

China Antitrust Update Six Supporting Rules of the Anti-Monopoly Law Published for Comments

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Following the adoption of the Decision on Revising the Anti-Monopoly Law (the **Amended AML**) at the 35th Session of the Standing Committee of the 13th National People's Congress on June 24, 2022, the State Administration for Market Regulation ("**SAMR**") is seeking public comments on June 27, 2022 on the following draft revisions of six supporting rules of the Anti-Monopoly Law:

- The Provisions of the State Council on the Thresholds for Declaring Concentration of Undertakings (Draft for Comments) (the "**Merger Review Thresholds Draft Regulations**")
- Provisions on the Review of Concentrations of Undertakings (Draft for Comment) (the "**Merger Control Review Draft Regulations**")
- Regulations on Prohibition of Monopoly Agreement (Draft for Comment) (the "**Monopoly Agreement Draft Regulations**")
- Regulations on Prohibition of Abuse of Dominant Market Position (Draft for comments) (the "**Dominance Abuse Draft Regulations**")
- Provisions on Prohibiting Abuse of Intellectual Property Rights to Exclude and Restrict Competition (Draft for comments) (the "**Abuse of IPR Draft Regulations**")
- Provisions on Prohibition of Abuse of Administrative Power to Exclude and Restrict Competition (Draft for comments)

In general, the above draft regulations of the six supporting rules of AML respond to and detail the new rules and procedures in the Amended AML, and at the same time, clarify and improve, in terms of rules, the issues that have become a growing consensus in the enforcement practice of the Anti-Monopoly Law in the past ten years.

Below is a brief summary and analysis of the highlights in the draft regulations that have a significant influence on the investment, M&A and daily operations of business undertakings for your reference. We will also pay close attention to relevant legislation and law enforcement, and update our observation in this area on a timely basis.



1. Merger Control Notification

1.1 Raising the current turnover thresholds; adding new notification thresholds for "Killer Acquisitions"

As is well known to the market, whether an investment, M&A, joint venture or a proposed transaction of other structure is subject to merger control notification in China, depends on whether the proposed transaction constitutes a "concentration of

undertakings” and whether the turnover of “the undertakings” reach the notification thresholds. If the above two conditions are met and there is no statutory exemption, then the “concentration of undertakings” should be notified to the anti-trust enforcement agency. Otherwise, the concentration shall not be closed prior to merger control clearance.

The Merger Review Thresholds Draft Regulations is proposed to make substantial revisions in the following two aspects:

- **Raise the current turnover thresholds** The current turnover thresholds have been in use for decades, in order to adapt to the social and economic development of China in current stage, reduce the number of declarations of small and medium-sized M&A transactions that do not have competition issues, and reduce the institutional transaction costs and burdens of enterprises, the Merger Review Thresholds Draft Regulations intends to raise the current turnover thresholds. Specifically, a concentration of undertakings shall be notified in advance if it meets one of the following conditions: (i) the global turnover of all the business undertakings participating in the concentration exceeds RMB12 billion in the previous financial year (*the current threshold is RMB10 billion*), and the turnover in China of at least two business undertakings exceeds RMB800 million in the past accounting year (*the current threshold is RMB400 million*); or (ii) the turnover in China of all the business undertakings participating in the concentration exceeds RMB4 billion in the previous financial year (*the current threshold is RMB2 billion*), and the turnover in China of at least two business undertakings exceeds RMB800 million in the past accounting year (*the current threshold is RMB400 million*).

- **Add new notification thresholds for “Killer Acquisitions”** Specifically, a concentration of undertakings shall be notified in advance if it meets the following conditions: (i) the turnover in China of one of the business undertakings (*in this context, the aforementioned business undertaking shall refer to one party to a merger or a party who acquires control of the target company in other transactions*) participating in the concentration exceeds RMB100 billion in the past accounting year; and (ii) the market value (or valuation) of other parties to a merger as specified in Article 2(1) of the Merger Review Thresholds Draft Regulations^[1] (*in this context, the aforementioned business undertaking shall refer to the other party to a merger*) or other business undertakings as specified in Article 2(2) and (3) of the Merger Review Thresholds Draft Regulations undertaking (*in this context, the aforementioned business undertaking shall refer to the target company in investment or M&A transaction*), is not less than RMB800 million, and the turnover in China accounted for more than 1/3 of its global turnover in the previous financial year.

Based on the above multiple thresholds designed by the rules, it is not difficult to interpret that the Merger Review Thresholds Draft Regulations intends to expand the antitrust enforcement agency’s jurisdiction to the Killer Acquisitions, in which **large enterprises** acquire, through merger, acquisition, investment, etc., the “Control” under the Anti-Monopoly Law, of target companies with **relatively high market value/valuations** and no significant turnover (**but at least 1/3 of which comes from China**) yet. Most of target companies involved in such Killer Acquisitions may refer to high-tech, platform or start-up companies with high valuations but no insignificant turnover.

It should be noted that, although the Merger Review Thresholds Draft Regulations proposes to raise the current turnover thresholds and add new notification thresholds for “Killer Acquisitions”, rules on how to calculate turnover are not revised, for example, when calculating the turnover of an undertaking who acquires control of a target, the turnover of all business undertakings controlled by its ultimate controller, i.e., the turnover of the group level, shall be included, to determine whether the turnover threshold is met.

1.2 Clarifying the notification and investigation procedures for concentration of undertakings that does not reach the notification threshold but raise competition concerns

Article 26 of the Amended AML stipulates that if a concentration of undertakings does not reach the notification thresholds provided by the State Council, but there is evidence showing that the concentration of undertakings has or may have the effect of excluding or restricting competition, the antitrust enforcement authority of the State Council may require the business undertaking to notify. Where the business undertaking fails to notify, the antitrust enforcement authority shall conduct an investigation in accordance with the law.

The Merger Control Review Draft Regulations further clarifies the above notification and investigation procedures,

specifically, for the concentration of undertakings that does not reach the notification thresholds but raise competition concerns:

- If the concentration has not been implemented, the SAMR may request the business undertakings to submit the merger control notification by notifying the business undertakings in writing. The concentration shall not be implemented unless approved;
- If the concentration has already been implemented, the SAMR may require the business undertakings to make a supplementary notification within **180 days**, and stop implementing the concentration or take other necessary measures.

1.3 Specifying the definition of “implementing concentration”, and the obligation of other parties in illegal concentration investigation

The definition of “implementing concentration” is an important prerequisite for the assessment of failure to notify in accordance with the law or “gun-jumping” in the law enforcement practice. Currently, there is no specific provision under the applicable rules. However, based on the enforcement precedents of the anti-trust enforcement agency, the relatively clear indications may include the completion of SAMR registration, appointment of senior management, or substantial decision on the operation and management of the target company.

The Merger Control Review Draft Regulations specifies that it shall mean the behaviors of acquiring control over other business undertakings or exerting decisive influences thereon, including but not limited to, completion of the SAMR registration of change in shareholders (or ROM), appointment of senior management, actual participation in decision-making and management of operation, exchange of sensitive information with other business undertakings, substantial integration of business, etc. Based on the foregoing, we expect that, in investment and M&A transactions which may reach the notification thresholds, more prudent and strict assessments shall be required as to how to reasonably specify the matters of a target company that shall be subject to prior consent of the investor/acquirer during the transitional period under the transaction documents, what reasonable measures the investor/acquirer may take to supervise the business operation of the target company during the transitional period to avoid any depreciation of its value, how to reasonably set up a “clean team” during due diligence to avoid exchange of competitively sensitive information and how to plan business integration in advance so as not to fall into the scope of “gun-jumping”, etc.

In addition, during the investigation of failure to notify, one of the issues faced by the undertaking who makes “supplementary” notification is that other undertakings participating in the transaction fail to provide relevant information, data and materials, which affects the quality and progress of the investigation. In this regard, the Merger Control Review Draft Regulations also sets forth third party’s obligation to cooperate with the investigation. With respect to the investigation of an illegal concentration of undertakings, in addition to the business undertaking under investigation, other business undertakings or individuals participating in the concentration shall cooperate with the antitrust enforcement authority’s investigation and submit relevant documents and materials as required.

1.4 Codifying the standards developed in law enforcement practice

- The definition of “control or exert decisive influence” is specified, i.e., the following factors shall be considered in determining that a business undertaking has control over, or is able to exert a decisive influence on, another business undertaking: the business undertaking’s direct or indirect holding of voting rights or similar equities of the other business undertaking, and its influence on the operation and management decisions of the other business undertaking, such as the appointment and removal of senior management, financial budgets and business plan, etc.;
- “Business undertaking participating in the concentration” in different transaction structures is specified.
- The specific time period of “turnover in past accounting year” is specified, i.e., the turnover in the past accounting year ending on the execution date of the concentration agreement.

2. Monopoly Agreement

2.1 Introducing “safe harbor” for vertical monopoly arrangements and providing compliance guidance for proper distribution system design

The Amended AML introduces a new “safe harbor” mechanism for vertical monopoly arrangements, e.g., fixing or maintaining resale prices, restricting sales regions or customers, exclusive supply/purchase, most-favored-nation treatment, etc.) between business undertaking and its counterparties, and it also adjusts the principle for determining illegal resale price maintenance arrangements in the current enforcement practice, where the principle is changed from “prohibited in principle” to “rule of reason”, i.e., an arrangement for fixing/maintaining resale price is not a monopoly agreement if the party can prove that it does not have the effect of excluding or restricting competition. For the implementation of the burden of proof and the content of proof, the Monopoly Agreement Draft Regulations adds specific application standards and procedures for the safe harbor mechanism in order to provide compliance guidance for business undertakings.

Specifically, in order to successfully apply the safe harbor mechanism, a business undertaking shall prove that:

- The market share in the relevant market of the undertaking and the counterparty who agree on vertical monopoly arrangements is **less than 15%** or the antitrust enforcement authority stipulates otherwise. Such market share shall include the aggregate market share in the relevant market of other entities that it controls or has decisive influence on. If there are multiple counterparties, the market share in the relevant market shall be calculated on an aggregate basis;
- There is no contrary evidence to prove that such agreement excludes or restricts competition;
- An undertaking may submit a written application to the antitrust enforcement authority to prove the above matters. The application should include: (i) the operating status and equity relationship between the undertaking and the counterparty in the relevant market, (ii) the market share of the business undertaking and the counterparty in the relevant market and the calculation basis, (iii) the agreement will not exclude or restrict competition in the relevant market, and other contents that need to be explained.

The antitrust enforcement authority will investigate and verify business undertakings’ applications, and in this process, in addition to the opinions from the other governmental authorities, industry associations, upstream and downstream enterprises, stakeholders, etc., the Monopoly Agreement Draft Regulations also proposes to seek opinions from third parties and the public.

2.2 Adding provisions on organizing or providing substantial assistance to reach a monopoly agreement.

With respect to the hub-and-spoke arrangements under Article 19 of the Amended AML, i.e., business undertakings may not organize other business undertakings to reach a monopoly agreement or provide substantial assistance for other business undertakings to reach a monopoly agreement, the Monopoly Agreement Draft Regulations sets forth detailed identification criteria, illegal circumstances and legal liabilities, specifically,

- The term “**organize**” refers to the following circumstances: (i) although the undertaking is not a party to the monopoly agreement, but in the process of reaching or implementing the monopoly agreement, it has a decisive or leading role in the scope, main content and performance conditions of the agreement; (ii) a business undertaking signs an agreement with multiple counterparties, and intentionally causes the counterparties with a competitive relationship to communicate with each other or exchange information through such business undertaking, so as to reach the monopoly agreement.
- The term “**substantial assistance**” refers to the behavior of the business undertaking who has not engaged in

organizing behaviors specified above, but provides support for the conclusion or implementation of the monopoly agreement, and has a causal relationship with the exclusion or restriction of competition and has a significant effect.

- Business undertakings that organize and assist other business undertakings to enter into monopoly agreements shall have the same legal liabilities as those reaching the monopoly agreements.

2.3 Further regulating procedures for suspension of investigation, specifying application and determination procedures, and adding interview system

- Further regulating procedures for suspension of investigation: After the anti-trust enforcement agency has investigated and verified the suspected monopoly agreement, if it believes that it constitutes a monopoly agreement, the previous provision “it will not accept applications for suspension of investigation made by undertakings” is revised as “the investigation shall not be suspended, and a decision shall be made pursuant to the law”, which is also provided by the Dominance Abuse Draft Regulations.
- Specifying application and determination procedures: Business undertakings participating in a monopoly agreement shall file an application with the anti-trust enforcement agency before the anti-trust enforcement agency files a case, initiates an investigation procedure, or issues an administrative penalty notice. Application materials should include the following: a report on the relevant situation of the monopoly agreement, including but not limited to the undertakings participating in the monopoly agreement, the scope of commodities involved, the content and method of the agreement, the specific implementation of the agreement, whether reported to other overseas law enforcement authorities, etc.; important evidence of reaching or implementing a monopoly agreement. Important evidence refers to the evidence which is not available to the anti-trust enforcement agency and can play a key role in initiating an investigation or determining a monopoly agreement.
- Adding interview system: If a business undertaking is suspected of violating these regulations, the anti-trust enforcement agency may interview its legal representative or person in charge, and request it to propose improvement measures, which is also provided by the Dominance Abuse Draft Regulations.

2.4 Other highlights

- With respect to prohibiting “competitive business undertakings” from reaching horizontal monopoly agreements, it is further clarified that “potential competitors” who have plans and feasibility to enter the relevant market competition within a certain period of time can also be “competitive business undertakings” under horizontal monopoly agreements.
- Monopoly agreement behaviors of digital economy are added, i.e., undertakings shall not use data and algorithms, technology, capital advantages, platform rules, etc. to engage in monopolistic behaviors prohibited by these regulations.



3. Abuse of Market Dominance

3.1 Focusing on the platform economy and the controversial “self-preferential treatment” proposed to be regulated as an abuse behavior

- An undertaking with a dominant market position shall not use data, algorithms, technologies, and platform rules, etc. to engage in abuse of market dominance behaviors;
- According to the enforcement practice, two new factors “transaction amount”, “ability to control traffic” are added to be considered in identifying dominant market position in the platform economy. Specifically, as a starting point of analyzing the abuse of a dominant market position, in assessing whether the undertaking in the platform economy

undertaking has a dominant position, the following factors shall be considered: undertaking the competition characteristics, business model, **transaction amount**, number of users, network effect, lock-in effect, technical characteristics, market innovation, **ability to control traffic**, ability to master and process relevant data, and market power of undertakings in related markets.

- A new prohibition that platform undertakings shall not implement “self-preferential treatment” is added. Specifically, platform undertakings with a dominant market position are prohibited from using data, algorithms, technologies, platform rules, etc., to give themselves the following preferential treatment without justifiable reasons, when competing with undertakings on such platform: (i) giving priority to display or order its own products; (ii) using the non-public data of undertakings on the platform to develop their own products or assist their own decision-making. It should be noted that, as a long-standing and widespread business practice, whether or not it is appropriate to regulate “self-preferential treatment” as an abuse behavior is controversial from the perspectives of both academic and practitioners. We are looking forward that this issue can be extensively discussed during the opinion seeking process, and eventually a consensus approach could be formed.



4. Abuse of Intellectual Property Rights

4.1 Introducing the “innovation (R&D) market” as a relevant market in abuse of intellectual property rights

In antitrust enforcement involving intellectual property rights licensing, the relevant commodity market can be the technology market, or the product market with specific intellectual property rights. Besides, the Abuse of IPR Draft Regulations introduces a concept of “the innovation (R&D) market”. Meanwhile, it also further clarifies the definitions of relevant technology market and relevant innovation (R&D) market. The related technology market refers to the market composed of a group or a class of technologies with a relatively close substitution relationship, and the relevant innovation (R&D) market refers to the market formed by the competition among undertakings for the research and development of new technologies or new products in the future.

4.2 Specifying behaviours of abuse of IP rights

- Behaviours of “tie-in sale” in abuse of IP rights are specified. Specifically, the Abuse of IPR Draft Regulations proposes to stipulate that a business undertaking with a dominant market position shall not, in the process of exercising intellectual property rights, without justifiable reasons, **force the licensee to purchase other unnecessary commodities when licensing the intellectual property, or force the licensee to accept a package license when licensing intellectual property rights**.
- “**Sole grant-back**” as one of the “unreasonable restrictive conditions” is added. Specifically, the Abuse of IP Rights Draft Regulations proposes to stipulate that a business undertaking with a dominant market position shall not, without justifiable reasons require the counterparty to give a **sole grant-back** or exclusive grant-back to its improved technology in the process of exercising intellectual property rights.

4.3 Clarifying monopoly arrangements in the formulation and implementation of standards and improving regulations on the abuse of a dominant market position in SEP (Standard Essential Patents)

Clarifying monopoly arrangements in the formulation and implementation of standards. Specifically, the Abuse of IPR Draft Regulations proposes to stipulate that in the process of exercising intellectual property rights, undertakings shall not use the formulation and implementation of standards to engage in the following acts to exclude or restrict competition: (i) **without justifiable reasons, joining with a business undertaking with a competitive relationship to exclude a specific business undertaking from participating in the formulation of standards, or excluding a specific business undertaking’s relevant standard technical solutions**; (ii) **without justifiable reasons, jointly excluding other specific business undertakings from implementing relevant standards with a business undertaking having a**

competitive relationship; or (iii) agreeing with business undertakings that have a competitive relationship not to implement other competitive standards.

• Improving regulations on the abuse of a dominant market position in SEP. Specifically, the Abuse of IPR Draft Regulations proposes to stipulate that a business undertaking with a dominant market position shall not engage in the following acts in the process of formulating and implementing standards to exclude or restrict competition: (i) in the process of participating in standard formulation, deliberately not disclosing its rights information to the standards development organization, or explicitly giving up its rights, but asserting patent rights against implementers of the standard involving its patent; (ii) after its patent becomes a standard essential patent, violating the **promise** of fair, reasonable and non-discriminatory licensing by **licensing it at an unfairly high price**, refusing to license **without justifiable reasons**, tie-in sale of products, implementing differential treatment or imposing other unreasonable restrictions condition; (iii) **in the process of licensing SEPs, breaching the promise of fair, reasonable and non-discriminatory licensing, and without good faith negotiation procedures, improperly requesting the court or relevant departments to make or issue judgments, rulings or decisions prohibiting the use of relevant intellectual property rights, force the licensee to accept its unfairly high price or other unreasonable restrictions**. The “patent ambush” and “patent hold-up” are explicitly stipulated above, which may help clarify the boundary between IP rights law and anti-monopoly law. Where IP rights are overused or even abused, it is necessary that the anti-monopoly law can intervene and regulate relevant abuse behaviours.

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1. Article 2 of the Merger Review Thresholds Draft Regulations: Concentration of undertakings refers to the following situations provided by the AML: (1) Merger of business operators; (2) An operator obtains control over other operators by acquiring equity or assets; (3) An operator obtains control over other operators through contracts or other means or is able to exert decisive influence on other operators.