

## China Antitrust Review 2022

February 27, 2023 | Client Update | 11-minute read

In 2022, China amended its Anti-Monopoly Law (AML) for the first time in fourteen years. This “New AML” significantly increases penalties for antitrust violations, provides greater flexibility for Chinese enforcers during merger review, and allows the enforcers to create safe harbors for vertical agreements. In a continued divergence from U.S. and EU trends, Chinese enforcers approved negotiated behavioral remedies and blocked no mergers.

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### Updates to the AML and SAMR regulations

#### The “New AML”

In a long-anticipated move, China’s amended Anti-Monopoly Law (New AML) went into effect on August 1, 2022.<sup>1</sup> The New AML follows two initial draft amendments published by the State Administration for Market Regulation (SAMR) in 2020 and 2021 (our analysis of these initial drafts is available [here](#) and [here](#).)

The New AML includes several key changes:

- **Increased penalties for antitrust violations:** The New AML introduces higher penalties for anticompetitive conduct, including: (1) new personal liability and monetary penalties for infringing parties’ legal representatives and persons who are responsible for antitrust violations;<sup>2</sup> (2) a tenfold increase in the statutory maximum fine for merger control violations from RMB 500,000 (approximately US\$72,822) to RMB 5 million (approximately US\$728,215) for unreported mergers that are *not anticompetitive*;<sup>3</sup> (3) a penalty for unreported *anticompetitive* mergers up to 10% of the party’s revenue for the previous fiscal year; and (4) fines of up to 50% of the party’s last fiscal year revenues for cartel conduct, abuse of dominance, or other “extremely serious” conduct. Although it is unclear whether SAMR would apply a 50% fine, the New AML underscores an enhanced commitment to enforce premerger notification requirements.
- **New “stop-the-clock” mechanisms in merger review:** SAMR can suspend the review period if: (i) filing parties fail to provide certain materials necessary for the review to proceed; (ii) new situations or events occur such that the review cannot proceed without further investigation; or (iii) where filing parties apply for a suspension of the merger review because further evaluation of potential remedies is needed. This provision may result in slower merger review timelines in China.
- **New warnings for the digital economy:** The New AML cautions dominant technology-sector players not to abuse their market position through the use of algorithms, platform rulemaking, or other advantages over rivals. It is unclear how SAMR will implement this general rule.
- **New public interest litigation for antitrust matters:** The New AML allows public prosecutors to initiate civil public interest litigation against monopolies that have damaged social public welfare.

- **Improved facilitation between administrative and judicial proceedings:** On November 18, 2022, the Supreme People’s Court of the People’s Republic of China (PRC Supreme Court) published draft Provisions of the Supreme People’s Court of the People’s Republic of China on Issues Concerning the Application of Law in Monopoly-Related Civil Disputes (Draft Provisions). Under the Draft Provisions, when an AML enforcement authority has found that monopolistic conduct has taken place, such conduct need not be proven by extra evidence in related civil disputes unless there is sufficient evidence to the contrary. This new rule, once approved, may change the playing field in favor of plaintiffs, who have had difficulty to date meeting the burden of proof in anti-monopoly civil disputes.

## Draft regulations to implement the AML

Following implementation of the New AML, SAMR published several draft implementing regulations (Draft Regulations). Critical provisions of the Draft Regulations focus on merger control<sup>4</sup> and monopoly agreements, among other provisions.<sup>5</sup>

### Merger control

The Draft Regulations introduce higher notification thresholds and – reflecting trends in the U.S., the EU, and the U.K. – a new focus on “killer acquisitions.”

- **Notification threshold increases:** The Draft Regulations propose an increase in the notification thresholds. Under this proposal, a merger must be reported if: (i) global revenues of all merging parties exceed RMB 12 billion (approximately US\$1.75 billion) (current standard, RMB 10 billion) in the last financial year and at least two parties generate Chinese revenues of over RMB 0.8 billion (approximately US\$117 million) (current standard, RMB 0.4 billion); or (ii) revenues generated from China of all merging parties exceed RMB 4 billion (approximately US\$583 million) (current standard, RMB 2 billion) and at least two parties generate Chinese revenues of over RMB 0.8 billion (approximately US\$117 million) (current standard, RMB 0.4 billion).
- **“Killer” acquisitions:** The Draft Regulations express concern that established platform companies’ acquisitions of startups and emerging platforms could be anticompetitive – reflecting a theory of harm that has given rise to enforcement efforts in Western countries. A filing is now required when an acquiring party generates Chinese revenue of over RMB 100 billion (approximately US\$14.6 billion) in the last financial year, the target company has a market capitalization (not revenue) of no less than RMB 0.8 billion (approximately US\$117 million) and such target company’s Chinese revenue accounts for more than one third of its global revenue in the last financial year. SAMR also has discretion to review deals that fall below these revised financial thresholds where it believes that a transaction could harm competition. This is similar to the discretionary tools available to regulators in other major jurisdictions, notably the EU.

### Monopoly agreements

- **Vertical agreements:** The Draft Regulations are more lenient on issues relating to vertical agreements – which marks a departure from enforcement trends in the U.S. and the EU. They create a “safe harbor,” such that if the parties to a vertical agreement can prove that their market share is lower than the standard specified by the State Council of People’s Republic of China, they will be exempted from the prohibition. The market share standard that controls the eligibility of the “safe harbor” is set at 15% under the Draft Regulations, but it is uncertain whether this threshold will be followed or modified in the final rules.
- **Hub-and-spoke conspiracies:** Although the Draft Regulations do not expressly embrace the concept of a “hub-and-spoke conspiracy” (i.e., a conspiracy among rivals carried out through a central “hub” of a common intermediary, such as a supplier or customer), they prohibit organizing or providing substantial assistance to other parties to enter into monopoly agreements. The Draft Regulations further define the terms “organize” and “provide substantial assistance” to cover all parties that: (i) provide support to a monopoly agreement; and (ii) have a significant contribution to the anticompetitive effect. This captures the typical case of hub-and-spoke conspiracies, where an organizer (the hub) enters into separate, often vertical agreements with multiple parties (the spokes) that are in a competitive relationship and helps exchange information between the spokes. Whether this language applies to “rimless” hub-and-spoke conspiracies (i.e., a highly controversial form of conspiracies where the individual “spokes” may not have knowledge of one another’s actions) remains subject to future interpretation and application.

These draft provisions may have important implications for internet platform companies in China, which should be particularly mindful when setting platform rules and entering into arrangements with merchants on their platforms.

- **Self-preferencing:** The Draft Regulations aim to address self-preferencing by “gatekeeper platforms” hosting large amounts of customer data. In particular, the regulations prohibit dominant platform companies from prioritizing their own products in search results and online rankings by means of data, algorithms, technology, or platform rulemaking.

The Draft Regulations further prohibit using non-public data in the platform to assist such platforms' decision-making or to develop their own products.

## Merger control developments

### Merger decisions

During 2022, SAMR imposed behavioral remedies in four transactions and a hybrid remedy in one, without blocking any transactions. Unlike other jurisdictions' focus on structural remedies, SAMR continues to rely primarily on behavioral remedies, including non-discrimination commitments, access commitments, and commitments to segregate business units and competitively-sensitive information. By imposing remedies in the semiconductor, telecommunications, and air transportation industries, SAMR's decisions reflect increased scrutiny on mergers in "strategic" industries. Below we briefly discuss two transactions involving global markets.

#### Global Wafers Co., Ltd & Siltronic AG<sup>6</sup>

On January 20, 2022, SAMR imposed both structural and behavioral remedies in the acquisition of Siltronic AG (Siltronic) by Global Wafers Co., Ltd. (Global Wafers), two leading semiconductor wafer producers. Their total market share of 8-inch wafers was 55%-60% in the global market and 30%-35% in the Chinese market for 2021. SAMR determined the acquisition would greatly increase concentration in China's wafer market and potentially preclude competition. To resolve these concerns, SAMR asked the parties to divest Global Wafers' zone melting wafer business and commit to supply varieties of wafers to Chinese customers on a fair, reasonable, and non-discriminatory (FRAND) basis.

#### Advanced Micro Devices Inc. & Xilinx Inc.<sup>7</sup>

On January 21, 2022, SAMR imposed multiple behavioral remedies in the acquisition of Xilinx Inc. (Xilinx) by Advanced Micro Devices Inc. (AMD). AMD focuses on R&D and production of central processing units (CPUs) and graphics processing units (GPUs). Xilinx is the biggest supplier of field programmable gate arrays (FPGAs) in both the global and Chinese markets. SAMR concluded that CPUs, GPUs, and FPGAs were closely related, and the post-transaction entity would be the only one able to supply all three. SAMR determined that this increased the likelihood that the post-transaction entity would bundle CPUs and GPUs with FPGAs, withhold FPGAs from CPU & GPU competitors, or reduce compatibility of its FPGAs with competitors' offerings. SAMR therefore required the post-transaction entity to refrain from bundling any product or imposing any unreasonable transaction terms; to commit to supplying CPUs, GPUs, and FPGAs to Chinese customers on a fair, reasonable, and non-discriminatory basis; and to ensure the compatibility of the post-transaction entity's products with those of third parties.

In other decisions, SAMR imposed long-term behavioral remedy requirements, such as supply commitments<sup>8</sup> and requirements that parties continue to supply products on fair, reasonable, and non-discriminatory terms.<sup>9</sup>

## SAMR conduct enforcement actions

As it has done in past years, SAMR and its local branches continued to prioritize enforcement actions against parties in the pharmaceutical and life sciences sector. SAMR also challenged conduct in the public utility, logistics, and education industries. Below we briefly discuss two enforcement actions.

### Abuse of market dominance

#### Continued crackdown on "choose one from two" practices

On December 26, 2022, SAMR imposed a fine on China National Knowledge Infrastructure (CNKI) equal to 5% of its 2021 revenues (87.6 million RMB, or approximately US\$13.0 million).<sup>10</sup> CNKI is a leading academic database that compiles academic literature and provides access to individuals, universities, research institutions, and public libraries, among others. Like other internet platforms that have been fined for "Choose One from Two" practices, CNKI entered into exclusive agreements with academic publishers and universities, prohibiting them from licensing or otherwise permitting any other platform that competes with CNKI to access their academic literature libraries. It also implemented a reward and penalty framework for the publishers and institutions based on their degree of compliance. CNKI was also found to have engaged in excessive pricing – a practice that generally does not have an analogous antitrust concept in

other jurisdictions – and enjoined from continuing to engage in the challenged conduct.

## Monopoly agreements

### First franchisor fined for resale price maintenance

In 2022, the Beijing Administration for Market Regulation (Beijing AMR) imposed its first fine for resale price maintenance practices.<sup>11</sup> Beijing Collegepre Education Technology Co., Ltd (Collegepre) was the sole franchisee of Sesame Workshop in China and had an exclusive sub-franchising right in China. According to Beijing AMR, from 2014 to 2021, Collegepre implemented a price maintenance policy in sub-franchising, requiring all franchisees to use prices set by Collegepre. Franchisees that did not comply with the policy were subject to monetary penalties, temporary suspension, and/or permanent suspension. Beijing AMR imposed a fine of RMB 942,386.47 (approximately US\$137,252) on Collegepre, marking the first case where a franchising structure was considered to be a price-maintaining vertical agreement. Collegepre argued that franchising should be exempt from the prohibition on resale price maintenance. Beijing AMR disagreed, ruling that resale price maintenance is not necessary to franchise structure or brand integrity.

## Key takeaways

The New AML, Draft Regulations, and multiple significant antitrust enforcement actions suggest an increasingly proactive approach to antitrust enforcement. Moreover, in 2022, China further indicated its willingness to continue to diverge from the enforcement priorities of certain other jurisdictions, particularly by accepting behavioral remedies in horizontal merger cases.

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- <sup>1</sup> National People's Congress of the People's Republic of China, "The Decision to Amend Anti-Monopoly Law by Standing Committee of NPC" (???) (June 24, 2022), available at <http://www.npc.gov.cn/npc/c30834/202206/e42c256faf7049449cdfaafb374a3595.shtml> (Chinese language).
- <sup>2</sup> As a general matter, each company in China must have a legal representative, who has the statutory power to represent a company and their acts bind the company.
- <sup>3</sup> All conversions from RMB into U.S. dollars were made at RMB 6.8661 to US\$1.00, the exchange rate as set forth in the H.10 statistical release of the Board of Governors of the Federal Reserve System in effect as of February 17, 2023.
- <sup>4</sup> State Admin. on Mkt. Regul., "Draft Regulation on Notification Standard" (???) (June 27, 2022), available at [https://www.samr.gov.cn/hd/zjdc/202206/t20220625\\_348149.html](https://www.samr.gov.cn/hd/zjdc/202206/t20220625_348149.html) (Chinese language); State Admin. on Mkt. Regul., "Draft Regulation on Merger Review" (???) (June 27, 2022), available at [https://www.samr.gov.cn/hd/zjdc/202206/t20220624\\_348144.html](https://www.samr.gov.cn/hd/zjdc/202206/t20220624_348144.html) (Chinese language).
- <sup>5</sup> State Admin. on Mkt. Regul., "Draft Regulation on Monopoly Agreements" (???) (June 27, 2022), available at [https://www.samr.gov.cn/hd/zjdc/202206/t20220625\\_348148.html](https://www.samr.gov.cn/hd/zjdc/202206/t20220625_348148.html) (Chinese language).
- <sup>6</sup> State Admin. on Mkt. Regul., "Announcement on Merger Decision on Remedies to Acquisition of Siltronic AG by Global Wafers Co., Ltd." (???) (Jan. 21, 2022), available at [https://www.samr.gov.cn/flds/tzgg/ftj/202204/t20220424\\_342164.html](https://www.samr.gov.cn/flds/tzgg/ftj/202204/t20220424_342164.html) (Chinese language).

- <sup>7</sup> State Admin. on Mkt. Regul., “Announcement on Merger Decision on Remedies to Acquisition of Xilinx Inc. by Advanced Micro Devices Inc.” (???) (Jan. 27, 2022), available at [https://www.samr.gov.cn/fldes/tzgg/ftj/202204/t20220424\\_342166.html](https://www.samr.gov.cn/fldes/tzgg/ftj/202204/t20220424_342166.html) (Chinese language).
- <sup>8</sup> State Admin. on Mkt. Regul., “Announcement on Merger Decision on Remedies to Acquisition of Asiana Airlines by Korean Air Lines” (???) (Dec. 26, 2022), available at [https://www.samr.gov.cn/fldes/tzgg/ftj/202212/t20221226\\_352414.html](https://www.samr.gov.cn/fldes/tzgg/ftj/202212/t20221226_352414.html) (Chinese language).
- <sup>9</sup> State Admin. on Mkt. Regul., “Announcement on Merger Decision on Remedies to Acquisition of Coherent by II-VI” (???) (June 28, 2022), available at [https://www.samr.gov.cn/fldes/tzgg/ftj/202206/t20220628\\_348220.html](https://www.samr.gov.cn/fldes/tzgg/ftj/202206/t20220628_348220.html) (Chinese language); State Admin. on Mkt. Regul., “Announcement on Merger Decision on Remedies to Establishment of Joint Venture by Shanghai Airport (Group) and Eastern Air Logistics” (???) (Sept. 14, 2022), available at [https://www.samr.gov.cn/fldes/tzgg/ftj/202209/t20220914\\_350009.html](https://www.samr.gov.cn/fldes/tzgg/ftj/202209/t20220914_350009.html) (Chinese language).
- <sup>10</sup> State Admin. on Mkt. Regul., “Penalty Decision over CNKI on Abuse of Dominance” (???) (Dec. 26, 2022), available at [https://www.samr.gov.cn/fldys/tzgg/xzcf/202212/t20221226\\_352400.html](https://www.samr.gov.cn/fldys/tzgg/xzcf/202212/t20221226_352400.html) (Chinese language).
- <sup>11</sup> State Admin. on Mkt. Regul., “Penalty Decision over Beijing Collegepre Education Technology Co., Ltd on Monopoly Agreements” (???) (July 27, 2022), available at [https://www.samr.gov.cn/fldys/tzgg/xzcf/202207/t20220727\\_348944.html](https://www.samr.gov.cn/fldys/tzgg/xzcf/202207/t20220727_348944.html) (Chinese language).