

Competition law fact sheet

People's Republic of China

December 2021





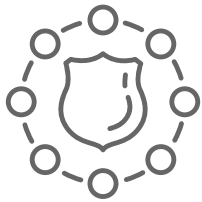
Main features of the law

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

High fines

Extraterritorial effect

Wide-ranging investigation powers



Enforcement trends

Focus on cartels and restrictive practices

Focus on utilities, pharmaceuticals, and technology licensing

Increased concerns with digital marketplaces, online sales restrictions and exclusivities

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.

The prohibition on monopoly agreements

The Antimonopoly Law prohibits "monopoly agreements" – defined as any agreements, decisions or concerted practices that eliminate or restrict competition. 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). The Antimonopoly Law applies to formal agreements as well as informal arrangements or understandings (concerted practices). The Antimonopoly Law also 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. Examples of prohibitions 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 joint boycott. Prohibitions on "vertical" restrictions essentially relate to the maintenance of resale prices, although the Antimonopoly Law enforcement authorities can also identify other practices between suppliers and customers that fall within the scope of the prohibition.

The 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 include unfairly high or low prices, below-cost pricing, refusal to deal, exclusive dealing, tying, and discriminatory practices.

Merger control

"Business concentrations" meeting specified turnover thresholds must be notified and cleared before they can be implemented. 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. A concentration that leads or may lead to 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.

The 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 (depending on the nature, degree and duration of the violation) of the undertaking's turnover in the preceding year. As regards merger control, a failure to notify a reportable concentration may lead to the imposition of fines of up to RMB500,000, 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.

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 can delegate enforcement power to local authorities at provincial, regional or municipal level. The SAMR 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.

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.

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. Over 100 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 such as Qualcomm (which faced a fine of close to RMB7 billion – around US\$1 billion, the highest fine imposed to date on a single undertaking under the Antimonopoly Law) and Tetra Pak (which was fined RMB667 million, around US\$100 million). Abusive licensing practices regarding technology patents 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

The SAMR currently reviews in excess of 400 M&A transactions per year under the Antimonopoly Law's merger control rules, including foreign-to-foreign mergers. In recent four years, more than 80 per cent of 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 60 had been made public as at the end of 2020 – 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.

Legislative proposals and enforcement focus

Proposed amendments of the Antimonopoly law

Early in 2020, the SAMR published proposed revisions to the Antimonopoly Law for public consultation. If adopted, these would be the first revision since the law was enacted in 2007. Most of the proposed revisions are of limited scope, seeking to clarify matters of procedure or of substance, or to slightly expand the law's ambit. The main substantive rules of the law and the enforcement model remain intact. More significant proposals are made in relation to liability. First, parties that facilitate or induce third parties to engage in certain infringements could be found liable. Second, while provisions governing penalties would remain largely unchanged, the SAMR proposes to significantly increase the maximum amount of fines for noncompliance with the merger control regime.

The proposed revisions also do not alter the general drafting of the Antimonopoly Law's provisions. Contrary to the approach adopted in the competition statutes of many other Asian jurisdictions, but consistent with that of the statutes in the EU and US, the law would continue to set out general principles, leaving a considerable margin for interpretation and discretion to the antimonopoly enforcement authority and the courts when enforcing its provisions.

Increased scrutiny of digital platforms and technology companies

Consistent with global enforcement trends, the technology sector, and in particular digital platforms and marketplaces, has recently been subject to increased scrutiny under the Antimonopoly Law. The SAMR has recently launched several investigations into the practices of online marketplace operators, including Alibaba, for alleged exclusionary practices.

This comes in addition to a more stringent review of M&A activity in the technology sector, with several parties sanctioned by the SAMR for failure to seek merger clearance under the Antimonopoly Law. This focus on digital platforms is likely to continue. In February 2021, the Antimonopoly Commission published *Guidelines for the Platform economy field*, which aim to ensure fair market competition and promote the healthy development of the sector. Similar to the approach adopted in other sectorial guidance under the Antimonopoly Law, the Guidelines reflect the enforcement policy across all of the four prongs of the Antimonopoly Law in respect of digital platforms. As regards the first prong – the prohibition on monopoly agreements – the Guidelines make clear that these agreements are also caught by the law where they are reached utilising technical methods such as data, algorithms, and platform rules. The Guidelines also highlight that digital platforms may also facilitate the formation of such illegal agreements through “hub-and-spoke” arrangements where the platform acts as a coordinator. Concerning the abuse of dominance regime, the Guidelines suggest that exclusivity arrangements or the reliance on big data and algorithms to discriminate among trading counterparties could be deemed abusive conduct. Finally, as regards mergers and acquisitions in the digital field, the Guidelines formally clarify for the first time that mergers involving variable equity structures are subject to merger control. They also indicate that the SAMR would make use of its power to review transactions between parties not meeting the mandatory notification thresholds that have or may have the effect of eliminating or restricting competition.

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

Antimonopoly Bureau of the State Administration for
Market Regulation

8 Sanlihe Donglu, Xichengqu

Beijing, 100820

People's Republic of China

Tel: +86 10 8865 0000

Website: <http://www.samr.gov.cn/fldj/>

Relevant officials

- Mr Wu Zhenguo
(Director General)
- Mr Yang Wanshan
(Deputy Director General)
- Mr Xu Lefu
(Deputy Director General)
- Mr Lu Wanli
(Deputy Director General)

Providing a coordinated legal service



Shanghai Pacific Legal and Norton Rose Fulbright services network

6800+

People worldwide

1000+

Partners worldwide
75% men, 25% women
(approximately)

3500+

Lawyers and other legal
staff worldwide

50+

Offices

Canada

Calgary
Montréal
Ottawa
Québec
Toronto
Vancouver

United States

Austin
Dallas
Denver
Houston
Los Angeles
Minneapolis
New York
San Antonio
San Francisco
St Louis
Washington, DC

Latin America

Mexico City
São Paulo

Europe

Amsterdam
Athens
Brussels
Frankfurt
Hamburg
Istanbul
London
Luxembourg
Milan
Monaco
Moscow
Munich
Paris
Piraeus
Warsaw

Middle East

Dubai
Riyadh*

Africa

Bujumbura**
Cape Town
Casablanca
Durban
Harare**
Johannesburg
Kampala**
Nairobi**

Asia Pacific

Bangkok
Beijing
Brisbane
Canberra
Hong Kong
Jakarta*
Melbourne
Perth
Shanghai***
Singapore
Sydney
Tokyo

* associate office

** alliance

*** Shanghai Pacific Legal and
Norton Rose Fulbright's offices

Shanghai Legal Pacific contacts

Frank Liu
Partner
Shanghai Pacific Legal
Tel +86 21 6086 0199
frank.liu@shanghaipacificlegal.com

Leslie Xu
Associate
Shanghai Pacific Legal
Tel +86 21 6086 0121
leslie.xu@shanghaipacificlegal.com

Norton Rose Fulbright contacts

Marc Waha
Partner
Tel +852 3405 2508
marc.waha@nortonrosefulbright.com

Nicolas Cassauba
Senior Associate
Tel +852 3405 2526
nicolas.cassauba@nortonrosefulbright.com

Joe Lee
Associate
Tel +852 3405 2310
joe.lee@nortonrosefulbright.com

Danyi Xu
Associate
Tel +81 80 8892 3292
danyi.xu@nortonrosefulbright.com

Lydia Fung
Knowledge Assistant - Legal
Tel +852 3405 2527
lydia.fung@nortonrosefulbright.com