

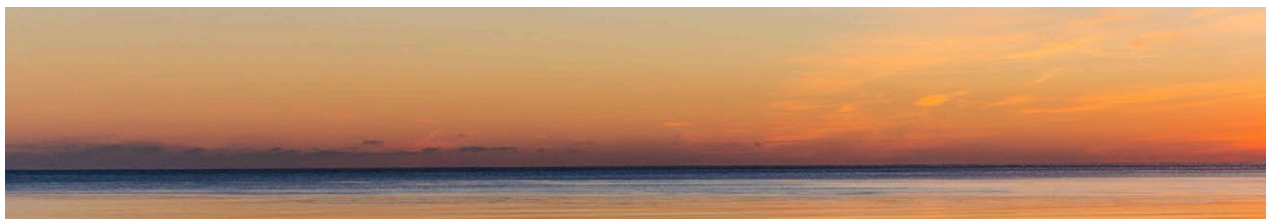
FANGDA PARTNERS
方達律師事務所

Antitrust China
2021

Annual Review



Pushing for a constant in times of uncertainty



As the world emerges from the pandemic, trade tensions and political disagreements remain. Going into 2022, expect greater antitrust enforcement and closer scrutiny of transactions in sensitive sectors.

Enforcement

Antitrust enforcement continues to intensify against Big Tech in China in line with global developments. After issuing its antitrust rules on the digital economy last year, the State Administration for Market Regulation (“**SAMR**”) proceeded to issue billion-dollar fines against digital platforms Alibaba and Meituan for exclusionary conduct. Beyond the digital sector, other sectors affecting people’s livelihood (pharmaceuticals, construction, utilities, financial services, and others) have been flagged as an enforcement priority.

Merger control

The review timeframe for complex transactions continues to be lengthy and uncertain. Of the 700+ deals that have been notified in China last year, SAMR cleared four transactions with remedies (despite other agencies not raising any concerns). All remedy decisions related to the high-tech and semiconductor industries and exceeded the statutory timeframe of 180 days (requiring the parties to pull and refile their notifications). SAMR also blocked the video game streaming merger between Douya/Huya, which is historically its third prohibition decision.

Regulatory framework

Changes to China’s antitrust framework will aim to address uncertainty and risk:

- the creation of Anti-Monopoly Bureau at a deputy-ministerial level under China’s State Council will devote itself to reinvigorating and streamlining antitrust enforcement; and
- the first reforms to China’s Anti-Monopoly Law (which have not been amended since being introduced in 2008) will likely introduce adjustments that reflect global standards, including safe harbors for anticompetitive agreements.

CONTENTS



Class of 2021: key legislative developments	02
Class of 2021: by the number	03
01: Reforms to China's antitrust laws	04
02: Overhaul of institutional design	08
03: Digital economy	11
04: Pharmaceutical antitrust	15
05: Sector-specific focus	18
06: Vertical restraints	21
07: Explosion of failure to notify investigations	24
08: Merger control	27
09: Digital and patent litigation	31
10: Administrative monopolies	34

Class of 2021: Key legislative developments

Regulatory provisions and guidelines

Document	Date of publication of finalized version	Date of publication of interim provisions or consultation draft
Regulatory provisions		
Detailed Rules for the Implementation of the Fair Competition Review System	July 8, 2021	October 23, 2017
Antitrust guidelines		
Antitrust Guidelines for the Platform Economy	February 7, 2021	November 10, 2020
Antitrust Guidelines in the Field of Active Pharmaceutical Ingredients	November 18, 2021	October 13, 2020
Guidelines on Companies' Antitrust Compliance Overseas	November 18, 2021	September 18, 2020

Draft antitrust law amendments/guidelines published for consultation

Antitrust law amendments/guidelines (Draft for consultation)	Date of publication of consultation draft
Anti-Monopoly Law Amendments	October 23, 2021
Measures for the Determination of Illegal Gains in Cases Involving Administrative Penalty by Administrations for Market Regulation	December 6, 2021

Class of 2021: By the numbers

704

The number of transactions approved

616

The number of simple case decisions

84

The number of normal case decisions

4

The number of conditional clearance decisions

13.8

The average review days of simplified cases

286.8

The average review days of remedy case

107

The number of failure to notify cases

110

The average review days for failure to notify investigations

20

The number of behavioral investigations concluded

7

The number of cartel cases

2

The number of vertical restraints cases

11

The number of abuse of dominance cases

RMB 18.2 billion

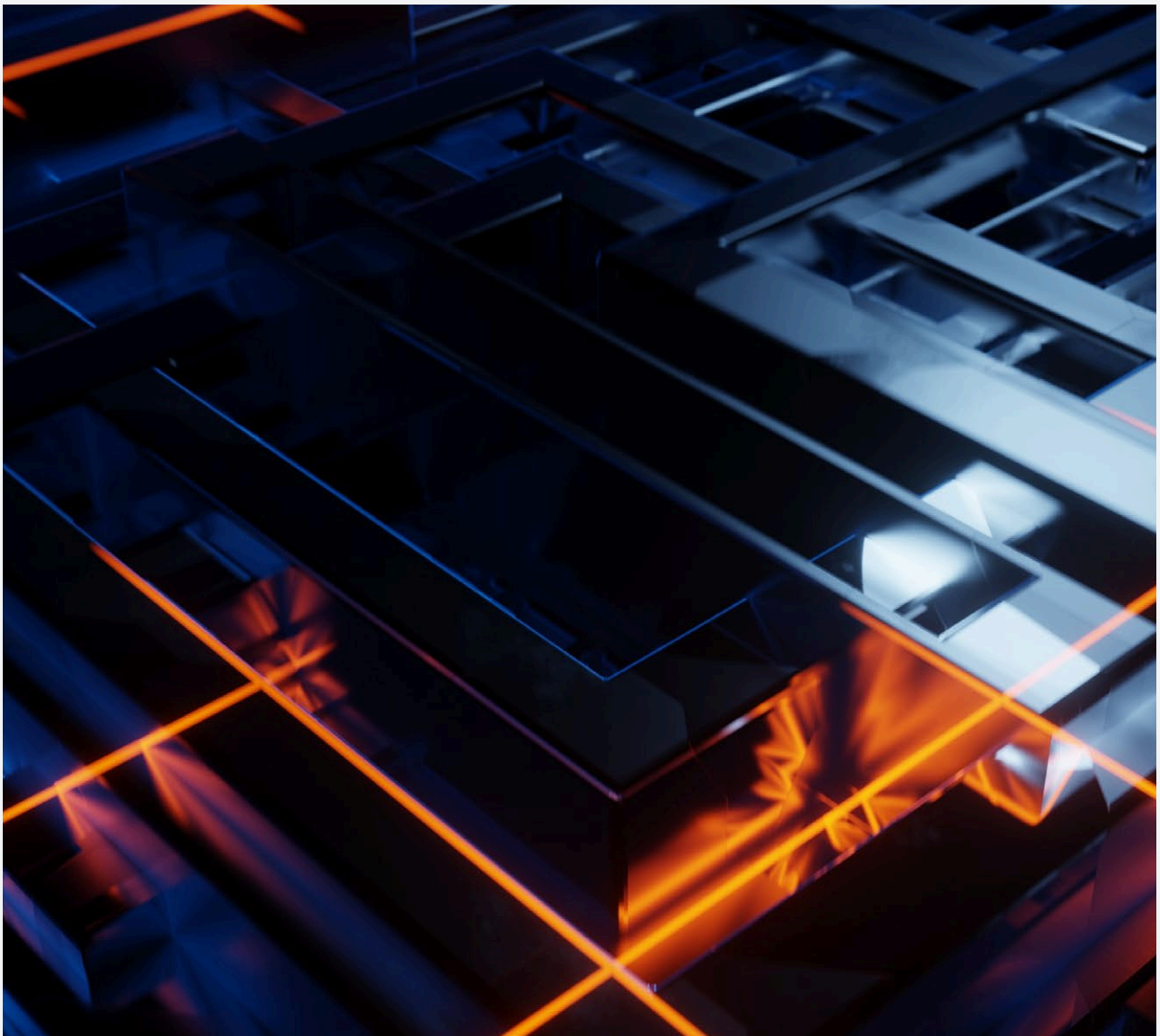
(approx. US\$2.82 billion)

The largest penalty imposed in a single decision

01

Reforms to China's antitrust laws

China's antitrust laws are subject to reform and change. Key changes introduced as part of the draft reforms of the laws include increased fines for antitrust violations, the introduction of a formal safe harbor system for anticompetitive agreements, and the implementation of a "stop the clock" mechanism in merger control.



1. Draft Amendments to China's Anti-Monopoly Law ("AML")

After years of deliberation, the amendments to the AML reached a legislative milestone in 2021. The draft amendments to the AML (the "**Draft AML Amendments**") passed the first review by the National People's Congress and were released for public consultation in October 2021. The proposed amendments clarified uncertainties that emerged regarding the scope, interpretation and application of China's antitrust laws over the past 13 years of enforcement and attempt to address the new challenges posed by the changing markets, especially the digital economy.

The key changes introduced by the Draft AML Amendments are set out below.

(i) Increase in fines for antitrust violations

Types of increase	Key changes
Increasing the upper limit of fines	<p>Increased fines for anticompetitive agreements and failure to notify transactions:</p> <ul style="list-style-type: none"> • Anticompetitive agreements: The fine for business operators with no sales revenues in the previous year could be up to RMB5 million (approx. US\$775,000), while the upper limit of fines for business operators and trade associations who entered into, but did not, implement an anticompetitive agreement is increased from RMB500,000 (approx. US\$77,500) to RMB3 million (approx. US\$465,000); • Failure to notify : The maximum fine is 10% of the previous year's sales revenue for the illegal implementation of concentrations that restrict competition. For concentrations that do not restrict competition, the maximum fine is increased from RMB500,000 to RMB5 million (approx. US\$775,000).
Increased penalties based on severity	For violations that are particularly serious, the amount of fines is increased by two to five times the original amount for anticompetitive agreements, abusive practices, failures to notify or obstructions of antitrust investigations.
Determining fines by taking into account various factors	<p>Various factors will be taken into account in determining the amount of penalties for violations:</p> <ul style="list-style-type: none"> • the extent to which the consequences of the illegal acts have been mitigated or eliminated, so as to encourage enterprises to amend their past violations in a timely manner; and • no longer required that the fine must be accompanied by the confiscation of the illegal income. Where it is difficult to accurately calculate the illegal income of anticompetitive conduct, the illegal income may be taken into account by the antitrust enforcement agency in determining the fine.
New penalties rules for responsible persons	New fines of up to RMB1 million (approx. US\$155,000) on an enterprises' legal representative, principal person in charge or directly responsible person if they are personally responsible for reaching an anticompetitive agreement.
Increasing fines for non-cooperation with investigations	For enterprises or individuals who refuse or obstruct investigations, the upper limit of fines has been adjusted from RMB1 million to 1% of the previous year's sales revenue for enterprises, and from RMB100,000 (approx. US\$15,500) to RMB1 million for individuals.
Introducing credit disciplinary deterrence	Administrative penalties imposed on business operators for violating the AML will be reflected in their credit records, and additional credit disciplinary measures for serious violations and breaches of trust have been imposed.

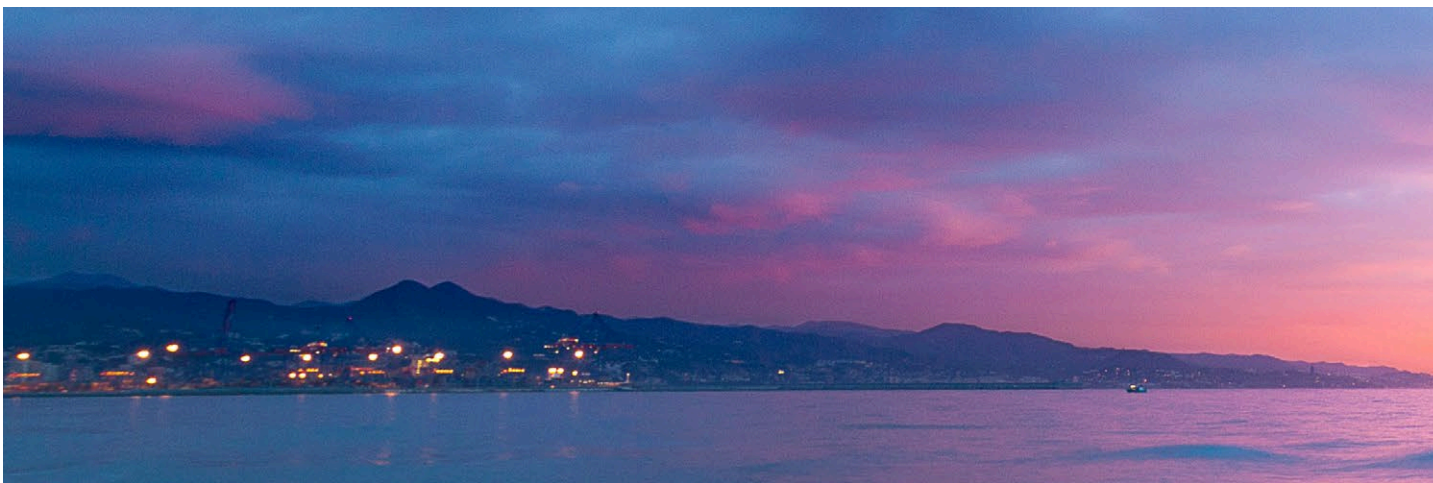
(ii) "Safe harbor" system for anticompetitive agreements

China's existing antitrust laws do not currently cater for a general "safe harbor" framework that applies to anticompetitive agreements. While there are safe harbor rules in some Antitrust Guidelines, such rules only cover the automobile sector and intellectual property rights.

The Draft AML Amendments formally introduce a general safe harbor framework for anticompetitive agreements, although specific market share thresholds are yet to be confirmed. We anticipate that the standard and scope of application of the safe harbor rules will be detailed in supporting regulations or guidelines after the Draft AML Amendments come into effect. The new safe harbor rules are expected to provide greater clarity to businesses on compliance with the AML and are also expected to promote operational and enforcement efficiency by allowing regulators and parties to rule out agreements as possible antitrust contraventions.

Current "safe harbor" mechanisms in China's antitrust guidelines

Guidelines	Safe Harbor Thresholds	Scope of Application
Antitrust Guidelines for the Automobile Sector	Vertical agreements: not exceeding 30% market share in any relevant market	Only applicable to geographical and customer restrictions in the automobile industry.
Antitrust Guidelines in the Field of Intellectual Property	Horizontal agreements: combined market shares not exceeding 20%.	Exclude horizontal and vertical agreements explicitly provided in the AML.
	Vertical agreements: not exceeding 30% market share in any relevant market. If it is difficult to calculate the parties' market shares or if market shares cannot accurately reflect the parties' market position, the safe harbor will apply if there are at least four substitutable technologies.	Exclude agreements that can be shown to have anticompetitive effects.



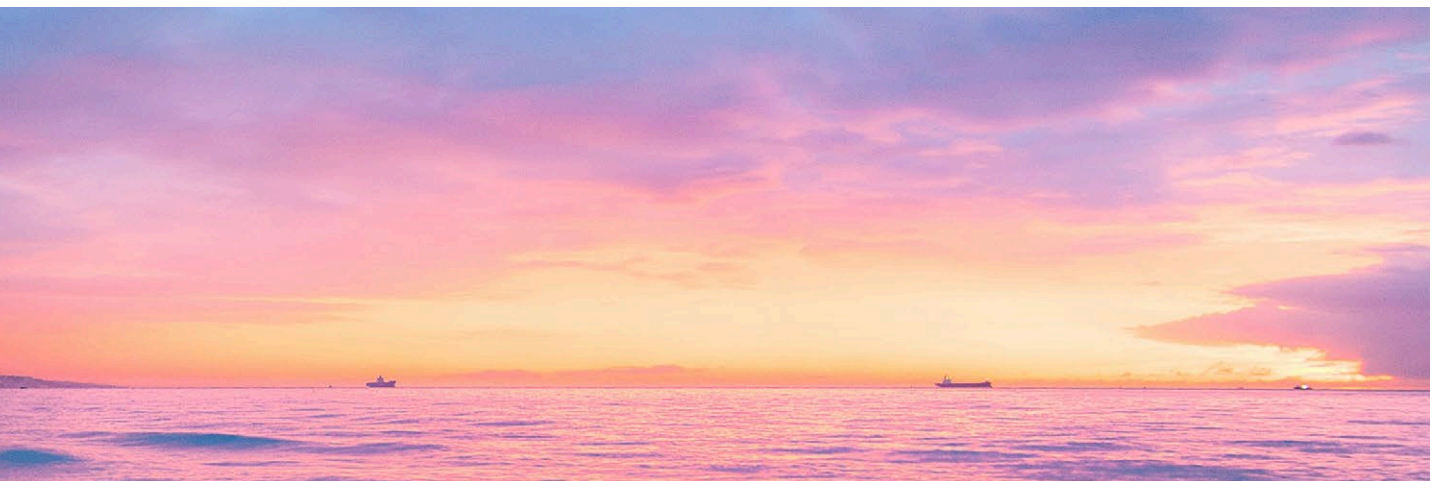
(iii) “Stop-the-clock” mechanism

Timelines can be indefinite and uncertain. In practice, complicated cases that cannot be concluded within the 180-day statutory review period usually have to be “pulled and refiled”, which requires parties to re-notify their transactions to allow the review clock to be restarted.

The Draft AML Amendments introduce a “stop-the-clock” mechanism to provide more timing certainty and allow SAMR to suspend timeframes if certain conditions are met, such as where notifying parties fail to submit documents or information, when new circumstances or facts emerge which have a significant impact on the review, or with the consent of the parties when remedies need to be further assessed.

2. Antitrust Guidelines

The National Antimonopoly Committee and SAMR issued three new guidelines in 2021: the Antitrust Guidelines for the Platform Economy, the Antitrust Guidelines in the Field of Active Pharmaceutical Ingredients, and Guidelines on Companies’ Antitrust Compliance Overseas. Taking these new guidelines into account, China currently has four effective guidelines providing guidance on substantive issues (including the Antitrust Guidelines for the Automobile Sector), while other guidelines provide guidance on procedural issues (including Guidelines for the Application of Leniency Program in Horizontal Monopoly Agreement Cases, Guidelines on Undertakings’ Commitments in Anti-Monopoly Cases and the Guidelines on the Implementation of Third-Party Fair Competition Review, and so on). Although these guidelines are not legally enforceable, they demonstrate the authorities’ views on the proper application of the AML and supporting regulations in specific sectors, providing compliance guidance to companies’ day-to-day business.





02

Overhaul of institutional design

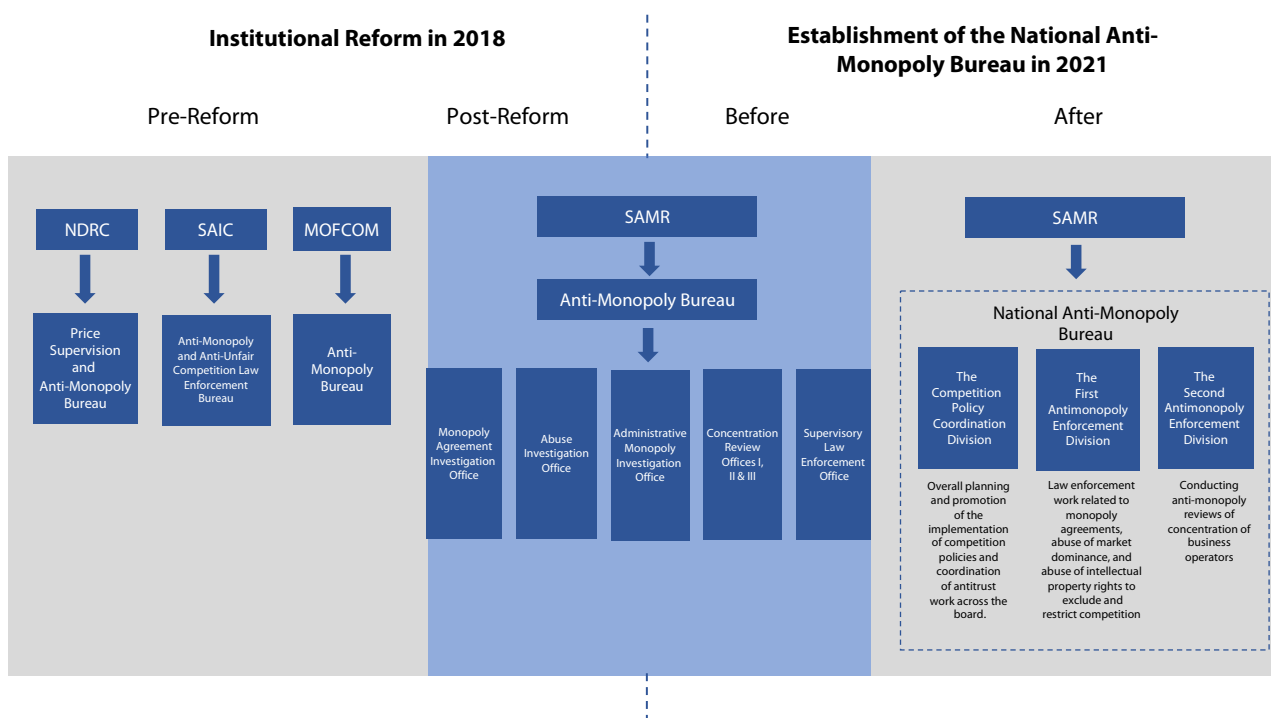
Strong enforcement action is expected to continue with the establishment of the National Anti-Monopoly Bureau and the strengthening of the central and local antitrust authorities' enforcement powers.

1. Establishment of the National Anti-Monopoly Bureau

On November 18, 2021, the Anti-Monopoly Bureau, while remaining within SAMR, was elevated from an internal department of SAMR to a deputy-ministerial level “National Anti-Monopoly Bureau” under the State Council. This is a significant move that follows the consolidation of China’s three antitrust enforcement authorities into SAMR’s Anti-Monopoly Bureau in 2018.

In line with its promoted status, the Anti-Monopoly Bureau will have increased staffing to reflect the growing significance of antitrust enforcement in China and capabilities to manage increasingly complex domestic and international antitrust cases.

Restructuring of the antitrust authorities in China

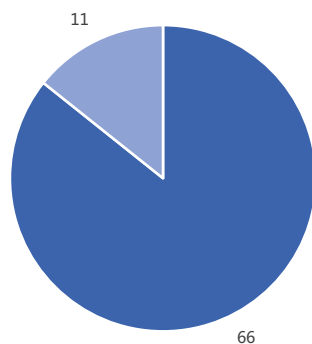


2. A centralized and localized antitrust enforcement system

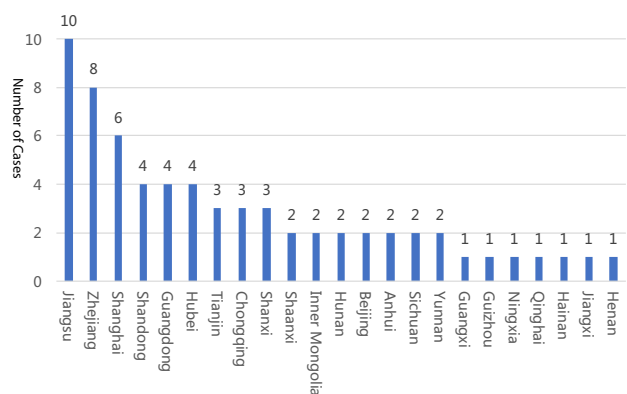
Currently, provincial antitrust authorities have the power to investigate anticompetitive agreements, abuses of dominance, and abuses of administrative power within their jurisdiction under SAMR’s supervision. In particular, provincial authorities are required to lodge their cases with SAMR within a specified period of case initiation and submit relevant case reports and draft documents to SAMR to seek SAMR’s guidance and supervision before any investigation decision. They are also required to submit legal documents to SAMR within a short timeframe after a decision has been made.

In terms of merger control review, a pilot program in Shanghai Pilot Free Trade Zone Lingang New Area is proposed to extend reviews to notified transactions at a local level. However, all the merger control notifications filed in 2021 were still reviewed at the SAMR level.

Number of antitrust investigation decisions for anticompetitive behavior on a national and local level¹ – 2018-2021



Numbers of antitrust investigation cases concluded by local authorities – 2018-2021



1. The antitrust law enforcement cases covered here only include cases involving anticompetitive behavior. It does not involve cases involving the failure to notify concentrations.

03

Digital economy

In line with global developments, China's antitrust authorities have taken action against Big Tech following years of unchecked growth. A number of investigations targeting practices in the digital sector are expected to intensify in light of the Antitrust Guidelines for the Platform Economy (the "Antitrust Digital Guidelines") introduced early last year. In particular, we expect the regulators to explore critical issues in the development of the digital economy such as big data, multi-sided markets, and network effects.

1. Antitrust Digital Guidelines

The Antitrust Digital Guidelines represent a sweeping and determined attempt to set out principles for assessing anticompetitive conduct involving digital platforms. After releasing drafts in November 2020, the Antitrust Digital Guidelines were formally issued some three months later in February 2021 following public consultation.

Key differences between the drafts and the final version of the Antitrust Digital Guidelines are worth highlighting as they follow similar debates regarding the assessment of platform markets globally. The clarifications suggest a greater willingness by the Chinese antitrust authorities to consider more sophisticated and flexible frameworks of assessment in the digital age without compromising legal certainty.

	Draft Guidelines	Final version of the Guidelines
Defining a market remains a necessary step.	Given the potential complexity in defining digital markets, the Draft Antitrust Digital Guidelines proposed the option of skipping the market definition exercise when assessing dominance and certain anticompetitive agreements.	The Antitrust Digital Guidelines ultimately do not adopt the proposal of bypassing the market definition exercise altogether, but recognize that “the relevant market usually needs to be defined”.
Removing the construction of data as an “essential facility”	Data that is considered an essential facility requires owners to share the data with competitors or potential competitors. The Draft Antitrust Digital Guidelines explored the possibility of treating big data as an essential facility, suggesting that “it is necessary to comprehensively consider whether the data is indispensable for participation in the market, whether there are other channels to access data, the portability of the data, and the possible impact on the data owner, etc.”	The Antitrust Digital Guidelines remove the possibility of construing data on its own as an essential facility and instead list the indispensability of data as a potential criterion.
Parallel behavior absent “meeting of minds” excluded as anticompetitive behavior.	The Draft Antitrust Digital Guidelines acknowledged that the covert nature of algorithmic collusions made it difficult to obtain direct evidence and proposed indirect evidence falling short of a meeting of the minds as a potential solution to confirming contraventions.	Whilst indirect evidence may still be used as proof of a cartel, the Antitrust Digital Guidelines exclude parallel behavior made independently (such as parallel pricing) as anticompetitive collusion, highlighting the importance of a “meeting of mind” in determining collusions.

2. Focus on exclusivity arrangements

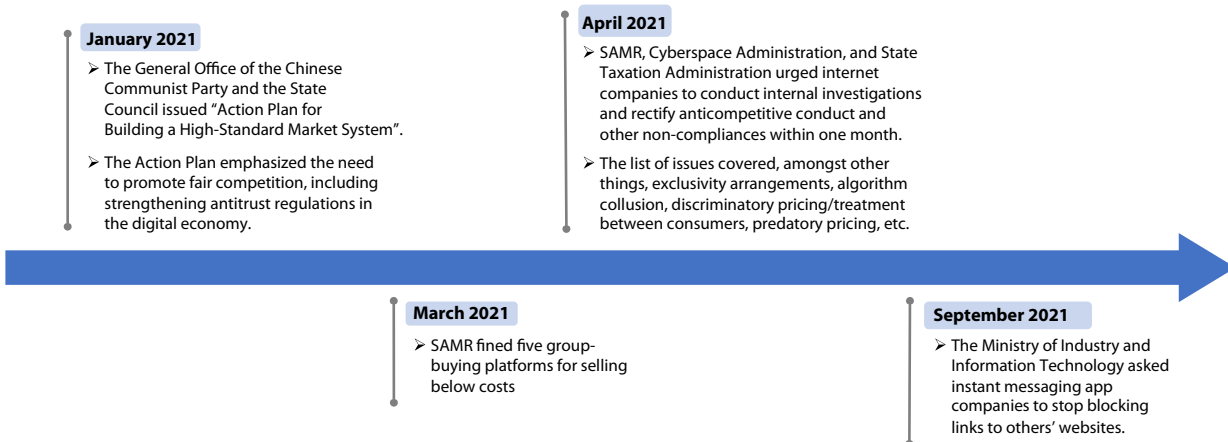
In the last year alone, China's antitrust authorities issued three key decisions concerning exclusivity practices adopted by digital platforms. The exclusivity arrangements - often referred to as the 'choose one from two' mechanism in China - require vendors and suppliers operating on platforms to exclusively operate on a single platform.

Enforcement Target	Decision date	Duration of the investigation	Fines (RMB)	Market definition	Anticompetitive effect
Alibaba	April 10, 2021	5 months	18.2 billion (approx. US\$2.82 billion)	Online retail platform service market in China	<ul style="list-style-type: none"> • Affected competition amongst online retail platforms • Damaged the interests of in-platform vendors and consumers • Hindered the optimal allocation of resources and restricted the innovation and development of the platform economy
Sherpa's	April 12, 2021	16 months	1.2 million (approx. US\$186,000)	Shanghai online catering delivery platform service market with English service	<ul style="list-style-type: none"> • Squeezed out competitors • Harmed the interest of cooperating restaurants and users
Meituan	October 8, 2021	6 months	3.4 billion (approx. US\$526 million) and a full refund of the exclusive cooperation deposit of 1.3 billion to in-platform merchants (approx. US\$204 million)	Online catering takeaway platform service market in China	<ul style="list-style-type: none"> • Eliminated competition in the online catering takeaway platform service market • Damaged the legitimate interests of in-platform merchants and consumers • Hindered innovation and development of the platform economy

In investigating these cases, the Chinese antitrust authorities explored challenging and emerging issues related to digital platforms, including innovation and the dynamic growth of the digital economy and the multi-sided nature of digital platform markets.

3. Digital transactions and other practices

- **Mergers.** The authorities also investigated digital transactions more intensely, adopting the first prohibition decision in the digital space and imposing more fines for failures to notify.
- **Prohibition decision in Huya/Douyu.** In July 2021, SAMR announced its prohibition decision of Tencent's game streaming subsidiary Huya's proposed acquisition of additional interests and sole control in fellow game streaming company Douyu. This was the third prohibition merger decision in China's antitrust history and the first in the internet sector. The decision is further discussed in Chapter 8.
- **Failures to notify.** SAMR published 107 failure-to-notify penalty decisions in 2021 - the highest number per year since the enforcement of China's antitrust regime - most of which involved digital companies.
- **Other potentially anticompetitive behaviors.** Business strategies of large digital platforms, such as blocking links to competitor platforms, self-preferencing and predatory pricing have also attracted the authorities' attention, as exemplified in the timeline below.





04

Pharmaceutical antitrust

Pharmaceuticals remain closely scrutinized. Enforcement in the manufacture and supply of active pharmaceutical ingredients (“API”) has been increasing and will likely feature high on the antitrust agenda after API-specific antitrust guidelines were issued in November last year.

China is the world's largest manufacturer and exporter of APIs. In the last year, China stepped up antitrust enforcement in the pharmaceutical sector amid growing concern of anticompetitive practices and pricing behavior. The scope of scrutiny applies to upstream raw materials but also to intermediate and finished drugs.

1. API Antitrust Guidelines

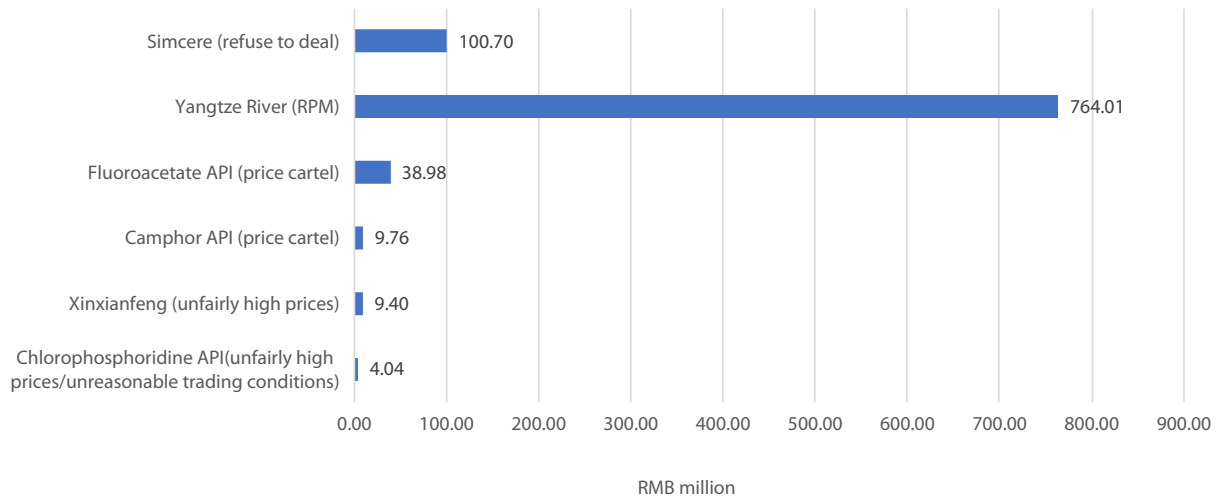
In November 2021, the Anti-Monopoly Commission issued Antitrust Guidelines in the Field of Active Pharmaceutical Ingredients ("**Antitrust API Guidelines**") to address anticompetitive practices in the manufacture and supply of APIs (defined as the raw materials used for the production of various drugs, specifically the effective ingredient in drugs).

The Antitrust API Guidelines generally follow well-established rules adopted globally, including a presumption that each API constitutes its own product market. The Antitrust API Guidelines explain that "since APIs play a special role in the production of drugs, an API generally constitutes an individual relevant product market, which may be further subdivided based on specific circumstances". Such specific circumstances include quality grade and use of the drug substance. For example, in the calcium gluconate drugs substance case (2020), as there were obvious differences in quality between calcium gluconate drugs for injection and oral use, calcium gluconate API for injection was treated as a separate market.

2. Investigations and fines

In 2021, the antitrust agencies published a total of six prohibition decisions in the pharmaceutical sector. The total amount of fines exceeded RMB900 million (approx. US\$140 million), and the amount of confiscation of illegal income was RMB20 million (approx. US\$3.1 million). Impact on pricing-related conduct remains a focus. Five of the six published cases involved monopolistic behavior related to price, including resale price maintenance ("**RPM**"), pricing cartels, and abuse of dominance in relation to excessive pricing.

Penalty amounts of antitrust enforcement cases in the pharmaceutical sector in 2021



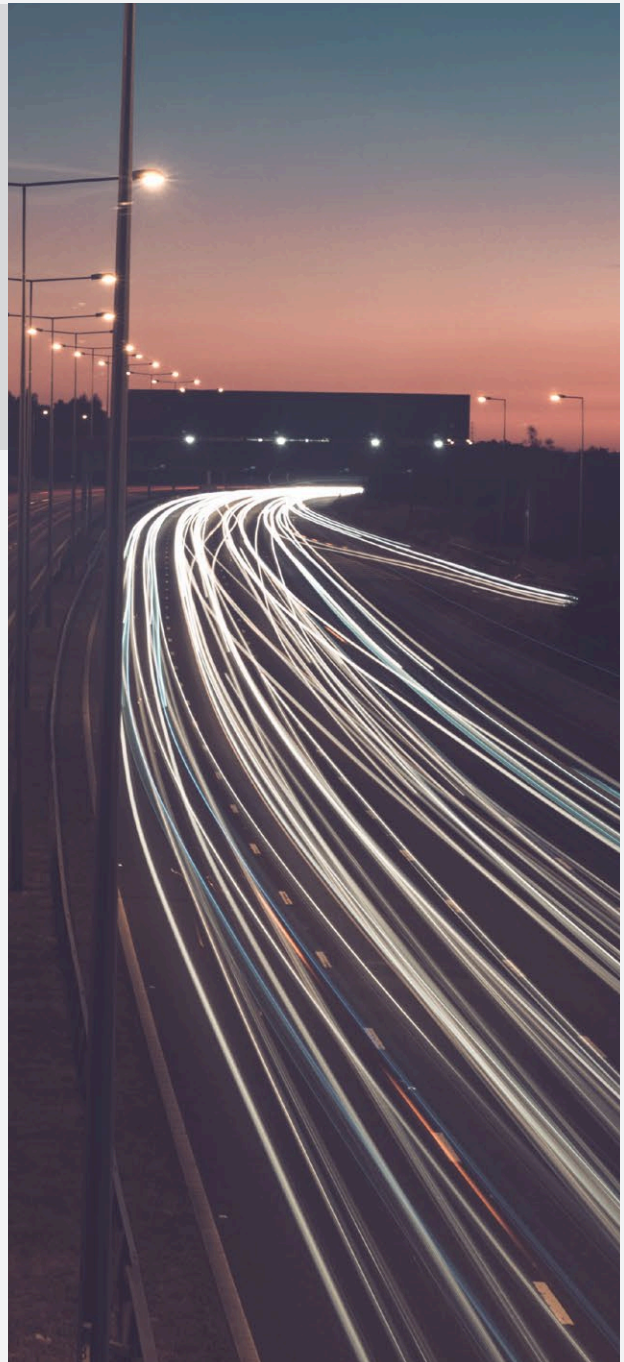
- Simcere Pharmaceutical – refusal to deal (January 2021).** As the only supplier of the batroxobin ingredient in China, Simcere Pharmaceutical was fined RMB100 million (approx. US\$15 million, representing 2% of its annual sales in 2019) for abusive conduct by refusing to supply the API to downstream pharmaceutical companies.
- Yangtze River Pharmaceutical Group (“Yangtze River”) – RPM (April 2021).** Yangtze River Pharmaceutical Group was fined about RMB764 million (approx. US\$118 million, representing 3% of its annual sales in 2018) for engaging in resale price maintenance. Yangtze was found to have signed agreements with dealers, chain pharmacies, and other retail pharmacies to fix and restrict the resale price of key drugs by issuing price adjustment letters and notices (and subsequently attempting to enforce the price adjustments through various threats and communications). Yangtze River also heavily monitored compliance and punished distributors who did not comply with formulated rules on pricing.



05

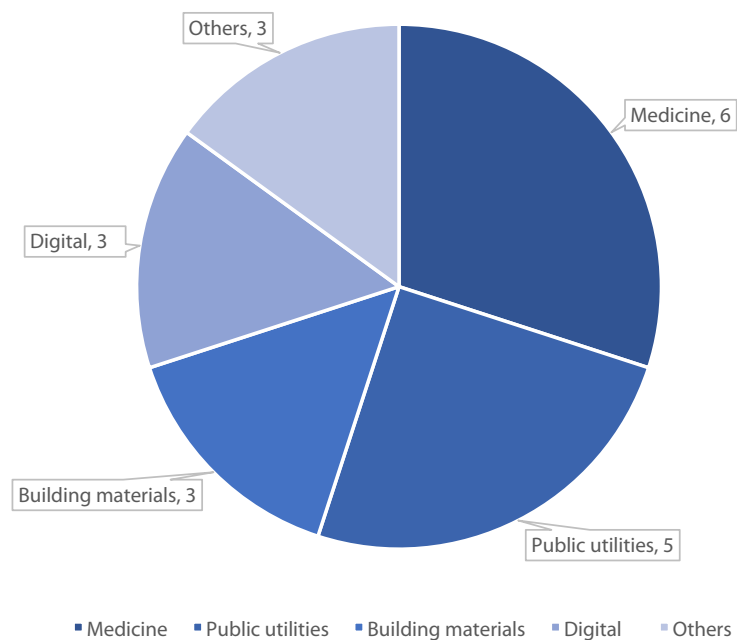
Sector-specific focus

COVID-19 continues to drive scrutiny in sectors affecting people's livelihood. In addition to the digital and pharmaceutical sectors, enforcement has extended to construction materials and public utilities in 2021. Other areas that will likely draw attention in 2022 include education and training, financial services, and commodities trading.



In July 2021, SAMR was tasked to carry out antitrust enforcement in key sectors affecting people's livelihood, such as medicine, public utilities, construction materials, education and training.

Antitrust enforcement cases by industry in 2021²



Construction materials

There were three antitrust cases in the construction materials industry in 2021, all involving horizontal anticompetitive agreements. The industry is considered susceptible to anticompetitive practices given the high degree of product homogeneity and severe overcapacity, which make it difficult for players to differentiate themselves from competitors.

2. The antitrust law enforcement cases covered here only include cases involving anticompetitive behavior. It does not involve cases involving the failure to notify concentrations.

Public utilities

Public utilities are often natural monopolies. They are subsidized by the government and are carried out on a franchise model. Public utility companies have therefore been targets for abuse of dominance. Four of the five antitrust investigation cases targeting public utilities in 2021 involved abuse of dominance.

Commodities

Commodities represent the upstream raw materials for many products. If the prices of commodities rise, so will the prices of related midstream and downstream products. Since May 2021, the Chinese government has stepped up measures to curb soaring commodity prices and maintain stable supply.

Regulatory authorities have indicated that they will closely monitor pricing trends of bulk commodities, strengthen supervision of their futures and spots markets, support inspections, and take action against abnormal transactions, spreading false information and bid-rigging. Last year, the National Development and Reform Commission and SAMR held meetings with key suppliers of iron ore, steel, copper, aluminum and other materials. The suppliers were warned about coordination to manipulate prices, disclosing pricing information (including their fabrication), and bid-rigging.

Financial services

On various occasions in 2021, the Chinese government signaled its efforts to “strengthen antitrust and prevent the disorderly expansion of capital”.

Guo Shuqing, the party committee secretary of the People’s Bank Of China and the chairman of China Banking and Insurance Regulatory Commission (“**CBIRC**”), highlighted in an interview that targeted anticompetitive practices would include: (i) the disorderly expansion of industrial capital in the financial field; (ii) illegal financial activities under the banner of “financial innovation” and “Internet plus finance”; and (iii) some large Internet platforms involved in various financial businesses to carry out unfair competition. Further, the “Regulations on Non-Bank Payment Institutions (Draft for Comment)” issued by the People’s Bank of China on January 20, 2021, has also stated that antitrust compliance in the field of payment services is an important measure to prevent systemic financial risks.

The financial sector is also under continuous antitrust compliance scrutiny. In 2021, a number of failure to notify decisions were issued in the financial sector. Entities subject to penalties included banks, insurance companies, investment companies, and other relevant operators. For example, Baidu and CITIC Bank were fined at the maximum level of RMB500,000 (approx. US\$77,500) for failing to notify the establishment of Baixin Bank, a retail bank in China.

06

Vertical restraints

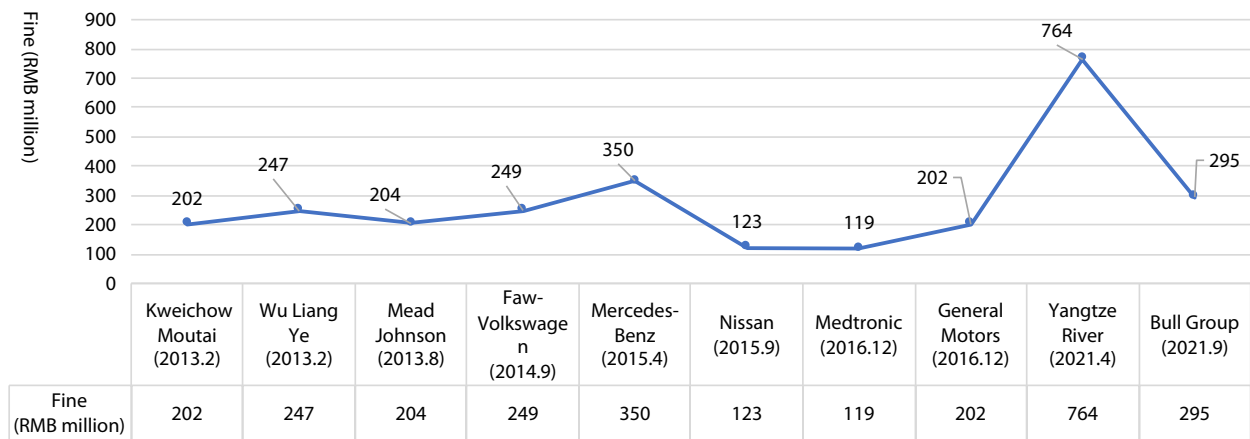
Resale price maintenance (“RPM”) remains an enforcement priority in China. In the future, non-price vertical restraints could be pursued on a standalone basis, given the risks highlighted in industry-specific antitrust guidelines, including customer and territorial restrictions. Amendments to AML are also expected to clarify the legal framework for vertical restraints. In particular, the draft AML amendments confirm that an effects analysis should be adopted in assessing RPM.



1. RPM remaining a focus

RPM has been a focus of antitrust enforcement in China since the regime’s early days. In 2021, the Chinese antitrust authorities issued record fines of RMB764 million (approx. US\$118 million) and RMB295 million (approx. US\$46 million), respectively, on Yangtze River Pharmaceutical Group (“**Yangtze River**”) and Bull Group for RPM (each amounting to 3% of the total domestic sales in the year prior to the investigation).

Top 10 RPM cases with the highest fines



Yangtze River also claimed exemption under Article 15 of the AML during the investigation. The claim was ultimately dismissed, noting that Yangtze River did not provide sufficient evidence to substantiate its claim.

2. Future scrutiny of non-price vertical restraints?

To date, the Chinese antitrust authorities have rarely pursued non-price vertical restraints. In SAMR’s previous enforcement, if an enterprise engaged in both RPM and non-price vertical restraints, the non-price vertical restraint was generally treated as a mechanism to reinforce RPM. In both **Yangtze River** and **Bull Group**, the authorities found that the parties restricted distributors from selling outside of designated areas, but instead of treating such territorial restrictions as standalone infringements, the authorities categorized them as means to implement RPM. After the AML is revised, it remains to be seen whether the antitrust authorities would start treating non-price vertical restraints as standalone offenses, to the extent anticompetitive effect is found.

Despite the lack of enforcement to date, non-price vertical restraints may attract more attention in certain industries in the future, as specified by the sectoral antitrust guidelines.

- The Antitrust Guidelines related to Active Pharmaceutical Ingredients (issued in November 2021) explore the implementation of territorial or other restrictions by API operators that could potentially lead to market segmentation and price discrimination, especially if a number of API players adopt mirroring restrictions.
- The Automotive Guidelines (issued in August 2020) provide that restrictions on passive sales, cross-supply between auto dealers, and restricting distributors from selling aftersales parts to consumers are presumed illegal regardless of market share. Other restrictions on active sales and limitations on automobile wholesalers from selling to end-customers are permissible to the extent market shares do not exceed 30%.

3. Safe harbors and clarification of “effects” assessment

The draft amendments to the AML proposed market share safe harbors of 30% for the first time. Agreements between parties that have a market share below this threshold are presumed permissible unless there is evidence of anticompetitive effects in light of particular prohibited restrictions.

Guidelines	Safe Harbor Thresholds for Vertical Restraints	Scope of Application
The Antitrust Guidelines for the Automobile Sector	> 30% market share in any relevant market.	Certain non-price vertical restraints in the form of territorial and customer restrictions in the automobile industry (except for a few hardcore restrictions, as mentioned above).
Antitrust Guidelines in the Field of Intellectual Property	> 30% market share in any relevant market. If it is difficult to calculate the parties' market shares or if market shares cannot accurately reflect the parties' market position, the safe harbor will apply if there are at least four substitutable technologies.	Non-price-related vertical restraints involving intellectual property rights.

While the scope and application criteria of the proposed safe harbor mechanism are yet to be clarified, the safe harbor mechanism appears to align China's antitrust regime with its global counterparts.

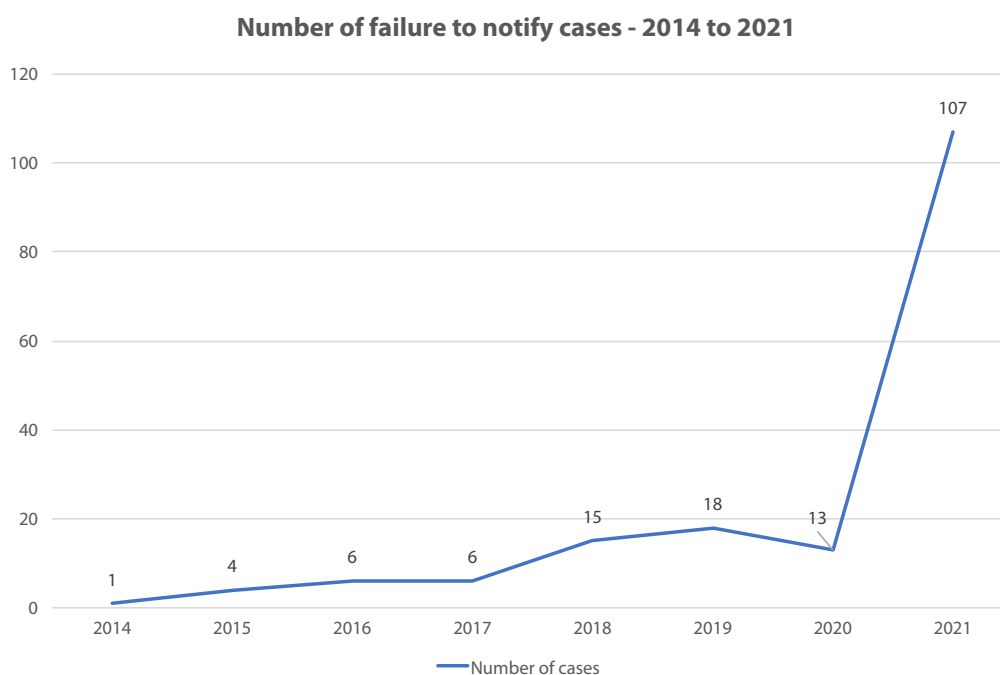


07

Explosion of failure to notify investigations

Failure to notify investigations have grown exponentially in the last year, ranging from targeted reviews of transactions in the digital sector, scrutiny of minority shareholdings as small as 6%, and imposing remedies for the first time.

A record number of failure to notify cases were completed last year, totaling 107 investigations and representing almost double the cases investigated since 2014. The sharp increase in the number of failure to notify penalty decisions demonstrates SAMR's zero-tolerance towards gun-jumping. In particular, after SAMR's clarification in 2020 that transactions involving variable interest entity ("VIE") structures are also notifiable, a number of failure to notify cases penalized by SAMR involved transactions or parties with a VIE structure.

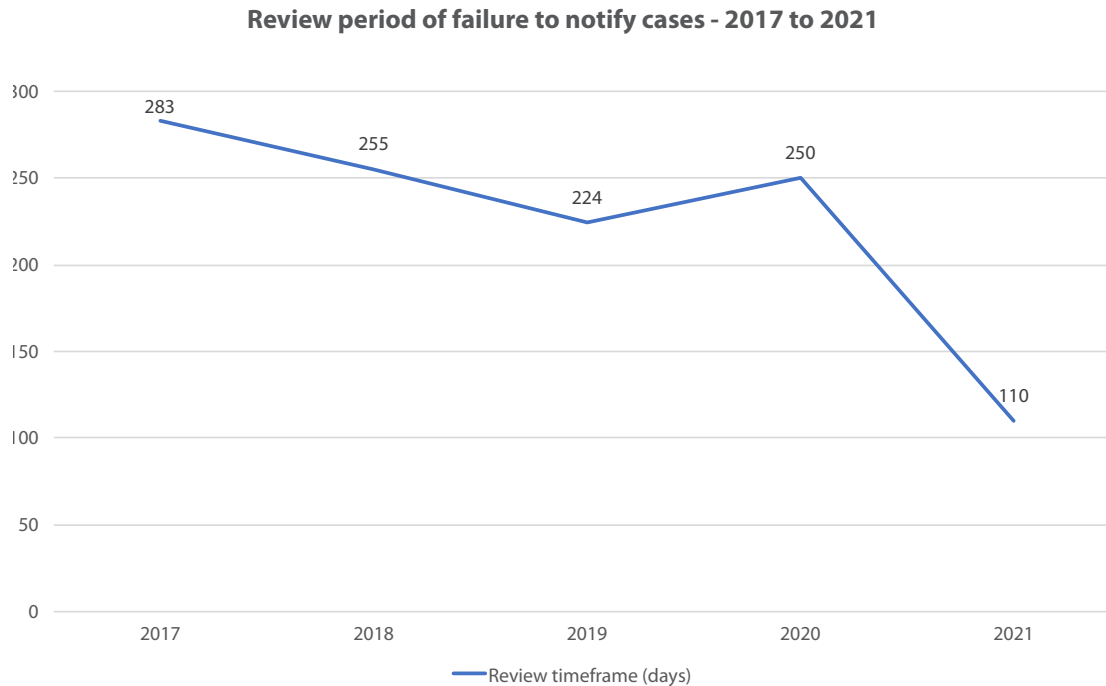


1. Minority shareholdings

Amongst the cases penalized, many involved the acquisition of minority shareholdings. Of the 107 penalty decisions in 2021, 51 involved an acquisition of interests of less than 30%. Remarkably, in Shanghai Hantao's acquisition of Lingjian, SAMR considered an acquisition of 6.67% interest (likely coupled with controlling rights) sufficient to be notifiable.

2. Increased speed and penalties

The sharp increase of cases is coupled with accelerated review efficiencies. In 2021, the average investigation timeframe for failure to notify investigations was 110 days, a significant improvement compared to the average of 250 days the year before. The shortest investigation took 40 days while the longest lasted 308 days - still significantly faster than the longest investigation in 2020 (479 days), showing SAMR's increased efficiencies and resources in handling failure to notify reviews.



3. Fines

SAMR issued the maximum fine of RMB500,000 (approx. US\$77,500) for the first time in 2020. Since then, SAMR has adopted the maximum fine as a standard. Almost all reviews (99/107) resulted in maximum penalties.

Under the draft amendments to the AML, parties that failed to fulfil their notification obligations could be subject to much higher fines in the future - a maximum of RMB5 million (approx. US\$775,000) for cases with no competition concerns and up to 10% of turnover in the previous year for cases that give rise to competition concerns.

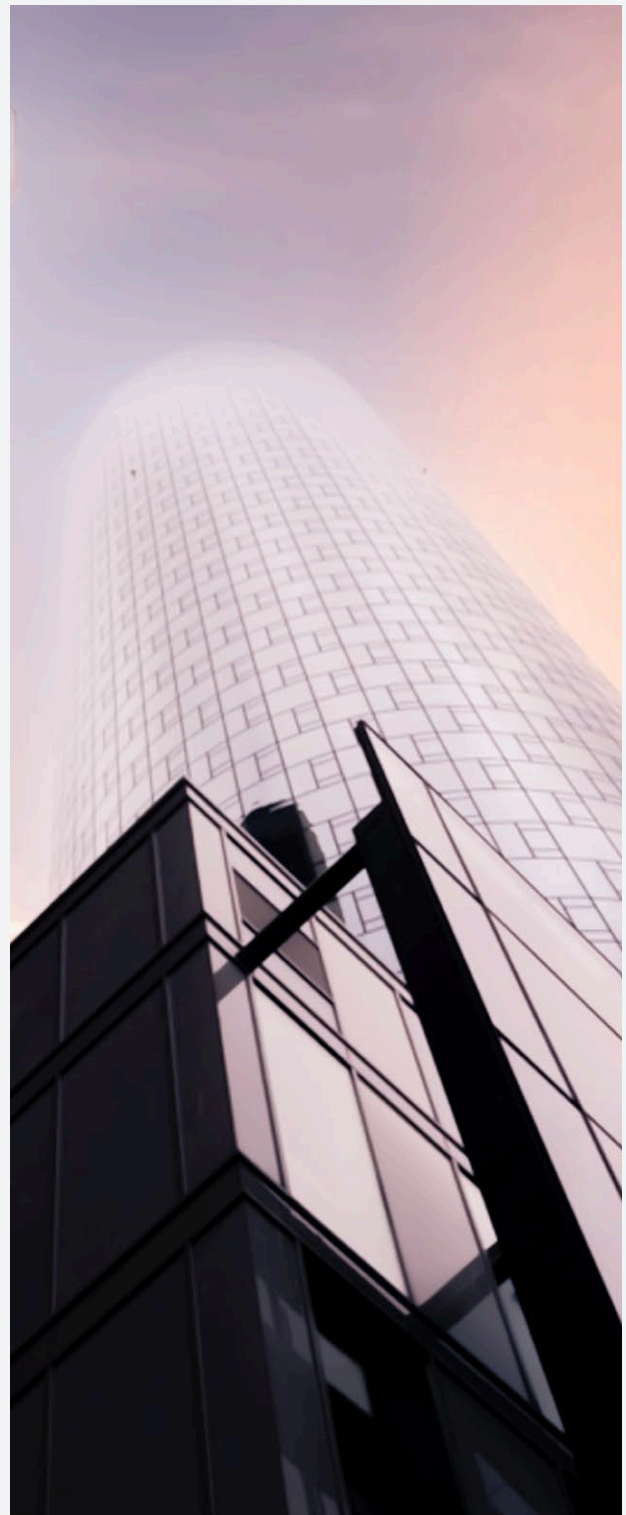
4. First gun-jumping case involving remedies

In an unprecedented move, remedies were imposed following a failure to notify review. In July 2021, SAMR issued a penalty decision against Tencent for its failure to notify an acquisition of a 61.64% stake in China Music Corporation. SAMR imposed the maximum fine of RMB500,000 (approx. US\$77,500) and imposed remedies to restore competition in online music broadcasting platforms through measures such as abandoning exclusive music copyright licensing arrangements. Tencent was also required to notify SAMR of future transactions, including those that fall below notification thresholds - a requirement that generally goes beyond the scope of remedies contemplated under the AML.

08

Merger control

China remains a challenging jurisdiction to obtain merger control approval procedurally and substantively for certain deals. In addition to its continued scrutiny of deals in the high-tech and semiconductor sectors, there has been a sharp increase in the review of transactions in the digital economy. In addition, a number of other sectors have been earmarked as key industries warranting careful review as part of the proposed reforms to China's antitrust laws, including finance, science and technology, and media.



In 2021, SAMR completed merger control reviews of 704 deals, of which 595 cases (85%) were cleared under the simplified review procedure. The average review period for simplified notifications took two weeks from the point of case acceptance, with some cases being cleared immediately following the expiry of the public notice period.

In 2021, SAMR challenged five transactions, four being conditionally approved and one being blocked.

1. Prohibited transaction

On July 10, 2021, SAMR issued its decision to prohibit the merger between Huya and Douyu. This was the first prohibition decision in China's digital sector and the third prohibition transaction since the China's antitrust laws came into force in 2008.

Pre-transaction, Tencent had sole control over Huya and joint control (together with Douyu's founder) over Douyu. Through the transaction, Tencent intended to acquire sole control over Douyu. SAMR explained in its decision that "there was a certain degree of competition" between Huya and Douyu in the game streaming platform market, and a change from joint to sole control over the target would have eliminated competition. However, in the decision, SAMR failed to demonstrate the level of competition between Huya and Douyu before the transaction; therefore, it remains unclear whether this prohibition decision served to preserve effective competition since Tencent remained a controller of both Huya and Douyu. In any event, the prohibition decision reflects an increased appetite to challenge deals in the digital sector.

2. Conditionally approved transactions

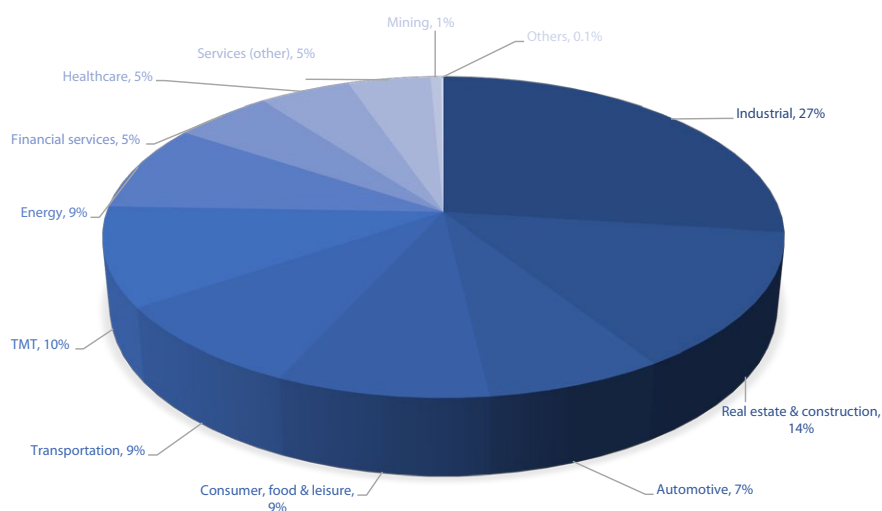
SAMR's pattern of imposing behavioral conditions continued in 2021. Of the four cases conditionally approved by SAMR, three of them involved pure behavioral remedies. Notably, SAMR was willing to adopt behavioral remedies to resolve horizontal concerns in two cases (Intel/SK Hynix; ITW/MTS).

Deal	Remedies
Acquisition of Acacia Communications (Ireland) Limited by Cisco Systems Inc.	<ul style="list-style-type: none"> · Continue to fulfill existing contracts with customers · Continue to supply upstream products to Chinese customers on FRAND terms · No tying or imposing other unreasonable trading conditions for upstream products · Provide compliance training to management and employees regarding the commitments
Acquisition of parts of Eaton Holdings Limited by Danfoss Inc.	<ul style="list-style-type: none"> · Divestiture
Acquisition of MTS Systems Corporation's by Illinois Tool Works, Inc.	<ul style="list-style-type: none"> · Continue to fulfill all existing business contracts involving relevant products and services with Chinese customers · Continue to maintain service levels to Chinese customers · No increase in the prices of relevant products and services sold to Chinese customers · Not to refuse, restrict or delay the supply of the relevant products or services to Chinese customers; not to impose unreasonable trading conditions; not to lower the service quality or technical level
Acquisition of part of Intel Corporation's business by SK Hynix Co. Ltd	<ul style="list-style-type: none"> · Prohibition on charging unfair prices for the supply of the relevant products in China · Expand production of the relevant products · Continue to provide all products in China on FRAND terms · No tying and bundling · Facilitate entry of a third-party competitor · No coordination with competitors in China in terms of sale prices, output or sales volume

3. Key industries

In 2021, the highest number of deals notified to SAMR involved manufacturing (24%), followed by transactions in the transportation, transportation, real estate, consumer goods and automotive sectors.

Unconditional approval cases by industry in 2021



The draft amendments to the Anti-Monopoly Law published in October 2021 proposed that the review of concentrations in the areas of people's livelihood, finance, science and technology, and media should be strengthened.

(i) Digital economy

Sharp increase in the number of notifications. In 2021, SAMR unconditionally approved 28 deals related to the digital economy. These consisted of four normal cases and 24 simple cases and involved digital giants such as JD, Tencent and Baidu.

Challenges to market definition. In light of the increased number of cases involving multi-sided markets and network effects, defining the relevant market and providing market share data has proven to be a challenging endeavor, especially where a platform's user data needs to be split by business segments. These technical issues add complexity to the review process and raise uncertainties to clearance timelines.

(ii) High-tech and semiconductors

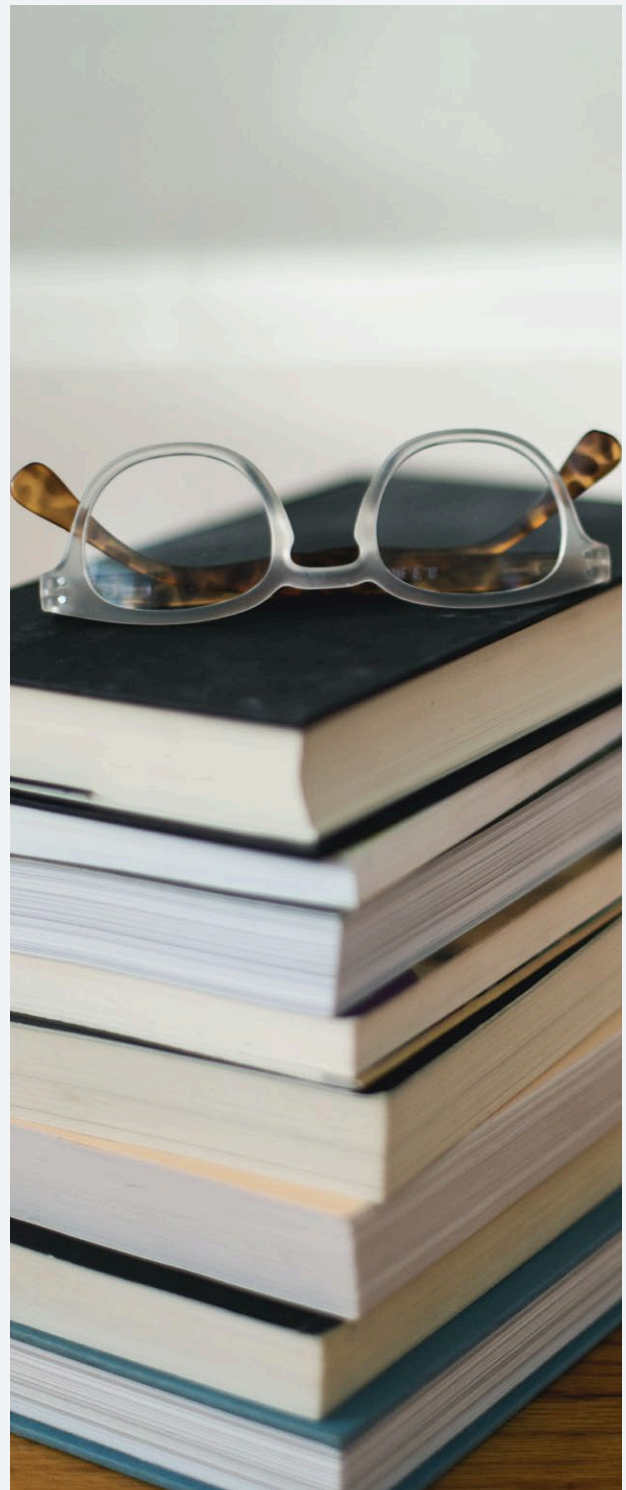
Continued scrutiny even when other jurisdictions have no concerns. SAMR continued to pay particular attention to transactions in the high-tech sector in 2021. In particular, the global chip shortage and the strategic importance of this industry has caused SAMR to take a more cautious attitude in reviewing semiconductor transactions and used its powers to take national security and industrial policies into account as part of its review. As a result, SAMR imposed conditions in certain deals in the high-tech sector where other jurisdictions raised no concerns. In Acacia / Cisco, the transaction was approved unconditionally in all other jurisdictions except China; in Eaton / Danfoss, the divestitures required by SAMR were not the same as those imposed in Europe.

Unpredictable and long review timeline. Amongst the two semiconductor transactions conditionally approved by SAMR in 2021, the Cisco / Acacia case took 450 days from filing to approval, while the SK Hynix / Intel case took 369 days. Both transactions involved "pull and re-file" mechanisms. As for other semiconductor transactions in 2021, the parties in GlobalWafers / Siltronic and AMD / Xilinx also pulled and refiled after the expiry of the statutory review period (i.e. 180 calendar days), and delayed their plans to close the transaction. Meanwhile, after a long review of almost 1.5 years, Applied Materials' acquisition of Kokusai was ultimately terminated as Applied Materials failed to offer satisfactory remedies to address SAMR's concerns.

09

Digital and patent litigation

Antitrust litigation continues to evolve in China. Last year, a number of cases were brought before the courts that relate to the digital economy. In addition, China's courts have adopted the essential facilities doctrine and adjudicated global standard essential patent ("SEP") disputes.



1. Digital antitrust lawsuits

In the digital space, a number of abuse of dominance challenges have been brought by competitors, in-platform customers and intermediaries, and users on the grounds of platform access and interoperability:

- **TikTok v. Tencent.** TikTok challenged Tencent's restrictions on users to share content from TikTok through WeChat and QQ.
- **Wang (individual) v. Meituan.** A Meituan user accused Meituan of preventing the use of Alipay to make payments on the platform.
- **Yifang Software v. Weibo.** Yifang Software challenged Weibo's refusal to issue a data license on reasonable terms constituted an abuse of market dominance and requested the court to order Weibo to allow Yifang Software to use Weibo's data on reasonable terms.

2. Global SEP disputes

China's courts have heard a number of cases related to global standard essential patent disputes, which illustrates that:

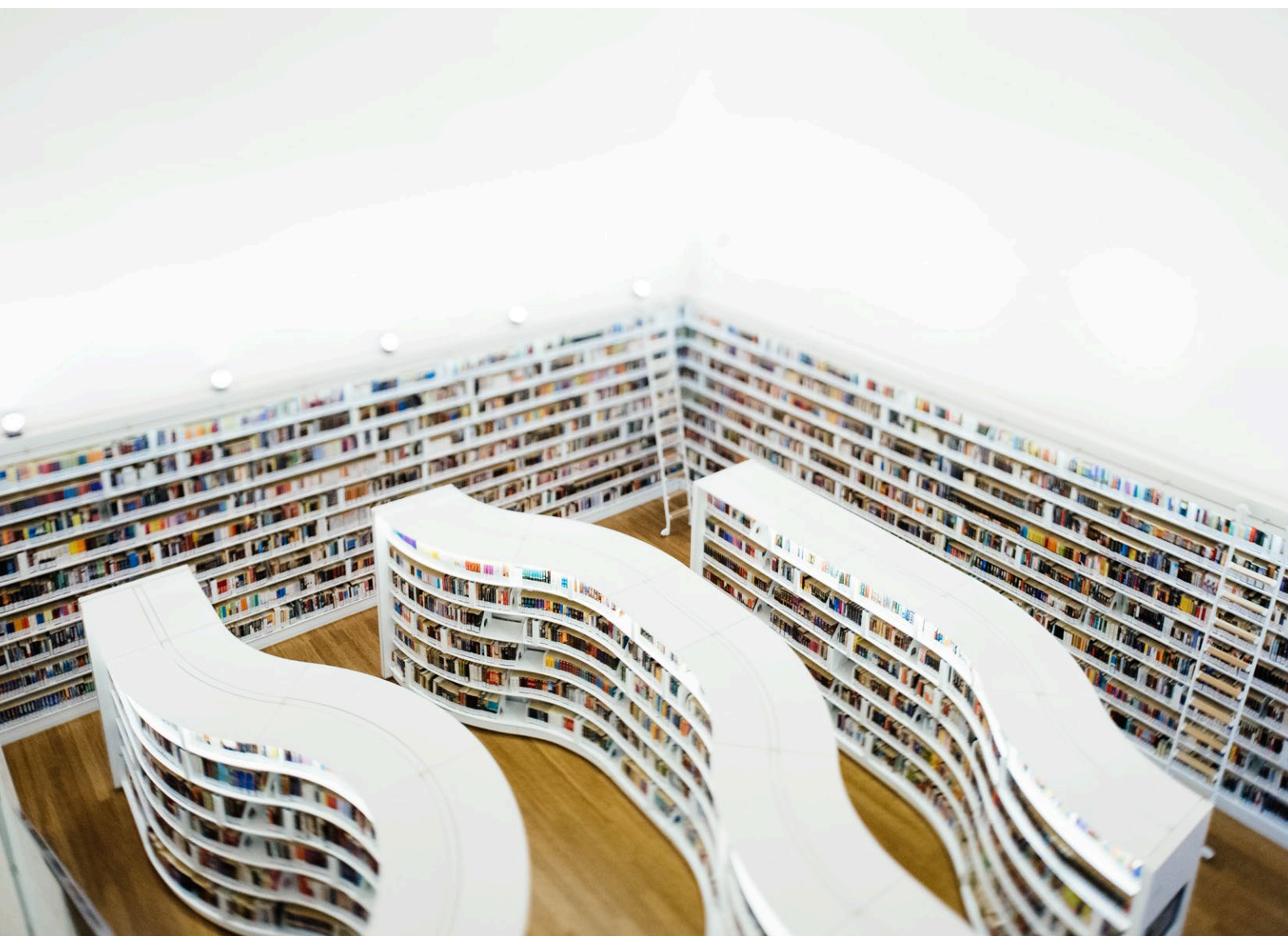
- China's courts have jurisdiction (i) over extraterritorial anticompetitive conduct involving SEPs which affect Chinese manufacturers and (ii) to adjudicate Chinese and global royalty rates for SEPs; and
- Chinese courts have to issue an "anti-suit injunction" when other jurisdictions are "contesting" the jurisdiction being exercised by Chinese courts for the royalty rates of SEPs.

Given that the UK and US courts have also previously confirmed jurisdiction over global royalty rates for SEPs, potential conflicts on jurisdiction and decisions between different jurisdictions are foreseeable. Such conflicts issue could in fact cause parties to settle (e.g. in the licensing disputes between Samsung and Ericsson and that between Xiaomi and Inter Digital).

3. Essential facilities doctrine

In 2021, a Chinese court for the first time applied the “essential facilities” doctrine to patents that are non-standard essential patents. The patent holder was found to have abused its dominance by refusing to license patents necessary for its competitors to compete. Sintered NdFeB patents owned by Hitachi Metal were considered “essential facilities” for the production of sintered NdFeB products. Hitachi Metal was ordered to offer a license for the patents on “fair, reasonable and non-discriminatory” terms as the refusal to license the patents violated China’s antitrust laws.

The adoption of the essential facilities doctrine will likely have extensive influence on the licensing and operation of many patents in the future, including patents that are not SEPs but are commonly used in various industries, especially in the industries of electronics, semi-conductor, medicine, information technology. The decision of the court is currently under appeal.





10

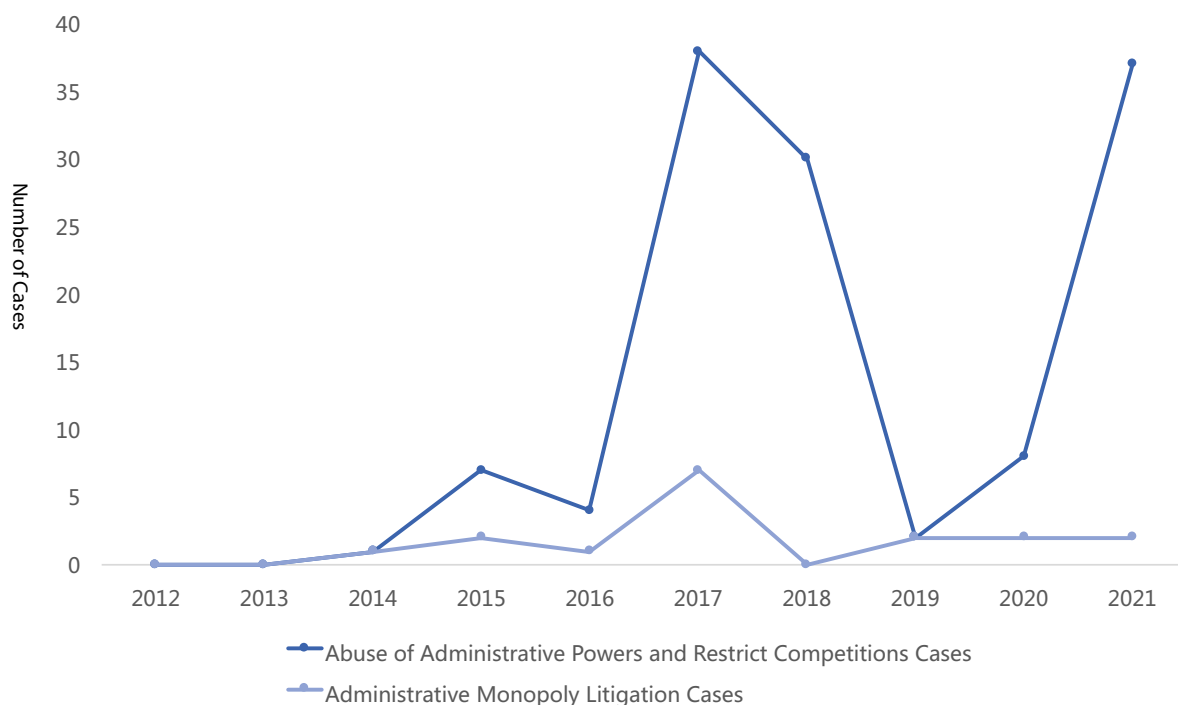
Administrative monopolies

China strengthened the enforcement against abuse of administrative power by government authorities (known as “administrative monopolies” in China) and refined the operational guidelines for fair competition review. In the future, the antitrust authorities can be expected to continue to crack down on administrative monopolies across China, particularly in light of a more concrete framework for review under proposed reforms to China’s antitrust laws.

1. Enforcement against administrative monopolies

China has continued to step up enforcement against administrative abuses of power to protect competition. In 2021, the number of cases involving administrative monopolies was higher compared to the previous two years, with a total of 38 cases. The conduct concerned involved local authorities' discriminatory treatment in bids towards non-local enterprises and issuing administrative licenses to favor local businesses.

Cases relating to administrative monopolies in the past ten years



2. Fair Competition Review (“FCR”)

A fair competition review mechanism was first introduced in 2016, which prohibits government agencies authorized to manage public affairs (referred to as “policy-making agencies”) from engaging in practices that impede market entry or treat businesses unfairly. A self-review is required to ensure compliance in making regulations and policies that may affect market activities. In July 2021, SAMR issued the Implementation Rules for Fair Competition Review (“**Implementation Rules**”), which provide detailed operational guidelines for the implementation of the FCR mechanism:

- **Protecting economic interests.** To protect economic interests, the Implementation Rules require policy-making agencies to consult with stakeholders or the public, which would allow interested third parties to challenge policies and measures.
- **Focus on key challenges businesses face and comprehensively refine the review criteria.** The Implementation Rules put forward more stringent and detailed review criteria, addressing key challenges faced by enterprises in past policy formulation processes. Specifically, the Implementation Rules specify how authorities should set out market entry and exit requirements. Policy-making agencies are prohibited from applying unreasonable or discriminatory access and exit conditions or granting franchise rights to operators without going through fair competition.
- **Reporting and complaint mechanism.** The Implementation Rules formally establish a reporting mechanism for businesses and individuals to raise complaints against policies that allegedly have not been subject to the FCR process.

It is expected that FCR will also be reflected in the amended Anti-Monopoly Law, which will provide a legal basis and framework for the mechanism previously established by administrative rules.



China's pre-eminent competition practice

Since its inception almost 14 years ago, China's antitrust regime has quickly evolved to become one the world's most influential and active systems alongside that of Europe and the United States. Our team continues to be the market leader in defending clients before China's competition authority across all competition matters.

Your antitrust contacts

Michael Han

Antitrust Partner, Beijing / Shanghai
E: michael.han@fangdalaw.com

Andrew Skudder

Antitrust Partner, Hong Kong
E: andrew.skudder@fangdalaw.com

Caroline Huang

Antitrust Partner, Beijing
E: caroline.huang@fangdalaw.com

Jin Wang

Antitrust Partner, Hong Kong
E: jin.wang@fangdalaw.com



No 1 across the board

Competition/Antitrust (PRC Firms): Band 1

Chambers Greater China, 2022

GCR100 Chinese Law Firm: Elite

Global Competition Review (GCR) 100, China Jurisdiction, 2022

Antitrust and Competition: PRC firms: Tier 1

The Legal 500 Asia Pacific, 2022

Competition/Antitrust: Outstanding

Asialaw Profiles, 2022

Competition/Antitrust Firm of the Year

Legal expertise awards, Regional Awards, Asialaw Awards, 2021

Merger Control Matter of The Year: Asia-Pacific, Middle East and Africa:

ZF Friedrichshafen / WABCO

Global Competition Review (GCR) Awards, 2021

Beijing

27/F, North Tower
Beijing Kerry Centre
1 Guanghua Road
Chaoyang District
Beijing 100020, China

Tel: +86 10 5769 5600
Fax: +86 10 5769 5788

Guangzhou

17/F, International Finance
Place, 8 Huaxia Road,
Zhujiang New Town
Guangzhou 510623, China

Tel: +86 20 3225 3888
Fax: +86 20 3225 3899

Hong Kong

26/F, One Exchange Square
8 Connaught Place, Central
Hong Kong

Tel: +852 3976 8888
Fax: +852 2110 4285

Shanghai

24/F, HKRI Centre Two,
HKRI Taikoo Hui
288 Shi Men Yi Road
Shanghai 200041, China

Tel: +86 21 2208 1166
Fax: +86 21 5298 5599

Shenzhen

17/F, Tower One, Kerry Plaza
1 Zhong Xin Si Road
Futian District
Shenzhen 518048, China

Tel: +86 755 8159 3999
Fax: +86 755 8159 3900