

ANTITRUST CHINA 2019 ANNUAL REVIEW Ten Emerging Trends

2019.12

China has become a pivotal antitrust jurisdiction alongside the United States and Europe and is increasingly the antitrust center of Asia. In the last eleven years since the implementation of China's Anti-Monopoly Law, we have seen the mindset and practices of China's competition authorities change. Merger control has become more vigorous and influential. Antitrust enforcement has become more frequent and robust. Continuous reform of antitrust laws is high on the agenda.

Our annual review examines ten trends in China's antitrust regime in 2019 and presents the forecasts for 2020.

01 One voice: unified enforcement by a single agency

- The consolidation of China's three antitrust enforcement agencies into the anti-monopoly bureau of the State Administration for Market Regulation ("SAMR") since May 2018 resulted in greater consistency in legal interpretation and enforcement practices.
- SAMR effectively delegated antitrust enforcement to local branches. Of the 15 investigations (as of November 30, 2019), 14 were launched by local authorities.

02 Legislative reform: the scope is expanding

- Refining China's Anti-Monopoly Law has been prioritized in 2019 and amendments are high on the agenda.
- SAMR issued three regulations concerning anticompetitive agreements, abuse of dominance and abuse of administrative power, addressing inconsistencies in previous antitrust rules and providing further enforcement guidance.

03 Politicization? Impact of politics may be exaggerated

- Despite trade wars and ongoing global debates about protectionism, neither merger control nor antitrust enforcement demonstrates that China's antitrust regime is politicized.
- Protectionist sentiments from domestic businesses have nonetheless led to an increase in regulatory complaints.

04 Sector focus: increased regulation on the digital economy and consumer goods

- The Chinese government has signaled an interest in regulating tech companies in line with global enforcement trends and priorities.
- Driven by policy goals, the antitrust authority has given much attention to sectors affecting Chinese consumers directly, including public utilities, pharmaceuticals, automobiles, infant formula, building materials, and consumer goods.

05 Enforcement trends: diversified enforcement across conduct

- SAMR and its local branches have taken a balanced approach in enforcement against "bread and butter" cases such as cartels and RPM and more complex cases such as abuse of dominance.
- The level of fines has been increased as antitrust authorities have moved towards more consistently imposing fines based on the total annual sales of a business instead of confining calculations to sales of relevant products.

06 Deal timeline management: greater timing certainty for simple cases, but less so for more complex deals

- There is greater certainty on review timeframes for "simple cases". Most cases were cleared within 30 days after case acceptance. The average post-acceptance clearance timeframe for "simple cases" was 18.5 days by Q3 2019.
- The review timeframes for cases that do not qualify for simplified treatment remain uncertain and can be lengthy. The average timeframe of clearance for the four remedy cases in 2019 to date was 373 days, which exceeds the maximum statutory timeframe.

07 Remedy cases: Chinese regime remains receptive to behavioral remedies and tech sector in focus

- SAMR has continued to be more receptive to using behavioral remedies to address competition concerns, including "hold-separate" remedies, FRAND commitments and commitments restricting tying and bundling.
- SAMR has also continued to focus its attention on the high-tech sector. Of the four conditional cases (up to November 30, 2019), two relate to the high-tech industry.

08 Gun-jumping and failures to notify: continued intensified enforcement

- Gun-jumping risks are on the rise. SAMR issued penalties for failing to notify transactions that were not typically expected to be notifiable, including a transaction outside mainland China and an acquisition of a minority stake.

09 Antitrust litigation: wielding competition laws as a sword

- Businesses are increasingly entertaining antitrust action to achieve commercial goals – to gain market share, seek better licensing terms, declare contractual terms void.
- As in other jurisdictions, the tech sector remains a high-risk area for antitrust action.

10 Judicial guidance: analytical frameworks for resale price maintenance and antitrust arbitration clarified

- The courts clarified the analytical framework of RPM and endorsed a view that antitrust authorities and the courts may adopt different analytical frameworks.
- The courts confirmed that private antitrust claims cannot be arbitrated in China.

2020

KEEPING AN EYE ON THE FUTURE

- **Amendments to the competition laws:** Talks of legislative reform of China's competition laws have been ongoing. No clear date for amendments has been set and the work of further refinement of the Anti-Monopoly Law is expected to intensify in 2020.
- **Global impact:** Despite political tensions, convergence and international coordination amongst authorities will continue. Businesses active in more than one jurisdiction need to continue to be mindful of the international reach of antitrust regimes.
- **Enforcement priorities:** Tech companies and sectors affecting the daily lives of Chinese consumers will remain enforcement priorities. Cartels and resale price maintenance will remain an enforcement focus. The authorities are also increasingly confident in investigating more complex abuse of dominance cases.
- **Deal management:** As the review timeframes and procedures for simple cases have become streamlined, more attention will be dedicated to complex cases. SAMR is still expected to remain more receptive to behavioral remedies over structural commitments. Detecting failures to notify and identifying gun-jumping concerns will continue to be a focus.
- **Antitrust litigation:** Private antitrust litigation will remain frequent. The tech sector is expected to remain a high-risk area. Businesses should be mindful of potential follow-on actions arising from antitrust investigations.

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Antitrust China

2019

Annual Review

2019.12

2019

The Chinese antitrust regime continues to gain momentum

2019 marks the 11th year of antitrust enforcement in China. Despite its young age, the Chinese antitrust regime has quickly become one of the world's most influential and active regimes. The robust enforcement – evidenced by increasingly active and sophisticated enforcement activities – has altered the global competition law landscape.

Since the implementation of China's Anti-Monopoly Law (the "AML") in 2008, the Chinese antitrust authorities have investigated close to 200 cases involving anticompetitive agreements and more than 60 cases involving abuse of dominance with fines totaling more than CNY 12 billion (approx. USD 1.7 billion), and have probed more than 200 cases involving abuse of administrative power to restrict competition. The authorities have reviewed close to 3,000 transactions with a combined value of more than CNY 50 trillion (approx. USD 6.98 trillion), of which 43 cases have been approved with conditions and two were blocked.

2019 marks the first full year of enforcement by a unified antitrust authority – the Anti-Monopoly Bureau of the State Administration for Market Regulation ("SAMR"). Despite the institutional reform, both legislative and enforcement efforts have been vigorous, while merger review remains efficient and robust.

Despite China's trade tensions with the United States and allegations that antitrust enforcement is becoming politicized, enforcement records in China do not demonstrate this. SAMR has remained a vigilant antitrust regulator, focusing on areas where antitrust issues are the most prevalent and which directly affects consumers.

Antitrust litigation in the private sector has also been on the rise. Antitrust litigation increased in 2019 between private parties that were either competitors or business partners, often involving big brand names.

In this annual review, we set out ten themes based on our experience advising on the Chinese antitrust regimes in 2019 :

- 01 One voice: unified enforcement by a single authority
- 02 Legislative reform: the scope is expanding
- 03 Politicization? Impact of politics may be exaggerated
- 04 Sector focus: increased regulation of the digital economy and consumer goods
- 05 Enforcement trend: diversified enforcement against a range of anticompetitive conduct with increased fines
- 06 Deal timeline management: greater timing certainty for simple cases, but less so for more complex deals
- 07 Remedy cases: Chinese regime remains receptive to behavioral remedies and tech sector in focus
- 08 Gun-jumping and failures to notify: continued intensified enforcement
- 09 Antitrust litigation: wielding competition laws as a sword
- 10 Judicial guidance: analytical frameworks for resale price maintenance and antitrust arbitration clarified

We sincerely hope that you enjoy reading our 2019 annual review.

01

One voice: unified enforcement by a single authority

LOOKING FORWARD TO 2020

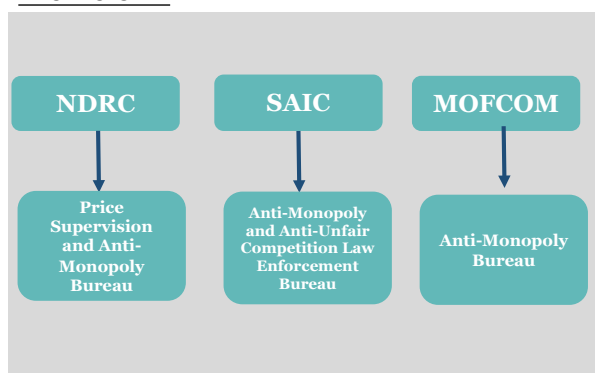
SAMR's horizon broadened. Institutional reform has not reduced SAMR's enforcement activities. We expect SAMR to remain active in 2020. SAMR is now better placed than its predecessors to assess competition issues across the whole economy. For example, if SAMR identifies any anticompetitive agreement in its merger review, unlike MOFCOM (the previous merger review authority which did not have the jurisdiction over anticompetitive agreements), it can initiate an investigation directly.

Continued in increase of enforcement by provincial branches. Enforcement by the provincial AMRs will be on the rise after the expected completion of the consolidation of local antitrust branches of NDRC and SAIC in 2020. Businesses need to be mindful of potentially increasing antitrust enforcement at the local level.

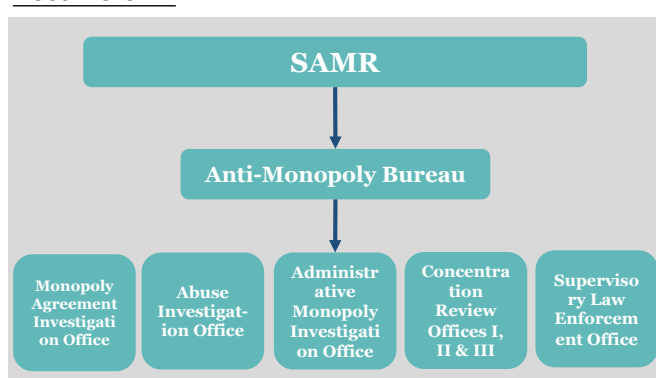
2019 marks the first full year since the consolidation of China's three antitrust enforcement authorities into the Anti-Monopoly Bureau of SAMR in May 2018, which involved a transfer of powers from the previous antitrust functions of the National Development and Reform Commission ("NDRC"), the State Administration for Industry and Commerce ("SAIC") and the Ministry of Commerce ("MOFCOM").

Institutional Reform

Pre-Reform



Post-Reform



The consolidation has resulted in greater consistency in legal interpretation and enforcement practices, as well as stronger enforcement by the provincial administration of market regulation ("AMRs").

Consistent legal interpretation

SAMR has published a set of interim provisions to address inconsistencies in NDRC's and SAIC's previous antitrust rules and to provide further guidance on the interpretation of the AML.

Unified enforcement priorities

2019 has seen more unified enforcement priorities, focusing primarily on the digital economy and sectors affecting Chinese people's livelihood.

Continued vigorous enforcement by SAMR with increased enforcement by local authorities

The consolidation of antitrust authorities has not led to a slow-down in enforcement. In January 2019, SAMR published the Notice on the Delegation of Authority on Anti-Monopoly Enforcement to set up a framework allowing provincial branches to initiate investigations on their own accord. As of November 30, 2019, SAMR and its local branches conducted 15 antitrust investigations (11 punishments, three suspensions, and one termination without penalty), which is broadly consistent with the number of cases in 2017 (21 cases) and 2018 (15 cases). Out of the 15 investigations in 2019, 14 were started by local authorities.

02

Legislative reform: the scope is expanding

After more than ten years of implementation, the Chinese government has identified amendments to the AML as a priority and the AML is now in the process of amendment. In line with the consolidation of the antitrust authorities, SAMR has endeavored to unify the legal interpretation of the implementation rules of the AML. It has also improved its legislative efforts by publishing a number of guidelines for consultation.

LOOKING FORWARD TO 2020

Amendment works to the AML to continue with a view to finalizing the revised draft for submission to the Ministry of Justice for review. Although there is no set deadline for completion of the amendments to the AML, it was reported that draft amendments had been discussed to ensure that the AML is “fit for purpose” and aligned to market developments, including the challenges of the digital economy and innovation, big data and artificial intelligence. Businesses should find a way to get involved in this important legislation process and we are happy to assist businesses with getting their views heard by the legislators.

Publications of guidelines. In addition to the “Whistleblower Reward Policy” and the “Guidelines on Antitrust Compliance”, publications of a number of new guidelines are expected, including the “Antitrust Guidelines for Automotive Industry” and the “Guidelines on Abuse of Intellectual Property Rights”, which were previously published in draft form for consultations.

Reforms to the AML a priority

Revision to the AML – the first time since its promulgation in 2008 – has been identified as a priority by the National People's Congress for 2019.

Publication of interim provisions: unified guidance and further clarification of the AML

On July 1, 2019, SAMR published three interim implementing regulations (the “Interim Provisions”) under the AML, namely:

- the Interim Provisions on the Prohibition of Anticompetitive Agreements;
- the Interim Provisions on the Prohibition of Abuse of Dominance; and
- the Interim Provisions on the Prohibition of Abuse of Administrative Power

These Interim Provisions, which came into effect on September 1, 2019, are the first set of regulations issued since SAMR's establishment. They address former inconsistencies in NDRC's and SAIC's antitrust rules and provide further guidance on enforcement of the AML.

Key points in the Interim Provisions

Anticompetitive Agreements

- Clarifies the definition of “concerted practice”
- Clarifies the “catch-all provision” for anticompetitive agreements
- Clarifies resale price maintenance (“RPM”) as per se illegal, subject to exemptions
- Sets out practical guidelines for the application of exemptions
- Unifies leniency framework regardless of types of anticompetitive agreements

Abuse of Dominance

- Set out potential justifications for allegedly abusive conduct
- Clarifies the concept of “collective dominance”
- Recognizes relevant factors that may indicate dominance in the digital economy

Abuse of Administrative Power

- Details the definition of “abuse of administrative power restricting competition”
- Details penalties for violation

Publication of whistleblower reward policy and antitrust compliance guidelines

SAMR's other legislative efforts include:

- “Whistleblower Reward Policy”: in November 2019, SAMR published a public consultation document on reward policies purporting to reward parties that report violations of business laws, including the AML;
- “Guidelines on Antitrust Compliance for Business Operators”: in December 2019, SAMR published for public consultation a set of guidelines on how businesses should comply with the AML, encouraging businesses to set up antitrust compliance systems.

03

Politicization?

Impact of politics may be exaggerated

LOOKING FORWARD TO 2020

The politicization of antitrust enforcement remains unlikely. Based on SAMR's 2019's track record, it appears that U.S. businesses will unlikely be subject to any discriminatory treatment in terms of antitrust enforcement in China

Political influence may affect antitrust enforcement in an increasingly fragmented world. While over-speculation should be avoided, increasing uncertainty in the global political scene may drive protectionism. Foreign businesses should be prepared to tackle challenges from domestic stakeholders in seeking merger clearance and enhance their antitrust compliance efforts to pre-empt complaints by domestic competitors or business partners.

Geopolitical fragmentation has continued throughout 2019, as the world's largest economies became embroiled in a continuing trade war. There has been speculation that the U.S.-China trade tensions would cause antitrust enforcement to be used as a political tool. While there has been no clear indication of the politicization of antitrust enforcement in China (particularly against U.S. companies), businesses need to be mindful of protectionist sentiments and acknowledge that, under the AML, SAMR can take industrial policies into account and often embed policy-driven goals in antitrust enforcement.

Merger review does not indicate discrimination on political grounds

From January 1 and November 30, 2019, SAMR unconditionally cleared 54 cases involving U.S. companies, 33 of which were reviewed under the "simple case" procedure. The 33 cases were all cleared within 30 days of case acceptance, in line with SAMR's review timeframe of simple cases.

For cases with substantive competition issues, SAMR has conditionally cleared two cases involving U.S. companies. The review of the two conditional cases, KLA/ Orbotech and II-VI / Finisar, took 291 days and 263 days respectively, both exceeding SAMR's maximum statutory review period and thereby requiring the parties to withdraw the original notification and resubmit (a practice known as "pull-and-refile"). Although the review periods were lengthy, these were shorter than the 2019 average timeframe for reviewing conditional clearance cases (373 days).

Amongst the unconditional clearances involving U.S. companies this year was Boeing / Embraer – Boeing's proposed acquisition of 80% stake in the Brazilian aircraft manufacturer. The transaction was cleared unconditionally by SAMR on November 9, 2019, while under in-depth Phase 2 review by the European Commission. This illustrates that SAMR was not penalizing U.S.-related transactions. Even in situations where a foreign authority has raised antitrust concerns, SAMR would come to its own judgment based on its assessment.

Both domestic and foreign businesses have been enforcement targets

China's antitrust authorities imposed penalties on U.S. businesses in two high profile cases in 2019, which could result in speculation that China was focusing on foreign, especially American, businesses as antitrust enforcement targets:

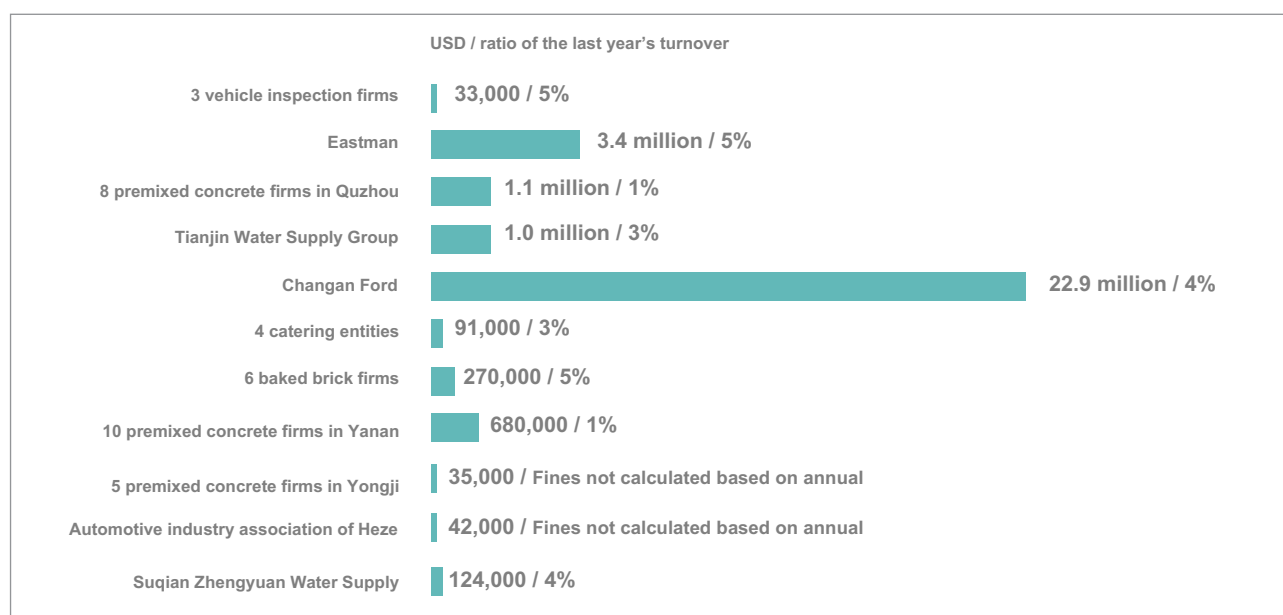
- the penalty decisions against Changan Ford Automobile ("Changan Ford"), a joint venture of the U.S. auto OEM, Ford for RPM, involving a fine of CNY 162.8 million (approx. USD 22.9 million), representing 4% of Changan Ford turnover in Chongqing in the year of infringement, and
- the penalty decision against Eastman, a U.S. chemicals manufacturer for abuse of dominance, involving a fine of CNY 24.4 million (approx. USD 3.4 million), representing 5% of Eastman's turnover in the year of infringement in China.

Accusations of potential bias appear uninformed, however. Between January and November 2019, most of the penalty decisions published by SAMR and its local authorities involved domestic businesses. For example:

- all four cartels on building materials penalized by provincial AMRs involved only Chinese companies; and
- in terms of abuse of dominance cases, besides the Eastman case, SAMR also published a penalty decision against Tianjin Water Supply Group, a state-owned-enterprise for imposing unfair terms on customers, involving a fine of CNY 7.44 million (approx. USD 1 million).

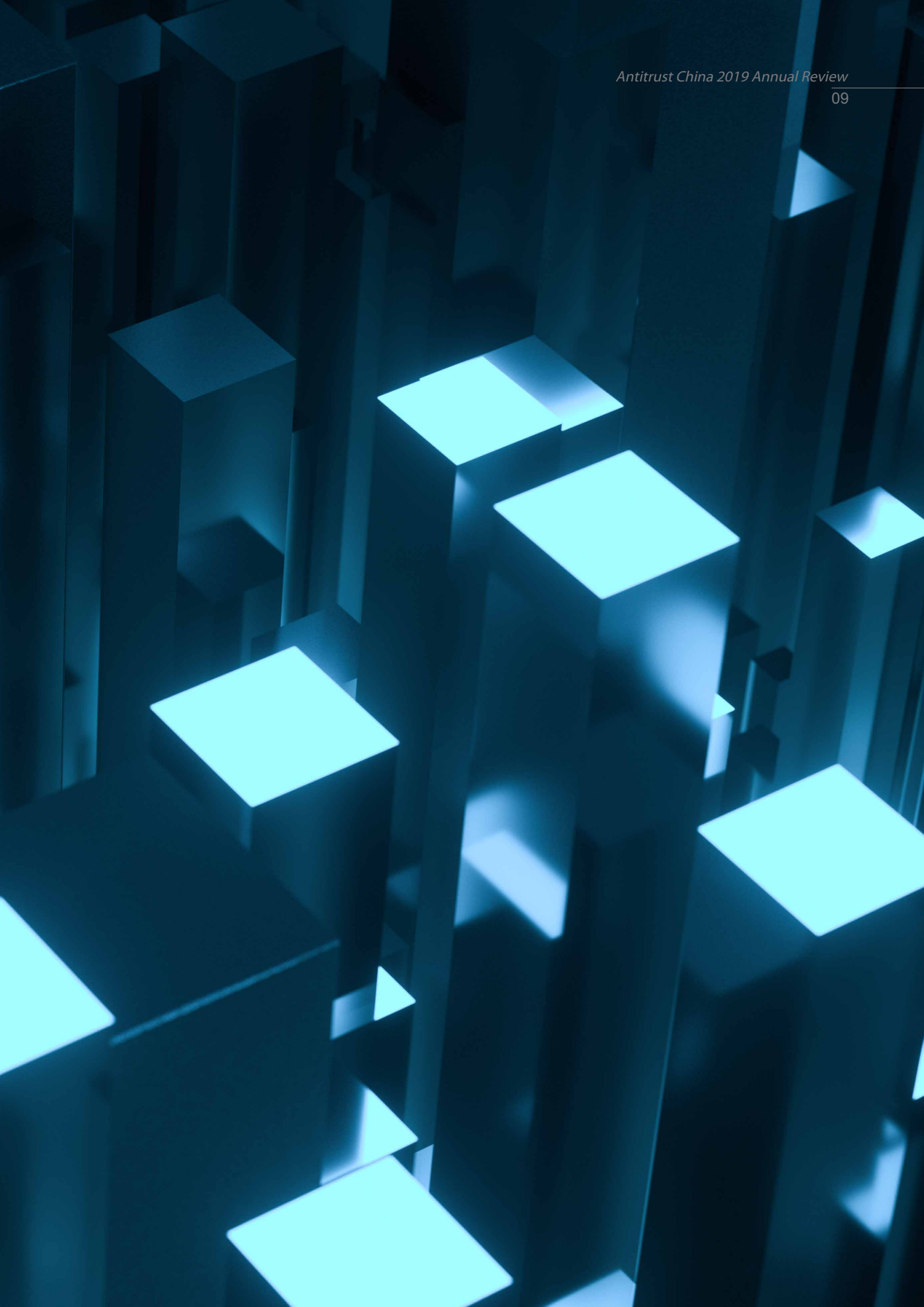
While the fines imposed on Ford and Eastman were the highest by a clear margin, the level of fines does not reflect discrimination against U.S. businesses, as fines of 4-5% on annual turnover appear roughly in the ballpark of the percentage fines that were imposed on local companies. This reflected the fact that Ford and Eastman had a high turnover.

Penalties decision in 2019 (up till November 30)



Protectionist sentiments from domestic stakeholders

Although there may be no signs of politicization in antitrust enforcement, we are aware of an increase in regulatory complaints made by domestic businesses to the authorities in the context of merger control and behavioral violations.



04

Sector focus:
increased regulation of the digital economy and consumer goods

LOOKING FORWARD TO 2020

Scrutiny in the tech sector. In line with global trends, we expect China to continue to increase scrutiny in the tech sector. SAMR may follow the U.S. and EU authorities and investigate hot topics such as algorithms and abuse issues arising from personal data collection.

Sectors affecting livelihood remains enforcement priority. Given SAMR's policy goal, sectors affecting the daily lives of the Chinese people will remain a priority. Businesses active in the following sectors should be particularly mindful: public utilities, pharmaceutical, automobiles, infant formula, building materials, and consumer goods.

The chemicals industry also a target. While not a sector directly affecting consumers, SAMR and its local branches appear to have a particular interest in the chemicals sector, as indicated by recent enforcement.

In deciding sectoral enforcement priorities, antitrust authorities often take into account (i) enforcement priorities in other jurisdictions; and (ii) other policy reasons – most evidently consumer protection. SAMR's enforcement focus in 2019 on tech companies and sectors affecting the livelihood of Chinese consumers has reflected such an approach.

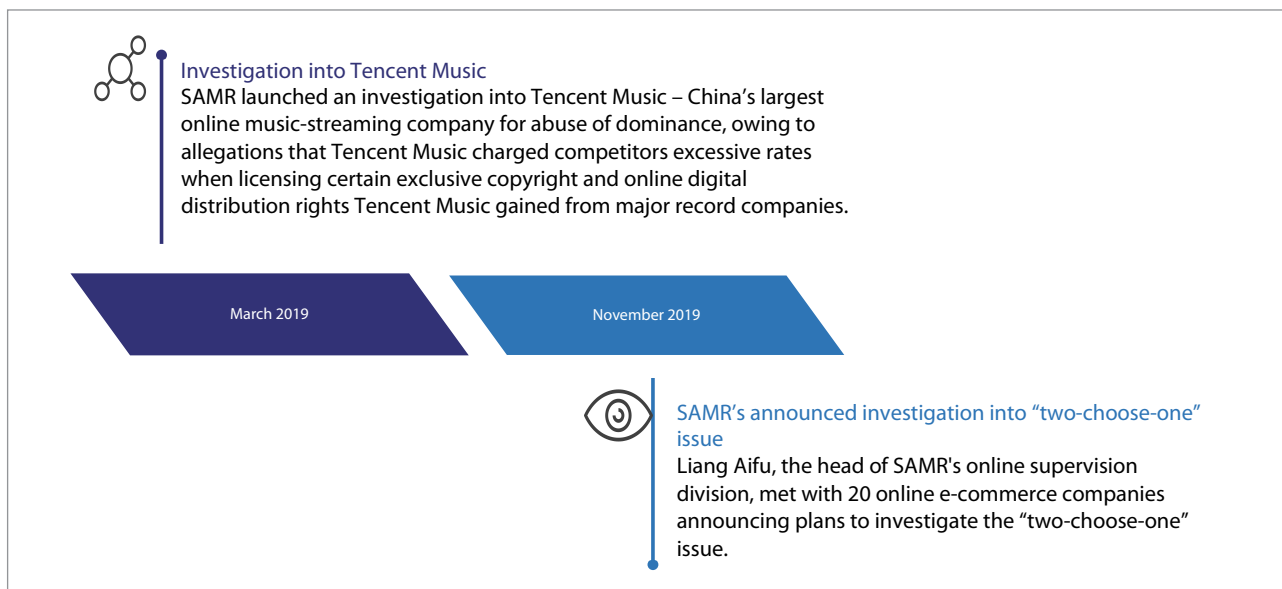
Regulating tech

In line with the global attention on tech companies such as the U.S. and European investigations of “FANG” (Facebook, Amazon, Netflix and Google), the Chinese government has signaled an interest in regulating tech companies, particularly in the digital economy in light of the overall regulatory climate:

- The E-commerce Law was implemented on January 1, 2019 and contained provisions relating to antitrust issues;
- On August 8, 2019, China's State Council published the “Guiding Opinions on Promoting the Regulated and Healthy Development of Platform Economy”, encouraging relevant authorities including SAMR to optimize and improve market access conditions.

The so-called “two-choose-one” issue rampant in the e-commerce sector has come under close scrutiny. “Two-choose-one” refers to exclusivity restrictions imposed by a platform operator that prohibits businesses from collaborating with a competing platform.

Timeline of enforcement initiatives targeting the e-commerce sector



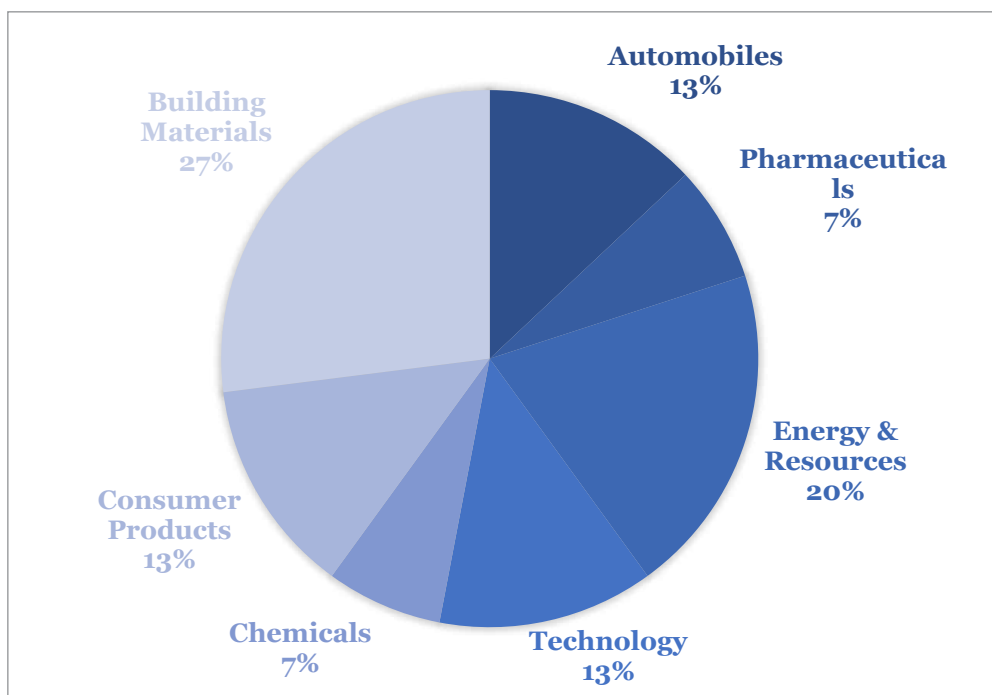
Other tech firms have also been under the radar for IP-related antitrust issues. In April 2019, SAMR reportedly started investigating Swedish telecom giant Ericsson for abusing its dominance by charging excessive royalty rates in licensing its patents concerning 3G and 4G cellular technology.

Focus on sectors affecting consumers

SAMR has repeatedly articulated its consumer protection goal in antitrust enforcement. In January 2019, Mr. Wu Zhen Guo, the Director-General of SAMR's Anti-Monopoly Bureau ("DG Wu"), made the statement in his 2019 "New Year Address" that SAMR would "concentrate its efforts on law enforcement in the areas most affecting ordinary livelihood". In July 2019, SAMR also stated that "antitrust enforcement must adhere to development thoughts that are people-oriented and strive to solve the issues that are the most concerned by and relevant to the people".

In the earlier statement made by DG Wu, public utilities, active pharmaceutical ingredients (APIs), automobiles, infant formula, building materials, and consumer goods have been named as the products and sectors "most relevant to people's livelihood". Active enforcement in these areas is evidenced by cases in building maintenance, energy and resources (including public utilities), pharmaceuticals and automobile sectors and consumer products. Other sectors that have seen enforcement action are technology and chemicals.

Enforcement cases by sector in 2019 (up to November 30)





05

Enforcement trend:
diversified enforcement against a
range of anticompetitive conduct
with increased fines

LOOKING FORWARD TO 2020

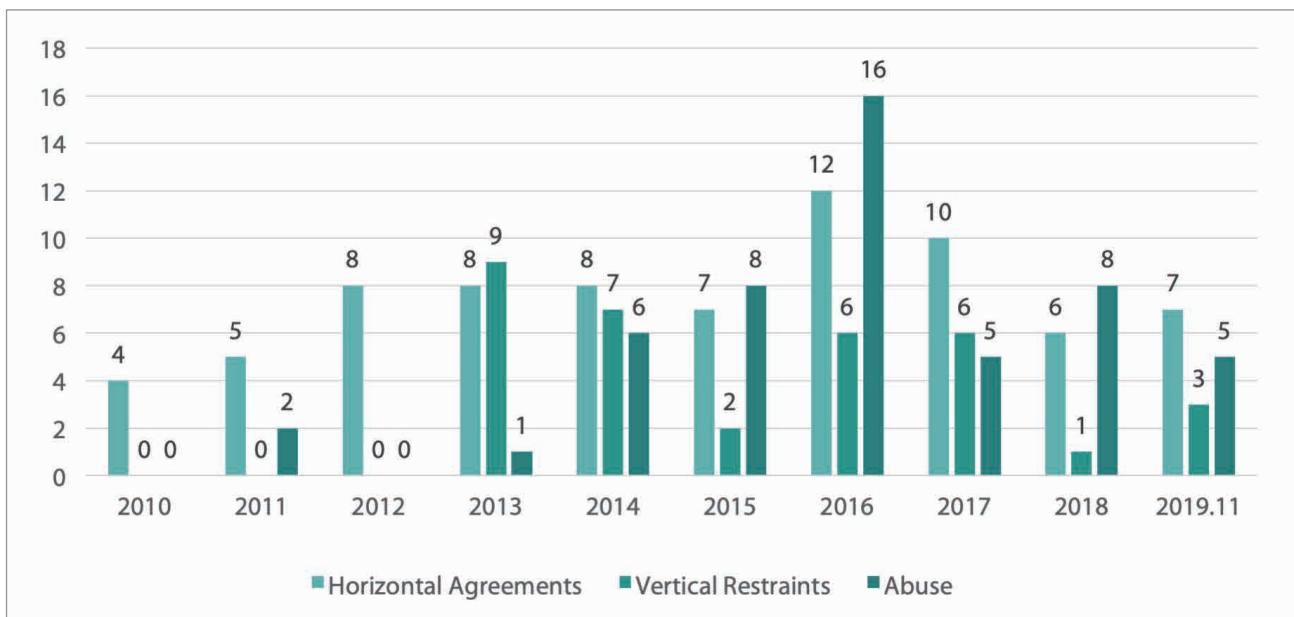
Aggressive enforcement against cartels and RPM. These cases will remain under the spotlight as they provide “easy wins” for SAMR and provincial AMRs.

Abuse cases on the rise. Enforcement of abuse cases, which often involve complex economic analysis, are on the rise. SAMR has shown its readiness to pursue difficult cases by canvassing expert economic evidence in recent cases.

Rewards for whistleblowers will prompt aggressive enforcement. In November 2019, SAMR published for consultation the draft “Whistleblower Reward Policy”. The proposed rewards, together with the existing leniency regime, will encourage reporting of potential antitrust violations. Businesses need to be more vigilant and adopt a proactive rather than reactive approach in antitrust compliance, e.g. conduct an antitrust audit to identify risks and clean up practices and organize dawn raid training.

In 2019, SAMR and its local branches have taken a balanced approach in enforcement against “bread and butter” cases such as cartels and RPM and more complex cases such as abuse of dominance. As of November 30, 2019, SAMR and its local branches conducted 15 antitrust investigations: seven concerning horizontal agreements, three concerning vertical restraints and five concerning abuse of dominance.

Number of antitrust enforcement cases since 2010



Vigorous enforcement against cartels and RPM

In line with previous years, enforcement against cartels and RPM remains vigorous in 2019. Cartels and RPM are often presumed to be illegal by antitrust authorities without the need to prove anticompetitive effect.

The 2019 enforcement highlights are set out below:

- Cartels:
 - o The most active area of cartel enforcement in 2019 was the building materials sector, which has seen four cartel penalty decisions by provincial AMRs. Other sectors include automobiles, pharmaceuticals and food and beverages.
 - o 2019 for the first time saw a penalty decision against buyer cartels, a less typical enforcement target. In August 2019, the Inner Mongolia AMR imposed a CNY 650,000 (approx. USD 91,000) fine on a trade association and four catering companies for a collective boycott of suppliers.
- RPM cases: in June 2019, SAMR announced that it fined Changan Ford CNY 162.8 million (approx. USD 22.9 million) for engaging in RPM conduct in respect of downstream dealers in Chongqing since 2013. Changan Ford was found to have formulated price lists, required dealers to sign “price discipline agreements”, and controlled the minimum prices that the dealers could sell at car shows and online. This is the highest antitrust fine imposed in 2019.

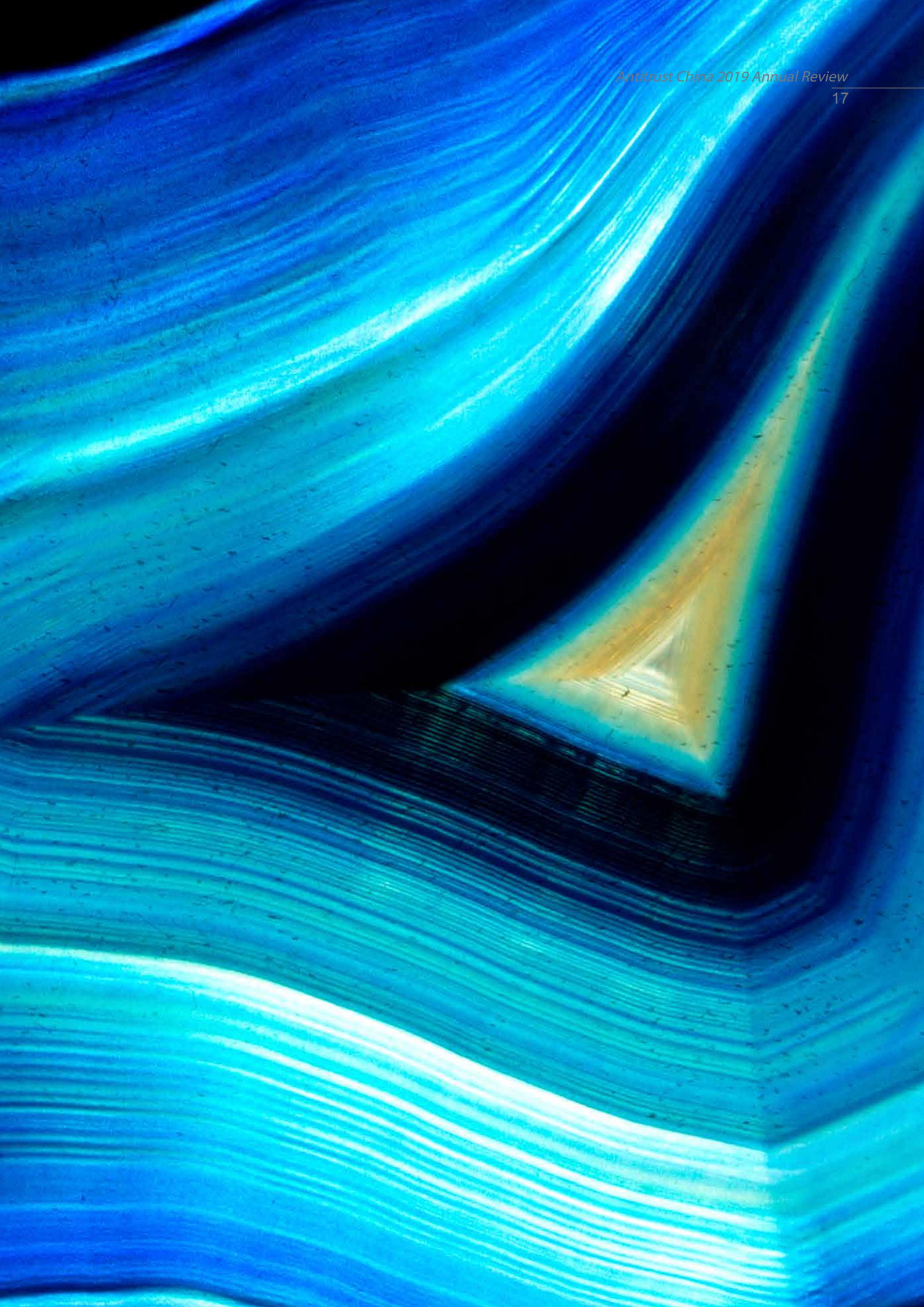
Challenges for dominant firms on the increase

There were two key penalty decisions relating to abuse of dominance in 2019:

- In April 2019, the Shanghai AMR imposed a CNY 24.4 million (approx. USD 3.4 million) fine on chemicals company Eastman, representing 5% of its 2016 turnover. The Shanghai AMR found that Eastman abused its dominance between 2013 to 2015 by imposing de facto exclusive arrangements on purchasers of ester alcohol through (i) providing discounts in addition to most-favored-nation (“MFN”) rates and (ii) imposing “take-or-pay” obligations which covered a significant portion of the customer’s total requirement. To facilitate its assessment, the Shanghai AMR has engaged its expert economist to adduce sophisticated economic evidence.
- In July 2019, Tianjin Water Supply Group (“Tianjin Water”) was fined CNY 7.44 million (approx. USD 1 million), representing 3% of its 2016 turnover, for imposing unfair terms on customers. The SOE was the sole public urban tap water supplier in southern Tianjin, and had required real estate developers dependent on its tap water to purchase certain control and monitoring equipment manufactured by its subsidiary. Tianjin Water was found to have abused its dominance in public tap water to exclude competitors in the supply of control and monitoring equipment market.

A new approach towards fines

The penalty decisions in 2019 also reflect a move away from imposing fines based on the relevant products’ annual sales previously adopted by the NDRC and SAIC before the establishment of SAMR. Instead, SAMR and provincial branches have moved towards more consistently imposing fines based on the annual sales of the infringer; out of the 11 penalty decisions (as of November 30, 2019), eight adopted “annual sales” of the infringer as the fining basis. The increase in base figure to calculating the 1-10% fine resulted in higher antitrust fines in 2019.



06

Deal timeline management:
greater timing certainty for
simple cases, but less so for
more complex deals

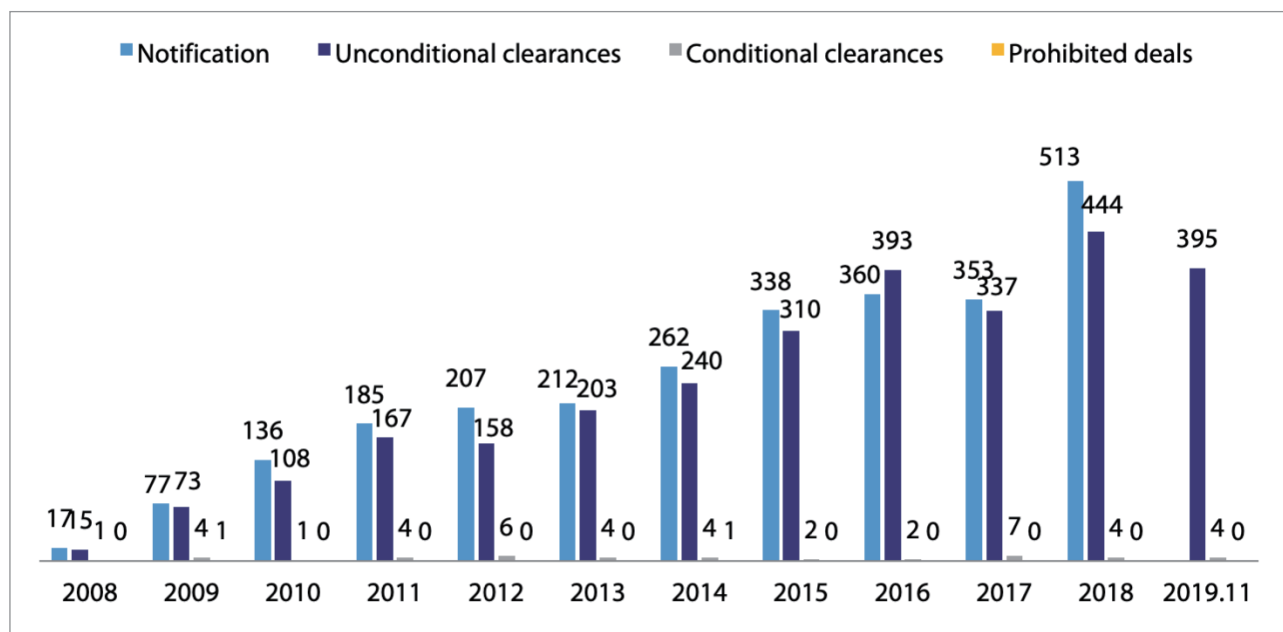
LOOKING FORWARD TO 2020

Swift review of simple cases after acceptance. We expect the review of simple cases to remain swift. However, deal teams should not be overly ambitious with timetables. There remains no statutory limit to the period between notification and case acceptance. As simple cases are subject to a public notice requirement, they may be prone to third party complaints which could lengthen the pre-acceptance phase.

Be prepared for long battles for normal cases, with or without remedies. The review timeframes for other cases are expected to remain lengthy. Our experience suggests that SAMR typically takes 3-6 months after case acceptance to clear normal (non-remedy) cases. The review timeframes of remedy cases are even lengthier and often exceed the maximum statutory limit of 180 days.

China continues to be one of the major merger control jurisdictions, alongside the EU and the U.S. SAMR unconditionally cleared 395 cases from January to November 30, 2019. No transactions were blocked in 2019 to date.

Annual merger caseload from 2008 to November 2019



Defined review timeframes for simple cases after acceptance

In 2019, China has continued to enhance its efficiency in reviewing transactions, particularly simple cases.

There is greater certainty on review timeframes for “simple cases”, i.e. cases that are unlikely to give rise to competition issues after case acceptance. This will help companies doing M&A transactions manage their deal timetables. Transactions that fall under the simple case procedure are generally cleared within 30 days after case acceptance. The average time of clearance after case acceptance has significantly decreased from 30 days in Q2 2015 to 18.5 days in Q3 2019.

More time to be allowed when budgeting deal timeline for complex cases

The review timeframes for cases that do not qualify for the simple case procedure (i.e. normal cases) remain uncertain. For complicated cases involving remedies, the review timeline may be lengthy:

- Normal cases without serious competition issues: there is less transparency on clearance timeframes for “normal cases”. Based on our experience, these cases are generally cleared within the maximum statutory review timeframe (180 days after case acceptance).
- Remedy cases: For remedy cases, they will be subject to much longer review. Amongst the four remedy cases as of November 30, 2019, none of them were cleared within the maximum statutory review timeframe, requiring the parties to pull-and-refile (i.e. withdraw the original notification and resubmit). The average timeframe of clearance for the four remedy cases was 373 days, which is slightly shorter than the average review time of remedy cases in 2018 (402 days).

07

Remedy cases:

Chinese regime remains receptive to behavioral remedies and tech sector in focus

LOOKING FORWARD TO 2020

SAMR will continue to be more receptive to behavioral remedies. Parties should be flexible in proposing alternative remedies in remedy discussions to achieve the best outcome.

Tech sector remains a high-risk area. Consistent with previous trends, SAMR is expected to continue focusing on high tech deals.

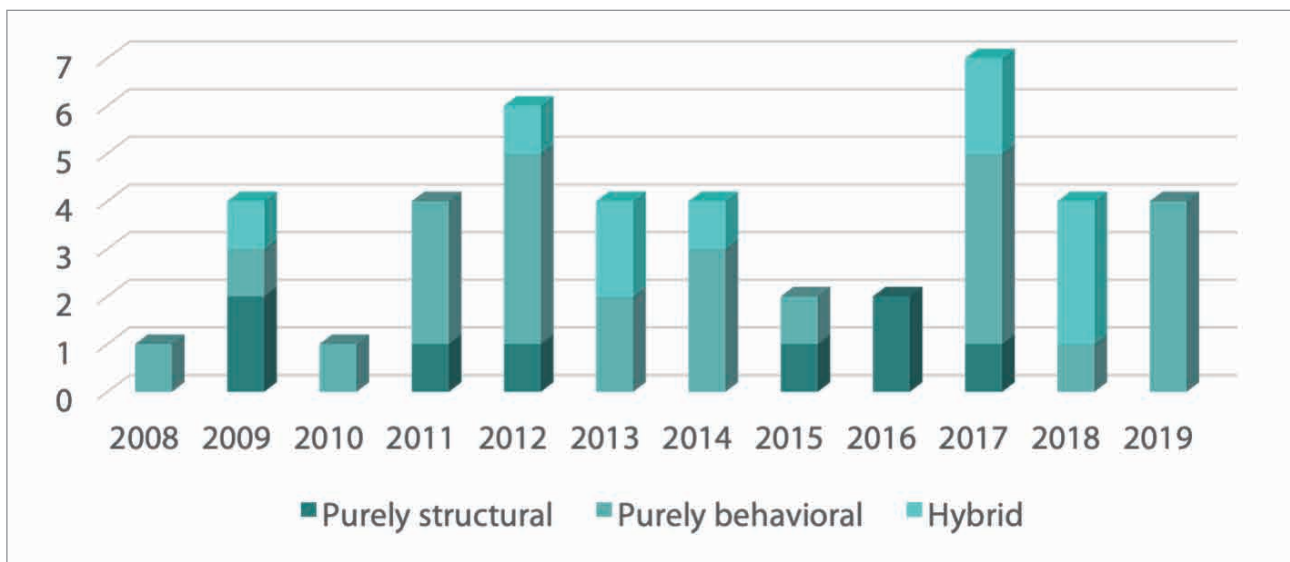
The uniqueness of Chinese merger review and remedies. Given SAMR's independent review and inclination to not follow the lead of other major antitrust authorities, transaction parties need to conduct a China-specific competition assessment and be prepared to offer remedies acceptable to SAMR.

SAMR is known to be tough but robust. Its independent thinking on transactions has resulted in unique and innovative behavioral remedies, including the controversial “hold-separate” remedies.

Behavioral remedies favored over structural remedies

Like its predecessor MOFCOM, SAMR has continued to be more receptive than its counterparts in the EU and the U.S. to using behavioral remedies to address competition concerns, even though they are more difficult to implement and monitor than structural remedies. In 2019, SAMR imposed behavioral remedies in all four conditional cases, ranging from the “hold-separate” remedies, FRAND commitments to commitments restricting tying and bundling.

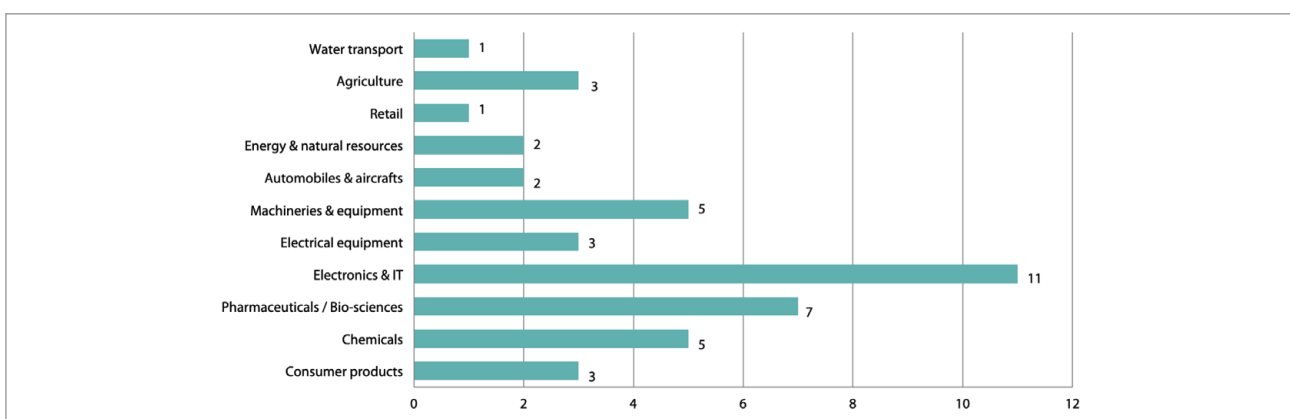
Types of remedies since 2008



The high-tech sector remains a prime focus

SAMR has also continued to focus its attention on the high-tech sector, following from high profile cases such as Qualcomm / NXP. Of the four conditional cases, two (KLA-Tencor / Orbotech) and (II-VI / Finisar) relate to the high-tech industry.

Remedy cases by sector since 2008 (as of November 30, 2019)



Independent assessment from other merger control regimes

SAMR has continued to show that it will conduct an independent assessment focusing on issues in China, without influence by other jurisdictions. Out of the four remedy cases in 2019, three were unconditionally cleared in all other jurisdictions. We are not aware of the remaining case being notified elsewhere.

We set out a summary of the 2019 remedy cases below.

Transaction (Date of Decision)	Sector	Competition Concerns	Remedy	Review status in other jurisdictions
KLA-Tencor / Orbotech (February 13, 2019)	Tech	The transaction would create a vertically integrated entity active in the upstream market for process control equipment and the downstream market for deposition and etching equipment. SAMR also noted the risk that the combined entity – which would have dominance in the upstream market – could potentially bundle the upstream and downstream products, foreclosing competitors from the downstream market.	Behavioral - for five years, the combined entity would ensure the supply of the upstream product to downstream market players in China on FRAND terms and refrain from tying or imposing unfair restrictions.	Cleared in all other notifiable jurisdictions, including Austria, Germany, Israel, Japan, Korea, Taiwan, the U.S.,
Cargotec / TTS Group (July 5, 2019)	Shipping machinery	The transaction gave rise to concerns in (i) hatch covers; (ii) roll-on roll-off (Ro-Ro) equipment and (iii) merchant cranes markets in China. The parties were each other's top two or three competitors in these markets, and the combined entity would have more than 50% markets share in these markets post-transaction.	Behavioral - (i) for two years, the parties shall hold-separate their China hatch covers, Ro-Ro equipment, and merchant cranes businesses; (ii) for five years, Cargotec will be prohibited from raising prices of the overlapping products above average price	Cleared in all other notifiable jurisdictions, including Germany and Korea

07

Transaction (Date of Decision)	Sector	Competition Concerns	Remedy	Review status in other jurisdictions
II-VI / Finisar (September 18, 2019)	Tech	The transaction represented a three-to-two merger that would have resulted in the combined entity having a post-transaction market share of 45 – 50% in the supply of wavelength selective switches in China and globally.	Behavioral – for three years, the parties shall hold-separate their wavelength selective switches business	Cleared in all other notifiable jurisdictions, including Germany, Mexico, Romania and the U.S.
Zhejiang Garden Bio-chemical High Tech Royal DSM (October 16, 2019)	Pharmaceutical	The transaction involved the set up of a joint venture manufacturing an upstream ingredient of vitamin D3 by two companies competing in the vitamin D3 markets for humans and animals. The transaction gave rise to horizontal concerns over coordination and information sharing and vertical concerns over input and customer foreclosure.	Behavioural – for five years, the joint venture will operate independently from their parents	No public record of notifications in other jurisdictions

08

Gun-jumping and failures to notify: continued intensified enforcement

LOOKING FORWARD TO 2020

Continuing aggressive enforcement against failures to notify. The steady increase in enforcement against failures to notify shows that SAMR is less tolerant and will continue to actively investigate failures to notify / gun-jumping cases.

Non-financial consequences. Transaction parties taking the risk of not filing in China need to be mindful that the implications are not purely financial. While fines are relatively low (max. CNY 500,000 (approx. USD 70,000)), failures to notify may result in the unwinding of the transaction and delays to the clearance of future transactions.

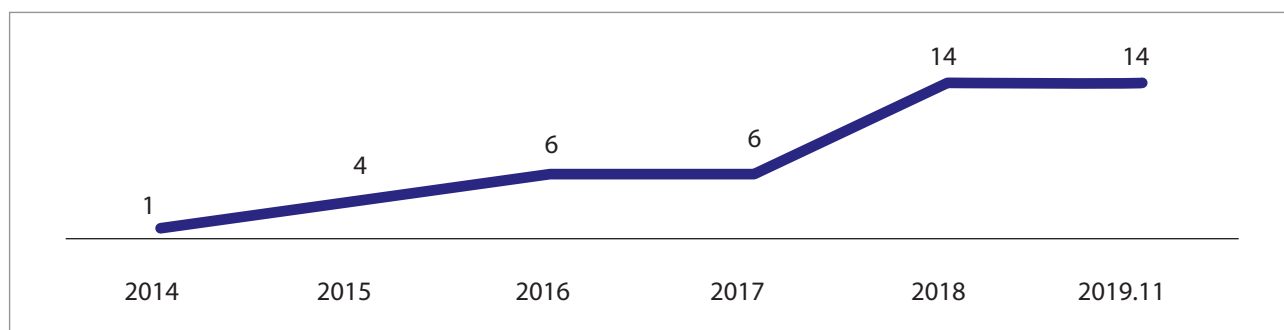
Fines for failures to notify may significantly increase. AML amendments may lead to increases in fines for failures to notify based on a percentage of the parties' turnover in line with other jurisdictions.

Enforcement against failures to notify / gun-jumping is increasingly common. As of November 30, 2019, there have been 45 failures to notify / gun-jumping penalty decisions, imposing fines of CNY 150,000 (approx. USD 21,300) to CNY 400,000 (approx. USD 57,000).

Enforcement has become more frequent

Enforcement has been steadily on the increase since the first enforcement case in 2014.

Enforcement against failures to notify since 2014



Enforcement against atypical targets

Amongst the 2019 penalty decisions, some concerned transactions that were not typically expected to be notifiable:

- Transactions outside mainland China: In Yageo / Brightking Holdings, SAMR fined Yageo Corporation CNY 300,000 (approx. USD 43,560) for failure to notify its acquisition of Brightking Holdings. Both companies are Taiwan-based electronic component manufacturers.
- Acquisitions of minority stake: In Tibet Dejin / Shanghai Huitong Energy, SAMR fined Tibet Dejin Enterprise Management CNY 300,000 (approx. USD 42,256) for failure to notify its acquisition of 29.99% stake in Shanghai Huitong Energy.

Practice notes

Transaction parties need to bear in mind:

- Failures to notify / gun-jumping cases are detected through third-party tip-offs or when subsequent transactions notified to SAMR require disclosure of relevant transactions in the past; and
- The Chinese merger regime has a wide remit and can catch transactions that may intuitively appear non-notifiable, including foreign-to-foreign transactions, non-full-function joint ventures and acquisitions of minority stake.

09

Antitrust litigation: wielding competition laws as a sword

LOOKING FORWARD TO 2020

Antitrust litigation as a tool to achieve commercial goals. Antitrust litigation will be on the rise as businesses continue to utilize it to achieve commercial goals.

Risk of follow-on damages actions. Businesses have to remain mindful of follow-on damages actions following a penalty decision by antitrust authorities, domestic or foreign.

Antitrust lawsuits between competitors and business partners in supply, distribution and licensing arrangements have risen. Many of the antitrust lawsuits are brought in pursuit of serving one's own commercial goals.

A means to achieve commercial goals

Gaining market shares; seeking better licensing terms; declaring contractual terms void – antitrust litigation is being used as a tool to achieve commercial goals. Businesses should carefully canvass the costs and implications of such actions, including time, litigation expenses, bad publicity reputational damage and increased scrutiny by antitrust authorities.

A selection of key cases filed or heard in Chinese courts in 2019 is set out below.

Claimant / Defendant	Status	Issues
Huawei v. InterDigital China	Filed by Huawei on January 2, 2019 Hearing pending as of November 30, 2019	Huawei alleged that InterDigital violated an obligation to license its patents that are essential to 3G, 4G and 5G wireless telecommunication standards on fair, reasonable and non-discriminatory terms and conditions
JD.com, Pingduoduo & Vipshop v. Alibaba	Filed by JD.com on January 1, 2017 Pingduoduo and Vipshop joined as claimants on September 12, 2019 Hearing pending as of November 30, 2019	The claimants alleged Alibaba of abusing its dominance by forcing merchants to enter exclusive sales contracts with Alibaba's e-commerce platforms.
Luckin v. Starbucks	Filed on May 16, 2018 Withdrawn on November 14, 2019	Luckin Coffee alleged Starbucks of abusing its dominance by including an exclusivity clause in its leases to prevent competitors from operating in the same premises.

Tech sector also a high-risk area in antitrust litigation

While there was only one new high-profile SEP-related litigation this year (Huawei v. InterDigital China), SEP holders shall remain alert, particularly in light of previous jurisprudence supporting the argument that SEPs holder can effectively exclude market entrants.

10

Judicial guidance: analytical frameworks for resale price maintenance and antitrust arbitration clarified

LOOKING FORWARD TO 2020

Businesses should continue to be cautious about RPM. Despite the courts' acknowledgment that the illegality of RPM can be rebutted, it remains unclear what evidence can be adduced in practice to rebut the presumption.

Non-arbitrability of civil antitrust claims can lead to conflict of law issues. Potential conflicts of law issues may arise in situations where domestic claimants obtain an overseas arbitration award with an antitrust element. It remains to be seen whether Chinese courts will be willing to recognize and enforce the arbitration award in light of the Huili decision.

Two judgments from the Supreme People's Court ("SPC") provided guidance on RPM's analytical framework and pronounced that civil antitrust claims cannot be arbitrated.

SPC clarified analytical framework of RPM

The treatment of RPM in China has been in a state of flux due to divergent approaches taken by the Chinese antitrust authorities and the courts.

Historically, RPM cases have been subject to two standards in China. Antitrust authorities ordinarily review RPM cases as per se illegal unless exemptions apply, whereas courts review RPM cases under the "rule of reason" approach in stand-alone damages actions, which takes into anticompetitive effects of the conduct.

Crucially, in *Hainan Yutai Technology Feed v. Hainan Price Bureau*, the SPC distinguished public enforcement from private actions, and endorsed a view that antitrust authorities and the courts may adopt different analytical frameworks.

SPC's interpretation of RPM's analytical framework

Nature of case	Approach	Burden of proof
Antitrust investigations by authorities	Presumed illegal, but rebuttable based on evidence that RPM has no anticompetitive effect or qualifies for exemptions under the AML (e.g. efficiencies)	Alleged infringer to disprove anticompetitive effect or prove the existence of exemptions
Litigation – administrative cases (e.g. judicial review of antitrust penalty)	Presumed illegal, but rebuttable based on evidence that RPM has no anticompetitive effect or qualifies for exemptions under the AML (e.g. efficiencies)	Claimants seeking to revoke an administrative penalty decision shall adduce evidence to disprove anticompetitive effect or prove the existence of exemptions.
Litigation – civil cases	Rule of reason	Claimants are required to show actual losses suffered.

Possibility to arbitrate antitrust violations examined

The issue of whether antitrust violations arising from contracts can be arbitrated also came under examination in Chinese courts.

In August 2019, the SPC in *Huili v. Shell* held that the adjudication of antitrust violations falls within the scope of public law. As a result, allegations of antitrust violations cannot be arbitrated privately in and must be subject to the jurisdiction of the courts.

The non-arbitrability of civil antitrust disputes deviates from the approach in other jurisdictions, e.g. the EU and the U.S. It remains to be seen whether this position will be challenged in the future.

2020

vision –
a new era dawning?

NO
NO
NO
NO

China continues to be a major antitrust jurisdiction and will continue to show its value and force in 2020.

Talks of legislative reform of China's competition laws have been ongoing. While no clear date of amendments has been set, amendment works to the AML are expected to be intensified in 2020. A key goal is to align with developments in the economy, including fast-paced technological advances.

Despite trade and political tensions, international coordination amongst authorities will continue. In 2019, SAMR has signed memoranda of understanding with antitrust authorities in South Korea, Japan, Russia and the Philippines to enhance collaboration. Businesses active in more than one jurisdiction need to be mindful of the international reach of antitrust regimes, including collaboration across authorities and potentially politicized regulatory environment.

Tech companies and sectors affecting the daily lives of the Chinese consumers will remain enforcement priorities. This does not preclude enforcement against other sectors, particularly automobiles, chemicals, shipping and ports, which have been of historical enforcement interests.

Antitrust enforcement will likely be more aggressive as China's antitrust authorities gain more exposure and the local consolidation of the agencies is expected to be completed in 2020. "Bread and butter" cases such as cartels and RPM will remain an enforcement focus. The authorities are increasingly confident in investigating more complex abuse of dominance cases. Proposals to reward whistleblowers, alongside the existing leniency regime, will also inspire enforcement activities. As evidenced by the Eastman case, SAMR is increasingly engaging expert economists to consider sophisticated econometric evidence.

The merger control regime will continue to be robust. Review for simple cases is streamlined and more attention will be given to complex cases. SAMR will continue to make independent decisions. SAMR is still expected to remain more receptive to behavioral remedies and innovative in finding ways to address competition concerns. The detection risks of failures to notify / gun-jumping cases are also increasing and subject to regular review.

Private antitrust litigation will remain frequent. Businesses are alert to potential challenges but also appreciating the value of antitrust litigation in achieving commercial goals.

Finally, we would like to use this space to express our heartiest congratulations to the Chinese antitrust authorities and courts on their achievements. Despite the young age of the antitrust regime, the Chinese antitrust authorities and courts have shown the world their determination to combat antitrust issues and enhance competition in China through a combination of diligence, dedication and innovation. We wish the Chinese antitrust regime every success going forward.

Fangda Antitrust Team

The Fangda Competition and Antitrust Practice

"A robust team that enjoys increasing prominence and offers talent in both domestic and international competition law matters. Handles high-profile antitrust investigations and litigation in China, while continuing to demonstrate significant ability in merger filings for cross-border M&A transactions. Maintains a varied roster of clients in the hi-tech, electronics, chemicals, container shipping and pharmaceutical industries. Considerable expertise in handling the competition law aspects of joint ventures between private and state-owned firms. Regularly mandated to handle multibillion-dollar merger filings."

*Chamber and Partners, Asia Pacific Rankings 2020
- Competition/Antitrust (PRC Firms) in China*

Recognition

Competition/Antitrust (PRC Firms) - Band 1 Chambers Asia-Pacific 2020

Antitrust and Competition: PRC firms - Tier 1 Legal 500 Asia Pacific 2019

Regional firm of the year – Asia-Pacific, Middle East and Africa Global Competition Review 2017

Competition Firm of the Year - China China Law and Practice 2017, 2018 and 2019

Leading China antitrust practice Asian - Mena Counsel Awards 2016

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