Antitrust Chronicle

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Year of the Tiger: Antitrust in China

CPI COMPETITION POLICY™ INTERNATIONAL

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LETTER FROM THE EDITOR[1]

Dear Readers,

We are delighted to release our CPI Antitrust Chronicle for March 2022, *Year of the Tiger: Antitrust in China*. This collection of nine excellent articles starts with a detailed analysis from Research Fellow at the Supreme People's Court of China Zhu Li and finishes by a visionary policy review from esteemed legal scholar Professor Yong Huang. Seven insightful pieces by top practitioners in leading global and Chinese antitrust law firms provide developments and highlights of key matters in legislation, merger review, antitrust investigation, and litigation on standard essential patents. This chronicle covers a wide range of important sectors and hot topics including digital platforms, electronic vehicles, data privacy, just to name a few. Here's a snippet of each article:

Zhu Li, a Research Fellow at the Supreme Court of China, provides an in-depth analysis of minimum resale price maintenance ("RPM") by comparing the legal framework taken by authorities in Chinese cases against US and Europe. He suggests that a structured rule of reason analysis could be a superior approach, yet it needs to show either (i) market power of a supplier or its dealer or (ii) a consumer price increase plus a quantity decrease as a condition for a presumptive antitrust violation of RPM.

China recently adopted a comprehensive data protection law, the Personal Information Protection Law of the People's Republic of China ("PIPL"). In their article, Sébastien Evrard, Felicia Chen, and Hayley Smith thoroughly discuss the complex interplay between the PIPL and China's Anti-Monopoly Law ("AML"), particularly in abuses of dominance cases involving personal data.

Ma Chen and Guo Jiahao provide an overview of China's anti-monopoly investigations in 2021 in three areas: monopolistic agreements, abuse of dominance, and failure to report notifiable concentrations and highlight new developments and impact on anti-monopoly regulations in China.

Against a backdrop of a large-scale battery electric vehicle launch in China, Wenting Ge and Hazel Yin carefully examine the existing Chinese antitrust regulation and enforcement activities in the auto sector and their implications for the market.

Reviewing three high-profile investigations against Alibaba Group, Sherpa's, and Meituan that were fined millions to billions of dollars by the State Administration of Market Regulation ("SAMR"), Wu Peng, Long Rui, and Dong Ke explore the finding of market dominance of online platforms.

Peter Wang and Yizhe Zhang analyze SAMR's merger review in the past four years and find new trends in and unique characteristics of its approach that could have profound implications for future complex global transactions.

The Chinese antitrust authorities and courts have become increasingly active in the past decade in cases involving standards and Standard-Essential Patents ("SEPs"). Alexandra Pu Yang and Fan Guo compare antitrust authorities' positions regarding SEP abuses in China, the U.S., and the EU and reveal China-specific causes of actions in FRAND violations.

Guanbin Xie, Shan Jiao, and Qing Ying review the OPPO v. Sharp ruling by the Supreme People's Court of China ("SPC") where the SPC for the first time opined on whether Chinese courts have jurisdiction over certain SEP royalty cases and whether it is appropriate for them to rule on global FRAND rates . They shed light on why disputes regarding the jurisdictions over SEP royalty cases arise and how the OPPO v. Sharp ruling fits in.

As the digital economy is entering the era of the "metaverse", Yong Huang , a law professor and director of the Competition Law Center at the University of International Business and Economics, introduces the characteristics of China's digital economy regulation and envisages the future of policies regarding industrial development and competition of the digital economy.

We would like to thank our contributors for their efforts and dedication to our March 2022 CPI Antitrust Chronicle, and hope you enjoy reading this special China issue.

Sincerely,

Elizabeth Xiaoru Wang, Ph.D.
Kun Huang, Ph.D.

1 CPI thanks Compass Lexecon for their sponsorship of this issue of the CPI Antitrust Chronicle. Sponsoring an issue of the Chronicle entails the suggestion of a specific topic or theme for discussion in a given publication. CPI determines whether the suggestion merits a dedicated conversation, as is the case with the current issue of the Chronicle, and takes steps to ensure that the viewpoints relevant to a balanced debate are invited to participate.

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Identifying an Appropriate Legal Framework for Minimum Resale Price Maintenance: Experiences from the EU and the U.S.

By Zhu Li

Antitrust legal frameworks around the world have long been hostile to minimum resale price maintenance ("RPM"). Contemporary U.S. antitrust law is more hospitable towards RPM arrangements than EU law is. Chinese courts and antitrust agencies have conflicting practices of minimum RPM enforcement. This paper evaluates the existing evidence, economic analysis, and legal framework - structured rule of reason versus hardcore restraint - regarding the effects of minimum RPM across different jurisdictions. It then proposes a structured rule of reason analysis to minimum RPM based on two factors: (1) the market power of the supplier or the dealer; and (2) the consumer price increase plus the sale quantity decrease. When either of the two factors is shown, it could be presumed that the minimum RPM is anticompetitive.

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Abuses of Dominance Involving Personal Information in China

By Sébastien J. Evrard, Felicia Chen & Hayley Smith

China's recently adopted Personal Information Protection Law ("PIPL") is a new weapon in its arsenal to tame big tech companies. As the first comprehensive legislation to protect personal information within China, the PIPL was adopted amidst a broad regulatory assault on Chinese big tech companies by multiple enforcement agencies, including the State Administration for Market Regulation ("SAMR"), which is responsible for enforcing the PRC Anti-Monopoly Law ("AML"). The PIPL's adoption will have a profound impact on the enforcement of the AML and, in this paper, we explore the interplay between the AML and the PIPL, in particular as it relates to abuses of dominance. We examine the jurisdictional challenges that may arise when anticompetitive conduct involves breaches of the PIPL. In addition, we analyze how the strict criteria for handling personal information under the PIPL may impact SAMR's ability to address the potential anticompetitive effects of abuses of dominance. As an increasing number of courts and administrative agencies outside of China are dealing with issues at the intersection of competition and data privacy laws, with the adoption of the PIPL, issues involving both the AML and the PIPL will soon also come to the forefront 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 expansion 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-monopoly 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 further 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 theories, 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 backdrop of a slowing economy.

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Antitrust Regulation in the Automotive Sector: Managing Risks in the BEV Era

By Wenting Ge & Hazel Yin

The auto sector has been under strict scrutiny by antitrust regulators across the globe including China. In 2020, the State Administration for Market Regulation ("SAMR") published the Anti-Monopoly Guidelines on the Automobile Sector (the "Auto Guidelines"), which provide guidance and outline SAMR's enforcement positions on key antitrust issues in the automotive industry. Over the past decade, SAMR and its predecessors have undertaken significant enforcement actions along the entire auto supply chain, from auto parts supply and distribution of cars to aftersales servicing. Leveraging from the existing legislation and the authority's decisional practice, this article will discuss the main characteristics that define the new BEV era and attempt to analyze a series of antitrust issues automakers should take note when trying to gain an edge in the BEV market.

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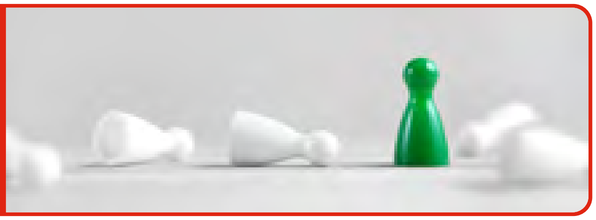

China's Practice in Finding Market Dominance of Online Platforms

By WU Peng, LONG Rui & DONG Ke

In the past year, one of the most important and noteworthy events for China's antitrust legislation and enforcement has been the intensification of antitrust scrutiny of large online platforms, with tech giants receiving huge fines for their abusive activities. Under China's antitrust laws and regulations, the dominant market position of a company is the first step and prerequisite for finding the illegality of its abusive behavior. This paper intends to analyze the approaches and practices of determining the market dominance of online platforms based on relevant antitrust enforcement cases, along with the newly issued guidelines for this economy sectors, in order to provide useful references for a better understanding of the latest developments in China.

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New Developments in China Merger Review

By Yizhe Zhang & Peter Wang

The Chinese competition authority went through a major restructuring in November 2021. The Anti-Monopoly Bureau under the State Administration for Market Regulation ("SAMR") was expanded to three separate bureaus to cover respectively conduct investigation, merger review and competition policy, which together constitute the new independent State Anti-Monopoly Bureau ("SAMB") within SAMR. Looking back on the merger review cases during the past few years (2018-2022), there are some notable new trends: (1) SAMR appears to be more likely to find competition concerns in vertical and conglomerate mergers than competition authorities in other major jurisdictions; (2) FRAND supply commitments to Chinese customers have become common in most conduct remedy cases; (3) SAMR has embraced a new behavioral remedy of helping a third party to enter the market; and (4) SAMR is less willing to allow automatic sunset clauses after an initial remedy term and instead often requires parties to apply at some certain points in the future for and justify termination of the remedy conditions based on changed market conditions.

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The Past and Future of SEP Antitrust in China

By Alexandra (Pu) Yang & Fan Guo

Chinese antitrust laws remain an effective legal weapon against SEP abuses. Unlike in the U.S. and E.U. where antitrust laws are fading away at least in SEP/FRAND disputes, Chinese antitrust laws remain strong and active. They are effective tools against SEP abuses, in parallel with FRAND obligations. The Chinese courts and antitrust enforcement have shown their willingness to enforce antitrust laws in FRAND disputes, and recent competition rules provide additional angles to address new rising disputes.

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Development of Adjudicating Global FRAND Rate in China: A review of *OPPO v. Sharp*

By Guanbin XIE, Shan JIAO & Qing YING

In recent ten years, the Chinese courts have heard a series of SEP cases and are becoming more deeply involved in the international SEP disputes through anti-suit injunctions, anti-anti-suit injunctions, global royalty rate rulings, etc. In August 2021, the Supreme People's Court of China explicitly confirmed the Chinese courts' authority on adjudicating global FRAND rates for SEPs for the first time in the *OPPO v. Sharp* case, which attracted great attention in the field of mobile communications. It used the "closer connection" principle to determine whether China has jurisdiction over such cases. However, it is still to be observed how the principles set by the SPC will be further interpreted and applied by lower courts as the guidance from *OPPO v. Sharp* is not yet crystal clear. The SPC's ruling in *OPPO v. Sharp* is only the beginning and the battle for jurisdiction over global SEP royalty rate cases is far from order.

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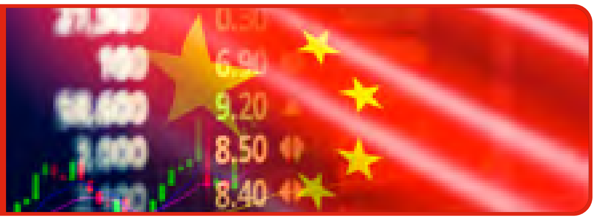

Competition Policy and Regulation in China's Digital Economy

By Huang Yong

Some believe that China is strictly supervising its digital economy. This text hopes to provide a different perspective. This article reviews the development process of China's digital economy, analyzes the regulatory system, rules and competition policy in the field of China's digital economy, and holds that when observing the regulation of China's digital economy, the needs of development and the constraints of the rule of law should not be ignored. As a young market economy and anti-monopoly jurisdiction, China needs to better clarify the boundaries of regulation and coordinate the functions and powers of different regulatory departments in order to achieve the established goal of developing digital economy.

WHAT'S NEXT?

For April 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **Biden's Antitrust** ; and (2) **Supply Chains**.

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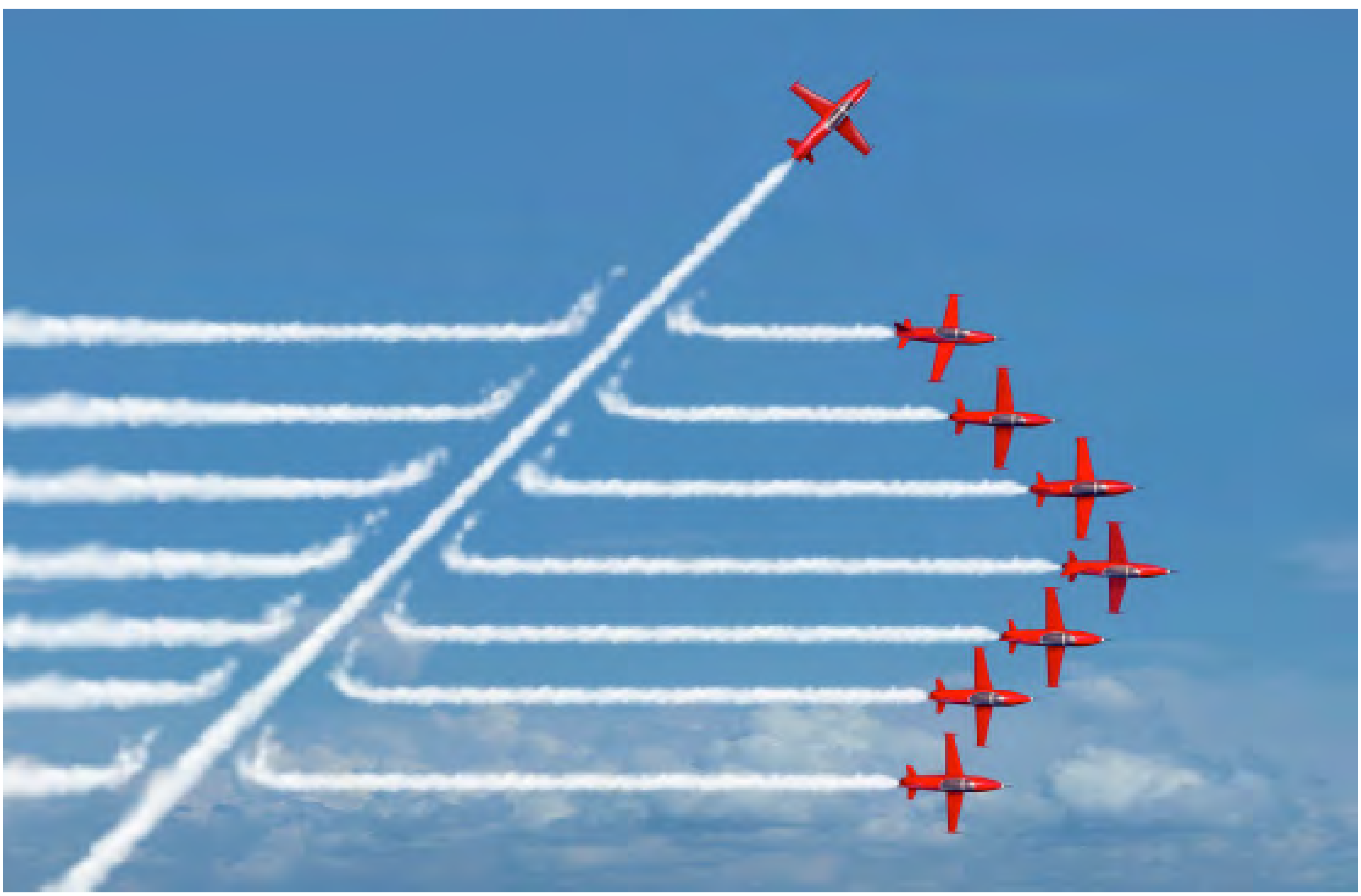
CPI ANTITRUST CHRONICLES May 2022

For May 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **Healthcare**; and (2) **No Poach Agreements**.

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.



IDENTIFYING AN APPROPRIATE LEGAL FRAMEWORK FOR MINIMUM RESALE PRICE MAINTENANCE: EXPERIENCES FROM THE EU AND THE U.S.

BY ZHU LI[1]

1 ZHU Li, Research Fellow, the Center for Judicial Protection of Intellectual Property, the Supreme People's Court, People's Republic of China. The views expressed in this essay are those of the author and do not in any way reflect the position of the Center or the Court.

The antitrust legal frameworks throughout the world have long been hostile to minimum resale price maintenance ("RPM"). In the European Union ("EU"), minimum RPM has generally been treated as a hardcore restriction. Including minimum RPM in an agreement gives rise to the presumption that the agreement restricts competition and thus falls within Article 101(1) of Treaty on the Functioning of the European Union ("TFEU").[2] In the United States ("U.S."), minimum RPM was treated as a per se violation for nearly 100 years. But recently, the U.S. legal framework applied to vertical restraints experienced a sea change. In 2007, the U.S. Supreme Court in Leegin abandoned the per se prohibition on minimum resale price maintenance and put it under a rule of reason analysis.[3] Contemporary U.S. antitrust law is now more hospitable towards RPM arrangements than EU law is, regarding them as a normally efficient means to get to market and rarely capable of aggrandizing market power.

The *Leegin* decision aroused a fierce controversy over the appropriate legal rule governing minimum RPM both in theory and practice. This controversial debate has not settled down even today. [4] This controversy echoed in China. Chinese courts and agencies have conflicting practices of minimum RPM enforcement. Courts have generally ruled that the minimum RPM arrangement was not sufficient for a finding of a monopolistic agreement without evidence of anticompetitive effects.[5] In contrast, China's National Development and Reform Commission ("NDRC") clarified that the fundamental approach to be taken in determining the legal status RPM is "principle of prohibition, individual exemptions."[6]

The aim of my paper is to identify the proper legal treatment of minimum RPM. This paper is divided into four parts. Part I explores the legal framework of minimum RPM in legislation and practice in EU and some member states. In this part I explain that the non-economic goals of EU competition law affect the legal treatment of minimum RPM and that viewing RPM as hardcore restraint is not economically sensible. Part II addresses the legal development of minimum RPM in the United States. I show in this part that not all the relevant factors articulated by the *Leegin* Court for concluding that RPM is likely anticompetitive make sense. Part III discusses the conflicting practices of legal enforcement of minimum RPM in China. Part IV begins with a discussion of the theoretical and empirical evidence regarding the effects of minimum RPM then summarizes the different legal frameworks of minimum RPM and analyzes their merits and demerits. I show that the economic evidence and enforcement experience from the U.S. and EU indicate that a structured rule of reason for minimum RPM may be appropriate to minimize the sum of error cost and direct cost. I set out a revised and structured rule of reason for minimum RPM in the end.

I. MINIMUM RESALE PRICE MAINTENANCE IN EUROPEAN UNION: HARDCORE RESTRAINT

A. The Legal Framework for RPM In EU

EU law in the field of vertical restraints is characterized by a high degree of regulatory intervention. Article 101 of TFEU prohibits both horizontal and vertical agreements restricting competition that negatively affect inner market trade.[7] Many kinds of vertical restraints are treated as hardcore restraints, which are presumed to likely have anticompetitive effects and cannot profit from the benefit of the group exemption. According to Article 4(a) of the Block Exemption Regulation on Vertical Restraints ("VBER"), minimum RPM arrangements are hardcore restraints, which fallen categorically into Article 101(1) of TFEU because they have their "direct or indirect object to restrict competition,"[8] even if they cover only

2 European Commission: Commission Notice – Guidelines on Vertical Restraints, SEC (2010) 411, 2.10, especially paragraph 223.

3 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

4 See, e.g. Thomas A. Lambert, A Decision-Theoretic Rule of Reason for Minimum Resale Price Maintenance, 55 *ANTITRUST BULL.* 167 (2010); Christine A. Varney, A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason, 24 *ANTITRUST* 22 (Fall 2009); Marina Lao, Free-Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 215-16 (Robert Pitofsky ed. 2008); Thomas A. Lambert & Michael Sykuta, Why the New Evidence on Minimum Resale Price Maintenance Does not Justify a Per Se or "Quick Look" Approach, *CPI ANTITRUST CHRON.* (Nov. 2013), *available at* https://www.competitionpolicyinternational.com/file/view/7019; Alber Foer & Sandeep Vaheesan, Action Needed to Address Resale Price Maintenance in Contact Lenses and Countless Other Markets, The American Antitrust Institute Public Letter to Chairwoman of Federal Trade Commission (October 24, 2014); Joshua D. Wright, The Economics of Resale Price Maintenance and Implications for Competition Law and Policy, London, United Kingdom (April 9, 2014); Maria Ioannidou & Julian Nowag, Can two wrongs make it right? Reconsidering minimum resale price maintenance in the light of *Allianz Hungária*, available at http://qmro.qmul.ac.uk/xmlui/handle/123456789/12202.

5 *Beijing Ruibang Yonghe Science and Technology Trade Company v. Johnson & Johnson Medical (Shanghai) Ltd., Johnson & Johnson Medical (China) Ltd.*, Third Civil Trial Division of Shanghai High Court (2012) (Zhi) zhongzi No. 61.

6 Lu Yanchun and Su Hua, Thoughts on Several Issues in Drafting the Auto Industry Antitrust Guidelines, 3 *PRICE SUPERVISION AND ANTIMONOPOLY IN CHINA* 37 (2016), at 39.

7 *Consten And Grundig v. Commission*, Case 56-58/64, EU:C:1965:60.

8 See European Commission: Commission Notice – Guidelines on Vertical Restraints, SEC (2010) 411, 2.10, especially paragraph 223.

a small part of the relevant market.[9] Therefore, minimum RPM arrangements are presumed anticompetitive and the block exemption does not apply.[10] Minimum RPM arrangements include both direct agreements on fixed or minimum resale prices and agreements achieving resale price maintenance through indirect means, such as fixed distribution margins, maximum discount levels, rebates dependent on the observance of a given price level or the termination of deliveries as a response to a given price level.[11]

Although there is the possibility that minimum RPM could be exempted from Article 101(1) by an efficiency defense under Article 101(3) in an individual case, it is difficult for RPM to fulfil the conditions of Article 101(3).[12] For example, in *SA Binon & Cie v. SA Agence et Messageries de la Presse* ("AMP"),[13] which concerned the legality of a clause in AMP's selective distribution system according to which the distributor reserved the right to fix prices and compel retailers to respect those prices, the European Court of Justice ("ECJ") held that "any price-fixing agreement constitutes, of itself, a restriction on competition and is, as such, prohibited by [Article 101(3) TFEU]."[14] The ECJ acknowledged that RPM may benefit from an exemption under Article 101(3) TFEU, but only under rigidly defined conditions:

> In considering the availability of exemption account should be taken of the possibility that the fixing of the retail price by publishers constitutes the sole means of supporting the financial burden resulting from the taking back of unsold copies and the possibility that the latter practice constitutes the sole method by which a wide selection of newspapers and periodicals can be made available to readers.[15]

B. The Reasons for the Harsh Treatment of RPM Under EU Competition Law

The Guidelines on Vertical Restraints explain in detail the competitive risks of RPM. RPM may facilitate collusion among suppliers or distributors lessening intrabrand and interbrand competition, soften competition between manufacturers and/or between retailers, ensuring price increase, foreclose smaller rivals and reduce dynamism and innovation at the distribution level.[16] The Guidelines acknowledge that RPM may also lead to efficiencies, such as inducing distributors to better promote new products, organizing a coordinated short-term low-price campaign, or helping to prevent free-riding at the distribution level.[17] However, the parties must prove that RPM achieve important distribution efficiencies is too much of a burden. The parties have to "convincingly demonstrate that the RPM agreement can be expected to not only provide the means but also the incentive to overcome possible free-riding between retailers on these services and that the pre-sales services overall benefit consumers as part of the demonstration that all the conditions of Article 101(3) are fulfilled."[18]

Besides the above economic reasons for the treatment of minimum RPM as hardcore restraint, the non-economic considerations also play an important role in the harsh treatment of vertical restraints in EU law. Today, EU competition law is best understood as a means to accomplish the broader tasks of the Union: the internal market and the social market economy.[19] The Article 3(3) TFEU states the goal of the law: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance."

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9 See Article 4(a) of Block Exemption Regulation on Vertical Restraints (VBER).

10 It needs to note that, there are three kinds of RPM in EU law, minimum RPM, maximum RPM, and recommended RPM. The block exemption does apply to maximum RPM and recommended RPM, but these two kinds of RPM are not the subject of this paper.

11 See European Commission: Commission Notice – Guidelines on Vertical Restraints, SEC (2010) 411, 2.10, especially paragraph 48.

12 See European Commission: Commission Notice – Guidelines on Vertical Restraints, SEC (2010) 411, 2.10, especially paragraph 223.

13 Case 243/83, Court of Justice, [1985] ECR 2015, [1985] 3 CMLR 800.

14 *Ibid*. paragraph 44.

15 *Ibid*. paragraph 46.

16 See European Commission: Commission Notice – Guidelines on Vertical Restraints, SEC (2010) 411, 2.10, especially paragraph 223.

17 *Ibid*. especially paragraph 224.

18 *Ibid*. especially paragraph 225.

19 Roger Van den Bergh, Vertical Restraints: The European Part of the Policy Failure, 61(1) *The Antitrust Bulletin* 167, 178 (2016).

Thus, the objectives of EU competition law include achieving a single market (market integration), sustaining progress and innovation, and realizing social equality and fairness.[20] The single-market objective focuses EU competition law on a combined pro-competition and pro-integration goal. Vertical restraints, such as minimum RPM, selective distribution and market partitioning by territory or customer group, could be used by manufacturers to resurrect the trade barriers between member states. To prevent this outcome, EU competition law shows severe attitude to vertical restraints including minimum RPM and does not fully consider its redeeming efficiencies.

C. The Failure of the EU Approach

The EU approach views minimum RPM as a hardcore restraint which is presumed to almost always have anticompetitive effects, such as facilitating horizontal or vertical collusion, lessening intrabrand and interbrand competition, maintaining high prices, and excluding competitors, regardless of the market share of the parties. This approach is not based on a sound economic foundation.

For risk of collusion, although RPM could be used to police agreed price and detect cheating, only in very limited circumstances could RPM facilitate manufacturers' or distributors' collusion. For manufacturers' collusion through via RPM arrangements, at least the following conditions are required: the colluding manufacturers must be capable of exercising market power by reducing output collectively in a relevant market; the RPM arrangements used by manufacturers must cover a substantial portion of the market and manufacturers must not have the ability to cheat; and the distributors must not be able to use non-price promotions as a substitute for price cuts.[21] Similarly, RPM arrangements could assist a distributors' collusion only when at least the following conditions are met: the goods over which the distributors would like to collude must be absent of competition; the barriers of entry into retailing of the products are so high that the manufacturers could not shift their distribution to new retailers.[22] If one of the above conditions is not satisfied, the collusion of manufacturers or distributors is difficult to happen or easy to collapse.

EU law also addresses the concern that manufacturer or distributor with market power might adopt RPM to exclude its rivals. For this kind of exclusionary effect to work, several conditions would have to be satisfied. In order for RPM to succeed as an exclusionary device by a dominant manufacturer, the RPM must guarantee enough retail profits to induce dealers to drop or demote products of the manufacturer's rival, and the RPM must apply to enough retailers so that the manufacturer could substantially foreclose its rivals from access to available retailers and therefore raise rivals' costs.[23] In order for RPM to be used by dominant retailer to limit competition from more efficient rivals, RPM policies must be implemented so widely that those rivals cannot gain an effective foothold in the retail market. At a minimum, the brands upon which a dominant retailer procures RPM must comprise a significant portion of sales within the relevant retail market.[24]

In reality, these conditions will rarely be satisfied. Most RPM arrangements will not be anticompetitive except in limited and special circumstances. The presumption that RPM is anticompetitive will be based on the illusory foundations.

The strict prohibition of RPM in EU law has had negative effects. In order to evade the legal problems concerning RPM, the parties have to switch to arrangements with higher costs but less legal risk. For instance, the manufacturer and distributor may use principle-agent arrangements to replace RPM agreements because principle-agent arrangements fall outside of the scope of Article 101 of TFEU.[25] In member state level, particular interest groups may try to lobby national governments to circumvent the EU prohibitions of RPM.[26] In Germany, RPM arrangements for book price were legal until the European Commission held these arrangements violated EU law to the extent that they also hindered interstate trade.[27] In response Germany passed specialized statutes immunizing RPM for agricultural products, press products, the

20 See European Economic & Marketing Consultants GmbH: THE FRAME – A genuine European approach in EU competition law, available at www.ee-mc.com/fileadmin/user_upload/ccr_en/The_Frame_part_1.pdf.

21 See, Thomas A. Lambert, A Decision-Theoretic Rule of Reason for Minimum Resale Price Maintenance, 55 ANTITRUST BULL. 167 (2010), at 183.

22 See similarly, Thomas A. Lambert & Michael Sykuta, Why the New Evidence on Minimum Resale Price Maintenance Does not Justify a Per Se or "Quick Look" Approach, CPI ANTITRUST CHRON. (Nov. 2013), available at https://www.competitionpolicyinternational.com/file/view/7019.

23 See Thomas A. Lambert, A Decision-Theoretic Rule of Reason for Minimum Resale Price Maintenance, 55 ANTITRUST BULL. 167, 184 (2010).

24 See Thomas A. Lambert, A Decision-Theoretic Rule of Reason for Minimum Resale Price Maintenance, 55 ANTITRUST BULL. 167, 183 (2010).

25 See European Commission: Commission Notice – Guidelines on Vertical Restraints, SEC (2010) 411, 2.10, especially paragraph 14.

26 Roger Van den Bergh, Vertical Restraints: The European Part of the Policy Failure, 61(1) *The Antitrust Bulletin* 167, 182-185 (2016).

27 Commission Decision 25.11.1981, Case VBBB/VBVB, O.J. 25.02.82, L 54/36.

supply of water, and books.[28] The fact that so many industrial fields are exempted from RPM prohibition in the largest EU member indicates the failure of EU approach.

II. RESALE PRICE MAINTENANCE IN UNITED STATES: THE EVOLUTION OF LEEGIN AND THE STRUCTURED RULE OF REASON

A. The Evolution of Leegin

In the U.S., both RPM and vertical nonprice restraints are challenged under Section 1 of the Sherman Act as contracts, combinations or conspiracies in restraint of trade. Similar to EU law, U.S. antitrust law had long been hostile to RPM. More than one hundred years ago, in *Dr. Miles Medical Co. v. John D. Park and Sons*,[29] the U.S. Supreme Court held that a massive minimum RPM scheme was unenforceable and offended Section 1 of the Sherman Act. The decision rested on the assertion that RPM is indistinguishable in economic effect from naked horizontal price fixing by a cartel. However, in *Dr. Miles*, the Supreme Court never distinguished horizontal from vertical price fixing and did not discuss either the market share or horizontal collusion issues in a way that explained RPM's underlying rationale. Subsequent decisions characterized *Dr. Miles* as holding that RPM is unlawful *per se*.

After nearly a century of debate among academics and lawyers, Supreme Court overruled *Dr. Miles* in its 2007 divided (5-4) *Leegin* decision.[30] The defendant Leegin was a manufacturer of leather garments which it sold through specialty retailers under the "Brighton" brand. The plaintiff PSKS was a discount retailer that operated "Kay's Kloset" and refused to abide by the resale prices that Leegin specified as a condition of supply. The Court found that the reasons upon which *Dr. Miles* relied do not justify a *per se* rule, and it is therefore necessary to examine the economic effects of vertical agreements to fix minimum resale prices, and reexamine whether the *per se* rule is nonetheless appropriate.

The Court first enumerated the procompetitive effects of RPM, such as enhancing interbrand competition by prevent free riding, facilitating market entry for new firms and brands and encouraging retailer services that would not be provided even absent free riding.[31] Then, the Court identified four ways in which RPM might be anticompetitive. It could facilitate a manufacturers' cartel; facilitate a dealer cartel; be used by a manufacturer with market power to protect that power by providing its dealers with an incentive not to sell the products of the manufacturer's smaller rivals or new entrants; and be used by a dealer with market power to forestall innovation in lower cost methods of distribution.[32] Notwithstanding the risks of unlawful conduct, the Court opined it cannot be stated with any degree of confidence that RPM "always or almost always tend[s] to restrict competition and decrease output."[33] Instead, the Court found that RPM can have "either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed."[34] "As the rule would proscribe a significant amount of procompetitive conduct, these agreements appear ill suited for per se condemnation."[35] Thus, according to the Court, the rule of reason is the appropriate vehicle for assessing RPM.

In order to give some guidance to apply rule of reason, the Court described three factors relevant to find anticompetitive RPM under a rule of reason analysis: (1) the scope of use of minimum RPM in a market; (2) the source of the restraint, i.e. whether it originated with the supplier or its dealers; and (3) the market power of the supplier and the dealer.[36] In fact, the Court suggested a structured rule of reason treatment to minimum RPM to provide more guidance to both courts and businesses.

28 Section 28 ACR (agriculture); Art. 30 ACR (press products); Art. 31 (water supply); Section 5 of the Law on Book Price Maintenance. See Boris Rigod, Resale Price Maintenance Under German Competition Law - FCO Imposes Fines on Furniture Manufacturers, available at https://www.hausfeld.com/news/eu/resale-price-maintenance-under-german-competition-law.

29 *Dr. Miles Medical Co. v. John D. Park and Sons*, 220 U.S. 373 (1911).

30 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

31 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890-892 (2007).

32 *Ibid.* at 892-894.

33 *Ibid.* at 894 (quoting *Business Electronics* at 723, 108 S.Ct. 1515).

34 *Ibid.* at 894.

35 *Id.*

36 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 897-898 (2007).

B. Minimum RPM After Leegin

Although the Leegin Court has set out a rule of reason treatment for minimum RPM, efforts to reinstate a per se illegal rule for minimum RPM arrangement are ongoing in U.S..[37] At the federal level, Congress had held hearings on legislation seeking to repeal the Leegin decision.[38] The attorneys general of 27 states submitted comments opposing a post-Leegin petition seeking modification of a FTC order that prohibited Nine West from using vertical pricing agreements with its dealers.[39] To date, at the state level, minimum RPM arrangements are still prohibited under state law of Maryland and California.[40] In New York, the Attorney General pursued a similar per se illegal interpretation of New York state law but has not persuaded the courts to agree.[41] In 2015, after contact lens manufacturers adopted minimum RPM policies, Utah enacted a statute prohibiting the enforcement of minimum RPM policies or agreements against contact lens retailers in Utah.[42] There are still several cases challenging minimum RPM policy on contact lenses and sports ticket, some are settled with manufacturers discontinuing minimum RPM practices, some are still pending.[43]

The commentators also have different opinions over what version of the rule of reason should apply to RPM. Some commentators have called for a full-blown rule of reason analysis which means the plaintiff should bear the burden of proving an actual anticompetitive effect.[44] Some suggest treating RPM agreements as presumptively or prima facie illegal because they are "inherently suspect."[45] Under this approach, parties engaged in RPM would have the initial burden of justifying it. Others have advocated structured approaches that would presume the anticompetitive RPM under the certain factors.[46] In sum, the legal landscape of RPM is far from clear in U.S. today.

C. Reconsidering Three Leegin Factors

In Leegin the Court listed three factors relevant to a rule of reason analysis. In the Court's view, each of these factors might help to identify instances in which RPM is more likely to be anticompetitive. A close examination of these factors can reveal that the Court's decision to base its methodology on certain factor may be wrong.

The first factor is the scope of use of RPM in a market. In Leegin the Court explained that the number of manufacturers that make use of minimum RPM in a given industry can provide important information. When only a few manufacturers lacking market power adopt minimum RPM practice, it is unlikely to be facilitating a manufacturer cartel because of the pressure of interbrand competition. In contrast, if many competing manufacturers adopt minimum RPM practice, it should be subject to more careful scrutiny.[47] Although widespread use of minimum RPM could suggest that the practice has anticompetitive potential to facilitate a dealer or manufacturer cartel, the widespread use of minimum RPM could also sug-

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37 Joseph Pereira, Price-Fixing Makes Comeback After Supreme Court Ruling, WALL ST. J., Aug. 10, 2008, at A1, available at http://online.wsj.com/article/SB121901920116148325.html?mod=hps_us_pageone. For a follow-up on RPM policies and the use of third party monitors, see Joseph Pereira, Discounters, Monitors Face Battle on Minimum Pricing, WALL ST. J., Dec. 4, 2008 at A1, available at http://online.wsj.com/article/SB122835660256478297.html.

38 See, e.g. *Bye Bye Bargains? Retail Price Fixing, the Leegin Decision, and Its Impact on Consumer Prices: Hearing Before the Subcomm. on Courts and Competition Policy of the Comm. on the Judiciary*, 111th Cong. (2009), available at http://judiciary.house.gov/hearings/hear_090428_1.html.

39 See Amended States' Comments Urging Denial of Nine West's Petition, Nine West Group Inc., FTC Docket No. C-3937 (Jan. 17, 2008), available at http://www.oag.state.ny.us/bureaus/antitrust/pdfs/Amended_State_ comments_011708-9west.pdf. The comments were originally submitted on December 28, 2007, and were amended on January 17, 2008, to add additional states. The FTC granted Nine West's petition in part. Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, Nine West Group Inc., FTC Docket No. C-3937 (May 6, 2008), available at http://www.ftc.gov/os/caselist/9810386/080506order.pdf.

40 See Michael A. Lindsay, Contact Lenses and Contact Sports: An Update on State RPM Laws, the antitrust source (April 2017); Michael A. Lindsay, Repatching the Quilt: An Update on State RPM Laws, The Antitrust Source (February 2014); Michael A. Lindsay, Overview of State RPM, The Antitrust Source (October 2014).

41 See Michael A. Lindsay, Contact Lenses and Contact Sports: An Update on State RPM Laws, the antitrust source (April 2017).

42 UTAH CODE ANN. § 58-16a-905.1.

43 See Michael A. Lindsay, Contact Lenses and Contact Sports: An Update on State RPM Laws, the antitrust source (April 2017).

44 See, e.g. Thomas A. Lambert, *A Decision-Theoretic Rule of Reason for Minimum Resale Price Maintenance*, 55 ANTITRUST BULL. 167 (2010); Christine A. Varney, *A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason, Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007),24 ANTITRUST 22 (Fall 2009).

45 See Alber Foer & Sandeep Vaheesan, Action Needed to Address Resale Price Maintenance in Contact Lenses and Countless Other Markets, The American Antitrust Institute Public Letter to Chairwoman of Federal Trade Commission (October 24, 2014), at 8.

46 See, e.g. Marina Lao, *Free-Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 215-16 (Robert Pitofsky ed. 2008).

47 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 897 (2007).

gest that it is widely perceived to be an efficient marketing practice by many firms in an industry.[48] Sometimes, the more efficient the minimum RPM is, the wider it is used. So the scope of use of minimum RPM in a market is not an appropriate factor to help finding anticompetitive minimum RPM.

Secondly, there is the source of the RPM restraint. In Leegin the Court argued that the source of the restraint may be an important consideration.[49] Retailer-initiated minimum RPM has a greater likelihood to facilitate a retailer cartel or support a dominant, inefficient retailer. By contrast, manufacturer-initiated minimum RPM independent of retailer pressure is less likely to promote anticompetitive conduct because the manufacturer has an incentive to protest inefficient retailer-induced RPM.[50] However, the Court's theory does not make sense. Manufacturers and retailers may both have an incentive to adopt RPM practice when there is a free riding problem. The amounts of products sold at retail substantially depend on point-of-sale services, including consumer education and product testing, which require a considerable investment on the part of the dealer.[51] Discount dealer free-riding takes place if consumers first visit the full-service retailer to obtain valuable promotional services and then purchase the product from a second discount dealer who does not provide those services. This kind of free-riding will discourage retailers' promotional efforts and decrease sales.

In this situation, the retailer and the manufacturer have common interest and incentive to use minimum RPM to prevent free-ridding by eliminating retail discounting. The identity of the initiating party is irrelevant to the competition effect of minimum RPM. Whether or not minimum RPM originated from a manufacturer or a retailer, the competition effect of minimum RPM in a concrete situation does not change. Focusing on where minimum RPM originates might well "divert attention and litigation resources from the more central question of evaluating the competitive effects of the practice and might not be necessarily probative of the practice's anti-or procompetitive effects."[52]

Thirdly, the market power of the supplier or the dealer. This factor is closely relevant to the competition effect of minimum RPM practice. As the Court noted in its Leegin explanation, the anticompetitive effects of minimum RPM may not be "a serious concern unless the relevant entity has market power."[53] If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.[54]

Among the three Leegin factors, only the factor of market power is closely related to the high probability of anticompetitive effect of minimum RPM. The structured rule of reason analysis of minimum RPM suggested by the Court in Leegin should be refined.

III. THE ENFORCEMENT PRACTICES OF RESALE PRICE MAINTENANCE IN CHINA: CONFLICTS BETWEEN AGENCIES AND COURTS

A. Resale Price Maintenance Under the Anti-Monopoly Law of China

Article 13 of China's Anti-Monopoly Law ("AML") prohibits horizontal agreements, that is, agreements between undertakings competing with one another. Article 14 of the AML prohibits vertical monopoly agreements, which include RPM arrangements. This article states:

> Undertakings are prohibited from concluding the following monopoly agreements with their trading counterparts:
>
> (1) on fixing the prices of commodities resold to a third party;
> (2) on restricting the lowest prices for commodities resold to a third party; and
> (3) other monopoly agreements confirmed as such by the authority for enforcement of the Anti-monopoly Law under the State Council.[55]

48 Andrew Gavil , William Kovacic, Jonathan Baker & Joshua Wright, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* (3rd edition)(2016), at 944.

49 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 897 (2007).

50 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 897 (2007).

51 Lester G. Telser, Why Should Manufacturers Want Fair Trade, 3 J. L. & ECON. 86 (1960).

52 Andrew Gavil, William Kovacic, Jonathan Baker & Joshua Wright, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* (3rd edition)(2016), at 944.

53 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 898 (2007).

54 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 898 (2007).

55 Article 14 of Chinese Anti-Monopoly Law.

Article 15 of the AML enumerates the agreements that will be exempted from Article 13 and 14. From the language of Article 14, it seems that fixed or minimum RPM is absolutely prohibited and per se illegal, thus there is no need to scrutinize competitive consequences of it. But the term "monopoly agreement" in Article 13 is defined to only include any "agreement, decision or concerted action which eliminate or restrict competition."[56] This is the only definition of the terms of "monopoly agreement" in the AML. If Article 14 is explained in light of this definition of "monopoly agreement," it becomes clear that the competitive effect of an agreement has to be taken into account before it is found to constitute a violation of the AML. The ambiguity and potential contradiction create legal limbo for certain forms of conduct that constitute agreements but may or may not have adverse competitive consequences.[57] The different understandings of Article 14 result in conflicting legal enforcement practices of RPM between Chinese courts and agencies.

B. The Enforcement Landscape of the NDRC and Its Subordinate Institution

The NDRC opined that, taking Article 14 and Article 15 as a whole, the fundamental approach of AML to determining RPM is "principle of prohibition, individual exemptions."[58] That is, the NDRC determined that any RPM arrangement is illegal per se and can only be exempted in narrowly defined situations. The NDRC's opinion on RPM is reflected in its newly published State Council Antimonopoly Commission's Consultation Proposals of Antimonopoly Guideline for Automotive Industry (Consultation Proposals).[59] The NDRC is entrusted by the State Council Antimonopoly Commission to take the lead in drafting the Consultation Proposals. The Consultation Proposals provide detailed guidance on issues specific to the automotive industry, with a focus on the vertical restrictions between auto manufacturers and distributors.[60] Notably, the Consultation Proposals state that RPM arrangements have obvious anticompetitive effects, inter alia, maintaining high prices, promoting horizontal and vertical collusion, weakening intrabrand and interbrand competition, and excluding competitors.[61] The Consultation Proposal illustrated four situations where RPM arrangements may be exempted on an individual basis: RPM for new energy automobiles during the promotional period and RPM imposed on three kinds of distributors who only act as an intermediary party.[62]

The NDRC's "principle of permission, individual prohibition" approach makes the assessing of competitive effects of minimum RPM unnecessary, which facilitates its enforcement of the AML on RPM.

1. The High-end Liquor Price Monopoly Case. Guizhou Development and Reform Commission, one of the NDRC's subordinate branches in provincial level, released an administrative penalty decision fining Guizhou Mao-tai, a Chinese well-known high-end liquor producer, RMB 247 million for its RPM conduct. Sichuan Development and Reform Commission together published an administrative penalty decision, fining the other state-owned producer of high-end liquor, Wuliangye, RMB 202 million for the same reason same day.[63]

2. Infant Formula Milk Powder Price Monopoly Case. On April, 2013, the NDRC initiated an investigation of milk powder producers —Biostime, Mead Johnson, Dumex, Abbott Laboratories, Friesland, Fonterra, Wyeth, Beingmate and Meiji —for their monopoly price conduct. NDRC held that the undertakings' conducts in fact achieved the effect of fixing or restricting the products' resale price, which falls within the scope of Article 14 of AML. Maintaining the price of milk powder at a higher level may exclude or restrain the intra-brand competition meanwhile weakens the brands' internal competition, as a result of destroying the fair and orderly market competition principle and harming the consumer welfare. During the investigation, each undertaking involved confessed their conduct was illegal and could not prove their alleged conduct could be exempted under Article 15 of AML. In the end, the NDRC imposed fines totaling of RMB 668.73 million on the six undertakings involved.[64]

3. Ophthalmic Lens Manufacturer Case. In June, 2014, the Shanghai Price Bureau confirmed that Essilor and Johnson violated Article 14 (1) of AML by reaching and implementing monopoly agreements of fixing resale price, which in fact excludes and restrains relevant

56 Article 13 of Chinese Anti-Monopoly Law, Paragraph 2.

57 See Wentong Zheng, Competition law in China, in COMPARATIVE COMPETITION LAW (John Duns, Arlen Duke and Brendan Sweeney eds.), Edward Elgar Publishing Limited (2015), p 450.

58 Lu Yanchun and Su Hua, Thoughts on Several Issues in Drafting the Auto Industry Antitrust Guidelines, 3 PRICE SUPERVISION AND ANTIMONOPOLY IN CHINA 37, 39 (2016).

59 The Consultation Proposals of Antimonopoly Regulation for Automotive Industry, available at http://www.sdpc.gov.cn/fzgggz/jgjdyfld/fjgld/201603/t20160323_795741.html.

60 See the Consultation Proposals of Antimonopoly Regulation For Automotive Industry, Chapter 2, Part 3, section 1, paragraph 2 and 3.

61 See the Consultation Proposals of Antimonopoly Regulation For Automotive Industry, Chapter 2, Part 3, section 1, paragraph 2.

62 See the Consultation Proposals of Antimonopoly Regulation for Automotive Industry, Chapter 2, Part 3, section 2.

63 Source: http://www.chinanews.com/cj/2013/02-22/4588678.shtm.

64 Source: http://xwzx.ndrc.gov.cn/xwfb/201308/t20130807_552992.html.

market competition and harms consumer welfare. Essilor was fined RMB 8.7 million which accounted for 2 percent of its turnover in 2012, and Johnson was fined RMB 3.6 million which accounted for 1 percent of its turnover in 2012.[65]

4. Haier Air Conditioner Price Monopoly Case. In August, 2016, under the guidance of the NDRC, the Shanghai Price Bureau imposed fines totaling RMB 12.348 million on Chongqing Ririshun Household Appliance Sales Co., Ltd (Shanghai Branch), Chongqing Haier Household Appliance Sales Co., Ltd (Shanghai Branch) and Chongqing Haier Electrical Appliance Sales Co., Ltd (Shanghai Branch) for their reaching and implementing of RPM agreements. The Shanghai Price Bureau confirmed that the conducts of undertakings involved violating Article 14(2) of AML, which excludes and restrains competition in the market and harm consumer welfare.[66]

5. Medical Field Price Monopoly Case. In December, 2016, the Shanghai Price Bureau confirmed that Smith & Nephew Medical Products (Shanghai) International Trade Co., Ltd. violated Article 14(1) by fixing resale price, which excludes and restrains competition in the market and harms consumer welfare. Smith & Nephew was fined RMB 742,147.98, which accounted for 6% of its relevant turnover in year of 2014.[67]

6. Automobile Price Monopoly Cases *(Chrysler/Faw-Volkswagen/Mercedes-Benz/ Dongfeng Nissan/ Hankook Tire/SAIC-GM)*. In June of 2014, Chrysler was fined RMB 31.68 million by the Shanghai Price Bureau for its RPM arrangements.[68] In September of 2014, the Hubei Price Bureau held Faw-Volkswagen violates Article 14 of AML by fixing resale price and limiting the minimum resale price and fined Faw-Volkswagen RMB 248.58 million, which accounts for 6 percent of its relevant turnover in last year.[69] In April of 2015, Mercedes was fined RMB 350 million by the Jiangsu Price Bureau for its concluding and implementing price monopoly agreement of fixing resale price and limiting the minimum resale price of level-E, level-S finished automobiles and parts with its distributors in Jiangsu Province.[70] In September of 2015, Dongfeng Nissan was fined RMB 123.3 million by the Guangdong Development and Reform Commission for its RPM arrangement.[71] In April of 2016, the Shanghai Price Bureau fined Hankook Tire RMB 217.52 million for its RPM agreements which accounted for 1 percent of the relevant turnover in 2014.[72]In December of 2016, the Shanghai Price Bureau fined SAIC-GM RMB 201 million for its RPM practices.[73]

C. Rule of Reason Analysis of RPM in Courts

Chinese courts' understanding of the application of Article 14 of the AML to RPM agreements is different from the NDRC's approach. The Supreme People's Court of China promulgated a Judicial Interpretation on Civil Litigation of AML Cases in May of 2012.[74] Article 7 of the Judicial Interpretation provides that where the alleged monopolistic conduct is found to be a monopolistic agreement in accordance with the conditions stipulated in Article 13, paragraph 1(1) — (5) of Anti-monopoly Law, the defendant shall have the burden of proving that the alleged monopolistic agreement does not have the effect of eliminating or restricting competition. This means the horizontal agreements stipulated in Article 13, paragraph 1(1) — (5) are presumed to be anticompetitive but the vertical agreements in Article 14 are not presumed to be anticompetitive. Therefore, under Article 14, the plaintiff should shoulder the burden of proving that vertical agreements including RPM have actual or potential anticompetitive effects.[75] This indicates that the courts will take the rule of reason analysis to RPM practices. The following cases explicitly show Chinese courts' rule of reason approach to minimum RPM.

65 Source: http://www.shdrc.gov.cn/info/iList.jsp?cat_id=10010&cur_page=4.

66 Source: http://www.shdrc.gov.cn/fzgggz/jggl/jghzcfjds/24137.htm.

67 Source: http://www.shdrc.gov.cn/fzgggz/jggl/jghzcfjds/25365.htm.

68 Source: http://news.xinhuanet.com/fortune/2014-09/11/c_1112443669.htm.

69 Source: http://finance.sina.com.cn/chanjing/gsnews/20140911/144220266697.shtml.

70 Source: http://news.qq.com/a/20150423/017671.htm.

71 Source: http://finance.sina.com.cn/chanjing/cyxw/20150910/104323209643.shtml.

72 Source: http://www.shdrc.gov.cn/fzgggz/jggl/jghzcfjds/23432.htm.

73 Source: http://www.shdrc.gov.cn/fzgggz/jggl/jghzcfjds/25286.htm.

74 Provisions on the Application of the Antimonopoly Law in the Trial of Civil Disputes Arising from Monopolistic Conduct(adopted at the 1539th Session of the Judicial Committee of the Supreme People's Court on January 30, 2012, and shall come into force on June 1, 2012; hereafter "Judicial Interpretation"), available at http://www.wipo.int/edocs/lexdocs/laws/zh/cn/cn375zh.pdf.

75 See Li Zhu, Understanding And Applying The Judicial Interpretation of Provisions on the Application of the Antimonopoly Law in the Trial of Civil Disputes Arising from Monopolistic Conduct and How, 15 People's Judicature 42, 46 (2012).

In August 2013, in *Rainbow v. Johnson & Johnson*,[76] the Shanghai high court held that the showing of anti-competitive effects is an indispensable requirement when determine the legality of the minimum RPM agreement and the plaintiff (Rainbow) should bear the burden of proving both the existence of and anti-competitive of effects the RPM practice. The Court then set out four factors to evaluate the competitive effects of RPM agreements: (1) Whether there is sufficient competition in the relevant market (primary condition); (2) Whether the defendant has a strong market position (prerequisite and basis); (3) The motivation of the defendant to conduct RPM (important factor); (4) The effects of RPM on competition (both anti-competitive and pro-competitive effects shall be considered).[77] After elaborating and examining these four factors, the Court found the effects of Johnson & Johnson's minimum RPM practices were to restrain and exclude competition in the relevant market, and had no obvious and sufficient contribution to the promotion of competition, and thus violated Article 14 of AML.

In the *Gree Air-conditioner* case[78] the Guangzhou Intellectual Property Court held that the disputed minimum RPM agreement did not constitute a monopoly agreement as prohibited under the AML because it did not result in anticompetitive effects in a relevant market. There the Court found that there is sufficient competition on air-conditioner market and that the distributors can still compete among one another in terms of pre-sale marketing, sale promotions and after-sale services.[79]

The National People's Congress of China now is considering amending Article 14 of the AML and clarifying the legal treatment to minimum RPM to eliminate the conflicts between courts and antitrust agencies.[80]

IV. WHAT CAN WE LEARN FROM U.S. AND EU: TOWARD A WAY OF EVIDENCE-BASED AND EFFECT-ORIENTED ANALYSIS?

The failure regarding the treatment minimum RPM as a hardcore restraint in EU, the ongoing controversy over the legal treatment to minimum RPM in U.S. and the conflicts of legal enforcement to minimum RPM between courts and agencies in China call for identifying the appropriate legal treatment to minimum RPM. The appropriate legal approach to minimum RPM ultimately depends on what we know about the competitive effect of minimum RPM. I will first summarize the existent theoretical and empirical evidence on competitive effects of minimum RPM. I divide this discussion into three parts: I begin by discussing the procompetitive effects of minimum RPM identified by economic theory, then the anti-competitive effects before assessing the available empirical evidence. Then I conclude this section by discussing the cost and benefits of various legal approaches.

A. The Procompetitive Effects of Minimum RPM

The procompetitive effects of RPM include enhancing interbrand competition by prevent free riding, facilitating market entry for new firms and brands and encouraging retailer services that would not be provided even absent free riding. Economic theory has long recognized the potential for RPM to reduce free-riding by retailers that fail to provide point-of-sale services. Consider, for example, two television retailers, one that has a showroom where consumers can assess picture quality and a second retailer that does not invest in a showroom. In the absence of minimum RPM, the second retailer would have lower costs and so could profitably undercut the first retailer's price leading some consumers to purchase televisions from the second retailer after visiting the first retailer's showroom.

As discussed in Section II.C, above, this kind of free-riding reduces retailers' incentive to provide point-of-sale services, and increases their incentive to compete on the basis of price. Imposing minimum RPM eliminates retail price competition and forces retailers to compete on

76 *Beijing Ruibang Yonghe Science and Technology Trade Company ("Rainbow") v. Johnson & Johnson Medical (Shanghai) Ltd., Johnson & Johnson Medical (China) Ltd.* (collectively "Johnson & Johnson"), (2012)Third Civil Trial Division of Shanghai High Court (Zhi) zhongzi No. 61.

77 *Beijing Ruibang Yonghe Science and Technology Trade Company ("Rainbow") v. Johnson & Johnson Medical (Shanghai) Ltd., Johnson & Johnson Medical (China) Ltd.* (collectively "Johnson & Johnson"), Third Civil Trial Division of Shanghai High Court, (2013) Zhi zhongzi No. 61.

78 *Dongguan GengliGuochang Electrical Appliance Shop v. Dongguan Shengshixinxing Gree Ltd. and Dongguang Heshi Ltd.*, Guangzhou Intellectual Property Court, (2015) Yuezhifashangminchuzi No. 33.

79 For a summary of the cases on RPM in 2016 in China, see Qing Ren, Anti-Monopoly Litigation in China: A Review for the Year of 2016, Competition Policy International (March, 2017).

80 See Draft Amendment of Anti-Monopoly Law of the People's Republic of China (Oct. 23, 2021), available at http://www.npc.gov.cn/flcaw/more.html, or https://new.qq.com/omn/20211024/20211024A018J400.html.

the basis of service quality, and high-quality point-of-sale services enhance the competitiveness of the manufacturer's product.[81] Returning to the example of the two television retailers, after minimum RPM was imposed, consumers would be less likely to buy a television elsewhere after visiting a showroom because other retailers would not be able to undercut the minimum RPM. Imposing minimum RPM strengthens the incentive to invest in point-of-sale services such as showrooms by eliminating consumers' incentive to use one retailer's point-of-sale services and then purchase from a second retailer with lower prices.

Similarly, in the absence of minimum RPM, free-riding can make it unprofitable for any retailer to provide a high level of point-of-sale services if most of the consumers who use these services end up purchasing from a discounter. If few retailers provide a high level of service it will not be profitable for manufacturers to introduce products that require a high level of point-of-sale services to generate significant sales.

For example, luxury cars can have difficulty generating significant sales without a dealer network that can provide maintenance and repairs. If a luxury car manufacturer distributed included discount retailers in its dealer network that did not provide maintenance and repair services they would be able to undercut full-service dealers' prices and, in the a absence of full-service dealers, the manufacturer's sales would suffer. Under RPM the manufacturer is able to set the retailer's margin and incentivize the desired service level. Consequently, as the Court observed in *Leegin*, minimum RPM can "give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between."[82]

Minimum RPM can also facilitate market entry by new firms and brands. This is because retailers typically must offer a higher level of point-of-sale services in order to make consumers aware of the existence, characteristics and benefits of new products. Alternatively, consumers may prefer to purchase new products from retailers that have invested in a reputation for providing high quality merchandise. In either case, the manufacturer of a new product can provide retailers with an incentive to provide the necessary service level using minimum RPM.[83] In the absence of minimum RPM, discount retailers can free-ride off the point-of-sale services or reputation of the higher-cost higher-service-level retailers. By imposing minimum RPM, the manufacturer of a new product can create a strong incentive for higher-cost retailers to carry their product speeding consumer adoption of new products.

In *Leegin*, the Court also noted the procompetitive effects of RPM in "encouraging retailer services that would not be provided even absent free riding."[84] It may be impractical for a manufacturer to make a contract with a retailer that specifying all the different services they require the retailers to perform or qualities they require the retailer have (e.g. how attentive and well-informed salespeople are or how much inventory is kept on hand …). Even in cases where it is possible to specify all of the services a retailer must provide it is often inefficient to measure how well they perform those services.

In many cases, offering the retailer a guaranteed margin and threatening termination can be the most efficient way for the manufacturer to induce the retailer to perform as desired while allowing it to use its own experience and expertise to provide retail services in the most efficient way.[85] By conditioning a retailer's ability to continue selling its product and earning the associated stream of profits on the retailer's performance, the manufacturer can use RPM to create a very strong incentive for the retailer to perform as required.

B. The Anticompetitive Effects of Minimum RPM

In *Leegin*, the U.S. Supreme Court relied heavily on economic theory and the economic literature on RPM. In abandoning the per se prohibition on RPM the Court explained that "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance."[86] As mentioned above, the Court also identified two types scenarios under which RPM is likely to be anticompetitive: (1) when used to facilitate a cartel; and (2) when used to maintain or extend dominance.[87]

81 Marvel & McCafferty, The Welfare Effects of Resale Price Maintenance, 28 J. Law & Econ. 363, 373 (1985)

82 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 887 (2007).

83 Marvel & McCafferty, The Welfare Effects of Resale Price Maintenance, 28 J. Law & Econ. 363, 373 (1985)

84 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 878 (2007).

85 Klein & Murphy, Vertical Restraints as Contract Enforcement Mechanisms, 31 J. Law & Econ. 265, 295 (1988)

86 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 878 (2007).

87 *Ibid.* at 892-894.

Economic theory teaches that a successful cartel must be able to detect and deter cheating by its members.[88] RPM makes this task easier for the members of a manufacturer cartel by reducing members' incentives to cheat on the cartel agreement by lowering wholesale prices and increasing sales. RPM limits the ability of retailers to reduce retail prices in response to wholesale prices because retailers cannot reduce their prices below the RPM. For those retailers who were already pricing at the RPM, the impact of a reduction in wholesale price is limited to an increase in promotional effort (and possibly a decrease in efforts to promote substitute products). Consequently, a given reduction in wholesale price will produce a smaller increase in sales than would have occurred in the absence of RPM and cartel members will have less of an incentive to cheat on the cartel by cutting wholesale prices. Similarly, in Leegin, the Court noted that a "group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance."[89] In this scenario, the manufacturer monitors the members of the retail cartel to make sure that they do not cheat on the cartel agreement by charging a price below the RPM. The manufacturer also deters cheating by withdrawing its product from retailers who charge a price below the RPM.

In *Leegin*, the court also discussed the possibility that a dominant retailer could compel a manufacturer to adopt RPM in an effort to prevent or forestall the entry of new lower cost retailers. By setting an RPM that is equal to the dominant retailer's price, the manufacturer prevents other, potentially lower-cost retailers from using lower prices to gain market share. The entry of lower-cost retailers would be expected to reduce retail margins, letting the manufacturer increase sales or wholesale prices. Imposing an RPM in this scenario would go against the manufacturer's economic interests, as it would prevent or slow the growth of lower-cost retailers by preventing them from using lower prices to attract consumers.[90] However, a manufacturer might be forced to accept the demand for a restrictive RPM if it came from a retailer with sufficiently high market share.

Finally, the Court noted that a manufacturer with market power might "use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants."[91] While the Court did not explain the mechanism, others have suggested that a dominant firm may use RPM "as a way to pay retailers for de facto exclusive dealing."[92] By setting a sufficiently high RPM manufacturer can control both the retail and wholesale prices of its product and set the profit margin that retailers earn. A manufacturer with a dominant market share could use RPM together with a refusal to supply retailers that carried the products of smaller rivals or new entrants to induce its retailers to become exclusive dealers. If enough retailers become exclusive dealers competing products will lack the distribution necessary to reach efficient scale, foreclosing their growth and entry.

Each of the scenarios discussed above in which RPM has anticompetitive effects involves the exercise or maintenance of market power. Importantly, the procompetitive effects of RPM, which the court enumerated before turning to the anticompetitive scenarios discussed above, need not depend whether or not market power is present. As discussed above, the procompetitive effects of RPM include enhancing interbrand competition by prevent free riding, facilitating market entry for new firms and brands and encouraging retailer services that would not be provided even absent free riding.

C. The Empirical Evidence on Competition Effects of Minimum RPM

To date, the existing empirical evidences show minimum RPM arrangements more likely benefit competition rather than harm competition.[93] In a research of all FTC RPM cases from mid-1965 through 1982 and catalogued existing empirical studies of RPM, a researcher concluded that RPM arrangements in most instances were pro-competitive because they occurred in markets that could support neither dealer nor manufacturer collusion.[94] Another study in 1991 examined 203 reported RPM cases from 1975 to 1982, the period during which U.S. federal antitrust law treated RPM as illegal *per se*.[95] This study hypothesized that "if the plaintiff had any evidence that the practice at issue in the litigation was used to support collusion, we would expect to see horizontal price-fixing allegations in these cases, in addition to the RPM allegation."[96] The researcher

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88 Osborne, Cartel Problems, 66 American Economic Review 835, 835 (1976)

89 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007).

90 Klein, Competitive Retail Price Maintenance, 76 Antitrust Law Journal 431, 470-471 (2009).

91 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 894 (2007).

92 Klein p. 468.

93 See generally, Joshua D. Wright, The Economics of Resale Price Maintenance and Implications for Competition Law and Policy, London, United Kingdom (April 9, 2014).

94 Thomas R. Overstreet, Jr., Resale Price Maintenance: Economical Theories and Empirical Evidence, Bureau of Economics Staff Report to the Federal Trade Commission, 1983.

95 Pauline M. Ippolito, Resale Price Maintenance: Empirical Evidence from Litigation, 34 J. L. & ECON. 263 (1991).

96 Pauline M. Ippolito, Resale Price Maintenance: Empirical Evidence from Litigation, 34 J. L. & ECON. 263 (1991), at 281.

found in all these cases, allegations of collusion appeared in only 9.8 percent of private cases and 13.1 percent of the entire sample. By contrast, a majority of the cases involved facts that were more consistent with procompetitive than anticompetitive uses of RPM. Then, the researcher concluded that service-and-sales-enhancing theories appear to have greater potential to explain the RPM practices than do collusion-based explanations.[97]

However, it should be noted that there are two recent studies which support the view that minimum RPM is more frequently anti-competitive than pro-competitive. In a study of June 2014, Alexander MacKay and David Aron Smith compared post-*Leegin* changes in price and output levels in states retaining a rule of *per se* illegality with those in states likely to assess minimum RPM under the rule of reason, aiming to conduct "a natural experiment to estimate the effects of *Leegin* on product prices and quantity."[98] They find that the price of product were most likely to increase combined with a quantity decrease as a result of *Leegin*. They estimated an overall price increase of 0.33 percent, an overall quantity decrease of 3.8 percent and a net consumer welfare decrease of 3.1 percent.[99] Therefore, they conclude that a more favorable legal environment for minimum RPM results in a loss in consumer welfare.[100] Some commentators have already pointed out that this study does not support a more restrictive policy towards minimum RPM.[101] Merely 1.6 percent of the product categories surveyed had both an increase in price *and* a decrease in quantity in states that shifted to the rule of reason.[102] Moreover, the study does not purport to actually present evidence that minimum RPM agreements were implemented for any of the product categories where price increases or output reductions were found.[103] This is particularly problematic because the study utilizes consumer product data for the grocery retail industry, where minimum RPM arrangements traditionally have not been employed and many products are distributed nationally so it is unlikely that manufacturers have entered into minimum RPM agreements on a state-by-state basis.[104]

In a study of February 2017, Matthias Hunold and Johannes Muthers challenged the efficiency defense for minimum RPM.[105] Using a theoretical model of two manufacturers with common retailers, they find minimum RPM increases consumer prices and can create a prisoner's dilemma for manufacturers without increasing, and possibly even reducing, the overall level of retail services.[106] This study does not support a more restrictive policy towards minimum RPM. The outcome of this study is strictly limited to the scenario of two manufacturers with common retailers. Further, encouraging retail services is only one of the pro-competitive effects of minimum RPM, this study cannot deny other pro-competitive effects of minimum RPM.

D. The Cost-Benefits Analysis of Different Approaches to Minimum RPM

Based on the existing empirical and theoretical evidence, we can conduct a cost-benefit analysis of different approaches to minimum RPM. We assume that the economic objective of the appropriate legal framework of minimum RPM is to minimize the sum of administrative costs and error costs, thereby maximizing the net social benefits of minimum RPM regulation. There is a wide-range of approaches for analyzing minimum RPM under antitrust law, with per se illegality and full-blown rule of reason at the two opposite far ends and a structured rule of reason based on various factors in the middle.

1. The Per Se Illegal or Hardcore Restraint Approach. Under this approach, minimum RPM is presumed to be anticompetitive and illegal. This approach may decrease administrative costs because of the bright line it provides. But just as the Leegin Court pointed out, admin-

97 *Ibid.* at 291-292.

98 Alexander MacKay and David Aron Smith, The Empirical Effects of Minimum Resale Price Maintenance (June 16, 2014), Kilts Center for Marketing at Chicago Booth – Nielsen Dataset Paper Series 2-006. Available at SSRN: https://ssrn.com/abstract=2513533 or http://dx.doi.org/10.2139/ssrn.2513533.

99 *Ibid.* at 3.

100 *Ibid.* at 24.

101 See Joshua D. Wright, The Economics of Resale Price Maintenance and Implications for Competition Law and Policy, London, United Kingdom (April 9, 2014); Thomas A. Lambert & Michael Sykuta, Why the New Evidence on Minimum Resale Price Maintenance Does not Justify a Per Se or "Quick Look" Approach, CPI ANTITRUST CHRON. (Nov. 2013), available at https://www.competitionpolicyinternational.com/file/view/7019.

102 See Joshua D. Wright, The Economics of Resale Price Maintenance and Implications for Competition Law and Policy, London, United Kingdom (April 9, 2014).

103 *Id.*

104 *Id.*

105 Matthias Hunold and Johannes Muthers, Resale price maintenance and manufacturer competition for retail services, 48 The RAND Journal of Economics 3–23 (2017).

106 *Id.*

istrative cost is only part of the equation. [107] As mentioned above, the existent evidence has shown that minimum RPM arrangements are more likely benefit competition rather than harm competition. The *per se* illegal or hardcore restraint approach will increase error cost in practices by prohibiting procompetitive conduct the antitrust laws should encourage. A typical example is the failure of EU approach we have discussed above. This approach also may increase litigation costs by promoting frivolous suits against legitimate practices.[108] The administrative advantages are "not sufficient in themselves to justify the creation of *per se* rules."[109]

2. The Full-blown Rule of Reason Approach. Under this approach, the plaintiff bears the initial burden of producing evidence of anticompetitive effect, and both the anti-competitive and pro-competitive effects should be fully examined and balanced. Obviously, this approach will decrease the false positive cost and simultaneously increase the administrative costs. Given the difficulty of showing anticompetitive effects, the full-blown rule of reason approach indicates high administrative costs. The high administrative costs will discourage the plaintiff to file suit, which increases the false negative cost.

3. The Structured Rule of Reason Based on Certain Factors. The U.S. Supreme Court suggested this approach in *Leegin*. Under this approach, when certain factor(s) are found in a specific situation, it will presume that the minimum RPM in that situation has anti-competitive effects, and then the defendant should bear the burden of proof to show any redeeming pro-competitive effects. Because it need not fully examine the pro-competitive and anti-competitive effects of minimum RPM arrangement, this approach will have lower administrative costs than the full-blown rule of reason approach. Simultaneously, this approach will have lower error costs than the *per se* illegal or hardcore restraint approach if it is based on sound economical evidence and theory. This approach may be the "a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones."[110] Thus, a structured rule of reason for minimum RPM may very well offer a superior legal rule.[111] The critical element of an appropriate structure of rule of reason for minimum RPM is that the relevant analytical factors correctly match the economic evidence.[112]

E. Redesigning the Structured Rule of Reason Approach to Minimum RPM

We have shown that two of the *Leegin* factors, the scope of use of minimum RPM in a market and the source of the RPM restraint, do not match the sound economic theory. Only the factor of market power is appropriate. But there may be other options for a structured rule of reason approach that are consistent with the economic evidence. Next, we will explore other factors to identify the proper factors matching the relevant economic theories.

1. Price Increase. There are some suggestions that if the consumer price has risen, the minimum RPM arrangement would be presumed anti-competitive.[113] We should be cautious about these suggestions. Higher consumer prices do not necessarily mean there has been an anticompetitive market effect. The goal of antitrust law is to promote consumer welfare. An increase in price may cause a decrease in consumer welfare, but it may also be the result of an increase in consumer welfare. If a price increase is the result of decreased quantity, there is a net loss of consumer welfare. Alternatively, the price may increase because there is an increase in demand.[114] Economic theory has found that minimum RPM may have a role to play in the context of Veblen goods (e.g. luxury cosmetics, luxury cars, designer handbags, and high-class wines).[115] As demand for Veblen goods ultimately depends on the conspicuous utility derived, the demand for this product could decrease if the real price has

107 *Leegin*, at 895.

108 *Id*.

109 *GTE Sylvania*, 433 U.S. 49–50.

110 *Leegin*, at 898.

111 See Joshua D. Wright, The Economics of Resale Price Maintenance and Implications for Competition Law and Policy, London, United Kingdom (April 9, 2014).

112 *Id*.

113 See, e.g. Brief for the American Antitrust Institute as Amici Curiae in Support of Appellant and Reversal, *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.* (5th Cir. 2009) (No. 09-40506); Amended States' Comments Urging the Denial of Nine West's Petition, *In re* Nine West Group, Inc., No. C-3937 (F.T.C. Jan. 17, 2008) (available at http://www.ftc.gov/os/comments/ninewestgrp/080117statesamendedcomments.pdf).

114 See Nathaniel J. Harris, Leegin's effect on Prices: An Empirical Analysis, 9 J.L. Econ. & Pol'y 251, 273-274(2013).

115 See Andrés Font-Galarza, Frank P. Maier-Rigaud, &Pablo Figueroa, RPM Under EU Competition Law: Some Considerations From a Business and Economic Perspective, CPI Antitrust Chronicle November 2013 (1).

been eroded by discounts.[116] In this situation, if the RPM arrangement increases the consumer price, the consumer welfare will increase too because of the increased sales or additional services provided.

We should also notice that RPM may give consumers more options to choose among low-price, low-service brands; high-price, high-service brands; and brands falling in between.[117] Moreover, just as the *Leegin* Court had mentioned, many decisions a manufacturer makes and carries out through concerted action can lead to higher prices.[118] The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices. The same can hold true for minimum RPM.[119] For example, a manufacturer might hire an advertising agency to promote awareness of its goods. Yet no one would think this action would violate antitrust law because it leads to higher prices.[120]

Therefore, a consumer price increase is not sufficient to establish anticompetitive effects. A price increase may be anti-competitive or pro-competitive depending on if it was caused by an increase or decrease in quantity sold.[121] Consequently, the consumer price increase plus the output or sale decrease is the proper factor to determine whether minimum RPM in a specific case is anti-competitive or pro-competitive.

2. No Free-riding. Some commentators suggest that if the minimum RPM was imposed on homogeneous products that are not sold with freerideable point-of-sale services, the minimum RPM practice should be presumed to have anti-competitive effects. This suggestion bases on the presumption that the free-riding is the single justification of minimum RPM. But this presumption is not true. Even absent free riding, minimum RPM arrangement can be able to be used pro-competitively by manufacturers to provide a financial incentive for retailers to implement strategies for promoting the manufacturer's product.[122] There is a prevalent incentive conflict between manufacturers and retailers with respect to retailer's point-of-sale promotional effort. Retailers generally have an insufficient incentive to provide promotional services from the manufacturer's point of view.[123] Therefore, manufacturers may use minimum RPM to induce dedicated retailer promotional efforts regardless of free-riding.

Moreover, when there is no risk of free-riding point-of-sale service, the optimal inventory problem may also drive manufacturers to implement minimum RPM. With fluctuating demand under uncertainty, minimum RPM can induce more appropriate inventory holding by retailers.[124] If demand declines, the value of retailer inventories would decline and may force the retailers to sell their stock at lower prices. As a result, retailers will hold inefficiently low stocks. Minimum RPM would eliminate an inventory devaluation, which would allow retailers to hold efficient stock levels benefitting the manufacturer and, under certain circumstances, also consumers.[125]

Minimum RPM can be pro-competitive even in the absence of free-riding because of the existence of other justifications of RPM. Non-existence of free-riding risk is not sufficient to establish anticompetitive effects of minimum RPM. The appropriate legal framework for minimum RPM analysis should not be based on this factor.

V. CONCLUSION

The appropriate legal treatment of minimum RPM will ultimately depend on the empirical evidence and development of economic knowledge. Economic analysis and actual practice of evading of EU law show the failure of regarding minimum RPM as hardcore restraint. The existing

116 Named after Thorstein Veblen who first described the underlying effects in his work THE THEORY OF THE LEISURE CLASS (1899). See H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers Demand*, 64 QUARTERLY J. ECON. 183-207 (1950); See Andrés Font-Galarza, Frank P. Maier-Rigaud, &Pablo Figueroa, RPM Under EU Competition Law: Some Considerations From a Business and Economic Perspective, CPI Antitrust Chronicle November 2013 (1).

117 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 878 (2007).

118 *Ibid*. at 895.

119 *Id*.

120 *Id*.

121 See Nathaniel J. Harris, Leegin's effect on Prices: An Empirical Analysis, 9 J.L. Econ. & Pol'y 251, 274(2013).

122 See Benjamin Klein, Competitive Resale Price Maintenance in the Absence of Free Riding, 76 ANTITRUST L.J. 431 (2009).

123 *Ibid*. at 449-56.

124 See R. Deneckere, H.P. Marvel, & J. Peck, *Demand Uncertainty, Inventories, and Price Maintenance*, 111 QUARTERLY J. ECON. 885-913 (1999).

125 See R. Deneckere, H.P. Marvel, & J. Peck, *Demand Uncertainty and Price Maintenance: Markdowns as Destructive Competition*, 87 AMER. ECON. REV. (1997).

evidence and cost-benefit analysis tell us that a structured rule of reason for minimum RPM may very well offer a superior legal rule. But the structured rule of reason analysis suggested by the *Leegin* Court do not all match the sound economic theory. Considering the existing empirical evidence and economic theory, we should structure a rule of reason analysis to minimum RPM based on two factors: (1) the market power of the supplier or the dealer; and (2) the consumer price increase plus the sale decrease. When either of the two factors is shown, it could be presumed that the minimum RPM is anticompetitive. Then the defendant should bear the burden of proof showing the pro-competitive effects the minimum RPM may have. Courts can identify other factors with the judicial learning and the development of Economics to structure the legal framework for minimum RPM.

ABUSES OF DOMINANCE INVOLVING PERSONAL INFORMATION IN CHINA

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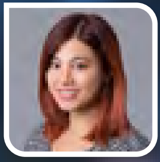


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I. INTRODUCTION

China has (finally) adopted a comprehensive data protection law, the Personal Information Protection Law of the People's Republic of China ("PIPL").[2]

The PIPL was adopted amidst a broad regulatory assault on Chinese big tech companies by multiple enforcement agencies, including the State Administration for Market Regulation ("SAMR"), which is responsible for enforcing the PRC Anti-Monopoly Law ("AML").[3] The PIPL is undoubtedly part of the arsenal of measures that the PRC government has adopted to tame big tech companies.

The adoption of the PIPL also comes at a time when multiple enforcement agencies around the world have devoted considerable resources to better understand the interplay between competition laws and data privacy[4] and, in some cases, aggressively enforce their competition laws in relation to breaches of privacy regulations.

The purpose of this contribution is to explore the interplay between the AML and the PIPL, in particular as it relates to abuses of dominance. Our conclusion is that there is a significant risk that both laws will be enforced against the same conduct such that companies would be punished twice. In this respect, it seems that the PIPL is a more suitable tool to police conduct involving personal information, even if in breach of the AML, because its enforcement agencies do not have to demonstrate the existence of a dominant position or of anticompetitive effects.

In addition, the strict criteria for handling personal information under the PIPL may impact enforcement of the AML. First, it will be more difficult for new entrants to request access to the incumbent's datasets of personal information. Indeed, the obligation to obtain consent from users should be a valid reason for any data owner in a dominant position to reject such request. Second, and for the same reason, the PIPL could also limit SAMR's ability to impose a remedy, such as a transfer of data including personal information, to address the potential anticompetitive effects of abuses of dominance (or of a merger). With the PRC State Council calling for stronger antitrust and data privacy legislation and enforcement, issues at the intersection of the PIPL and the AML will increasingly be at the forefront in China.

II. LEGISLATIVE FRAMEWORK

A. The PIPL

The PIPL came into effect on November 1, 2021. The PIPL is China's first comprehensive legislation to protect personal information rights of natural persons within China. The PIPL is the primary piece of legislation that protects personal data in China and supplements a patchwork of data privacy-related legislations, including the Cybersecurity Law[5] and the Data Security Law,[6] to create a fulsome regulatory framework regarding cybersecurity and data privacy protection in China.[7]

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2 For an English translation of the PIPL, see https://digichina.stanford.edu/news/translation-personal-information-protection-law-peoples-republic-china-effective-nov-1-2021.

3 See, e.g. SAMR's USD 2.8 billion fine on Alibaba: https://www.samr.gov.cn/xw/zj/202104/t20210410_327702.html.

4 See e.g. Competition Policy for the Digital Era (Directorate-General for Competition, European Commission, 2019); Report of the Study Group on Data and Competition Policy in Japan (Japan Fair Trade Commission, 2019); Digital Platforms Enquiry – Final Report (Australia Competition and Consumer Commission, 2019); Competition and Data Protection in Digital Markets: A Joint Statement between the CMA and the ICO (Competition and Markets Authority and the Information Commissioners Office, 2021); FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets (Federal Trade Commission, 2019).

5 For an English translation of the Cybersecurity Law, see https://www.newamerica.org/cybersecurity-initiative/digichina/blog/translation-cybersecurity-law-peoples-republic-china/.

6 For an English translation of the Data Security Law, see https://digichina.stanford.edu/news/translation-data-security-law-peoples-republic-china.

7 The Cyberspace Administration of China ("CAC") is considering draft management rules on cyber-data security for online platform operators to implement the data security articles currently set forth in the Cybersecurity Law, Data Security Law and PIPL. See the full text of the draft management rules in Chinese at http://www.cac.gov.cn/2021-11/14/c_1638501991577898.htm. Furthermore, on January 6, 2022, CAC also made public the draft Provisions on the Administration of Mobile Internet Application Information Services. The new draft provisions revise the currently in-effect Regulation on the Administration of Mobile Internet Application Information Services to impose additional legal obligations on app distribution platforms and clarify existing legal obligations. See the full text of the draft provisions at http://www.gov.cn/xinwen/2022-01/05/content_5666589.htm.

The PIPL creates new rights of actions for individuals whose personal information rights are violated, as well as requirements and penalties for personal information handlers ("PIH") that violate this law. The PIPL shares many similarities with the European Union's General Data Protection Regulation (the "GDPR"),[8] including, amongst others, the extraterritorial effect, the creation of personal information rights, and penalties for PIH in case of breaches.[9] The PIPL is broad in scope and its interpretation will depend on guidance documents, new regulations and standards, and enforcement actions by authorities, which are only beginning to be published at this stage.[10]

The purpose of the PIPL is to protect personal information rights, standardize activities around personal information processing[11] and encourage the reasonable use of personal information.[12] The PIPL applies to PIHs[13] who process personal information of natural persons within China.[14]

The scope of personal information processing is limited to that which has a "clear and reasonable purpose" and is "directly related to the processing purpose," in order to minimize the impact on individuals' rights and interests.[15] The PIPL adopts principles of transparency towards personal information processing, which includes disclosing to individuals the rules for processing personal information and clearly indicating the purpose, method, and scope of such processing.

There is a limited list of legal grounds for PIHs to process personal information. This includes obtaining individuals' consent,[16] which must be given with full knowledge and in a voluntary and explicit statement.[17] If there is a change to the purpose or method of such processing or to the categories of processed personal information, individual consent will need to be obtained again.[18] Individual consent may also be rescinded and PIHs must provide a convenient way to withdraw such consent.[19] If an individual does not provide consent or rescinds his consent, PIHs may not refuse to provide their products or services to that individual except where processing personal information is necessary to provide such product or service.

There are limited circumstances in which PIHs may process personal information without individual consent, including where necessary to fulfil a contract in which the individual is an interested party or to fulfil statutory duties.[20] In the event that personal information needs to be transferred due to a merger, the PIH must notify individuals regarding the name and contact method of the receiving party, which will have to continue to fulfil the PIH's obligations.[21] If the receiving party changes the original processing purpose or method, it will need to obtain individual consent again,[22] which may be withdrawn.[23]

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8 A copy of the official legal text of the GDPR is available at https://gdpr-info.eu/.

9 There are also many differences between the GDPR and the PIPL. See https://iapp.org/news/a/analyzing-chinas-pipl-and-how-it-compares-to-the-eus-gdpr/.

10 Administrative agencies have started to issue notices and guidance documents in response to PIPL. For example, the Shanghai Municipal Administration for Market Regulation has issued a set of guidelines to assist online platforms' compliance with various laws, including PIPL, when using algorithms to conduct sales activities. See the full text of the guidelines in Chinese at https://www.shanghai.gov.cn/gwk/search/content/2c9bf2f67d043165017d30e80ce54da0.

11 The term used in the Chinese text for "handling" is "处理," which we will translate interchangeably in "processing" and "handling."

12 See Article 1 of the PIPL.

13 The term used in the PIPL is "个人信息处理者," which can be translated into "personal information handlers." We will use the term "PIH" throughout this article.

14 See Article 3 of the PIPL. Personal information refers to "all kinds of information, recorded by electronic or other means, related to identifiable or identifiable natural persons, not including information after anonymization handling."

15 See Article 6 of the PIPL.

16 Article 13 of the PIPL. One of the differences with the GDPR is that under the PIPL "legitimate interest" is not a legal ground for processing personal data.

17 See Article 14 of the PIPL.

18 *Id.*

19 See Article 7 of the GDPR and Article 15 of the PIPL.

20 See Article 13 of the PIPL. Importantly, "legitimate interest" is not a legal ground for processing personal information, an important difference with the GDPR.

21 See Article 22 of the PIPL.

22 See Articles 14 and 22 of the PIPL.

23 See Article 15 of the PIPL.

The PIPL gives agencies at different levels enforcement power over its regulations. The State cybersecurity and informationization department is responsible for planning and coordinating personal information protection work, as well as carrying out related supervision and management.[24] Relevant departments under the State Council are responsible for enforcing the PIPL to the extent enforcement falls within their respective scope of duties, and relevant departments at the county-level and higher people's governments are responsible for enforcing the PIPL according to relevant State provisions (together with the State cybersecurity and informationization department, the "PIPL Enforcement Agencies").

The PIPL Enforcement Agencies can impose sanctions for breaches of the PIPL. They can order PIHs to correct their conduct, confiscate their unlawful income and order the suspension of any application programs unlawfully handling personal information.[25] In the event the PIH refuses such correction, the PIPL Enforcement Agencies can impose a fine of up to RMB 1 million on the PIH and a fine between RMB 10,000 and RMB 100,000 on directly responsible personnel.[26] Additionally, for grave[27] violations, the penalties are more severe. The PIPL Enforcement Agencies can fine the PIH up to RMB 50 million (or 5 percent of annual revenue),[28] suspend the PIH's business activities as well as cancel the PIH's administrative or business licenses.[29] The PIPL Enforcement Agencies can also fine directly responsible personnel between RMB 100,000 and 1 million and they may ban such personnel from holding positions of director, supervisor, high-level manager or personal information protection officer for an unspecified period of time.[30]

Finally, PIHs may be liable for any harm resulting from the breach of the PIPL if they fail to prove they are not at fault.[31] Compensation is determined based on either the resulting loss to the individual or the benefits that accrue to the PIH.[32] If such calculation methods are hard to determine, compensation is to be determined according to "practical conditions."[33] The PIPL also allows for certain groups, which are the People's Procuratorates, statutorily designated consumer organizations and organizations designated by the state's cybersecurity and informatization department, to file a lawsuit with a People's Court when PIHs have committed infringements of the rights of many individuals.[34]

B. The AML

The AML came into force in 2008.[35] It includes a prohibition on anticompetitive agreements between competitors, including price-fixing, output restrictions, market allocation and boycotts.[36] It also prohibits vertical agreements that restrict or eliminate competition, including resale price maintenance.[37] Certain agreements may benefit from an exemption of the prohibition on anticompetitive agreements where they, essentially, have pro-competitive consumer benefits.[38]

24 See Article 60 of the PIPL.

25 See Article 66 of the PIPL.

26 *Id.*

27 The PIPL does not define what qualifies as "grave."

28 The PIPL does not provide the method for determining annual revenue.

29 See Article 66 of the PIPL.

30 *Id.*

31 *Id.*

32 See Article 69 of the PIPL.

33 *Id.*

34 See Article 70 of the PIPL.

35 On the AML generally, see S. Harris, P. Wang, Y. Zhang, M. Cohen & S. Evrard, Anti-Monopoly Law and Practice in China, Oxford University Press, 2011.

36 See Article 13 of the AML.

37 See Article 14 of the AML.

38 See Article 15 of the AML.

The AML also prohibits abuses of a dominant position.[39] This includes selling products at unfairly high prices, selling below costs, refusals to deal, tying and discrimination.[40] The AML includes a presumption of dominance where a single undertaking's market share exceeds 50 percent.[41]

Finally, the AML includes a pre-closing merger control system. Mergers exceeding certain revenue thresholds must be notified to SAMR and cannot be closed before clearance. SAMR will review whether the transaction results or may result in the elimination or restriction of competition. In that case, SAMR has the power to prohibit a transaction. Parties to a transaction may offer remedies to address any concerns, in which case SAMR may conditionally approve the transaction.

In terms of sanctions, SAMR may impose a fine between 1 and 10 percent of a company's turnover in case of a breach of the prohibition on anticompetitive agreements or abuses of dominance. The fine for a breach of the obligation to notify transactions is limited to RMB 500,000, but SAMR can unwind a deal if it comes to the conclusion that such deal is anticompetitive.[42] SAMR can also confiscate illegal gains.

Over the years, SAMR and its predecessors have issued a host of guidelines. For the purpose of this contribution, we refer in particular to the Antitrust Guidelines in the Field of Platform Economy ("Platform Guidelines")[43] and the Interim Provisions on Prohibiting Acts of Abuse of Dominant Market Position ("Abuse of Dominance Guidelines").[44]

III. JURISDICTIONAL ISSUES

The PIPL's adoption will have an impact on the enforcement of the AML. Indeed, we consider that some anticompetitive conduct will involve breaches of the PIPL such that both enforcement agencies may have jurisdiction (and impose sanctions).nWe also consider whether the PIPL has curtailed SAMR's ability to enforce the AML, or at least SAMR's ability to impose some remedies involving the transfer of personal information.

A. Dual Enforcement of Anticompetitive Conduct Involving Breaches of the PIPL

SAMR and the PIPL Enforcement Agencies will both have jurisdiction over anticompetitive conduct involving breaches of the PIPL. It is unclear whether and how they will coordinate their enforcement actions.[45] This creates a risk that a company could be fined twice for the same conduct.[46]

In China, there is a significant risk of dual enforcement, which is that both SAMR and the PIPL Enforcement Agencies would investigate (and potentially impose a fine for) conduct that is in breach of both the PIPL and the AML. While the Administrative Penalty Law ("APL")[47] includes a provision against double jeopardy, it is unlikely to provide meaningful protection against dual enforcement. Article 29 of the APL provides that *"[t]he administrative fine shall not be imposed more than once for the same violation of law by a party. Where an illegal act violates several legal provisions, with each of them imposing a fine on such act, the provision that imposes the heaviest fine shall apply."* According to a literal reading of this provision, double jeopardy only applies in case of two violations of the same law. This would mean that double jeopardy does not apply when the same act violates two different laws, such as the PIPL and the AML.

39 See Article 17 of the AML.

40 See Article 17 of the AML.

41 See Article 19 of the AML. The presumption of dominance also applies where two undertakings have a combined market share in excess of 66 percent, or three undertakings have a combined market share in excess of 75 percent. These presumptions are based on combined market shares do not apply to an undertaking that has a market share below 10 percent.

42 See Article 48 of the AML.

43 See the full text of the Platform Guidelines in Chinese at https://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207_325967.html.

44 See the full text of the Abuse of Dominance Guidelines in Chinese at https://gkml.samr.gov.cn/nsjg/fgs/201907/t20190701_303057.html.

45 We are already starting to see challenges to PIPL enforcement between regulators at different levels. On December 9, 2021, the Shanghai market regulator and Shanghai Municipal Economic and Informatization Commission issued guidelines to boost digital advertising in the city. The guidelines' approach to data security were more lenient than the PIPL's and which marks a divergence between the interests of central and local regulators.

46 This issue has arisen is other jurisdictions. See, e.g. European Court of Justice, case C -252/21, *Facebook Inc., and Others v. Bundeskartellamt*, in which one of the questions submitted to the Court relates to the German competition authority's jurisdiction over an alleged abuse of dominance involving personal data in view of the ongoing data privacy investigation in another EU Member State. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CN0252.

47 For an English translation, see http://www.npc.gov.cn/englishnpc/c23934/202105/f18b60e2b2ed4198ab12fa3ac999fc5a.shtml.

Enforcing both laws for the same conduct would be a considerable waste of the government's resources and could put a significant burden on PIHs. It would therefore be recommended that the respective jurisdictions of SAMR and the PIPL Enforcement Agencies be delimited, for example through a memorandum of understanding. In this respect, there are small differences in their enforcement powers such that, depending on the circumstances, one or the other agency may be better placed to investigate and, as the case may be, put an end to the alleged conduct.

Both agencies have wide powers to conduct their investigation and, in particular, both can conduct dawn raids, interview relevant individuals and seize documents.[48] Both can ask the PIH to cease and desist the infringing conduct.[49] While both can impose a fine, it seems that for non-grave breaches, the PIPL Enforcement Agencies can only impose a fine if the PIH refuses to "correct" its conduct.[50] Provincial or higher-level departments fulfilling personal information protection duties are responsible for imposing fines and ordering correction for grave violations.[51]

The amount of the fines that they can impose is also different: while the PIPL distinguishes between non-grave (maximum RMB 1 million) and grave (maximum 50 million or 5 percent of revenues) violations, SAMR can impose fines of up to 10 percent of turnover, regardless of the gravity of the infringement.[52] The PIPL Enforcement Agencies can impose fines (and other sanctions) on individuals while SAMR can only impose fines on undertakings. Finally, both can order the confiscation of the illegal income stemming from the infringement.

Abuses of dominance is the area where there is the highest risk of dual enforcement. It seems that, in many cases involving abuses of dominance where the alleged conduct is also a breach of the PIPL, the PIPL Enforcement Agencies may be better placed to investigate as they do not need to demonstrate the existence of a dominant position or of the conduct's effects on the market. This would, for example, be the case where the allegation is that a PIH in dominant position is engaging in exploitative abuse such as harvesting personal data in breach of the PIPL or making the use of its service contingent upon the processing of personal information beyond what is strictly necessary.

B. SAMR's Ability to Request Information from Third Parties

SAMR routinely sends requests for information to parties under investigation and/or to third parties in order to gather data for the purpose of its investigation into a particular conduct. This power is enshrined in Article 39 of the AML and a refusal to provide the requested information is subject to penalties under Article 52 of the AML.

Responding to these requests for information regularly involves the disclosure of personal information. For example, internal documents may reveal the identity of a company's employees. In order for SAMR to obtain such information and process it lawfully, the PIH must be able to rely on a legal ground to disclose the information to SAMR and, in addition, SAMR must have a legal ground to process the personal information.

PIH are likely to be able to rely on Article 13(2) of the PIPL to disclose personal information to SAMR, this is "where necessary to fulfil statutory duties and responsibilities or statutory obligations." As explained above, PIHs have a legal obligation to respond to SAMR's request for information.

Article 34 of the PIPL may serve as a ground for SAMR to collect and process personal information: *"State organs handling personal information to fulfil their statutory duties and responsibilities shall conduct them according to the powers and procedures provided in laws or administrative regulations; they may not exceed the scope or extent necessary to fulfil their statutory duties and responsibilities."* This provision, however, seems to call for a specific law or administrative regulation to deal with the processing of personal information, which SAMR has not yet published.[53]

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48 See Article 63 of the PIPL and Article 39 of the AML.

49 The PIPL enables the PIPL Enforcement Agencies to "correct" the breach, which should be substantially the same as the SAMR's ability to order a "cease and desist."

50 In the absence of any definition of a "grave" breach, the PIPL Enforcement Agencies are likely to take an expansive view of that term.

51 See Article 66 of the PIPL.

52 According to Article 49 of the AML, SAMR will take the seriousness of the violation into account when determining the amount of the fine. The highest fines imposed thus far by SAMR for abuses of dominance include a USD 2.8 billion fine against Alibaba and a fine of nearly USD 1 billion against Qualcomm. See SAMR's decision against Alibaba in Chinese at https://www.samr.gov.cn/fldj/tzgg/xzcf/202104/t20210409_327698.html, and the decision against Qualcomm in Chinese at https://www.samr.gov.cn/fldj/tzgg/xzcf/202101/P020210126539901257191.docx.

53 See, in the European Union, the Commission Decision (EU) 2018/1927 of 5 December 2018 laying down internal rules concerning the processing of personal data by the European Commission in the field of competition in relation to the provision of information to data subjects and the restriction of certain rights, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018D1927.

This being said, where the identity of specific individuals is not necessary for the purpose of investigating a particular conduct, it is questionable whether SAMR has the power to request such personal information. Indeed, as explained above, one of the fundamental principles of the PIPL is that "the collection of personal information shall be limited to the smallest scope for realizing the handling purpose, and excessive personal information collection is prohibited."[54] For example, in the case of a cartel investigation, given that SAMR does not have the power to impose fines on individuals, it is questionable whether SAMR has the power to request the identity of employees as opposed to anonymized data.[55] It is likely, though, that SAMR will take an expansive view of its powers and will take a dim view on any undertaking trying to resist the disclosure of employee details. This may, however, put some companies at risk of violating their employees' rights if they disclose personal information without a legal ground.

C. AMR's Ability to Order Remedies Involving Personal Information

In case of a breach of the prohibition on anticompetitive agreements or of abuses of dominant position, SAMR can order the undertaking to "cease and desist" such acts. Parties under investigation can also offer "commitments" to suspend the investigation. As regards merger control, SAMR has the ability to accept commitments (including, for example, a divestiture of assets) to conditionally approve a transaction.

Some of these measures may require a PIH to transfer personal information protected under the PIPL to third parties. For example, in the case of a refusal by a PIH to grant access to personal information protected under the PIPL to a competitor, SAMR may want to order the PIH to grant such access. In the case of a merger requiring a divestiture, the divested assets may include personal information.

SAMR seems to consider that, in the merger context, it has the power to impose a remedy that requires the processing of personal information protected under the PIPL. Article 21 of SAMR's Platform Guidelines states that SAMR may impose "structural conditions such as divestiture of tangible or intangible assets such as intellectual property, technology and data or divestiture of relevant interests" as well as "behavioral conditions such as opening of infrastructures such as networks, data or platforms, licensing key technologies, terminating exclusivity agreements, modifying platform rules or algorithms, committing to compatibility or no reduction of interoperability levels, etc."

However, these guidelines were drafted before the adoption of the PIPL and the strict provisions of the PIPL may curtail SAMR's ability to impose such measures. Indeed, a PIH can only transfer personal data to a third party in a limited set of circumstances listed in Article 13 of the PIPL.

The most relevant legal grounds for transferring data as part of a commitment are Article 13(1) of the PIPL (consent) and Article 13(3) of the PIPL (which authorizes data processing "where necessary to fulfil statutory duties and responsibilities or statutory obligations"), which does not require consent from the individual.[56]

In case the merger parties offer a commitment to SAMR in order to obtain a conditional approval for their transaction, it seems that Article 13(3) of the PIPL would not apply as the transfer of personal information is a voluntary process and not in pursuance of a legal or statutory obligation. Hence, merger parties would have to inform users about the transfer in accordance with Article 22 of the PIPL. Given that individuals can rescind their consent in accordance with Article 15 of the PIPL, there is no guarantee that a commitment, which appears adequate on paper, will in the end have the intended effect.

In the case of an investigation into an alleged refusal to grant access to personal data by a dominant firm, SAMR may want to order the dominant firm to "cease and desist" such conduct, which practically means that access must be granted.

In that case, it is unlikely that the dominant firm will have the individuals' consent to transfer their personal information to the competitor requesting access. The dominant firm will therefore need to obtain such consent in accordance with Article 13 of the PIPL. The other possible ground is Article 13(3) of the PIPL, but it is not obvious that a SAMR decision to cease and desist a specific conduct will constitute a valid "statutory duty and

54 Article 6 of the PIPL.

55 Except if, for example, SAMR wants to interview specific individuals.

56 It seems that Article 22 of the PIPL, which requires PIH to inform users and obtain their consent in case of a transfer to another PIH, would not apply in the case of a statutory obligation to transfer data because Article 13(7) explicitly provides that consent is not required.

responsibility" or a "statutory obligation"[57] to transfer such data.[58] Further guidance would be required, for example by adopting a specific law or regulation specifying that SAMR decisions are to be considered as a statutory duty and responsibility or statutory obligation under Article 13(3) of the PIPL.

IV. ABUSES OF DOMINANCE INVOLVING PERSONAL INFORMATION

An increasing number of courts and administrative agencies outside of China have had to deal with issues at the intersection of competition and data privacy laws. This is not a surprise given the importance of data in today's economy. With the adoption of the PIPL, in the midst of a crackdown on big tech, issues involving both the AML and the PIPL will soon also come to the forefront in China. In this section, we look at how the AML and the PIPL would be applied to abuses of dominance involving personal information.

A. Abusive Processing of Personal Data

In a series of overseas cases, PIHs have faced allegations that they abused their dominant position by requiring individuals to consent to the processing of personal data in order to use their service.[59] The relevant question is whether a dominant PIH would be in breach of the AML if it were to collect information as a pre-condition for using a particular service.

In China, as explained above, PIHs must obtain users' consent before processing their personal information. Such consent must be based on "full knowledge"[60] and based on the information listed in Article 17 of the PIPL, this is (I) the identity and contact details of the PIH, (ii) the purpose and methods of processing, (iii) the methods and procedure for individuals to exercise their rights, and (iv) other information prescribed by law. In addition, according to Article 6 of the PIPL, "the data shall be collected for clear and reasonable purposes, its collection should be directly related to the processing purpose, and be conducted in a way that minimizes any effect on individual rights." Article 16 also prevents PIHs from refusing to provide a product or service on the basis that the individual does not consent to the handling of their personal information.

Article 17(5) of the AML prohibits undertakings in a dominant position from imposing unreasonable trading conditions. According to Article 18 on the Interim Provisions on Prohibiting Acts of Abuse of a Dominant Market Position, this includes attaching transaction terms that are not relevant to the subject-matter of the transaction. Similarly, Article 16 of the Platform Guidelines provides a non-exclusive list of factors that would be taken into account when determining whether a dominant undertaking is imposing unfair trading conditions. This list includes the "compulsory collection of unnecessary user information […]." Given that the list is not exhaustive, we can assume that forcing individual users to consent to the transfer of their data to third parties (for example, for the purpose of providing targeted advertising) will also be considered as an unfair trading condition.

A PIH in a dominant position that requires users to provide "unnecessary information" (or to consent to a transfer of personal information to a third party) as a condition for using the service could therefore be in breach of both the PIPL and the AML.

In this respect, there is no guidance on the term "unnecessary information." A narrow interpretation would mean that a PIH can only collect information that is strictly necessary to use a service (or deliver a product). In this respect, in July 2021, a local court in Zhejiang province found that Ctrip, the largest online travel agent, was liable for collecting personal data from users that was used to personalize price offering and could result in higher prices for consumers.[61] The court ordered Ctrip to either allow for the plaintiff to use its services without agreeing to the platform's privacy policy and service agreement or stop collecting unnecessary personal information.

57 The term used by the PIPL is "法定义务" which we have translated as "statutory obligation." The term "statutory obligation" appears to suggest a prerequisite statutory law, order or regulation that would give rise to an obligation to comply. In the present case, a cease-and-desist decision appears to fall short of this requirement.

58 Under Article 6.1(c) of the GDPR, data can be processed where it is "necessary for compliance with a legal obligation to which the controller is subject." It is debatable whether this would be a sufficient ground for allowing access to data under Article 102 TFEU (which prohibits abuses of dominance). Indeed, according to recital 41 of the GDPR "*such a legal basis or legislative measure should be clear and precise and its application should be foreseeable to persons subject to it.*" See V. Kathuria & J. Globonick, Exclusionary conduct in data-driven markets: limitation of data sharing remedies, Max Planck Institute for Innovation and Competition, Research paper No. 19-04, p. 23.

59 For example, in March 2016, Germany's competition authority, the Bundeskartellamt, launched an investigation to assess whether Facebook's data policy infringes Germany's competition law. The case has been referred to the European Court of Justice for a preliminary ruling. Further, in March 2021, the Competition Commission of India ("CCI") ordered a *suo moto* investigation into changes to WhatsApp's privacy policy. Prior to conducting any investigation, the CCI took the *prima facie* position that the changes constituted the imposition of unfair terms. WhatsApp challenged the characterization of its policy update and argued that the CCI should not be able to exercise jurisdiction to initiate an investigation until after parallel judicial challenges before various courts in India are resolved. WhatsApp's jurisdictional challenge to the CCI's decision to open an investigation is currently pending before the Indian courts. See *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Moto Case No. 01 of 202*, available at: https://www.cci.gov.in/sites/default/files/SM01of2021_0.pdf.

60 See Article 14 of the PIPL.

61 See https://www.scmp.com/tech/policy/article/3141264/tripcom-ordered-make-exception-privacy-policy-lawsuit-could-open-door. The legal basis for the rule is unclear.

Any limitation on the amount of information that can be processed could create an issue for services that are funded by advertising and where the service operator collects personal information from its users to offer more targeted advertising and raise revenues. This personal information is arguably not necessary (in a strict sense) to provide the service. A possible workaround would be to provide that the data is in fact the "price" that the user must pay for obtaining the service and that, in the absence of such "payment," the user will be unable to use the service. However, the PIH would still potentially face a competition law claim as Article 17(3) prohibits the imposition of an "unfairly high price."

Enforcement against "unfairly high prices" has been limited in China[62] and it is very much the question how SAMR could determine whether prices are unfairly high. In its Interim Provisions on Prohibiting Acts of Abuse of a Dominant Market Position, SAMR provides that prices are unfairly high when they are (i) significantly higher than prices for comparable products sold by competitors, (ii) significantly higher than the prices applied by the undertaking in other geographic markets, (iii) when the price increases beyond the normal range with stable costs, (iv) when the price raises significantly faster than the increase in costs[63]. In this case, it is unclear whether SAMR could use these factors to assess whether the personal information that the user is required to provide is too extensive.

It seems therefore that guidance is needed on what constitutes "unnecessary information." In addition, it seems that the PIPL Enforcement Agencies will be better placed than SAMR to investigate allegations of processing of unnecessary personal information as they will not have to demonstrate the existence of a dominant position nor of anticompetitive effects.

B. Refusals to Deal[64]

Historically, refusal to deal claims have not been widely successful in China[65] although the Chinese economy is characterized by the presence of monopolies across multiple industries, which should be a fertile ground for such claims.[66]

The PIPL is likely to make such claim more difficult given that the PIH would need to obtain users' consent to transfer their personal information to a third party.[67] Hence refusals to deal involving personal information will only be possible in exceptional cases. This would not be inconsistent with the practice overseas where there have been few cases of refusals to deal involving personal data.

Article 17 of the AML prohibits undertakings with a dominant position from refusing to deal without justified reason. Refusals to deal are not limited to "essential facilities" cases. Indeed, Article 16 of the SAMR Interim Guidelines on the Prohibition of Abuses of Dominance Position clarifies that, in addition to "essential facilities," refusals to deal include interrupting existing transactions, refusing to enter into new transactions, imposing restrictive conditions to make transactions more difficult. As regards "essential facilities," the Guidelines state that to determine whether

62 See the cases listed in Yi Xue & Tian Gu, Competition Enforcement against Unfairly High Prices in China, June 23, 2020, Competition Policy International, available at https://www.competitionpolicyinternational.com/competition-enforcement-against-unfairly-high-prices-in-china/.

63 See Article 14 of the Interim Provisions on Prohibiting Acts of Abuse of a Dominant Market Position.

64 There are two significant cases from the US regarding the intersection of refusals to deal and data privacy. One such case is *HiQ v. LinkedIn*, in which the plaintiff, hiQ Labs ("hiQ"), a data analytics company, scraped information from LinkedIn that users included on public LinkedIn profiles for use in its "people analytics" software. Although LinkedIn initially permitted this access to user data, it later sent hiQ a cease-and-desist letter asserting that hiQ was in violation of LinkedIn's User Agreement and demanding that hiQ stop accessing and copying data from LinkedIn's server. On appeal to the Ninth Circuit, the court found all of hiQ's antitrust claims to be deficient for failure to adequately allege a product market, namely the "people analytics market." The court granted hiQ leave to amend its product market. See *hiQ Labs, Inc. v. LinkedIn Corp*, 938 F.3d 985 (9th Cir. 2019) and *hiQ Labs, Inc. v. LinkedIn Corp*, (Case No. 17-cv-03301-EMC) (Docket No. 137).

The second case is *PeopleBrowsr v. Twitter*. In 2012, PeopleBrowsr brought a lawsuit in US State Court against Twitter for anticompetitive practices by Twitter in seeking to limit access to its data to a select subgroup of companies, excluding PeopleBrowsr. PeopleBrowsr paid Twitter for access to the Twitter "Firehose," through which PeopleBrowsr was able to access every tweet posted on Twitter. PeopleBrowsr sought a temporary restraining order ("TRO") against Twitter, seeking to preserve PeopleBrowsr's access to the Firehose, which Twitter threatened to cut off (para. 2, Application for TRO). The US State Court initially granted PeopleBrowsr's application for a TRO, however the case was eventually settled out-of-court on April 25, 2013. Pursuant to the settlement, PeopleBrowsr was able to continue accessing the Firehose through to the end of 2013, after which it would transition to data access from an authorized Twitter data reseller. *See* https://thenextweb.com/news/peoplebrowsr-vs-twitter (which contains PeopleBrowsr's Application for TRO and Twitter's Opposition to TRO); See also https://casetext.com/case/peoplebrowsr-inc-v-twitter-2?__cf_chl_jschl_tk__=pmd_UWCCWL6.L1__8DlszLB6Uq0VOXAnwswOdzplfPWasbHM-1631603249-0-qNtZGzNAjujcnBszQs9 (Order Granting Plaintiffs' motion to Remand to State Court).

65 For an example of successful claim in a lower court, see https://www.allenovery.com/en-gb/global/news-and-insights/publications/hitachi-metals-essential-patents-recognised-as-essential-facility-in-china.

66 For more details see S. Evrard & Y. Zhang, Refusal to Deal in China: A Missed Opportunity, in A. Emch & D. Stallibrass (eds) China's Anti-Monopoly Law, the First Five Years, p. 135.

67 The data privacy defense would likely not apply if the complainant asked for access to anonymized data. Indeed, according to Article 4, the PIPL does not apply to data that has been anonymized, this is where it has been processed to ensure it is impossible to identify specific natural persons without the support of additional information.

there is a justification for refusing access to an essential facility, account should be taken of various factors including, essentially, whether it is feasible to duplicate the facility in order to compete effectively on the market.[68]

The Interim Guidelines also set out what could constitute a "justified reason" for refusing to deal, including the fact that conducting the transaction will unduly impair the interests of the operators, as well as "other reasons that can justify the legitimacy of the actions." As regards internet platforms, the Platform Guidelines set out a similar test.

A competitor claiming that a PIH is abusing its dominant position by refusing access to personal data is likely to face an uphill battle.

First, from a competition law point of view, the plaintiff would have to demonstrate that the PIH holds a dominant position. While the AML includes a rebuttable presumption of dominance based on market shares, such market shares may be difficult to calculate in data-related markets. In addition, the Chinese Supreme People's Court ruled in *Qihu v. Tencent* that market shares alone might be an unreliable indicator of market dominance in the internet sector because it is highly dynamic and the boundaries of the relevant market are far less clear than those in traditional sectors.[69]

If the plaintiff claims that the data is an essential facility, it will have to demonstrate that such data is necessary or indispensable to compete. Given that data is non-exclusive and non-rivalrous[70], it is likely that such a claim would fail. Finally, the plaintiff will have to demonstrate that the refusal has an anticompetitive effect.[71]

Second, it seems that the PIPL may provide the PIH with a justified reason for refusing access to personal data. Indeed, a PIH can only transfer personal data to a third party in a limited set of circumstances listed in Article 13 of the PIPL.[72]

The most relevant ground is likely to be 13(1) of the PIPL, which authorizes a PIH to transfer personal data provided it has obtained the user's consent. According to Article 14 of the PIH such consent must be based on "full knowledge." According to Article 23 of the PIPL, before transferring data to a third party, the PIH must notify the individual of the identity of the recipient, the purpose and method for processing the data and obtain consent. Given that a PIH's privacy policy is unlikely to include information about potential transfers of personal data to competitors, the PIH will not have the user's consent to transfer the data. The absence of consent should constitute a justified reason for refusing access to the data.

Another possible ground to justify the transfer of data to a third party seeking access to personal data would be Article 13(3) of the PIPL, which authorizes data processing "where necessary to fulfil statutory duties and responsibilities or statutory obligations." Such ground does

68 See Article 13. This test is reminiscent of the test developed by the European Court of Justice in case C 7-97, *Oscar Bronner GmbH v. MediaprintZeitungs- und Zeitschriften-verlag GmbH*; [1998] ECR I-7791. Further on this case, see S. Evrard, Essential Facilities, *Bronner and Beyond*, The Columbia Journal of European Law, 2004, p. 491. More generally, on the application of the essential facilities doctrine to data in Europe, see I. Graef *Rethinking the Essential Facilities Doctrine for the EU Digital Economy*, April 2019, TILEC discussion paper, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457. See also Article 7 of the Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition; see also Article 16 of the Anti-Monopoly Guidelines of the Anti-Monopoly Committee of the State Council in the Intellectual Property Industry.

69 In two cases of abuse of dominant position involving the use of personal data, the French and Belgian competition authorities concluded that the holder of such data had a dominant position. However, in these cases, the owners had respectively a legal monopoly for the supply of gas and electricity in France and the supply of public lottery services in Belgium. See French Competition Authority, decision 17-D-06 of March 21, 2017 relating to practices in the sector of natural gas, electricity, and energy; Belgian Competition Authority, decision BMA-2015-P/K-28-AUD of September 22, 2015.

70 Non-exclusive, meaning that it may not be possible to prevent others from using the data, and non-rivalrous, meaning that one person's use of data does not reduce another's use of the same data

71 Article 6 of the AML provides that undertakings should not abuse their dominant position to restrict or eliminate competition. In Qihu v. Tencent, the SPC decided that "even if the sued business operator has a dominant market position, determining whether its [act] constitutes an act of abusing a dominant market position requires [the court] to comprehensively assess the negative effects and the potentially positive effects of the act on consumers and competition so as to judge the legality of the act." See 北京奇虎科技有限公司诉腾讯科技（深圳）有限公司、深圳市腾讯计算机系统有限公司滥用市场支配地位纠纷案》*Beijing Qihu Technology Co., Ltd. v. Tencent Technology (Shenzhen) Company Limited and Shenzhen Tencent Computer Systems Company Limited*, A Dispute over Abusing Dominant Market Positions), STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT, English Guiding Case (EGC78), Apr. 7, 2017 Edition, http://cgc.law.stanford.edu/guiding-cases/guiding-case-78.

72 The data privacy defense would likely not apply if the complainant asked for access to anonymized data. Indeed, according to Article 4, the PIPL does not apply to data that has been anonymized, this is where it has been processed to ensure it is impossible to identify specific natural persons without the support of additional information.

not require consent from the individual.[73] Although the language is vague enough to support the view that access to data would be necessary to comply with the AML, it would seem, that such interpretation would run counter to the objective of the PIPL, which is to grant individuals the right to decide who will process their data and how. In particular, Article 44 of the PIPL explicitly provides that "individuals have the right to know and the right to decide relating to their personal data, and have the right to limit or refuse the processing of their personal data by others, unless laws or administrative regulations provide otherwise"[74]. Therefore, subject to further clarification regarding the scope of Article 13(3) of the PIPL, it would seem unlikely that a request for access to data could be based on the need to comply with statutory obligations.

In any event, it is very much the question whether access to such data would be at all useful for a third party. Indeed, the recipient would have to provide information to individuals under Article 17 of the PIPL[75] and such individuals would have the right to obtain the deletion of their data on the basis of Article 47 of the PIPL. Under these circumstances, it may be easier and less cumbersome for complainants to simply try to obtain personal information directly from individuals.

The courts may have a first opportunity to opine on these issues. In November 2021, the Changsha Intermediate People's Court accepted an antitrust complaint brought by Eefung Software, a network public opinion monitoring company based in Hunan province. Sina Weibo allegedly terminated its cooperation with Eefung Software, which then attempted to reconnect with Sina Weibo to no avail. Eefung Software alleges that its business model was destroyed by such termination. Eefung Software is accusing Sina Weibo of refusing to deal and is seeking the use of Sina Weibo's data under reasonable conditions, as well as compensation for economic loss and reasonable legal costs.[76] This case will likely be a precedent for future cases involving the intersection of antitrust and access to data.

V. CONCLUSION

The PIPL is a new weapon in the Chinese government's arsenal to reduce or restrict the power of Chinese big tech companies. It should be a very efficient tool given the very restrictive conditions imposed upon the processing of personal data, and the high fines that can be imposed.

While dual enforcement of both the PIPL and the AML is possible, it seems that the PIPL Enforcement Agencies will be better placed to tackle abuses of dominance involving a breach of the PIPL. It remains to be seen whether both enforcement agencies will try to assert their role as the preeminent enforcement agency against Big Tech, which could lead to dual enforcement, or will cooperate and let the better placed agency investigate and put an end to conduct violating both the PIPL and the AML.

One thing is clear, the adoption of the PIPL will have a profound effect on the enforcement of the AML and, as in other jurisdictions, is likely to lead to a significant number of enforcement actions and controversies.

73 It seems that Article 22 of the PIPL, which requires PIH to inform users and obtain their consent in case of a transfer to another PIH, would not apply in the case of a statutory obligation to transfer data because Article 13(7) explicitly provides that consent is not required.

74 Under Article 6.1(c) of the GDPR, data can be processed where it is "necessary for compliance with a legal obligation to which the controller is subject." It is debatable whether this would be a sufficient ground for allowing access to data under Article 102 TFEU (which prohibits abuses of dominance). Indeed, according to recital 41 of the GDPR "*such a legal basis or legislative measure should be clear and precise and its application should be foreseeable to persons subject to it.*" See V. Kathuria & J. Globonick, Exclusionary conduct in data-driven markets: limitation of data sharing remedies, Max Planck Institute for Innovation and Competition, Research paper No. 19-04, p. 23.

75 See above, para. 65.

76 See a summary of the civil lawsuit brought by Eefung Software against Sina Weibo in Chinese at https://www.scmp.com/tech/big-tech/article/3155556/weibo-sued-monopolistic-practices-limiting-access-its-data-chinas.

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

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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.

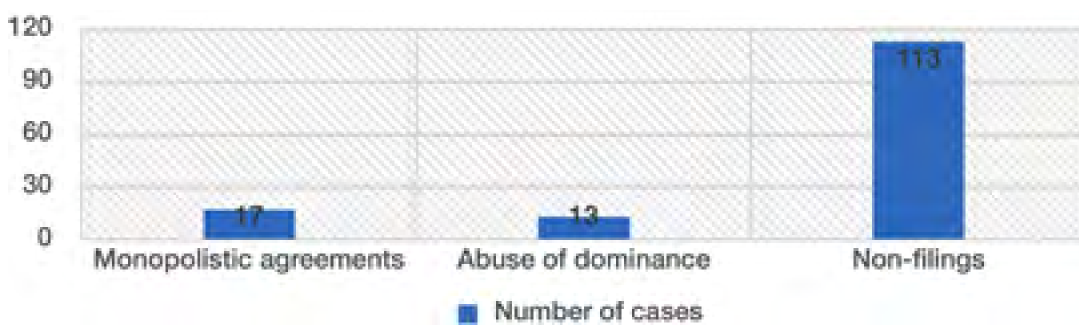
Table 1: Tone from the top

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).

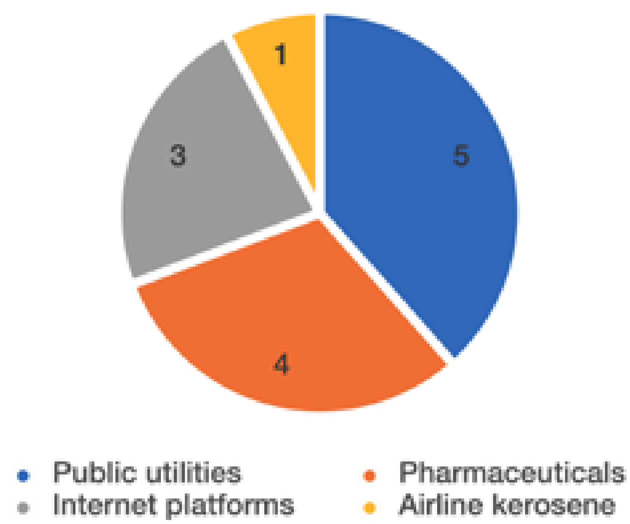
11 For purposes of this article, we do not calculate those decisions relating to abuse of administrative powers. Please note that SAMR disclosed 15 non-filing cases on Jan. 5, 2022 but these decisions were made on Dec. 31, 2021, therefore we also include them in this article.

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)

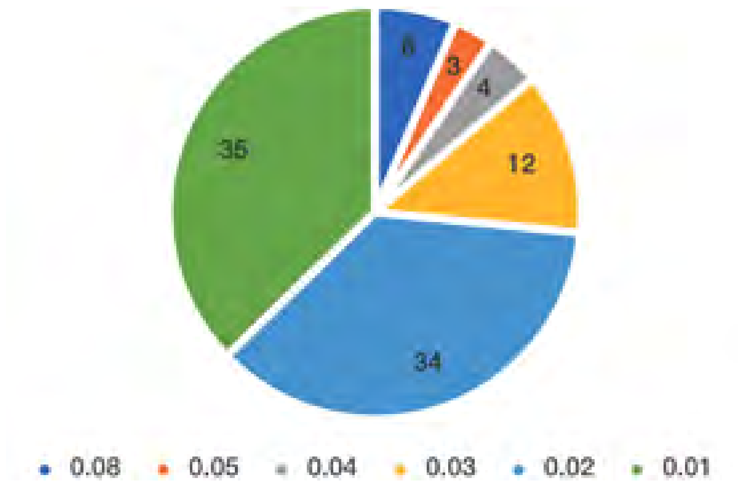
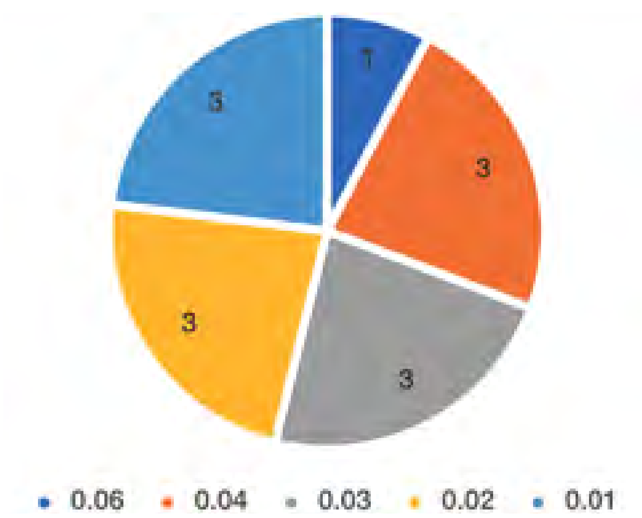


Chart 5: Fines imposed in abuse of dominance cases (percentage of prior fiscal year turnover)



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.

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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.

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 <u>proves</u>" 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 <u>presumed</u> 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 <u>shall not apply</u> 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]

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.

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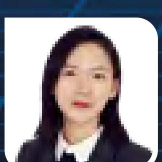
55 AML Amendment, art. 65: " Where undertakings … engaged in conduct that restricts or eliminates competition, the anti-monopoly law enforcement may summon the legal representative or responsible persons(s) to hold a talking and require them to employ correction measures." ("经营者……实施排除、限制竞争行为的，反垄断执法机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。").

ANTITRUST REGULATION IN THE AUTOMOTIVE SECTOR: MANAGING RISKS IN THE BEV ERA

BY WENTING GE & HAZEL YIN[1]



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I. INTRODUCTION

China has been the top market in the world for battery electric vehicles ("BEVs"), with total BEV sales reaching nearly two million in 2020.[2] It is forecasted that the BEV sales in China will continue to grow rapidly for the foreseeable future. Three in five new cars go on China's roads may be powered by electricity instead of fossil fuel in 2030 according to UBS, while the China government's forecast is for a 20 percent penetration rate by 2025.[3] Key drivers of this growth include the extension of BEV state subsidies and the continued push for BEV adoption, both in corporate and leasing fleets and among Chinese private car buyers. For example, an increasing number of cities in China have mandated that ride-hailing cars must be BEVs, and some local governments specify that a certain number of new license plates must go to BEVs.

Adoption of BEVs has brought a profound impact on the automotive supply chain. Major systems that are essential to vehicles with internal combustion engines ("ICE") are absent from BEVs. Makers of exhaust systems, fuel systems, and transmissions face the prospect of disruption as BEVs become more mainstream. In the meantime, innovative technologies such as autonomous driving, connected cars are becoming crucial to remain competitive in the BEV market. The BEV market has also seen new distribution models emerge. An increasing number of BEV brands are beginning to sell cars directly to consumers. The days of consumers purchasing their cars exclusively through dealers are numbered. In terms of the aftersales market, the impact of electrification is less certain. Although BEVs tend to have fewer mechanical parts that break down, which leads to less maintenance and a lower demand for spare parts than internal combustion engine ("ICE") vehicles, servicing BEVs requires more specialized capabilities, as the tasks involved are more complex.

Automakers are faced with a host of new challenges as well as opportunities in this era. Taken together, these developments will result in an increasingly dynamic and competitive BEV market in which both traditional OEMs with a record of succeeding in the ICE market and BEV start-ups as newcomers will have to fight hard for market share. In such a dynamic market, antitrust regulation and enforcement will continue to play a crucial role to ensure the effective competition and sustainable development of the market.

The auto sector has been under strict scrutiny by antitrust regulators across the globe including China. In 2020, the State Administration for Market Regulation ("SAMR") published the Anti-Monopoly Guidelines on the Automobile Sector (the "Auto Guidelines"), which provide guidance and outline SAMR's enforcement positions on key antitrust issues in the automotive industry.

Over the past decade, SAMR and its predecessors have undertaken significant enforcement actions along the entire auto supply chain, from auto parts supply and distribution of cars to aftersales servicing. Leveraging from the existing legislation and the authority's decisional practice, this article will discuss the main characteristics that define the new BEV era and attempt to analyze a series of antitrust issues automakers should take note when trying to gain an edge in the BEV market.

II. ANTITRUST CHALLENGES ALONG THE VALUE CHAIN

A. Production of BEV Cars – Collaboration Has Become the Trend

The BEV era has redefined not just the automobile itself but the mobility ecosystem. Seizing the opportunities in the emerging market requires market players to innovate around autonomous, connected, electric and shared vehicles and technologies ("ACES"). Leading international automotive manufacturers typically spend as much as RMB 50 to 100 billion a year on research and development.[4] In the BEV era, much of this money, and more, will need to be redirected toward refining the ACES technologies. McKinsey research indicates that if an OEM wants to achieve significant success in all areas of ACES, it would have to invest approximately RMB 500 billion over 10 years.[5]

The considerable costs of keeping pace with these innovation trends are forcing consolidation and collaboration among market players, including collaboration between traditional OEMs and collaboration between OEMs and suppliers of auto parts or technologies. BMW and Mer-

2 McKinsey & Company, Winning the Chinese BEV market: How leading international OEMs compete, https://www.mckinsey.com/industries/automotive-and-assembly/our-insights/winning-the-chinese-bev-market-how-leading-international-oems-compete.

3 South China Morning Post, China's 2021 electric car sales soar, putting world's largest EV market on track to reach 20 percent penetration target ahead of schedule, https://www.scmp.com/business/china-business/article/3163005/electric-cars-account-over-20-cent-chinas-new-vehicle-sales.

4 McKinsey & Company, Winning the race: China's auto market shifts gears, https://www.mckinsey.com/industries/automotive-and-assembly/our-insights/winning-the-race-chinas-auto-market-shifts-gears.

5 *Id.*

cedes-Benz, for instance, have forged a partnership focused on the next generation of mobility, which is an example of collaborations between traditional OEMs. The Renault-Nissan-Mitsubishi Alliance has partnered with Google's Android Automotive, in an example of a trend that OEMs collaborate with non-OEM partners such as tech companies.

When assessing collaborations between competitors, while the starting point for antitrust law is that competitors should act independently, competitors should be allowed to collaborate with each other when it is objectively necessary to do so in order to achieve a beneficial aim. Such collaborations can be pro-competitive and allowed under antitrust law on a case-by-case basis. The Anti-Monopoly Guidelines for the Intellectual Property Industry (the "IPR Guidelines") set forth SAMR's criteria for assessing joint R&D agreements, which assume that joint R&D agreements between competitors are permitted when the combined share of the parties in the relevant market is no more than 20 percent, to the extent that there is no hardcore restriction and absent evidence showing anti-competitive effects.[6] In addition, the Auto Guidelines specifically recognize that collaboration in the R&D and production of new energy cars can be pro-competitive because it allows market players to share costs, enhance efficiency and improve public welfare.[7]

However, companies should still be cautious of defining the boundaries of legitimate collaboration, as it will bite if the extent of the collaboration goes beyond what is needed to achieve pro-competitive benefits. For example, even if it is legitimate to collaborate on R&D, joint production, marketing or selling of the results of the R&D may not automatically be exempted and requires careful analysis on its legitimacy. Going further than what is absolutely necessary for achieving a legitimate goal may constitute coordination that results in prohibited cartel conduct (such as fixing prices, reduction of output, or sharing of customers or markets).

Also, while it is inevitable for competitors to communicate and contribute to each other's knowledge in the collaboration, information exchange risks may arise in such context. To avoid the risks, information of the competitors should generally be shared only when it is strictly necessary to achieve the collaboration. In addition, any sharing of competitively sensitive information that is necessary to plan or implement the cooperation should be subject to safeguards, such as "clean team" arrangements which usually require that information is disclosed on a "need to know" basis to a limited group of individuals who are subject to strict confidentiality obligations and will, where possible, refrain from a role in which they might make use of their rivals' competitively sensitive information.

While risks of cartel conduct may not arise in collaborations between an OEM and non-OEM suppliers, such collaborations are not exempt from antirust risks. In particular, SAMR will scrutinize if any vertical foreclosure effects may arise, especially when the collaboration concerns leading technologies and involves parties who are market leaders in the relevant markets. For example, in 2014, SAMR's predecessor MOFCOM found concerns and ultimately imposed remedies when reviewing a collaboration in the new energy car sector, the proposed joint venture among Hunan Corun New Energy Co., Ltd., Toyota Motor (China) Investment Co., Ltd. (Toyota China), Primearth EV Energy Co., Ltd. ("PEVE"), Changshu Xinzhongyuan Investment Co., Ltd. and Toyota Tsusho Corporation.[8]

The joint venture was established to produce nickel metal-hydride ("NMH") battery packs for another Toyota joint venture in hybrid cars. PEVE was the market leader in the NMH market with a 66.4 percent market share, and Tokyo held 80.3 percent market share in the hybrid car market. MOFCOM considered that the transaction would strengthen Toyota's controlling power on the value chain of the hybrid car industry, and other hybrid car companies in the China market may be restricted to access the NMH products supplied by the proposed joint venture. Specifically, MOFCOM found that the transaction agreement allowed Toyota to veto any proposals of the joint venture to sell products externally, and thereby may in fact lead to the joint venture supplying NMH products exclusively to Toyota and cause foreclosure impact on other hybrid car makers.

To address such concerns, MOFCOM placed remedies on the joint venture by requiring it to sell its products to third parties on fair, reasonable and non-discriminatory ("FRAND") manners, and required that the joint venture should generate external sales within the first three years of operation if there is market demand. The FRAND-type remedies in this as well as many other conditionally approved cases in China reflect the regulators' persistent concerns over vertical foreclosure effects, which may have to be solved by committing not to discriminate the Chinese customers and to supply to the China market on fair terms, especially in industries subject to close scrutiny, such as those markets along the value chain for BEV cars.

Antitrust concerns may arise not only in SAMR's merger review process, but also when assessing specific types of conduct in the context of collaborations between players at different levels along the supply chain. In the BEV era, OEMs teaming up with tech companies to

6 Article 13 of the IPR Guidelines.

7 Article 5 of the Auto Guidelines.

8 MOFCOM, Announcement of the Anti-Monopoly Review Decision to Conditionally Approve establishment of joint venture among Hunan Corun New Energy Co., Ltd, Toyota Motor (China) Investment Co., Ltd, Primearth EV Energy Co., Ltd, Changshu Xinzhongyuan Investment Co., Ltd., and Toyota Tsusho Corporation. Order No. 49, July 2, 2014.

develop ACES technologies has become the trend. When planning their partnership strategies, companies should carefully consider the antitrust implications, especially when the collaborations are carried out by market leading players. The IPR Guidelines put forward a 30 percent market share safe harbor for vertical agreements, where agreements between non-competitors in which each party's market share in any relevant market affected by the technology agreement satisfies the safe harbor will be presumed as lawful, to the extent that there is no hardcore restriction.[9]

In addition, no matter in collaborations between competitors or non-competitors, companies should be cautious for antitrust concerns raised by restrictive provisions in collaboration agreements. Such restrictive provisions may include, for example, requiring exclusivity by prohibiting the partner to develop the same kinds of technologies or technologies in fields not related to joint R&D with third parties or on its own, restrictions on carrying out follow-up R&D on the developed products, limiting the licensing or supply of the technologies or products to other market players.[10] The antitrust assessment for such restrictive agreements is not straightforward and typically requires an effects-based test taking into account the factual background covering a number of factors, including the parties' market share, the market conditions and potential efficiencies brought by the collaborations. Thinking about these issues up front will prevent unwittingly bringing antitrust risks.

B. Distribution of BEV Cars – Evolving Retail Models

In the early 2000s, given lack of authorized dealerships and aftersales channels, it was not easy to purchase a car from authorized channels and to obtain proper repairing services in China. To protect the consumers' interests and reinforce the management of the distribution channels, the Chinese government published the Administrative Measures for Automobile Brand Sales in 2005 (the "2005 Auto Sales Measures") which established dealerships authorized by OEMs as the only permissible channel for distributing cars in China.[11] Following the promulgation of the 2005 Auto Sales Measures, 4S stores (short for sales, service, spare parts and surveys) quickly began to set new standards in the purchasing market and had become "the norm" of the auto distribution model until recent years.

In the traditional 4S store resale model, dealers purchase vehicles and parts from OEMs and then resell the products to consumers. In such a resale model, an agreement between an OEM and a dealer to set or maintain the price at which the dealer will resell the products, known as resale price maintenance ("RPM"), carries high risks and is a prominent target for antitrust enforcement in the auto sector in China. In the Auto Guidelines and enforcement practice, SAMR and its predecessors have presumed that RPM is unlawful, with very limited and narrowly defined exceptions. RPM behavior in the auto sector is subject to strict scrutiny by the regulators, with 7 cases involving both international and domestic OEMs being penalized with fines exceeding RMB 1,200 million (approx. USD 188.65 million) in total over the past decade.

In contrast to the traditional 4S store model for distributing ICE cars, OEMs are starting to revolutionize the sales models of BEVs by switching to direct sales. As a general observation, there are typically two types of direct sales models adopted by the OEMs.[12] Some BEV OEMs open fully owned and directly managed stores to sell cars directly to consumers (the "Self-Owned Store Model"). In the Self-Owned Store Model, no vertical concerns including RPM risks would arise given that the OEMs themselves provide retail distribution services on their own, and have full freedom to decide sales strategies (including pricing).

However, the Self-Owned Store Model requires considerable investment and costs by the OEMs to set up and operate the stores. To split the investment and costs, some other OEMs adopt an alternative direct sales model where they do not own sales stores but recruit third party agents to operate the so-called "brand flagship centers" to offer services such as display of car models and test-driving. In this model, the sales contracts with consumers are concluded between the end customers and OEMs, and the agents generate profits by commission fees paid by the OEMs (the "Agency Model").[13]

In addition, unlike traditional dealers under the 4S store model, the agents typically do not take ownership of the stock or assume contract default risks with end customers, although they may take certain commercial risks for operating the stores.[14] There remains to be ambiguity about the treatment of the Agency Model under Chinese antitrust laws and whether OEMs can enjoy exemptions of RPM to decide the retail price.

9 Article 13 of the IPR Guidelines.

10 Article 7 of the IPR Guidelines.

11 In 2017, the 2005 Auto Sales Measures was revoked, and the *Administrative Measures for Automotive Sales* came into effect.

12 Strategy &, Direct sales or agency model: the road ahead of the sale of automobiles, https://www.pwccn.com/zh/automotive/direct-selling-or-agency-mar2021.pdf.

13 Thoughtworks, The change of OEM-led automobile sales model – the transformation from direct sales, https://insights.thoughtworks.cn/oem-automotive-retail-transformation/.

14 Accenture Study, Future automotive sales in China, https://www.accenture.com/_acnmedia/PDF-149/Accenture-Study-Future-Automotive-Sales-China.pdf.

Under the EU competition laws, a supplier is permitted to control the retail price where the dealer meets the criteria for a "genuine agent."[15] A genuine agent negotiates or transacts on behalf of a principal and does not bear or bears insignificant commercial or financial risks by itself. It is treated by the EU competition laws as forming part of the principal and the vertical relationship between the genuine agent and the principal is exempt from the EU competition laws. Nonetheless, the criteria for a "genuine agency" are very strict and are applied narrowly in EU competition law practice.

There is no explicit acknowledgement of the genuine agency exemption under existing China laws, but there is evidence implying that this may also be recognized in China. The genuine agency exemption was once incorporated in an earlier draft of the Auto Guidelines (the "2016 Draft"), although it was ultimately left out in the final version.[16] In particular, the 2016 Draft included some detailed guidance for assessing the genuine agency relationship, which was largely consistent with the test as provided in the EU competition laws. In fact, it is understood that EU competition rules played an important role in shaping the Auto Guidelines and the final version of the Auto Guidelines largely mirror the relevant rules covered in EU Motor Vehicle Block Exemption Regulation. This suggests that in practice, SAMR may adopt a similar assessment approach as the EU Commission and accept the genuine agency exemption.

While being silent on the genuine agency exemption, the Auto Guidelines provide a separate exemption of RPM when a dealer acts as an "intermediary" in the sales of cars.[17] In such a scenario, the sales price is directly negotiated and agreed upon between an OEM and specific end customers (e.g. an employee, key account or advertising sponsor) and the dealer only provides supporting services such as delivery, invoicing and payment collection. An additional exemption following the same logic may arise in the e-commerce context, whereby a dealer plays a similar "intermediary" role for OEMs' sales via an e-commerce platform. However, distinct from a genuine agent, an intermediary dealer may have obtained title to the automobiles which they are reselling since the intermediary dealer has already completed the wholesale purchase from OEMs and may undertake certain commercial risks during the transaction (such as the inventory or financial risks).

So far, there has been no precedent from past enforcement cases indicating that RPM in the auto sector was exempted based on the intermediary/e-commerce exemption or a genuine agency exemption. Companies need to carefully assess the functions and roles of a dealer in a specific transaction on a case-by-case basis to determine whether the dealer can qualify as an intermediary dealer or a genuine agent eligible for the exemption. As the distribution model continues to evolve in the BEV era, it would appear sensible to revisit the traditional approach towards RPM and adopt a more flexible test to adapt to the new business reality in the BEV era.

C. Aftersales of BEV cars – The Impact of Electrification Remains Uncertain

A primary focus of the antitrust enforcement in the automobile sector has been the aftermarkets. In the ICE era, competition in the maintenance and repair markets occurs between authorized repairers that belong to the OEMs' official networks and independent workshops. For several reasons, competition on these markets is not particularly strong. For one thing, the OEMs' authorized networks have high market shares – often exceeding 50 percent.[18] For another, OEMs have a stranglehold over two of the inputs necessary to compete effectively – technical repair information and certain spare parts, known as captive parts, which can only be obtained from the vehicle manufacturers. This is an important market for automobile consumers, since car ownership is a major part of overall expenditure, and repair and maintenance costs currently account for a large part of the cost of owning a car.

Antitrust authorities have been concerned that this gives an OEM market power within its own ecosystem, resulting in lack of effective competition in the auto aftermarket. Specifically, the Auto Guidelines recognize that the aftermarket may have a brand-specific feature. OEMs that do not hold a dominant market position in the automobile manufacturing market may nevertheless possess market power (and therefore be deemed dominant) in aftermarkets for parts and services for their vehicles due to so-called "lock-in effects." Accordingly, OEMs face more limitations in terms of imposing restrictions on their counterparts in the aftersales market in order to avoid behavior that may constitute an abuse of dominant position.

The impact of electrification on auto aftermarkets is less certain. Compared with ICE cars, BEVs experience lower wear and tear per mile travelled, typically resulting in lower maintenance costs. However, even though BEVs typically require less maintenance work than ICE vehicles, with less frequent service touchpoints, servicing BEVs requires specialized capabilities, as the tasks involved are more complex. Therefore, be-

15 Commission Guidelines on Vertical Restraints (OJ 2010 C131/01, 19.5.2010).

16 Hua Su, Study on Antitrust Regulation of Automobile Market – a Comparison of China, EU and U.S. (2017), page 317, China University of Political Science and Law Press.

17 Article 6(2) of the Auto Guidelines.

18 Autohome, Aftersales service is critical: maintaining customers is key to 4S stores, https://www.autohome.com.cn/news/202007/1013571.html.

cause of commercial reasons and technical barriers, the independent aftermarket has not developed a strong competing repair and maintenance offer for BEVs.

In the short term, BEV owners tend to be more loyal to the aftermarket network authorized by OEMs, largely due to the fact that the owners – often concerned by the complexity of BEV cars – are looking for the "peace of mind" that remains at the OEM-authorized network. However, in the mid-to-long term, once BEVs become the mainstream in the auto market, independent repair shops may start to enter into aftermarkets and antitrust authorities may want to ensure that there is sufficient competition between authorized and non-authorized repair shops. Similar to what happened in the ICE era, SAMR may become particularly concerned about the barriers for independent repair shops to enter BEV aftermarkets by that time.

The Auto Guidelines have specifically identified some restrictions by OEMs that can amount to an abuse of dominance because these restrictions create barriers for independent repairs to enter into the aftersales markets. These restrictions include, *inter alia*: (i) preventing dealers or repairers from purchasing aftermarket spare parts, particularly compatible parts or original parts obtained through channels other than the OEMs; (ii) preventing parts suppliers, dealers and repairers from selling parts among themselves or to end-users; and (iii) withholding access to technology information, testing equipment and tools necessary for repairers.[19] Although technically there is some room for an OEM to prove that it does not have a dominant market position in parts and services aftermarkets for its own brand, SAMR appears to take an aggressive approach by *de facto* prohibiting the above conduct and presuming market power in those aftermarkets.

III. CONCLUSION

China has been the top market in the world for BEVs. Many international automotive OEMs and suppliers have not started large-scale launches of BEVs in EU, U.S., and other countries until recently, while in China, a rapidly growing BEV market and ecosystem have already emerged. The Chinese automotive market has been essential for the business of international OEMs and suppliers for more than a decade – and will be even more indispensable in the post-COVID BEV era.

In the transition to the BEV era, many market players have developed new business models to thrive, such as collaborations with other market players and forming partnerships and developing new distribution models. While the exiting legislation and regulation is well positioned to address most of the issues arising in the BEV era, there are still issues that are yet to be clarified. As China moves into the lead in global electric mobility, the China antitrust authority could be a pilot to examine these issues.

Given SAMR's strict scrutiny in the auto sector, companies must develop a precise understanding of the China antitrust laws and should be aware of its unique features. Even if certain forms of conduct or transactions do not raise concerns under antitrust laws in the EU, U.S., or other jurisdictions, companies should consider carrying out another round of review from the China antitrust law perspective.

19 Articles 8 and 9 of the Auto Guidelines.

CHINA'S PRACTICE IN FINDING MARKET DOMINANCE OF ONLINE PLATFORMS

BY WU PENG, LONG RUI & DONG KE[1]

  

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With a number of online platforms and e-commerce transactions, China is the largest e-commerce market in the world. The possible regulatory loopholes in antitrust law and regulations in the face of digital economy have aroused widespread concern. For this purpose, in the past year, the authority has successively issued the Anti-monopoly Guidelines on Platform Economy Sectors ("Guidelines") and the Draft Amendment to the Antimonopoly Law of the People's Republic of China ("Draft Amendment") for public comments, in the hope of providing clearer guidance on the enforcement of antitrust laws to platform economy sectors. In addition to the Guidelines customized for platform economy sectors, the Draft Amendment intends to explicitly bring the platform economy under the regulatory framework of the Antimonopoly Law ("AML"),[2] although based on current regulations, the AML is equally applicable to these sectors.

In terms of enforcement practice, from April to October 2021, the State Administration for Market Supervision and Administration ("SAMR") made a series of decisions, in which SAMR imposed high penalties on Alibaba Group, a leading company specializing in e-commerce, retail, Internet, and technology, Sherpa's, an online platform providing food delivery service in English, and Meituan, an online one-stop platform for food, transportation, travel, shopping and entertainment respectively for their abuse of market dominance. Accordingly, the identification and abuse of market dominance by platform companies have once again become the focus.

Under the AML, the finding of market dominance is a necessary prerequisite for further analysis of the abusive conducts at issue, the same as for platform economy sectors. This chapter is to review the decisions of high-profile cases mentioned above and to discuss relevant issues related to the finding of market dominance of online platforms, combined with the provisions of the Guidelines.

I. TO DEFINE RELEVANT MARKET IN PLATFORM ECONOMY SECTORS

One of the significant features of platform economy is that the business models involve "two-sided markets," or "multi-sided markets" proposed by economic theories,[3] which brings divergent opinions on market definition regarding the cases in these sectors. Moreover, considering that business scopes of online platform companies often cover a range of areas, which may increase the uncertainty in market definition. With respect to market definition, the Guidelines first clarify that the principle of case-by-case review shall be adhered to, as the actual need for defining the relevant market varies in different categories of monopoly cases. Based on the wording of this article, it seems that the provision can be interpreted as market definition may not be a necessary step for the cases involving platform economy sectors,[4] in fact, there have been different voices about the value of market definition for these cases in practice. Nonetheless, immediately afterwards, the Guidelines go on to provide that in cases related to online platforms, generally it is necessary to define relevant market. Accordingly, in the cases mentioned above, SAMR continued to follow the general approach of finding abusive conducts under the AML and carried out completed analysis on market definition in these decisions.

A. Back to the Market Where the Abuse Occurred

According to the general rules of market definition,[5] all competitive activities should have occurred within a scope of certain market, relevant markets are defined to specify the scope of market in which the rivals compete. Therefore, when identifying the relevant market, the starting point should be the abusive activities at issue and then considering the scope of relevant market by assessing the scenarios in which the business models or activities at issue of the online platform companies took place, the competitors they face for specific business, and the business areas in which the rivals mainly compete for.

Although the platform economy sectors have more complex business models and more diverse forms of competition, the Guidelines clarifies that the traditional framework under the AML is still to be followed and substitutability analysis is the basic method of defining relevant market.

2 See Article 10 and Article 22 of the Draft Amendment.

3 This was first proposed by Jean-Charles Rochet & Jean Tirole, please see Jean-Charles Rochet & Jean Tirole, Platform Competition in Two-Sided Markets—1 J. EUR. ECON. ASS'N 990 (2003).

4 In the report Rethinking Antitrust Tools for Multi-Sided Platforms posted by OECD in 2018, when it comes to the market definition, there are considerations saying that there might be little value in carrying out a market definition exercise in markets involving multi-sided platforms. Therefore, consider carefully whether a market definition exercise is a necessary and proportionate use of resources, see p. 15.

5 See Article 2 of *Guidelines of the Anti-monopoly Commission Under the State Council Concerning the Definition of Relevant Markets*.

B. Based on One Side or Based on the Entire Platform?

Online platforms are two-sided or even multi-sided in nature. In the context of multi-sided platforms, the considerations[6] to be used to conduct market definition exercise such as user cohorts, platform functionalities, use cases, etc. are intertwined with each other. This poses a challenge to market definition, for which the Guidelines provided that both defining one market and multiple markets are possible for platform economy sectors.[7] In the Alibaba case,[8] for instance, SAMR considered the parties entering into transactions through the platform as a whole and defined only one relevant product market based on the entire platform. Notwithstanding, neither in the Guidelines nor in the Alibaba case, the difference between "two-sided transaction and non-transaction" platforms has been mentioned, however, the practice shows that transaction platforms are more likely to be defined as one market.[9] In the *Alibaba* case, the relevant product market was defined as online retail platform services.

The platform can gather and match merchants and consumers on its both sides and because of indirect network effect and scale effect, the demand of both sides closely related and the value of choosing one platform for one user cohort depends on the choice and demand of user cohort on the other side, thus, SAMR conducted demand substitution analysis from both the undertaking (the merchants) and the consumer side of the platform. According to Article 4 of the Guidelines, "when the cross-platform network effect embodied in such platform can impose sufficient competition constraints on platform operators, the relevant product market can be defined based on the entire platform."

Accordingly, whether the services provided by the online platform to each side can be objectively separated can be an important consideration when defining the market for a two-sided platform. In the *Alibaba* case, it appears that the "pick one of two" practice is mainly targeted to the merchants, and the platform charges service fees only from the merchants as well. However, the amount of service fee charged by the platform is in fact based on a certain proportion of the transaction amount between the merchants and the consumers. The services provided by the platform serve actually both sides of the platform. The user cohorts connected by the platform are different but are closely interdependent with each other.

C. Further Segmentation of the Relevant Product Market?

For online business models, whether the relevant product market needs to be segmented is another challenge. Based on the enforcement cases above, we have noticed that the scope of relevant product market defined by SAMR varies greatly. In the *Alibaba* case, the relevant product market was "online retail platform services,"[10] in the case of Sherpa's, the relevant product market was "online catering takeout platform services in English (in Shanghai),"[11] and in the *Meituan* case, the relevant product market was "online catering takeout platform service" (in China).[12] The relevant geographic markets also vary in scope, from the national market (e.g. in China) to the individual city (specified as Shanghai).

- **The need for segmentation differs depending on the activities at issue**. The service provided by Alibaba is online retail platform services, which itself serves numerous merchants providing diverse products on the platform and does not differ depending on different categories of products. In this regard, SAMR held in the decision of the Alibaba case that "the online retail platform services provided for different product categories are included into the same relevant product market … retail products trade on the platform can be divided as clothing, electronic digital, household appliances, food, cosmetics, household goods, building materials and home improvement products, etc., and each category can be further subdivided, but for merchants and consumers on the platform, there is no essential difference in the content of the online retail platform services." While in the case of Sherpa's, the platform provides only online catering takeout service, which itself already belongs to a subdivision of takeout service.

- **From the perspective of substitutability analysis**. From the perspective of substitutability analysis, it is to consider whether the demand for platform service and the input by supplier will be different depending on product categories. Take Alibaba's Tmall platform as an example,

6 See Article 4 of the Guidelines.

7 According to Article 4 of the Guidelines, specifically, a relevant product market can be defined based on the products on one side of the platform; multiple relevant product markets can also be defined separately based on the multiple products involved in the platform, and the relationship and interaction between the relevant product markets shall be considered.

8 See Guo Shi Jian Chu [2021] No. 28.

9 The distinction among two-sided markets, see Lapo Filistrucchi, "Market definition in multi-sided markets," Rethinking Antitrust Tools for Multi-Sided Platforms 2018, OECD, p.42.; see also Sebastian Wismer, Arno Rasek, "Market definition in multi-sided markets," Rethinking Antitrust Tools for Multi-Sided Platforms 2018, OECD, p.60.

10 In Chinese 中国境内网络零售平台服务市场。

11 In Chinese 上海市提供英文服务的在线餐饮外送平台服务市场。

12 In Chinese 中国境内网络餐饮外卖平台服务市场。

merchants and consumers will consider the overall situation of the platform when they choose to reside in it or purchase from the platform. One consideration is the comprehensive level of platform services, which is reflected in specific services such as product information display, marketing promotion, search function, order processing, logistics service, payment tools, evaluation function of products, after-sales support, etc.; secondly, the number of users adhered to the platform is a key factor when choosing platform, for merchants for instance, the greater the number of potential consumers will be generated, the higher the likelihood that merchants may achieve profitability.

- **The scope of the activities implemented**. In the Alibaba case, SAMR found that the "pick one of two" practice was implemented on the entire platform, rather than concentrated in a certain segment of product categories. In contrast, in the case of Sherpa's, the merchants (the restaurant in this case) were asked to enter into an exclusive agreement with the platform and the one who did not comply with the clause were required to be taken off from the "shelves" of competing platforms, which implemented only in the field of catering takeout service. Furthermore, from the approaches and considerations SAMR took by market definition, it can be concluded that the authority may have concerns not only with abuses that occur within a larger scope of market, but also with the competitive order in a relative smaller market. Thus, for companies in the platform economy sectors, their duty of care under the AML is to some extent independent to the scale of the platform among others but depends on its market power in specific defined relevant market.

II. FACTORS USED TO FIND MARKET DOMINANCE

A. Market Shares

Market shares is the only indicator that can be quantified among other factors used to find market dominance. According to Article 19 of the AML, unless there is evidence to the contrary, an undertaking with a market share of 50 percent in the relevant market may be presumed to have a market dominance. In finding the market dominance of a platform companies, according to the Guidelines, besides market shares, competitive conditions of relevant market should be considered at the same time. Accommodate to the characteristics of the platform economy sector, market shares are to be considered in the ways below.

- **High market shares do not equal to market dominance**. Online platform company with high market shares usually means it has strong market power, however, a market shares over 50 percent does not necessarily mean that the company has a dominant position. In finding market dominance, it is required to conduct comprehensive analysis based on, among others, the competitive situation of relevant market, its ability to control the market, its financial resource and technical conditions, the extent of reliance of other undertakings on it and the difficulties for other undertakings to enter the relevant market.

- **Result can be mutually confirmed**. Turnover is the main merit most commonly used to calculate market share in antitrust cases, but due to the particularity of business models in digital economy, turnover cannot always directly reflect the market power of a company. Therefore, the Guidelines provide that to determine the market share of undertakings in platform economy sectors, the proportional metrics in the relevant market in terms of monetary value involved in the transactions, number of transactions, sales volume, number of active users, click-throughs, duration of use or other metrics can be considered.

  In the Alibaba case, SAMR calculated Alibaba's market share based on two merits, e.g. service revenue and gross merchandise volume generated from the platform, with both over 50 percent. It follows that even though the merits in platform economy sectors are diverse and the result of individual indicator may sometimes not be credible enough, it cannot be concluded that market share is not significant in finding market dominance of a company. The results from different merits can be cross-examined and confirmed by each other.

  In addition, the availability of data also needs to be considered when selecting metrics. Moreover, for some kinds of merits, it is less likely to find market dominance simply based on the result of such merits, by way of example, due to the multi-homing behaviors, it is common for users to be active on different competing platforms. Therefore, when determining market share using merits such as "number of active users, click-throughs, duration of use," the market share of competitors may overlap and there will be issue of double counting, notwithstanding, the result is still reference significant.

- **The duration of market share can reflect market power to a certain extent.** The platform economy involves complex business categories and evolving competitive dynamics, which once made the authority inadequate. Generally speaking, highly concentrated market structures and high profitability can positively imply the market power to some extent, however, for platform economy, it is argued that the market power of platform companies is not stable and at the same time, in order to compete for the attention of users, there is "cross-border" competition among platform companies of different business categories. Thus, high market shares at one point in time are of limited indicative use.

To find a way out, the Guidelines provide that, in determining market dominance, the characteristics of platform competition, innovation and technological changes of relevant market may be considered, while likewise the network effect and lock-in effect should be taken into account. As a counterbalance, the consideration of the time dimension, i.e. the duration of market share, is incorporated in the determination of the market power. In the Alibaba case, for example, SAMR found that Alibaba held a high market share for a long time and provided 5 years (from 2015 to 2019) as an observation period, which could serve as a non-binding reference period.

B. Market Power in Associated Markets

It is noteworthy that in the decision of the *Alibaba* case, with regard to market dominance of Alibaba, SAMR held that "the party has made ecological layout in the fields of logistics, payment tool and cloud computing, providing strong logistics service support, payment guarantee and data processing capacity for its online retail platform services, which further consolidate and enhance the market power of itself." Based on the analysis, SAMR was of the view that market power of a platform company in associated markets may have a leverage effect and the market power in one market can be transmitted to another. Such a way of determination would increase the risk for platform giants to be found to have market dominance, as these companies are often active in numerous associated markets either by business operations or by investments.

The digital economy booms over the past decades and in the process of development, platform companies have accumulated a large amount of capital and gradually expanded their businesses. Platform companies are also widely distributed in fields such as entertainment industry, online to offline, mobile social networks, finance, and transportation services, etc. These companies are shaping their platform and ecosystem strategies to create value and stay competitive. The various business areas of these platform companies seem to be independent, but in fact they are interrelated, and the development of each business area can support and promote by each other.

For these group of companies, especially for the giants, the finding of market dominance would be even to some extent independent of market definition. Regardless of specific market in which the abuse at issue occurs, the companies may be found to have market dominance because of their comprehensive market power, which in turn would increases the risk of finding the abuse at issue illegal. Nevertheless, naturally whether the strength in associated markets will necessarily strengthen the market power in relevant market in specific case needs to be analyzed on a case-by-case basis. In addition, according to the Alibaba case, in finding of market dominance of platform companies, other factors such as financial resource and technical condition, the extent of reliance of other undertakings on such undertaking etc. are associated factors to be considered. It is the advantages that platform companies may have under multiple dimensions that ultimately establish their market power.

III. THE ROLE OF THE ABUSES AT ISSUE IN FINDING MARKET DOMINANCE

Although, as mentioned above, having market dominance is a prerequisite for further analysis of whether the abuse is illegal under the AML, however, it is worth noting that the finding of market dominance and the assessment of the abusive conduct at issue are not two completely separate and independent parts of each other. The specific abusive conduct will be considered when conducting analysis of market definition and the finding of market dominance.

Take the "pick one of two" practice as example, it is very difficult for a platform company that does not have market power to require in-platform operators to make an "either-or" selection between competing platforms or to enter into an exclusive agreement, because merchants don't want to lose the opportunity to multi-home on several platforms they would presumably have in the absence of exclusive clauses, as more distribution channels means more trading possibilities. From this perspective, the ability to successfully perform certain conducts is in itself the evidence of the existence of market power or dominant position to some extent.

The draft version of the Guidelines has once provided that: "in individual case, if direct factual evidence is sufficient and conducts that can only be implemented by taking advantage of a dominant market position have lasted for a considerable period of time and caused clear damage, however, the conditions are insufficient or it is very difficult to accurately define relevant market, it may not be necessary to define the relevant market, in which case it can be directly found that undertaking in platform economy sector has committed monopolistic conduct." In the final version of the Guidelines, this article has been removed, which indicate that the possible approach that finding monopolistic conduct without defining relevant market will not be followed, while this article is still relevant when assessing the market power of companies and their rivals.

IV. SUMMARY

With the Guidelines for platform economy sectors being effective and the publication of a series of cases, antitrust rules for digital economy are taking shape. In this context, Anti-Monopoly Law enforcement and judicial practice in the field of online platform economy sectors will become more active in the future and the relevant regulatory system will gradually become clearer. Online platform companies, especially those with a certain scale and market power, should pay more attention in daily operation for the purpose to lower the risk of being found illegal for certain activities and business models.

NEW DEVELOPMENTS IN CHINA MERGER REVIEW

BY YIZHE ZHANG & PETER WANG[1]

1 Yizhe Zhang & Peter Wang are partners of Jones Day. Yichen Wu and David Wu, associates in Jones Day's Beijing Office, assisted in preparation of the article. The views expressed in this article are those of the authors and do not necessarily reflect the views of Jones Day.

I. INTRODUCTION

This article summarizes several new trends in merger review by the Chinese competition authority — SAMR — that have emerged over the past 4 years (2018-2022).[2] These include the increased concern regarding conglomerate effects, the expansive use of FRAND commitments, the introduction of a new type of behavioral remedy, and the frequent use of open remedy terms without automatic sunset clauses. These developments reflect SAMR's increased focus on domestic industries and have profound implications for future transactions.

II. AGGRESSIVE ENFORCEMENT AGAINST CONGLOMERATE TRANSACTIONS

Compared with competition authorities in other jurisdictions, SAMR is more receptive to theories of harm based on conglomerate effects. During the past few years, SAMR imposed conditional approvals in 6 conglomerate transactions, 5 of which had been unconditionally cleared by the European Commission ("EC") and the U.S. competition authorities.

A closer examination of these cases shows that high market shares (typically more than 50 percent) in non-overlapping products sold to the same group of customers can easily lead to conglomerate concerns in China. SAMR's conglomerate concerns or theories of harm can include tying, imposing potentially less favorable trade terms post-transaction, degrading interoperability and refusals to deal. Chart 1 below reflects categories of SAMR's concerns in recent conglomerate cases.

Tying is the leading concern expressed by SAMR in conglomerate transactions. For example, in *Infineon/Cypress* (2020), SAMR found that two groups of products, i.e. automotive-grade IGBT/automotive-grade MCU, and automotive-grade NOR flash memory/automotive-grade MCU, have the same customer group. The post-transaction entity could tie automotive-grade MCU with automotive-grade IGBT or automotive-grade NOR flash memory to coerce downstream customers to procure Infineon's MCU.[3]

Degrading interoperability is another typical concern for SAMR in technology deals. For example, in *AMD/Xilinx* (2022), SAMR was concerned that the post-transaction entity would be likely to degrade interoperability between its field-programmable gate arrays ("FPGAs") and CPUs or GPUs produced by third parties, leveraging its strong market power (over 50 percent market share) in FPGAs, to eliminate or restrict competition.[4]

Chart 1. Types of Concerns from SAMR in Conglomerate Cases (2018-2022)

No.	Case	Tying and/or bundling	Product integration	Degrading interoperability	Less favorable trade terms post- transaction
1	*AMD/Xilinx (2022)*	✓	n/a	✓	✓
2	*Nvidia/Mellanox (2020)*	✓	n/a	✓	✓
3	*Infineon/Cypress (2020)*	✓	✓	✓	✓
4	*KLA-Tencor/Orbotech (2019)*	✓	n/a	n/a	n/a
5	*UTC/Rockwell Collins (2018)*	✓	n/a	ü	ü
6	*Essilor/Luxottica (2018)*	✓	n/a	n/a	n/a

In contrast, EC and U.S. antitrust authorities cleared 5 of these cases unconditionally, only imposing divesture remedies in UTC/Rockwell Collins (2018) to address horizontal, rather than conglomerate, concerns.

2 SAMR's Anti-Monopoly Bureau was reorganized and changed its name to the State Anti-Monopoly Bureau ("SAMB") in November 2021. SAMB currently oversees three bureaus within SAMR, i.e., the Anti-Monopoly Enforcement Bureau I, the Anti-Monopoly Enforcement Bureau II and the Competition Policy Coordination Bureau. The functions of each bureau are available at https://www.samr.gov.cn/jg/.

3 SAMR Conditional Approval of Infinon's Acquisition of Cypress (2020) available at https://www.samr.gov.cn/fldj/tzgg/ftjpz/202004/t20200408_313950.html.

4 SAMR Conditional Approval of AMD's Acquisition of Xilinx (2020) available at https://www.samr.gov.cn/fldj/tzgg/ftjpz/202201/t20220127_339441.html.

In UTC/Rockwell Collins (2018), SAMR found that Rockwell Collins had a 40-45 percent share in China's avionics market, and UTC had high shares in certain markets, including engine nacelles (40-45 percent), auxiliary flight control actuators (30-35 percent), ice-detector systems (90-95 percent), power systems (75-80 percent), and fire control systems (50-55 percent). SAMR therefore was concerned that the post-transaction entity would adopt a tying or bundling strategy to leverage its market power in avionics into neighboring products, or vice versa. Similarly, SAMR found that UTC had a dominant position in air data sensors (55-60 percent) and integrated air data systems (95-100 percent), leading it to conclude that the post-transaction entity would have the ability and incentive to leverage that market strength into air data computers.[5]

The EC also examined conglomerate links between the parties' activities in (a) aircraft engines and avionics, (b) environmental control systems and galley cooling, and (c) pilot controls, flight control and actuation. However, the EC found that the parties had no such ability and incentive to foreclose competitors through the use of tying or bundling strategies.[6]

The U.S. Department of Justice ("DOJ"), in its Competitive Impact Statement, did not discuss conglomerate concerns, but rather addressed only horizontal concerns in two relevant markets, namely pneumatic ice protection systems for aircraft, and trimmable horizontal stabilizer actuators for large aircraft. Given that both parties were close competitors in such concentrated markets, the DOJ proposed a divesture as a remedy.[7]

III. THE EXPANSIVE USE OF FRAND COMMITMENTS

A fair, reasonable and non-discriminatory ("FRAND") commitment is typically made by patentees of standard essential patents ("SEPs") to standard setting organizations ("SSOs"). The FRAND doctrine aims to avoid the acquisition or abuse of dominant market position by SEP holders as a result of the standard setting process. Nevertheless, a FRAND commitment in and of itself is ambiguous as to what level of royalty constitutes a FRAND royalty in the context of SEP licensing.

FRAND commitments were first introduced into Chinese merger remedies in MOFCOM's conditional clearance of *Google/Motorola Mobility* (2012). In this case, Google was required to continue to obey FRAND obligations related to the patents of Motorola Mobility.[8] MOFCOM imposed more detailed FRAND obligations on SEP holders in *Microsoft/Nokia* (2014).[9] In these two merger cases, the FRAND obligations were strictly limited to SEP licensing.

Recently, SAMR has further expanded the FRAND doctrine to non-SEP cases to ensure fair post-transaction supply to Chinese customers. Since 2018, SAMR has imposed FRAND commitments on behalf of Chinese customers in 11 out of 16 conditional approval cases involving behavioral remedies.

SAMR has imposed FRAND conditions even in cases where the parties' shares were relatively moderate. For example, in *Cisco/Acacia* (2021), the post-transaction entity's total shares in the coherent digital signal processor market would have been 45-50 percent worldwide and 40-45 percent in China respectively. In Globalwafers/Siltronic (2022), the FRAND supply obligation was expanded beyond the relevant product of concern (8-inch wafer) to the supply of 6-inch and 12-inch wafers, which were defined as separate relevant markets by SAMR. In *AMD/Xilinx* (2022), the FRAND obligation was expanded beyond the relevant product of concern (FGPA) to AMD's CPU and GPU processors, even though SAMR found AMD's 2020 CPU and GPU worldwide market shares to be below 5 percent and 10 percent respectively.[10]

The specific meaning of FRAND is subject to SAMR's interpretation. However, conditions imposed in the above cases seem to suggest that FRAND as envisioned by SAMR in merger remedies typically implies: (1) that no discriminatory treatment should be imposed against customers facing similar trading conditions; (2) that refusals, restrictions or delays to supply products should be prohibited; and (3) suppliers should

5 SAMR Conditional Approval of UTC's Acquisition of Rockwell Collins (2018) available at https://www.samr.gov.cn/fldj/tzgg/ftjpz/201811/t20181123_332679.html.

6 EC Case M.8658 – UTC/Rockwell Collins Decision on May 4, 2018 available at https://ec.europa.eu/competition/mergers/cases/decisions/m8658_2749_3.pdf.

7 *U.S. v. UTC and Rockwell Collins, Inc.* (Case Number: 1:18-cv-02279-RC) (2019) available at https://www.justice.gov/atr/case/us-v-united-technologies-corp-and-rockwell-collins-inc.

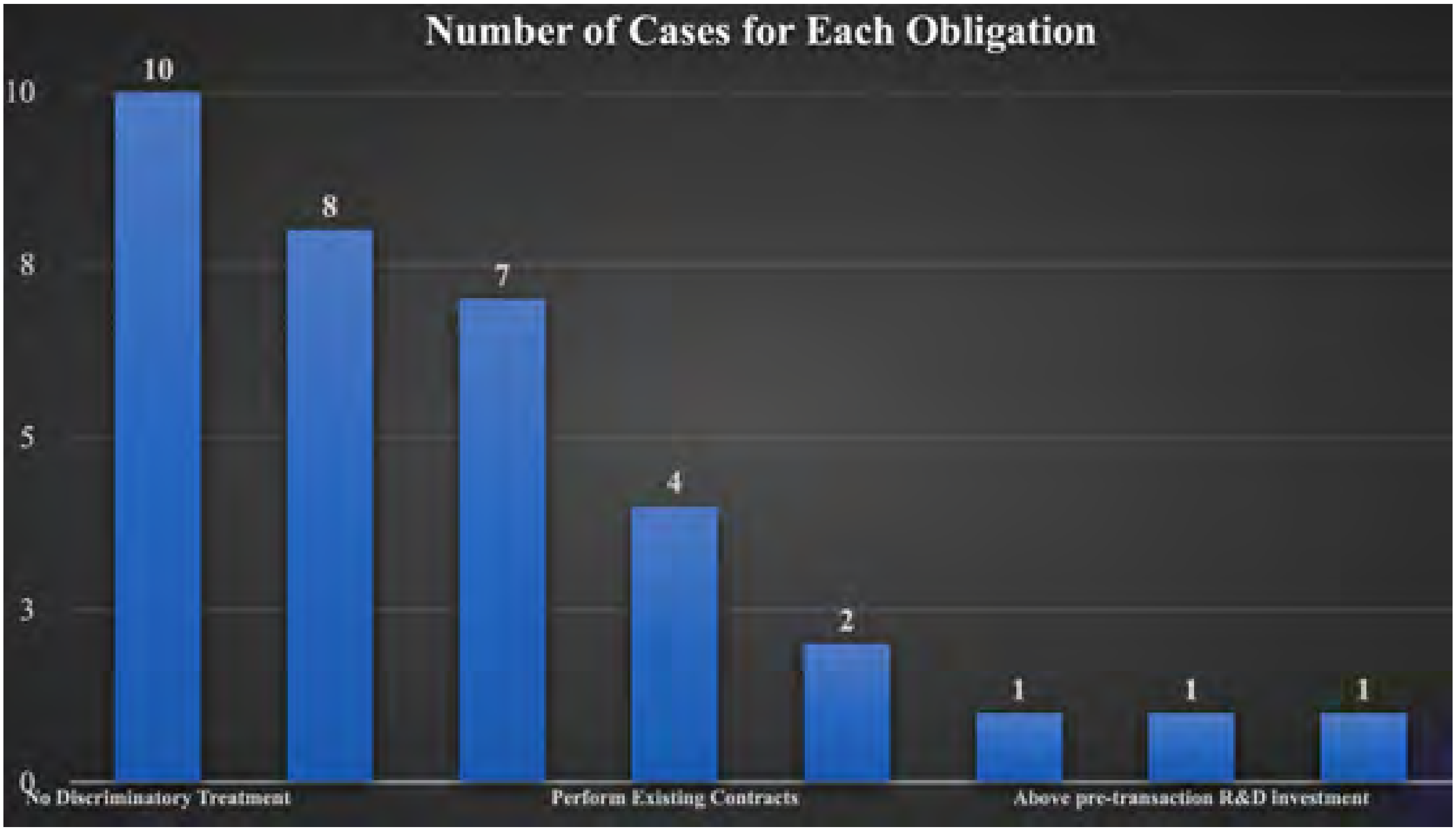
8 MOFCOM Conditional Approval of Google's Acquisition of Motorola Mobility (2012) available at http://fldj.mofcom.gov.cn/article/ztxx/201205/20120508134324.shtml.

9 MOFCOM Conditional Approval of Microsoft's Acquisition of Nokia's Device and Service Businesses (2014) available at http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml.

10 EC Decision of AMD/Xilinx Case (2021), Para 108 and 126, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021M10097&from=EN.

not provide Chinese customers with terms less favorable nor levels of service inferior to those given pre-transaction. Chart 2 below summarizes specific obligations relating to FRAND in 11 recent cases.[11]

Chart 2. Obligations relating to FRAND Commitments in SAMR Merger Cases (2018 – Jan. 2022)



IV. THE INTRODUCTION OF A NEW BEHAVIORAL REMEDY

In *SK Hynix/Intel* (2021),[12] the Chinese competition authority embraced a new type of behavioral remedy: requiring the post-transaction entity to assist third-party competitors to enter the relevant markets ("Market Entry Assistance"). In that case, SAMR expressed competition concerns over unilateral and coordinated effects in the (global and Chinese) markets for PCIe enterprise-class SSDs and SATA enterprise-class SSDs.[13]

The SAMR noted high market entry barriers in both relevant markets, given that enterprise-class SSDs are mainly used in data center servers; customers have extremely high requirements for product quality and stability; and new entrants usually face financial and customer-recognition obstacles.

It is not clear from the decision what the appropriate circumstances are for requiring such a market entry assistance remedy. If SAMR is concerned about eliminating a competitor, divestiture (which maintains an existing competitor in the market) appears to be a more logical remedy, but the criteria are not yet well-defined.

11 The cases are *Essilor/Luxottica* (2018), UTC/Rockwell Collins (2018), *KLA-Tencor/Orbotech (2019), DSM/Zhejiang* Garden (2019), *Infineon/Cypress* (2020), *Nvidia/Mellanox* (2020), *ZF/Wabco* (2020), *Cisco/Acacia* (2021), *SK Hynix/Intel* (2021), *GlobalWafers/Siltronic* (2022), and *AMD/Xilinx* (2022).

12 *SAMR Conditional Approval of SK Hynix's Acquisition of Intel's SSD and NAND Businesses* (2021) available at https://www.samr.gov.cn/fldj/tzgg/ftjpz/202112/t20211222_338317.html.

13 In contrast, the EC concluded, among other things, that the post-transaction entity will still have to live up to the pace of a very dynamic market, and Samsung will still hold the largest market share and continue to be the market leader, making unilateral effect less likely to be a serious concern. See EC Case M.10059 – *SK Hynix / Intel's NAND and SSD Business*, Article 6(1)(b) Non-Opposition, May 20, 2021, Paragraphs 136-38, available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_10059.

The remedy of helping new entry also may face some practical issues in implementation.

First, the scope of the mandated "assistance" is unclear. Assistance is a broad term that could cover not only financing or loan efforts, but potentially also the transferring or licensing of intellectual property rights ("IPRs") such as patents, copyrights, trademarks, and even know-how. Financing or loans readily can be obtained from foreign and China financial markets rather than from merging parties. However, the transferring or licensing of IPRs is always a complex battlefield, particularly between incumbent companies and potential competitors. The post-transaction entity and the third-party competitor would need to negotiate, for example, the number and types of IPRs required to enter into the relevant markets, whether the IPRs include SEPs and non-SEPs, and applicable royalty rates. The third-party competitor might also ask for the post-transaction entity's assistance in product quality control and servicing.

Second, the meaning of "entry" can be interpreted differently. Market entry can be understood as either a one-time effort, such as licensing a patent portfolio, or as a continuous effort over a certain period of time, such as assisting in building up a new production line. Given the complexity of certain business environments, a third-party competitor may not be able to grow to become a stable supplier. It is not clear whether the merging parties have an obligation to ensure successful third-party entry, and at what point their assistance obligation would end.

Third, there are coordination risks relating to the potential exchange of competitively sensitive information. Absent a clean team and firewall during the assistance period, the risk of exchanging competitively sensitive information would exist between the post-transaction entity and the third-party competitor or new entrant. However, at present it appears that in the merger review context SAMR is more concerned about reducing alleged vertical and conglomerate effects (particularly on Chinese customers) rather than any risks of facilitating horizontal coordination.

V. SUNSET AND OPEN-ENDED TERMINATION CLAUSES

The *Interim Provisions on the Review of Concentration of Undertakings (2020)* ("SAMR Interim Provisions") provide two methods of termination: (1) automatic termination of conditions upon expiry of the remedy term if there was no breach of the conditions, and (2) termination of conditions upon SAMR's review and approval.[14]

Among the 16 cases involving conduct remedies from 2018 to January 2022 (see Chart 3 below), SAMR adopted automatic sunset clauses in only 6 cases and required open-ended termination clauses in 10 cases.

Termination of conditions only based on SAMR's approval, even after expiry of the original remedy term, requires a substantive evaluation of market conditions years after, places the burden of proof on the merging parties, and thus essentially constitutes a second merger review potentially extending the remedy term indefinitely. Such practically unlimited remedy terms in China have become a source of frequent frustration for merging parties.

Chart 3. The Number of Cases with Sunset and Open-Ended Termination Clauses (2018 - Jan 2022)

Sunset Clauses in SAMR Cases

Case	Sunset Clause
Cisco/Acacia (2021)	Lift automatically 6 years after the decision.
ZF/Wabtec (2020)	Lift automatically 6 years after the decision.
Infineon/Cypress (2020)	Lift automatically 5 years after the decision.
Novelis/Aleris (2020)	Lift automatically 10 years after the decision.
Zhejiang Garden High Tech/DSM (2019)	Lift automatically 5 years after the decision.
KLA-Tencor/Orbotech (2019)	Lift automatically 5 years after the decision.

14 Article 46 of the SAMR Interim Provisions on the Review of Concentration of Undertakings (2020) available at https://gkml.samr.gov.cn/nsjg/fgs/202010/t20201027_322664.html.

Open-Ended Termination Clauses in SAMR Cases

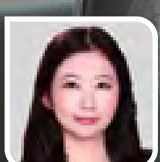
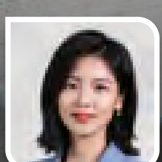
Case	Open-Ended Termination Clause
AMD/Xilinx (2022)	Lift by application and upon SAMR approval after 6 years' initial term.
Globalwafers/Siltronic (2022)	Lift by application and upon SAMR approval after 5 years' initial term.
SK Hynix/Intel (2021)	Lift by application and upon SAMR approval after 5 years' initial term.
ITW/MTS (2021)	Lift by application and upon SAMR approval after 5 years' initial term.
Nvidia/Mellanox (2020)	Lift by application and upon SAMR approval after 6 years' initial term.
II-VI/Finisar (2019)	Lift by application and upon SAMR approval after 3 years' initial term.
Cargotec/TTS (2019)	Lift by application and upon SAMR approval after 5 years' initial term.
Linde/Praxair (2018)	Lift by application and upon SAMR approval after 5 years' initial term.
UTC/Rockwell Collins (2018)	Lift by application and upon SAMR approval after 5 years' initial term.
Essilor/Luxottica (2018)	Lift by application and upon SAMR approval after 5 years' initial term.

VI. CONCLUSION

SAMR has and exercises significant discretion in its merger review cases and is not shy of adopting unique theories of harm and imposing China-specific conditions. For complex global transactions that potentially require remedies, parties and their counsel must thoughtfully assess the antitrust risks associated with SAMR's review, and plan their China filings accordingly.

THE PAST AND FUTURE OF SEP ANTITRUST IN CHINA

BY ALEXANDRA (PU) YANG[1] & FAN GUO[2]

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I. INTRODUCTION

Standard-setting organizations ("SSOs") have long played a critical role in the advancement of some of the most important technology sectors, particularly that of the information and communication sector. When people still need different chargers for different electrical standards, a cell phone applying Wi-Fi and telecommunication standards will work all the same across the globe. With such great convenience comes grave danger of monopoly, and standard setting has been the focus of international authorities and courts for the past few decades. With China's enormous market, the Chinese FRAND and antitrust enforcement is critical to any SEP owners' licensing activities.

Over the years, major international antitrust authorities and respective national courts have taken different positions regarding the antitrust issue involving standards and Standard-Essential Patents ("SEPs"). Among them, the Chinese antitrust authorities and legal regime have been increasingly active in the past decade and have been adopting a unique approach. We argue in this paper that the current Chinese antitrust regime still offers a direct and forceful legal remedy under the antitrust laws against SEP abuses, while other major antitrust authorities' enforcement related to standard setting has focused largely on the interpretation and implementation of the Fair, Reasonable and Non-Discriminatory ("FRAND") commitment made by the patent holders.[3]

Mandatory FRAND is used by the current standard-setting regimes (such as ETSI) to deal with the monopoly issues of standardization. The major threat perceived by SSOs in the standard setting process is patent holdup, where without some checks, SEP owners would essentially have veto power over implementers and be incentivized to impose exorbitant terms in licensing patents. FRAND exists to ensure that the licensing terms are fair, reasonable, and non-discriminatory. Reasonable and fair make sure the compensation to SEP owners does not exceed its technical contribution, and non-discriminatory ensure equal treatment of similarly situated licensees. FRAND eventually protect consumers from bearing excessive cost for a solution devised by profit-driven parties. FRAND applies to all SSO members, and naturally becomes the center of standard related enforcement and litigations, including antitrust disputes.

While FRAND is critical, it is not only a remedy for SEP implementers, at least not in China. In China's judicial practice, a breach of FRAND duties could directly raise antitrust issues, for example a supra-FRAND royalty could be found constituting excessive pricing – an abuse of market dominance practice. By contrast, antitrust laws in the U.S. or the EU have not attempted to define the breach of FRAND principle as antitrust behaviors, despite continuous allegations by implementers. A joint policy statement from the United States Patent and Trademark Office, the National Institute of Standards and Technology and the Department of Justice clarified the U.S. position is that F/RAND licensing disputes do not raise antitrust concerns.[4] The CJEU also ruled that SEP owners seeking injunctions in certain situations could be violating anti-competitive law, but FRAND disputes do not otherwise raise such concerns.[5] The U.S. and E.U. positions gained support from some Chinese legal scholars who argue against a public antitrust enforcement of private FRAND commitments.[6] However, recent Chinese antitrust rules issued by competition authorities still directly prohibit the violation of FRAND principle and a close reading of these rules provides additional angles in applications against FRAND disputes.

II. DUTIES ON SEP OWNERS

SEP owners' duties regarding licensing terms of their patents come from two sources: FRAND commitments made to SSOs, and antitrust laws and regulations imposed by the government. The latter is mostly unique to China.

The FRAND commitments made to SSOs are similar in their languages and courts around the world have developed similar standards in applying FRAND principles. While FRAND disputes do not raise antitrust concerns in the U.S., the Chinese Antimonopoly Law ("AML") and regulations have been applicable in FRAND violations.

Specifically, Articles 17-19 of the Chinese AML prohibit the abuse of dominant position, which has been applied by Chinese courts against FRAND-violating licensing terms.[7] In late 2020, the State Administration for Market Regulation ("SAMR") issued the *Rules of Prohibiting the Abuse of*

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3 See A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 Yale L. J. 2110 (2018).

4 U.S. Patent & Trademark Office, Nat'l Inst. of Standard and Tech., U.S. Dep't of Justice, Antitrust Div., policy statement on remedies for standards-essential patents subject to voluntary F/RAND Commitments, (Dec. 2019), https://www.justice.gov/atr/page/file/1228016/download.

5 See *Huawei Techs. Co. Ltd. v ZTE Corp.*, 2014 E.C.R. 2391, Case C-170/13, (July 16, 2015).

6 See Du Ning, *Criticism on the Intrinsic Correlation between Violation of the FRAND Principle and That of Antimonopoly Law*, 4 Tech. & Law 37 (2021).

7 See *Huawei Technologies Co. v. InterDigital* Technology Inc. et al, Guangdong High People's Ct. Oct. 21, 2013.

Intellectual Property Rights to Limit or Restrict Competition ("Rules Against the Abuse of IPRs").[8] The SAMR is the State Antimonopoly Bureau responsible for administrative antitrust enforcement. Before, this responsibility was taken by the National Development and Reform Commission ("NDRC") who investigated InterDigital and Qualcomm's SEP licensing practices. The Rules Against the Abuse of IPRs have a provision – Article 13 – specifically deal with the abuse-of-market-dominance issues in SEP licensing. Article 13.2 prohibits competition-restrictive FRAND violations, including refusal to license, tying and unreasonable licensing terms.[9] Article 13.1 is special, as it prohibits participants' late disclosure (patent ambush) in standardization process.

Articles and provisions other than those prohibiting abuse of market dominance may also apply to FRAND disputes, though no actions of such have been filed in China. Articles 13-15 of the Chinese AML prohibit monopoly agreements and concerted actions.[10] Article 12 of the Rules Against the Abuse of IPRs prohibit the same reached by patent pools.[11] Both articles would have a play in SEP disputes involving patent pools holding portfolios of SEPs.

As most SEP owners engage in patent licensing in China, they will eventually fall under the additional duties and direct antitrust compliance risks imposed by Chinese AML and relevant regulations.

III. SEP/FRAND RELATED ANTITRUST CASES

A. Leading Chinese Cases

The leading cases in China are still *Huawei v. InterDigital*[12] and *NDRC v. Qualcomm*,[13] which are years old. Subsequent SEP/FRAND antitrust-related cases either were quickly settled or are still under review, e.g. *Qualcomm v. Meizu* (settled), *Apple v. Qualcomm* (settled) and *Apple v. IWNCOMM* (under review).

Huawei v. InterDigital remains one of the most important cases in China on SEP and antitrust law. In 2011, Huawei brought an antitrust suit against InterDigital for abuse of dominant market position, where the Chinese court applied Article 17 of the AML and found InterDigital in violation. In 2013, Guangdong High Court found InterDigital to be in violation of the FRAND commitments made to ETSI, charged unreasonably high licensing fee and committed tied selling.[14] On these grounds, Guangdong High Court found that InterDigital had violated Article 17 of the AML and abused its dominant market position.[15] This landmark case is ground-breaking in several aspects, first, private parties could bring and win antitrust suits against unreasonably high licensing fees requested by SEP owners; second, FRAND violations would be violations *per se*, or at the very least, prima facie violations of the AML, which differs greatly from the U.S. approach of not connecting FRAND issues with antitrust law; last but not least, as manifested in the NDRC's following investigation against InterDigital, a successful private antitrust suit will bring antitrust enforcement agencies upon the defendant. The NDRC ceased the antitrust review against InterDigital after it had made a list of commitments.

The NDRC's antitrust review and later 6 billion RMB penalty decision against Qualcomm in 2015 was, at the time, the biggest antitrust penalty China's enforcement agencies had made.[16] This decision, however, is rather different from the later European Commission penalty decision against Qualcomm for abuse of market power.[17] The European Commission decision is based on Qualcomm's anti-competition behaviors in the sale of baseband chips, which is also touched upon in the NDRC decision.[18] However, in addition to attaching unfair conditions in the sale of baseband chips, the NDRC also found Qualcomm in violation of the AML for charging unreasonably high licensing fee and involving in tied

8 Guan Yu Jin Zhi Lan Yong Zhi Shi Chan Quan Pai Chu, Xian Zhi Jing Zheng Xing Wei de Gui Ding (Prohibiting the Abuse of Intellectual Property Rights to Limit or Restrict Competition) (promulgated by State Admin. For Market Regulation, Oct. 23, 2020, effective Oct. 23, 2020).

9 *Id.*

10 Fan Long Duan Fa [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) (China).

11 See Rules against abuse of IPRs, *supra* note 8.

12 *Supra* note 7.

13 Fa Gai Ban Jia Jian Chu Fa 2015 No. 1 [Sanction Decision] (promulgated by the Nat'l Dev. and Reform Comm'n of P.R.C., effective Feb. 9, 2015), http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html. (China)

14 *Supra* note 7, at 58.

15 *Id.* at 57.

16 *Supra* note 13.

17 ANTITRUST PROCEDURE, Council Regulation (EC) 1/2003, Case AT.40220.

18 *Id.* at 116.

selling.[19] The decision did not make any explicit reference to the FRAND commitment in finding Qualcomm's licensing fee unreasonably high and constituted violation of Article 17 of the AML.[20] Among other things, the NDRC found the unreasonable pricing "increased the cost of wireless communication end products manufacturers, passed down to the consuming end, and harmed the interests of the consumers."[21] Much as this decision is similar to Huawei v. InterDigital, that the defendant was found in violation of the AML for charging unreasonably high price and involving in tied licensing, the NDRC decision made it clear that FRAND violation is not necessary to find antitrust enforcement.

The NDRC stated that using the wholesale price of the end equipment as the base for calculating a licensing fee, when the overall licensing fee is high, could be "obviously unfair," which would be a factor in determining AML violation.[22] The NDRC decision also set several important standards in SEP related antitrust law issues in China, including first, the application of antitrust law to SEP practices does not necessarily need FRAND violations; second, factors beyond the FRAND commitments such as consumer interest would also be basis for AML violations; and third, every single SEP was a market where the SEP owner had 100% market share, thus constituting market dominant position under Article 19 of the AML. The NDRC decision is arguably more important in the sense of predictability, as Chinese courts are not bind by Huawei v. InterDigital (provincial High Court Case), while competition authority would likely have more consistency within the agency.

B. Leading U.S. and EU Cases

As compared to the Chinese authorities applying antitrust law in cases involving SEP and unreasonably high licensing fee, the U.S. courts take a very different approach. In a line of SEP/FRAND antitrust cases, including *Rambus, Inc., v. F.T.C.*,[23] *Qualcomm Inc. v. F.T.C.*,[24] and *Continental Automotive Systems v. Avanci*,[25] the U.S. courts have made it clear that a breach of FRAND commitments, standing alone, is not enough to find antitrust violation. Breach of FRAND commitments could hurt consumers; however, it is not an antitrust concern if competition is not foreclosed.

In *Rambus, Inc., v. F.T.C.*,[26] the DC circuit Court overturned FTC's finding that deliberate late disclosure, or in other words deception of standard setting organizations constitute Sherman Act section 2 violations.[27] The court required anticompetitive effect to be basis of a monopolization claim, and therefore required proof that the SSP would not have included the patented technology but for the deception of the SEP owner.[28] This is a case that is arguably impossible for the prosecution to prove, especially when the SEP owner is well counseled. In some way, this has shut the door for antitrust enforcement against late disclosure in standard setting in the U.S.

In *Qualcomm Inc. v. F.T.C.*, the Ninth Circuit reversed the FTC's district court victory in challenging Qualcomm's SEP licensing practice. Applying Aspen and *Trinko*, the Ninth Circuit rejected the FTC's theory that Qualcomm's refusal to license chip competitors in breach of FRAND commitments constitute an unlawful refusal to deal, a Sherman Act §2 violation.[29] The Ninth Circuit further rejected the FTC's antitrust claim against Qualcomm's "no license, no chip" policy. The reasoning is that even if the policy allowed Qualcomm to charge exorbitant royalties in breach of FRAND, the FTC fails to state a competition harm, that is, the policy impaired the opportunities of rivals (all licensees have paid the same).[30] Lastly, the FTC's exclusive dealing claims based upon Qualcomm's volume discount to Apple also failed for lack of foreclosure effect.[31]

Continental Automotive Systems v. Avanci had a similar outcome before the Northern District of Texas. Continental alleged Sherman Act §§ 1 and 2 violations because the defendant is a patent pool whose members are competitors in the market. Its central claim is that Avanci's

19 *Supra* note 13, at 11.

20 *Id.*

21 *Id.* at 10.

22 *Id.*

23 *Rambus Inc. v. F.T.C.*, 522 F.3d 456 (D.C. Cir. 2008).

24 *Qualcomm Inc. v. F.T.C.*, 969 F.3d 974 (9th Cir. 2020).

25 *Continental Automotive Systems v. Avanci*, 485 F.Supp.3d 712 (N.D. Tex. 2020).

26 *Supra* note 23, at 464.

27 *I Claire Guo, Intersection of Antitrust Laws with Evolving FRAND Terms in Standard Essential Patent Disputes*, 18 J. Marshall Rev. Intell. Prop. L. 259 (2019), 270, at 276.

28 *Supra* note 23, at 465.

29 *Supra* note 24, at 994.

30 *Id.* at 1002.

31 *Id.* at 1005.

pooling arrangement is a horizontal monopoly agreement among competitors to charge supra-FRAND terms. Again, Continental's antitrust claims were all rejected. During the review, DOJ filed an amicus brief to the Court of the Northern District of Texas stating that Continental's complaint failed to state a harm to the competitive process, which was agreed by the Taxes Court.[32] In the U.S., it is clear that a FRAND breach does not constitute an antitrust violation unless there is foreclosure (almost impossible to prove). As for Continental's § 1 claim, the Court also rejected for reasons that Avanci's pooling arrangement allows individual licensee to license outside the pools.[33]

Thus, though there remain theoretical possibilities in applying U.S. antitrust laws against competition-restrictive FRAND breach by SEP owners, such cases could be very hard to prove. The U.S. antitrust laws allow monopolists to enjoy their monopoly profit on SEPs. Disputes over exorbitant royalties are only resolvable through FRAND enforcement.

The European practices in SEP and antitrust laws lean towards the U.S. approach. In the CJEU's decision in *Huawei v. ZTE*, CJEU decided that it is not in violation of Article 102 TFEU, that is, not abuse of dominant position, for a SEP owner to seek injunctive relief in the case which the SEP owner engaged in FRAND negotiations in good faith and the alleged infringer failed to diligently respond to such negotiation.[34] This is largely consistent with U.S. case laws where courts often refuse to grant injunctions for FRAND-encumbered SEPs.[35] In the Advocate General's opinion regarding the case, the Advocate General made two clear statements that distinguish from the Chinese approach: first, the Advocate General noted that the fact a company holds a SEP does not necessarily mean that it holds a dominant position; second, the Advocate General made it clear that competition law has no role in determining FRAND terms.[36] Overall, the European approach on SEP and antitrust/competition laws is similar to that of the U.S., where FRAND disputes per se do not raise antitrust concerns.

To conclude, while U.S. and EU authorities are separating FRAND and antitrust issues in practice, Chinese authorities have taken very different approaches. Where being a SEP owner does not necessitate dominant market position in the EU, the Chinese NDRC has found Qualcomm's dominant position based exactly on it being an SEP owner. Where U.S. DOJ has clarified that FRAND disputes do not raise antitrust concerns, Chinese courts and antitrust enforcement agencies (including in particular the SAMR) have included FRAND principles in determining the existence or not of anticompetitive actions.[37]

IV. CURRENT AND POTENTIAL ANTITRUST LAW HANDLES AGAINST SEP OWNERS

A. The Conventional Antitrust Handles

As one could see from the cases above, recent applications of antitrust law in FRAND disputes mainly involve three issues: first, excessive pricing (coupled by injunctions); second, tied selling; and third, refusal to deal. Although tied selling could also raise antitrust issues under the Sherman Act[38], it has not been applied in FRAND disputes in the U.S. for years. Among the recent applications, the first two occurred in China, and the unfair pricing cause of action is a unique and powerful weapon for implementers against SEP owners. Outside of China, there are no readily available antitrust remedies that would penalize unfair pricing by SEP owners, where the most they would get is a court-set FRAND rate. More importantly, the Chinese precedents have shown that FRAND violation in pricing could make a *prima facie* case for abuse of dominant position[39], and such violation of the AML could be found independent of FRAND related findings. (see *NDRC v. Qualcomm*).[40]

Under Chinese law, the most commonly applied antitrust provisions in FRAND and SEP disputes include Article 17 of the AML, under Chapter 3. Specifically, Article 17 regulates abuse of dominant position, and Article 17.1.1 and 17.1.5 address overpricing issue and tied

32 *Supra* note 25, at 736.

33 *Id*. at 732.

34 *Supra* note 5, at 11.

35 Nat'l Research Council, *Patent Challenges for Standard-Setting in the Global Economy: Lessons from Information and Communications Technology*, (2013), at Chapter 6.

36 Advocate General's Opinion in Case C-170/13 (Nov.25, 2014).

37 See *Huawei v. InterDigital*, supra note 7, at 58.

38 See Melamed & Shapiro, *supra* note 3, at 2135.

39 See *Huawei v. InterDigital*, *supra* note 7, at 57.

40 See NDRC Decision, *supra* note 13, at 11.

selling issue respectively.[41] These two provisions are applied in both *Huawei v. InterDigital and NDRC v. Qualcomm*. Article 17.1.1 could be a very far-reaching provision as it only has two elements, that the undertaking has dominant market position, and the undertaking abuses such dominant position by selling products at an unfairly high price, or buying products at an unfairly low price. While Article 17.1.5, tied selling, is more clear in its scope and interpretation.

With regard to these two elements, dominant market position is defined in Article 17.2, Article 18 and 19 of the AML, and the Guangdong High Court and the NDRC took identical approaches in defining dominant market position in SEP disputes. Namely, they both found that each SEP constitutes an individual market, where the respective SEP owner has 100% share of the market. The Guangdong High Court, under Article 17.2 of the AML, partially based its dominant market position finding on InterDigital being a non-practicing entity, where Huawei would not be able to balance the bargaining power through cross licensing.[42] Therefore, InterDigital has the power to dictate the terms in the transactions which constitutes dominant position under Article 17.2. The NDRC went a step further, presumed Qualcomm's dominant position, under Article 19, by the very fact that it owns SEPs in various wireless communication standards.[43] In either case, each SEP owner is deemed to have 100% market share in the specific SEP.

With regard to the determination of excessive pricing, however, the Chinese authorities have been rather liberal. Similar to the court in *Microsoft v. Motorola*,[44] where the court conducted an exhaustive process in determining what would have been a FRAND rate, the Chinese authorities listed factors that contributed to excessive pricing. It is worth noting that the only common factor used by the Guangdong court and NDRC was the SEP owner forced the implementer to cross-license patents to the SEP owner, while all other factors are different. The Guangdong court compared the licensing fee charged against other comparable implementers and took into consideration the non-practicing entity status of the SEP owner,[45] while the NDRC focused on practices including charging against expired patents and the using the wholesale price of the end products as basis for royalties.[46]

These two different sets of factors both resulted in finding of violation of Article of 17.1.1 of the AML. Particularly for *NDRC v. Qualcomm*, instead of setting a "reasonable" price first, then determine whether there is excessive pricing, the Chinese approach reflects the underlying logic of punishing wrongdoing. Excessive pricing is deduced from the SEP owners' wrongdoing that would result in excessive profit.[47] While it could be harder for private parties to establish excessive pricing violation under the AML without a clear and finite list of factors, it also gives both the enforcement and private parties more liberty to allege and try to prove such violation.

Notably, after the conclusion of *Huawei v. InterDigital and NDRC v. Qualcomm*, there are voices against defining FRAND violations as antitrust behaviors, in particular about excessive pricing. One line of argument is that antitrust enforcement requires a proof of competition harm. Though this burden may be less under the Chinese antitrust regime, it is still not satisfied in a SEP/FRAND antitrust-related case where the plaintiff only has evidence of exorbitant licensing terms but not harms to rival's opportunities.[48] Another line is that FRAND is offering sufficient protection and remedies to implementers and consumers against monopolistic behaviors, the additional antitrust scrutiny of the same behavior of licensors seems superfluous.

Various court guidelines and administrative regulations have since then been limiting the application of AML to SEP disputes. Guangdong High Court issued its *Guidelines for Judicial Review of Cases concerning Disputes on Standard Essential Patents* in 2018, providing that "FRAND violations do NOT necessarily give rise to AML violations"; however, it is still clear that excessive pricing in SEP terms will be subject to AML sanctions if there is "retracting and exclusionary effect to competition."[c] Similarly, Article 6 of *Rules Prohibiting Abuse of IPR* (2020) provides that, an undertaking should not be presumed to have dominant position just for owning intellectual property.

The limitations are by no means denying the AML grounds for FRAND disputes in China, but rather confirming the validity of such grounds by limiting their otherwise very broad scope. FRAND violations are not sufficient evidence *per se*, but still constitutes important basis

41 See *AML, supra* note 10, at Article 17.

42 *Supra* note 7, at 58.

43 *Supra* note 13, at 2.

44 *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 WL 2111217 at *2 (W.D. Wash. Apr. 25, 2013).

45 *Supra* note 6, at 56.

46 *Supra* note 13, at 9.

47 *Id*. at 6.

48 See Du Ning, *supra* note 6.

if not creates strong presumption for AML violations in China. Article 13 of the *Rules Against Abuse of IPRs* lists breach of FRAND principles as elements in determining actions excluding or limiting competition. It is clear that in China, SEP actions such as excessive pricing, refusal to deal and tie-in licenses [c guideline] are still basis for AML violation, though the plaintiff in future actions may bear a higher burden of proof of "retracting and exclusionary effect to competition." AML violation resulting from SEP licensing, as alleged by either private or public entities, will remain a feasible threat against SEP owners in China.

B. Additional Antitrust Handles Under Chinese law

Beside the conventional basis, antitrust laws offer other basis for SEP implementer to challenge competition-restrictive behaviors of SEP powers in standardization and SEP licensing, including issues of late disclosure and patent pool agreements.

The first is the application of antitrust laws in *Rambus*-like disputes. *Rambus* involves the late disclosure of SEP owners in standardization process.[49] Late disclosure includes, first, a failure to disclose patent information essential to a standard until after the standard is published, and then, a demand for royalties for late-disclosed patents. The potential consequence of late disclosure is that it prevents SSOs from adopting a non-proprietary solution in the standard. By not disclosing its patent information, the owner may also have acquired a monopoly for having its patented solution incorporated into the standard. Late disclosure is bad because it raises the cost of acquiring licenses for standards, which are eventually borne by consumers. All IPR policies of SSO dis-encourage or prohibit late disclosure. For example, Article 4.1 of the ETSI IPR Policy requires *"a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER's IPR which might be ESSENTIAL if that proposal is adopted."*

In U.S., late disclosure could give rise to an equitable defense (which renders the asserted SEP non-enforcement), but not Sherman Act Section 2 violations.[50] The *Rambus* court make it clear that failure to disclosure is not sufficient to prove required anticompetitive effect, which is the basis of a monopolization claim.[51] In China, late disclosure is actionable under antitrust laws, and claimants have a greater prospect of success under this claim. Article 13.1 of the *Rules Against Abuse of IPRs* prohibits *"undertaking having a dominant position, without justifiable reasons, carry out the following anti-competitive conduct, i) deliberately withholding its patent information to SSOs during standardization, or explicitly give up its right, but later."* The word *"deliberate"* stresses a knowing failure.[52] A typical fact pattern could be the participants in the working group who sets standard are applicants/inventers of patents. The antitrust analysis of late disclosure applies the rule of reason, the SEP owner could defeat the claim on ground of justifiable causes. While no wording in Art. 13.1 requires the challenger to provide specific proof of competition harm because of the late disclosure, such as that alternative non-patented solution is excluded, but such proof would certainly strengthen the antitrust claim.

Secondly, articles regarding monopoly agreements and concerted actions now have a play in SEP/FRAND disputes. The conventional antitrust challenges against SEP licensing rest solely on the abuse-of-market-dominance claims. This will change as patent pools are taking a greater role in SEP licensing. An SEP patent pool gathers a portfolio of SEPs owned by different owners and licenses them to implementers on behalf of these owners. Pools enhances the efficiency of SEP licensing by offering a "one-stop-shop" where implementers can acquire SEPs owned by multiple owners; however, they also raise a number of competition-restrictive concerns. First and foremost, the pooling arrangements of patent pools are reached among SEP owners which are direct competitors in the market. If the arrangements hide intentions of price fixing, market division, or output restraints, they would be challenged as monopoly agreements under Art. 13 of the Chinese AML. Even if the pooling arrangement is clear of competition-restrictive provisions, there is still risk that members to patent pools act concertedly in individual's licensing practice for cartel purposes. Besides, there is greater risk for SEP pools to carry out abuse-of-market-dominance by charging exorbitant terms when they have the combined power of multiple SEP owners.

As mentioned earlier, Continental Automotive Systems, a supplier of control units enabling cellular communication of cars, already challenged Avanci and several of its licensors (e.g. Qualcomm, Nokia, Sharp) for Sherman Act §§ 1 and 2 violations in 2019.[53] However, none of the antitrust claims were supported. The Northern District of Texas conclude that Avanci's arrangement allows individual licensees to license outside

49 *Supra* note 23, at 478.

50 See Guo, *supra* note 27, at 275.

51 *Supra* note 23, at 464.

52 See Rules against abuse of IPRs, *supra* note 8.

53 *Supra*, note 25.

the pools, suggesting that SEP implementers have to option to obtain license from individual licensers.[54] Also because of there is no proof that the licensers would act concertedly outside the pools, there is no finding of conspiracy to restrain trade. The Court acknowledged that its decision may have differed had the arrangement stipulated otherwise.[55]

Continental Automotive Systems may have a greater chance of success if its action were filed before a Chinese court. Chinese antitrust laws explicitly prohibit patent pools from restricting competition. Beside the general provisions in Art. 13 of the *AML, the Rules Against Abuse of IPRs* have the Article 12 enumerate the typical competition restrictive arrangement of patent pools, of which the first is restricting pool members from licensing outside the pools, either in an agreement or tacit consent. Other explicit prohibitions in Art. 13 include restricting R&D to foreclose innovation, mandatory grant-back, prohibition of validity challenge, and discriminatory treatment of similarly situated licensees. Notably, there is an exemption provision for monopoly agreement in the AML, which is Art. 15. If members to the patent pools could prove their arrangements are "(those) for the purpose of upgrading product quality, *reducing costs, improving efficiency*, unifying product specifications or standards, or carrying out professional labor division," and additionally "do not substantially restrict competition in the relevant market and can enable the consumers to share the benefits from the agreement," they are exempted from Article 13.[56]

However, Article 15 does not change that cartels are per se illegal. It can be interpreted as imposing an active duty for parties attempting to benefit from the exemption to ensure their arrangement have no substantial restriction of competition despite their contribution to market efficiency. Article 15 also has this unique clause requiring parties to enable consumers share the benefits of the exempted monopoly agreement.[57] This is another proof showing the difference between China and U.S. antitrust laws. Chinese antitrust laws disallow monopolists from acquiring monopolistic profit which essentially transfer wealth from consumers to monopolistic. This also explains why excessive pricing is regulated. The antitrust authorities intervene on excessive pricing not for the defense of the implementer, but to increase the welfare of the consumers.

V. THE INTERSECTION OF CHINESE ANTITRUST LEGISLATION AND FRAND PRINCIPLES AND BEYOND

Over the years, courts and antitrust enforcement agencies over the world have largely settled on their position regarding the application of antitrust law in SEP/FRAND related disputes. The U.S. and EU approach is to leave the disputes to the parties, and use patent and contract law to interpret and oversee the enforcement of the FRAND principle.[58] Such approach has a strong presumption, that patent and contract law would be sufficient to enforce the FRAND commitments, and such enforcement would be sufficient to counter the monopoly power and effects that come naturally with standard-setting.[59] However, from both court proceedings involving private parties, to public antitrust enforcement, to antitrust legislation, the Chinese authorities have demonstrated a different approach to the issue.

First, the Chinese legislators have explicitly put FRAND principles into antitrust laws and regulations. As much as the compliance requirements for SEP owners could be similar, such laws and regulations provide unique antitrust causes of action against FRAND violations in China. The Rules against IPRs defines late disclosure and certain actions in violation of FRAND as anticompetitive actions; and be precedents, Article 17 of the AML is clearly applicable in excessive pricing cases against SEP owners. In addition, as of Huawei v. InterDigital, which has not been overturned in any way and remains the landmark case for SEP/FRAND disputes in China, the Chinese practice largely conforms to a synchronized FARND and antitrust law enforcement.[60] That is, FRAND violations are deemed as per se violations under antitrust laws. Even after the later NDRC decision not involving FRAND principle and the Guangdong High Court guidelines stating that FRAND violations do not necessarily raise AML violations, FRAND violations would still make strong prima facie cases for antitrust violation under the laws and regulations incorporating FRAND principles.

Second, the Chinese antitrust regime provides additional protection against SEP owners with dominant position beyond FRAND. NDRC decision against Qualcomm made it clear that Chinese AML alone, without referencing to FRAND principle, is sufficient to penalize SEP owners

54 *Id*. at 732.

55 *Id*.

56 See AML, *supra* note 10, at Article 15.

57 *Id*.

58 See Melamed & Shapiro, *supra* note 3, at 2111.

59 *Id*. at 2132.

60 See Guo, *supra* note 27, at 270.

for actions that would otherwise be FRAND violations.[61] Chinese authorities have also demonstrated that actions such as excessive pricing, that usually only falls under patent and contract law in other jurisdictions, are also subject to AML. This is particularly worth noting as FRAND disputes regarding pricing usually only results in a re-negotiation or a court-set rate in other jurisdictions, while in China it could raise antitrust issues regarding excessive pricing. The Chinese AML has explicit provisions (Article 17) against excessive pricing and, just the existence of such provision, could provide implementers with additional bargaining power in the otherwise imbalanced negotiation with SEP owners.

Lastly, a close reading of the Chinese AML also provides additional potential causes of actions against SEP owners as well SSOs, where Article 15 could be used to compel patent pools to adopt extra measures to ensure the protection of competition and consumer interests, which, in turn, protects the SEP implementers.

VI. CONCLUSION

As antitrust law is fading away in SEP/FRAND disputes in the U.S. and the EU, the Chinese Anti-Monopoly Law and relevant antitrust laws and regulations remain strong and active in cases against SEP abuses. The Chinese antitrust regime imposes additional duties on SEP owners and clearly defines actions, that do not usually fall under antitrust law in other jurisdictions, as anticompetitive. The Chinese courts and antitrust enforcement have also shown their willingness to enforce antitrust laws in FRAND disputes where their U.S. and EU counterparts are leaving the issues to patent and contract law. With the ever-growing Chinese market, the importance of the unique Chinese antitrust causes of actions against SEP owners would only increase. Before FRAND evolves into its perfect form and can effectively constrain the monopoly power comes with standardization, which does not the Chinese antitrust laws and regulations will continue to feasible, if not some of the most effective legal weapons against SEP abuses.

61 *Supra* note 13.

DEVELOPMENT OF ADJUDICATING GLOBAL FRAND RATE IN CHINA: A REVIEW OF *OPPO v. SHARP*

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On August 19, 2021, the Supreme People's Court of China (hereinafter referred to as the "SPC") issued a final ruling which rejected the jurisdictional objections raised by the appellants Sharp Corporation and ScienBizip Japan Corporation (hereinafter referred to as "Sharp") over the standard essential patents (hereinafter referred to as "SEPs") license dispute with the appellee OPPO Guangdong Mobile Communications Co., Ltd. and the Shenzhen Branch of OPPO Guangdong Mobile Communications Co., Ltd. (hereinafter referred to as "OPPO"). This is the first time that China's highest judicial authority explicitly confirmed the Chinese courts' authority on adjudicating global FRAND rates for SEPs, and clarified which court has jurisdiction over such cases.

Starting from the early 2010s, the Chinese courts have heard a series of SEP cases in the field of mobile communications. "Standard Essential Patents Licensing Dispute" is an independent cause of action in China, which can be filed either by the patent holder or the potential licensee. Such a cause of action does not necessarily connect with any infringement action or declaration of non-infringement action. In the past, precedents filed under the cause of action of SEP Licensing Disputes were limited to Chinese patents only, regardless of whether the negotiation was global in nature. For example, in *Huawei v. InterDigital*, the Shenzhen Intermediate Court adjudicated on the FRAND rate for InterDigital's Chinese SEP portfolio, ant its ruling was affirmed by the Guangdong High Court. It is undisputed that the Chinese courts have authority to adjudicate the FRAND rate for Chinese SEPs as these patents are issued under China's Patent Law and implemented in China market.

However, in 2020, quite a few cases were filed before lower Chinese courts under the cause of action of SEP licensing Disputes for setting the FRAND global rate. For example, in December 2020, the Shenzhen Intermediate court ruled in *OPPO v. Sharp* that it will determine the global FRAND rate and other licensing terms for Sharp's 3G, 4G and WLAN SEPs. Despite the jurisdictional objection filed by Sharp, for the first time, a Chinese court expressed its willingness in a ruling to determine global FRAND royalty rates. The Shenzhen court states in its ruling that it "believes that the determination of global royalty rates by the court can facilitate the overall effectiveness, fundamentally resolve the disputes between two parties, avoid the repeated litigation in different countries and therefore is in accordance with the nature of FRAND principle."[2]

In addition, the Wuhan Intermediate Court accepted a lawsuit filed by Xiaomi against InterDigital related to determination of global FRAND rates and stated in its ruling that *"adjudication of global royalty rates can resolve the problem of choosing and determining the scope of licensing between two parties, save the licensing cost, reduce litigation exhaustion and therefore is extremely reasonable."*[3] Samsung also filed before Wuhan Intermediate Court for the global rate setting of Ericsson's 4G and 5G SEPs.

However, it was not until the appeal of OPPO v. Sharp that the SPC was for the first time to review the issue of global rate setting by Chinese courts. This article will review why disputes on the jurisdiction over SEP royalty cases arises and how the *OPPO v. Sharp* ruling responds to these questions.

I. BACKGROUND

The dispute on jurisdiction over SEP royalty cases arise from multiple aspects. Firstly, it is not settled what the nature of FRAND obligation is under Chinese law and accordingly what the nature of a FRAND royalty dispute is. Under Chinese law, different jurisdictional rules are applicable for patent infringement cases and contractual disputes. On one hand, SEP royalty cases have some characteristics of patent infringement disputes, which may involve issues such as whether the involved patents are standard essential patents, whether the licensee has implemented the patent at issue, and the validity of the patents. On the other hand, SEP royalty cases have the characteristics of contract disputes, which may involve issues such as the determination of licensing conditions such as the subject matter of the license, royalty rates and license terms. Since the jurisdiction of infringement disputes and contract disputes are governed by different laws, it is difficult to determine the jurisdiction of an action for SEP royalty cases.

Secondly, FRAND royalty cases usually contain some extraterritorial elements, and international comity should be considered. In SEP royalty cases, it is not uncommon that one of the litigants is a non-Chinese company, which may have no domicile in China. In addition, a SEP license in many SEP royalty cases is a worldwide license to the patentee's owned and controlled SEPs, which raises the question whether a Chinese court can decide the FRAND rate for non-Chinese patents. A global license dispute may also result in parallel litigation around the world. As a result, there are disputes over jurisdiction, as well as issues of international judicial comity around the world, which complicate the jurisdiction of SEP global royalty cases.

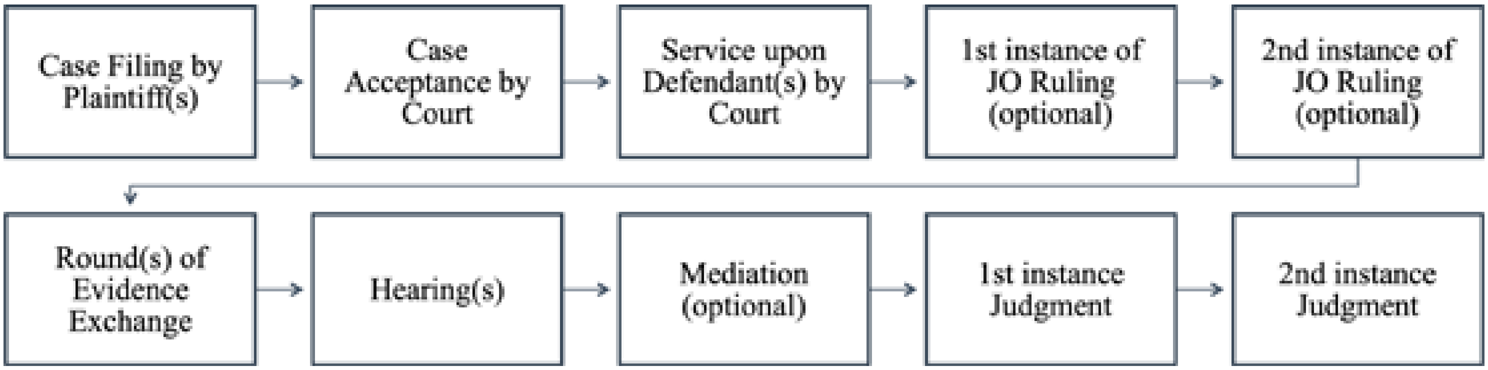
Before diving into the factual and procedural background of the *OPPO v. Sharp* case, it might be useful to introduce basics of Chinese procedural law to understand why the SPE stepped in at this stage of the case.

2 Shenzhen Court's 1st instance Jurisdictional Objection ruling in *OPPO v. Sharp*.

3 *Xiaomi Communication Technology Co., etc. v. InterDigital, Inc.*, etc., A Dispute over Standard Essential Patents Licensing, Dec. 4, 2020, (2020) E 01 Zhi Min Chu 169 Zhi Er.

Regardless of the type of case, SEP-related issues are almost all heard by an IP tribunal within a court, or by specialized IP courts. These cases all follow similar procedural steps. The flowchart below provides an overview of the entire life cycle of a civil litigation case in China, including those related to SEPs.

Chart 1: Life Cycle of Civil Litigation Proceeding in China



The court system in China normally consists of the Basic People's Court, the Intermediate People's Court, the High People's Court, and the SPC, in ascending order of hierarchy. But China has a relatively centralized jurisdiction over technology-related intellectual property cases where the appeal will go directly from intermediate courts to the SPC, skipping the high courts. The court of first instance for SEP cases is the Intermediate People's Courts at certain locations appointed by the SPC, including Beijing, Shanghai and Guangzhou IP Courts. From January 1, 2019, the SPC's own internal tribunal - the Intellectual Property Tribunal – handles all second instance appeals of SEP cases. If an Intermediate People's Court issues a first instance judgment or jurisdictional objection ruling, the judgment or ruling does not take effect immediately, and any party may, within the appeal period, appeal to the IP Tribunal of the SPC, which will conduct a full hearing on the determination of facts, application of law, and procedural issues of the case, and issue a second instance judgment.

"JO" in the flowchart refers to the jurisdictional objection proceeding, which is an option to be exercised by defendant(s). In most, if not all, SEP cases, defendant(s) will choose to file for JO as a delaying tactic. Once filed, the trial and appeal of the JO may take six months to one year, allowing defendant(s) to better prepare evidence and litigation strategy. The chance of winning a JO is low, but it is almost a routine step taken by defendant(s) in civil litigation, given the fast-moving pace of Chinese litigation proceedings otherwise. The *OPPO v. Sharp* ruling we discussed here occurred at the stage of JO where Sharp appealed against the first-instance JO ruling by the Shenzhen Intermediate Court thus the SPC for the first time had the opportunity to review the jurisdictional issues in global FRAND royalty cases. In the other two cases, *Xiaomi v. InterDigital and Samsung v. Ericsson*, the JO stage did not go up to the SPC as the parties settled at an early stage of the litigation.

II. INTRODUCTION OF *OPPO v. SHARP*

On March 25, 2020, the first-instance court - the Shenzhen Intermediate People's Court - formally accepted the global SEP litigation filed by OPPO against Sharp. On October 16, 2020, the Shenzhen Intermediate People's Court held in a first instance ruling that it has jurisdiction on the global royalty case. Sharp refused to accept the ruling and initiated an appeal to the SPC in December.

The SPC found out the following facts after the hearing:

1. OPPO's main place of business, manufacturing and sales of smart terminal products are in China. As of December 31, 2019, OPPO's sales in China accounted for 71.08 percent of its revenues.

2. The place of licensing negotiation: on February 19, 2019, the parties held conference at OPPO Shenzhen Company.

3. SEP Licensing terms: the SEP licensing period is 5 years. The licensed patents are 3G, 4G, WiFi and HEVC SEPs with a "worldwide non-exclusive license, without sub-license right, and limited to the field of use for the implementation of the licensed standards."

4. During the negotiation period, from January 2020, Sharp filed patent infringement lawsuits against OPPO or its partners in the Tokyo District Court of Japan, the Munich District Court of Germany, the Mannheim District Court of Germany and the Intellectual Property Court of Taiwan.

Based on the parties' claims and preliminary findings, the SPC believed that the key issues in the second instance of this case include: (1) whether Chinese courts have jurisdiction over the present case; (2) if Chinese courts have jurisdiction over the present case, whether it is appropriate for the first-instance court to exercise this jurisdiction; and (3) if the first-instance court has jurisdiction, whether it is appropriate to rule on the global royalty terms of the involved SEPs.

After the trial, the SPC made a final ruling of this case, confirming that the Chinese courts shall have jurisdiction over the disputes on the determination of licensing conditions of the SEPs worldwide, provided that both parties are willing to reach a global licensing agreement and the case is more closely related to the Chinese courts.

III. KEY POINTS IN THE SPC'S JUDGMENT

A. Whether Chinese Courts Have Jurisdiction Over the Case.

The SPC regards that under the circumstance that the defendants (Sharp) are foreign enterprises without residence and representative organization within the territory of China, the criteria for determining the proper connections to China may include whether the place is located within the territory of China, including the place of patent granted, the place of patent implementation, the place where the contract is entered into, the place of negotiation for the patent license, the place of contract performance, or the place in which the property subject to distraining or enforcement is located. As long as one of the aforementioned locations is within the Chinese territory, it should be deemed that the case is properly connected to China, and the Chinese court has jurisdiction over the case. In the present case, the Chinese court, no matter whether those courts are located at the place where the patents are granted, or at the place of patent implementation, or at the place of negotiation for the patent license, all have jurisdiction over the case in accordance with the law.

B. Whether it is Appropriate for the Shenzhen Court to Exercise the Jurisdiction

The SPC holds that consideration may be given to the jurisdictional join points of the place of patent granted, the place of patent implementation, the place where the contract is entered into or the place of negotiation for the patent license, the place of contract performance, or the place where the property subject to distraining or enforcement etc. based on the specific circumstances. Therefore, Shenzhen Court, the court of the first instance, as the court at the place of patent granted and the place of negotiation, can exercise jurisdiction over the present case.

C. Whether the Shenzhen Court is Appropriate to Rule on the Global Royalty Terms of the Involved SEPs

The SPC holds that whether it is appropriate for the first-instance court to rule on the royalty terms of the involved SEPs on a global scale should be comprehensively considered based on the investigation of the basic facts of the jurisdictional disputes in the present case, combined with the particularity of the SEP license disputes. Firstly, the parties in the present case were willing to reach global license agreement for the involved SEPs and they had conducted negotiations. Secondly, it is clearly that the present case has closer relationship to China. Finally, it should be noted that if the parties can reach agreement on the court which can make a judgement on the SEP global royalty terms, such court indeed has jurisdiction and can adjudicate on the global royalty terms for the SEPs between the parties. However, an agreement by the parties not a necessary condition for the jurisdiction of a specific court over the SEPs' global royalty terms. Given the willingness of the parties to reach a global license agreement and closer connection to Chinese courts, it is not improper to hold that the court of first instance is suitable to rule on the global royalty terms of the SEPs involved based on its jurisdiction over the case.

IV. ANALYSIS OF *OPPO v. SHARP*

A. The SPC has Determined the Following Basic Principles for Adjudicating the Jurisdiction over SEP Global Royalty Cases

1. SEP license disputes "may be regarded as a special type of disputes with a relatively more contractual nature"

Whether a Chinese court has jurisdiction over a foreign civil dispute filed by defendants without domicile or a representative organization within the territory of China depends on whether the case is properly connected to China.[4] To determine whether the SEP license dispute has proper connection with China, the characteristics of such a dispute should be taken into account firstly. In the *OPPO v. Sharp* cases, the first-instance

4 Article 272 of the *Civil Procedure Law of the People's Republic of China.*

court and the SPC reached basically the same conclusion on the nature of this type of case. The Shenzhen Intermediate People's Court held that the SEP royalty case was neither a typical contractual dispute nor a typical infringement dispute. Therefore, it could not be simply treated as a tort dispute when determining the competent court. The SPC basically agreed with this statement and added that the core of SEP license disputes is to request the court for the determination of royalty terms, in order to encourage the parties to eventually conclude or perform the license agreement. Therefore, SEP license disputes may be regarded as a special type of dispute with a relatively more contractual nature.

Previously, in *ZTE v. Conversant* and *Xiaomi v. IDG*, the SPC, Wuhan Intermediate Court and other courts' opinions were basically consistent with the Shenzhen Intermediate People's Court. In *OPPO v. Sharp*, the SPC for the first time proposed that a SEP licensing dispute be considered as a special type of dispute with a relatively more contractual nature.

2. The SPC Continues the use of the Principle of Closer Connection to Determine Whether the Chinese court has Jurisdiction over this Case

In terms of the licensing scope of SEP royalty case, it generally includes two types: one is to request for adjudication on global royalty rate, such as the *Xiaomi v. IDG*, and *OPPO v. Sharp* cases; the other is to adjudicate the country-based SEP royalty rate, such as in *Huawei v. IDC, Huawei v. Conversant* and, *ZTE v. Conversant*, etc. *Huawei v. IDC* is a typical case in the early stage of the litigation concerning SEP royalties heard by Chinese courts. The underlying claim in the case was to request the court to determine the Chinese SEP royalty rate hold or controlled by IDC, and the second instance court Guangdong Higher People's Court made the judgment based on the closer connection principle. The Guangdong High Court held that the involved SEPs were applied for or granted by IDC in the Chinese territory, and the parties had not previously agreed on the court with jurisdiction. Since the domicile of Huawei, the place of implementation of the patents and the place of negotiation were all in the Chinese territory, the court ruled that the case was subject to Chinese law.

Recently, in *Xiaomi v. IDG*, the Wuhan Intermediate Court for the first time determined that a Chinese court should have jurisdiction over a global SEP royalty dispute. The Wuhan Intermediate Court held that Xiaomi's domicile, R&D, production and sales bases are all located in the Chinses territory, and one of its affiliates is located in Wuhan and is responsible for the implementation of the SEPs. Therefore, the Wuhan Intermediate Court should have jurisdiction over the case.

Based on an analysis of the above two matters, we could conclude that although the scope of the patents involved in the two cases is different, there is no substantive difference in the internal logic for the courts to determine whether they have jurisdiction or not. Both cases are based on the principle of closer connection. In OPPO v. Sharp, the SPC confirmed the "closer connection" principle to determine whether China has jurisdiction. It noted that the Chinese SEPs account for a high proportion in the relevant SEP portfolio. It also noted that the place of implementation and licensing negotiation for the relevant patents are all located in China, so there is a connection between this case and China, and the Chinese courts should have jurisdiction.

a) Elements of "Closer Connection"

The SPC held that when determining whether the court of first instance has jurisdiction over global royalty cases, the court should firstly consider whether the parties are willing to reach worldwide licensing for the involved SEPs, which constitutes a fundamental factual basis for the court to determine the jurisdiction. In *OPPO v. Sharp*, it is clear that the negotiations of between the parties included global license terms for SEPs.

Once it is confirmed the parties are willing to enter into a global license, the court should use the principle of the closer connection and the notion of a "convenience court" to decide whether the Chinese court is best placed to adjudicate global license terms for the involved SEPs. This includes consideration not only whether the court in question is best placed to ascertain the involved SEPs, but also to facilitating the enforcement of judgments.

In *OPPO v. Sharp*, the SPC considered the following four factual elements: (a) SEPs licensed countries and distribution involved in licensing negotiations; (b) the main place of implementation, main place of business, or main place of revenue source of the SEPs implementer; (c) the place of negotiation, or the place where the contract is entered into between the parties; (d) the locations of the parties' property subject to distraining or enforcement. In this case, because most of the patents involved are Chinese patents, the licensee's place of patent implementation, the place of main business, main source of revenue, and patent licensing negotiation place are all in China, and China is also the place where the property can be seized or enforced. Therefore, the Chinese court adjudicating on the licensing conditions and terms of the involved SEPs on a global scale is not only conducive to the identification of patent enforcement, but also facilitates the enforcement of the case ruling. Due to the fact that the court of first instance, as the court of the place where the patent was implemented and the place where the license was negotiated, could exercise jurisdiction over this case. On the basis that the court of first instance has jurisdiction over this case, it is appropriate to make a ruling on the global licensing conditions of the involved SEPs.

b) Consensus on Jurisdiction is Not a Must

The SPC held that if the parties to an SEP licensing dispute voluntarily reach an agreement during the negotiation process, jointly choosing the courts of a certain country to adjudicate the global royalty rate, then the courts of that country may govern and rule on the global licensing conditions between the parties. The practice of choosing the competent court by agreement is in line with international practice. The SPC recognizes a mutual agreement and autonomy between the parties to confer jurisdiction on a national court to hear a global royalty litigation over SEPs. However, in the absence of a mutual choice between the two parties, it should be premised on the willingness of both parties to reach a global license, and the court should follow the principle of closer connection to make jurisdictional decisions.

V. WHAT TO EXPECT NEXT?

From *Huawei v. IDC, Huawei v. Samsung, ZTE v. Conversant*, to *Xiaomi v. IDG, OPPO v. Sharp*, and *OPPO v. Nokia*, the Chinese courts are becoming more deeply involved in the coordination and resolution of international SEP disputes through anti-suit injunctions, anti-anti-suit injunctions, global royalty rate rulings, etc. From the *Xiaomi* SEP royalty case to the *OPPO* case, the courts at all levels have begun to accept to hear litigation for global royalty rates, and to prohibit extraterritorial courts from conducting parallel proceedings through anti-suit injunctions, in order to effectively resolve disputes between parties. The SPC has clarified this issue through the *OPPO* case, which means that the Chinese courts will take more affirmative steps to hear global FRAND cases in the future. However, this is far from the end of the story. It is still to be observed how the principles set by the SPC will be further interpretated and applied by lower courts. For example, what elements should be considered in deciding "closer connection"? And what priority should be given to certain elements? The battle for jurisdiction over global SEP royalty rate cases is far from order, and the SPC's ruling in *OPPO v. Sharp* is only the beginning.

COMPETITION POLICY AND REGULATION IN CHINA'S DIGITAL ECONOMY

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I. INTRODUCTION

With the maturity, popularization, application and expansion of communication, the Internet and other technologies, the digital economy is booming. Big data, cloud computing, artificial intelligence and the emerging "metaverse" are placing the world in a wave of industrial digitization. Meanwhile, how to implement competition regulation for the digital economy is also a common problem faced by many jurisdictions around the world in recent years. How to identify anticompetitive effects in the digital economy? How to design corresponding remedy measures? And the most important and essential issue is how to promote market competition through implementation of the AML? In order to solve these and other problems, many jurisdictions around the world have taken a series of actions, such as issuing antitrust fines for digital giants, investigating the digital market, issuing research reports, amending laws, issuing special bills, etc.

China is not only an antimonopoly jurisdiction with world influence, but also the second largest country in the global digital economy. Coupled with the characteristics of transition economies in China's market system, the regulation of China's digital economy is not the most representative in the world, but may be the most characteristic. Based on the thoughts above, this paper will first introduce the characteristics of China's digital economy regulation, and, on this basis, look forward to the future of China's digital economy from the perspective of competition policy and industrial development.

II. CHINA'S DIGITAL ECONOMY AND REGULATORY CHARACTERISTICS

A. Transformation, Opening and Conflict: Development of the Chinese Digital Economy

Before considering the competition policy of China's digital economy, this paper hopes to introduce a concept about the market and law of China's system. From a macro perspective, China is a transitional economy in the process of continuous improvement. The "improvement" mentioned here includes not only about the market, but also the system, rules, and law. The development of China's market can be summarized as a process of transferring space from the public sector to the private sector. In the era of planned economy, China's industries and systems were formed around state-owned enterprises and plans. Nowadays, the continuous expansion and opening of China's market will inevitably reshape China's industrial and institutional structure. In such a "one advance and one retreat," various issues of interest balance naturally emerge.

At present, the digital economy takes the Internet industry as the main development carrier. Under the background of loose regulatory environment and lack of all-round competition at home and abroad and relying on the huge domestic market, China's Internet industry continues to give birth to new business models through follow-up innovation.[2] In the process of the rapid development of Chinese Internet enterprises, in addition to the problems of "nonstandard and insufficient development, shortcomings and risks,"[3] "savage growth and disorderly expansion" [4]pointed out by the CPC Central Committee Financial and Economic Commission and the Commission for Comprehensively Deepening Reform, they, like other fields in China that have gradually realized marketization after economic transformation, have great impact on some traditional industries. For example, social network app partially replaces traditional mobile phone calls and text messages, and electronic payment replaces traditional payment and settlement channels. And these fields were generally monopolized by state-owned enterprises in the past.

B. Multiple Laws & Departments: Regulatory Characteristics of China's Digital Economy

2021 is considered to be the year of "strict supervision" of China's digital economy.[5] The administrative punishment decisions of Alibaba, Tencent, Meituan and other digital platform enterprises for violating China's antimonopoly law were released this year. Among them, Alibaba received fines of up to 18.228 billion yuan, which was more than the sum of China's antimonopoly administrative fines in the previous 12 years. The stock price shows that the capital market seems to lack confidence in China's platform economy - market value of Chinese Internet companies fell

2 China's Alibaba, Tencent and other Internet companies were founded before the 21st century. At that time, China had not promulgated Anti-monopoly Law, E-commerce Law, Personal Information Protection Law, and other regulatory laws, and also, corresponding regulatory authorities had not been established. In the early days, China's Internet industry mainly imitated emerging or mature Internet business models around the world, such as e-commerce, social networks, etc. As China's huge internal market continues to deliver new demand, there have been derivative innovations such as mobile payment, takeout and short video platforms in China.

3 The ninth meeting of the Financial and Economic Committee of the CPC Central Committee. See at http://www.gov.cn/xinwen/2021-03/15/content_5593154.htm, in Chinese.

4 The 21st Meeting of the Central Committee for Comprehensively Deepening Reform. See at https://www.12371.cn/2021/08/30/ARTI1630323508362885.shtml, in Chinese.

5 Chen Yongwei, China's digital economy at the inflection point, economic observer, January 11, 2022. See at http://www.eeo.com.cn/2022/0111/518271.shtml, in Chinese.

by 5.8 trillion yuan in 2021. Indeed, the regulation and punishment of antimonopoly law are very eye-catching, but if the study of China's digital economy regulation only focuses on the topic of antimonopoly, it will regret to lose a more comprehensive perspective.

China's supervision in the field of digital economy has the institutional characteristics of "multi law co governance and multi department co management." In addition to the Antimonopoly Law, Article 12 of the Unfair Competition Law specifically stipulates unfair competition conducts in the Internet field, and the E-commerce Law is a law regulating the field of e-commerce. At the same time, Consumer Protection Law, Price Law, Advertising Law, and corresponding departmental regulations also provide law enforcement basis for the supervision of China's digital economy. Similar behaviors may violate different regulatory regulations at the same time. The "one out of two" behavior[6], which is being strictly regulated by China, is a good example. Alibaba's "one out of two" behavior is subject to the punishment of the Antimonopoly Law, while Vipshop's "one out of two" behavior is subject to the punishment of the Unfair Competition Law. Price collusion and dumping at low prices may not only violate the antimonopoly law, but also be suspected of violating the price law. Price collusion and low-price dumping may violate the Antimonopoly Law and the Price Law simultaneously. The advantage of this regulatory system is that the government can accurately regulate the platform economy from different angles. In order to achieve this effect, the boundaries of different regulatory rules should be clarified, and functions and powers of different regulatory authorities had to be straightened out. At present, there is still much work to be done in the coordination of regulatory rules and departments.

C. Compliance Systems: A Feasible New Model

In addition to the "confrontational" regulation, China's platform economy also has a "cooperative and interactive" compliance mechanism. April 13, 2021, the State Administration of Market Regulation, together with the Office of the Central Cyberspace Affairs Commission and the State Administration of Taxation, held an administrative guidance meeting for Internet platform enterprises, which was attended by representatives of 34 Internet platform enterprises. Afterwards, the 34 platform enterprises participated the meeting took their initiative to publicly publish the Compliance Operation Commitment, which is a very special approach on a global scale. In November, the China Association for standardization published the public draft of the “Anti-monopoly Compliance Management Rules for Platform Undertakings.” This draft standard was proposed by dozens of platform enterprises such as Alibaba, Tencent and Baidu, and jointly drafted by the Association for Standardization and numbers of research institutes of colleges and universities.

III. COMPETITION POLICY OF CHINA'S DIGITAL ECONOMY

Strict supervision is not the whole picture of China's digital economy. China has a clear policy system to support the development of this industry.

A. Industrial Development Policy for China's Digital Economy

In China's "14th five-year plan" development plan announced in 2021, the word "digitization" appeared more than 20 times in the text, and the promotion of "digital industrialization" and "industrial digitization" has been highlighted. [7] January 2022, the State Council of China issued the "14th five-year plan" for the development of digital economy, this document’s objectives of industrial promotion include increasing the number of Gigabit broadband users from 6.4 million to 60 million within five years, and increasing the penetration rate of industrial Internet platform from 14.7 percent to 45 percent. Coincidentally, the regulatory policy requirements also take promoting development as an important goal. The 2020 economic work conference of the CPC Central Committee called for "strengthening antitrust and preventing disorderly expansion of capital." At the same time, it also made it clear that "the State supports the innovative development of platform enterprises and enhances international competitiveness."[8]

In March 2021, the ninth meeting of the financial and Economic Commission of the CPC Central Committee specially studied the topic of "promoting the standardized, healthy and sustainable development of platform economy," while affirming the positive role of the platform economy and insisting on continuing to develop the digital economy, the meeting also pointed out the existing problems of China's platform economy and the maladjustment of the regulatory system. In August 2021, the 21st meeting of the Comprehensive Deepening Reform Commission of the CPC Central Committee pointed out that through investigating monopoly and unfair competition of relevant platform enterprises according to law, competition in the market has steadily improved. At the same time, it stressed the need to pay equal attention to both regulation

6 This is a business practice that requires the opposite party of the transaction to only trade with the actor or the object designated by the actor, but not with others.

7 The 14th five-year plan for national economic and social development of the people's Republic of China and the outline of long-term objectives for 2035. See at http://www.gov.cn/xinwen/2021-03/13/content_5592681.htm, in Chinese.

8 2020 CPC Economic Work Conference. See at http://www.gov.cn/xinwen/2020-12/18/content_5571002.htm, in Chinese.

and development, and set up a "traffic light"[9].[10]In October 2021, the Political Bureau of the CPC Central Committee conducted a collective study entitled "grasping the development trend and law of digital economy and promoting the healthy development of China's digital economy,"[11] The economic work conference of the CPC Central Committee in 2021 not only continued the expression of "preventing the barbaric growth of capital," but also made it clear that "fair supervision ensures fair competition."[12] This meeting also proposed to "correctly understand and grasp the characteristics and behavior laws of capital" and clarify that "the socialist market economy is a great creation, and there will be various forms of capital in the socialist market economy."

B. China's Regulation of the Digital Economy is Constrained by the Rule of Law

China's regulation and corresponding rules in the field of platform economy are not arbitrary, but are constrained by professionalism and the rule of law.

In February 2021, the Antimonopoly Commission of the State Council issued Antimonopoly Guidelines on Platform Economy. From the text, it can be seen that this guideline is not a product or tool of "campaign-style" law enforcement. The reason is that it not only lists the possible abuse of market dominant position by platform enterprises, but also stipulates the possible justifications for each kind of behavior. For instance, the possible justifications for platform enterprises to implement the "one out of two" limited trading behavior include "protecting the interests of trading counterparties and consumers," "maintaining a reasonable business model," etc.

It can also be noted that the expression "relevant markets may not be defined" once appeared in the exposure draft of the guide, which was deleted from the final published guide. This deletion means that “not defining the relevant market” has not been considered as a widely adopted part of law enforcement framework, indicating that China will continue to adhere to the traditional analysis and identification framework and standard in the implementation of the AML in the field of platform economy.

Last, but certainly not least, the implementation of regulation through the introduction of rules is also the embodiment of the restriction of regulation by the rule of law. Among these legislations have been or are being formed, some new concepts and methods emerged,

C. Perfecting China's Supervision of the Digital Economy

China's current performance in formulating regulatory laws for the digital economy may be relatively conservative, and this conservative trend may continue. While adhering to the tradition, China is also constantly strengthening its AML enforcement agencies, so as to provide more authority, resources, professionalism, and procedural guarantees for AML enforcement.

When dealing with the challenge of digital economy to traditional law, we can see that some jurisdictions are trying to make special legislation. Among these legislations that have been or are being formed, some new concepts and methods have emerged, such as "gatekeeper" in Digital Market Act (“DMA”) in Europe and "covered platform" in American Innovation and Choice Online Act. In contrast, there seems to be no sign that China is making similar legislative attempts.

China is revising its AML and has entered the stage of deliberation by the Standing Committee of the National People's Congress at which there would seldom be structural changes to the bill. The current draft has not formulated specific provisions for digital economy, instead, it only stipulates that "Undertakings shall not exclude or restrict competition through data and algorithms, technology, capital advantages and platform rules," which is only declarative in nature. Therefore, it can be predicted that the antitrust supervision in the field of platform economy in China still follows the traditional professional analysis framework, which is consistent with the suggestions and predictions of many Chinese scholars. China has not only formulated antimonopoly guidelines for platform economy according to the current AML, but also issued fines for some platform enterprises. Therefore, China's regulatory rules and law enforcement team have considerable adaptability to supervise platform economy.

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9 "Traffic light" is a metaphor, which means that supervision is not to blindly prohibit, but to set clear behavior boundaries and enhance certainty through rules, so as to effectively guide market expectations and behavior.

10 Xi Jinping presided over the 21st meeting of the Comprehensive Deepening Reform Commission of the CPC Central Committee. See at https://www.12371.cn/2021/08/30/ARTI1630323508362885.shtml, in Chinese.

11 Xi Jinping presided over the 34th collective study of the Political Bureau of the CPC Central Committee. See at http://www.gov.cn/xinwen/2021-10/19/content_5643653.htm, in Chinese.

12 See at https://www.12371.cn/2021/12/10/ARTI1639136209677195.shtml, in Chinese.

In November 2021, China's National Antimonopoly Bureau was officially established, which marks the new strengthening of China's antimonopoly law enforcement agency after the reform of state institutions in 2018. China's AML was implemented in 2008. In the first 10 years, the National Development and Reform Commission ("NDRC"), the Ministry of Commerce and the former State Administration for Industry and Commerce respectively enjoyed some AML enforcement power. After the reform of state institutions in 2018, the State Administration of Market Regulation ("SAMR") uniformly exercised the power of antimonopoly law enforcement. However, only one bureau actually undertakes the AML enforcement function, and China's AML enforcement resources were insufficient. The establishment of the National Antimonopoly Bureau has increased the number of bureaus under SAMR to undertake AML enforcement from one to three, and the staffing has been greatly expanded accordingly. And, China will have a more normalized AML enforcement system in the future, which will bring more professional and procedural guarantee to China's AML, and make China, a young antimonopoly jurisdiction, move forward and grow towards maturity.

IV. CONCLUSION AND PROSPECT

When it comes to China's digital economy, many people will think of the increasing and upgrading strict supervision, and this paper hopes to provide a different perspective and view. There are two backgrounds that cannot be ignored in the development of China's digital economy. One is that the basic legal rules are imperfect – in many countries and regions, there have been rules and corresponding practices in antimonopoly, personal information, and privacy before the emergence of digital economy; Second, the special problems of the development of emerging industries in transition economies – the improvement of the market, the opening of regulated industries and the impact of emerging industries. China's policy on digital economy is not strict supervision, but to promote the healthy development of norms through fair supervision. The former may reduce professional requirements and eventually deviate from the track of the rule of law, while the latter adheres to professionalism and is always on the track of the rule of law.

The main task of China's digital economy competition regulation in the future is to further concretize the competition policy proposed by the state in the field of digital economy and implement it in the cases, which requires that regulatory and law enforcement actions should not only comply with the law of innovation and development of platform economy, but also produce practical effects of promoting development. In the meantime, the shrinking confidence of the capital market in China's digital economy may change. With the enrichment of capital China's digital economy will have more resources to achieve innovation. With the continuous expansion, opening up and improvement of the Chinese market, supervision and reform will be more adaptable to the future.

The digital economy is entering the era of the "metaverse," followed by significant changes in the combination of resources and elements of digital platform. Accordingly, antitrust analysis and regulation should evolve with the industry. In addition to continuing to pay attention to multilateral markets, algorithms and data, the future antitrust analysis and research of digital economy may also pay more attention to topics such as digital economy and XR, digital economy and standards, etc.

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