FANGDA PARTNERS
方達津師事務所

2022
Antitrust China Annual Review

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Class of 2022: Key legislative developments

Law amendments

Document	Date of publication of finalized version	Date of publication of consultation draft
Anti-Monopoly Law Amendments	June 24, 2022	October 23, 2021

Draft law amendments/regulatory provisions/judicial interpretations for consultation

Document	Date of publication of consultation draft
Law amendments	
Anti-Unfair Competition Act Amendments	November 22, 2022
Regulatory provisions	
Provisions on Prohibition of Anticompetitive Agreements	June 27, 2022
Provisions on Prohibition of Abuse of Dominant Market Position	June 27, 2022
Provisions of the State Council on the Standard for Notification of Concentration of Undertakings (Amendments)	June 27, 2022
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Judicial interpretations	
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Class of 2022: By the numbers

01 A new era of China's antitrust regime

Outlook for 2023

As the Chinese antitrust regime is maturing, on top of straightforward and obvious breaches, the antitrust authorities are also getting ready to identify more complex and covert forms of breaches such as hub-and-spoke cartels and pay-for-delay agreements.

In light of China's approach to "normalize antitrust supervision", businesses should consider a holistic update to their antitrust compliance framework based on the AML Amendments and other quasi-legislative developments.

2022 marks a new era of China's antitrust regime following the adoption and codification of the modifications to China's Anti-Monopoly Law ("**AML**") that have been in the making since the initial consultation kicked-off back in 2020.

Following a year of extremely vigorous antitrust enforcement in 2021, the core theme in 2022 was to "normalize antitrust supervision". In line with this policy, China focused its efforts on legislative and quasi-legislative updates, which set out the expectations of commercial conduct and provided a solid basis for future regulatory oversight. These developments demonstrated that the Chinese antitrust regime has evolved by reflecting upon its learning from the last 14 years. As the antitrust framework becomes increasingly sophisticated, China is now ready to tackle more nuanced conducts that impact competition.

Legislative and quasi-legislative reforms

The most significant change is the reform to the AML – for the first time since the regime's inception in 2008. With the publication of two drafts for consultation in 2020 and 2021, the amendments were finalized and published on June 24, 2022, and came into effect on August 1, 2022. Taking into account China's antitrust enforcement experience in the last 14 years, the 2022 amendments to the AML ("**AML Amendments**") significantly increase the penalty levels and clarify several substantive issues including, among others, expanding the scope of undertakings covered by horizontal anticompetitive agreements, clarifying the assessment approach for resale price maintenance ("**RPM**")[1], introducing safe harbor rules for vertical agreements, and specifying how to identify dominance and abusive behavior in the digital economy.

Accompanying the AML Amendments, China's antitrust enforcement agency, the State Administration for Market Regulation ("**SAMR**"), published six draft regulations for consultation. The draft regulations supplemented the changes made to the AML and clarified certain rules, such as proposing a safe harbor market share threshold for vertical agreements. The regulations are still in draft form and are expected to be finalized in 2023.

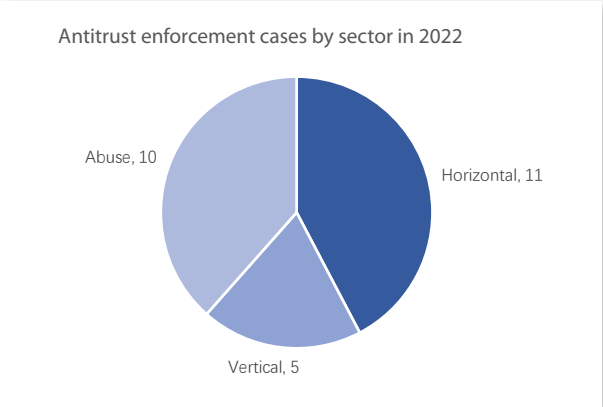
In parallel, China's highest court, the Supreme People's Court ("**SPC**"), published the draft judicial interpretation of the AML ("**Draft SPC Interpretation**")[2], elaborating on both the substantive and procedural rules. Key changes included highlighting that pay-for-delay agreements may violate the AML and specifying that the Chinese courts may proactively identify antitrust issues in non-antitrust disputes and refer such information to SAMR. While this may facilitate antitrust enforcement, the proposal could also cause concerns about judicial activism. It remains to be seen whether this position will be accepted in the finalized interpretation.

Another notable legislative development is the draft amendments to the Anti-Unfair Competition Law ("**AUCL**") – the third proposed amendment to the AUCL within five years. The proposed amendments appear to target the digital sector, particularly to capture conducts that affect fair competition but do not fall under AML's remit. The proposed introduction of the concept of "abuse of superior bargaining power" is, however, controversial and may conflict with the notion of "abuse of dominance" under the AML.

Enforcement developments

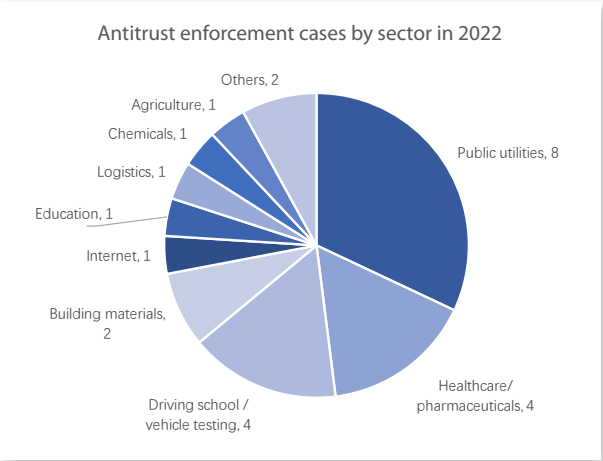
In 2022, SAMR and its local branches investigated 149 cases and issued a total of 25 behavioral penalty decisions, 11 of which related to horizontal agreements, five related to vertical restraints (all of which involved RPM)[3], and ten related to abuse of dominance.

1. Please refer to Chapter 04 for further discussion.
2. The Provisions of the Supreme People's Court on Certain Issues Relating to the Application of Law in Hearing Monopoly Civil Disputes (Draft for Consultation)
3. One case, which concerns a "hub-and-spoke" cartel, involved both horizontal and vertical issues.



Consistent with the trends observed in previous years, the Chinese antitrust authorities continue to heavily scrutinize "sectors affecting the Chinese people's livelihood". Such sectors include, in particular, utilities (often involving abuse of dominance by a local water or natural gas supplier in the form of exclusive dealing, tying or bundling), as well as healthcare and pharmaceuticals (particularly RPM cases involving medical devices or drugs).

SAMR also investigated a case that drew significant public attention. In its December 2022 penalty decision of an online academic journals database, cnki.net ("**CKNI**"), SAMR found that CKNI had abused its dominance by engaging in excessive pricing and exclusive dealing. CNKI was fined RMB87.6 million (approx. US$12.6 million), representing 5% of CNKI's 2021 annual turnover. On the same day of the penalty decision, CKNI announced on its website 15 "rectification" measures.



In 2022, more than 90% of the enforcement targets were Chinese domestic businesses with no foreign links, illustrating that the authorities did not target foreign businesses and there is no sign of politicization in antitrust enforcement.

The antitrust enforcement trend in 2022 also indicated an extremely active role of SAMR's local branches. Except for one abuse of dominance case against CNKI.net, all other cases were conducted by local antitrust authorities.

Antitrust litigation

In 2022, the Chinese courts demonstrated a proactive approach:

- In antitrust disputes relating to intellectual property rights ("**IPR**"), the Chinese courts have continued to assert their jurisdiction to adjudicate global standard essential patent disputes.

- In follow-on actions, the SPC ruled in favor of the claimant in a follow-on action[4] for the first time in China's antitrust history. The court also confirmed that an effective administrative penalty decision could serve as evidence of a violation, subject to contrary evidence. This is seen as a pioneering move that could increase follow-on actions in China.

- In patent disputes, the court took the initiative to review the legality of patent settlement agreements. The SPC also proposed to introduce a new mechanism allowing the Chinese courts to share information pertaining to potential antitrust violations with the antitrust enforcement agencies.

The Chinese court's evolving interpretation of the AML will serve as valuable guidance for businesses seeking to balance antitrust compliance and commercial needs.

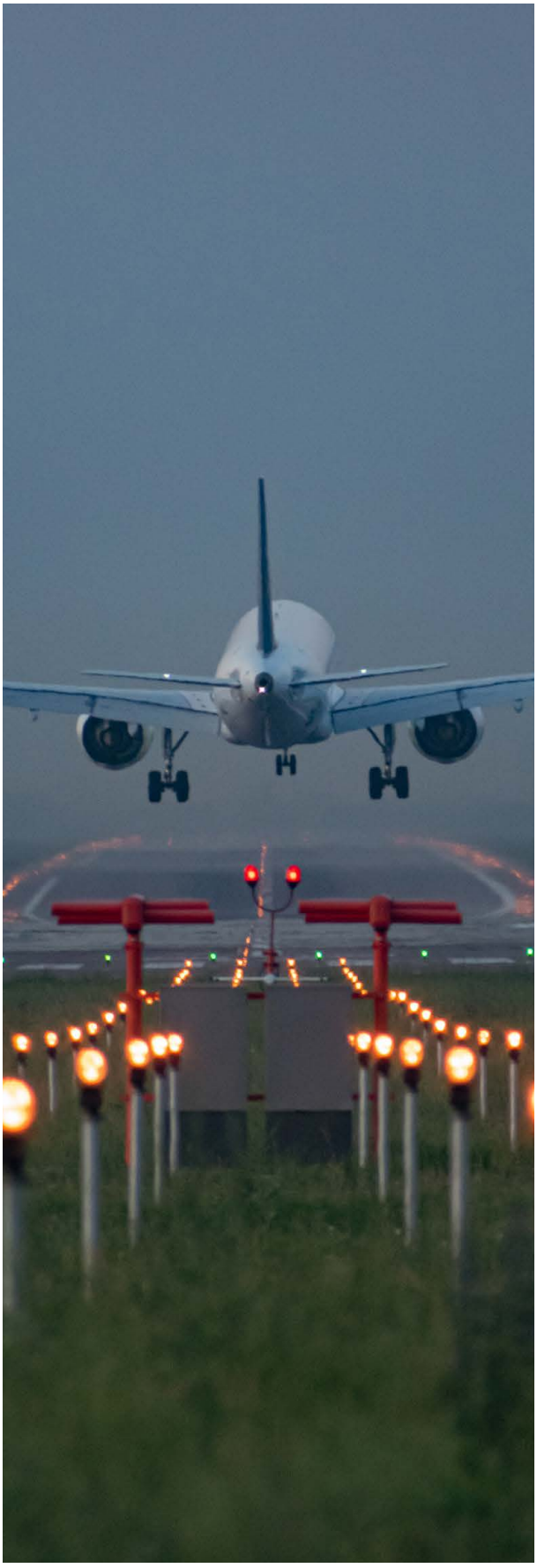
4. Follow-on actions are claims for damages where the infringement of competition law has already been established by a competition authority.

M&A

China has remained one of the key jurisdictions to look out for in merger control. In 2022, SAMR reviewed some 794 transactions. Based on published records, the authorities cleared 768 cases unconditionally (677 simple cases and 91 normal cases) and imposed remedies in five transactions. In 2022, the average review time for simple cases from filing to approval was about two weeks (18 days) (since case acceptance), in line with the trend observed in previous years. Complex cases continue to be subject to strict scrutiny with a long review timeline.

Due to global geopolitical tensions and, in particular, the US-China trade conflicts, Chinese stakeholders have been particularly concerned about supply chain resilience, particularly in the semiconductor/technology sector. Therefore, security of supply became the top industry concern which was often raised in the merger control review process concerning semiconductor/high-tech transactions.

Relatedly, national security review has become another important regulatory regime that parties to cross-border transactions must consider in addition to merger control review. The Chinese authorities are taking a more active role in overseeing national security issues arising from foreign investments, including calling in transactions which do not otherwise meet the merger control review thresholds. The review process was generally not transparent and might be lengthy, and could lead to remedies such as divestment. Chinese investors investing overseas should also be mindful of such regulatory hurdles in other jurisdictions, as concerns about China's growing influence remain.



02 Increasing penalties: Antitrust law enforcement sharpens its teeth

Outlook for 2023

The antitrust enforcement authorities have not published any penalty decision based on the enhanced penalties under the AML Amendments. It remains to be seen whether the actual penalties for antitrust violations will increase significantly under the new regime.

Nevertheless, considering the deterrent effect of the significantly higher penalties, businesses are devoting more effort to developing and implementing their antitrust compliance processes. In particular, considering that senior management may be vicariously and personally liable for their employees' violations in the future, special attention to ensure antitrust compliance is warranted. The need to balance antitrust compliance and commercial imperatives may become a pressing issue in 2023.

Antitrust laws in China are particularly powerful owing to the significant potential financial consequences of breaches. Since the dawn of China's antitrust regime, the maximum fine for engaging in anticompetitive conducts has been set at 10% of a business' turnover, and confiscation of illegal gains is allowed.

Chinese antitrust enforcement authorities' strict approach can be gauged from the fines imposed over the years and how these have increased. Before the establishment of SAMR, the fines were based on the annual turnover of the relevant products and relevant geographic areas. Since SAMR's establishment in 2018, the fines have been based on the violating business' overall annual turnover in China, significantly increasing the basis on which fines are calculated.

The AML Amendments, effective from August 2022, introduced important penalty-related developments, reflecting legislators' intention to increase China's antitrust law's deterrence effects. These changes include an increase in the maximum level of fines and the introduction of new forms of breaches, which are summarized in the table below:

Penalties under the AML – pre- and post-AML Amendments

Antitrust violation	Penalties pre-amendments	Penalties post-amendments
Behavioral breaches		
Concluding anticompetitive agreements, but without implementation	Maximum RMB500,000 (approx. US$75,000)	Maximum RMB3 million (approx. US$450,000)
Conclusion of anticompetitive agreements by businesses with no revenue in the preceding year	N/A	Maximum RMB5 million (approx. US$750,000)
Organization of anticompetitive agreements by industry associations	Maximum RMB500,000 (approx. US$75,000). Deregistration of the industry association	Maximum RMB3 million (approx. US$450,000). Deregistration of the industry association
Organizing/facilitation of anticompetitive agreements (i.e., "hub-and-spoke" cartels)	N/A	Up to 10% of turnover in the preceding financial year
Individuals contributing to anticompetitive agreements	N/A	Maximum RMB1 million (approx. US$150,000)
Obstruction of investigations		
Refusal to provide materials, providing false information or concealing, destroying or removing evidence	Maximum RMB1 million (approx. US$150,000)	Maximum 1% of sales revenues from previous year If the business generates no revenues in the preceding year or it is hard to ascertain the revenues, maximum, RMB5 million (approx. US$750,000)
Individuals obstructing investigations	Maximum RMB100,000 (approx. US$15,000)	Maximum RMB500,000 (approx. US$75,000)
Merger control		
Gun-jumping including failure to notify and implementation of the transaction before merger clearance	Maximum RMB500,000 (approx. US$75,000)	Up to RMB5 million (approx. US$750,000) for transactions that do not eliminate or restrict competition Up to 10% of the relevant parties' turnover in the preceding financial year for transactions that eliminate or restrict competition
For providing false disclosure or omissions in filing	RMB200,000 (approx. US$30,000) for the relevant party RMB100,000 (approx. US$15,000) for the responsible individual	Up to 1% of the relevant parties' turnover in the preceding financial year for the relevant party RMB500,000 (approx. US$75,000) for the responsible individual

The key changes are as follows:

- **Substantially increased fining cap:** For egregious breaches, the maximum fines can be multiplied by two to five times based on the normal fining levels. This effectively increases the maximum fine to 50% of a business's annual turnover in China.

- **Expanding individual liabilities:** While cartels and restrictions on resale prices are often driven by individuals, historically individuals were not held liable under the AML. The AML Amendments introduced financial penalties of up to RMB1 million (approx. US$150,000) for individuals responsible for anticompetitive agreements. This could cover senior management and the persons directly responsible. This change will likely add to China's antitrust law's deterrent effect.

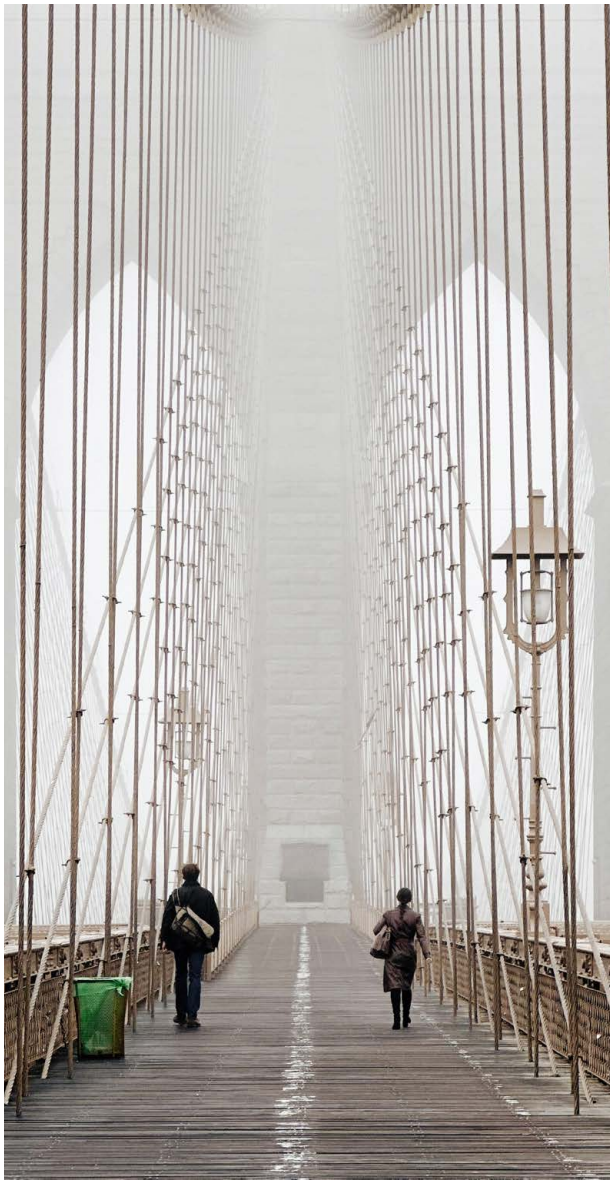
- **Significant increase to penalties for gun-jumping:** The maximum fine for gun-jumping has historically been RMB500,000 (approx. US$75,000). The low level of penalties resulted in a significant number of failure-to-notify cases. Since the AML Amendments, the maximum fines have been increased.

- **Enhanced penalties for obstructing investigations for businesses and individuals:** The maximum fine has been increased for both businesses (from RMB1 million (approx. US$150,000) to 1% of annual turnover) and individuals (from RMB100,000 (approx. US$15,000) to RMB500,000 (approx. US$75,000).

- **Potential criminalization of antitrust violations:** Criminal liabilities may be imposed on antitrust violations. Previously, criminal liabilities applied only to obstructing investigations. The precise application of criminal liabilities and whether individuals violating antitrust laws could be subject to imprisonment are expected to be clarified in upcoming amendments to China's Criminal Law.

Besides financial implications, the penalties will be recorded in the violators' social credit record. Thus, antitrust violations could potentially affect violators' future business activities, including banking transactions, bidding for government procurement projects or applications for licenses and certificates.

Between the promulgation of the AML Amendments and the end of 2022, SAMR (and its local branches) did not levy enhanced penalties in any cases. However, we have observed that businesses are becoming increasingly conscious of antitrust compliance – as evidenced by a sharp increase in the number of merger filings. Since the publication of the draft amendments to the AML in 2021, the number of merger filings increased from 459 in 2020 to 705 in 2021 and then to 794 in 2022.



03 Cartels: Towards more sophisticated scrutiny on interactions between competitors

Outlook for 2023

Anticompetitive horizontal agreements remain the most blatant form of violation under the AML as such agreements cause the most harmful disruption to competition. Anticompetitive horizontal agreements will remain highly scrutinized in 2023 and such agreements are expected to be the priority for future criminalization of antitrust violations.

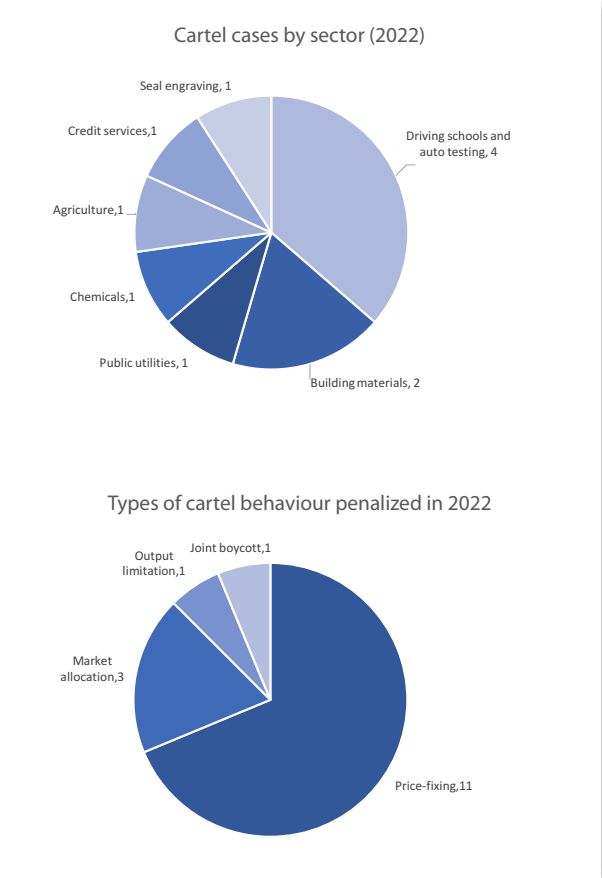
In addition to investigation and punishment of typical horizontal agreements, antitrust authorities are expected to pay more attention to new forms of violations such as hub-and-spoke agreements, patent settlement agreements that undermine competition, and concerted practice between shareholders of joint ventures.

Businesses should be vigilant as to whether any form of cooperation exceeds the necessary boundary of collaborations to avoid potential antitrust violation risks.

While the enforcement cases in 2022 illustrate that price-fixing remains a focus, new rules established in 2022 and judicial decisions indicate that China has a growing appetite for tackling more complex issues, such as patent settlement agreements. Where such agreements go beyond the necessity to resolve the dispute and would cause anticompetitive effects, the agreements may be invalidated. Meanwhile, "hub-and-spoke" agreements are also caught under the AML Amendments, suggesting more sophisticated scrutiny of interactions involving competitors can be expected.

1. Administrative enforcement in 2022: price cartel remains the focus

In 2022, the Chinese antitrust enforcement authorities scrutinized 11 cartel cases across a wide range of sectors. Consistent with the trend observed in previous years, price-fixing remains the major conduct subject to investigations.

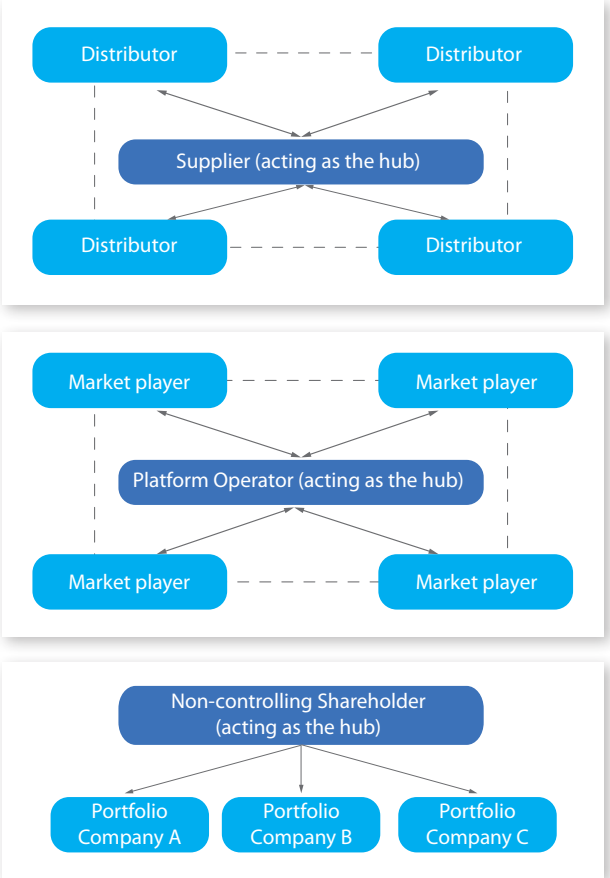


All the cases were enforced by local authorities rather than SAMR, and all targets were domestic trade associations or domestic entities. No foreign businesses or Chinese branches of foreign enterprises were penalized in China for horizontal collusion in 2022. The fine imposed on the cartelists ranged from 1-5% of their Chinese turnover. The authorities confiscated illegal gains in one of the 11 cases.

2. The AML Amendments in 2022: extending scrutiny of "hub-and-spoke" cartels

"Hub-and-spoke" cartels refer to a situation where an undertaking not directly involved in supplying the relevant product or service facilitates horizontal cooperation between players at another level of the supply chain.

Typical scenarios of "hub-and-spoke" cartels



While hub-and-spoke cartels have been recognized in many foreign jurisdictions as being anticompetitive, prior to its amendments, the AML did not expressly prohibit non-competing businesses from organizing or facilitating "hub-and-spoke" cartels, except that industry associations were clearly prohibited from organizing or facilitating members to enter into cartels. As such, before the revision to the AML this year, "hub-and-spoke" pricing cartels organized by businesses that were not trade associations were penalized as (i) resale price maintenance[5] imposed by the upstream business on its distributors and (ii) a cartel arrangement between the distributors. Meanwhile, there has not been historical enforcement against non-price-related "hub-and-spoke" cartels as scrutiny over non-price vertical restraints in China has to date been very limited. Amongst the penalty decisions published in 2022, four cases involved trade associations organizing or facilitating cartels among their members, accounting for more than one-third of the horizontal penalty decisions this year. This confirms that the amendments to the AML are much needed.

The AML Amendments expressly prohibited such "hub-and-spoke" cartels, with a maximum fine of 10% of turnover of the preceding financial year – the same level as the fine for engaging in cartels. The formal recognition of "hub-and-spoke" cartels as an antitrust violation, coupled with the introduction of personal liabilities with a maximum fine of RMB1 million (approx. US$150,000) for individuals contributing to anticompetitive agreements, will likely deter "hub-and-spoke" cartels in the future.

Following these developments, businesses that engage with multiple competing businesses at a different level of the supply chain – whether supplier, distributor, digital platform, franchisor, or investors investing in competing portfolio companies – will need to pay extra attention to avoid facilitating collusion or exchange of competitively sensitive information between these competing counterparties.

Case study:
Civil explosive equipment cartel case

In December 2022, the Zhejiang Administration for Market Regulation fined three civil explosives equipment manufacturers, their sole distributor and a trade association for involvement in a cartel scheme. Since late 2014, China has ceased restricting the prices of civil explosive equipment. However, the trade association was found to have organized meetings between 2015 and 2019 for the manufacturers and the distributor to fix prices and coordinate production and output volume. The cartel members were also found to have jointly boycotted a business that did not follow the trade association's instructions.

Under the AML Amendments, it may also be possible for the antitrust watchdog to categorize and penalize this kind of behavior as a "hub-and-spoke" cartel. This is because, at the trade association's direction, the prices of the three manufacturers' supply prices were essentially fixed through their engagement of the sole distributor. However, as the legacy AML did not penalize "hub-and-spoke" cartels via players at a different level of the supply chain, the authority instead used a combination of horizontal collusion, RPM and the facilitation of anticompetitive behavior by an industry association to capture the full extent of the scheme.

The manufacturers and the sole distributor were each fined 2% of their 2020 turnover; only the sole distributor faced confiscation of illegal gains. So far as the trade association was concerned, while the decision came after the AML Amendments came into effect, given the conduct concerned occurred before the AML Amendments, SAMR

5. Please refer to Chapter 04 for further discussion on resale price maintenance.

penalized the trade association using the legacy AML and imposed a fine of RMB400,000 (approx. US$60,000), as the pre-amendment cap of fines that could be imposed on trade associations facilitating cartels was RMB 500,000 (approx. US$75,000).

3. SPC rules on antitrust issues associated with IP settlement between competitors

Settlement is a common way to bring an end to IPR infringement disputes and is generally regarded as beneficial to the parties. However, settlement agreements may be invalidated if they go beyond settling the IPR dispute and possibly trigger antitrust liabilities.

In 2022, the SPC recognized that a patent settlement agreement could potentially constitute an antitrust violation. In *Shanghai Huaming v. Wuhan Taipu*, the SPC ruled that settlements between competitors beyond the scope of genuine patent dispute settlement could constitute an anticompetitive horizontal agreement.

Case study:
Shanghai Huaming v. Wuhan Taipu

Shanghai Huaming ("**Huaming**") and Wuhai Taipu ("**Taipu**") are competitors in manufacturing de-energized tap changers ("**DETCs**").[6]

In 2008, Taipu obtained the relevant patent rights to manufacture certain DETCs. In 2013, Taipu realized that Huaming manufactured certain DETCs in violation of Taipu's patent. In 2016, Huaming and Taipu reached a settlement agreement on the patent infringement. Based on the settlement agreement, (i) Huaming shall engage Taipu to manufacture, on its behalf, all but one of its DETC products; (ii) Huaming shall be Taipu's sale representative in overseas market and agreed not to sell such products overseas; (iii) Taipu and Huaming shall align on the prices of the DTECs.

Huaming claimed that the settlement agreement violated the AML. The first-instance court rejected all claims of Huaming on the ground that "the settlement agreement was concluded to avoid the recurrence of patent infringement disputes and was not anticompetitive in nature".

Upon appeal, the SPC revoked the judgment of the first instance court. The SPC held that the settlement agreement constituted a horizontal anticompetitive agreement and was invalid. It considered that the parties entered into a patent settlement to cover up their intention to divide the market, limit production and fix prices. The settlement agreement went beyond the necessity to resolve a genuine patent infringement issue and, therefore, constituted an anticompetitive agreement. The SPC further highlighted that agreements violating the AML should, in principle, be invalid. Thus, the settlement agreement was found to be invalid.

Notably, the SPC considered Huaming and Taipu to be competitors as they were both active in selling DETCs, notwithstanding Taipu's claim that their relationship was vertical as Huaming and Taipu had engaged each other to provide manufacturing and sale services. This illustrates that, in determining business relationships, the authorities tend to consider the actual market situation, rather than the contractual relationship.

6. De-energized tap-changers are used to adjust the voltage setting of oil transformers.

The Draft SPC Interpretation of the AML published in November 2022 also criticized patent settlement agreements often seen in the pharmaceuticals sector, commonly known as "pay-for-delay" agreements. These agreements involve an arrangement in which the patent holder pays the generic drug manufacturer to stop disputing the validity of the patent or to delay entering the market (e.g., not selling a generic version of a drug) for some time. The SPC recognizes that this type of agreement may be regarded as a horizontal anticompetitive agreement where the compensation paid by the patent owner to the generic manufacturer is too high.

In an earlier SPC ruling on an IP dispute, i.e., *AstraZeneca v. Jiangsu Aosaikang* (2021), the SPC proactively addressed potential antitrust issues associated with "pay-for-delay" arrangements, notwithstanding neither party raised any antitrust claims during the proceedings.

With the introduction of the drug patent linkage system[7] in China in 2021, patent infringement disputes and settlement arrangements between drug originators and generic manufacturers will likely increase. Against this backdrop, it is expected that antitrust disputes and enforcement of patent infringement settlement agreements will also be further strengthened in the future.

Case study:
AstraZeneca v. Jiangsu Aosaikang

In December 2021, the SPC reviewed an appeal made by AstraZeneca that originated from a patent infringement dispute. The decision was published in 2022. The patent at the center of the appeal was for the active ingredient Saxagliptin, which was previously owned by BMS and later acquired by AstraZeneca (the claimant in the case) in 2014. Previously, Vcare and BMS had disputes around this patent, which cumulated into BMS' commitment to not pursue Vcare or its affiliates for implementing the patent after January 1, 2016. Later, Vcare entered into a cooperation agreement with Aosaikang to allow the latter to manufacture and sell Saxagliptin tablets after 2016. In the meantime, BMS transferred the Saxagliptin patent to AstraZeneca in 2014.

In 2019, immediately after Aosaikang obtained approval to manufacture Saxagliptin tablets, AstraZeneca filed a lawsuit against Aosaikang for patent infringement, complaining that Aosaikang was not an affiliate of Vcare and should be prohibited from implementing the patent and manufacturing or selling Saxagliptin. The court of first instance held that Aosaikang, as a related party of Vcare, was entitled to manufacture and sell Saxagliptin under the settlement agreement. AstraZeneca appealed to the SPC but later applied for withdrawal because it had settled its dispute with Aosaikang. In reviewing the withdrawal application, the SPC proactively considered the settlement agreement entered into between BMS and Vcare in 2012 to be akin to a "*reverse payment agreement for pharmaceutical patents*" and decided to review "*whether the settlement agreement has violated the antitrust law*", even though neither party raised any antitrust-related allegation throughout the legal proceeding.

The SPC noted that if the withdrawal of an appeal is based on a settlement akin to reverse payment agreement, the court shall examine whether such a settlement may constitute any antitrust infringement. Although the SPC ultimately did not conduct a substantive review of the potential

7. The 'Drug Patent Linkage System' links the marketing authorization of a drug to the patent status of the originator's branded drug. The system aims to resolve drug patent disputes between the originator and the generic applicant at an early stage, through judicial or administrative proceedings, before the relevant generic drug is granted marketing approval.

anticompetitive effect of the settlement because the underlying patent had already expired and the IP barrier to market entry arguably no longer existed, the SPC indicated, for the first time, that reverse payment agreements would be subject to future court reviews from an antitrust law perspective, and outlined its approach to conducting this assessment.

4. Spillover effects of joint ventures ("JV")

In one of its conditional merger clearances of this year, SAMR identified potential coordination between the JV parents and the JV, all of which are active in the same market, as a theory of harm. While this is a merger control decision instead of an enforcement case, the decision illustrates that SAMR is increasingly aware of the possibility of coordination between the JV parents via a JV, and may scrutinize this area going forward.

This is not the first time China imposed remedies in the context of the establishment of JVs. For example, in the establishment of a JV by Corun, Toyota and Primearth EV Energy and Sinogy (2014), the authority considered that competition amongst the JV parents may be weakened due to the establishment of the JV, but ultimately the commitments focused on mitigating the potential foreclosure effects brought about by the transaction. In the establishment of a JV between Zhejiang Garden Bio-chemical and Royal DSM (2019), SAMR started considering the spillover effects of the JV amongst competing parents and imposed remedies to mitigate such effects. This year, in Shanghai Airport/China Eastern Air Logistics, SAMR took a deep-dive into the spillover effects of the JV. While the case is not a behavioral penalty decision, the factors considered in the analysis of spillover effects and the specific measures proposed to eliminate anticompetitive effects, such as Chinese wall, are useful guidance for businesses seeking to establish JVs with competitors.

Case study:
Shanghai Airport/China Eastern Air Logistics

Shanghai Airport Authority ("**Shanghai Airport**") and China Eastern Air Logistics ("**CEA**") planned to establish a JV to provide smart airport cargo terminal services at Shanghai Pudong Airport ("**Pudong Airport**").

In September 2022, SAMR found that the proposed transaction is likely to eliminate or restrict competition in the markets for cargo terminal services at the Pudong Airport and services related to international/domestic air cargo departing from or arriving at the airport. It identified the JV's spillover effects as a potential concern as the JV may weaken its parents' close competitive relationship in the market. Considering the JV parents' combined market share exceeded 70%, it may be difficult for other competitors to provide effective competition constraints.

To address such concerns, SAMR imposed a range of conditions, including (i) Shanghai Airport and CEA should hold separate their cargo terminal businesses at Pudong Airport, and continue to compete independently; (ii) Shanghai Airport, CEA and the JV should operate independently and (iii) Shanghai Airport, CEA and the JV should ensure that there is no exchange of competitively sensitive information amongst them.

Beyond horizontal issues, SAMR also considered the vertical relationship between the JV (that engaged in container terminal services) and CEA (that engaged in airfreight services) and found that the transaction would lead to foreclosure effect. As such, SAMR also imposed conditions requesting the parties to continue honouring the existing contractual obligations and to adopt fair, reasonable, and non-discriminatory (FRAND) terms in their ongoing provision of cargo terminal services.

04 RPM: Game-changing in 2022?

Outlook for 2023

The rules stipulated in the AML Amendments appear to provide more scope for defending vertical restraints but questions remain. In particular, whether the refinement of the rules means that enforcement against RPM will soften, and whether enforcement against non-price vertical restraints will tighten.

In 2023, it remains to be seen whether intensive enforcement against vertical restraints will continue, or whether the enforcement authorities will relax their approach.

RPM[8] remains the focus of vertical enforcement. In 2022, all five vertical cases that were penalized concerned RPM.

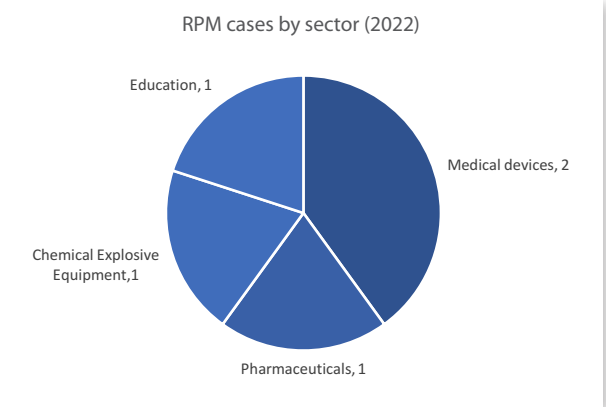
Changing the assessment framework for RPM was one of the highlights of the AML Amendments. In the AML Amendments, RPM is presumed to be illegal *unless* there is evidence that it has no anticompetitive effects. This puts an end to the debate between the Chinese courts, which adopted a *rule of reason* approach, and the administrative authorities, which treated RPM as a *"by object"* infringement.

In line with antitrust rules in many other jurisdictions, safe harbor exemption for vertical restraints (including RPM) were introduced under the AML Amendments. However, the market share thresholds for exemption harbor exemption are yet to be finalized. The Draft SPC Interpretation also recognized that an agency model and fixing the resale price for new product promotion might be exempt from the prohibition against vertical restraints.

1. Overview of RPM enforcement in 2022: sector focus and scrutiny of vertical behaviors

In 2022, all five vertical cases announced by the antitrust enforcement authorities concerned RPM. Non-price vertical restraints (e.g., restrictions on distributors' sales territories or customers) were not penalized. Consistent with the practice in previous years, these acts were regarded as measures to implement RPM. Relatedly, the AML Amendments and regulations published in 2022 did not specifically list out non-price vertical restraints as antitrust violations.[9]

The distributor model is commonly used in several industries, including automotive, pharmaceuticals and consumer goods. Healthcare remains the sector focus. Three of the five cases related to healthcare (two medical device cases and one pharmaceutical case), illustrating the antitrust enforcement authorities' concerns over practices resulting in price increases over such critical products.



The percentage fines in these cases ranged from 2-3% of the annual turnover of the businesses, which are relatively low in comparison to the penalties for horizontal monopoly and abuse of market dominance. Since 2008, China's antitrust enforcement authorities have only confiscated illegal gains in one vertical case, indicating the difficulty in calculating illegal gains in RPM practice.

In the penalty decision against Hainan Eshun Pharmaceutical ("**Eshun**") the authority found that the RPM conduct was not implemented. In the past, although many businesses tried to defend their case by arguing that the RPM agreement was not implemented, such defenses were rarely accepted.

8. RPM is most commonly adopted in the context of distributorship model, where an upstream distributor either fixes the resale price or imposes restrictions on the minimum price of its products and requires the downstream retailers to adhere to such fixed or minimum price when selling the products to its customers. Article 18 of the revised AML prohibits such conduct unless the market share of the undertaking is below the prescribed threshold or the undertaking is able to prove that such arrangements do not have anticompetitive effects.

9. That said, guidance documents, such as SAMR's Antitrust Guidelines for the Platform Economy ("**Digital Antitrust Guidelines**") published in 2021, discussed that restriction on sale channels and "most favored nation" clauses may constitute "other vertical anticompetitive restraints" – to be discussed further in Chapter 08.

Case study:
Hainan Eshun Pharmaceutical – penalty on unimplemented RPM arrangements

In June 2022, the Hainan Administration for Market Regulation ("**Hainan AMR**") fined drug producer Eshun for engaging in RPM. The investigation started in August 2020 following tip-offs.

In 2019-2020, Eshun purported to fix the minimum resale prices of the anti-inflammatory pill via agreements with 40 distributors. In the agreements, Eshun also included provisions imposing penalties on distributors who sold outside of their designated territories or online.

One possible reason for the antitrust enforcement authority to find that the agreement was not implemented might be the national mandatory maximum resale price for the concerned drug during the COVID-19 pandemic. Since the mandatory maximum resale price is lower than the minimum resale price agreed between Eshun and the distributors, none of the distributors could actually enforce Eshun's restrictions.

Interestingly, the Hainan AMR specified in the decision that the agreements eliminated price competition between distributors and weakened inter-brand competition, which appears to contradict the facts found in the case, without giving any reasoning as to how conduct that has not been implemented could cause any anticompetitive harm.

Notably, for the first time in 2022, the authorities penalized RPM conduct in a franchise model. This has put the franchise model under the spotlight. This was the controversial *Sesame Street English* decision, which stirred up debates on whether the franchisor/franchisee relationship should be distinguished from the supplier/distributor relationship. The argument is that justifications exist for franchisors to standardize prices of their franchisees, in light of the significant resources a franchisor needs to invest in its franchisees. However, the decision indicated that there is no default exemption applicable to the franchisor/franchisee relationship in general, and any such justifications should be assessed on a case-by-case basis.

Case study:
Sesame Street English – the first RPM case against the franchisee model

In July 2022, the Beijing Administration for Market Regulation ("**Beijing AMR**") penalized Beijing Kairui Alliance Education Technology ("**Kairui**") for RPM.

Kairui is the licensee of the language learning brand "Sesame Street English" in China. It is engaged in the franchise business of English learning services for children. The Beijing AMR found that Kairui primarily sold its English training courses via its franchisees and considered there to be a vertical relationship between Kairui and its franchisees. It further found that between 2014 and 2021 Kairui fixed the course prices of its franchisees via agreements, issuing price plans for the franchisees and requesting franchisees to report their prices. Franchisees were required to seek Kairui's approval before making any price adjustments. Some franchisees were penalized for breaching Kairui's price terms.

In assessing the anticompetitive effect, the Beijing AMR noted that franchise model is not necessarily exempt from prohibited RPM practices, and found that Kairui failed to provide evidence to justify standardized pricing is essential to maintaining its business model and protecting the brand. Accordingly, the Beijing AMR found that Kairui's RPM restricted both intra-brand competition amongst the franchisees and inter-brand competition with other English learning service providers, and fined Kairui 3% of its 2020 annual turnover, which amounted to RMB942,000 (approx. US$140,000).

2. Amended AML in 2022: aligning the judicial and administrative approaches, RPM is now presumed anticompetitive, subject to rebuttal

The AML Amendments settled a long-lasting debate between the Chinese courts, which adopted a "*rule of reason*" approach toward RPM (i.e., anticompetitive effect is required to be shown), and China's antitrust enforcement authorities, which treated RPM as an "*object*" infringement (i.e., *per se* illegal unless exemptions apply), by landing at a compromise: all vertical restraints are subject to a "*rule of reason*" approach, while RPM is presumed to be illegal subject to rebuttal that there are no anticompetitive effects.

At the legislative level, the revised rule will help the alleged infringers. Theoretically, an alleged infringer can defend a RPM allegation in future investigations if it can demonstrate that the RPM conduct does not give rise to anticompetitive effects. In practice, the standard of proof is unclear, making practical application difficult. The Draft SPC Interpretation specified that potential procompetitive and anticompetitive effects an RPM practice can bring about, and clarified that an RPM practice is only illegal where (i) the party imposing RPM requirements has significant market power and (ii) the anticompetitive effects outweigh the procompetitive effects. However, it remains to be seen in practice whether businesses can successfully raise the "effects defense" during administrative enforcement.

3. Further clarifying exemptions

(i) Safe harbor

The AML Amendments introduced a generic safe harbor[10] provision for vertical restraints based on market share. In the past, there was no general safe harbor applicable to anticompetitive agreements in China except for those relating to the automobile sector and intellectual property.

Before the AML Amendments came into effect, the safe harbor exemption has already been introduced in the antitrust guidelines relating to automobiles and intellectual property. However, the safe harbor rules proposed in these guidelines only apply to non-price restrictions, i.e., RPM is excluded from the scope of application. In contrast, the AML Amendments did not exclude any conduct from the application of safe harbor; hence, even RPM falls within the scope.

The applicable market share threshold for safe harbor, however, has not yet been set out in the AML Amendments. The draft rules[11] published by SAMR proposed a threshold of 15% market share in both the upstream and downstream markets. It is worth noting that this proposal is lower than the 30% market share threshold adopted in the EU, as well as the "Antitrust Guidelines for the Automobile Sector" and the "Antitrust Guidelines in the Field of Intellectual Property" for vertical agreements currently in force in China.

10. Safe harbor exemption is widely available in many jurisdictions. Conducts by businesses with a market share below the prescribed threshold are considered to have limited restrictive effects on the market.

11. The Provisions on Prohibition of Monopoly Agreements, published for consultation in June 2022.

Summary of the vertical safe harbor in SAMR's various provisions/guidelines

Regulations/Guidelines	Safe Harbor Thresholds for Ver-tical Restraints	Scope of Application
Draft Provisions Prohibiting Monopoly Agreements	< 15% in both the upstream and downstream markets	All vertical restraints
The Antitrust Guidelines for the Automobile Sector (the "**Automotive Guidelines**")	< 30% market share in any relevant market	Certain non-price vertical restraints in the form of territorial and customer restrictions in the automobile industry (except for a few hardcore restrictions, as mentioned above)
The Antitrust Guidelines in the Field of Intellectual Property	< 30% market share in any relevant market. If it is difficult to calculate the parties' market shares or if market shares cannot accurately reflect the parties' market position, the safe harbor will apply if there are at least four substitutable technologies	Non-price-related vertical restraints involving intellectual property rights

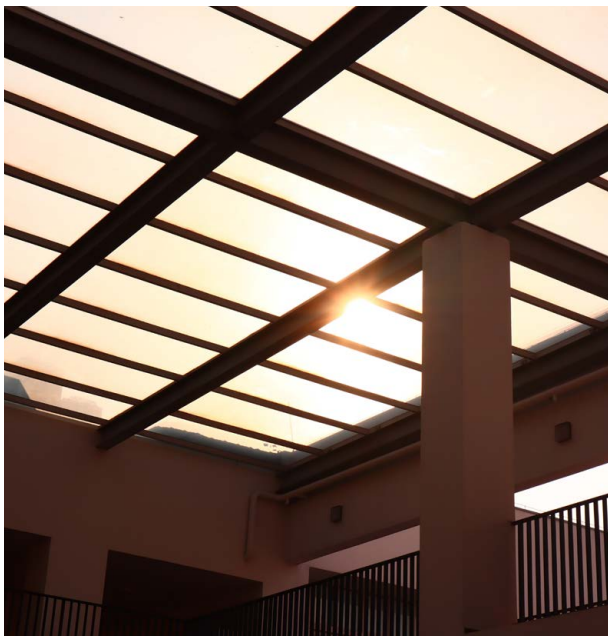
(ii) Genuine agency

For the first time, in 2022, the Draft SPC Interpretation recognizes that "genuine agency" may be exempted from the AML's prohibition against vertical restraints. This is in line with the position in many jurisdictions, where a principal-agent relationship is exempt from prohibited anticompetitive agreements, as the agent is considered not to be independent of the principal.

The implication is that where a reseller can be categorized as an agent (rather than an independent distributor), the principal shall not be found to have breached the AML by imposing vertical restraints (including RPM) on the agent. That said, the SPC only spelt out the principle, and stopped short of specifying the factors that would allow a reseller to be categorized as an agent. In particular, in the Automotive Guidelines (published in 2020), SAMR recognized the exemption of an "intermediate agent", which does not strictly fall into the definition of "agent" under the Civil Code but refers to resellers who only provide limited logistics assistance (delivery, payment and invoicing) in transactions between automotive OEMs and its direct customers. It is to be clarified whether SPC's genuine agency exemption can also cover such an "intermediate agent" recognized in the Automotive Guidelines and accordingly extend the exemption to industries other than the automotive sector.

(iii) RPM for new products during promotional period

The Draft SPC Interpretation also recognizes that fixed resale price for new product promotion may be exempt from the AML's prohibition as long as such practice is limited to a reasonable period of time. In the past, SAMR recognized in the Automotive Guidelines that RPM for new energy automobiles during the promotional period (up to nine months) can be exempted. The Draft SPC Interpretation recognizes the application of such exemption in other industries, while the "reasonable period" may be identified on a case-by-case basis.



05 Abuses: Concerns over revival of "abuse of superior bargaining power"

Outlook for 2023

Due to the natural monopolistic nature of the public utilities, abusive behavior of public utilities is expected to remain a focus of antitrust enforcement in the coming year. Businesses in public utilities, platform economy, pharmaceuticals and other sectors that concern public welfare should pay adequate attention to compliance risks in addition to business development when formulating strategic decisions. For instance, these businesses should be mindful of significantly increasing product prices and engaging in ring-fencing through exclusivity provisions that may be found to be anticompetitive.

Businesses that are potentially in a dominant position should include antitrust compliance assessment as a factor in their business decisions to manage antitrust risks. In light of the significant amendments to the rules on abusive conduct that will come in 2023, businesses with considerable market power should closely monitor regulatory developments and calibrate their internal compliance standards.

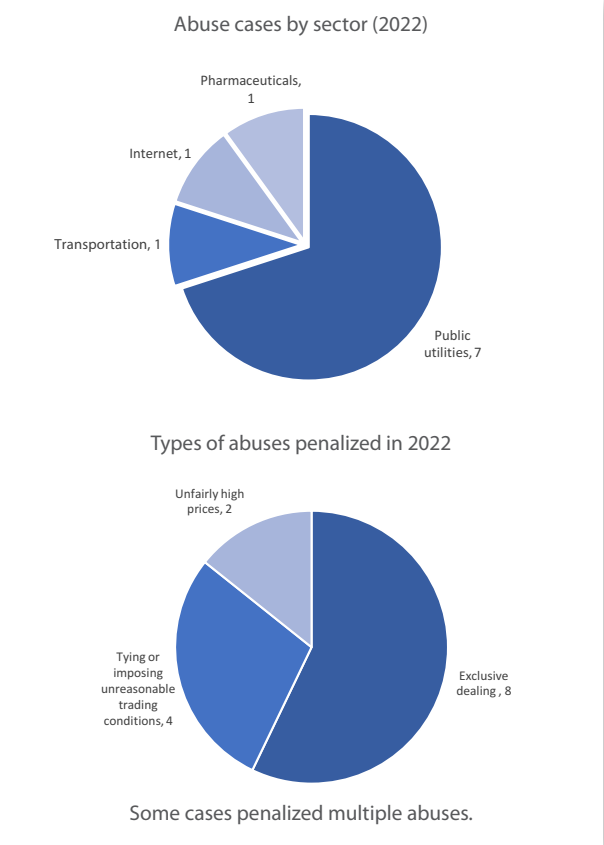
Abuse cases this year continued to focus on "sectors critical to livelihood", including public utility sectors. While the AML Amendments did not significantly revise the basic rules relating to abuse of dominance, SAMR and the SPC have both worked on their respective implementation rules and judicial interpretation in 2022 to clarify how abuse of dominance rules should be applied, in particular to the digital platform sector.

Another notable, while controversial, development of 2022 was that SAMR proposed to introduce the concept of "abuse of superior bargaining power" to the AUCL. Overlap in the types of abusive behavior subject to the AML and the AUCL invites concerns that a strict legal test of "dominant position" under the AML may be bypassed, increasing the risk of over-regulation. Legislators are expected to consider these concerns and reassess whether it is necessary to introduce a parallel set of regulations over the same conducts.

1. Enforcement overview

Consistent with the trend observed in previous years, abuse cases in 2022 focused on "sectors critical to livelihood". Most abuse cases in 2022 concerned public utilities, accounting for seven of the ten cases. The remaining three cases related to the transport, pharmaceuticals[12] and internet sectors. Nine cases were enforced by the local antitrust authorities, with only one enforced by SAMR.

Amongst the types of abuse scrutinized, exclusive dealing remained under the spotlight.



In the above cases, fines ranged from 2-5% of the business' annual turnover. Illegal gains were confiscated in seven of the cases.

(i) Public utilities under scrutiny

As public utilities are often regarded as "natural monopolies", they have been frequent targets for abuse of dominance enforcement actions. The public utilities penalized this year, active in providing natural gas and supplying water in the local district, were often found to have a 100% market share in a narrowly defined market (e.g., supply of water/natural gas in a district).

Continuing the trend from previous years, the antitrust authorities found that these utilities abused their dominant position by imposing exclusivity requirements or other unreasonable trading

12. This includes the penalty decision against Northeast Pharmaceutical for charging unfairly high prices. The penalty decision has not been officially published yet, but Northeast Pharmaceutical announced its acceptance of the penalties in a public announcement in December 2022.

conditions on customers, as well as tying and bundling.

(ii) Penalty imposed on exclusive dealing and excessive pricing adopted by online academic database

In December 2022, SAMR penalized an online academic journals database, CNKI, for excessive pricing and exclusive dealing. The investigation was triggered by a local media report of complaints raised by a retired professor alleging CNKI abused its market power by removing all the articles authored by the professor from the database after CNKI lost an IP lawsuit.

2. SAMR and the judiciary clarified the abuse rules

While the AML Amendments did not heavily revise the rules regarding abuse of dominance, both SAMR and the SPC worked on their implementation/interpretation rules respectively to develop a more nuanced framework for assessing abuses.

(i) Clarifying the concept of "collective dominance"

On top of presuming a business to be dominant where its market share exceeds 50%, the AML also covers the concept of "collective dominance", such that dominance may be found where two businesses have a combined market share of two-thirds of the market, or three businesses have a combined market share of three-quarters. Theoretically, businesses with less than 50% may still be caught under "collective dominance" in a concentrated market if the other competitors also have a significant market share. This could potentially mean that businesses in a highly concentrated market with a few key players could easily be regarded as being (collectively) dominant.

To address this peculiarity, the Draft SPC Interpretation clarified that competing businesses can rebut the presumption of collective dominance by (i) establishing that they are actual competitors or (ii) they are collectively subject to competition restraints from other rivals. This rebuttal indicates that "collective dominance" will only be found where businesses align their market-facing conduct but not when they are actually competing with each other. The line of thinking is aligned with other jurisdictions such as the EU.

Case study:
Abuse of dominance decision against CNKI

In December 2022, SAMR published a penalty decision against an online academic journals database CNKI for abuse of dominance.

In considering CNKI's dominance, CNKI was found to have a market share above 50% based on both revenue and download rate in 2014-2021 in the Chinese academic literature network database service market. Other factors including market concentration, entry barriers, CNKI's financial prowess, users' dependence, and its relative strength in related services (e.g., plagiarism checking service) were also considered.

In terms of abuses, CNKI was found to have excessively priced its data services. In determining the definition of "excessively high prices", SAMR considered CNKI's historical costs and the prices of its competitors, concluding that CNKI employed unfair means to increase its prices. CNKI was also found to have engaged in exclusivity arrangements by prohibiting academic journal publishers and universities from authorizing any third party to use their academic literature.

CNKI was fined RMB87.6 million (approx. US$12.6 million), representing 5% of CNKI's 2021 annual turnover. No illegal gains were confiscated. On the day when the punishment decision was announced, CNKI published a detailed "rectification" plan with 15 measures on its website for public supervision.

Case study:
Three mobile operators were found to be collectively dominant by the SPC

In 2015, an individual consumer, Mr. Ma, signed an agreement with China Mobile, requesting a designated mobile number. In 2021, Mr. Ma filed a lawsuit before Zhengzhou Intermediate People's Court against China Mobile, alleging it abused its dominant market position by refusing to allow him to keep his mobile number when switching to another mobile network operator. In contrast, this is allowed by other network operators.

After the first-instance court rejected the Ma's claim, he appealed to the SPC. While ruling that there was no abuse, the SPC recognized that China Mobile was in a dominant position.

The SPC held that the relevant market should be defined as the mobile communication services market of Luoyang City, Henan Province. In considering whether China Mobile was dominant, the SPC considered the parallel market behavior of China Mobile and two other operators. The SPC ruled that the three mobile network operators were collectively dominant considering that their conduct was aligned and that they had a combined market share of 100%.

(ii) Identifying new forms of abuses for the digital economy

In 2022, the new SAMR draft rules and Draft SPC Interpretation recognized new forms of abuses:

- **"Self-preferencing"**, which denotes conduct where a business favors an affiliate over third parties. In 2022, SAMR specified in its draft rules[13] that "self-preferencing by digital platforms", including (i) giving priority to the display or ranking of the platform's own products; and (ii) use of non-public data by in-platform operators to develop the platform's own products or to aid the platform's own decision-making, can be abusive.

- **Parity clauses**, which are provisions where a business requires a trading counterpart not to offer better terms/lower prices on other channels (including the counterpart's own channel). This type of behavior has been criticized widely in overseas jurisdictions as both a vertical restraint and an abuse of dominance. The SPC explicitly spelt out, in its Draft SPC Interpretation, that parity clauses imposed by digital platforms may violate the AML as both anticompetitive agreements and as abuse of dominance. This went farther than the position in SAMR's Digital Antitrust Guideline, which only stated that parity clauses might be an anticompetitive vertical restraint.

3. Revival of "abuse of superior bargaining power" under proposed AUCL amendments – supplementing or bypassing the AML?

Beyond the AML framework, draft amendments to the AUCL ("**Draft AUCL Amendments**") (published for public consultation in November 2022) also sought to regulate abuses by prohibiting businesses with "superior bargaining power" from engaging in certain abusive conduct. The implication of the provision is that businesses that fall short of being dominant under the AML[14] may still fall foul of the AUCL as a business in "a superior bargaining position" (which

13. The Draft Provisions Prohibiting Abuse of Dominance.

14. Under the AML, an undertaking is presumed to have a dominant position if it achieves 50% market share in the relevant market.

appears to be a more fluid concept than dominance). However, the concept of "abuse of superior bargaining position" may bring about some legal uncertainty.

The concept of "superior bargaining power" was, in fact, introduced in the 2016 draft revision of the AUCL. It was not adopted at the time owing to public criticism on theoretical and practical grounds.

The reintroduction of this concept in 2022 reflected the difficulties faced by SAMR (and its local branches) in adopting the abuse of dominance provision in the AML to penalize abusive conduct such as exclusive dealing and tying/bundling, particularly in the digital economy (e.g., the requirements to define relevant market, establish dominance and identify competitive effects). Criticism of this concept remains: some of the assessment criteria, such as technical superiority, degree of market influence and operators' reliance, are not objective or quantitative, which could lead to legal uncertainty and may be seen as an attempt to circumvent the strict legal test of "dominance" under the AML.

The list of "abuses" identified under the Draft AUCL Amendments substantially overlapped with that in the AML, both covering exclusive dealing, imposing unreasonable trading conditions, and tying/bundling. If the concept of "abuse of superior bargaining power" is adopted in the finalized AUCL, the potentially overlapping application of the AML and the AUCL should be resolved to avoid parallel enforcement over the same conduct.

06 M&A: Updated merger control rules call for careful deal planning

Outlook for 2023

As enterprises become more aware of antitrust compliance, the number of merger filings is expected to remain high in 2023. That said, the implementation of the new thresholds and the ongoing delegation of review to local authorities is expected to relieve SAMR's pressure and improve the predictability of merger control review timeline.

Potential investigations of "below-threshold" transactions that may lead to competition concerns, expected increased scrutiny over gun-jumping and the introduction of "stop-the-clock" mechanism may pose challenges to parties' deal-planning. Transaction parties need to carefully consider the impact of merger filing at an early stage of the transaction, assess the deal's impact on the market in advance, carefully design the transaction structure (including interim covenants) to prevent gun-jumping risks, and properly prepare the filing materials to improve the predictability over the deal timeline.

In 2022, SAMR reviewed 794 transactions, the highest number of transactions reviewed by SAMR since the dawn of China's antitrust regime. Of these cases, 768 were cleared unconditionally, including 677 cases reviewed under the simplified procedure ("**simple cases**") and 91 cases reviewed under the regular procedure. Five cases resulted in remedies. No cases were prohibited by SAMR in 2022.

The sharp increase in the number of cases and the limitation of manpower have posed a huge challenge to SAMR. In 2022, SAMR steered its resources towards cases with the most prominent anticompetitive effects and entrusting its local branches with the review of simple cases. The impact is reflected in the review time. In 2022, for simple cases, the average time from formal case acceptance to clearance was about two weeks, in line with the trend observed in previous years. For transactions that do not give rise to competition issues, as long as the transaction parties can properly prepare the filing materials and avoid "gun-jumping", they can expect to obtain approval quickly. In contrast, the average review period for complex (remedy) cases from filing to approval was 434.2 days. Evidently, complex transactions giving rise to competition concerns are subject to strict scrutiny with longer review periods, and the parties should be prepared to propose remedies. As a result, to increase the certainty of the transaction timeline, businesses may wish to conduct an effects assessment at an early stage and plan ahead for antitrust filings.

1. Revised rules to determine merger notifiability

(i) Increasing the turnover notification thresholds

In light of commercial growth, SAMR issued the "Provisions of the State Council on the Standard for Notification of Concentration of Undertakings (Amendments) (Draft for Consultation)" ("**Draft Notification Thresholds**") in 2022, which proposes to increase the turnover thresholds for merger filing. This represents the first amendment to the turnover threshold since 2008. A comparison of the current and the proposed thresholds is set out below.

	Current thresholds	Proposed thresholds (not yet effective)
Threshold 1	(i) Combined worldwide turnover exceeding RMB10 billion (approx. US$1.5 billion) and (ii) at least two business operators each had a Chinese turnover exceeding RMB400 (approx. US$60 million) million, in the preceding financial year.	(i) Combined worldwide turnover exceeding RMB12 billion (approx. US$1.8 billion) and (ii) at least two business operators each had a Chinese turnover exceeding RMB800 million (approx. US$120 million), in the preceding financial year.
Threshold 2	(i) Combined Chinese turnover exceeding RMB2 billion (approx. US$300 million) and (ii) at least two business operators each had a Chinese turnover exceeding RMB400 million (approx. US$60 million), in the preceding financial year.	(i) Combined Chinese turnover exceeding RMB4 billion (approx. US$600 million) and (ii) at least two business operators each had a Chinese turnover exceeding RMB800 million (approx. US$120 million), in the preceding financial year.

The Draft Notification Thresholds also seek to strengthen regulatory review over "killer acquisitions".[15] A new set of thresholds has been proposed, purporting to capture a situation where a mega firm proposes to acquire a business that has a relatively high market value (e.g., a unicorn company) but whose turnover or market share is yet to be realized:

- the Chinese turnover of one business operator involved in the concentration exceeded RMB100 billion in the preceding financial year; and
- the market value of another relevant party is no less than RMB800 million, and at least one-third of such party's global turnover is generated in China.

15. Killer acquisitions refer to a situation in which an incumbent acquires an innovative target to stunt the target's development and preempt future competition. These are most commonly observed in the digital and pharmaceutical industries. Examples in China include the high-profile Didi/Uber merger (2015), which was not notifiable in China as Uber's Chinese turnover did not meet the relevant thresholds.

(ii) Explanation of factors in determining control

Many financial investors acquiring minority stakes have been penalized by SAMR for failures to notify, triggering questions over the definition of "change of control" from an antitrust perspective. Notably, SAMR does *not* accept any safe harbor/*de minimis* shareholding percentage in finding control – *an acquisition of strategic rights* would be sufficient to a confer control. This approach has been confirmed in SAMR's "Provisions on Review of Concentration of Undertakings (Draft for Consultation)" ("**Draft Merger Review Rules**"), which clarified that the following rights would confer control:

- appointment or removal of senior management personnel;
- approval of the financial budget; and
- approval of the business plan.

The types of governance rights identified as sufficient to confer control are in line with the EU approach. But crucially, this list is not exhaustive – it is possible that SAMR may regard other rights as conferring control on a case-by-case basis.

(iii) Clarification of "gun-jumping" actions

If a company is found to have implemented the transaction during the merger review, even if the transaction itself does not give rise to competition issues, the review timeline may be significantly delayed. To provide businesses with more legal clarity, SAMR's Draft Merger Review Rules clarify the types of behaviors that may constitute the implementation of a concentration, including:

- effecting changes in the register of shareholders;
- appointing senior management personnel;
- participating in business decision-making and management;
- exchanging sensitive information with other operators; and
- carrying out business integration.

Transaction parties should avoid taking any of the above actions before merger clearance has been obtained.

In practice, to prevent the seller from engaging in actions that may impair the target company's commercial value, and to ensure the buyer can start operations as soon as possible after obtaining approval, transaction parties usually set out in the transaction documents the interim arrangement of the target company between signing and closing. Parties should carefully design such interim provisions bearing in mind SAMR's guidance on gun-jumping, and be wary of imposing unnecessary temporary restrictions on the target company before obtaining merger clearance.

The above list only sets out some examples and is non-exhaustive. Any actions that allow the buyer to effectively influence the target company's operations before merger clearance has been obtained may be regarded as premature implementation and subject to gun-jumping risks.

(iv) Formalizing the review rules for "below-threshold" transactions that harm competition

Under the AML Amendments, SAMR can request the transaction parties to file a transaction even if it does not meet the notification threshold (i.e., "below-threshold" transactions), so long as there is evidence that the transaction eliminates or restricts competition.[16]

The Draft Merger Review Rules further set out that SAMR may require the parties to make a retrospective notification within 180 days if the transaction has already been implemented. Therefore, even if a transaction does not meet the notification criteria, the parties will still need to consider whether the transaction may result in competition concerns and be subject to SAMR's filing request, as well as

16. Although this power appeared in previous SAMR guidelines, this is the first time such power has been established at the legislation level.

the corresponding implications on the transaction timetable. Where parties have concerns over the potential competitive effect of their transactions, they should consider making a voluntarily filing, or at least consult SAMR, to avoid being "called in" unexpectedly, which can result in potential delays to the transaction.

2. Optimizing merger review procedures

By optimizing the review process, the review timeline for cases that qualify as simple cases remains short and predictable, as observed in previous years. With the introduction of "stop-the-clock" mechanism under the AML Amendments, the review timeline for complex transactions is expected to be more predictable going forward.

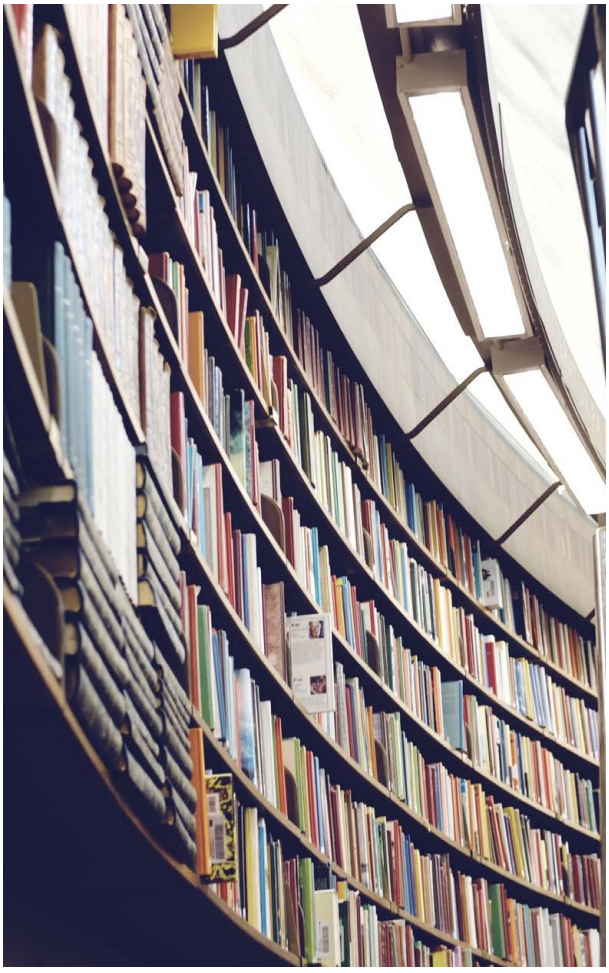
(i) Predictable timeline for the review of simple cases

Since August 1, 2022, SAMR announced a pilot program to delegate the review of certain simple case filings to five of its local counterparts in Beijing, Shanghai, Guangdong, Chongqing and Shan'xi Provinces during a three-year pilot period. A transaction can be delegated to one of the five local authorities where there is a nexus to the relevant city or province. Thus far, the move has produced a positive outcome in terms of reducing SAMR's caseload. The review timeline by SAMR and the local authorities is similar. In 2022, the average review timeline of simple cases by the local authorities was 17.8 days (from official case acceptance to clearance), compared to 17.9 days by SAMR.

(ii) Introducing the "stop-the-clock" mechanism

Considering that SAMR's review of complex cases often exceed the statutory timeline, a new "stop-the-clock" mechanism for merger review has been introduced, allowing the authority to pause the statutory review timeframe under certain circumstances, such as: (i) the parties' failure to submit supporting information in a timely manner; (ii) new circumstances arising which materially impact the review; and (iii) further evaluation of remedy conditions is required (provided that the filing parties consent). As of January 2023, it has been reported that, in some high-profile cases, SAMR has already been employing the "stop-the-clock" mechanism.

With the introduction of "stop-the-clock" mechanism, going forward, parties will likely no longer need to withdraw the original notification and resubmit (a practice known as "pull-and-refile") where the statutory review timeline is exceeded. This may provide more transparency for the process because, without reasons explicitly provided in the AML Amendments, SAMR cannot "stop-the-clock" arbitrarily for delays caused by other reasons, e.g., stakeholders' delays in providing responses during the stakeholder consultation process. However, there is no statutory limit to the number of times the clock may be stopped, and the maximum duration. Thus, it remains to be seen whether the "stop-the-clock" mechanism will improve the predictability of the review timeline for complex transactions in China.



3. Focus on sectors of strategic importance

In 2022, SAMR cleared five transactions conditionally. Three of the transactions related to semiconductor/tech (to be discussed further in Chapter 07, and the remaining two related to the airline industry.

Transaction (clearance date)	Sector	Concerns	Type of remedies	Duration of review (from filing to clearance)	Unconditional clearance obtained in other jurisdictions?
GlobalWafers/ Siltronic (January 20, 2022)	Tech (semi-conductors)	Horizontal	Hybrid: structural (divestment); behavioral conditions will last for five years, subject to lifting by application to SAMR	392	Yes. But the parties could not secure German foreign investment approval by the deadline and the transaction lapsed.
AMD/Xilinx (January 21, 2022)	Tech (semi-conductors)	Conglomerate	Behavioral conditions to last for five years, subject to lifting by application to SAMR	368	Yes
II-VI/Coherent (January 28, 2022)	Tech (semi-conductors)	Horizontal and vertical	Behavioral conditions to last for five years and will expire automatically	372	Yes
Shanghai Air-port/ China Eastern Air Logistics/JV (September 13, 2022)	Air transport (airfreight and airport cargo terminal)	Horizontal and vertical	Behavioral one condition to last for five years and the rest to last for eight years, all subject to lifting by application to SAMR	328	No public record of notifications in other jurisdictions
Korean Air/Asiana Airlines (December 26, 2022)	Air transport	Horizontal	Hybrid: structural (divestment of flight slots and traffic rights for ten years) and other behavioral conditions to last for ten years and will expire automatically	711	Remedies imposed in Korea; approvals are pending in the US, EU, Japan and the UK; unconditionally cleared elsewhere

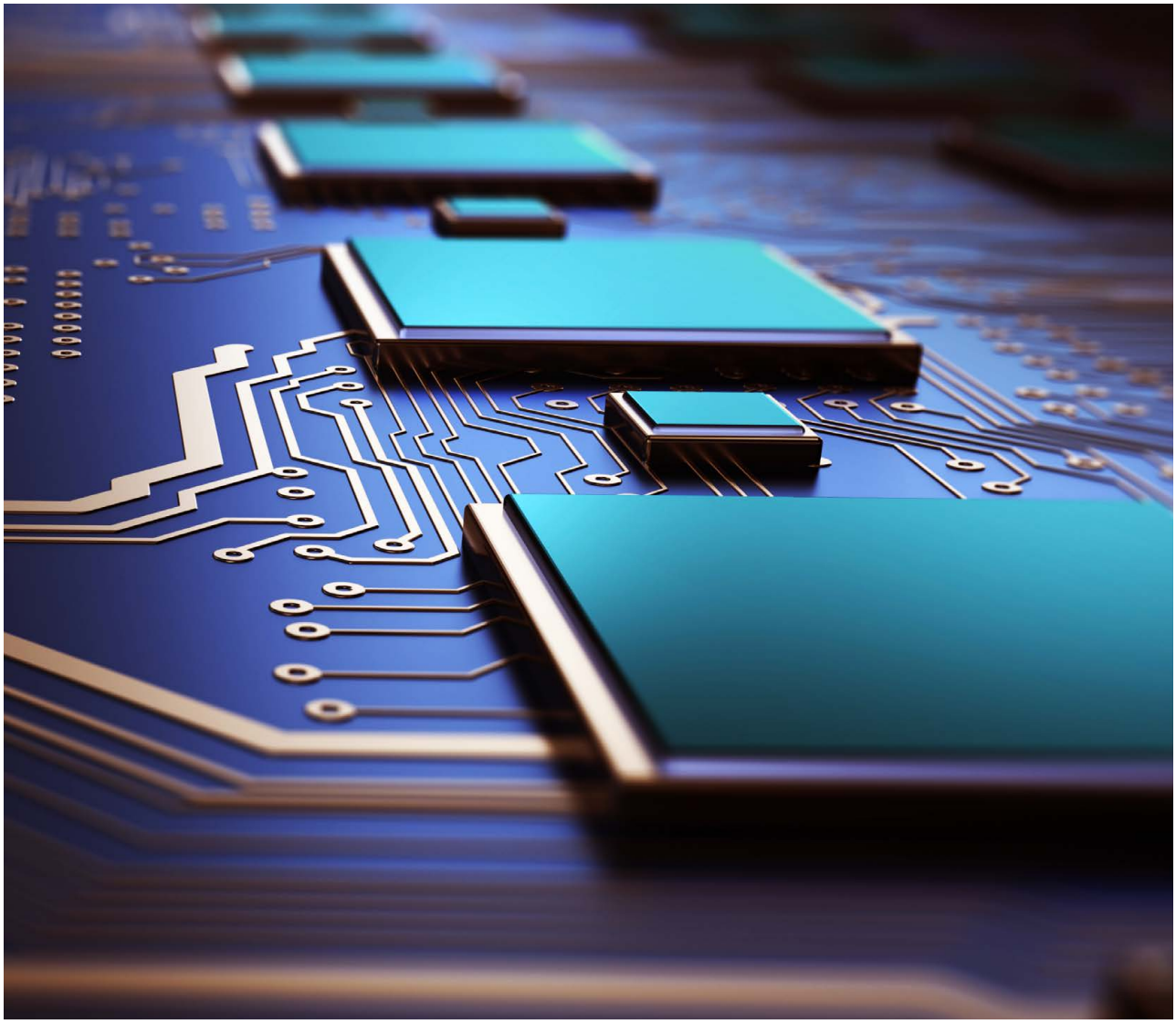
SAMR's review timeline for remedy cases is known to be long and unpredictable. The average review timeline of the five conditional clearances in 2022 was 434.2 days, significantly longer than the average timeline of 286.8 days in 2021. The longest review took 711 days (Korean Air/Asiana Airlines), and the shortest review took 328 days (Shanghai Airport/China Eastern Air Logistics). All of the five cases exceeded the statutory review timeline of 180 days.

As evidenced above, China is often the only jurisdiction that imposes remedies. Out of the 18 cases conditionally cleared in China between 2019 and 2022, China was the only jurisdiction to impose remedies in 12 of them (67%).

07 Chips and semiconductors: The merger control battle for critical technologies

Outlook for 2023

Shifting global politics and concerns over supply chain resilience, particularly in the semiconductor sector, will likely further amplify the concerns of China's decision-makers and market players, whose blessing is decisive in securing clearance of semiconductor deals. Parties should be ready to address such concerns and offer remedies to avoid unnecessary delays in clearance.



Supply chain disruptions and the quest for semiconductor and tech dominance were among the biggest business stories in 2022. Global tensions and the pursuit of achieving self-sufficiency featured high on the antitrust agenda with China directing a great deal of attention to the power of merger control (rather than foreign direct investment screening) as a crucial step to fulfil its policy goals. Based on numbers alone, the scrutiny of semiconductor and tech deals is undeniable:

- More than half of China's remedy decisions in 2022 concerned semiconductors and critical technologies (similar to trends in the last three years);

- of all semiconductor and tech deals that were subject to remedies in China in 2022, all were cleared unconditionally around the world.

How might these trends develop in the next year? It is less clear whether China's competition authority has taken a stricter approach to assess and remedy mergers in the semiconductor and tech markets. Rather, shifting offshore policies and priorities in the final months of 2022 to address chip shortages may further enlarge the concerns of China's decision-makers and market players, whose blessing is decisive in clearing and remedying semiconductor deals.

Wielding merger control as a shield

As part of protecting (and creating) China's production hub for semiconductors and critical technologies, merger control in China continues to play a powerful role as the shift in global policy impacts the assessment and review process of semiconductor deals. For example, our experience suggests that changes in export control restrictions can fuel a lack of support for semiconductor and tech deals by Chinese stakeholders.

In the second half of 2022, global policies in relation to semiconductors and tech transformed into bolder forms than in previous years, which have had implications on the assessment of semiconductor and tech deals:

- The United States introduced the Chips Act to boost domestic semiconductor manufacturing (an investment valued at US$52.7 billion) and reduce offshore disruptions to the supply of chips. [17]In late December 2022, the United States added some 30 Chinese companies to its export controls blacklist.[18]

- The European Union proposed its own version of a Chips Act (valued at €43 billion) which will be subject to a vote in early 2023.[19] In late November 2022, the European Council gave its final approval to the foreign subsidies regime that focuses on strategically crucial supply chains, including semiconductors.[20]

China's long-term goal to cut dependence on foreign supply chains and create self-sufficiency is set out in its broader strategic policy frameworks (i.e. the "Made In China 2025" policy "National Integrated Circuit Development Plan"). In 2022, China introduced further initiatives to boost local competitiveness including preferential taxes and exemptions, education programs and integrated circuit grants to help shape and protect national champions.

Wielding merger control as a sword

Whilst there has been a proliferation of foreign direct investment scrutiny globally, equivalent intervention in China is typically a feature of merger control.

Other key jurisdictions have made it clear that industrial policy should not play a critical role in

17. https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/.

18. https://public-inspection.federalregister.gov/2022-27151.pdf.

19. https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733596/EPRS-Briefing-733596-EU-chips-act-V2-FINAL.pdf.

20. https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/council-gives-final-approval-to-tackling-distortive-foreign-subsidies-on-the-internal-market/.

merger control, but China's regime has remained a critical channel to promote industrial and strategic policies. The recent reforms to China's competition laws extend this scope by adding a provision requiring SAMR to enhance its reviews of deals that are related to people's livelihood, which includes technology as a priority sector.

Considering China's merger control regime is a key lever of control for the government, the views of stakeholders continue to be paramount in reviews. Common actors in the review process include the Ministry for Industry and Information Technology (**MIIT**) as well as Chinese trade associations whose members are active in the semiconductor and tech supply chains. SAMR engages in a consensus-building exercise in which a range of stakeholders have equal footing, which explains the typical long review timeline in China – China was the final jurisdiction requiring clearance in all conditional decisions of semiconductor and tech deals in the last three years. Typically, the long review timeline is driven by pull-and-refile practices, which effectively restart the review clock from Phase I once the review hits the maximum 180-day statutory review time limit. Change to this setting is expected in 2023 following the introduction of SAMR's "stop-the-clock" powers as part of recent reforms (SAMR is now already testing its new powers in complex cases).

Transaction	Concerns	Types of remedies	Duration	Duration of review
GlobalWafers / Siltronic	Horizontal	Structural and behavioral – Divestment – Supply on FRAND terms – No refusal to renew contracts without reasons	Behavioral conditions will last for five years, subject to lifting by application to SAMR	392 days
AMD / Xilinx	Conglomerate	Behavioral – Supply on FRAND terms – No tying or bundling or unreasonable terms – Maintain interoperability – Protect third-party confidential information	Five years, subject to lifting by application to SAMR	368 days
II-VI / Coherent	Horizontal and vertical	Behavioral – Supply on FRAND terms – Multi-source and procure on nondiscriminatory basis – Protect third-party confidential information	Five years, subject to lifting by application to SAMR	372 days

Remedying concerns

In 2022, China's distinct pattern of reviewing semiconductor and tech deals has remained consistent, strong and – of course – unique. We expect SAMR to be even bolder in 2023 in light of the increasing geopolitical sensitivities of semiconductor and tech deals.

First, semiconductor and tech deals are prone to scrutiny given that the many components of the merging parties are meant to fit together and function as part of a larger product. SAMR assesses possible combinations of products that might give rise to conglomerate and foreclosure concerns even in the absence of overlaps. In II-VI/Coherent, SAMR raised concerns about potential foreclosure strategies in laser optics, including refusals to supply and discriminating against competitors (similar concerns were not raised in other jurisdictions). In AMD/Xilinx (see case study below), SAMR was concerned about potential bundling/tying practices and degradations of interoperability (similar concerns were not raised elsewhere).

Second, SAMR's preference for behavioral (over structural) remedies is well-known. In 2022, all remedy cases in the semiconductor and tech space involved a host of behavioral conditions. Notably, remedy design did not necessarily appear linked to certain

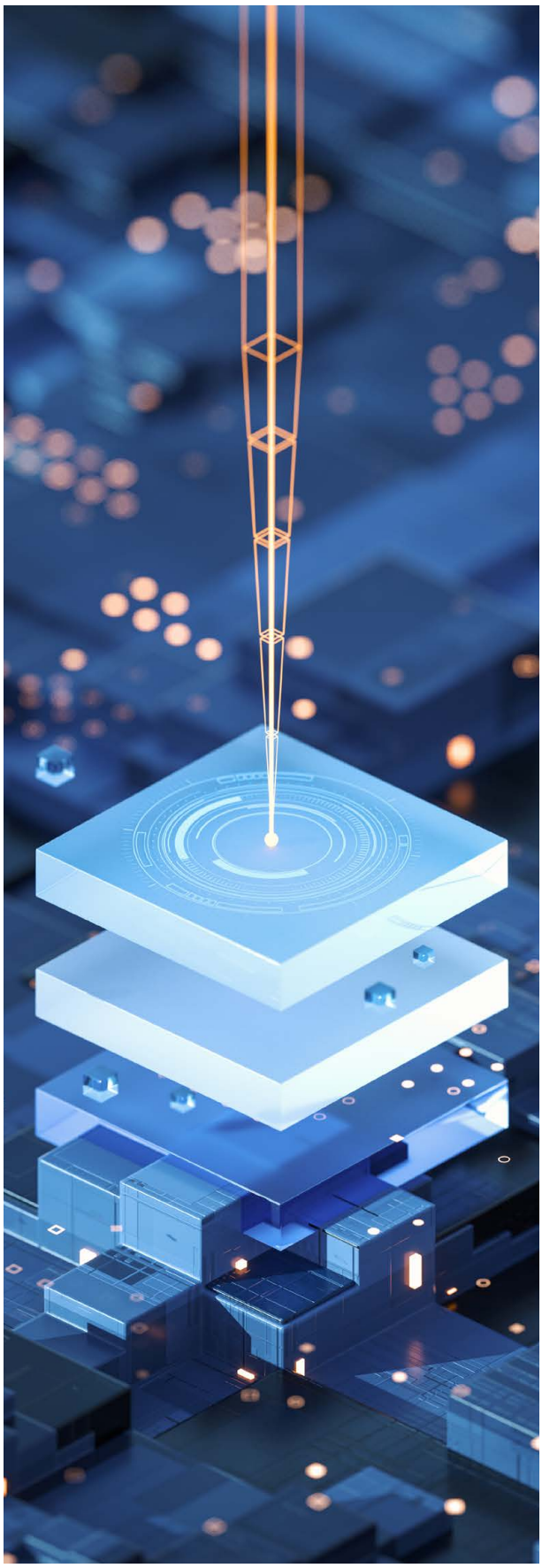
types of concerns. All the conditional clearances involved a commitment to continue and maintain supply of products to Chinese customers regardless of the nature of the concerns. One key driver may be the need to protect China's supply chains against interference and interruptions of foreign export restrictions. Remedies may therefore not always be merger-specific and can be intended to address threats posed by growing trade tensions.

Case study:
Advanced Micro Devices (AMD)/Xilinx

Semiconductor designer AMD acquired Xilinx in an effort to increase its breadth in key markets such as data centers. The record chip industry deal was valued at US$50 billion and subject to review in a number of jurisdictions, including China, the European Union and the United States.

SAMR identified competition concerns as a result of neighboring/adjacent overlaps between AMD and Xilinx in the global and Chinese markets for central processing units (CPUs), graphics processing unit (GPU) accelerators, and field-programmable gate array (FPGA) devices. Xilinx had a market share above 50% in the FPGA segment. The economic analysis suggested that the combined entity could engage in tie-in sales, refusals to supply, and reduce interoperability in order to significantly increase the sales volumes, market share and profits. Xilinx was the market leader in the FPGA devices (with a market share of >50%) and could therefore take advantage of its significant market power to refuse supply of FPGAs to other CPA and GPU accelerator competitors.

Following a review of more than 12 months, the deal was cleared in January 2022 subject to a range of behavioral conditions, including requirements not to tie/bundle the products and maintain interoperability. Notably, AMD and Xilinx also committed to developing their cooperation efforts with Chinese suppliers in relation to the concerned products.



08 Digital markets: A shift from ex-post enforcement to ex-ante regulation?

Outlook for 2023

As discerned from policy direction, comments from senior officials, the overall enforcement trend and institutional interpretation, the vigorous enforcement in the digital economy witnessed in 2020 to 2021 is likely to soften in 2023, with the focus in the digital sector shifting to normalization of regulation.

Large-scale digital platforms should continue to pay close attention to their compliance policies and practices and be aware of an evolving regulatory environment, in light of increase in the intensity and level of statutory punishment, refinement of rules and global antitrust enforcement trend.

The rapid pace of digital development continues to draw global antitrust attention to the digital markets in various jurisdictions. Tech giants such as Apple, Amazon, Google and Meta came under intense scrutiny globally in 2022 for their market conduct.

In contrast, following 2021 which saw extremely active antitrust enforcement with landmark penalties against local tech giants such as Alibaba, Meituan and Tencent, 2022 was a relatively quiet year for antitrust enforcement in the digital sector. While the enforcement slowed down, there have been significant developments in the rules governing the digital economy, marking a shift from ex-post enforcement to ex-ante supervision. In response to the development and market characteristics of the digital economy, the new antitrust rules provide a more detailed, clear and targeted regulatory framework for data abuse, self-preferential treatment and exclusionary arrangements by "gatekeepers" who have first-mover advantages which smaller businesses are dependent on. Special merger filing thresholds have been introduced for potential "killer acquisitions".

At the end of 2022, China's Central Economic Work Conference proposed to "vigorously develop the digital economy and enhance the level of routine regulation", and emphasized the need to "support platform enterprises in leading development, creating jobs and competing internationally". As many regulatory amendments are expected to be completed and come into force in 2023, China's antitrust regulation is expected to continue to strengthen ex-ante supervision of the digital economy, help platform enterprises enhance their antitrust compliance capabilities necessary to participate in international competition, restrict anticompetitive conduct to protect the vitality of the digital economy market, and promote the role of the digital economy in the development of the national economy.

1. New antitrust rules regulating market behaviors of digital platforms

The most remarkable legislative update in 2022 was the amendment to the AML, which includes two new provisions focusing on the digital sector to: (i) prohibit anticompetitive conduct through the use of data, algorithms, technology, capital advantages or platform rules; and (ii) oblige dominant businesses not to abuse their dominance by using data, algorithms, technology or platform rules.

Following publication of the AML Amendments, SAMR also proposed new rules to clarify how the market should be defined and how the AML rules should apply to the digital economy. In particular, in light of antitrust enforcement cases in other jurisdictions against self-preferencing (e.g., Google (Shopping)[21], and the European Commission's investigation against Amazon[22]) and parity clauses (also known as "most favored nation" ("**MFN**") clauses), the draft revised rules published in 2022 list these conducts as potential forms of abuses by digital platforms. While most of the rules are still in draft form, they serve to indicate future enforcement priorities.

- **"Self-preferencing"** refers to a conduct where a digital platform favors an affiliate within its own ecosystem over third parties. SAMR's draft rules[23] specified that "self-preferencing by digital platforms", including (i) giving priority to the display or ranking of the platform's own products; and (ii) using non-public data of in-platform operators to develop the platform's own products or to aid the platform's own decision-making can be regarded as an abuse of dominance.

- **Parity clauses, also known as MFN clauses**, are provisions where a digital platform requires in-platform merchants not to offer better terms or lower prices on its direct channel (narrow

21. In 2017, the European Commission fined Google €2.42billion for breaching EU antitrust rules. Google abused its market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service.

22. In 2022, the European Commission reached a settlement decision with Amazon. This concluded European Commission's investigation against Amazon for leveraging non-public data from in-platform merchants to benefit its own competing business as a retailer.

23. The Draft Provisions Prohibiting Abuse of Dominance.

parity) or any channel, including its own channel and other platforms (wide parity). In its draft judicial interpretation of the AML Amendments, the SPC explicitly spelt out that parity clauses by digital platforms may violate the AML as both anticompetitive agreements and as abuse of dominance. The judicial interpretation goes beyond the position in the Digital Antitrust Guidelines, which only treats parity clauses as a potential vertical restraint.

2. Multiple tools to promote antitrust compliance in the digital economy

While it is certainly possible to raise compliance awareness of enterprises through enforcement and punishment, the impact of severe punishment on the momentum of enterprises and confidence in economic development should not be underestimated. With the adjustment of the regulatory model, China's anti-monopoly enforcement authorities have designed and experimented with a variety of tools to promote regular compliance awareness among digital economy enterprises, including:

- **Administrative guidance:** In the Alibaba and Meituan exclusivity cases in 2021, SAMR provided guidance to the parties to comprehensively regulate their conduct in business operations. The guidance went beyond requesting the parties to cease their anticompetitive conduct, but also required the parties to revise other conducts that are potentially anticompetitive. The guidelines generally require the parties to report regularly to the antitrust enforcement authorities on their "rectification" measures, thus providing continuous monitoring of the businesses' antitrust compliance status.

- **Public commitment:** In the 2022 CNKI abuse decision (as discussed in Chapter 05), although SAMR required CNKI to cease its illegal conduct, it did not set out detailed rectification measures in the penalty decision, nor did it issue any administrative guidance. Instead, CKNI decided how it would achieve the requirement to cease its illegal conduct in the future by making a public commitment. Although the public commitment system does not impose a reporting requirement, given most digital economy companies serve everyday users, and the issues involved in public commitments may be of immediate interest to everyday users, public scrutiny of companies' commitments, coupled with regulatory supervision, will likely be effective in ensuring a business' ongoing compliance.

- **Interviews of senior management:** The revised AML provides that the enforcement authorities may interview the legal representative or person in charge of businesses suspected of antitrust breaches. While such power to request interviews is not limited to the digital sector, in practice, the interviews have been frequently applied to internet enterprises since 2020. The interviews create a two-way communication channel between the enforcement authorities and businesses, encourage antitrust compliance and often prompt businesses to voluntarily undertake rectification measures, thereby lowering enforcement costs and promoting competition in the digital economy.

3. Multi-layered mechanisms to prevent "killer acquisitions"

Innovation is essential to ensuring competitiveness in the digital economy, but the "winner-takes-all" phenomenon is an inherent characteristic of the digital economy. To ensure vigorous development of the digital economy, it is essential to protect smaller players against mega companies with extensive capital. Thus, regulation of "killer acquisitions" – in which an incumbent acquires an innovative target to stunt the target's development and preempt future competition – is essential. SAMR's measures to tackle such "killer acquisitions" are set out below:

(i) Since 2020, SAMR clarified that the internet industry is not exempt from merger filing obligations – this resulted in a high number of voluntary reporting of past failure-to-notify instances by tech companies in 2021 and 2022;

(ii) SAMR introduced a filing threshold based on the valuation of the target company. At their

development phase, digital businesses tend to charge low or zero fees to quickly accumulate customers to create a network effect. As such, start-ups usually have low revenues and acquisitions of such businesses are likely not to trigger mandatory merger filing obligations based on the existing threshold. A new filing threshold based on valuation allows for sharper monitoring of the acquisition of potentially innovative and dynamic businesses.

(iii) Codification of SAMR's ability to review below-threshold transactions where there is evidence it may lead to elimination or restriction of competition.[24] This ensures SAMR would have the power to intervene, even where a transaction does not fall under any of China's notification thresholds.

4. Proposed amendments to the AUCL to regulate digital market behavior

Following the amendments in 2017 and 2019, SAMR launched the third amendment to the AUCL in 2021 and published draft revisions in November 2022 for public comments. The new proposed amendments also appear to focus on regulating digital market behaviors: proposed regulation of "abuse of superior bargaining power" under the Draft AUCL Amendments is discussed in Chapter 05.

The Draft AUCL Amendments target not only digital platforms but also unfair competition behaviors among market players active on the digital platforms. The list of prohibited conduct amounting to "unfair competition" includes:

- Inserting links, redirecting users, or embedding products or services in the products or services lawfully provided by other operators without their consent;
- Promoting one's products or services by misleading or deceiving users into clicking links using means such as keyword association or using fake buttons;
- Misleading or deceiving users into, or coercing users to, modify, close or uninstall products or services lawfully provided by other operators;
- Maliciously limiting the interoperability of products or services lawfully provided by other operators; and
- Without justifications, intercepting or blocking the content lawfully provided by other operators.

Beyond the AML and the AUCL, China's E-Commerce Law also sought to regulate conduct of e-commerce platforms, including prohibiting digital platforms from abusing their dominance and requiring digital platforms not to impose unreasonable conditions using service agreements, platform rules or technological means, etc. – such provisions again, overlap with the AML and AUCL.

It remains to be seen how the various laws will be applied in practice, and if the overlapping provisions will create legal uncertainty and disharmony, which could increase business's compliance costs and stifle innovation.

24. The thresholds are: (i) the Chinese turnover of one business operator involved in the concentration exceeded CNY100 billion in the preceding financial year; and (ii) the market value or valuation of another relevant party is no less than CNY800 million, and at least one-third of this party's global turnover is generated in China.

09 Beyond antitrust: Greater scrutiny resulting from national security reviews and foreign investment reviews

Outlook for 2023

In 2023, it is expected that global political tensions will remain and national security review ("**NSR**") and foreign direct investment ("**FDI**") review may further intensify. To avoid potential setbacks caused by regulatory intervention, businesses should undertake the following steps in deal planning for cross-border transactions:

NSR/FDI risk assessment

- Assess whether the transaction requires NSR/FDI review in any jurisdictions, particularly where sensitive sectors are involved. In some jurisdictions, even minority investment with no controlling rights can trigger a NSR/FDI review.

Timetable management

- The deal timetable should take into account the time required for NSR/FDI review – some jurisdictions may take 6-12 months for such review, or even longer.

Negotiating the transaction documents

- For transactions that require NSR/FDI review, parties will need to negotiate the transaction documents to cover this aspect, such as listing national security clearance as a condition precedent, aligning on the parties' standard of efforts to secure clearance, and consider appropriate compensation packages should the transaction fail.

Amidst growing global political tensions, there has been increasing regulatory intervention in transactions. As well as merger control, NSR/FDI review is a tool frequently used by governments to intervene foreign investments.

In 2022, we observed that the Chinese authorities were more actively overseeing national security issues arising from foreign investment, including calling in non-notified transactions. At the same time, following a revamp of China's national security review rules in 2021, more foreign investors have consulted the regulators and submitted NSR filings.

Globally, an increasing number of jurisdictions introduced NSR/FDI reviews in 2022. Owing to tightening trade tensions and concerns over national security and supply chain resilience, particularly anxieties over China's growing influence, scrutiny over transactions with Chinese ties have intensified. Transaction parties should be mindful of potential setbacks caused by such regulatory intervention, such as delays to the deal timeline and potential structural changes to the deal, including divestment.

1. Active national security review in China

Since China introduced significant updates to its NSR regime in 2021, we observed increasing activities by the regulator, the National Development and Reform Commission ("**NDRC**") in 2022.

The NSR regime in China captures two categories of foreign investment: (i) any foreign investment into defense-related sectors; and (ii) acquisition of control by foreign investment in other sectors that have a national security connection, such as agriculture, energy, critical infrastructure, critical transportation services, critical technology, and critical financial services.

In 2022, some cases indicated the timeline for the NSR review process could be lengthy, even exceeding one year. During the process, given the NDRC is generally reluctant to disclose the Chinese government's precise concerns and the status of the review process, it might be difficult for parties to engage with the authorities to adequately address any concerns. Based on our observation, the NDRC tends to only reveal the specific concerns and the required remedial measures at a later stage after all ministries involved have reached a consensus, without actively consulting the transaction parties. Thus, transaction parties are often left with very limited time to decide whether to accept the remedies and proceed with the transaction.

Importantly, Chinese businesses should also be aware that listing in a foreign jurisdiction could also be seen as receipt of foreign investment and be subject to NSR review in China. This was clarified by the State Council's proposed overseas listing rules at the end of 2021, which provided that the authority can require the divestiture of certain business or assets of the Chinese company, as well as other necessary measures, to mitigate the national security concerns arising from overseas listing before the listing is completed.

2. Introduction of foreign direct investment controls and major reform globally

Amidst global trade tension, a number of foreign jurisdictions have for the first time introduced FDI controls, while others introduced reform to their existing FDI regimes.

3. Regular intervention of transactions with Chinese ties by foreign FDI regimes

The consistent trend of increasing national security interventions has been driven by the so-called "China factor", i.e., the concern about Chinese businesses' growing influence in foreign economies. In line with the trend observed in previous years, such concerns continued to play out publicly, as reflected by several governments' decisions to ban or modify transactions with ties to China or requests to Chinese companies to divest interests in critical sectors.

We have observed intervention with Chinese investments by Canada, Germany, the UK and the US, impacting sectors such as aviation, energy, critical infrastructure, mining, military, pharmaceuticals, satellite/space technology, and semiconductors. The ongoing list of FDI challenges revealed growing apprehension among governments around China's emerging influence in critical sectors.

Key developments globally – FDI controls

Belgium
Belgium proposed a new FDI regime that will apply to non-EU companies wishing to invest in strategic sectors in Belgium. The regime came into effect on January 1, 2023, and applied to any transactions that have not closed prior to the effective date.

Ireland
Ireland published proposals for a new mandatory FDI screening regime. The regime is expected to come into force in early 2023; it is intended to apply retroactively to deals completed in the 15 months prior to the start of the regime.

The Netherlands
The Netherlands passed the Investments, Mergers and Acquisitions Security Screening Bill. The bill introduced a mandatory and suspensory national security regime that is applicable to both Dutch and foreign investors.

Sweden
Sweden introduced a new FDI scheme intending to expand the scope of activities that are subject to mandatory notification. The scheme came into effect on January 1, 2023.

United Kingdom
In January 2022, the UK's National Security & Investment Act ("**NSI**") came into force, marking the formalization of the UK's national security review regime for foreign investment.

United States
The US President issued a groundbreaking executive order ("**EO**") expanding the list of factors to be considered by the Committee on Foreign Investment in the United States ("**CFIUS**") when reviewing transactions for national security concerns. The EO directs CFIUS to consider issues related to supply chain resilience, impact on US technology leadership, assessment of overall investment trends across industries, cybersecurity risks and sensitive data.

Case study: German's partial approval of COSCO's investment in a Hamburg container terminal

In October 2022, the German Federal Ministry of Economics and Energy issued a decision to partially approve COSCO Shipping Ports' proposed investment into a shipping container terminal at the Hamburg port.

COSCO Shipping Ports is a subsidiary of Chinese state-owned COSCO Shipping Group (collectively referred to as "**COSCO**"). In September 2021, it announced its plan to acquire a 35% stake in the Container Terminal Tollerort ("**CTT**") for €65 million. The transaction triggered a FDI security review in Germany. During the review, multiple federal ministries raised national security concerns. The ministries reportedly noted that the transaction could disproportionately expand China's influence on German and European infrastructure, leading to Germany's dependence on China. [25]

Ultimately, the German cabinet decided that COSCO could acquire less than 25% of CTT and that further acquisitions above this threshold were prohibited. In addition, COSCO will also be prohibited from acquiring contractual veto rights over strategic business and personnel decisions. COSCO therefore reduced its stake in CTT to 24.9%, which is below the "a blocking minority" in Germany, meaning that COSCO cannot gain operational decision-making power over CTT.

25. Reuters, "German go-ahead for China's Cosco stake in Hamburg port unleashes protest", October 26, 2022, available at <https://www.reuters.com/markets/deals/german-cabinet-approves-investment-by-chinas-cosco-hamburg-port-terminal-sources-2022-10-26/>

10 Antitrust litigation: IPR cases under spotlight and clarification of procedural rules by China's highest court

Outlook for 2023

More aggressive judicial adjudication means more risks for businesses with antitrust compliance problems. Consequences are not limited to pecuniary form such as higher level of fines that can be imposed by antitrust authorities, but also the risks resulting from liabilities in follow-on litigation. On the other hand, strengthening of judicial adjudication should benefit and free businesses that are suffering from the shackles of anticompetitive behavior of other businesses, paving the way for further corporate development. Following the refinement of the procedures and substantive rules of civil antitrust litigation, the risks and opportunities presented by antitrust litigation will both be elevated.

In 2022, the Chinese judiciary adopted a more active approach towards antitrust litigation. On the one hand, the courts adopted a proactive approach in confirming their jurisdiction over global disputes and in finding antitrust infringements in court cases. On the other hand, the court provided its interpretation of the AML through court cases and issuing judicial interpretation. In November 2022, the SPC published (i) the People Court's Typical Antitrust Cases; and (ii) the Draft SPC Interpretation, both of which clarified procedural rules and provided guidance on substantive interpretation of the AML based on the judiciary's experience. As businesses pay more attention to antitrust compliance, the Chinese courts' interpretation of the AML will serve as valuable guidance.

1. The Chinese courts are adopting a more proactive approach in antitrust litigation

Previously, it was argued that the People's Court had taken an overly conservative approach in finding antitrust violations, meaning that it was difficult for claimants to succeed. However, amongst the cases published in 2022, there were some instances in which the claimant prevailed[26], particularly in five abuse of dominance disputes where the defendants were found to be dominant.[27] This indicated a more proactive approach by the Chinese courts.

(i) Confirming China's jurisdiction over global disputes relating to standard essential patents ("SEPs")

In 2022, the Chinese courts continued to flex their muscles by maintaining jurisdiction over global SEP disputes. In particular, the SPC asserted again the Chinese courts' jurisdiction to determine the fair, reasonable and non-discriminatory royalty rates of relevant SEPs in disputes over the portfolios concerning 3G, 4G and 5G standards in *OPPO v. Nokia*.

The SPC's *OPPO v. Nokia* ruling signals that China continues to be an important battlefield for global 5G patent disputes involving Chinese licensees. Globally, the dispute was also filed in many other jurisdictions, including Australia, Germany, France, Finland, Indonesia, the Netherlands, Sweden, Spain and the UK, with mixed results for both sides.

Similar disputes between non-PRC SEP owners and PRC licensees, including *Xiaomi v. InterDigital* and *OPPO v. Sharp*, have been concluded. In both previous

Case study:
OPPO v. Nokia

OPPO Mobile Telecommunications Corp., Ltd. ("**OPPO**") is a leading Chinese consumer electronics manufacturer. Its major product lines include smartphones, smart devices, audio devices and other electronic products. It entered into an agreement with Nokia in 2018, in which Nokia licensed certain SEPs to OPPO. Upon renewal of the license in 2021, a dispute ensued regarding the royalty rates for the SEPs.

In July 2021, OPPO petitioned the Chongqing People's First Intermediate Court (the "**Chongqing Court**") in China to adjudicate the global royalties and other licensing terms of Nokia's global SEP portfolios concerning 3G, 4G and 5G standards. In December 2021, the Chongqing Court made a ruling in favor of OPPO. Nokia challenged the SPC that China (and the Chongqing Court) lacked the jurisdiction to adjudicate this case. In September 2022, the SPC dismissed Nokia's appeal, upholding China's and the Chongqing Court's right to hear the dispute over global SEP rates as the licensing agreement was negotiated and expected to be performed in China, and OPPO manufactured and sold its products in Chongqing.

26. For example, in *Weihai Hongfu Real Estate v Weihai Water Group* (regarding abuse of dominance) and *Shanghai Huaming v. Wuhan Taipu* (regarding anticompetitive agreements), as well as the follow-on actions by the individual consumer against General Motors and its distributor, some or all of the claimant's claims were supported by the courts.

27. According to published decisions as of the end of 2022, there were five civil litigation cases involving abuse of dominance, including *Weihai Hongfu v. Weihai Water Group; Ma (individual) v. China Mobile*; *Sports Entertainment (Beijing) Cultural Media v. China Super League*; *six KTV operators v. China Audio and Video Copyright Collective Management Association*; and *Bao (individual) v. State Grid*.

disputes, the parties similarly commenced simultaneous proceedings against each other in multiple jurisdictions around the world and achieved milestones, but due to various orders in different jurisdictions restraining the other party from seeking judicial enforcement (including an injunction by a Chinese court), the parties eventually had to cease and desist and return to the negotiating table, reaching a settlement agreement in late 2021.

(ii) Encouraging follow-on actions by recognizing administrative decisions

As a groundbreaking development, the SPC for the first time ruled on a follow-on antitrust damages action in favor of the claimants. In December 2022, the SPC ruled in favor of a consumer in a follow-on damages action against SAIC General Motors Sales ("**General Motors**") and its distributor, Shanghai Yilong Automobile Sales Service ("**Yilong**"). In the Draft SPC Interpretation, the SPC also specified its position that the Chinese courts shall recognize administrative decisions in follow-on actions and the claimants will no longer be required to separately prove a breach of the AML, provided that the decision is not subject to judicial review. Nonetheless, the defendants may be able to provide sufficient evidence to disprove the authorities' finding of violation. The General Motors case, together with SPC's clarified position under the Draft SPC Interpretation, may encourage more follow-on damages actions in the future.

Case study:
Follow-on antitrust action against General Motors

In 2016, Shanghai Price Bureau penalized General Motors for RPM. In 2018, an individual consumer filed a follow-on antitrust action against General Motors and Yilong to the Shanghai Intellectual Property Court. After the Shanghai court dismissed his claim, he appealed to the SPC.

Ruling in favor of the claimant, the SPC concluded that, where an antitrust penalty decision was not subject to the court's review within the statutory deadline, or where the court had confirmed the decision, the claimant would not have to bear the burden of proof to establish the relevant antitrust breach in follow-on civil actions, unless contrary evidence arises.

(iii) The judiciary's power to assess antitrust issues in patent settlement agreements

In its judgment in *AstraZeneca v. Jiangsu Aosaikang* in 2021, the SPC proposed that applications for the withdrawal of appeals from patent litigation due to a settlement between the parties should be examined in accordance with the law. If the settlement agreement is, at face value, a "reverse payment agreement for pharmaceutical patents", the court may examine whether the agreement violates the AML, even if the parties did not request such an examination. The court may also review whether the agreement violates the AML before deciding whether to allow the withdrawal of the appeal. The Draft SPC Interpretation explicitly incorporated the issue of reverse payment into the antitrust regime. (See further discussion in Chapter 03.)

2. Clarification of procedural rules for antitrust civil disputes

In November 2022, the SPC issued the Draft SPC Interpretation for public comments. The consultation draft further explained the procedural rules of civil anti-monopoly litigation in terms of the burden of proof, the validity of evidence and the mechanism for sharing of leads between the judiciary and administrative enforcement.

(i) Lowering the evidential threshold for claimants

The Draft SPC Interpretation will have a significant impact on the following aspects of private antitrust litigation in China:

- **Cartels:** The Draft SPC Interpretation clarified that in antitrust litigation concerning "concerted practice", the claimant can (i) demonstrate a consistency of market conduct between the competitors and (ii) provide evidence of a meeting of minds or

exchange of sensitive information between such competitors. Alternatively, where the claimant cannot demonstrate the existence of contacts between the defendants, as long as it can adduce evidence showing (i) consistency of market conduct between the competitors and (ii) a change in market structure or competitive landscape, the evidential burden will then be shifted to the defendants to justify the consistency of the conduct.

- **RPM:** Following the AML Amendments, which saw a convergence between the court's and SAMR's approach in their assessment framework (as discussed in Chapter 04), RPM is now presumed anticompetitive (and hence illegal) subject to contrary evidence. In line with this, the Draft SPC Interpretation proposed to extend the presumption of anticompetitive effect to the RPM, relieving the claimants' evidential burden and instead shifting the burden of proof to the defendant to show an absence of anticompetitive effects.

  In proving the absence of anticompetitive effects, the Draft SPC Interpretation outlined both anticompetitive effects (including increasing entry barriers, preventing a more efficient distributor or distribution model and eliminating inter-brand competition) and pro-competitive effects (such as preventing free-riding, increasing intra-brand or inter-brand competition, maintaining brand image, increasing pre- or after-sales services and promoting innovation) that RPM practice could bring about, and specified that RPM is illegal only when the (i) party imposing RPM has significant market power, and (ii) the anticompetitive effect outweighs the pro-competitive effect. These rules, once effected, will provide much clarity in defending a RPM case.

(ii) Coordination between parallel antitrust litigation and investigation

A victim of anticompetitive conduct can simultaneously report the alleged violation to the antitrust enforcement agencies and file standalone antitrust litigation – meaning the administrative investigation and court proceedings can occur in parallel. The Draft SPC Interpretation specified that the court has the right (but is not bound) to suspend court proceedings concerning a case when the enforcement agency is conducting an antitrust investigation regarding the same case. While arguably this may optimize the allocation of judicial resources and may allow claimants to benefit from the findings by the authorities where an infringement has been established in pursuing civil proceedings, against that, the court proceeding may be unnecessarily delayed due to the lack of statutory timeline for administrative investigations.

(iii) Referral of leads of potential antitrust violation from the Chinese courts to SAMR

The Draft SPC Interpretation proposes a process for the Chinese courts to refer leads to the antitrust enforcement authoritie upon ruling that an antitrust violation has occurred in standalone antitrust litigation or upon discovering evidence suggesting there are antitrust violations in non-antitrust cases. While the court may not share evidence directly with the enforcement agencies, they can share certain "leads" about such violations, such that the antitrust authorities can further investigate. This provision has two implications: (i) allowing the court to identify antitrust issues in non-antitrust cases; and (ii) allowing the court to transfer the leads of antitrust violations to the administrative authorities, thereby exposing litigation parties to antitrust investigation and fines.

This novel process may result in judicial activism and intervention of the administrative process. It remains to be seen whether the final version of the SPC's AML interpretation will retain this provision. If the rule is adopted, litigation parties may wish to review the evidence from an antitrust-compliance perspective before submitting such evidence to the court to ensure that the civil litigation will not be expanded into an unintended administrative antitrust investigation.

3. Judicial guidance on substantive antitrust issues

As the number of antitrust disputes grows, judicial precedents will increasingly serve as useful guidance.

In November 2022, the SPC selected a number of key cases that it considered to have precedential value and published the "People Court's Typical Antitrust Cases". This publication elaborated on the judicial interpretation of substantive antitrust issues, such as the contractual validity of anticompetitive agreements, the criteria for analyzing and judging the abuse of IPR, calculation of damages and the determination of concerted practice.

The "People Court's Typical Antitrust Cases", together with the SPC Draft Interpretation, clarified the following issues:

- **Introducing concepts** such as "single economic entity" and the agency argument in the context of vertical arguments, which have been considered and applied in practice, but have not yet been formally recognized in Chinese antitrust rules until now;

- **Clarification of behavioral rules** such as "parity clauses" and "pay-for-delay agreements" that may violate the AML, and the criteria in establishing "concerted practices";

- **Providing the rules relating to abusive conduct in the internet sector** such as the considerations in defining markets, calculation of market share, principles in identifying abusive behavior, and that MFN clauses may amount to abuse of dominance.

4. Expected growth of public interest civil lawsuits against AML infringements

While class actions are not available under the AML, victims of antitrust infringements may seek remedies by petitioning China's public prosecutor (i.e., the People's Procuratorate) under the AML Amendments.

The AML Amendments authorize the public prosecutor to file public interest civil lawsuits against AML infringements where public interests are undermined. Under the current public interest lawsuit rules, the public prosecutor can, on its own initiative or based on petitions from the public, initiate pre-suit investigations and then decide whether to file civil lawsuits against the AML infringements. The public prosecutor can also consider and accept the rectification commitments proposed by the suspected infringers to settle a public lawsuit.

Such a public interest antitrust litigation regime is expected to leverage the public prosecutor's substantial investigatory power and resources to address the issue of the heavy burden of proof for the private claimants in civil antitrust lawsuits, thereby enhancing antitrust enforcement.

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Competition/Antitrust (PRC Firms): Band 1
Chambers Greater China, 2023

GCR100 Chinese Law Firm: Elite
Global Competition Review (GCR) 100, China Jurisdiction, 2023

Competition/Antitrust: Outstanding
Asialaw Profiles, 2022

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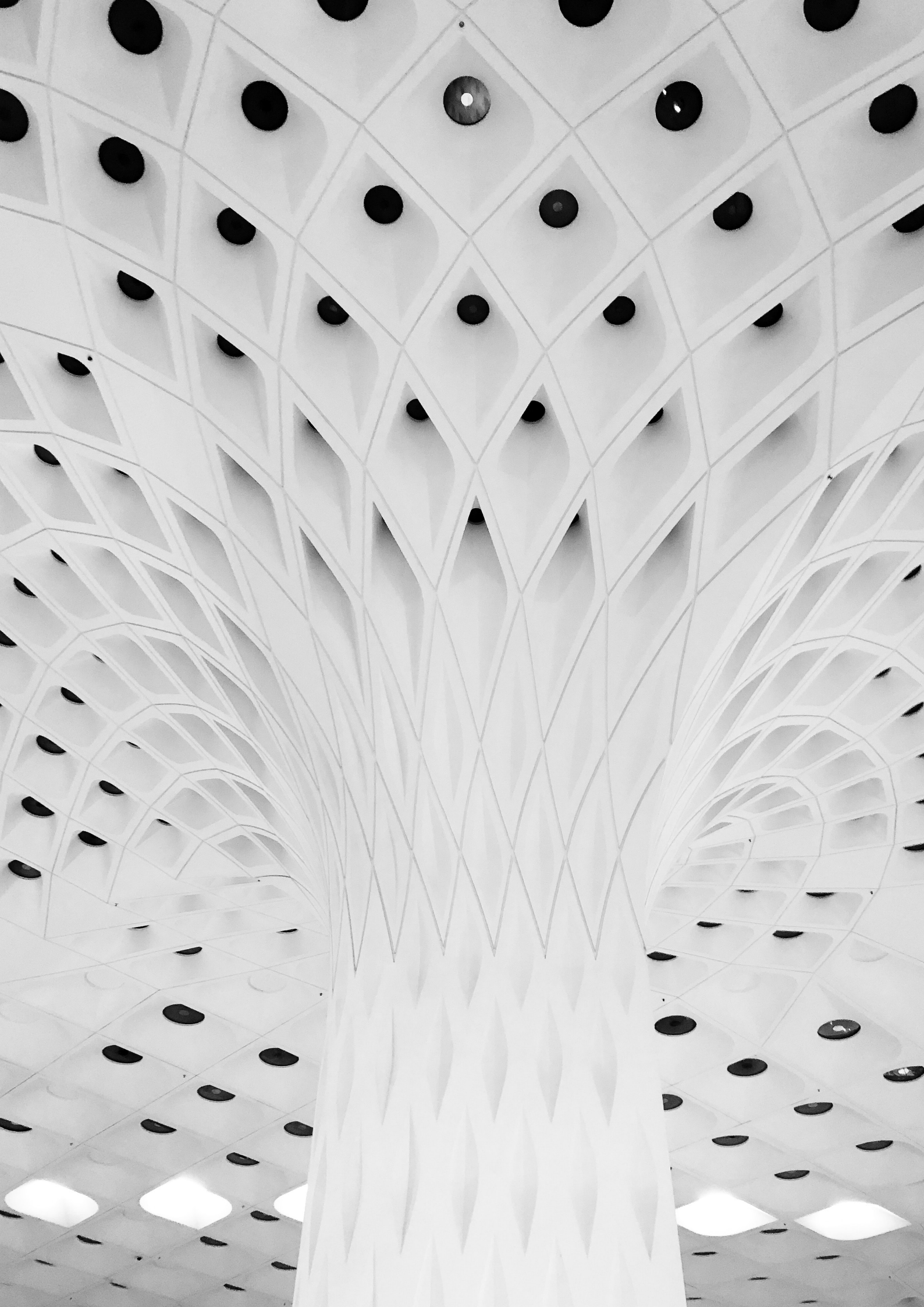

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