control review in the internet sector.

First, because internet activities are heavily regulated in China, investors have used the variable interest entity ("VIE") as a vehicle to bypass regulatory hurdles. There has been speculation that the SAMR and MOFCOM are reluctant to delve into VIE issues. As a result, whether mergers by VIE entities are subject to the jurisdiction of antitrust authorities remains uncertain.

Second, the appropriate method to calculate the turnover of internet companies is controversial. Some argue that sales generated by platform merchants should not be attributed to the platform's turnover. Instead, only the commission or service fees charged by the platform should be counted as the platform's revenue. Consequently, many internet companies would not be caught by the statutory turnover thresholds for an antitrust filing.

Third, whether a non-notified merger in the internet sector creates anticompetitive effects is subject to debate. For example, it is arguable whether ride-hailing apps compete with taxi companies, and thus whether they are in the same relevant market. Moreover, the question of how to assess the competitive dynamics of two-sided platforms adds a further level of complexity.

Fourth, even if a non-notified merger is found to have restricted competition, the question of how to remedy any such effects create another headache for enforcement officials. For a company like Didi, which is valued at as much as USD 56 billion, unwinding the transaction would be unthinkable, but a statutory penalty of RMB 500,000 (approximately USD 70,000, the maximum fine under the current AML) is unlikely to have any deterrent effect.

To address these problems, it has been suggested that value of the merging parties be used as the notification threshold in lieu of revenues, and that penalties for non-notification be substantially raised. The draft AML amendment provides that the penalty for non-notification be raised to a maximum of 10 percent of a company's turnover in the preceding year, and that the SAMR be authorized to adjust the filing thresholds so that the agency can efficiently react to new developments. Antitrust observers will closely follow whether internet M&A will be subject to more stringent scrutiny by antitrust enforcers.

IV. CHINESE ANTITRUST LITIGATION IN THE INTERNET INDUSTRY

A. China's Reformed Jurisdiction System for Antitrust Litigation

Similar to other major jurisdictions, aside from public enforcement, in China there are also other means to obtain antitrust relief, namely private enforcement. In addition, if an injured party disagrees with an administrative decision, they may apply for "administrative reconsideration" or file an administrative lawsuit.

On January 1, 2019, the Regulations on Some Issues of the Intellectual Property Court ("IP Regulations") came into effect. China's civil antitrust jurisdiction ushered in a great transformation: the new structure of the IP court of the Supreme People's Court will hear appeals against first instance judgments of local IP courts and intermediate people's courts. The IP court of the Supreme People's Court will also directly hear appeals against administrative monopoly cases decided by local IP courts and intermediate people's courts at the first instance. Such appeals crossing the court hierarchy are known as "Leapfrog Appeals" in the Anglo-American legal system. In other words, an appeal of a first-instance judgement may, in some circumstances, bypass intermediate courts of appeal, and go directly to the Supreme Court.

Since the IP Regulations provide for jurisdictional allocation for antitrust litigation, China has formulated the following system:

1. The IP Court of the Supreme People's Court ("IPCSC") will be the appellate and retrial court for all antitrust cases of first instance in China.

2. The Beijing, Shanghai, and Guangzhou special IP Courts were set up in 2014, and exercise special jurisdiction over antitrust cases at first instance within their respective jurisdictions. The Guangzhou IP Court hears cases originating within the territory of the whole Guangdong Province, except Shenzhen. These three IP courts are intermediate courts. Before the establishment of the IPCSC, the first instance antitrust cases tried by the IP courts were appealed to the higher courts in Beijing, Shanghai and Guangdong Province. As of January 1, 2019, the first instance antitrust cases in the special IP courts are all appealed to the IPCSC.

3. The local special IP Tribunals in city intermediate courts – since January 2017, the Supreme People's Court has approved the establishment of 20 special IP Tribunals in Zhengzhou, Tianjin, Changsha, Xi'an, Hangzhou, Ningbo, Jinan, Qingdao, Fuzhou, Hefei, Shenzhen, Nanjing, Suzhou, Wuhan, Chengdu, Nanchang, Lanzhou, Changchun, Haikou, and Urumqi. These IP Tribunals are usually set up in intermediate courts in provincial capitals or major cities and are internal divisions of the local intermediate courts. At present, apart from Zhejiang, Shandong and Jiangsu Province, which have established two IP Tribunals to hear cases in different parts of the province, other provinces have only set up one IP Tribunal in their respective capital cities to handle cases across the province. As with IP Courts in Beijing, Shanghai and Guangzhou, appeals from first instance antitrust cases tried by the local special IP Tribunals will all be heard by the IPCSC.

4. Other civil tribunals in intermediate courts – other provincial capitals which do not have established the special IP Tribunals are still on the old track whereby the Third Civil Tribunal of the intermediate court in the relevant provincial capital usually hears antitrust cases from the province. However, it seems likely that more special IP courts and tribunals will be established in the near future.

B. Challenges in Antitrust Litigation Practice

After ten years of AML enforcement, the Supreme People's Court named ten "typical" antitrust cases in 2018. Over the past decade, since the implementation of the AML, the number of antitrust cases accepted and concluded by the people's courts has increased significantly. The Supreme People's Court has stated that by the end of 2017, 700 new cases had been accepted at first instance, and 630 were completed. These cases involve transportation, insurance, medicine, food, household appliances, power supply, information networks and other industries. Of these cases, the majority concerned alleged abuses of market dominance (which accounted for more than 90 percent of all cases), and monopoly agreement cases.

Nonetheless, despite the increased number of antitrust cases, plaintiffs' winning rates are still very low, and almost all cases are lost due to lack of evidence. In some specific cases, both parties often lack legal arguments, economic analysis and evidential support concerning relevant market definition and the establishment of dominance.

In addition, the rules governing coordination between antitrust investigations and litigation procedures are unclear. For instance, do parties still need to prove the facts that have been established in a decision of the enforcement agencies? If an agency decides to suspend or terminate an investigation based on an undertaking from the parties, can the existence of monopoly behavior be inferred? In cases that involve both litigation and administrative investigations, will relevant documents such as a voluntary surrender and application for leniency, as submitted by a party in the administrative procedure, be taken as evidence against that party in any subsequent litigation? All these questions need to be further addressed by legislators and judges.

C. Antitrust Litigation in the Internet Sector

In a report issued by the Supreme People's Court, it said that, in the past decade, the rate of antitrust litigation is generally increasing, and that the industries or fields involved are rather wide, covering transportation, insurance, medicine, food, household appliances, power supply, information networks and other areas. Especially, cases in the internet sector appear frequently. This trend is also the result of the explosive development of China's internet industry.

One milestone case in the internet industry is *Qihoo v. Tencent*. This case was also listed in the top 10 antitrust cases (2008-2018) by the Supreme People's Court. And the Supreme People's Court's judgment has had a demonstrable effect on proceedings in subsequent cases.

In its judgment, the Supreme People's Court pointed out that in litigation concerning abuse of market dominance, the definition of the relevant market is a tool for assessing the market power of the operators and the impact of the alleged behavior on competition. However, it is not an end in and of itself. Even if the relevant market is not clearly defined, the market position of the defendant and the potential impact of its behavior can be evaluated through direct evidence to the effect that it excludes or impedes competition. Therefore, not every case of abuse of market dominance needs a clearly defined relevant market.

Further, the Supreme People's Court held that a high market share is not dispositive of a dominant market position. Competition in the internet industry is highly dynamic, and the boundaries of the relevant market are far less clear than in traditional fields. In this case, the court will not overestimate the importance of market share data, but will instead undertake a comprehensive assessment based on multiple factors, as specified in Article 18 of the AML, to determine whether internet operators in fact hold a dominant market position.

In 2018, the Supreme People's Court extended the trial approach it took in the *Qihoo v. Tencent* to *Xu Shuqing v. Tencent*. The lawyer Xu Shuqing filed a lawsuit against Tencent for abuse of dominant market position in the Internet Emoji Service Market. The Supreme People's Court held that in determining the existence of a dominant market position by an internet enterprise, market shares only have a coarse-grained and potentially misleading use.

Notably, in the latest Revised Draft of the AML, released on January 2, 2020, Article 21 provides that, in determining whether internet operators have a dominant market position, factors such as network effects, economies of scale, lock-in effects, and the ability to control and to process related data must be considered. This article echoes judicial practice in the past and will provide a new legal basis for the court's approach.

As mentioned above, the internet industry is also facing the same challenges in antitrust litigation practice that traditional industries are. Without innovation in the rules of civil procedure and the AML, internet firms will still face difficulties collecting and providing evidence to win lawsuits. In the meantime, future judgements of the Supreme People's Court in different cases will fulfil the role of precedents, and will still need to be observed. In any event, economic analysis is going to be increasingly important as evidentiary support in terms of relevant market definition and the determination of market dominance. It can be predicted that parties to litigation and even courts themselves will frequently invite economists as expert witnesses or consultants in antitrust litigation in the internet sector.

THE SCIENCE OF CHINA'S FRAND RATE-SETTING

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I. BACKGROUND

China's courts and antitrust authorities have increasingly played active roles in setting fair, reasonable and non-discriminatory ("FRAND") royalty rates for the wireless communication industry. The Shenzhen court applied a very low rate in *Huawei v. InterDigital* back in 2014, which was vacated as a result of a settlement. The Beijing Intellectual Property Court and the higher people's court affirmed the rate for China's own WiFi standard in favor of a China-based technology company (IWNCOMM), in 2017. In September 2019, Nanjing Intellectual Property Court issued the China FRAND rates for Conversant's 3G/4G patent portfolio. Of course, the most influential decision is the anti-monopoly enforcement authority's decision in 2016 against Qualcomm, where a 65 percent discount was imposed in China sales.

China's courts have also announced their intention to adjudicate on global FRAND rates. In May 2018, the appellate court in China's Guangdong Province, where some of largest Chinese mobile handset manufacturers are based, issued special judicial guidelines on dealing with standard-essential patent ("SEP") cases. One of the most interesting provisions suggested that at least the Guangdong court was willing to adjudicate global FRAND rates at the request of litigants.

While we have not seen any such global rates being set by any of the Chinese courts, it seems to many of us that Chinese judges, whether in Shenzhen, Beijing, Nanjing or in the Intellectual Property Court in the Supreme Court, might sooner or later take up opportunities to make such rulings.

This article proposes that certain "framework aspects" and "foundational factors" should be the focus of discussions if China is genuinely interested in setting FRAND rates (either for China only or globally), with credibility and support. China aspires to have global accountability, and its courts must be prepared to issue decisions that have global impact. Whether or not the courts are the ideal place for handling such disputes, judges must be ready.

The framework aspects and the foundational considerations that we propose here are largely based on rule of law considerations for FRAND rate determination. The framework aspects we set out include the boundary of the royalty stack, the good faith of implementers, the readiness to use arbitration, and the larger context of trade policies and the global industry ecosystem. The foundational factors to be built include China's jurisdiction (ultimately the comity issue), protection of confidentiality, use of expert witnesses, *amicus* briefs, and due process requirements for antitrust investigations.

One of the specific questions we raise relates to foreign policy, as trade tensions have long formed a significant part of the backdrop to IP issues. The most worrisome policy part of current dialogue concerning the U.S.-China trade relationship relates to so-called "delinking," i.e. excluding China from U.S.-centered technologies and supply chains. If China-based implementers see no hope of being part of the global supply chain, implementers will exhibit much more resistance, and the potential for collaboration between licensors and licensees will come up against more barriers. These barriers could all become part of a blockade to future developments in many important technological fields such as 5G and the internet of things ("IoT").

Our aim is to provide some pathways for policymakers and stakeholders (both inside and outside China) to develop a system to address the conflicts between patent owners and implementers. Finding a solution would unlock tremendous efficiencies and significant opportunities for innovation and the global supply chain.

II. FRAMEWORK ASPECTS

By "framework aspects" we refer to broader contextual issues China needs to consider when its courts have opportunities to take on FRAND rate setting cases.

These issues concern the views or perceptions among licensors, China-based implementers, and Chinese regulators, judges and regulators. The points of view listed below may or not already be familiar. Providing opportunities for stakeholders to address these points is key. These issues include:

- Whether China-based implementers will be forced to carry an unfair burden of royalty rates?
- Whether China-based implementers will be treated fairly or discriminated against outside China, specifically in foreign courts or foreign arbitration tribunals?
- Should not China-based implementers be accountable for any hold-out behavior?
- Will hold-out even hurt China-based innovators one day? Can patent owners ever be paid for their innovation efforts?
- Will China try to choke off or unfairly squeeze resources for innovations made outside China?
- Where does royalty money come from? Are we still in the same economic ecosystem? Will we truly be business partners, rivals or even enemies in the future, given the way the world (and specifically U.S.-China trade relations) is developing?
- Does the patent system still make a key difference to innovation?

The following is the set of framework aspects to work from.

A. Boundary of the Royalty Stack

One of the biggest concerns among Chinese regulators and judges is royalty stacking. Industrial policy decision-makers are often haunted by stories that Chinese implementers end up having no profits at all after paying royalties, whether or not they have been paid in reality.

It is suspected that, as a defense mechanism, Chinese implementers, antitrust enforcers and judges are looking to the excessive pricing provision under China's anti-monopoly law ("AML") to threaten actions against patent owners. It is unsurprising that the implementers' recourse to AML litigation is often considered to be a form of hold-out by patent owners.

There is a real need for regulators or judges who take into account industrial policy factors (whether or not they should do so) to have reliable knowledge about the current consensus, if any, or other views about the total size of the royalty stack in wireless communication. One of the common worries about judges or regulators is that they might not be sufficiently knowledgeable about industry or business practices.

If FRAND cases indeed reach the courts or antitrust regulators, our best hope is that these judges or regulators will catch up quickly and gain real business insight. It would also be valuable for them to be aware of current trends in other jurisdictions, e.g. the pending FTC case against Qualcomm, the DOJ's investigation into standard-setting organizations, etc. All of these developments could reshape current thinking. When stakeholders have more insight, they might find it sobering to look at the real state of the royalty stack.

B. Arbitration

Are courts really the ideal forums for FRAND rate determination? In China and other jurisdictions, there are committed judges who are fully capable of adjudicating such disputes. There is no doubt about these judges' capabilities. But even those judges in China who have in fact rendered such decisions in the past privately admit that they are reluctant to handle the task, given the complexity and the amount of time that must be allocated to FRAND cases. Judges are increasingly overloaded with complex cases and other judicial responsibilities. This is particularly true in China.

Going to courts for FRAND rate setting is probably not what was intended when patent owners made FRAND commitments during the standard setting process in the first place. FRAND rates are by their nature business decisions to be made by the parties to transactions. Arbitration by a team of experts in this area is supposed to offer efficiency when disputes arise. This is probably why China's MOFCOM seemingly accepted the use of arbitration as a condition to determining the willingness of licensees in its conditional approval of Microsoft's acquisition of Nokia's cellphone business.[2]

Why are China-based implementers showing little willingness to take the arbitration route? What are the lessons, valid or invalid, that they have drawn from the past experiences? Reportedly, leading Chinese companies have suffered significant disappointment from their arbitration experiences. What caused this, aside from the result itself? Some implementers think arbitration decisions are not binding precedents, as licensors could always assert patents elsewhere against other implementers if the licensors are not pleased with certain results.

If location is a key issue, might arbitration in Hong Kong or Singapore be a better choice? Mainland China and the Hong Kong SAR recently reached a new agreement that allows China's courts to enforce injunctions issued in Hong Kong. But anecdotally, the Hong Kong International Arbitration Center ("CIETAC") does not have a sufficient supply of competent arbitrators that are considered to be FRAND experts.

What would it take for more arbitration organizations to be ready to truly realize this form of alternative dispute resolution? Are there arbitration panels that are irresistible to both implementers and patent owners? If not, what would it take to build them? And how long would it take?

C. Asymmetry in the World of FRAND

FRAND was never intended to be a rigorous set of legal tests, but FRAND commitments make it possible for standardized technologies to be implemented at scale. China places high priority on the good faith principle ("cheng shi xin yong") in its civil code (Art. 7) and in its intellectual property system. This is arguably consistent with the values behind FRAND.

China's legal scholars seem to agree that a FRAND commitment is a unilateral legal act that delivers legal effect under its civil code and contract law. It would be interesting to clarify whether implementers should be held accountable to the good faith principle in China.

The China Supreme People's Court's position on SEP injunction issues suggests that it looks at the "fault" (i.e. "culpability)" of both licensors and implementers. The guidance issued by the Beijing Higher People's Court even went one step further by comparing the "fault" on both sides. All this implied that implementers bear some obligation to act in good faith. China has long recognized the principles of "fault in contract making" (Art. 42 in the Contract Law). Should this principle be applied more rigorously to stop "hold-out" behaviors and prevent "efficient infringements"?

D. International Trade Relationships

One of the most worrying conversations surrounding the U.S.-China trading relationship concerns "delinking" or the so-called "new cold war."[3] The idea is that the U.S. should abandon economic cooperation with China concerning science, technology, investments, industry, education and shared talent pools. Whether or not this will become a reality is beyond the scope of this discussion, but it inevitably affects policymaking and even judges' thought processes when discussing FRAND royalties.

2 See MOFCOM merger review decision dated April 8, 2019, http://www.mofcom.gov.cn/article/b/e/201404/20140400542508.shtml.

3 See https://foreignpolicy.com/2019/09/06/the-u-s-china-cold-war-is-a-myth/.

Irrespective of the territoriality of patent laws around the world, all jurisdictions share one common underlying value – providing stimulus for innovation. No one has convincingly argued that innovation incentives should be limited to local innovation in a particular country. Given the nature of the global economy and innovation ecosystem, the way patent licensing has been working undoubtedly benefits global innovation. This is not a secret, despite the doctrine of territoriality of intellectual property laws.

Empirical experience shows that much less hold-out has been experienced by companies in Japan and Korea, particularly in the past. Moreover, hold-out was rarely mentioned back in the DVD licensing era by China-based implementers. Even today, the Chinese firms that take on most licenses are often those with more sales outside China. All this probably proves that a real commitment to become a bigger player in the global market makes it more likely for implementers to pay royalties.

Today, the divisiveness surrounding free trade and globalization, and more worryingly, the rising conversation around "delinking" the U.S. and Chinese economies, paints a much darker picture for implementers. At some point, governments will begin to inquire if royalty payments benefit rivals, and why?

If there is more government intervention in the near future, patent licensing will become more of a geopolitical rather than a legal issue. This is not desirable for implementers or patent owners. Even worse, if we unfortunately fall into a new cold war era, we should simply leave royalty issues to diplomats and bureaucrats.

III. FOUNDATIONAL FACTORS

While all stakeholders pay attention to the framework aspects noted above, there is no doubt that certain specific foundations should also be developed in China, if courts or antitrust regulators plan to rule on FRAND rates, be they local or global, with credibility and global influence.

The foundational factors we set out below may not be exhaustive, but developments concerning these factors will be critical. None of these proposals are out of reach. There is no reason not to try to implement any of them.

A. Loopholes in Jurisdictional Rules

Generally speaking, Chinese courts can exercise jurisdiction over FRAND cases through either (i) a special "FRAND fee dispute cause of action," or (ii) under the AML. The FRAND fee dispute cause of action originated from the *Huawei v. InterDigital* case back in 2013. The second cause of action derives from the "excessive fee" provision of the AML. Both causes of action seem to be loosely based on Chinese anti-monopoly laws. In particular, the nature of the FRAND fee dispute cause of action is somewhat perplexing.

Why should Chinese courts exercise jurisdiction under the anti-monopoly rules? In China, anti-monopoly claims are generally treated as tort claims in nature. The competent jurisdictions for tort claims include the places where the tort is committed, the places where its consequences materialize, or the domicile of the defendant. One significant loophole concerns places where the consequences of a tort materialize. A plaintiff can always allege it suffers from a tort and that its home court should have jurisdiction. If Chinese courts blindly say yes to such claims, it would essentially allow plaintiffs to choose where they want to sue.

Chinese courts might have to at least set out some clearer rules on the standard of proof to establish where the "consequences" of a tort occur in the context of anti-monopoly violations. A plaintiff should have to prove at the outset what the consequences are, and how they would happen, if at all.

Chinese courts should be fully aware of the likelihood of abusive forum shopping by implementers. This is particularly problematic when there are existing court actions between the same parties outside China. When a SEP licensor sues an implementer outside China based on SEP disputes, for infringement and/or for FRAND rate determination, a Chinese court action will make the situation much more complex. Conflicting court opinions might be exactly what the implementers are looking for, as part of a "hold out" strategy.

Another trending dialogue concerns China's anti-suit injunctions. A U.S. Court imposed an anti-suit injunction against Huawei in its battle against Samsung. Will China follow this path?[4]

4 See https://www.essentialpatentblog.com/2018/04/judge-orrick-enjoins-huawei-enforcing-injunction-infringing-seps-issued-chinas-shenzhen-court-huawei-v-samsung/.

B. Confidentiality

Chinese judges now widely employ a "top-down" approach to FRAND disputes, and rely on comparable licenses to determine royalty rates. In future FRAND rate cases in China, we might see that the courts will first determine which licensees were "similarly-situated," and then calculate royalty rates from a set of comparable licenses. However, disclosure of comparable licensing agreements is a very sensitive issue, even when the parties choose to do so with waivers from third parties.

If the courts in China wish to conduct proceedings with full trust from litigants around the world, the issue of confidentiality must be handled flawlessly. In China, as far back as 2012, the Supreme Court's judicial interpretation for private antitrust lawsuits already set out measures such as ordering non-public hearings, compulsory confidentiality undertakings, restrictions or bans on reproduction of documents, or allowing evidence to be reviewed only by attorneys.[5] Such measures are critical when courts try to determine FRAND rates by looking at "comparable licenses" or other confidential information. Courts must instruct lawyers acting for SEP owners and implementers to sign confidentiality undertakings. In China, one sensitive issue is that in-house counsel often appear in the courtroom to particulate in the entire proceeding, and have access to all documents and evidence. Chinese courts might consider imposing restrictions on the access of in-house counsel to confidential information provided by the other side.

A related point is the possibility of limited discovery. China does not have U.S.-style discovery, but of late more courts, the latest example being Beijing, appear to be willing to grant special orders to counsel to investigate evidence from third parties, including government authorities. Such investigation orders could open up new opportunities for litigants to discover more evidence.

C. Expert Witnesses

The value of economic analysis has increasingly been recognized by Chinese judges. In some recent high-profile court cases and antitrust investigations, economic testimony has played a substantial role, even when offered by U.S.-based economists. This was unthinkable even 10 years ago.

In August 2019, the Beijing local government issued a special policy guideline encouraging the active participation of expert witnesses in evaluating intellectual property disputes. If this guideline is fully implemented, we could well see judges becoming more willing to spend courtroom time on expert opinion and to allow cross-examinations and rebuttals, etc. In the past, one reason judges were less willing to grant requests for expert testimony was the risk of extended hearings. Judges probably have to realize that a lot more time will be needed for FRAND cases.

We expect that judges could well soon begin to scrutinize the qualifications of experts (although no clear criteria have been established in this regard). Rules on the scope of expert opinion, the manner of presenting expert evidence, or cross-examining experts could also emerge. After all, Chinese judges and counsel receive little training in handling experts in the courtroom. Judges in China are still suspicious about the credibility of paid expert witnesses, and tend to rule out expert opinion on even very technical subject matter, without providing sufficient reasons. This could undermine courts' abilities and credibility in dealing with complex subject matter in the long run.

D. Amicus Briefs

The utility of *amicus* briefs has started to be appreciated. The Beijing Intellectual Property Court has even experimented with publishing such *amicus* briefs in certain cases.[6] And in certain high-profile cases, Chinese courts are known to receive briefings or opinions from prominent professors or even industry associations.

The courts in China have yet to establish a formal mechanism close to the *amicus* brief. One reason is that Chinese courts do not make certain litigation documents open to the public, and it is therefore almost impossible for outsiders to submit an *amicus* brief in a timely fashion. Courts also lack experience in dealing with *amicus* briefs in actual proceedings. But Chinese judges could soon realize that being open to *amicus* submissions is very valuable in adjudicating on FRAND cases of global significance. Even before the official adoption of an *amicus* brief mechanism, industry associations, professors or companies should actively seek opportunities to submit their opinion or reports to Chinese courts where FRAND cases are being litigated.

5 See Art. 11 of China Supreme Court's Judicial Interpretation on Private Antitrust Lawsuits, Fa Shi 2005 no. 5, https://www.wipo.int/edocs/lexdocs/laws/zh/cn/cn375zh.pdf.

6 See http://www.chinaiprlaw.com/index.php?id=3487 Beijing Daily "Beijing Intellectual Property Cited Legal Opinion from Third Party Body in its Judgment," January 28, 2016.

E. Due Process in Antitrust Investigation

Whenever Chinese antitrust enforcement agencies start looking at the issue of FRAND rates, they must bear in mind fundamental due process requirements. For example, on April 5, 2019, the ICN published its Framework for Competition Agency Procedures, which provides that antitrust investigations should focus on competition-related information. In the latest U.S. China Phase One Trade Agreement concluded on January 15, 2020, Art. 1.9 specifically dealt with the protection of confidential information by China in any criminal, civil, administrative ore regulatory proceeding. The same provision suggests that China undertake to limit requests for or access to information to no more than what is necessary for the government to perform legitimate investigative or regulatory functions.[7] All such ICN recommendations and the Phase 1 Trademark Agreement need to be fully implemented in China, so that parties involved in such procedures are not unduly burdened. Notably, the recently-issued interim SAMR rules on abuses of dominance do not set out any additional procedural safeguards beyond those in the general administrative penalty rules it issued in December 2018. The traditional approach in China emphasizes "objectivity, completeness, fairness and timeliness" in dealing with the extent to which evidence should be required by enforcement authorities. There is a strong and urgent need to address the issue of relevancy, reasonableness and proportionality. This should be a priority when FRAND rates are at issue in any antitrust investigation.

IV. CONCLUSION

This article set out certain framework aspects and foundational factors for discussion among all stakeholders in FRAND rate determination in China. It might be useful for stakeholders to confront their underlying concerns and conduct meaningful dialogue that provides a basis for real action.

After all, setting FRAND rates for patent portfolios essential to global technology standards is one of the key challenges in today's IP world. We must keep updated about global perceptions of IP, technology, innovation and trade policies. If deadlocks can be dissolved soon, it would benefit everyone.

7 See https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf.

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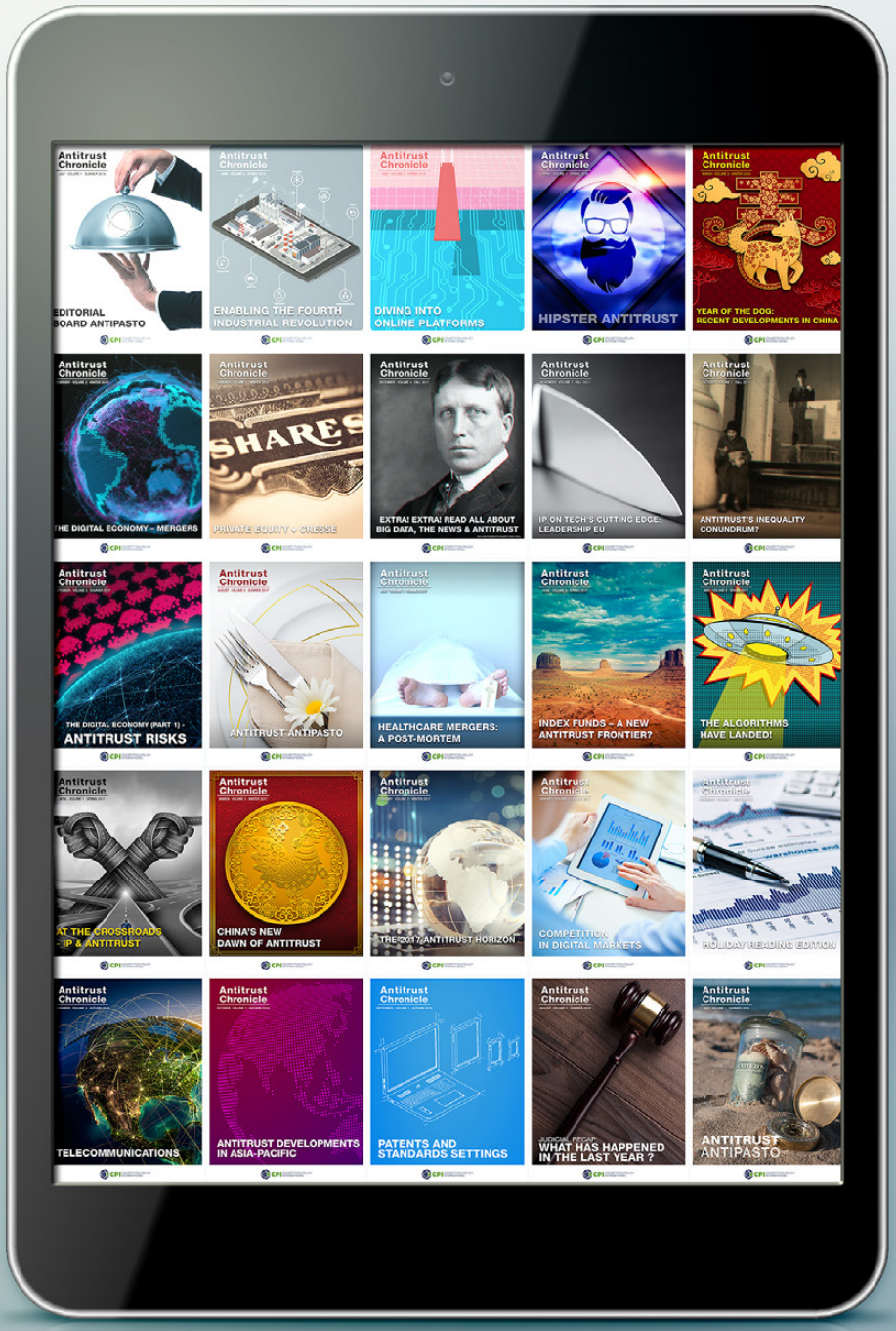


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