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Antitrust China 2020

Annual Review

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REINVENTING ANTITRUST FOR A BRAVE NEW WORLD.

Uncertainty and disruption have been the key themes for 2020. The COVID-19 pandemic has reshaped the way we live and work. Rising political trade tensions have resulted in the introduction of more ambiguous and untested measures targeting Chinese investments, particularly in Europe and the United States. China's successful playbook for building some of the world's most admired domestic tech companies and digital platforms has come under unexpected fire.

Despite 2020's cloud of uncertainty, China's competition authority, the State Administration for Market Regulation ("**SAMR**"), has moved quickly to articulate its vision for the future of antitrust in China both procedurally and substantively. As the world emerges from the pandemic in 2021, SAMR will continue to crystallize and test its core enforcement priorities and continue operating under more efficient work procedures and capabilities which it has introduced last year. Quite admirably, despite China being at the center of COVID-19, SAMR has operated as normal without any disruptions or delays throughout 2020. At the same time, its focus on the digital sector and proposed draft rules has signaled a broader willingness by SAMR to consider a wider range and more sophisticated frameworks of assessment, theories of harm, and types of evidence that have traditionally not featured in China's antitrust regime. This includes prohibiting digital players from using data from businesses with whom the platforms compete, self-preferencing their own services, and abusing their strong market position over their customers and competitors.

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Contents

Class of 2020: Key legislative developments 02
Class of 2020: By the numbers 05
01 Stepped-up efficiencies during COVID-19 06
02 Shifting global trade tensions 10
03 Market power in the digital economy 16
04 Widening the merger control net 20
05 Conglomerate effects and behavioral remedies 24
06 Big data 28
07 Localizing antitrust enforcement 31
08 Antitrust litigation 35
09 Sector-specific focus 39
10 Building a culture of compliance and cooperation 42

Welcome to another edition of Fangda's Antitrust Annual Review, which looks at the developments of 2020 and provides a glimpse into the future to help businesses position themselves in China for 2021.

CLASS OF 2020: KEY LEGISLATIVE DEVELOPMENTS

2020 was the year of consolidation and renewal. Following the combination of China's three antitrust agencies into one in 2018, 2020 was the year where previously piecemeal and sometimes overlapping legacy guidelines and regulations issued by the different agencies were consolidated, which brought clarity of direction to antitrust enforcement rules and procedure.

2020 also saw the antitrust enforcement framework take big steps towards renewal. From changes to the Anti-Monopoly Law, to new rules on the platform economy, to refreshed guidelines on the antitrust treatment of intellectual property issues, these changes are a response to the challenges of the new decade, and ensures that China's Anti-Monopoly Law continues to remain relevant and effective going forward.

1. First amendments to the Anti-Monopoly Law

An important development was the proposed changes to the Anti-Monopoly Law, which is the primary legislation that forms the basis of competition law in China. The Anti-Monopoly Law has not been amended since it first came into effect in 2008 and the draft amendments, which were released for public consultation on 2 January 2020, represents a timely revision that incorporates the learnings from the past decade of enforcement. China's Standing Committee of the National People's Congress has identified amendments to the Anti-Monopoly Law as one of its key legislative tasks for 2021.

Class of 2020: Key changes to the Anti-Monopoly Law

Increase in level of fines.	The proposed amendments significantly increase penalties for various offences (including the failure to notify a transaction and gun-jumping).
Possible criminal offences.	The proposed amendments appear to open the door for different types of antitrust infringements to be criminalized.
Stiffer penalties for obstructing investigations.	The proposed amendments increase the maximum fines for individuals and companies who do not cooperate or who hinder antitrust investigations.
Liability for assistance in antitrust violations.	The proposed amendments expressly prohibit any undertaking from organizing or assisting others to enter into anticompetitive agreements.
Review standard for vertical agreements, including resale price maintenance.	The proposed amendments appear to clarify that a 'rule of reason' approach will be adopted (i.e. assessment of effect on competition is required) when assessing other vertical agreements apart from resale price maintenance conduct.
No suspension of investigation of hardcore cartel cases.	Under the proposed amendments, investigations cannot be suspended if they involve anticompetitive agreements related to price-fixing, sales and/or output restriction or market allocation.
Indispensability requirement to demonstrate efficiencies.	The proposed amendments introduce the requirement for the agreement in question to be 'indispensable' for any claimed efficiencies to be realized.
Definition of 'control' introduced.	The proposed amendments now provide an express definition of 'control' by referring to the 'right or actual status that an undertaking directly or indirectly, solely or jointly, has or may have to impose a decisive influence on the production and operation activities or other major decisions of other undertakings.'
Improvements to merger review procedure.	The proposed amendments suggest a number of changes to more efficiently review transactions. This includes the option for the competition authority to 'stop the clock' and amend the turnover notification thresholds from time to time. The power to amend the turnover notification thresholds is reserved to the State Council under the existing framework.
Increased scrutiny of internet companies.	The proposed amendments outline various economic theories of harm that need to be addressed in assessing whether an internet company has a dominant position.

2. Guidelines

SAMR has also released a series of guidelines on various substantive and procedural areas, which represents efforts to clarify and renew the antitrust enforcement rules for the challenges of the new decade.

Class of 2020: Guidelines finalized by SAMR

Guideline	Date of publication of finalized version	Date of publication of consultation draft
Regulatory provisions		
Interim Provisions on the Examination of Concentrations Between Undertakings	October 23, 2020	January 7, 2020
Antitrust guidelines		
Antitrust Guidelines for the Automobile Sector	August 6, 2020	March 23, 2016
Antitrust Guidelines in the Field of Intellectual Property	August 6, 2020	December 31, 2015, February 4, 2016 and March 23, 2017
Guidelines for the Application of Leniency Program in Horizontal Monopoly Agreement Cases	August 6, 2020	February 3, 2016
Guidelines on Undertakings' Commitments in Anti-Monopoly Cases	August 6, 2020	February 3, 2016
Guidelines for Anti-Monopoly Compliance of Undertakings	September 18, 2020	November 28, 2019

Class of 2020: Draft guidelines published for consultation

Antitrust guidelines (Draft for consultation)	Date of publication of consultation draft
Guidelines on Companies' Anti-Monopoly Compliance Abroad	September 18, 2020
Antitrust Guidelines in the Field of Active Pharmaceutical Ingredients	October 13, 2020
Antitrust Guidelines for the Platform Economy	November 10, 2020

CLASS OF 2020: BY THE NUMBERS

458

The number of transactions notified

372
The number of simple case decisions

82
The number of normal case decisions

4
The number of conditional clearance decisions

14
The average review days of simplified cases

9.5
The average review months of remedy cases

12
The number of failure to notify cases

250
The average review days for failure to notify investigations

17

The number of behavioral investigations concluded

8
The number of cartel cases

1
The number of vertical restraints cases

8
The number of abuse of dominance cases

RMB **325.5**m
The largest penalty imposed (USD 50m) in a single decision

01
STEPPED UP EFFICIENCIES DURING COVID-19

IN 2021

COVID-19 has catalyzed major changes to China's antitrust regime, both procedural and substantive in nature. From the introduction of e-filing for submissions to the use of virtual meetings and more, review and investigation procedures were simplified and expedited. These changes have worked well in increasing efficiency and reducing review timelines, and we expect at least some of these to become a permanent feature of China's antitrust regime going forward.

In response to COVID-19, SAMR released a COVID-19 Notice in April 2020 announcing a slate of measures on the operation and enforcement of China's Anti-Monopoly Law to support efforts to control the pandemic and recover the economy. Antitrust enforcement was stepped up in certain areas, particularly against unfair pricing in crucial sectors; exemptions and flexibility were granted in other areas where they were needed to support pandemic control or the recovery of work and production. This malleability to fit evolving circumstances testifies to the government's commitment to ensure that the Anti-Monopoly Law continually remains a relevant and effective tool to deal with pressing issues of the times, and to protect and benefit people rather than impede recovery.

1. Greater procedural efficiencies

Merger control

During the height of COVID-19 in China, SAMR showed no signs of delay or slow-down in its review processes. Whilst other competition authorities adopted stop-the-clock mechanisms or even requested parties to refrain from filing any transactions for a while, SAMR's operations were 'business as usual' as it optimized its procedural framework. Between January and May 2020, SAMR concluded more than 180 merger reviews, including all of the four remedy decisions issued in 2020. SAMR introduced an e-filing system in the first quarter of 2020 and began to accept merger filings via email. Any follow-up request for information and clearance decisions are now also issued by email. At the same time, in understanding the difficulties caused by the pandemic, SAMR has become more flexible about certain formality requirements and documentation.

SAMR also committed earlier in 2020 to expedite the review of transactions in certain industries that would help control the pandemic and recover work and production, for example, in pharmaceutical manufacturing, medical instrument and equipment manufacturing and transportation. This speaks to SAMR's flexibility in enforcing merger control to ensure that it is used as a tool to benefit people during times of crisis. In certain respects, SAMR was even more efficient than prior years as evidenced by the slightly shorter review timeframes of simplified filings.

Simple review	The review timelines for simple cases decreased from an average of 16 days from case acceptance in 2019 to only 14 days in 2020.
Normal review (no remedy)	The more efficient procedures guarantee that there would be no material impact on the duration of normal review timelines.
Remedy cases	Remedy cases were cleared around 8-12 months from case notification. Two of the four remedy cases were cleared within the statutory review timeframe and did not involve a 'pull and refile' (i.e. resubmitting the filing when the statutory timeline expires).

Investigations

There has been no discernable slowdown in enforcement action in 2020 due to COVID-19. While SAMR (and its local branches) issued 16 antitrust infringement decisions in 2019, the number has stayed around the same at 17 in 2020. The pandemic has in fact led to the adoption of more efficient investigative procedures, including accepting submissions and evidence electronically and adopting virtual meetings. SAMR also committed to expedite its response to consultations, complaints and exemption applications relating to COVID-19 control and the recovery of work and production.

2. Enforcement against price-gouging and other antitrust scrutiny

Specific sectors were under the spotlight for antitrust enforcement as a result of COVID-19. In its COVID-19 Notice, SAMR focused on anticompetitive conduct involving equipment used for pandemic control such as masks, medicine, medical equipment, and areas that affect daily living necessities. Unfair pricing and price gouging behavior were of particular concern in the early half of 2020 when the effects of the pandemic were more serious in China.

CASE STUDY

Calcium Gluconate API case: A study of dominance as a group

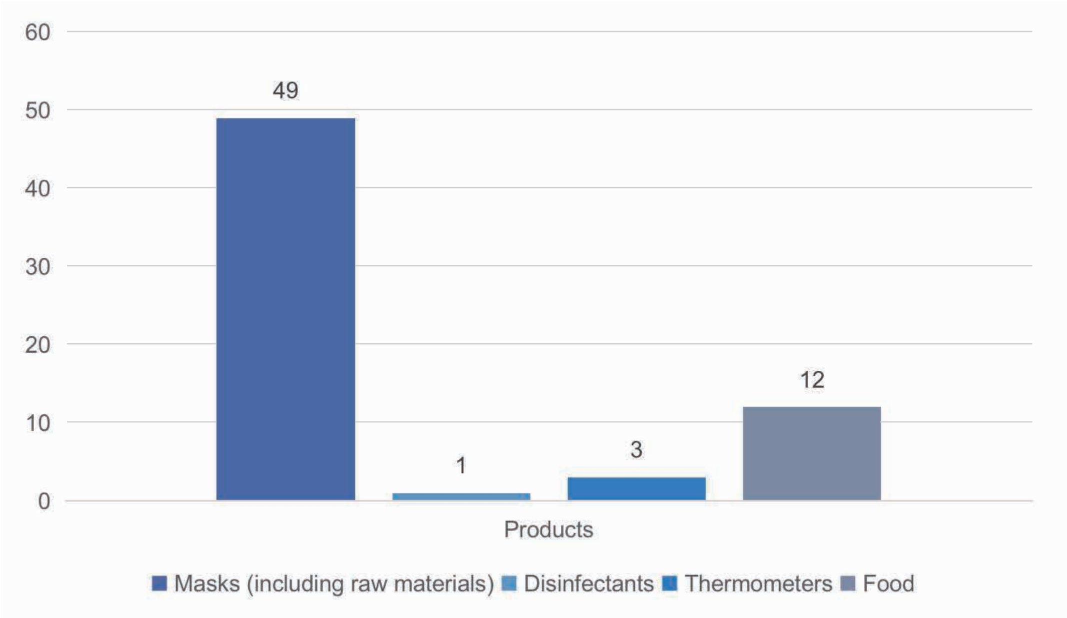
Background. In April 2020, SAMR imposed a penalty of RMB 325.50 million (USD 50 million) on three distributors of calcium gluconate API for abuse of dominance.

Dominance as a group. SAMR held that the three distributors were collectively dominant in the relevant market. Even though they were independent legal entities, SAMR found that one of the distributors – Shandong Kanhui Medicine – had control over the other two distributors by way of personnel and financial connections, and its ability to make business decisions on their behalf. It is not entirely clear if the decision relied on the notion of collective dominance (which is formally recognized under China's antitrust rules) or whether the language of 'control' suggests that the three distributors were being treated as one undertaking.

Abuse. The three distributors sold the products at unfairly high prices to downstream drug manufacturers, as determined by a price-cost comparison. They also imposed unfair transaction terms on downstream drug manufacturers by requiring the latter to sell the final drug products only back to the three distributors.

Apart from China's antitrust laws, SAMR (and its local branches) also has more interventionist tools at its disposal. China's Price Law has been used extensively to regulate prices during COVID-19. While there has only been one reported decision in 2020 relating to unfair pricing under the Anti-Monopoly Law, the bulk of the pricing cases have been pursued under the Price Law. Infringements under the Price Law do not require 'dominance' to be established and can be brought against lower price increases – some provincial guidelines indicate that if prices exceed those charged before January 21, 2020, or if the cost price difference exceeds 15%, these can be grounds for a Price Law infringement. From January to April 2020, SAMR regularly enforced against price gouging conduct affecting the supply of commodities that impact pandemic control and people's livelihoods. The bulk of these cases involved action in relation to masks (and their raw materials), although a substantial number also involved food-related items.

COVID-19 related enforcement actions under the Price Law (Jan-Apr 2020)



* The data only reflects Price Law enforcement cases announced by SAMR in relation to pandemic control

Exempting cooperation agreements

While stepping up enforcement in certain areas, SAMR has also shown flexibility in granting exemptions to cooperation agreements relating to the resumption of work and production. The COVID-19 Notice clarified that certain cooperation agreements relating to pandemic control or the recovery of work and production between competitors can be exempted if they aid technological progress, improve efficiency, advance public interest, or protect consumer interest. Examples of such cooperation include agreements that lead to the development of new vaccines or testing technology, agreements that improve efficiency in producing items needed to control the pandemic, and agreements that improve the competitiveness of small and medium enterprises. Prior to this, there has been no clear stipulation that businesses may request for exemptions from SAMR before reaching or implementing agreements.

3. Failing firm defense

In China, there is no concrete concept of a failing firm defense, which is well-established in other jurisdictions and allows merging parties to argue that there would be no loss in competition as the target would have exited the market if the merger did not go ahead. Even so, SAMR has been more receptive towards the significant financial challenges experienced by merging parties and relevant markets. Our own experience confirms that such arguments have been put before SAMR owing to the pandemic-related financial difficulties that many firms have faced in the past year. Even if the defense is not formally raised, SAMR will consider a firm's financial position in its review and it is also a requirement that parties disclose whether the transaction involves a bankrupt firm or a firm on the verge of bankruptcy. Since COVID-19, SAMR has also closely tracked financial forecasts through merger filings to determine whether an industry is under financial pressure or is otherwise facing other challenges such as excess capacity.

02
SHIFTING GLOBAL TRADE TENSIONS

IN 2021

Chinese merger control will likely feature more prominently given the escalating trade tensions globally, the raft of reforms introduced to curb China's influence, and the impact of COVID-19. Transactions in sectors that are of strategic importance to China are more likely to be subject to intensified scrutiny, particularly high-tech and semiconductor deals given the uptick in M&A activity in that space and the importance of the sector to China. Chinese investors will also face challenges overseas as a number of jurisdictions have introduced FDI controls for the first time in 2020, whilst others, such as the United States, have further refined their existing FDI regimes. As a result, 2021 will in many ways test the scope and procedures of the regimes that have taken shape last year.

1. Intervention in global M&A deals

China's merger control regime will continue to serve as a route to scrutinize major deals in sensitive and critical sectors, more so in light of continued trade tensions and jurisdictions seeking to curb the growth of China's influence by introducing a vast armory of foreign investment controls. In 2020, SAMR has again demonstrated that:

(i) it will not shy away from intervening when authorities elsewhere have found no competition concerns;
(ii) it will continue to focus on high-tech sectors that are of strategic national importance to China; and
(iii) it will impose China-specific remedies in global deals where necessary.

This is evident in the most recent Infineon/Cypress and NVIDIA/Mellanox deals in the semiconductor sphere, which took 12 months and 8 months to review, respectively. In both decisions, SAMR imposed a range of behavioral remedies whilst all other jurisdictions, including the European Union and the United States, cleared the deals unconditionally. In ZF/Wabco, the products concerned auto parts that were considered critical to customers in China.

Class of 2020: China's remedy cases

Buyer	Target	Sector	Remedies imposed elsewhere?	Review days
Danaher (United States)	GE Healthcare's Life Sciences Business (United States)	Life sciences	Divestment in EU.	305 days (10 months)
Infineon Technologies (Germany)	Cypress (United States)	Tech (semiconductors)	No.	238 days (8 months)
NVIDIA (United States)	Mellanox Technologies (Israel/United States)	Tech (semiconductors)	No.	358 days (12 months)
ZF-Friedrichshafen (Germany)	WABCO (United States)	Vehicle technology / auto parts	No.	263 days (9 months)

Two major deals that were thought to reach the finish line in 2020 include Acacia Communications' USD 2.6 billion proposed acquisition of CISCO and Applied Materials' USD 3.5 billion proposed acquisition of Kokusai Electric Corporation. Both deals involve or are related to semiconductors and have required the parties to extend the termination dates of their merger agreements purely to allow for regulatory approval in China – the final remaining jurisdiction requiring sign-off. As of the date of this publication, SAMR's blessing remains pending. Both deals, again, involve semiconductors. Earlier in 2021, Acacia Communications chose to terminate its merger agreement with CISCO on grounds that it reportedly failed to obtain approval from SAMR by the long-stop date. It can be expected that this pattern of scrutiny will continue in 2021 as a result of an uptick in M&A activity and consolidation in the semiconductor industry.

The lengthy merger filing reviews in China can largely be explained by SAMR reaching out to a large range of industry stakeholders as part of the review process. This provides an open platform for stakeholders to raise any complaints as SAMR will not unilaterally dismiss any concerns, leaving it to the merging parties to address all issues. As a result, any concerns raised by stakeholders have the capacity to complicate and significantly delay the review process, particularly if political sensitivities are attached to the deal.

China also has a national security review regime that might feature more prominently in the future. Under the regime, any national security issues arising from deals could potentially be examined in parallel with any merger control review. China has recently expanded the list of critical sectors subject to national security review, which will take effect in January 2021. The national security review decisions of the National Development Reform Commission ("**NDRC**") are not published. To date, only a limited number of deals that were notified to the NDRC are known. According to PaRR, the proposed acquisition of Lite-On Semiconductor by Diode was reviewed in 2020 on national security grounds as Lite-On is a Taiwanese company with significant affiliates in China.

2. Foreign direct investment controls

A number of foreign jurisdictions have introduced foreign direct investment ("**FDI**") controls for the first time in 2020, whilst others have further refined their existing FDI regimes. As a result, 2021 will in many ways test the scope and procedures of the regimes that have taken shape last year.

In 2020, China has been the key driver for many governments imposing tougher FDI measures. This consistent pattern of reform has been driven by national security concerns, which played out publicly this year, including several governments banning or discouraging Chinese supply of 5G equipment and the US government ordering ByteDance to divest TikTok's US assets. The high number of reforms within the last year have also been introduced at an accelerated pace due to concerns of COVID-19, and in reaction to fears of Chinese acquisitions of distressed foreign assets at much cheaper prices and China's economy possibly recovering faster from COVID-19. These moves are seen as either protectionist, or necessary to protect domestic businesses from 'fire sales'.

Investments into some key sectors are typically screened. The defence sector and access to sensitive information are classic examples. More recent examples that have been scrutinised include critical infrastructure relating to energy, water, and telecommunications, and also sectors such as finance, insurance, transport and food. There is also a focus on new technologies, such as artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, etc.

Class of 2020: Reforms to FDI controls

United States

In February 2020, the Foreign Investment Risk Review Modernization Act took effect in the United States. The Committee on Foreign Investments of the United States ("**CFIUS**") is well-known to have reviewed a wide range of transactions based on a loose and undefined concept of 'national security'. The new regulation additionally permits CFIUS to review 'other' investments, including non-controlling foreign investments involving certain critical technologies, critical infrastructure, or personal data as well as certain real estate transactions.

Germany

In July 2020, new rules for Germany's FDI control regime came into force. The German government widened the scope of its previous regime by catching transaction that could have a 'probable impairment' (rather than 'actual threat') to Germany's public security and order. There are two types of investment controls:

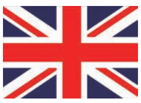
- **Sector-specific control.** Acquisitions of 10% or more in targets active in the production of weapons, military equipment and IT security products may be subject to government screening.
- **Cross-sector control.** Acquisitions of 10% or more in targets active in critical infrastructure (including energy, information technology, telecommunications, etc) are subject to mandatory notification. Otherwise, acquisitions of 25% or more in German targets for non-specified sectors may also be subject to review.

European Union

In October 2020, new FDI regulations in the European Union came into effect. The new regime establishes minimum standards for review systems of Member States and sets-up a cooperation mechanism:

- Member States can make comments when the FDI is likely to affect its security or public order.
- The European Commission can issue opinion on transactions that (i) pose a threat to the security or public order of more than one Member State; or (ii) could undermine a project of interest to the whole EU.

The ultimate decision as to whether a particular investment should be permitted will remain with the Member State where the investment is conducted.



United Kingdom

In November 2020, the UK introduced a new National Security and Investment Bill aimed at modernizing the government's powers to investigate and intervene in potentially concerning foreign direct investments. Deals within 17 specified sectors are expected to be subject to mandatory notification requirements, and the government is consulting on what parts of the sectors should be covered.

3. Scrutiny of investments by Chinese state-owned enterprises

In addition to major changes to the FDI landscape, the European Commission introduced new far-reaching proposals to regulate the distorting effects of foreign subsidies as detailed in its White Paper published in October 2020 ("**White Paper**"). The proposals will likely come into shape and force in 2021 and will have a particular impact on investments into Europe by Chinese state-owned enterprises. The proposals generally apply to all market situations and sectors, although the White Paper notes aluminium production and semiconductors as examples where foreign subsidies may have possible distortive effects and which also happen to be critical sectors to China.

The White Paper sets out three enforcement mechanisms (referred to as "**Modules**") to regulate foreign subsidies that cause 'distortions' in the EU. The measures are broad and capture existing operations and proposed investments in the European Union, as well as bids that are part of public tenders.

- **Module 1: General mechanism to review and address market distortions.** The mechanism would enable the European Commission (along with Member State authorities) to open investigations into foreign subsidies on an ex officio basis. Two phases are proposed – a preliminary review followed by an in-depth investigation if there is evidence of distortive effects caused by foreign subsidies. If a market-distorting subsidy is established, the European Commission may impose remedies, including redressive payments or structural / behavioural measures similar to those typically imposed as part of merger control conditional clearances.

- **Module 2: Mandatory notification regime to capture distortions caused by foreign subsidies facilitating the acquisition of EU undertakings.** The procedure contemplated under Module 2 is similar to the existing merger control regime of the European Commission. Parties would be required to notify the European Commission for 'controlled' acquisitions of targets established in the EU that are financed through foreign subsidies where the target's turnover exceeds EUR 100 million (RMB 800 million) (but possibly also based on other complementary thresholds such as deal size or the total amount of financial contributions received over the last three years prior to notification). Notably, the concept of 'control' proposed under the White Paper is broader than under merger control rules and would capture subsidised acquisitions of at least 35% of shares or voting rights or otherwise of 'material influence'. The notification would be followed by a standstill obligation, prohibiting the parties from closing the transaction until clearance has been obtained. If the European Commission finds that the subsidized acquisition has distortive effects, it can issue a conditional clearance by imposing remedies similar to Module 1, or otherwise prohibit the transaction.

- **Module 3: Public procurement.** Similar to Module 2, bidders participating in public tenders would be required to notify the contracting authority if they are beneficiaries of any foreign subsidy. The proposed notification thresholds canvassed in the White Paper include limiting the relevant subsidy period to three years prior to notification, or limiting the subsidy amount to a certain value. The public procurement procedure may need to await assessment if a potentially subsidised bid wins and is under investigation. If the investigation finds that the subsidised bid has distortive effects, the bidder may be excluded from the ongoing, and possibly future, public procurement procedures.

CASE STUDY

Germany's review of CRRC's acquisition of Vossloh Locomotives: Merger control and FDI scrutiny of Chinese state-owned enterprises

Background. In April 2020, the German Federal Cartel Office ("**FCO**") cleared the proposed acquisition of Vossloh Locomotives by CRRC Zhuzhou Locomotives, a Chinese state-owned company and the world's largest manufacturer of rolling stock. Vossloh Locomotives was an important shunter manufacturer in Europe with a 40-50% market share. The transaction was also subject to Germany's foreign direct investment regime.

Assessment. The FCO highlighted that it "examined all the particularities associated with the acquisition of a European company by a Chinese state-owned company"' including possible state subsidies, the availability of technical and financial means and strategic advantages from other shareholdings. While the transaction did not lead to significant horizontal overlaps due to the absence of CRRC's activities in Europe, the review took almost a year. During the review process, CRRC was subject to extensive information requests, and the FCO made use of stop-the-clock measures multiple times.

Outcome. The FCO considered all Chinese SOEs controlled by the Assets Supervision and Administration Commission ("**SASAC**") as part of the same group. This increases (i) the possibility of notification based on aggregated turnover of all entities; (ii) the possibility of information requests involving numerous affiliated companies; and (iii) the scope of competitive concerns where the affiliated companies are active in relevant markets. The FCO also considered the economic power and resources of SOEs, which included particular theories of harm, such as the possibility of low-pricing strategies. In this case, the FCO dismissed concerns regarding low-pricing strategies on the basis of market forecasts, which showed that the competitive power of Vossloh Locomotives would diminish in the short term.

The strong opinions of the FCO regarding the control of SASAC over Chinese SOEs show that any acquisitions of foreign targets (in Germany at least) will be subject to scrutiny. Chinese SOEs should therefore engage in pre-consultation with the authorities even where relevant thresholds are not met. Critically, the FCO concluded that CRRC formed part of the whole group of companies controlled by SASAC based on public materials and extensive internal documents of CRRC. First, the FCO found that SASAC exerts influence on essential aspects of Chinese SOEs' economic practices and that CRRC firmly bases its actions on the 13th Five-Year Plan. Second, the FCO also noted that the group of affiliated companies would at least include all companies in which China holds a majority share. The FCO did not differentiate between 'SASAC' and 'China', so it is unclear whether Chinese SOEs controlled by Chinese government agencies other than SASAC would be considered as part of the same 'group'.

03
MARKET POWER IN THE DIGITAL ECONOMY

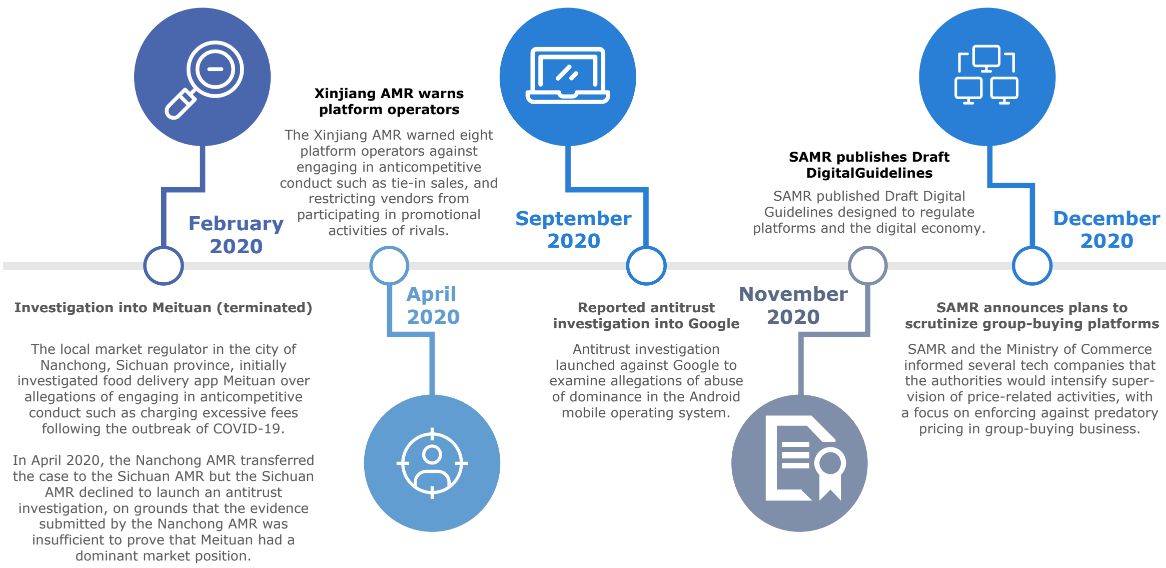
IN 2021

Perhaps unexpected to many, the digital space promises to be in the antitrust spotlight following the development of the Draft Platform Guidelines which will be finalized in 2021, and a number of high-profile enforcement actions in the last year. The rules proposed in 2020 are likely to find their real bite in the year ahead and will target digital platforms and ecosystems with market power. SAMR and its local branches are expected to act decisively by bringing landmark actions to set the benchmark for antitrust enforcement in the digital economy.

1. Targeting the digital economy

China's digital economy continues to experience explosive growth with the development of significant tech titans and digital ecosystems that are of similar scale to the likes of Amazon, Facebook, Apple and Google. As competition authorities globally felt the pressure to ramp up investigations in the digital space for a number of years, scrutiny of China's powerful digital platforms also became a hot button issue in 2020. As other jurisdictions continue to consider and reform their antitrust rules in digital markets on a staged and rolling basis, SAMR has released its "**Draft Digital Guidelines**" targeting digital platforms in November 2020 ("Draft Antitrust Guidelines for the Platform Economy"). The Draft Digital Guidelines represent a sweeping and determined attempt to set out principles for assessing abusive conduct and anticompetitive agreements involving digital platforms.

Class of 2020: Key digital developments



Other than China's Anti-Monopoly Law, the Anti-Unfair Competition Law and the E-Commerce Law also contain rules regulating misconduct in the tech industry. Previously, there has been some local enforcement against tech companies under the Anti-Unfair Competition Law and the E-Commerce Law, but penalties under these laws are much lower in comparison to the Anti-Monopoly Law. With the introduction of the Draft Digital Guidelines, we anticipate more high-profile cases with significant fines in the tech industry.

2. Regulating market power

SAMR's top priority will be to regulate any perceived abuses by dominant tech companies. In a press conference in December 2020, SAMR noted that "[o]ur country's online economy is booming, with new business models emerging endlessly. It has become a new driving force for economic growth, playing an important role in promoting high-quality economic development and meeting the needs of the people for a better life. But at the same time, the online economy is showing a trend of increasing market concentration. Resources skew towards the top platforms. Monopolistic issues in the platform economy are reflected by an increased number of reports, showing that there are some competition risks and hidden concerns in the development of the online economy." As a result, SAMR and its local branches are expected to focus their efforts in 2021 on the following areas highlighted in the Draft Digital Guidelines:

- **Technical restrictions that could eliminate competition,** including setting discriminatory platform rules/features or algorithm criteria to make transactions difficult (i.e. refusals to deal), to exclude competitors' products (i.e. exclusivity), to promote products from within the same ecosystem or demote products from competitors (i.e. self-preferencing /differential treatment), or to force users to accept other products/services from the same ecosystem (tying and bundling).

- **Price-related practices,** such as excessive or predatory pricing.

In light of the increased public enforcement and scrutiny, we also expect a surge of private actions against tech companies initiated by both individual consumers and competing tech companies.

Assessing dominance

In assessing the dominance of digital companies, China's competition authority would consider specific features and characteristics that are unique to platform markets, including the multi-sided nature of platform operators, and network effects. The Draft Digital Guidelines also indicate that SAMR may skip the assessment of dominance altogether - in line with the approach taken by the Supreme People's Court in Qihoo 360 v. Tencent (2016).

3. A new approach towards vertical restraints

Businesses that are not 'dominant' should also be mindful of potential antitrust violations in respect of most-favored-nation ("**MFN**") clauses and exclusivity obligations as detailed in the Draft Digital Guidelines.

- **MFN clauses.** Online platforms typically use MFN clauses to require their sellers not to offer another platform more favorable terms. Such provisions could reduce competition amongst platforms. Globally, concerns over such cases were displayed in the European Commission's 2017 allegations that Amazon's parity clauses with e-book publishers were anticompetitive, as well as parallel investigations against online travel agencies in Europe and Asia for requiring hotels to sign MFN clauses. It would not be surprising if SAMR follows suit and investigates this area.

- **Exclusivity clauses.** Exclusivity provisions in the digital space are expected to raise particular scrutiny. In addition to an abuse of dominance, exclusivity may be treated by SAMR as a potential vertical restraint.

To a degree, the numerous investigations being brought by authorities globally may inspire SAMR to focus on particular forms of conduct.

CASE STUDY

'Brand-gating': Germany's investigation into Amazon and Apple over exclusivity arrangements

Background. In October 2020, the German Federal Cartel Office ("**FCO**") opened an investigation against Amazon and Apple. Amazon offers brand manufacturers exclusivity on Amazon, banning unauthorized third-parties from selling the brand's products via so-called 'brand-gating' agreements. Amongst the brands that have entered into such arrangements is Apple, which agreed with Amazon that only Apple dealerships and Amazon can offer Apple products on the platform.

Concerns. The FCO is concerned that such 'brand-gating' arrangements are effectively exclusivity arrangements and an abuse of dominance on both Apple's and Amazon's parts by excluding unauthorized dealers from selling Apple products on Amazon and thereby eliminating competition between Apple and these dealers.

Outcome. The case is currently under investigation by the FCO.

04
WIDENING THE MERGER CONTROL NET

IN 2021

Under China's Anti-Monopoly Law, SAMR has the power to review non-reportable transactions that fall below the notification thresholds to catch transactions that could seriously affect competition. SAMR has signaled a desire to exercise its powers in respect of (i) mergers in the pharmaceutical and digital markets; and (ii) 'killer acquisitions'. Enforcement against failure to notify transactions will remain active, particularly against variable interest entity structures as SAMR has confirmed the notifiability of these structures in 2020. Penalties for failures to notify are expected to increase exponentially from the current maximum fine of RMB 500,000 (USD 80,000) to 10% of the undertaking's turnover once the revised Anti-Monopoly Law is published.

1. Below-threshold transactions

Generally, the revenues generated by parties worldwide and in China have to be considered in assessing whether a transaction has to be notified. However, SAMR retains the authority to investigate below-threshold transactions if they potentially eliminate or restrict competition in China. In 2015, China's competition regulator commenced an investigation into the merger between Didi Chuxing and Uber even though it did not cross the notifiability thresholds as it was seen as having a significant impact in the ride-sharing sector.

SAMR has again signaled its approach to review below-threshold transactions where intervention is warranted. In the "**Draft API Guidelines**" ("Draft Antitrust Guidelines in the Field of Active Pharmaceutical Ingredients") and the "**Draft Digital Guidelines**" ("Draft Antitrust Guidelines for the Platform Economy"), SAMR confirmed that it would pay particular attention to transactions in the pharmaceutical and digital sectors if smaller competitors are acquired that could eliminate competition or stifle innovation, including (i) where the target is a start-up or emerging platform such that there is no/low turnover in the previous year; (ii) where the transaction parties' turnovers are low because they use free or low-price business models; or (iii) where market concentration is high with limited competition.

2. Notifiability of VIE structures confirmed

The notifiability of variable interest entity ("**VIE**") structures has long been debated in China owing to questions over the legality of VIE structures, which are typically used to bypass foreign investment restrictions. The VIE structure allows Chinese enterprises to be financed and listed outside China, and for foreign capital to invest in China. Through a series of contracts (rather than shareholdings), the VIE structure allows foreign investors to control onshore assets in China that would otherwise have foreign ownership restrictions. Historically, if a transaction party adopts a VIE structure, there would usually be difficulties notifying the transaction under China's merger control regime. Significant progress was made in 2020 to remove uncertainties surrounding VIEs:

- **In April 2020,** SAMR published its simple case review decision of a joint venture between Mingcha and Huansheng in which one of the parties was controlled through a VIE arrangement. The case demonstrated SAMR's willingness to review deals involving VIE structures.

- **In November 2020,** SAMR expressly confirmed for the first time in the Draft Digital Guidelines that transactions involving VIE structures are notifiable.

- **In December 2020,** SAMR issued three failure-to-notify penalty decisions against tech companies Alibaba, China Literature (ultimately controlled by Tencent) and Hive Box. While not mentioned by SAMR in the penalty decisions, all of these businesses are reportedly structured as VIEs.

3. Enforcement against failures to notify

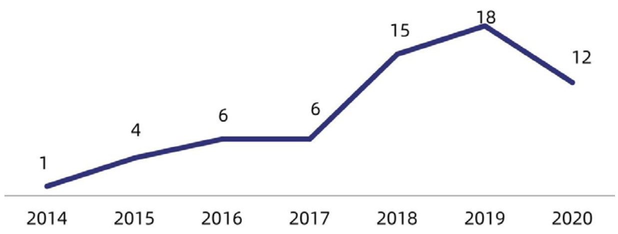
SAMR has continued to actively enforce against parties that fail to notify their transactions in 2020 despite a slight decline in enforcement activities compared to 2018 and 2019. SAMR issued a total of twelve penalty decisions, covering a wide range of transactions including foreign-to-foreign transactions, acquisitions of minority stakes, and multiple-step transactions designed to prevent or delay filing obligations:

- **Foreign-to-foreign transactions:** SAMR fined the parties Taiwan Cement and Ordu Yardimlasma (a Turkish military pension fund) RMB 300,000 (USD 50,000) each in relation to establishing an offshore joint venture in the Netherlands. This shows that, even for transactions that are purely offshore and unlikely to affect Chinese markets, where a filing obligation is triggered and the transaction is not notified, SAMR would still take enforcement action.

- **Acquisitions of minority interests:** In September 2020, SAMR fined Zhejiang Construction RMB 350,000 (USD 55,000) in respect of its acquisition of a 29.83% stake in Dohia. The minority interest was regarded by SAMR as sufficient to trigger control.

- **Multiple-step transactions:** In December 2020, SAMR fined Alibaba RMB 500,000 (USD 80,000) in respect of its series of acquisitions of interests in Intime Retail. Through three transactions between 2014-2017, Alibaba was found to have increased its stake in Intime from 9.9% to 27.83% and ultimately to 73.79%.

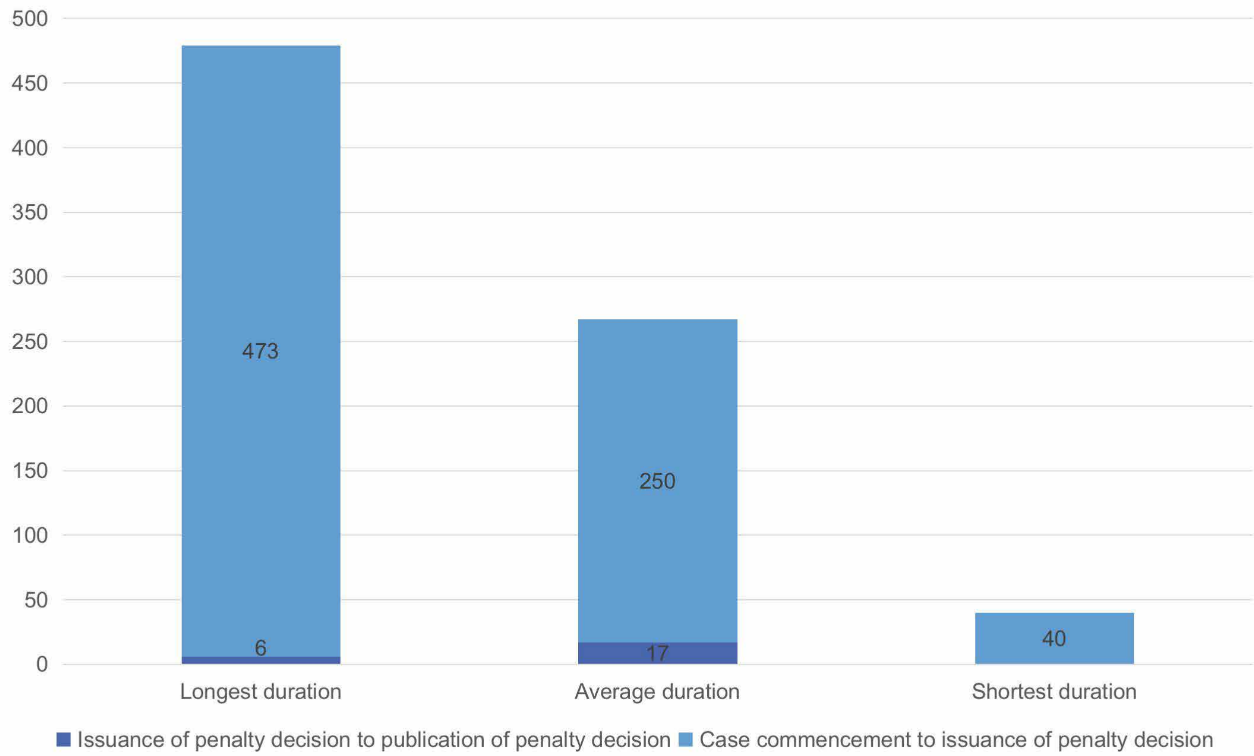
Number of failure to notify cases concluded since enforcement in 2014



Increase in fines. In December 2020, SAMR issued, for the first time, the maximum fine of RMB 500,000 (USD 80,000) to Alibaba, China Literature and Hive Box for a failure to notify. While the level of fines in China are relatively low (RMB 500,000 for each party), the draft amendments to the Anti-Monopoly Law propose to increase the fines for a failure to notify to 1-10% of the undertaking's turnover.

Possibility of expedited investigations in targeted sectors. In 2020, the review timeframe for failure to notify investigations averaged around 250 days. The longest investigation lasted more than one year (479 days). However, for certain priority sectors, including the digital sector, investigations may be accelerated. The investigation of several digital companies commenced in early November 2020 and was concluded by mid-December 2020, representing a review period of only 40 days.

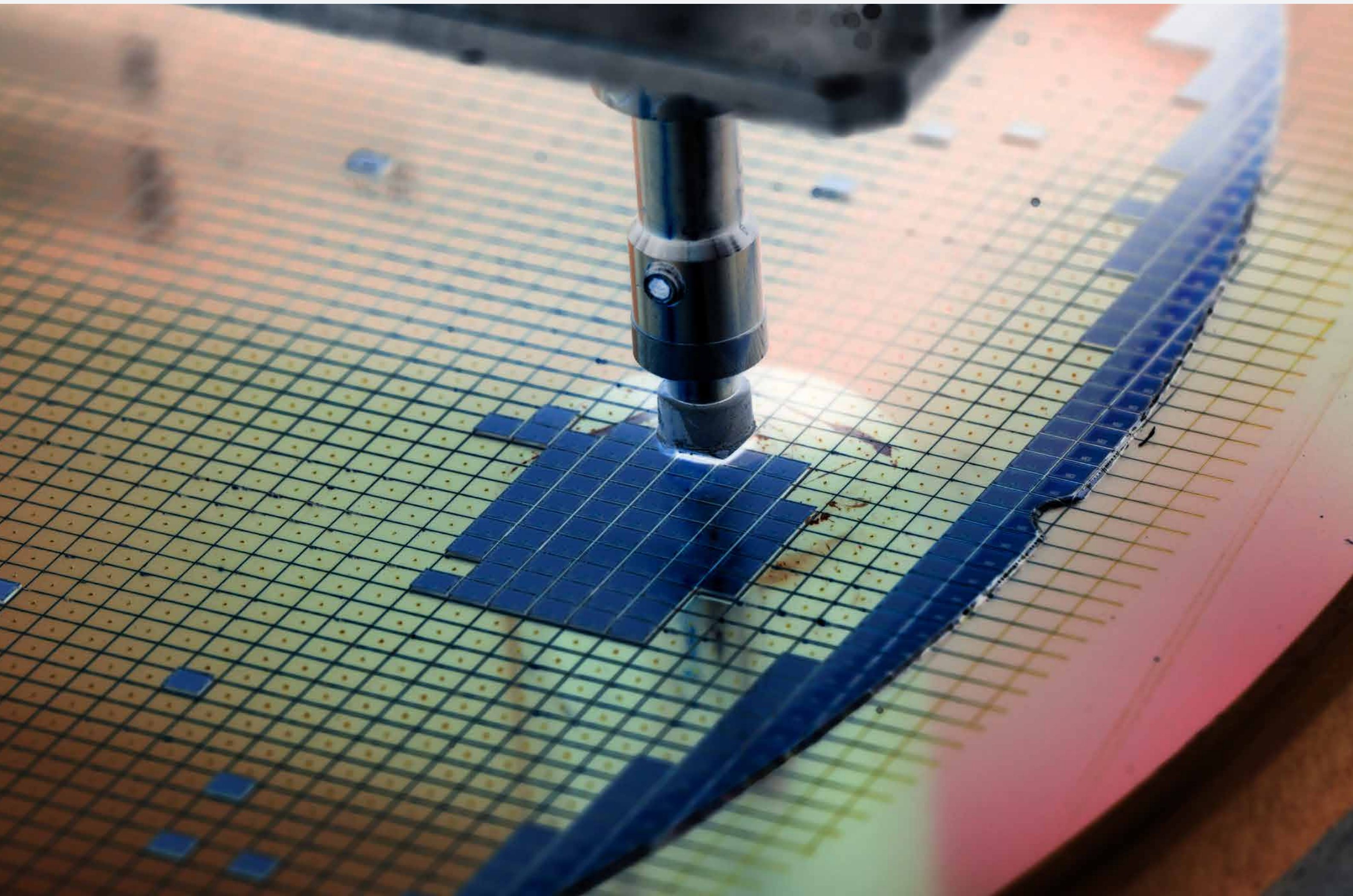
Class of 2020: Duration of investigations in 2020 (days)



05 CONGLOMERATE EFFECTS AND BEHAVIORAL REMEDIES

IN 2021

SAMR will continue to raise conglomerate effects theories of harm and seek to address these through a range of behavioral remedies, including ensuring interoperability and guaranteeing continuous supply of products on a standalone basis, including on FRAND terms. Transactions in the high-tech space involving various products and components that need to work together or involving significant innovation efforts are particularly susceptible to scrutiny, more so if the products represent a critical input to Chinese customers.



1. Conglomerate effects

Conglomerate effects arise where the merged entity is able to leverage a strong market position from one market across to another complementary market by tying, bundling or other exclusionary practices. For some time, SAMR has invoked conglomerate effects theories of harm as part of its merger reviews. These theories of harm are particularly popular for mergers in the high-tech space and have warranted behavioral access and interoperability commitments. Only about 5% of cases reviewed by the European Commission raised conglomerate concerns from 2015 – 2019 compared to 40% of all remedy cases in China over the same period. We are seeing SAMR continuing to intervene on the basis of conglomerate concerns despite other jurisdictions dismissing such issues, demonstrating a more liberal approach in China to identifying adjacent markets.

Traditionally, SAMR has raised conglomerate effects associated with tying and bundling. The most direct way for such foreclosure to take place would be if the post-transaction entity simply refuses to supply products on a standalone basis, or ties the products together by technical means, which SAMR has often addressed directly through behavioral remedies.

This has not changed, but has more recently shifted in 2020 to concerns about the potential degradation of interoperability, as evidenced in the remedy decisions of NVIDIA/Mellanox and Infineon/Cypress. Both transactions concerned semiconductor products, which are more susceptible to issues concerning interoperability given that many of the components are required to fit together and function as part of a larger product. The important technical capabilities of the merged entity in NVIDIA/Mellanox would have allowed them to engage in foreclosure strategies to degrade essential interoperability of rival products compared to captive use. Remedies, including fair, reasonable and non-discriminatory ("**FRAND**") supply, were imposed to maintain interoperability so that customers would not prefer the post-transaction entity's bundle of products as they work better together.

Similar remedies are also imposed in the context of vertical concerns. A key factor SAMR will take into account is the extent Chinese customers are reliant and dependent on the parties' products. In ZF/Wabco, SAMR was concerned over potential foreclosure practices of the merged entity by refusing to supply vehicle technology products to Chinese customers. As a result, the merging parties committed to supply products to customers in accordance with FRAND principles and without comprising price, quality, quantity, delivery times, technology levels and after-sales services.

Class of 2020: SAMR's theories of harm and remedies

Transaction	Theory of harm	Remedies	Review days
Danaher/ GE Healthcare	Horizontal · Various markets with high market shares · Unilateral effects, including loss of innovation (extending to pipeline products)	Divestment including transitional arrangements to continue developing a pipeline project for two years.	305 days (10 months)
ZF-Friedrichshafen/ WABCO	Vertical · Input foreclosure (refusal to supply)	· Continuous supply of products to existing customers without comprising price, quality, quantity, delivery times, technology levels and after-sales services. · Continuous supply on FRAND terms. · Continue to provide Chinese customers with opportunity to develop upstream products.	263 days (9 months)
Infineon/ Cypress	Conglomerate · Degradation of interoperability · Tying or bundling	· No tying, bundling or other unreasonable trading conditions · Supply on FRAND terms · Continuous supply of standalone products · Maintain interoperability	238 days (8 months)
NVIDIA/ Mellanox	Conglomerate · Degradation of interoperability · Tying or bundling Horizontal · Misuse of third party confidential information	· Maintain interoperability · No tying or bundling · No discrimination and continuous supply of standalone products · Continue supply on FRAND terms · Open-source commitment · Protect third-party confidential information	358 days (12 months)

2. Innovation and pipeline products

In addition to concerns over the supply of critical products to Chinese customers, SAMR has also demonstrated a continued desire to protect innovation, including R&D pipelines. This follows trends focusing on innovation concerns in Bayer/Monsanto (2018) (in line with the European Commission) and KLA/Orbotech (2019). The divestment imposed by SAMR in Danaher/GE Biopharma largely aligns to the global divestment package also negotiated with other competition authorities but SAMR raised separate concerns about the market for hollow-fibre filters for tangential flow filtration in which Danaher was developing a pipeline project that could potentially compete with GE. As a result, SAMR found that Danaher could reduce its R&D investments and could lack the incentive to commercialize products in a timely manner. SAMR required Danaher to provide the buyer of the divested business with the necessary assets, proprietary tech, and trade secrets involving the non-exclusive licences of the project. Interestingly, SAMR also imposed transitional arrangements requiring Danaher to continue to be involved in the project for two years.

3. Behavioral remedies remain preferred

Classic structural remedies such as divestitures are relatively rare in China and behavioral commitments are the preferred instrument in the implementation of merger control. More than 80% of all conditional clearance decisions in China involved some form of behavioral commitment. This trend continued in 2020 with almost all remedy cases involving behavioral commitments, which can typically last anywhere from two to ten years.

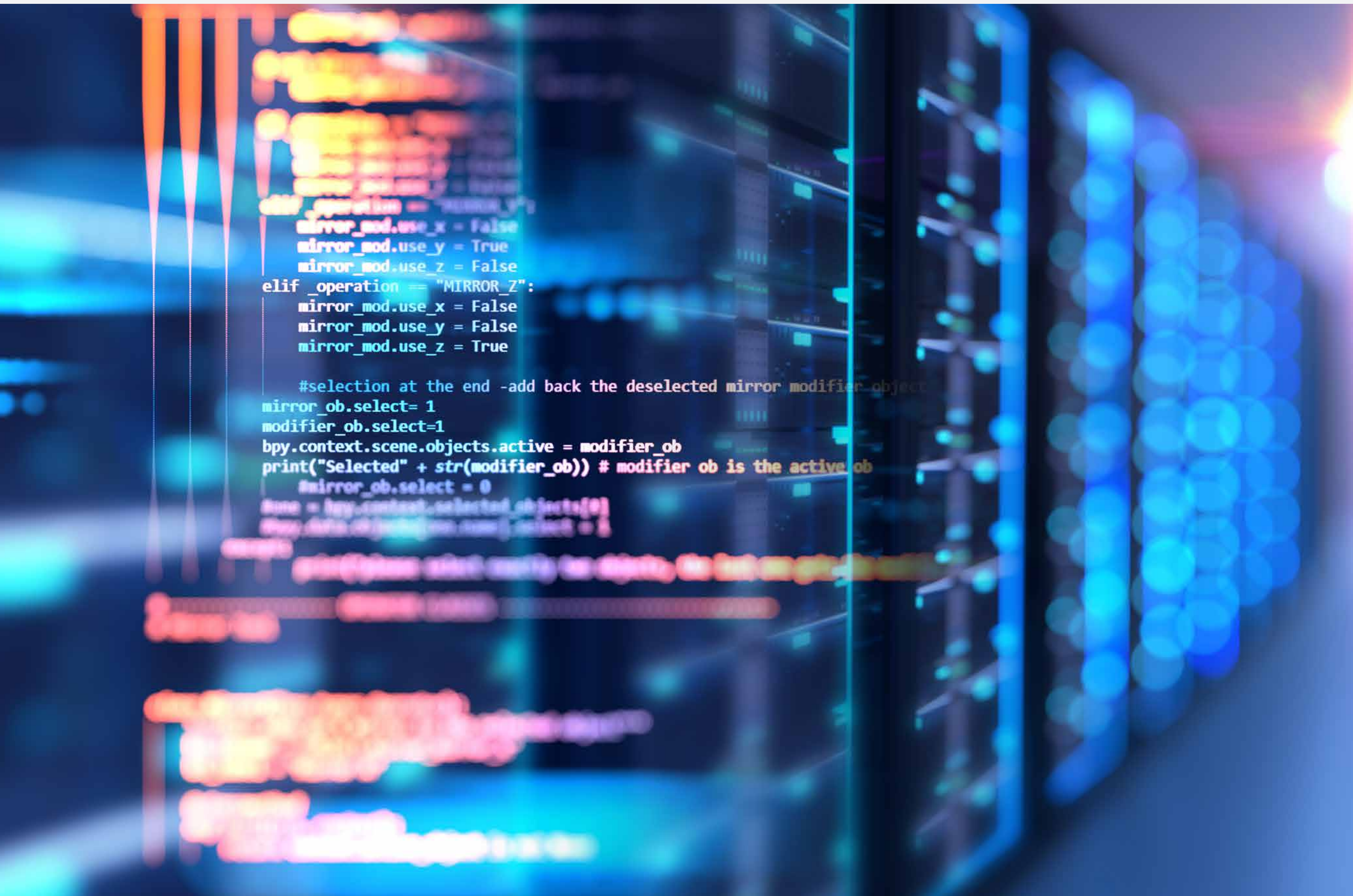
Class of 2020: Types of behavioral remedies imposed

Continuous supply commitments	This commitment is fairly typical in vertical and conglomerate mergers and requires the parties to continue to supply products to customers on existing terms, including price, quality, quantity, delivery times, technology levels, and after-sales services.
FRAND sale commitments	In ZF/Wabco and Infineon/Cypress, the parties agreed to continue to supply various products on FRAND terms in the Chinese market.
Ensuring interoperability	In NVIDIA/Mellanox, the parties committed to ensure that certain NVIDIA and Mellanox devices continued to remain interoperable with third-party networks and processers. Similar commitments were imposed in Infineon/Cypress.
No tying/bundling	A commitment not to tie or bundle oftentimes also covers other indirect conduct that could amount to tying or bundling. For example, in NVIDIA/Mellanox, apart from the express requirement not to tie and bundle, the parties were also prohibited from discriminating against customers who wanted to buy individual products, or generally impeding such sales.
Protecting third-party information	A commitment to protect third-party data addresses the competitive concern of access to third-party competitively sensitive information which could give the merged entity an unfair advantage in the markets where the third parties operate. The remedy therefore restricts sharing and use of their competitively sensitive information.

06
BIG DATA

IN 2021

Big data has become an integral part of maintaining a competitive advantage in the digital space. But access to big data can also be exclusionary, reinforce market power, and potentially create barriers to entry. Although enforcement actions targeting big data are yet to be realized, China's antitrust agencies are determined to explore and investigate potential abuses related to data use and collection as reflected in the rules laid out in the Draft Digital Guidelines and in line with global antitrust developments. In addition, the Draft Digital Guidelines set out the ground rules to detect and take on algorithmic cartels.



Globally, competition authorities have been contemplating whether existing antitrust rules are sufficient to address new developments in the digital economy including regulating the collection and use of data as "big data" increasingly becomes critical to achieve a competitive advantage. The "**Draft Digital Guidelines**" targeting digital platforms released in November 2020 ("Draft Antitrust Guidelines for the Platform Economy") place a significant emphasis on data, including abusive collection and use of big data and algorithmic cartels. However, there have been no enforcement cases in China to date. Big data remains a truly novel area of antitrust law in China and we expect SAMR to take a cautious approach in taking any enforcement actions. In particular, the properties of data would suggest that the possession of big data will not automatically convey market power, particularly because many data sets are highly dynamic, not unique and non-exclusive as they can be collected and replicated. Still, once the Draft Digital Guidelines are finalized, there is an increasing risk of standalone damages actions before the courts by customers or competitors. Businesses therefore need to ensure their data collection and usage practices are compliant.

1. Collection and use of big data as potential abuses

This year, SAMR will likely feel the pressure to closely review the data collection activities of digital platform operators. There is an implied acknowledgment under the Draft Digital Guidelines that China's existing antitrust regime is already equipped to tackle the challenges of the digital economy, including the collection and use of vast amounts of information.

Practice	Abusive forms of conduct
Improper collection of users' data	Dominant platforms that force users to provide personal data may be considered to be imposing unreasonable trading conditions.
Differential treatment of customers based on data	Dominant platforms that discriminate between users based on big data collected through its ecosystem, such as offering individualized prices based on a user's browsing and purchasing history or personal data.
Self-preferencing based on big data	Where a dominant platform player favors its affiliated business within the same ecosystem by offering the affiliated business data advantages.
Refusal to share data where data is an essential facility	If data is determined to be an essential facility, any refusals by a dominant platform to share data with competitors might be construed as abusive. Platforms might be required to share data with their competitors (even though the interaction between this requirement, and data portability and privacy issues are yet to be clarified).

2. Algorithmic cartels

Beyond regulating the collection and use of data by dominant companies, SAMR is also expected to examine algorithmic cartels. In line with international developments, the Draft Digital Guidelines treat 'algorithmic collusions' amongst competitors (where algorithms facilitate collusion) in the same manner as other cartels. This includes a scenario where a platform provides the same algorithm or coordinated algorithms to sellers on the platform under a hub-and-spoke arrangement (i.e. where the platform algorithm effectively acts as an intermediary to the information exchange between participants).
Most remarkably, SAMR's potential approach to investigating algorithmic cartels appears far-reaching. Under the Draft Digital Guidelines, SAMR would be allowed to rely on indirect evidence to establish collusion in light of the covert nature of algorithmic cartels, which makes it difficult to obtain direct evidence. This raises questions about the scope and types of 'indirect evidence' including whether algorithmic collusions that fall short of an agreement (or 'meeting of minds') would violate China's antitrust laws, including any coordinated conduct by autonomous 'self-learning' algorithms or by algorithms using public data. Clarifications on this point can be expected in the final version of the Draft Digital Guidelines this year.

CASE STUDY

European Commission's investigation into Amazon's self-preferencing data practices

Background. In July 2019, the European Commission opened an antitrust probe into Amazon's dual role as a marketplace facilitating transactions between merchants and consumers and as a retailer selling its own products on its marketplace in competition with third-party merchants.

Concerns. As a marketplace service provider, Amazon has access to various non-public business data of third-party merchants, including the number of ordered and shipped products, sellers' revenues on the marketplace, and the number of user visits to sellers' offers, etc. The Commission's preliminary view is that very large quantities of non-public seller data is available to Amazon's direct sales business and flow directly into the automated systems of that business. The Commission is concerned that such 'self-preferencing' practices allow Amazon's direct-sales arm to avoid the normal risks of retail competition and to leverage its dominance in the market for the provision of marketplace services in France and Germany.

Outcome. As of November 2020, the Commission has issued a 'Statement of Objections' to Amazon. The Commission's decision is pending.

07
LOCALIZING ENFORCEMENT

IN 2021

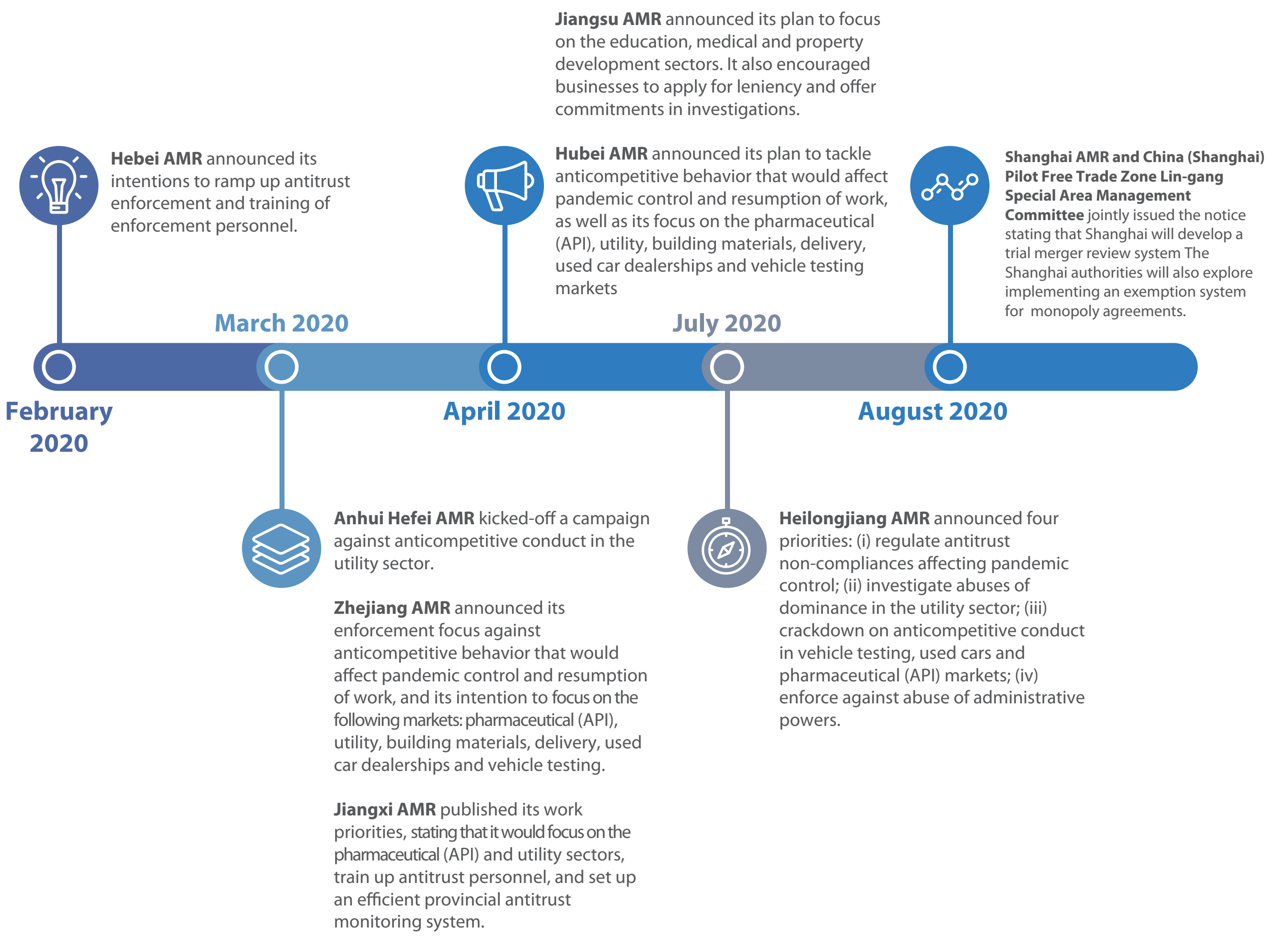
Local antitrust authorities are expected to continue to be the driving force behind enforcement targeting sectors that affect the livelihood of Chinese citizens, including utilities, pharmaceuticals, and automobiles. SAMR has also delegated powers to the Shanghai authorities to review certain mergers on a trial basis, although the detailed rules and scope of such reviews are pending and will be a point to look out for in 2021.

1. Delegating enforcement locally

In 2020, all except one of the 17 concluded behavioral investigation cases (including two termination decisions) were launched by local authorities. SAMR only managed one investigation in 2020. The most active antitrust agency was the Zhejiang Administration for Market Regulation ("**AMR**"), which oversaw four investigations in 2020. The Guangdong and the Shanxi AMRs completed two cases each and the Jiangsu AMR was in charge of two investigations (one of which was terminated). Other active local authorities include the Anhui, Hubei, Hunan, Ningxia, and Qinghai AMRs as well as the Beijing AMR, which issued a termination decision this year without fining the enforcement target. The trend of delegation to local authorities is consistent with observations from 2019 during which 15 of the 16 enforcement decisions were concluded by local authorities.

The enthusiasm of local authorities is captured in their many announcements and campaigns throughout 2020, as shown in the timeline below. Another key development that transpired in August 2020 is SAMR's delegation of powers to the Shanghai authorities on a trial basis, including merger control reviews and developing an exemption system for anticompetitive agreements.

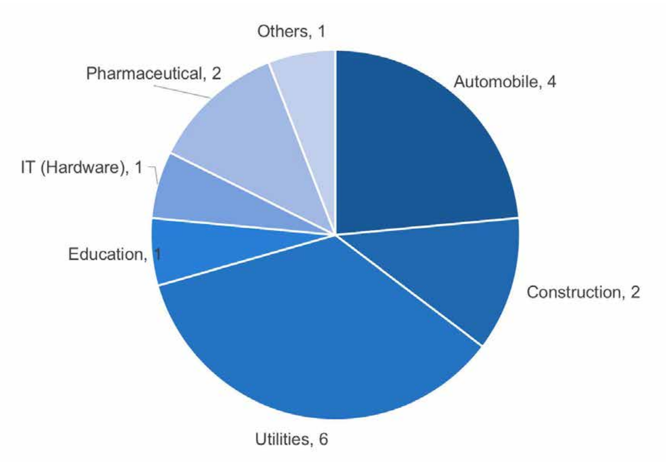
Class of 2020: Timeline of local authorities' announcements and campaigns to ramp up antitrust enforcement



2. Sectors that drive China's daily life

In early 2020, Mr. Xiao Yaqing, SAMR's Director-General at the time, stated that SAMR would focus on antitrust enforcement in sectors affecting the daily life of Chinese citizens, including the pharmaceutical and public utility sectors. The impact of the COVID-19 crisis has further reinforced this. Targets of enforcement by local antitrust agencies include state-owned enterprises, as evidenced by the investigation against Nanjing Water Group's subsidiary Gaochun.

Class of 2020: Enforcement cases by sector



- **The utility sector.** Various local antitrust agencies – the Hunan, Qinghai, Jiangsu, Shanxi AMRs – have taken action against utility companies, including for market partitioning and exclusive dealing.

- **The pharmaceutical sector.** China's antitrust agencies brought two actions in the pharmaceutical industry, both targeting abusive conduct in the active pharmaceutical ingredient ("**API**") markets. In one case, SAMR fined three calcium gluconate API distributors (including confiscation of illegal gains) a total of RMB 325.5 million (USD 50 million) for excessive pricing. Two of the companies challenged SAMR's decision before the Beijing No. 1 Intermediate People's Court.

- **The automobile sector.** Penalty decisions in the automobile sector have targeted dealerships rather than original equipment manufacturers (in contrast to previous years). Three of the decisions concerned price-fixing and market partitioning amongst car dealerships; the remaining case concerned a trade association organizing a price-fixing scheme amongst motor vehicle testing companies.

In line with sectoral enforcement priorities, SAMR has issued guidelines setting out rules relating to the automobile and pharmaceutical sectors in 2020, as further discussed in Chapter 9 of this publication ('Sector-specific focus').

3. Cooperation in investigations

The 2020 antitrust enforcement decisions illustrate a divergence in consequences between businesses willing to cooperate with the authorities and those who do not. The authorities are generally willing to treat parties who cooperate more leniently, even offering exemptions to penalties where a party provides key evidence or tip-offs in relation to an investigation.

- **Price-fixing between two gas retailers (Hunan AMR, June 2020).** One of the cartel parties, Huaihua Railway Economic Technology Development, reported the case to SAMR voluntarily and cooperated throughout the investigation. Huaihua Railway was not penalized, while the other party was fined RMB 1.76 million (USD 300,000), representing 3% of its revenue in the year prior to the violation.

- **Price-fixing and market allocation amongst 11 second-hand car dealerships (Ningxia AMR, October 2020).** One of the cartel parties, Pingluo County Zhongli Second-hand Vehicle Trading provided key evidence to the Ningxia AMR that demonstrated profit-sharing amongst the cartelists. No penalties were imposed on Pingluo Zhongli while the other cartelists were each fined 4% of their 2018 revenues, with illegal gains confiscated.

In contrast, businesses can face adverse consequences where they obstruct investigations, including high fines and even personal liability.

- **Abuse of dominance case against three pharmaceutical ingredient distributors (SAMR, April 2020).** Two companies (Kanghui and Puyunhui) and their 14 employees obstructed the investigation by refusing to provide materials as well as concealing, destroying or relocating evidence. In June 2019, SAMR fined Kanghui and Puyunhui RMB 1 million (USD 150,000) each. Individuals found to have obstructed the investigations received fines of RMB 20,000 (USD 3,000) to RMB 100,000 (USD 15,000) each. In April 2020, SAMR fined Kanghui and Punyunhui RMB 143.8 million (USD 20 million), representing 10% of its 2018 revenues, and Puyunhui RMB 48.3 million (USD 7 million), representing 9% of its 2018 revenues. Illegal gains were also confiscated. The fines imposed were on the very high end of the fining scale (10% of revenues being the maximum).

- **Abuse of dominance of Qinghai Minhe Chuanzhong Oil and Gas (Qinghai AMR, May 2020).** Minghe refused to cooperate with the local antitrust agency and was found to have concealed and destroyed evidence. Minhe was fined RMB 700,000 (USD 100,000) for obstructing the investigation. By taking into account the serious nature of the breach, the Qinghai AMR also imposed a fine of RMB 4.46 million (USD 700,000) on Minghe, representing 9% of its 2017 sales.

The importance of cooperating with China's antitrust agencies is further discussed in Chapter 10 of this publication ('Building a culture of compliance and cooperation').

08
ANTITRUST LITIGATION

IN 2021

Antitrust litigation will continue to be a useful tool for businesses, especially small businesses, to achieve commercial goals. Individuals have stood up to defend their rights, challenging big tech through antitrust litigation in 2020. We expect to see similar cases in 2021. Follow-on litigation will likely remain scant in China in contrast to other jurisdictions. Actions against quasi-governmental organizations are expected to increase as the courts have clarified that China's antitrust rules apply to them. The Chinese courts are also expected to robustly protect their jurisdiction to decide on disputes relating to standard essential patents.

1. Increased actions against big tech

In line with increased numbers of actions against tech companies globally, China's tech companies have become top targets of private antitrust litigation in 2020. Tech businesses should be mindful of antitrust litigation risks, and carefully examine the costs and implications of defending any actions, including time, litigation expenses, bad publicity, reputational damage and increased scrutiny by antitrust authorities. On top of cases where smaller businesses have used antitrust litigation as a tool to challenge tech titans to change existing practices, individual consumers have also taken part.

Class of 2020: Selection of high-profile litigation against big tech

Case	Issue	Status
Huaduo v. NetEase	The claimant alleged NetEase abused its dominance by forcing players to stream its game "Fantasy Westward Journey 2" on its own platform and by bundling the installation of the game and the platform.	In May 2020, the Higher People's Court of Guangdong Province ruled in favor of NetEase. The Court found that NetEase did not have dominance in the online game services market.
Wang (individual) v. Meituan	The claimant took action against Meituan for abuse of dominance by cancelling Alipay as a viable payment option.	The case has reportedly been accepted by the Beijing Intellectual Properties Court in December 2020.
Zhang (individual) v. Tencent	The claimant alleged Tencent abused its dominance by blocking the direct sharing of Taobao and Douyin links through WeChat, amounting to a refusal to deal.	After trial, the claimant successfully applied to withdraw the case at the Beijing IP Court.

2. Follow-on litigation remains scant

Compared to other jurisdictions where private follow-on litigation is very active, the number of follow-on actions in China remains low, even though the Supreme People's Court clarified in 2012 that claimants may bring follow-on litigation where a competition authority (including an overseas authority) has issued a penalty decision, provided such conduct has the effect of eliminating or restricting competition in China.[1]

Follow-on litigation in China remains challenging for private parties, primarily owing to the absence of a formal mechanism compelling the production of evidence uncovered during investigations, and the short limitation period of two years starting from the date that the claimant knew or should have known of the infringement. A further layer of difficulty is added because the Chinese courts tend to conduct fresh reviews and reach their independent conclusions regardless of the competition authority's penalty decision – as indicated in the Shanghai court's decision of Hanyang Guangming v. Hankook Tire, discussed below. Having regard to the pattern of actions brought in the past, follow-on litigation in China will likely remain infrequent.

1. See, 'Provisions of the Supreme People's Court on Certain Issues Relating to the Application of Law in Hearing Cases Involving Civil Disputes Arising out of Monopolistic Acts'. The provisions were amended in December 2012 and implemented in January 2021.

CASE STUDY

Update on follow-on damages actions: Hanyang Guangming v. Hankook Tire

Background. In 2016, the Shanghai Municipal Price Bureau found that Hankook reached resale price maintenance ("**RPM**") agreements with its Shanghai dealers from 2012 to 2013. A fine of RMB 2.18 million (USD 300,000) was imposed. Hanyang later filed a suit in the Shanghai IP Court against Hankook alleging that Hankook engaged in various practices including RPM, excessive pricing, tying, sales volume restrictions and other abusive conduct.

Assessment. In July 2018, the Shanghai IP Court determined, in the first instance, that the defendant's actions did not constitute RPM because Hankook's actions did not eliminate or restrict competition. It also found that Hankook did not have a dominant position in any of the relevant markets.

Outcome. In July 2020, the Higher People's Court of Shanghai Municipality upheld the decision on appeal. This case reflects the divergent approaches to finding an RPM infringement in public enforcement and private litigation. While China's antitrust agencies presume RPM to be illegal unless exempted for reasons such as efficiency, in private litigation, the court will adopt a rule of reason approach.

3. Actions against quasi-governmental organizations

There has been an increasing number of actions in 2020 challenging quasi-governmental organizations authorized by the government to carry out certain social functions exclusively. Amongst these cases include actions against the China Audio-Video Copyright Association ("**CAVCA**"), authorized by the National Copyright Administration to be the only collective copyright management organization for audio-video works, and the China Internet Network Information Center ("**CNNIC**"), authorized by the Ministry of Industry and Information Technology to exclusively manage Chinese domain names.

Even though the courts ruled in favor of the defendants, the cases reinforce the recognition of claims against quasi-governmental organizations. There has been doubt in the past about the applicability of China's antitrust laws to quasi-governmental organizations as they are not engaged in profit-making activities and do not fall squarely into the category of 'administrative bodies' caught under China's Anti-Monopoly Law. The court's acceptance of these cases shows that these quasi-governmental organizations fall within the ambit of China's antitrust laws.

Case	Issue	Status
Eight KTV Operators v. CAVCA	Eight KTV operators alleged in separate suits that CAVCA abused its dominance by requiring them to contract with a designated agent for copyright licensing of songs, who attached unreasonable conditions such as charging contract signing fees.	The Beijing IP court ruled in favor of CAVCA. The Court found that CAVCA possessed a dominant position in the market for licensing movie-like or audio-video products to KTV operations but that there was insufficient evidence of an abuse.
Wangdian v. CNNIC and Jieda v. CNNIC	The claimants were not allowed to register their domain names by CNNIC and brought separate suits against CNNIC for abuse of dominance on the basis of a refusal to deal.	The Beijing IP court ruled in favor of CNNIC in both cases because the evidence was not sufficient to prove that CNNIC possessed market dominance or engaged in any anticompetitive conduct.

4. Standard essential patent litigation

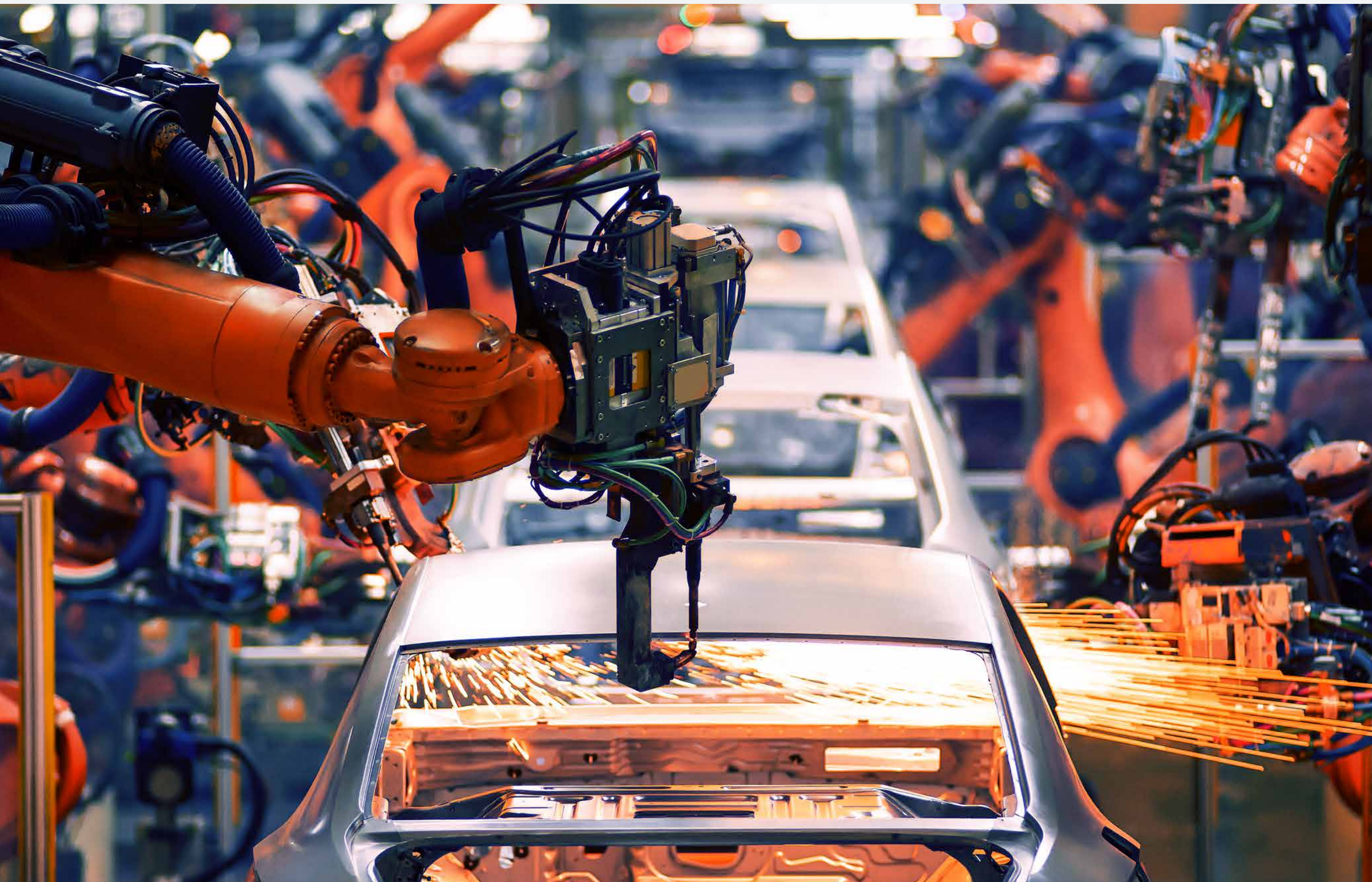
The past year has seen the Chinese courts flex their muscles by maintaining jurisdiction over standard essential patent ("**SEP**") disputes. In ZTE v. Conversant Wireless (2020), the Supreme People's Court of China ("**SPC**") held that Chinese courts had jurisdiction to determine the fair, reasonable and non-discriminatory ("**FRAND**") royalty rates of relevant SEPs under dispute. Importantly, while there were related proceedings ongoing in the English courts, the SPC considered that parallel proceedings with overlapping claims in foreign courts did not affect the Chinese court's ability to hear the case. This could give rise to conflicting outcomes between English and Chinese courts in respect of what amounts to FRAND terms for a given set of SEPs. Further, the Shenzhen Intermediate People's Court later confirmed in OPPO v. Sharp (2020) that Chinese courts have jurisdiction to determine global FRAND rate for SEPs.

Separately, the Chinese courts have also claimed jurisdiction in SEP disputes through the use of antisuit injunctions. In Huawei v. Conversant Wireless (2020), the SPC issued an injunction prohibiting Conversant Wireless from enforcing a German decision that it considered would interfere with ongoing Chinese patent infringement proceedings. This was the first time a Chinese court granted an antisuit injunction in an SEP dispute, and the SPC's lead has now been followed by other lower Chinese courts (e.g. the Wuhan Intermediate People's Court in Xiaomi v. Interdigital).

09
SECTOR-SPECIFIC FOCUS

IN 2021

Continuing its legislative efforts, SAMR has issued a series of guidelines targeting the automotive and pharmaceutical sectors and providing rules for intellectual property related agreements and conduct. These guidelines illustrate SAMR's continued interest in the automobile and pharmaceutical sectors (in addition to the digital economy), which will likely result in enforcement actions in 2021. It also showcases SAMR's attempt to provide guidance for enforcement in IP-related areas and it would not be surprising if China's antitrust agencies run an IP-related case in the near future.



1. Automotive and pharmaceutical sectors

The automotive and pharmaceutical sectors have been antitrust enforcement priorities in China for some years. SAMR's decision to develop sector-specific guidelines are therefore not surprising. The "**Auto Guidelines**" ("Antitrust Guidelines for the Automobile Sector") and the "**Draft API Guidelines**" ("Draft Antitrust Guidelines in the Field of Active Pharmaceutical Ingredients") summarize SAMR's observations of antitrust concerns in these two sectors and inform SAMR's enforcement focus for the future:

- **Automobile manufacturers and distributors** need to be particularly mindful of certain vertical restraints, including resale price maintenance, restricting passive sales of distributors, restricting cross-supply between authorized distributors; and restricting distributors from selling aftersales parts to consumers. Such types of conduct will not benefit from the <30% market share safe harbor included in the Auto Guidelines. Presumptive exemptions based on the safe harbor are available only to certain types of vertical territorial or customer restrictions.

- **API manufacturers and distributors** need to pay close attention to hardcore anticompetitive agreements between competitors (i.e. price-fixing, output limitations and market partitioning) in addition to non-hardcore agreements (i.e. joint production, joint purchasing, joint sales and joint bidding that may restrict competition) and vertical restraints (e.g. territorial/customer restrictions). Effects analyses of these types of conduct may be required to assess antitrust risks. With regards to abuse of dominance, the Draft API Guidelines set out that each API will likely constitute a separate product market for the purpose of assessing dominance. Certain conduct prevalent in the API industry, such as excessive pricing, refusal to deal, exclusive distributorship and tying of API with other products, may constitute an abuse of dominance.

2. Intellectual property guidelines

Similar to IP-related guidelines published by the EU and US competition authorities, SAMR issued its "**IP Guidelines**" ("Antitrust Guidelines in the Field of Intellectual Property") to provide a clear framework for assessing IP-related conduct, including IP-related anticompetitive agreements and abusive conduct. SAMR and its local branches will, in the future, likely be more vigilant in identifying IP-related antitrust concerns in investigations.

- **Anticompetitive agreements and safe harbor.** Non-hardcore IP-related anticompetitive agreements such as joint R&D, cross-licensing, exclusive grant-backs, non-challenge obligations and standard-setting will be subject to an assessment of weighing their pro-competitive benefits against anticompetitive effects. Similar to the EU and US approaches, the IP Guidelines provide a safe harbor for these non-hardcore agreements. For agreements between competitors, the combined market share cannot exceed 20%. For agreements between non-competitors, the market share of each party cannot exceed 30%. Where market shares are not readily accessible, the safe harbor may still be available where there are at least four substitutable technologies.

- **Abuse of dominance.** The IP Guidelines highlight potential abusive conduct such as excessive royalty/licensing fees, refusal to license, tying (e.g. license/transfer of IP conditioned on accepting a license/transfer of other IP or products) and discrimination involving IP. Other unreasonable conditions include exclusive grant-backs, non-challenge clauses, and restriction on counterparties' use or R&D of competing technologies. However, SAMR also clarifies that possession of IP does not automatically lead to dominance.

The IP Guidelines also include a new chapter on merger control rules involving IP transfers and licensing. They also address other hot issues which could give rise to concerns in the IP arena from a competition law perspective, including patent pools, standard essential patents and collective management of copyright.

10 BUILDING A CULTURE OF COMPLIANCE AND COOPERATION

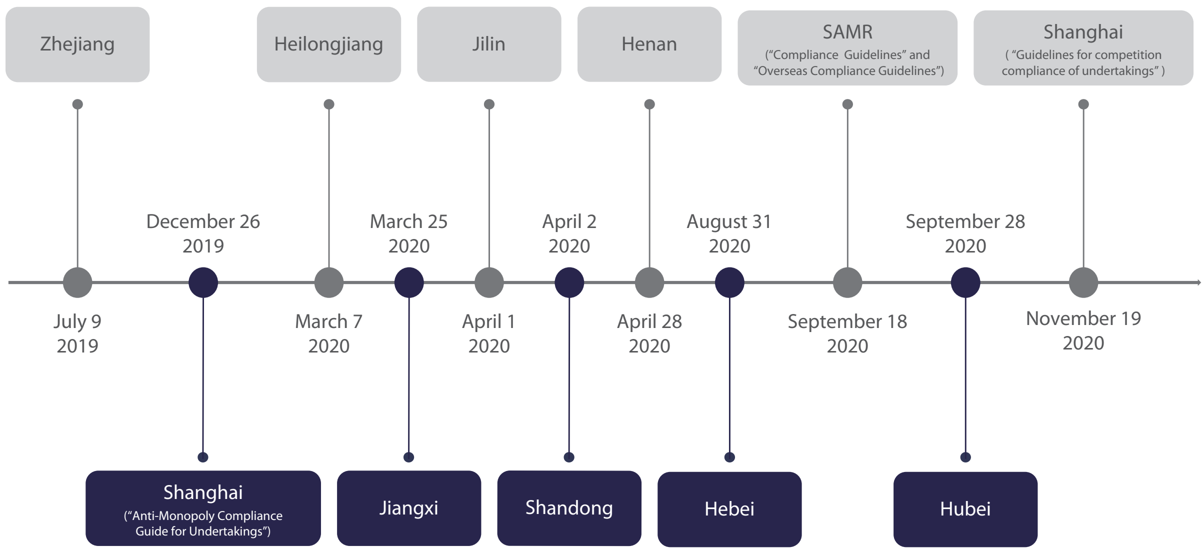
IN 2021

China's antitrust agencies have established a reputation for promoting antitrust compliance through education as opposed to penalties. This mindset is reflected in the Compliance Guidelines published by SAMR and its local branches as well as the Leniency Guidelines and Commitment Guidelines, which formalize China's leniency and commitment regimes, encouraging businesses to cooperate with the agencies by self-reporting breaches in return for reductions in fines and offering commitments in exchange for suspension/termination of investigations. Businesses should be reminded that, where they show a willingness to cooperate with China's antitrust agencies by rectifying wrongdoings and improving antitrust compliance programs, the agencies will likely show appreciation and reduce penalties.

1. Building a robust compliance culture

SAMR has long emphasized its intention to educate businesses to comply with the Anti-Monopoly Law instead of penalizing businesses. Since the second half of 2019, SAMR and its local branches have issued a series of antitrust compliance guidelines, educating businesses to develop robust compliance programs. This underscores a trend that compliance programs are increasingly used as a tool to ensure businesses do not engage in anticompetitive conduct.

Class of 2020: Compliance guidelines released by China's antitrust agencies



In September 2020, SAMR released the "**Compliance Guidelines**" ("Guidelines for Anti-Monopoly Compliance of Undertakings") to explain how businesses can foster robust competition compliance cultures. While there is no 'one-size-fits-all' solution, the Compliance Guidelines highlight the following key elements of a successful compliance model:

(1) Compliance department and responsible person. Businesses are encouraged to either establish a dedicated antitrust compliance department or integrate antitrust compliance into existing compliance management systems. A responsible person should be identified to lead the compliance department and compliance efforts. The department and responsible person should have sufficient independent authority to effectively carry out their role. Senior management is also encouraged to take charge of the compliance department and be involved in the implementation and overall coordination of compliance management.

(2) Formulating compliance measures. Compliance measures should be formulated and integrated into all areas of the company's businesses.

(3) Inspection. Compliance inspections and audits of business activities should be carried out to detect and stop non-compliant conduct. Big data and other tools can be used to strengthen the monitoring and assessment of compliance.

(4) **Training and advice.** Antitrust compliance education and training should be carried out to raise awareness within the business. Avenues should be available to provide antitrust compliance advice to business units and employees.

(5) **Individual responsibility.** Compliance obligations can be incorporated into job responsibilities and employee performance evaluations. A system of rewards and penalties can also be introduced to increase employees' incentives to adhere to compliance rules.

(6) **Internal reporting.** Clear internal reporting policies should be adopted to allow individuals to report any potential breaches and non-compliant behavior.

(7) **Compliance commitment.** Senior management is encouraged to take the lead in making and fulfilling clear and publicized antitrust compliance commitments.

SAMR also published the Draft Guidelines on Companies' Anti-Monopoly Compliance Abroad for public consultation in September 2020, which provides guidance on how Chinese enterprises can comply with antitrust laws outside China. These guidelines highlight the importance for businesses operating outside China to understand and abide by applicable antitrust laws.

2. Encouraging cooperating through a leniency regime

In addition to building a compliance culture, SAMR also encourages businesses engaged in anticompetitive conduct to cooperate with SAMR by reporting breaches and assisting in investigations through its leniency regime.

In August 2020, SAMR formalized its leniency regime by publishing a final version of the "**Leniency Guidelines**" ("Guidelines for the Application of Leniency Program in Horizontal Monopoly Agreement Cases"), providing greater certainty for businesses intending to self-report. Businesses are expected to be more willing to consider leniency applications in China as a result.

- **Greater procedural clarity.** Consistent with the approach adopted in other competition regimes, the Leniency Guidelines clarify that the leniency regime is only applicable to horizontal anticompetitive agreements. The Leniency Guidelines set out details of a 'marker' system designed to preserve and protect the applicant's place in a leniency queue, and provides for a confidentiality regime to protect leniency applications.

- **Guidance on the timing of application.** An application can be made any time before (i) initiation of a case; (ii) initiation of the investigation procedure; or (iii) after initiation of the investigation procedure but before issuance of prior notice of an administrative penalty. The approach to cover applications made after investigations are initiated is in line with prevailing international practices to make leniency available both where SAMR is unaware of the cartel and where SAMR is aware of the cartel but does not have sufficient evidence to prosecute the case.

- **Fine reductions.** Potential applicants can also benefit from greater certainty with regards to fine reductions. The applicant first in line is granted full immunity if it applied before SAMR initiated a case or an investigation procedure. Otherwise, the applicant first in line will receive a minimum 80% reduction to the applicable fine. The second applicant may receive a reduction between 30% and 50%; the third applicant may receive a reduction between 20% and 30%.

- **Continuing obligations to cooperate.** To benefit from leniency, the applicant must maintain its cooperation with SAMR, including immediately stopping any suspected violations (unless required by SAMR to continue to assist with the investigation), reporting any leniency applications submitted in other jurisdictions, and cooperating with SAMR in a quick, continuous, comprehensive, and truthful manner.

3. Encouraging investigation targets to offer commitments

Consistent with SAMR's preference of favoring education and rectifying breaches through softer measures as opposed to imposing penalties, SAMR published the "**Commitment Guidelines**" ("Guidelines on Undertakings' Commitments in Anti-Monopoly Cases") in August 2020. The Commitment Guidelines introduce rules to offer commitments in exchange for suspending or terminating investigations):

- **Scope of commitments.** Businesses can offer structural commitments (e.g. divesting assets), behavioral commitments (e.g. a change in pricing strategy, removing or changing various sales restrictions, etc.), or hybrid commitments involving both structural and behavioral commitments. The commitments need to show how they address and remove the effects of any suspected anticompetitive conduct.

- **When to offer commitment.** Businesses are encouraged to propose commitments after investigatory actions (e.g. information requests by the authority in the course of an investigation, dawn raids), but before an advance notice on administrative penalties has been issued. Businesses should communicate with SAMR and understand their concerns before proposing commitments.

- **Potential public consultation.** If the alleged anticompetitive conduct has affected other parties or the public interest, SAMR may seek public comments on the proposed commitments. The consultation period will ordinarily take no less than 30 days.

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