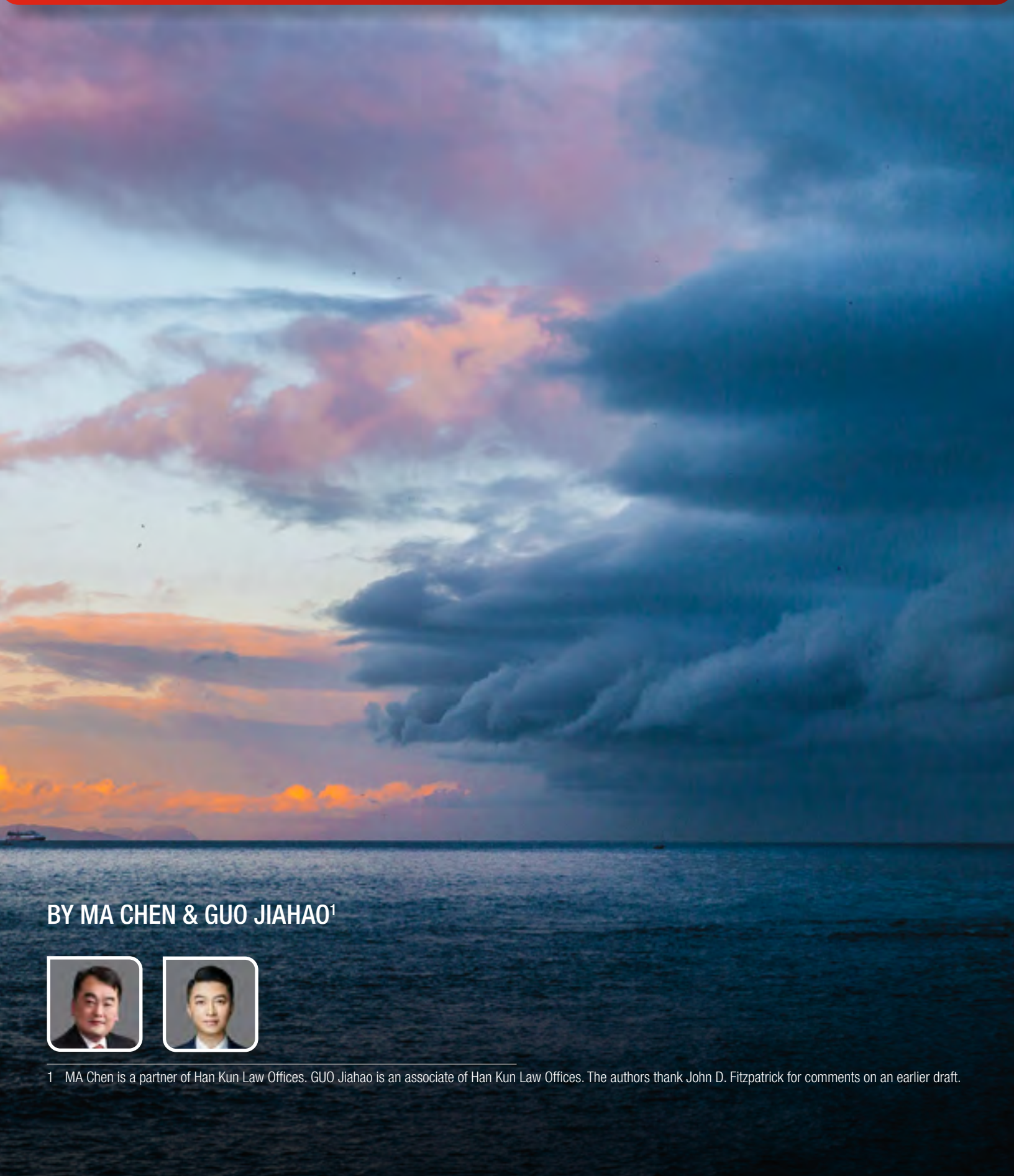
ENTERING THE STORM: AN OVERVIEW OF RECENT ANTI-MONOPOLY INVESTIGATIONS IN CHINA



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Entering the Storm: An Overview of Recent Anti-monopoly Investigations in China

By MA Chen & GUO Jiahao

The current "anti-monopoly enforcement storm" was prompted by China's top leadership in late 2020 under the policy objective of "preventing disorderly ex-pansion of capital". China's anti-monopoly regulator, SAMR (and its provincial counterparts), has concluded more than 100 anti-monopoly investigations so far, at a rate of nearly one investigation every three days. Many of China's well-known internet companies have been penalized for various types of Anti-mo-nopoly Law violations. While internet giants' non-filing due to the use of VIE structures significantly outnumbered other violations, headlines and attention have been largely devoted to abuse of dominance cases, in particular "choose one of two" exclusive dealing practices by internet platform companies. To fur-ther understand this enforcement storm, we analyze in this article its features and underlying reasons, and summarize notable developments among these anti-monopoly investigations, such as the adoption of two-sided market theo-ries, use of sophisticated economic analysis, and imposition of administrative guidance for violators. We also look prospectively into potential changes in China's anti-monopoly investigative landscape that may result from legislative developments and the establishment of the State Anti-monopoly Bureau. In light of government priorities, such as "common prosperity" and data security, this enforcement storm might become a "new normal", even against the back-drop of a slowing economy.

Industry observers commonly view November 2020 as the beginning of the current anti-monopoly enforcement storm in China.[2] This month coincided with the State Administration for Market Regulation ("SAMR") issuing an exposure draft of the *Anti-monopoly Guidelines for the Platform Economy*[3] (the "Platform Guidelines"), which later went into effect on February 7, 2021. The Platform Guidelines target various internet company practices in China that had been the subject of complaints and criticism from market participants and consumers. The Platform Guidelines were reinforced by the subsequent publication of a policy statement by the Central Politburo of the Communist Party of China ("CPC"), which called for "strengthen[ing] antimonopoly enforcement and prevent[ing] the disorderly expansion of capital."

The ongoing anti-monopoly enforcement storm is a response to the public's call for government intervention in China's internet industry, to curb monopolistic behaviors and to reduce the influence of the country's internet giants. Reading from the subsequent tones and actions of SAMR and provincial Administrations for Market Regulation that report to SAMR ("provincial AMRs"), a number of internet company market practices have been identified as particularly toxic and inimical to competition.[4] These practices have reinforced the internet giants' influence over other undertakings and the general public, including pervasive "choose one of two" exclusive dealing practices among close competitors in oligopolistic markets, prevalent predatory pricing by financially resourceful internet giants, failure to file for merger review by internet companies due to use of the variable interest entity ("VIE") structure, and "ecosystem building" by means of killer acquisitions and widespread investments in related markets.

Anti-monopoly investigations have been the focal point and foothold for stepped-up regulation and enforcement. After the Platform Guidelines were released for public comments, SAMR was observed launching the enforcement storm, announcing the closing of 130 investigation cases by either itself or provincial AMRs. These investigations have included high-profile cases targeting well-known Chinese internet giants and have drawn worldwide attention. To date, this enforcement storm has led to dozens of companies being penalized and fined of billions of RMB.

In this article, we provide an overview of the anti-monopoly investigations conducted by SAMR and provincial AMRs and share our thoughts on Chinese anti-monopoly enforcement going forward. In Section I, we analyze from a statistical perspective these investigation cases and the statements from top leadership that heavily influenced them. In Section II, we analyze new developments revealed by these investigations from the perspective of monopolistic agreements, abuse of dominance, and failure to report notifiable concentrations (herein referred to as "non-filings"), respectively. In Section III, we envisage the impact to be caused by new developments in anti-monopoly regulation in China. Finally, we conclude with our forward-looking views on anti-monopoly regulation in China.

I. OVERVIEW OF ANTI-MONOPOLY INVESTIGATIONS AMIDST THE ENFORCEMENT STORM

China's top leadership has driven the current enforcement storm by making continued vows to strengthen anti-monopoly regulation. We briefly summarize some of these statements in the following Table 1.

2 For purposes of this article, "enforcement storm" refers to the current round of SAMR enforcement investigations into, and penalty decisions against, monopolistic behaviors on the internet and other industries. Generally, the enforcement storm is considered to have started in November 2020 and remains ongoing as of January 2022.

3 《平台经济领域的反垄断指南》[Anti-monopoly Guidelines for the Platform Economy] (St. Council Anti-monopoly Commission, Guo Fan Long Fa [2021] No. 1; promulgated and effective Feb. 7, 2021).

4 For example, many of SAMR's penalty decisions target the practices of "choose one of two" (or transaction restrictions), predatory pricing (based on the Price Law), and failure to notify a notifiable concentration between undertakings.

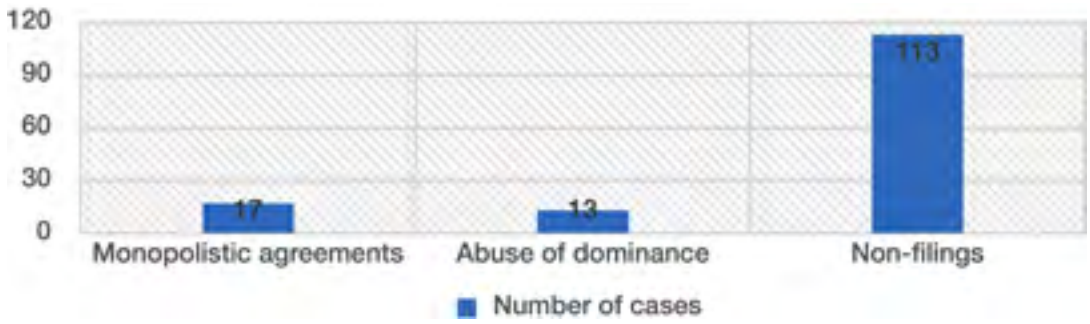
Table 1: Tone from the top

Date	Scenarios	Statements
Dec. 11, 2020	Meeting of the Central Politburo	"Strengthen anti-monopoly and prevent disorderly expansion of capital."[5]
Dec.16~18, 2020	Central Economic Work Conference of the CPC	"Strengthen anti-monopoly and prevent disorderly expansion of capital."[6]
Mar. 5, 2021	Report on the Work of the Government	"We will step up efforts against business monopolies and guard against unregulated expansion of capital, and ensure fair market competition."[7]
Aug. 11, 2021	Implementing Outlines for Building a Government under the Rule of Law (2021-2025)	"Strengthen legislation and enforcement in the field of Anti-monopoly Law and Anti-unfair Competition Law."[8]
Aug. 26, 2021	Central Committee for Deepening Comprehensive Reform Conference of the Communist Party	"Strengthen anti-monopoly regulation, investigate and penalize monopolistic and unfair-competition conducts of certain platforms."[9]

In short, these calls from the top leadership are unprecedented in the history of China's Anti-monopoly Law[10] (the "AML"), which entered into force in 2008. Market dysfunction due to monopolistic conduct is clearly the root cause for the enforcement storm; however, another important factor is concern that China's internet industry is dominated by private and foreign interests who exert too much control and influence over the Chinese economy and society. It is likely for these reasons that the CPC and the government felt the need to tame these apparent excesses.

As of December 31, 2021, SAMR has published 143 anti-monopoly investigation decisions made by either itself or provincial AMRs, which cover all types of monopolistic conduct.[11] We summarize the grounds for these investigations in Chart 1 below.

Chart 1: Types of Anti-Monopoly Investigations (Excluding Abuse of Administrative Power)



5 See "First time that the Central Politburo mentioned 'strengthening anti-monopoly and preventing disorderly capital expansion' and what does it mean?," available at https://new.qq.com/omn/20201217/20201217A01KMI00.html, last visited on Dec. 15, 2021 (Chinese).

6 See "Central Economic Work Conference held, Xi Jinping and Li Keqiang made important speeches," available at http://www.gov.cn/xinwen/2020-12/18/content_5571002.htm, last visited on Dec. 15, 2021 (Chinese).

7 See "Report on the Work of the Government," available at http://www.xinhuanet.com/english/download/2021-3-12/report2021.pdf, last visited on Jan. 17, 2022.

8 See "Implementing Outlines for Building a Government under the Rule of Law (2021-2025)," available at https://yndaily.yunnan.cn/content/202108/12/content_15782.html, last visited on Dec. 15, 2021 (Chinese).

9 See "Strengthening the level of anti-monopoly and anti-unfair competition," available at http://shanghai.xinmin.cn/xmsz/2021/09/01/32019631.html, last visited on Dec. 15, 2021 (Chinese).

10 《中华人民共和国反垄断法》[Anti-monopoly Law of the People's Republic of China] (29 Standing Comm., 10 Nat'l People's Cong., P.O. 68; promulgated Aug. 30, 2007, effective Aug. 1, 2008).

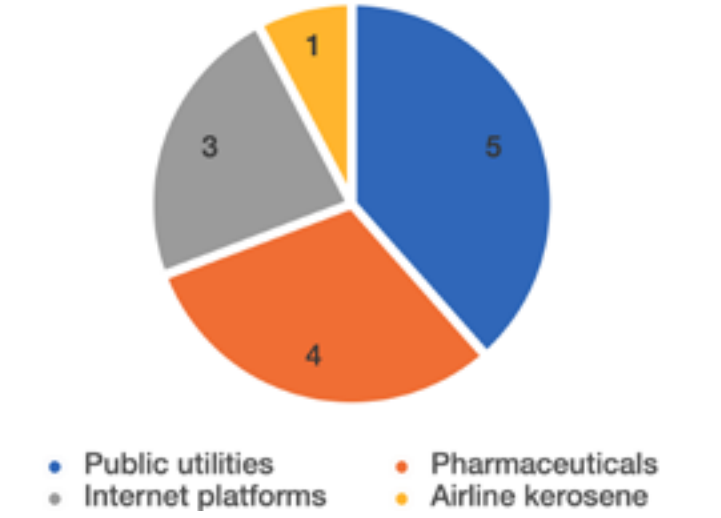
11 For purposes of this article, we do not calculate those decisions relating to abuse of administrative powers. Please note that SAMR disclosed 15 non-filing cases on Jan. 5, 2022 but these decisions were made on Dec. 31, 2021, therefore we also include them in this article.

SAMR and the provincial AMRs imposed penalties in a total of 143 cases during the enforcement storm through December 31, 2021, according to SAMR's announcement. This means that penalty decisions have been issued at a rate of approximately one every three days during this period since November 2020. Based on our analysis, non-filing investigations represented the vast majority of penalty cases.

We also analyzed the industries that were the subject of monopolistic agreement cases and abuse of dominance cases in Chart 2 and Chart 3 below.

Chart 2: Industries involved in monopolistic agreement cases

Chart 3 Industries involved in abuse of dominance cases



Monopolistic agreement investigations involved 11 industries, while abuse of dominance investigations involved four industries, primarily public utilities, pharmaceuticals, and internet platforms. The pharmaceuticals industry has been a priority for both types of investigations.

Fines imposed is another important metric to consider. Under the AML, the penalties for monopolistic agreements and abuse of dominance consist of three parts, i.e. order to suspend illegal behaviors, fines between 1-10 percent of prior fiscal year turnover, and confiscation of illegal gains. SAMR and provincial AMRs have imposed fines (or exempted fines based on leniency programs) in basically every case; only in some cases did they confiscate illegal gains, the reason for this is unclear. Thus, for purposes of our analysis, we focus only on the fines imposed and summarize below in Chart 4 and Chart 5 the fines imposed on undertakings in the monopolistic agreement and the abuse of dominance cases.

Chart 4: Fines imposed in monopolistic agreement cases (percentage of prior fiscal year turnover)

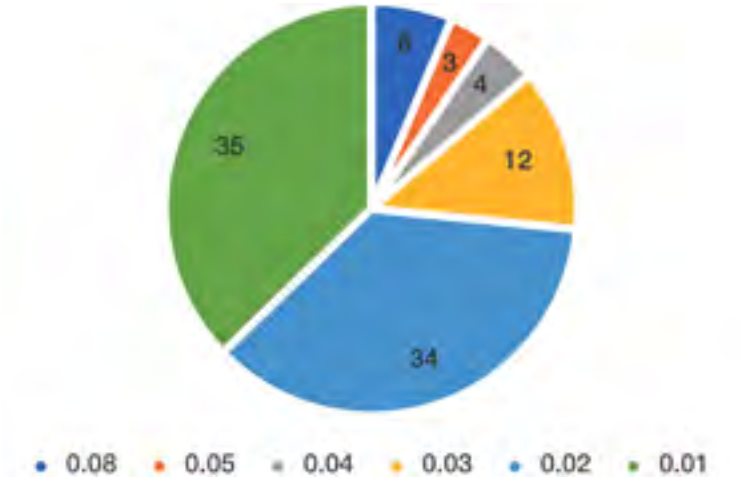
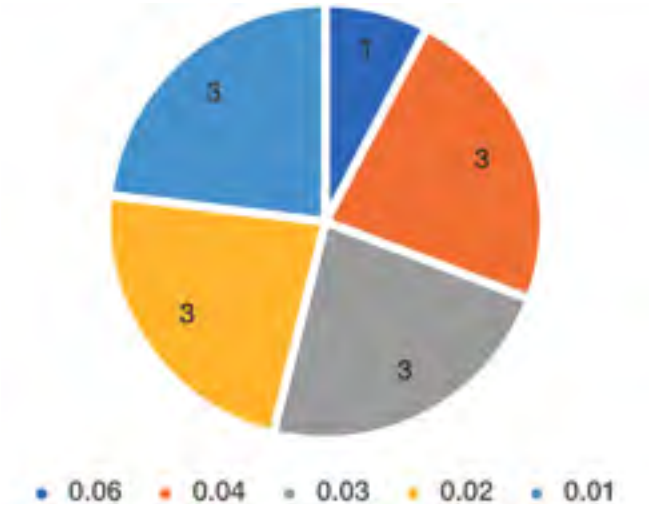


Chart 5: Fines imposed in abuse of dominance cases (percentage of prior fiscal year turnover)



It can be seen from Chart 4 and Chart 5 that SAMR and the provincial AMRs have imposed high percentage fines in only a limited number of cases. Typically, the level of fines is below 5 percent; in monopolistic agreement cases, especially, the typical fine is 1 to 3 percent of the undertaking's prior fiscal year turnover.

As for non-filing investigations in relation to failure to file due to use of the VIE structure, we note that SAMR imposed the maximum fine of RMB 500,000 in 91 percent of all non-filing cases (a non-filing case may involve more than one filer with filing obligations). We list below in Chart 6 the total number of penalty cases against some key companies based our research of publicly available information.

Chart 6: Non-filing decisions by company (as of December 31, 2021)

Company name	Number of non-filing penalty decisions
Tencent and affiliates	36
Alibaba and affiliates	21
Didi and affiliates	13
Meituan and affiliates	7
JD.com and affiliates	5
Baidu and affiliates	4

Six companies were subject to a total of 87 non-filing penalty decisions, which means that they were involved in more than two thirds of the 113 non-filing penalty decisions announced so far during the enforcement storm. These figures give credence to the belief that the enforcement storm is in part predicated upon taming the growing influence of internet giants.

From these data, we can draw the following conclusions: First, SAMR and the provincial AMRs have placed great emphasis on penalizing non-filing cases, and it is no coincidence that the majority of the companies so penalized are Chinese internet giants. Second, judging from the size of the fines, abuse of dominance is clearly the focus of SAMR and the provincial AMRs — Alibaba alone was fined approx. RMB 18.23 billion (approx. USD 2.9 billion), far exceeding the total amount of fines in monopolistic agreement cases and non-filing cases combined. Third, the enforcement storm is comprehensive and has covered a wide range of companies and monopolistic behaviors.

Further, investigations by SAMR are also distinguishable from concurrent antitrust investigations in other jurisdictions. First, only SAMR has placed emphasis on non-filing cases. Second, while SAMR (and provincial AMRs) and the authorities of other jurisdictions all investigated the anti-competitive behaviors of internet giants, SAMR and the provincial AMRs appear to have focused heavily on "choose one of two" practices (e.g. the three arguably most high-profile platform cases) while the authorities of other jurisdictions have exhibited more diversified concerns. Third, while many of these cases remain ongoing, SAMR and the provincial AMRs have speedily closed more than a hundred investigations with the subject undertakings raising no challenges. Efficient as it is, to some, this was achieved through investigative techniques that could be considered questionable and too heavy handed.

II. NEW DEVELOPMENTS IN ANTI-MONOPOLY INVESTIGATIONS DURING THE ENFORCEMENT STORM

Amidst calls to strengthen anti-monopoly regulation and prevent disorderly capital expansion, SAMR and the provincial AMRs have adopted new measures in their anti-monopoly investigative efforts. This is especially observable among penalties imposed in abuse of dominance and non-filing cases. We discuss below some new developments that have emerged during the enforcement storm.

A. Monopolistic Agreement-related Cases

While monopolistic agreements have not garnered as many headlines, SAMR and the provincial AMRs have taken actions in monopolistic agreement cases during the enforcement storm. Among the 17 monopolistic agreement cases, 15 involved horizontal agreements and 2 involved vertical agreements. The table below provides more details of these cases.

Table 2: Breakdown of monopolistic agreement cases by legal basis

Violation category	Number of penalty cases	Specific grounds for punishment	Number of cases
Horizontal agreement	15	Fixing prices among competitors	14
		Segmenting markets	8
		Restricting output	3
Vertical agreement	2	Fixing resale prices	2
		Restricting the minimum resale prices	2

B. Horizontal Agreement Cases

SAMR and the provincial AMRs have not shown a change in course during the enforcement storm in regulating horizontal agreements, either with respect to relevant rules or enforcement practices. More specifically, the theories of harm relied upon are not substantially different, nor are the procedures of their investigations or the fines imposed (as illustrated in Chart 4).

C. Vertical Agreement Cases

Thus far, during the enforcement storm, SAMR has made public only two vertical agreement cases and both concern retail price maintenance ("RPM"). The two cases are the Yangtze River Pharmaceutical Group RPM case,[12] which was handled by SAMR ("Yangtze River RPM"), and the

12 Case number: Guo Shi Jian Chu [2021] No. 29 (国市监处〔2021〕29 号).

Bull Group case[13] ("Bull Group RPM"), which was handled by the Zhejiang AMR. SAMR's reasoning revealed therein clearly indicates that it is quite difficult for RPMs to be granted exemptions in individual cases. Further, this also suggests that while SAMR and the provincial AMRs recognize the competition harm of certain non-price related monopolistic practices, such as the most favored nation clauses,[14] their enforcement focus for vertical monopoly agreements has remained RPM.

In these two cases, the fines (both 3 percent of prior year turnover) were not set at a level significantly higher than previous RPM cases, but it is likely that both cases used nationwide turnover as the basis in determining the penalty imposed.[15] If so, this would differ from the approach adopted in the two most closely watched precedential cases, i.e. the *Toyota RPM*[16] case and the *Chang'an-Ford RPM*[17] case, both made public in 2019. In those two cases, the turnover bases were limited to the localities in which the provincial AMR investigations took place. An explanation for such a difference is the geographical area where the illegal behaviors were carried out, namely the *Yangtze River RPM* case and the *Bull Group RPM* case both were nationwide in scope, while the *Toyota RPM* case and the *Chang'an-Ford RPM* case only concerned much smaller areas. We therefore anticipate that geographical area will continue to play an important role in future penalties.

The *Yangtze River RPM* case is notable because SAMR analyzed in unprecedented detail Yangtze River's claimed exemptions, namely that its RPM measures: (i) were intended to facilitate the launch of new drugs and thus benefited consumers; and (ii) prevented malicious low-price competition so that distributors and retailers could invest more in their service quality. SAMR undertook thorough fact-checking and determined that the RPM at issue was continued after the new drugs were launched and that no evidence suggested that distributors and retailers actually invested more in service quality (especially due to the RPM). The analysis here clearly indicates that it is quite challenging to be granted exemptions in individual cases, even after the fact-checking phase—it requires proving market competition will not be severely restricted and the beneficial fruits will be passed on to consumers. Further, SAMR has also made clear that, among others, the mere existence of disciplinary clauses suffices to prove that RPM agreements have been implemented if it can be established that these clauses wield sufficient deterrent power.

While the provincial AMRs accept applications by undertakings investigated to suspend RPM investigations, they do so only rarely, such as in the *Lenovo RPM*[18] case and the *Haichang Contact Lenses RPM*[19] case. During the enforcement storm however, SAMR and the Zhejiang AMR have not done so. In fact, SAMR refused two such requests from Yangtze River. No suspension decision was granted in other cases, either. This likely reflects a lack of leniency on the part of regulators during the enforcement storm.

D. Abuse of Dominance Cases

With a total number of 13 penalty cases, abuse of dominance is clearly a priority for SAMR and the provincial AMRs in the enforcement storm. This is so especially considering the amounts of fines imposed[20] and the profound influence of the landmark cases, especially the cases against Alibaba[21] (*"Alibaba Abuse case"*) and Meituan[22] (*"Meituan Abuse case"*). That said, transaction restrictions are not the only focus of SAMR and the provincial AMRs when investigating abuse of dominance, who also looked into matters such as unreasonable transaction terms, unfair pricing, refusal to deal, and tying. We summarize in the table below a breakdown of the grounds of abuse of dominance that SAMR and AMRs have relied on when investigating such cases during the enforcement storm.

13 Case number: Zhe Shi Jian An [2021] No. 4 (浙市监案〔2021〕4号).

14 Platform Guidelines, art. 7: "The practice that a platform undertaking requires platform-based undertakings to provide it with transaction terms equal or superior to other competitive platforms in terms of commodity price, quantity, etc. may constitute a monopolistic agreement or constitute abuse of a dominant market position." ("平台经营者要求平台内经营者在商品价格、数量等方面向其提供等于或者优于其他竞争性平台的交易条件的行为可能构成垄断协议，也可能构成滥用市场支配地位行为。").

15 It is clearly stated in the Bull Group decision that the basis is "China domestic sales." Based on the wording and the amount of sales in the Yangtze River decision, we tend to view that the basis therein is also China domestic sales.

16 Case number: Su Shi Jian Fan Long Duan An [2019] No.1 (苏市监反垄断案〔2019〕1号).

17 Administrative penalty decision remains undisclosed to date.

18 Case number: Jing Shi Jian Jia Zhong Zhi [2020] No. 1 (京市监价终止〔2020〕1号).

19 Case number: Hu Jia Jian Zhong Zhi [2019] No. 1 (沪价检终止〔2019〕1号).

20 In addition to the *Alibaba* Abuse case, SAMR also imposed a fine of appx. RMB 3.43 billion in the *Meituan* Abuse case.

21 Case number: Guo Shi Jian Chu [2021] No. 28 (国市监处〔2021〕28号).

22 Case number: Guo Shi Jian Chu [2021] No. 74 (国市监处〔2021〕74号).

Table 3: Breakdown of legal bases for investigating abuse of dominance

Violation category	Specific grounds for punishment	Number of cases
Abuse of dominant market position	Imposing unreasonable transaction terms	6
	Transaction restrictions	5
	Unfair pricing	3
	Refusal to deal	1
	Tying	1

In the following paragraphs, we focus on the most frequently used grounds for abuse of dominance shown in the above table, namely transaction restrictions, unfair pricing, and imposing unreasonable transaction terms.

1. Transaction Restrictions

As introduced above, pervasive "choose one of two" practices among close competitors in oligopolistic markets were one of the main triggers of the enforcement storm. To address this problem, the Platform Guidelines clearly indicate that "choose one of two" is a sub-category of transaction restrictions.[23] Of the five transaction restriction cases concluded so far during the enforcement storm, two cases concern traditional sectors (public utilities) and three cases concern the new economy (e-commerce platforms). SAMR and the provincial AMRs have handled many cases in the field of public utilities on various grounds and these two cases are not readily distinguishable. New developments in enforcement of transaction restriction investigations have been revealed in the three spotlight cases, namely the *Alibaba Abuse* case, the *Meituan Abuse* case, and the *Sherpa's Abuse* case.[24]

2. Two-sided Platforms Defined

SAMR and the Shanghai AMR for the first time defined two-sided platforms in these three cases,[25] showing their open attitude to more advanced anti-monopoly theories. However, both SAMR and the Shanghai AMR bypassed discussing whether the two-sided platforms witnessed sufficient "cross-platform network effect," and their use of such theories have been considered controversial and subject to criticism.

According to the Platform Guidelines, a relevant market based on the platform as a whole may be defined when the cross-platform network effect is sufficiently strong.[26] Although the term "cross-platform network effect" is not clearly defined, it is generally understood that such phrase has the same or a similar meaning as "indirect network effects" in the *Amex* Case in the United States.[27] The latter case concerns the credit card market, which was deemed subject to strong indirect network effects and thus viewed as a "transactional two-sided market," meaning that the two sides of that market should be considered together when conducting competition analysis.

In all three abuse of dominance penalty cases, SAMR and the Shanghai AMR did not state in the penalty decision that the platforms concerned were "transactional two-sided markets," but the analysis went on to directly differentiate between online and offline services by considering each platform as a whole. Specifically, they considered demand-substitution for users (which is one side of the platform), demand-substitution for platform-based undertakings (which is the other side of the platform), and supply-substitution for platforms, finally concluding that

23 Platform Guidelines, art. 15: "Undertakings in the platform economy with a dominant market position may abuse their dominant market positions by limiting, without justification, the transactions of their transaction counterparties, so as to eliminate or restrict market competition. In the analysis of whether trade restrictions are constituted, the following factors may be considered: (1) whether an undertaking requires its platform-based undertakings to "choose one of two" competitive platforms or limits its transaction counterparties to entering into transactions only with itself; …" ("具有市场支配地位的平台经济领域经营者，可能滥用市场支配地位，无正当理由对交易相对人进行限定交易，排除、限制市场竞争。分析是否构成限定交易行为，可以考虑以下因素：（一）要求平台内经营者在竞争性平台间进行"二选一"，或者限定交易相对人与其进行独家交易的其他行为；").

24 Case number: Hu Shi Jian Fan Long Chu [2020] No. 06201901001 (沪市监反垄处〔2020〕06201901001号).

25 The relevant markets are the mainland China market for online retail platform service (*Alibaba* Abuse case), the mainland China market for online catering takeaway platform service (*Meituan* Abuse case), and the Shanghai market for English-language online catering delivery platform service (*Sherpa's* Abuse case).

26 Platform Guidelines, art. 4: "When the existing cross-platform network effects of a platform can impose sufficient competition constraints on the platform undertakings, the relevant product market may be defined based on the platform as a whole." ("当该平台存在的跨平台网络效应能够给平台经营者施加足够的竞争约束时，可以根据该平台整体界定相关商品市场。").

27 *Ohio et al. v. Amex*, 585 U.S.

online services are their own markets. It waits to be seen how SAMR and the provincial AMRs will determine the strength of "cross-platform network effects"; however, their market definition approach based on two-sided market theory surely indicates their willingness and preference to rely on more sophisticated (or even frontier) legal and economic theories.

The Shanghai AMR's analysis in the *Sherpa's Abuse* case further demonstrates competition regulators' willingness to adopt sophisticated theories. In this case, the Shanghai AMR deployed the SSNIP test to confirm the proposed market definition, where it first built an economic model to predict the critical loss rate for Sherpa's based on an analysis on the correlation among users, platform-based shops, and platforms. The Shanghai AMR also considered other factors such as meal price, delivery price, number of restaurants, average cost, and relationship between the number of orders and the demand. The Shanghai AMR then analyzed the actual data within the range of 2015 to 2019 on that model under various assumptions, which all showed that Sherpa's was incentivized to raise price(s) on a small scale. Moreover, the Shanghai AMR also listed out the daily and monthly average orders, sales, and the number of users as proof of Sherpa's' market share and arranged for a survey to demonstrate users' reliance on the Sherpa's' platform.

On the other hand, the *Sherpa's Abuse* case faced criticism for how it defined the relevant market. Generally, critics claimed that the Shanghai AMR defined the market too narrowly, therefore questioning the robustness of their economic model. For example, some commented that the Shanghai AMR's analysis of the supply-substitution between English-language and Chinese-language online catering delivery platforms was debatable because, *inter alia*, the switching cost (such as translating restaurants' menus and developing English-language interface) is not as high as what the Shanghai AMR described in its decision; further, the Sherpa's' app also has a Chinese-language interface, indicating that Sherpa's can make a quick market entry into the Chinese language food delivery market.[28] As for the SSNIP test, critics also commented that it could have been due to the Shanghai AMR's use of an incorrect price base, i.e. the monopolistic price which would cause consumers to switch to other services even given a smaller price increase.[29] Therefore, serious doubts exist as to whether the Shanghai AMR defined the market too narrowly, and wrongly conclude that Sherpa's was dominant. However, controversies aside, the Sherpa's Abuse case, together with the *Tetra Pak Abuse*[30] case, where the authority also conducted in-depth economic analysis on the anti-competitive impact of Tetra Pak's loyalty rebates, suggest that SAMR and provincial AMRs are fully capable of undertaking economic analysis to prove their points when necessary.

3. Data

Both SAMR and the Shanghai AMR identified data as a factor of market dominance pursuant to the Platform Guidelines, which stipulate that the ability to control and process data is a factor to consider when assessing an undertaking's financial and technical strength and the difficulty to obtain data is considered an entry barrier. We believe SAMR views these matters from an anti-monopoly perspective while other regulators may view them from national security and sovereignty perspectives. However, the concerns of different regulators can converge in their enforcement against certain business behaviors, such as in these cases, and data processors' potential wrongdoings can be subject to both anti-monopoly and data regulation.

In the *Alibaba Abuse* case, SAMR found that Alibaba accumulated abundant data on transactions, logistics, and payments, which could be utilized based on its advanced algorithms to satisfy consumers' demands; further, it is difficult to transfer data on Alibaba's platform (especially user reviews) to other competing platforms, therefore vendors on the platform heavily rely on Alibaba. Likewise, in the *Sherpa's Abuse* case, the Shanghai AMR also established that the sheer volume of commercial data that Sherpa's accumulated yields a competitive edge *vis-à-vis* other competitors in terms of owning, analyzing, and utilizing data.

Data resources and the use of data have become core factors in assessing an undertaking's market power. China has recently enacted a series of laws to regulate data, such as the Cybersecurity Law, the Data Security Law, and the Personal Information Protection Law, together with relevant supporting regulations. These laws impose heavy burdens on data processors in relation to data collection, use, storage, and transfer, which reflects the Chinese government's determination to safeguard data as a valuable public resource and to protect national security. These government objectives can presumably be implemented through anti-monopoly regulation. Therefore, we expect that SAMR and the provincial AMRs will pay more attention to data-related issues going forward, not only in assessing market dominance, but also in investigating data-based monopolistic conduct such as algorithm collusion and discrimination based on big data.

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28 See "Two questions on the penalties on 'Sherpas for choosing-one-from-two" (关于"食派士"因二选一被处罚一案的两点疑问), at https://mp.weixin.qq.com/s/EdPt63_M85oe8FlUtutasw.

29 *Id.*

30 Case number: Gong Shang Jing Zheng An Zi [2016] No. 1 (工商竞争案字〔2016〕1号).

4. Emphasis on Punishing Penalty Restraints

SAMR and the Shanghai AMR also found that these platforms enter with their platform merchants a series of interrelated agreements to promote exclusivity, which consist of both penalties and rewards. Based on their reasoning, such agreements used the threat of penalties as a weapon to reinforce monopolistic conduct. This reflected SAMR's focus point when assessing transaction restrictions.

According to the Platform Guidelines, transaction restrictions are to be analyzed by considering the penalties and rewards that the platform adopts: in case of any penalty being imposed, SAMR and the provincial AMRs will normally establish that such a restraint constitutes a transaction restriction; in case of any rewards, however, SAMR and the provincial AMRs also acknowledge that such rewards may benefit consumers and social welfare and thus look further into whether the restriction is anti-competitive, taking account of more evidence.[31] However, despite the existence of both penalties and rewards, SAMR and the Shanghai AMR mainly focus on the undertaking's penalties in their written penalty decisions, possibly because penalties can directly prove the anti-competitive nature of these agreements. Questions remain as to how SAMR and the provincial AMRs view the common market practice of offering rebates to platform merchants. However, it is safer for undertakings (even traditional, non-platform undertakings) to offer rewards to incentivize their trading counterparties, rather than to impose penalties.

5. Administrative Guidance

SAMR also revealed a new method to force rectification of wrongdoings, i.e. administrative guidance.

In both the Alibaba Abuse case and the *Meituan Abuse* case, SAMR issued two administrative guidelines on the undertaking's daily operations, which were intended to direct Alibaba and Meituan in their future business practices. These two sets of guidelines impose numerous obligations on Alibaba and Meituan, respectively, covering a range of issues such as competition activities, compliance controls, and stakeholders' interests. The administrative guidelines enable SAMR to impose more specific obligations while overseeing the self-rectification process. We expect that SAMR will in the future issue more administrative guidance in conjunction with penalty decisions, especially when handling high-profile cases.

E. Unfair Pricing and Below-Cost Pricing Cases

Three of the abovementioned cases[32] concern unfair pricing. They call into question the practice of selling goods at excessively high prices as gauged by huge price increases and high profit margins. Further, SAMR and the provincial AMRs may rely on a lower burden of proof in determining and undertaking's prices to be unlawful if it sets prices so low that they are considered below cost (i.e. no need to establish market dominance, pursuant to current cases).

Based on the unfair pricing cases, SAMR and the provincial AMRs mainly rely on historical prices and profit calculations to determine the reasonableness of pricing. Exceptionally, the government will lay down clear standards in some closely regulated areas, e.g. gas construction projects where the government dictated the profit margin to be no more than 10 percent, as in the *Yixing Towngas Abuse*[33] case. Overall, there is still no quantifiable standard to predict the discretion of SAMR and the provincial AMRs as to the reasonableness of prices; however, it can be seen from these three cases that the penalized undertakings all implemented large price increases (e.g. the sale price increases identified in the *Yixing Towngas Abuse* case reach 900 percent, 1,400 percent, and 2,400 percent of cost, while their purchase price remained relatively unchanged) and achieved very high profit margins (e.g. the sale prices were 2.8-4 and 3.3-7.3 times the purchase prices in 2014 and 2015-2017 respectively in the *Xin Xianfeng Abuse*[34] case).

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31 Platform Guidelines, art. 15: "In the analysis of whether trade restrictions is constituted, the focus should be on considering the following two situations: (1) restrictions imposed by platform undertakings through such penalties as shop shield, search right reduction, traffic restriction, technical obstacles and deposit deduction, which may cause direct damage to market competition and consumer interests, may generally be determined as constituting transaction limitation; and (2) restrictions imposed by platform undertakings through such rewards as subsidies, discounts, preferential offers and traffic resource support, which may have a certain positive effect on the interests of platform-based undertakings and consumers and the overall welfare of society but have an obvious impact of eliminating or restricting market competition as proved by evidence, may also be determined as constituting trade restrictions." ("分析是否构成限定交易，可以重点考虑以下两种情形：一是平台经营者通过屏蔽店铺、搜索降权、流量限制、技术障碍、扣取保证金等惩罚性措施实施的限制，因对市场竞争和消费者利益产生直接损害，一般可以认定构成限定交易行为。二是平台经营者通过补贴、折扣、优惠、流量资源支持等激励性方式实施的限制，可能对平台内经营者、消费者利益和社会整体福利具有一定积极效果，但如果有证据证明对市场竞争产生明显的排除、限制影响，也可能被认定构成限定交易行为。").

32 Case number: Yu Shi Jian Chu Zi [2021] No. 1 (豫市监处字〔2021〕1号), Su Shi Jian Fan Long Duan An [2021] No. 4 (苏市监反垄断案〔2021〕4号), Hu Shi Jian Fan Long Chu [2021] No. 3220190101511 (沪市监反垄处〔2021〕3220190101511号).

33 Case number: Su Shi Jian Fan Long Duan An [2021] No. 4 (苏市监反垄断案〔2021〕4号).

34 Case number: Yu Shi Jian Chu Zi [2021] No. 1 (豫市监处字〔2021〕1号).

To date, SAMR has yet to publish any penalty decision on below-cost pricing based on the AML. However, SAMR has dealt with such pricing practices based on the Price Law (《价格法》). For example, SAMR fined multiple companies in relation to low-price competition in the field of community group buying; e.g. SAMR fined Nice Tuan (十荟团) for "dumping at a price below cost for purpose of excluding competitors or monopolizing the market" because that company offered huge amount of subsidies that rendered the sale prices of multiple products far below their purchase prices.[35] This suggests that SAMR are open to, and capable of, grounding their theories of harm based on rules that do not require market dominance, such as the Price Law and the E-Commerce Law (《电子商务法》). Because the rules laid down in these laws are more conceptual and subject to fewer restraints (such as the existence of market dominance), SAMR and the provincial AMRs have more discretion when interpreting them in a way that greatly facilitates law enforcement. For example, Article 35 of the E-Commerce Law provides that platforms must not unreasonably limit platform-based undertakings' transactions with other platforms or impose unreasonable terms, but leaves open how to interpret unreasonableness for this purpose.[36] Therefore, legislators urgently need to provide more clarity here to avoid arbitrary or uneven enforcement.

F. Imposing Unreasonable Transaction Terms Cases

A total of six cases in the enforcement storm concern tying and imposing unreasonable trading terms. Among them, five cases concern dominant undertakings collecting unreasonable fees or collecting fees in an unreasonable way[37] and one case concerns restricting the transaction counterparties of upstream suppliers.[38] While the former cases indeed show that SAMR cares about consumers' daily livelihoods, the latter reveals the potential for imposing unreasonable transaction terms being used as a saving clause.

According to the *Interim Provisions on Prohibiting Abuse of Dominant Market Positions*,[39] collecting unreasonable fees on top of the price is a typical form of abuse of dominance.[40] The fact that SAMR and the provincial AMRs focus on cracking down on collecting unreasonable fees show their efforts to safeguard the livelihoods of consumers. For example, in the five cases mentioned above, three cases involve public utilities (water and gas supply) which directly provide livelihood services to consumers; one case involves pharmaceutical active ingredients in a drug that forces patients to pay much more; one involves collecting additional fees from airline companies which can predictably pass on such costs to passengers. The crackdown on these behaviors can help build up the government's positive image and win the support of the general public.

In the *WEPON Abuse*[41] case, the dominant undertaking required drug manufacturers to sell certain drugs only to itself, which was deemed as an unreasonable transaction term. This conduct was apparently deemed a transaction restriction, which by definition covers scenarios where the dominant undertaking forces transaction counterparties into exclusive dealing arrangements. This is not the first time when SAMR and the provincial AMRs have turned a transaction restrictions case into an unreasonable terms case, e.g. it was established that a water supply company's restriction on real estate developers to buy products from its designated company constituted an unreasonable transaction term.[42] This again indicates the potential for SAMR and the provincial AMRs to rely upon "unreasonable transaction terms" as a catch-all phrase, which can offer them more discretion in law enforcement because of the far-reaching nature of its wording.

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35 Case number: Guo Shi Jian Chu [2021] No. 38 (国市监处〔2021〕38号). See also "SAMR's responses to reporter's questions in relation to the unfair pricing practices of 'Nice Tuan'"(市场监管总局对"十荟团"不正当价格行为再次作出行政处罚答记者问), at https://www.samr.gov.cn/xw/zj/202105/t20210527_329903.html.

36 E-Commerce Law, art. 35: "An e-commerce platform operator shall neither take advantage of the service agreement, transaction rules, technologies or other means to impose unreasonable restrictions or terms over the trades and trade prices concluded by platform-based undertakings on the platform, or over their trades with other undertakings, or to charge unreasonable fees on the platform-based undertakings." ("电子商务平台经营者不得利用服务协议、交易规则以及技术等手段，对平台内经营者在平台内的交易、交易价格以及与其他经营者的交易等进行不合理限制或者附加不合理条件，或者向平台内经营者收取不合理费用。").

37 Case number: Chuan Shi Jian Chu [2021] No.2 (川市监处〔2021〕2号), Shan Shi Jian Fan Long Duan Chu Fa Zi [2021] No. 1 (陕市监反垄断处罚字〔2021〕1号), Yun Shi Jian Jia Chu [2021] No.2 (云市监价处〔2021〕2号), and Hu Shi Jian Fan Long Chu [2021] No. 3220190101511 (沪市监反垄处〔2021〕3220190101511号).

38 Case number: Zhe Shi Jian An [2020] No. 14 (浙市监案〔2020〕14号).

39 《禁止滥用市场支配地位行为暂行规定》 [Interim Provisions on Prohibiting Abuse of Dominant Market Positions] (SAMR, Decr. 11; promulgated June 18, 2019, effective Sept. 1, 2019).

40 *Id.* art. 18: "Undertakings with dominant market positions shall be prohibited from tying commodities or imposing other unreasonable transaction terms when trading without justified reasons: … (4) adding unreasonable charges to the price when trading." ("禁止具有市场支配地位的经营者没有正当理由搭售商品，或者在交易时附加其他不合理的交易条件：……（四）交易时在价格之外附加不合理费用。").

41 Case number: Zhe Shi Jian An [2020] No. 14 (浙市监案〔2020〕14号).

42 Jin Shi Jian Ji Fa Zi [2019] No. J1 (津市监稽罚字〔2019〕J1号).

G. Non-Filing Cases

As of December 31, 2021, SAMR has by our count published a total of 113 non-filing penalty decisions since the start of the enforcement storm.[43] As shown in Chart 6, these non-filing investigations predominantly concern Chinese internet giants and rarely involve foreign companies. One reason for this is the prevalent adoption of the VIE structure by Chinese internet companies, which incentivized non-filing or made it impossible to notify otherwise notifiable concentrations. Another reason is that many foreign internet companies, such as Facebook and Netflix, do not conduct internet-related businesses in China directly due to foreign investment restrictions and they elect not to do so through VIEs. In any event, the non-filing cases, coupled with the call to "prevent disorderly expansion of capital," help to show that the government has noticed the unregulated expansion of private capital and their desire to tame the influences of these internet giant companies controlled by Chinese tycoons.

Based on our observations, non-filing cases have the following characteristics.

- Fines imposed on the undertakings involved are significantly heavier. Specifically, SAMR imposed the maximum fine of RMB 500,000 in all non-filing cases due to the VIE structure, significantly raising the average level of fines. In fact, only in 10 out of 113 decisions did SAMR impose a fine lower than RMB 500,000; in other words, 91 percent of non-filing cases were given the maximum monetary penalty permitted under the AML. By comparison, SAMR published a total of 56 non-filing penalty decisions prior to the enforcement storm, and none of these cases received the maximum monetary penalty.

- SAMR handled these non-filing investigation cases quickly. Per our calculation, the average investigation period for the 56 cases prior to the enforcement storm was 248 days (excluding five decisions with no specific period disclosed), while the average investigation period for the 113 cases during the enforcement storm was approximately 116 days (including the conditional clearance of Tencent's acquisition of shares in China Music Corporation[44]), 53.2 percent shorter compared with those in-prior decisions.

Notably, SAMR for the first-time imposed remedies to address competition concerns in non-filing investigation cases. In 112 of the 113 cases, SAMR found the transactions caused no effect of eliminating or restricting competition. In only one case, SAMR found an acquisition transaction had anti-competitive effects, i.e. the conditional clearance of Tencent's acquisition of China Music Corporation ("CMC"). Specifically, SAMR found that in the relevant market where Tencent shared horizontal overlap with CMC, the mainland China market for online music streaming, the combined entity held extremely high market share in terms of monthly active users, monthly duration of usage, sales, and size of music libraries; as such, this transaction removed close competition between Tencent and CMC and could enhance entry barriers. Notwithstanding the foregoing, SAMR also identified several factors to offset anti-competitive effects, such as the fast growth of Tencent's main competitor and competition restraints imposed by short video platforms. All considered, SAMR ordered Tencent to reinstate market competition by, *inter alia*, terminating exclusive contracts with suppliers, refraining from requiring suppliers to offer Tencent better terms than its competitors, and not offering prepayments to raise competitors' costs. This decision reminds us that SAMR has broad discretion and is willing to impose conditions to revitalize market competition when handling non-filing cases. Following this precedent, it can be expected going forward that more non-filing cases will be subject to remedial conditions.

III. IMPACT OF THE AML AMENDMENT AND THE ESTABLISHMENT OF THE STATE ANTI-MONOPOLY BUREAU

Proposed amending of the AML and the establishment of the State Anti-monopoly Bureau (the "SAB") have both occurred during the enforcement storm. These developments have the potential to reshape the anti-monopoly regulatory regime in China.

A. The AML Amendments

Calls to further amend the AML have been ongoing for several years. On January 2, 2020, SAMR issued a revision draft to the AML for public comment.[45] The National People's Congress later made public in October 2021 a proposal to amend the AML[46] (the "AML Amendment"). After

43 As explained above, we also included those non-filing decisions concluded on Dec. 31, 2021, but which were made public on Jan. 5, 2022.

44 Guo Shi Jian Chu [2021] No. 67 (国市监处〔2021〕67号).

45 《<反垄断法>修订草案（公开征求意见稿）》[Anti-monopoly Law (Revision Draft for Comment)] (SAMR; issued Jan. 2, 2020 for public comment until Jan. 31, 2020), available at https://www.samr.gov.cn/hd/zjdc/202001/t20200102_310120.html, last visited on Jan. 18, 2022 (Chinese).

46 《<反垄断法>修正草案》[Anti-monopoly Law (Amendment Draft)] (Nat'l People's Cong.; issued Oct. 23, 2021 for public comment.).

rounds of further revision, this would be the first amendment to the law since the AML took effect in 2008. In its current form, the AML Amendment would update and introduce multiple mechanisms that are intended to change the current anti-monopoly regulatory regime, especially for anti-monopoly investigations. Based on the AML Amendment, we preliminarily anticipate that the proposed changes would affect the anti-monopoly investigation in the following respects.

B. Legal Status of RPMs

Perhaps most significantly for anti-monopoly investigations, the AML Amendment would change the legal status of RPMs. The current AML regime regulates monopolistic agreements under the so-called "prohibited in principle, exempted by exception only" framework, i.e. those agreements clearly enumerated in the AML are presumed to be illegal and subject to a case-by-case exemption analysis under the AML,[47] while those not listed in the AML will be identified as illegal only upon further in-depth analysis of the competition impact. However, in China's legal practice, notwithstanding SAMR's view that RPMs are "prohibited in principle" as exemplified in the abovementioned RPM cases, courts tend to hold that plaintiffs must prove RPMs are anti-competitive when hearing civil cases. As such, a bifurcation exists under the current RPM regime.

The legality of RPM has always been controversial, not only in China but in other jurisdictions as well. In other words, it is still arguable whether RPMs are so anti-competitive that they should be presumed illegal. Against this backdrop, the current RPM regime in China may appear too harsh on undertakings. A better option may be for RPMs to be presumed illegal but to permit more opportunities to establish they are justified.

Therefore, the AML Amendment makes clear that RPMs are "prohibited in principle" by providing that they are prohibited unless the undertakings establish that the agreement does not preclude or restrict competition.[48] But, unlike horizontal agreements that are "prohibited in principle," the AML Amendment would offer two alternatives for undertakings: the first is the traditional approach, namely to establish that the RPM at issue should be "exempted by exception only" based on the AML; the second is a new approach, namely that the undertakings can directly establish that an RPM is not anti-competitive, regardless of whether the agreement falls in one of the exempted scenarios as provided in the AML.

C. Safe Harbor Rules

The AML Amendment also introduces a safe harbor for less restrictive monopolistic agreements, which are not prohibited if the undertakings can establish that their market share in the relevant market is lower than the threshold(s) prescribed by SAMR. These agreements would still be deemed illegal if subsequent evidence establishes that the agreements have the effect of eliminating or restricting competition.

This safe harbor mechanism would provide more certainty for undertakings. That said, it remains unclear whether the safe harbor rules would also apply to agreements that are "prohibited in principle." In general, safe harbors do not apply to the so-called "hardcore restraint" agreements (e.g. the Vertical Restraints Block Exemption by the EU Commission does not apply to monopolistic agreements that are deemed as "hardcore restraints").[49] But, according to the proposed AML Amendment, below-threshold agreements would still be illegal "where evidence proves" they are anti-competitive. On the other hand, theoretically, there could be agreements that are "prohibited in principle" but actually lack anti-competitive effects. As introduced above, under the current AML, agreements that are "prohibited in principle" are presumed to be anti-competitive and therefore there is no need to even analyze their anti-competitive effects. Upon adoption, the AML Amendment will require clarification in this regard by legislators or later by courts and SAMR.

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47 AML, art. 15: "The provisions of Article 13 and 14 of this Law shall not be applicable to the agreements between undertakings which they can prove to be concluded for one of the following purposes: … In the cases as specified in subparagraphs (1) through (5) of the preceding paragraph, where the provisions of Articles 13 and 14 of this Law are not applicable, the undertakings shall, in addition, prove that the agreements reached will not substantially restrict competition in the relevant market and that they can enable the consumers to share the benefits derived therefrom." ("经营者能够证明所达成的协议属于下列情形之一的，不适用本法第十三条、第十四条的规定：……属于前款第一项至第五项情形，不适用本法第十三条、第十四条规定的，经营者还应当证明所达成的协议不会严重限制相关市场的竞争，并且能够使消费者分享由此产生的利益。").

48 AML Amendment, art. 17: "Where undertakings can prove that the agreements as specified in Subparagraphs (1) and (2) of the preceding paragraph do not bear the effect of restricting or eliminating competition, such agreements shall not be prohibited." ("对前款第一项和第二项规定的协议，经营者能够证明其不具有排除、限制竞争效果的，不予禁止。").

49 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. Article 4 thereof provides that "the exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (a) the restriction of the buyer's ability to determine its sale price …"

D. Hub-and-spoke Agreements

Hub-and-spoke agreements refer to a web of vertical agreements that achieve horizontal effects. To date, no decisions or court judgments in China have been published that involved hub-and-spoke agreements, likely owing to the lack of clear rules on these agreements, even if some cases were suspected to be hub-and-spoke agreements. For example, the insurance industry association of Loudi, Hunan Province organized a new car insurance service center, whose shareholders were 11 insurance companies who divided markets indirectly through this service center.[50] The authority handling this case condemned these arrangements as cartels, but left alone the service center, which served as the hub in this case. This lack of rules has long puzzled practitioners in China.

The Platform Guidelines introduce hub-and-spoke agreements for the first time, but do not make clear whether they are subject to Article 13 of the AML (horizontal agreements) or Article 14 of the AML (vertical agreements).[51] The AML Amendment further provides in Article 8 that "undertakings may not organize other undertakings to reach monopolistic agreements or offer substantive assistance"[52] as a standalone clause in addition to the previous Articles 13 and 14, therefore offering a more straightforward basis for penalizing hub-and-spoke agreements in investigations. To be more specific, this clause should help address the increasingly common dilemma of how to deter organizers who are not direct parties of, but indeed contribute to, horizontal monopolistic agreements.

E. Substantial Increase in Fines

The AML Amendment would substantially increase fines for violating the AML. The following increased maximum fines specifically relate to anti-monopoly investigations and will certainly enhance the deterrence effect of the AML:[53]

- A party to a monopolistic agreement which generated no turnover in the prior fiscal year can be imposed a fine of up to RMB 5 million (approx. USD 800,000);
- Parties to a monopolistic agreement not yet implemented may each be fined up to RMB 3 million (the current fine is capped at RMB 500,000);
- Industry associations that organize the conclusion of monopolistic agreements may be fined up to RMB 3 million (the current fine is capped at RMB 500,000);
- Legal representatives, primary persons responsible, and others directly responsible for the conclusion of monopolistic agreements may each be fined up to RMB 1 million;
- Fines imposed on undertakings and individuals would be greatly increased—undertakings which obstruct investigations may be fined up to 1 percent of their prior fiscal year turnover or, where they generated no turnover in the previous year or it is difficult to calculate such turnover, a fine of up to RMB 5 million may be imposed; Individuals may be fined up to RMB 500,000;
- The AML Amendment would also allow fines to be multiplied by two to five times the base amount when "the circumstances are particularly serious, the impact is particularly severe, and the consequences are particularly serious."[54]

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50 See "The insurance industry association of Loudi, Hunan Province was fined for uniting 12 companies to achieve monopoly" ("湖南娄底保险行业协会联合12家单位搞垄断被处罚"), available at http://finance.people.com.cn/insurance/n/2013/0108/c223018-20130807.html, last visited on January 18, 2022.

51 Platform Guidelines, art 7: "Platform-based undertakings competing with each other may not, by means of their vertical relationships with platform undertakings, or by way of organization and coordination through platform undertakings, achieve hub-and-spoke agreements that can are of the effect of horizontal monopolistic agreements." (具有竞争关系的平台内经营者可能借助与平台经营者之间的纵向关系,或者由平台经营者组织、协调，达成具有横向垄断协议效果的轴辐协议。).

52 AML Amendment, art. 8: "Undertakings may not organize other undertakings to reach monopolistic agreements or offer substantive assistance." ("经营者不得组织其他经营者达成垄断协议或者为其他经营者达成垄断协议提供实质性帮助。").

53 See AML Amendment, arts. 56 and 62.

54 AML Amendment, art. 63: "The anti-monopoly law enforcement agencies may impose a fine of two to five times the amount specified … when the circumstances are particularly serious, the impact is particularly severe, and the consequences are particularly serious." ("违反本法规定，情节特别严重、影响特别恶劣、造成特别严重后果的，反垄断执法机构可以按照……规定的罚款数额的二倍以上五倍以下处以罚款。").

F. New Law Enforcement Measures

The AML Amendment would provide new measures against undertakings' legal representative and the persons responsible. For example, SAMR and the provincial AMRs would be empowered to summon the legal representative and persons responsible to their offices, educate them, and instruct them to correct their wrongdoings.[55] SAMR and the provincial AMRs have widely used this measure in anti-monopoly investigations, and it plays a major role in directly overseeing self-rectification efforts.

For another example, as introduced above, the legal representative and the persons responsible may additionally be fined up to RMB 1 million. This newly proposed fine further highlights the importance of an effective competition compliance system.

G. New Investigators Entering the Game

The AML Amendment provides that public prosecutors may bring public-interest litigation cases where social public interests are harmed by monopolistic conducts. Because the term "social public interests" are not defined and thus subject to expansive interpretation, this could substantially increase the risk of undertakings in terms of potential litigation, especially those whose products or services involve a large number of consumers.

Further, the AML Amendment would also pave the way for the introduction of criminal liability. Under the current AML, only obstruction of an investigation and the wrongdoing by case-handlers may be criminalized, as provided in various clauses of the AML. However, the AML Amendment has set up a standalone clause that clearly states "criminal liability may be pursued against a violation of this law that constitutes a crime."[56] This obviously goes beyond the criminalized scenarios under the current AML; in other words, serious monopolistic behaviors themselves (such as price cartels) may be deemed crimes. That said, this would depend on corresponding amendments to the Criminal Law.

H. The SAB

The State Antimonopoly Bureau ("SAB") was officially established on November 18, 2021 and reportedly it is also increasing headcount to cope with the increased enforcement needs. The SAB is the product of the reorganization of SAMR's Anti-monopoly Bureau ("AMB"), and is considered higher in the administrative hierarchy than the former AMB.

It remains to be seen whether the SAB will further delegate merger review authority to certain provincial AMRs. It was rumored that the Shanghai AMR could be given such authority to review simple-procedure merger filings, but this talk seems to have disappeared, possibly because of the importance of retaining a unified central review system.

All said, with the prevailing enhancement of law enforcement authority, the SAB symbolizes a new era in China's anti-monopoly regulation and enables further strengthening of anti-monopoly investigation in all aspects.

IV. CONCLUDING REMARKS

The Chinese government has placed unprecedented focus on ramping up anti-monopoly regulation, as evidenced by the enforcement storm investigations mentioned above coupled with the tone from top leadership. Several reasons may lie behind such a dramatic increase in anti-monopoly regulation, including disorder in internet industry market competition and concerns over the growing influence of internet giant companies. The enforcement storm continues apace and it is difficult to predict when it will end. But, given the challenges that the economy is facing, some believe that SAMR and the provincial AMRs will tone down their enforcement efforts. Others believe that the speed and strength of enforcement will simply become a "new normal."

These investigations suggest that SAMR and the provincial AMRs are increasingly capable and willing to investigate all sorts of anti-monopoly cases and impose heavy fines. Given the public awareness of the AML and the government's desire to tame monopolistic behaviors and control the disorderly expansion of capital, undertakings doing business in China, or whose business will influence market competition in China, should consider further building up or improving their anti-monopoly compliance awareness and systems, while doing their best to remain up to date on China's anti-monopoly regulatory environment.

55 AML Amendment, art. 65: " Where undertakings … engaged in conduct that restricts or eliminates competition, the anti-monopoly law enforcement may summon the legal representative or responsible persons(s) to hold a talking and require them to employ correction measures." ("经营者……实施排除、限制竞争行为的，反垄断执法机构可以对其法定代表人或者负责人进行约谈，要求其采取措施进行整改。").

56 AML Amendment, art. 67: " A violation of this law that constitutes a crime will be subject to criminal liability." ("违反本法规定，构成犯罪的，依法追究刑事责任。").

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