

July 26, 2022

China Revises its Anti-Monopoly Law 14 years after its Initial Implementation

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On June 24, 2022, China's National People's Congress Standing Committee (the "**NPC**") amended the *Anti-Monopoly Law* (《反垄断法》) for the first time since its initial enactment in 2008 (the "**2008 AML**"), effective August 1, 2022 (the "**2022 AML**"). The 2022 AML has 70 articles, increased from the 57 articles of the 2008 AML. Immediately thereafter, on June 27, 2022, China's enforcement agency of anti-monopoly – the State Administration for Market Regulations (the "**SAMR**") – published six draft regulations for public comments, namely: (i) *Provisions on Merger Control Review* (《经营者集中审查规定 (征求意见稿)》); (ii) *Regulations on the Merger Control Filing Thresholds* (《国务院关于经营者集中申报标准的规定 (修订草案征求意见稿)》); (iii) *Provisions on Prohibition of Abuse of Dominance* (《禁止滥用市场支配地位行为规定 (征求意见稿)》); (iv) *Provisions on Prohibition of Elimination and Restriction of Competition through Abuse of IP Rights* (《禁止滥用知识产权排除、限制竞争行为规定 (征求意见稿)》); (v) *Provisions on Prohibition of Elimination and Restriction of Competition through Abuse of Administrative Power* (《制止滥用行政权力排除、限制竞争行为规定 (征求意见稿)》); and (vi) *Provisions on Prohibition of Monopoly Agreements* (《禁止垄断协议规定 (征求意见稿)》) (collectively, the "**Draft Implementation Rules**"), signaling a new era of anti-monopoly enforcement in China.

Given the complexity of the various revisions brought by the 2022 AML, this article is not intended to be a comprehensive guide to all rules imposed by the new law, but rather a summary of key highlights that justifies due attention from foreign businesses and multinational companies (the "**MNC**") with operations in China.

I. Changes to the Merger Control Procedure

a. The "stop-the-clock" mechanism

The 2022 AML introduces the "stop-the-clock" mechanism during the merger control review process, similar to what is available in the European Union (the "**EU**"). Specifically, the SAMR may suspend a merger review if (i) the filing parties fail to provide requested information or materials rendering the merger review unable to proceed; (ii) new circumstances that materially impact the merger review occur and the merger review cannot proceed without examining such new circumstances or facts; or (iii) the proposed remedies require further assessment and the filing parties agree to the suspension.

Such mechanism is intended to streamline the review process for complex cases. Prior to this amendment, previous practice often requires filing parties of complex cases to withdraw and refile their case, just so that the legally prescribed timeframe (i.e. maximum 180 days from filing) can be met.

However, this significantly increases regulatory power and flexibility and for less complex cases, such "stop-the-clock" mechanism may well cause uncertainty on the timing of the transaction. Trying to address the issue, the Draft Implementation Rules propose that once the interrupting factors are eliminated, SAMR shall promptly resume the review process upon request by the transaction parties. It remains to be seen if, how and to what extent the "stop-the-clock" mechanism will work in practice. For foreign businesses planning acquisitions in China, parties should be aware of this added uncertainty in China's merger review process when considering the deal's transaction timeline.

b. Review of transactions that are below the mandatory filing threshold

Article 26 of the 2022 AML allows SAMR to require parties to a transaction – albeit falling below the merger control review threshold¹ – to nevertheless file for a merger review, if evidence suggests the transaction has or may have the effect of eliminating or restricting competition. It is worth noting that SAMR can only request such below-the-threshold filing prior to closing – i.e., the SAMR cannot do so after the deal is closed – which provides certainty to transactions.

Indeed, the SAMR already had the right to review below threshold transactions, according to the existing *State Council's Regulations on the Merger Control Filing Thresholds (2008)* (《国务院关于经营者集中申报标准的规定(2008)》), but such power has rarely been exercised. It remains to be seen what practical effect this new provision will have on transactions.

c. Enhanced merger review on certain sectors

Article 37 of the 2022 AML requires the SAMR to strengthen its scrutiny of deals relating to “key industries including those concerning people’s livelihood.” The key industries are not officially defined, but the *State Council's Opinion on Accelerating the Building of a Unified and Nationwide Market (2022)* (《国务院关于加快建设全国统一大市场的意见(2022)》) published in April early this year indicates that finance, media, technology, digital platforms, etc. can all potentially be included as key sectors subject to higher scrutiny.

II. Rules Changes to the Monopoly Agreements

a. Relaxed treatment of Resale Price Treatment Agreements (the “RPM”)

Since the 2008 AML came into effect, RPM are usually considered illegal *per se*, and have been aggressively prosecuted. The 2022 AML does not abandon the *per se* illegal presumption of RPM, but has opened a door for businesses to rebut such presumption if they can prove the RPM have no anticompetitive effects.

¹ The Draft Implementation Rules proposed to revised China’s current filing threshold to: (i) (a) the combined worldwide turnover test to be increased from RMB 10 billion to RMB 12 billion; (b) the combined Chinese turnover test to be increased from RMB 2 billion to RMB 4 billion; and (c) the individual Chinese turnover test to be increased from RMB 400 million to RMB 800 million. (ii) if the test as described in (i) above is not met, then the filing requirements also apply if (a) one party with more than RMB100 billion turnover in China in the previous financial year; and (b) the other party has market valuation of RMB 800 million, and more than one third (1/3) of its worldwide turnover is generated from China in the previous financial year.

b. “Safe harbor” defense for vertical monopoly agreements

Article 18 of the 2022 AML introduces a “safe harbor” defense similarly available in the EU. Specifically, in the context of vertical monopoly agreements only, if the undertakings can “prove that their market shares in the relevant markets are below the standards provided by the State’s antitrust authorities², and meet other conditions provided by the same,” then such vertical agreements will not be prohibited. That is to say, the 2022 AML creates a rebuttable presumption that a vertical monopoly agreement is legal if the undertaking’s market share is below certain thresholds.

c. Applicability to “hub-and-spoke” arrangements

The 2022 AML prohibits an entity from “organizing other undertakings to reach a monopoly agreement or providing substantial assistance for other undertakings to reach a monopoly agreement,” which closes a loophole in the 2008 AML prohibitions against horizontal and vertical monopoly agreements. Cartel facilitators can now be found in violation of China’s AML even if they are not direct participants of monopoly agreements.

III. Enhanced penalties for violations

The 2022 AML also significantly increases the potential penalties to different parties, including:

- a. **Newly introduced personal liability:** Individuals, including the legal representatives, principal person-in-charge and direct responsible person, of the violating undertakings can now be fined up to RMB 1 million (approx. US\$150,000), if such person is personally responsible for reaching a monopoly agreement. Nevertheless, we expect personal liability will only be imposed in serious violation cases rather than as a general rule.
- b. **Failure to file for merger review:** To deter parties in M&A transactions from intentionally not making merger control review filings, the 2022 AML substantially increased the fines for failure-to-file from merely RMB 500,000 (approx. US\$75,000) under the current 2008 AML. In particular, for transactions that are found to have potential monopoly effects, fines of up to 10% of the undertaking’s revenue from the preceding year can be imposed for failure-to-file. If the transaction is found to have no monopoly effect, the fine for failure-to-file will be capped at RMB 5 million (approx. US\$746,000).
- c. **Aggravated fines for serious violations:** According to the 2022 AML, the SAMR can impose a multiplier of 2x~5x to the available fines, if it determines that “the violation is egregious, the impact is especially negative, and the consequences are particularly harmful.” On the other hand, SAMR has the discretion to grant leniency if the violation and its consequences can be remediated.
- d. **Public interest lawsuits and potential criminal liabilities:** The 2022 AML introduces civil public interest lawsuits to be brought by the people’s procuratorate, and potential criminal liabilities for

² The 2022 AML itself does not provide specific threshold, but provisions in the Draft Implementation Rules shed some lights, setting the market share threshold to 15%.

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violating the AML. We can foresee that the people's procuratorate will play a much more active role in judicial enforcement of the new AML.

In recent years, China has been strengthening anti-monopoly enforcements in an effort to facilitate free market competition. This effort first started in the crack-down on digital platform giants such as Alibaba and Meituan, then spread to other more traditional sectors such as pharmaceuticals and medical device industries. With the passing of the new 2022 AML, together with the soon-to-be-adopted SAMR implementation rules, we anticipate that anti-monopoly will become a key operational and transactional compliance focus by MNCs and foreign businesses in China.