

SHANGHAI PACIFIC LEGAL
上海市太平洋律师事务所

Competition law fact sheet

People's Republic of China

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Main features of the law

Prohibition on monopoly agreements, abuses of dominance, anticompetitive mergers and abuses of administrative power

High fines

Extraterritorial effect

Wide-ranging investigation powers



Enforcement trends

Major focus on digital marketplaces, online sales restrictions and exclusivities

Significant increase in number of M&A transactions subject to review

Focus on cartels and restrictive practices

Substantive provisions

Main rules

The Antimonopoly Law prohibits restrictions on competition in the People's Republic of China (the "PRC") through the following four broad sets of rules:

- the prohibition on monopoly agreements;
- the prohibition on the abuse of dominance;
- merger control; and
- the prohibition on the abuse of administrative power that leads to restrictions on competition.

Prohibition on monopoly agreements.

The Antimonopoly Law prohibits "monopoly agreements" – defined as any agreements, decisions or concerted practices that eliminate or restrict competition.

The Law applies to formal agreements as well as informal arrangements or understandings (concerted practices). They are prohibited regardless of whether the restrictive agreements are "horizontal" (that means, between competitors) or "vertical" (that means, between a supplier and a customer or a supplier and a distributor).

Prohibited "horizontal" monopoly agreements include agreements amongst competitors to fix prices, to limit supply, to allocate markets, to limit the purchase or development of new technology or equipment and to jointly boycott. Prohibitions on "vertical" restrictions essentially relate to the maintenance of resale prices that have the effect of eliminating or restricting competition. The Antimonopoly Law enforcement authorities can also identify other practices that fall within the scope of the prohibition.

The Law is less stringent in respect of "vertical" agreements, as it expressly recognises that parties can demonstrate that their agreement does not have a restrictive effect, and further provides for a "safe harbour" rule under which vertical agreements are not prohibited where undertakings can prove that their market share in the relevant market is lower than specific thresholds (that have yet to be set at the time of writing).

Aside from prohibiting the conclusion of monopoly agreements, the Antimonopoly Law also prohibits facilitating or providing substantive assistance in their conclusion by

third parties. The Law further prohibits industry associations from inducing their member undertakings to engage in prohibited conduct. Sanctions can be imposed even where the agreement has not been implemented.

Prohibition on the abuse of dominance.

The Antimonopoly Law prohibits conduct involving an undertaking which both (i) is dominant on the relevant market and (ii) abuses its position of dominance. Simply having a dominant market position, or market power, will not itself amount to an infringement under the Antimonopoly Law. The Antimonopoly Law defines a dominant market position as "a market position where an undertaking has the ability to control the price or quantity of goods or other trading conditions in the relevant market or to prevent or affect the entry of other undertakings in the relevant market".

Dominance is presumed under the Antimonopoly Law when either (i) one undertaking has a market share of 50 per cent or more; (ii) two undertakings have a combined market share of at least two-thirds; or (iii) three undertakings have a combined market share of at least 75 per cent in the relevant market.

Examples of abuses provided in the Law include unfairly high or low prices, below-cost pricing, refusal to deal, exclusive dealing, tying, and discriminatory practices. The Law further provides, with an eye on the digital economy, that dominant undertakings shall not abuse of their position through the use of data, algorithms, technology or "platform rules".

Merger control.

"Business concentrations" must be notified and cleared before they can be implemented where the undertakings participating in the concentration meet the following thresholds:

- In the previous accounting year: (a) the combined worldwide turnover of all undertakings involved in the concentration exceeded RMB10 billion; and (b) at least two of these undertakings each had a turnover in the PRC exceeding RMB400 million; or
- In the previous accounting year: (a) the combined turnover in the PRC of all undertakings involved in the concentration exceeded RMB2 billion; and (b) at least two of these undertakings each had a turnover in the PRC exceeding RMB400 million.

The Antimonopoly Law provides that a concentration refers to either (i) the merger of undertakings; (ii) the acquisition of control over other undertakings by virtue of acquiring their equities or assets; or (iii) the acquisition of control over other undertakings or the ability to exercise decisive influence on other undertakings by virtue of contract or any other means. Concentrations that do not meet the specified turnover thresholds may still be reviewed by the Antimonopoly Law enforcement authorities, that may require parties to seek clearance where there is evidence of potential restrictive effects on competition.

A concentration that leads or may lead to the elimination or restriction of competition in the relevant market in the PRC may be prohibited. When a concentration raises competition issues, remedies may be proposed to reduce its harmful effects and to obtain clearance. Failure to comply with the notification requirements will entail an investigation from the Antimonopoly Law enforcement authorities.

In terms of procedure, under the Antimonopoly Law, the enforcement authorities must conclude their examination of notified mergers within 180 calendar days from the receipt of complete application materials. Note, however, that the authorities have the ability to "stop the clock" and suspend this period in some circumstances. In practice, the vast majority of merger transactions are being reviewed under a "simple case" procedure, with authorities adopting their clearance decision within 30 calendar days of receipt of complete application materials.

Prohibition on the abuse of administrative power.

The Antimonopoly Law prohibits administrative authorities from abusing their administrative power by eliminating or restricting competition through various means, with an emphasis on local administrative abuses. It prohibits any exercise of administrative power which hinders (i) the free flow of goods across regions; (ii) participation by parties based elsewhere in the PRC in local tendering processes or (iii) local investments by parties based elsewhere in the PRC. The Law also prohibits any exercise of administrative power that effectively compels any undertakings to trade or to engage in monopolistic conduct, and prohibits administrative authorities from formulating anticompetitive regulations.

Sanctions

Where an undertaking enters into a prohibited monopoly agreement or abuses its dominant position, the Antimonopoly Law enforcement authorities may order it to cease and desist, confiscate any illegal earnings and impose a fine between one and 10 per cent of the undertaking's turnover in the preceding year. The exact amount of the fine shall be set depending on the nature, degree and duration of the violation. In particularly egregious cases, the maximum fine can be increased five-fold, i.e. up to 50 per cent of an undertaking's turnover. While there is no prospect of sanctions for individuals under the abuse of dominance regime, an undertaking's managers and legal representatives can be subject to a fine of up to RMB1 million where their undertaking concludes a monopoly agreement or facilitates the conclusion of a monopoly agreement by third parties. Again, for particularly egregious violations, the maximum fine can be increased by up to five times, i.e. up to RMB5 million.

As regards merger control, a failure to notify a reportable concentration that has or may have the effect of eliminating or restricting competition may lead to the imposition of a fine between one and 10 per cent of the undertaking's turnover in the preceding year, as well as an order to stop the implementation of the transaction, to dispose of shares or assets, to transfer the business or take any other measure to restore pre-existing market conditions. A failure to notify a reportable concentration that does not have effect of eliminating or restricting competition may lead to the imposition of fines of up to RMB5 million. As with other sanctions under the Antimonopoly Law, the maximum fine can be increased by up to five times for particularly serious violations.

Finally, the Antimonopoly Law also provides for sanctions on parties that refuse to cooperate or obstruct investigations. The Antimonopoly Law enforcement authorities may impose a fine of up to 1 per cent of the undertaking's turnover in the preceding year. Any individual who resists or obstructs and investigation can also be subject to a fine of up to RMB0.5 million.

Extraterritorial effect

The Antimonopoly Law has extraterritorial reach in that it applies to monopolistic conduct outside the territory of the PRC which has the effect to eliminate or restrict competition in the PRC. The Antimonopoly Law's merger control provisions are also applicable to foreign mergers where the parties meet specified turnover thresholds in the PRC.

Enforcement regime

Public and private enforcement

Administrative enforcement authority rests with the State Administration of Market Regulation (the "SAMR"), which has delegated enforcement power to local authorities at provincial, regional or municipal level. The SAMR – and the local authorities to which enforcement has been delegated – is vested with significant powers to investigate, adjudicate and dispose of a case, and sanction Antimonopoly Law infringements. It works under the guidance of the Antimonopoly Commission, which directly reports to the PRC's State Council, and which is primarily responsible for formulating competition policy and ensuring the overall coordination of enforcement.

The Antimonopoly Law also provides for a private enforcement regime in relation to civil liabilities. The adjudication of antimonopoly cases falls under the jurisdiction of the intermediate people's courts, and appeals are being heard by the intellectual property division of the Supreme People's Court. Potential civil public interest litigation is also provided under Antimonopoly Law, allowing the public prosecutor to bring civil actions.

Leniency

Where an undertaking takes the initiative to report to the antimonopoly enforcement authority on its involvement in a horizontal monopoly agreement and provides important evidence that is critical to the launch of an investigation or the determination of a violation, the SAMR may in its discretion offer to such undertaking reduction in or exemption from the penalty. Leniency can be granted any time before the SAMR adopts a decision imposing fines.

Investigation powers

The SAMR has wide-ranging investigation powers, including the power to conduct on-site inspections of business premises (so-called “dawn raids”), to hear witnesses, to request the production of information and documents, to seize relevant evidence, and to inquire about the undertakings’ bank accounts. Local enforcement authorities, making use of their delegated power, have the same investigation powers.

Recent enforcement trends

Public and private enforcement

Horizontal and vertical monopoly agreements.

Since the entry into force of the Antimonopoly Law in 2008, the SAMR and local authorities at provincial, regional or municipal level (as well as their predecessor enforcement authorities) have been very active in enforcing the law in respect to both horizontal and vertical monopoly agreements. Around 200 enforcement actions have been publicised, including major cases involving price-fixing and market allocation cartels, which have been an enforcement focus in line with international practice. It is also noteworthy that very significant fines have been imposed on parties for their involvement in vertical resale price maintenance. Sectors involved in these decisions range from financial industry to construction materials, with a recent enforcement focus on the pharmaceuticals and healthcare sector. The vast majority of parties sanctioned for conclusion of monopoly agreements are domestic Chinese companies or local affiliates of foreign companies for conduct which took place in China. So far the SAMR and its predecessor authorities have only rarely investigated and sanctioned international cartel practices under the Antimonopoly Law.

Private enforcement is much more limited in this respect, with only very few court cases relating to monopoly agreements, generally focusing on vertical resale price maintenance issues.

Abuses of dominance.

While there have been fewer instances of public enforcement of the abuse of dominance regime since the Antimonopoly Law has entered into force, the SAMR and its predecessor authorities have not hesitated to bring

major cases and impose very significant sanctions under this regime, including on foreign companies (with a fine of close to RMB7 billion – around \$1 billion – imposed on a large technology company and a fine of RMB667 million, around \$100 million, imposed on an industrial company). The authorities’ enforcement focus in recent years has shifted to the digital economy, with the SAMR adopting several decisions sanctioning operators of online marketplaces for exclusionary practices. The highest fine imposed to date on a single undertaking under the Antimonopoly Law was on domestic technology company Alibaba in 2021 with a fine of RMB18.2 billion, around \$2.9 billion, for requiring exclusivity commitments from merchants using its online retail platform services. Abusive licensing practices regarding technology patents also attracted particular scrutiny from the antimonopoly enforcement authorities. There were also several cases where regional or provincial authorities sanctioned local utility companies for abusive practices, usually involving refusal to access or bundling issues.

In contrast to the relatively few abuses of administrative power cases, a majority of private Antimonopoly Law disputes in the courts related to alleged abuses of dominance, with many cases involving large domestic Chinese companies active in the digital economy. These disputes often involved alleged abusive IP licensing practices, particularly in respect of technology patents.

Mergers and acquisitions.

In the years following the entry into force of the Antimonopoly Law, the number of transactions reviewed annually steadily increased, reaching well over 400 cases per year by 2020. Since then, there has been a significant increase in the number of transactions subject to the SAMR’s review, with the authority reviewing around 800 M&A transactions per year in 2021 and 2022, including foreign-to-foreign mergers. More than 80 per cent of these transactions were reviewed under a simple case review procedure that leads to a prompt approval and more than 98 per cent of transactions were cleared unconditionally.

A particular feature of Chinese enforcement is the comparatively large number of decisions – more than 200 had been made public as at the end of 2022 – sanctioning parties for noncompliance with mandatory clearance requirements, suggesting that a significant

number of transactions were not notified in breach of the Antimonopoly Law's procedural requirements. Noncompliance with the remedies imposed as a condition for a transaction's approval was also sanctioned on several occasions.

Future enforcement focus and developments

Effects of the 2022 reform.

The Antimonopoly Law was revised for the first time in 2022, with the introduction of higher penalties and a broader scope for liability for monopoly agreements, which can now be ascribed to parties facilitating their conclusion. The legislator also introduced specific provisions meant to better address competition issues in the digital economy, with an express prohibition on abuses of a dominant position through the use of data, algorithms, technology or "platform rules"; and an expansion of the merger control regime allowing the SAMR to review transactions involving small parties but with a possible significant impact on competition.

The 2022 reform is not yet fully implemented, with the SAMR expected to introduce safe harbour market share thresholds under which "vertical" monopoly agreements shall not be prohibited, as well as new merger control thresholds, which may lead to a reduction in the number of M&A transactions subject to review.

In parallel to the legislative reform, the SAMR has increased the decentralised enforcement of the Antimonopoly Law, delegating for the first time in 2022 merger review powers to local authorities. Provincial authorities in Beijing, Shanghai, Chongqing, Shaanxi and Guangdong are now tasked with the review of simple transactions involving parties or geographic markets in corresponding geographic regions. The provincial authorities' respective geographic jurisdiction is as follows:

Provincial Authorities	Region
Beijing Authority	Beijing, Tianjin, Hebei, Shanxi, Inner-Mongolia, Liaoning, Jilin, Heilongjiang
Shanghai Authority	Shanghai, Jiangsu, Zhejiang, Anhui, Fujian, Jiangxi, Shandong
Chongqing Authority	Henan, Hubei, Hunan, Chongqing, Sichuan, Guizhou, Yunnan, Xizang
Shaanxi Authority	Shaanxi, Gansu, Qinghai, Ningxia, Xinjiang
Guangdong Authority	Guangdong, Guangxi, Hainan

Continued scrutiny of digital platforms and technology companies.

Consistent with global enforcement trends, the technology sector, and in particular digital platforms and marketplaces, has been subject to increased scrutiny under the Antimonopoly Law over the past few years. This focus on digital platforms is likely to continue, as evidenced by the introduction of specific provisions in the Antimonopoly Law through the 2022 reform.

New merger control thresholds expected to lead to a decrease in the number of M&A transactions subject to review.

The SAMR is expected to introduce higher turnover thresholds above which "business concentrations" are subject to mandatory merger clearance, likely leading to a decrease in the number of merger review procedures. In parallel, according to a draft of the implementing rules that was published for consultation in June 2022, the SAMR is set to introduce alternative transaction value thresholds, requiring large domestic Chinese companies to seek clearance where they pay a significant consideration for the acquisition of companies whose sales value is below the turnover threshold.

Key information

Relevant legislation

Antimonopoly Law of the People's Republic of China

Competition authorities

Antimonopoly Commission of the State Council Members of the Commission

- Mr Hu Zucai
- Mr Wang Jiangpin
- Mr Gan Zangchun
- Ms Cheng Lihua
- Mr. Dai Dongchang
- Mr Li Chenggang
- Mr Liu Guoqiang
- Mr Weng Jieming
- Ms Gan Lin
- Ms Jia Nan
- Mr Liang Tao
- Mr Yan Qingmin
- Mr Qi Chengyuan
- Mr He Hua

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Antimonopoly Enforcement Bureau Two

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Competition Policy and Liaison Bureau

Website <https://www.samr.gov.cn/jzxts/>

Relevant officials

- Mr Luo Wen, Minister
- Ms Gan Lin, Vice Minister, Head of National Antimonopoly Administration
- Mr Tian Shihong, Vice Minister, Director of State Standardization Administration
- Mr Qin Yizhi, Vice Minister
- Mr Pu Chun, Vice Minister
- Mr Shen Changyu, Minister of National Intellectual Property Administration
- Ms Jiao Hong, Minister of State Food and Drug Administration
- Mr. Li Li, Vice Minister of State Food and Drug Administration

Leading Party Members of the SAMR

- Mr Luo Wen
- Mr Tian Shihong
- Mr Qin Yizhi
- Mr Pu Chun
- Ms Yang Yizheng
- Mr Shen Changyu
- Mr Li Li

National Antimonopoly Administration

Relevant officials

- Ms Gan Lin, Head of the Antimonopoly Bureau and Deputy Chief of the SAMR
- Mr Xu Xinjian, General Inspector of Antimonopoly Administration, Director of Department of Policies, Laws and Regulations of the SAMR
- Mr Wu Zhenguo, Director of Antimonopoly Enforcement Bureau One
- Mr Yu Lu, Vice Director of Antimonopoly Enforcement Bureau One
- Mr Xu Lefu, Vice Director of Antimonopoly Enforcement Bureau Two
- Mr Zhou Zhigao, Vice Director of Competition Policy and Liaison Bureau

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