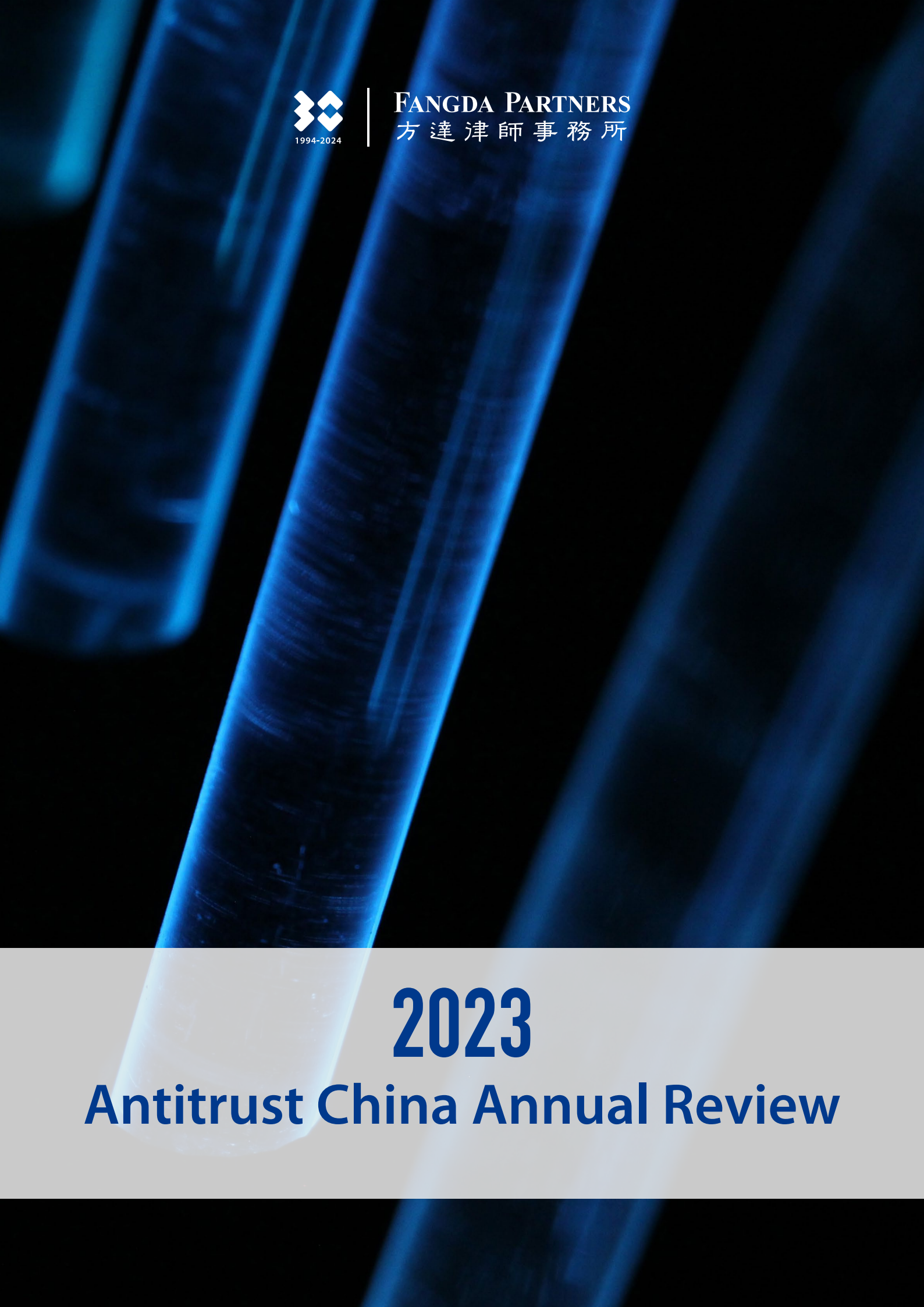

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FANGDA PARTNERS
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2023
Antitrust China Annual Review

1994-2024

Our annual review examines the ten trends in China's antitrust regime in 2023 and presents the forecasts for 2024.

01 Strengthening China's Antitrust Framework: Regulatory Refinement

- **Enhanced clarity in antitrust regulation**: A comprehensive set of regulations is now in force following the key amendments to China's Anti-Monopoly Law ("**AML**") in 2022, providing critical updates and clarifications to the framework for antitrust enforcement and compliance.

- **Streamlined antitrust enforcement processes**: The introduction of phased enforcement (through the "three notices and one letter" system), along with detailed guidelines, underscores risk prevention and compliance over the exercise of harsher enforcement tools and powers.

02 Antitrust Enforcement: A Shift to Balanced Enforcement

- **Livelihood sectors under antitrust watch**: Anticompetitive practices in livelihood-related sectors and hardcore horizontal agreements remain a priority, but the enforcement focus targeting resale price maintenance practices is diminishing.

- **Digital sector sees regulatory shift**: In the wake of high-profile digital cases in the last few years, a more moderate approach centered around self-discipline and monitoring is prevailing over harsher interventions.

03 Industry Focus: Pharma Conduct under the Microscope

- **Hefty fines imposed on pharmaceutical companies**: In 2023, the pharmaceutical sector was again under regulatory spotlight as eight pharmaceutical companies were penalized for engaging in different types of anticompetitive practices. Hefty fines were imposed.

- **Pricing strategies**: Anticompetitive conduct affecting prices of active pharmaceutical ingredients, including price-fixing, resale price maintenance and excessive pricing has continued to gain regulatory interest in line with the authorities' goal to safeguard consumer rights.

04 Intellectual Property Rights: Enhanced Regulatory Frameworks to Challenge Rising Litigation Activity

- **Balancing IP rights and innovation**: As a result of increased IP litigation in transaction negotiations, regulations and draft guidelines focus on striking a balance between safeguarding IP rights and fostering innovation.

- **China Asserts Authority in Global SEP Disputes**: China's Supreme People's Court reaffirmed the jurisdiction of Chinese courts over global licensing rates, solidifying China's position in the global battleground for SEP disputes.

05 Merger Control: Higher reporting thresholds but conditions for intervention continue to expand

- **Revised notification threshold**: The revised merger notification thresholds have finally become effective, elevating the global turnover of all the undertakings to RMB12 billion (approx. US$1.70 billion), or the Chinese turnover of all the undertakings to RMB4 billion (approx. US$567.64 million), and the Chinese turnover of each of at least two undertakings to RMB800 million (approx. US$113.53 million). It is expected that fewer transactions will become notifiable, reducing the reporting requirements of transactions of a smaller scale.

- **Reviewing transactions below reporting thresholds**: Following the revision to the notification thresholds, it is expected that SAMR may more actively intervene transactions that do not meet the stipulated thresholds but could harm competition.

06 Industry Spotlight: Supply Chain Security of Semiconductors and Critical Technologies

- **Security of supply**: Despite trade tensions, China is willing to give its blessing to global semiconductor transactions so long as China's access to supply remains intact.
- **Caution in AI and automotive investments**: Heated competition in the artificial intelligence and automotive sectors between China and other countries may drive scrutiny of semiconductor deals in these sectors.

07 Judicial Practice: Increased Interaction between Judiciary and Administrative Authorities

- **Rise on follow-on litigation**: Follow-on antitrust litigation has surged in the past year after China's Supreme People's Court recognized the potential use and reliance of administrative penalty decisions in bringing follow-on damages claims. Businesses must be alert about exposure to civil liabilities for antitrust violations.
- **Judicial insights on the revised AML**: While the judicial interpretation on the revised AML remains pending, Chinese courts have shed light on both substantive and procedural issues, including the conditions that need to be met to demonstrate "collective dominance" or that an arbitration agreement does not prevent Chinese courts from intervening over antitrust disputes.

08 Greater Bay Area: Hong Kong's Booming Development in Competition Enforcement

- **Focus on the digital economy and sectors affecting daily lives**: Businesses active in the digital economy and sectors that affect people's daily lives are particularly vulnerable to antitrust scrutiny, as the Hong Kong Competition Commission is actively regulating such sectors.
- **Continued interests in cartels**: Cartel behavior continues to be an enforcement priority in Hong Kong, with two high-profile cartel cases subject to Tribunal proceedings in the past year alone. One concerns commission-rate-fixing between real estate agents and the other involves bid-rigging in an attempt to misappropriate government subsidies.

09 National Security/Foreign Investment Review: Potential Politicization and Stricter Scrutiny of Cross-Border Investments

- **More clarity through NDRC engagement regarding inbound transactions**: To help mitigate review uncertainties for sensitive deals, foreign investors can proactively consult with China's NDRC to clarify national security review requirements.
- **Western scrutiny intensifies on Chinese outbound capital**: Concurrently, Chinese investments in high-tech and critical resources are increasingly scrutinized under rapidly expanding foreign investment review measures in key Western jurisdictions.

10 Emerging Trends in Global Antitrust: Future Enforcement Directions in China

- **Emerging Interest**: In line with global developments, Chinese authorities are increasingly examining antitrust issues in labour markets and the burgeoning AI sector.
- **ESG competition issues**: The increasing global focus on Environmental, Social, and Governance (ESG) initiatives is expected to undergo scrutiny in China to ensure compliance with antitrust regulations.

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CONTENTS

Class of 2023: Key Legislative Developments

Regulatory provisions/guidelines officially released in 2023

Name of the document	Date of publication of the finalized version	Date of publication of the consultation draft
Regulatory provisions		
The Provisions on Prohibiting Abuse of Dominant Market Positions	March 10, 2023	June 27, 2022
The Provisions on Prohibiting Anticompetitive Agreements	March 10, 2023	June 27, 2022
The Provisions on Prohibiting Abuse of Administrative Power to Eliminate or Restrict Competition	March 10, 2023	June 27, 2022
The Provisions on the Review of Concentration of Undertakings	March 10, 2023	June 27, 2022
The Provisions on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition	June 25, 2023	June 27, 2022
Guidelines		
The Anti-Monopoly Compliance Guidelines for Undertakings in Hebei Province	March 24, 2023	/
The Guidelines for Implementing Third-Party Assessment of Fair Competition Review	April 26, 2023	/
The Anti-Monopoly Compliance Guidelines for Platform Enterprises in Heilongjiang Province	June 13, 2023	/
The Anti-Monopoly Compliance Guidelines for Undertakings in Shanxi Province	July 17, 2023	/
The Anti-Monopoly Compliance Guidelines for Concentration of Undertakings in Hunan Province	August 2, 2023	/
The Anti-Monopoly Compliance Guidelines for Public Utilities Enterprises in Hainan Province	August 24, 2023	June 30, 2023
The Guidelines for Antitrust Compliance in the Concentration of Undertakings	September 5, 2023	June 19, 2023
The Beijing Anti-Monopoly Compliance Guidelines	September 7, 2023	/
The Shaanxi Provincial Anti-Monopoly Compliance Guidelines for Construction Materials Industry	September 15, 2023	August 18, 2023
The Compliance Evaluation Guidelines for Internet Platform Enterprises (Shanghai)	October 20, 2023	June 30, 2023
The Guidelines for Regulatory Interview on Enforcement Against Abuse of Administrative Power to Exclude or Restrict Competition	October 23, 2023	/
The Anti-Monopoly Compliance Guidelines for Undertakings (Liaoning)	October 30, 2023	August 21, 2023
The Competition Compliance Guidelines (Anti-Monopoly) for Internet Platform Undertakings in Guangdong Province	November 1, 2023	/
The Liaoning Province Regulation on Promoting Fair Market Competition	November 15, 2023	July 4, 2023
The Competition Compliance Guidelines for Enterprises in Shenzhen	December 14, 2023	/

Draft guidelines for consultation released in 2023

Name of the document	Date of publication of the consultation draft
The Regulations on Fair Competition Review (draft for consultation)	May 12, 2023
The Anti-Monopoly Guideline for Industry Associations (draft for consultation)	May 15, 2023
The Anti-Monopoly Guidelines in the Field of Standard Essential Patents (draft for consultation)	June 30, 2023

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Class of 2023: By the Number

786
The number of transactions approved

707
The number of simple case decisions

75
The number of unconditional normal case decisions

4
The number of conditional clearance decisions

20
The average review days of simplified cases

363
The average review days of remedy case

20
The number of behavioral investigations concluded*

12
The number of cartel cases

1
The number of vertical restraints cases

8
The number of abuse of dominance cases

* There is one case that involves both cartel and abuse of dominance behaviors.

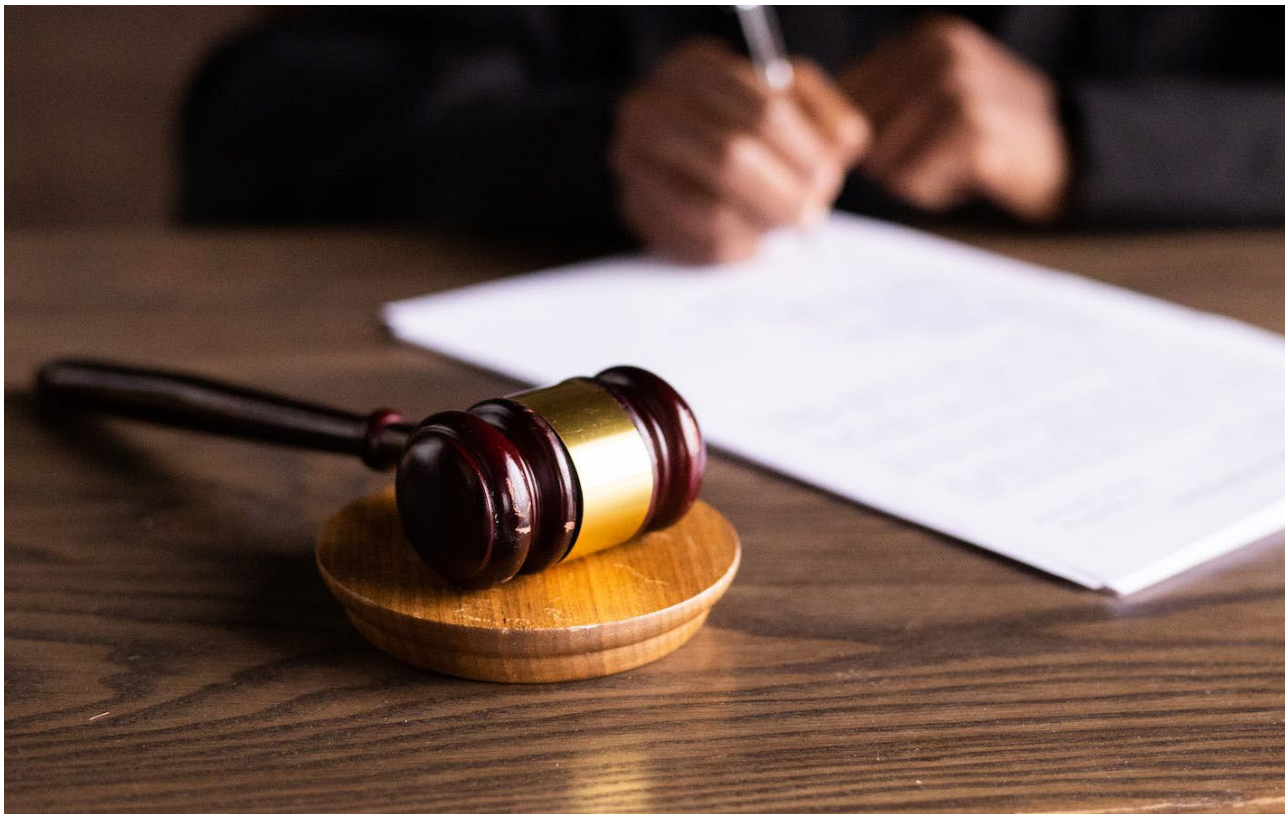
RMB175 million (approx. US$24.83 million)
The largest penalty imposed in a single decision

01 Strengthening China's Antitrust Framework: The Journey of Regulatory Refinement

Outlook for 2024

Heading into 2024, we foresee a continued effort to sharpen and define antitrust and anti-unfair competition legislations and regulations. Key legislative enhancements are expected, including the clarification of the concept of "superior bargaining power" under revisions to the Anti-Unfair Competition Law ("**AUCL**").

Moving forward, it is anticipated that the State Administration for Market Regulation ("**SAMR**"), along with its local branches, will introduce a more comprehensive set of rules and guidelines. These developments are expected to reinforce the existing antitrust framework, clarify the boundaries of compliant business conduct, and improve the predictability of regulatory outcomes for enterprises. Key antitrust guidelines, including those concerning horizontal concentrations of undertakings and standard essential patents, are expected to be finalized. This progress underscores a commitment to fostering greater transparency and predictability for market participants.



With the revised Anti-Monopoly Law ("**AML**") debuted in 2022, China's antitrust efforts advanced significantly in 2023. This new framework not only encapsulates a decade's worth of enforcement achievements but also integrates lessons from international practices. As the legal infrastructure around the new law solidifies, updates to the implementing rules are being carefully considered. The antitrust authorities are tasked with the challenging job of creating a level playing field. They must carefully balance the need to safeguard innovation alongside preserving vigorous competition, and strike an equilibrium between enforcement and providing businesses with the latitude to operate and grow.

1. Clarifying the Regulatory Framework in the Wake of the AML Amendments

In 2023, following the revision of the AML, SAMR systematically introduced a suite of supporting regulations, including:

- The Provisions on Prohibiting Abuse of Dominant Market Positions;
- The Provisions on Prohibiting Anticompetitive Agreements;
- The Provisions on Prohibiting Abuse of Administrative Power to Eliminate or Restrict Competition;
- The Provisions on the Review of Concentration of Undertakings; and
- The Provisions on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition.

These regulations mark the transition from interim versions to a more established legal framework that encapsulates the essence of the revised AML while also reflecting the cumulative experience of past antitrust enforcement and aligning with current practices.

- **The introduction of the "efficiency defense" in resale price maintenance ("RPM")**: One significant update is the introduction of an "efficiency defense" for RPM activities. The updated Provisions on Prohibiting Anticompetitive Agreements now allow undertakings to justify RPM agreements under certain conditions. While the principle of prohibition remains, this opens a pathway for companies to argue for the positive effects of RPMs. In theory, if a company can convincingly demonstrate that its RPM practices do not harm competition, such practices may not be deemed illegal. However, the burden of proof is substantial, and the lack of clarity in the standard of proof means that, in practice, successfully defending such practices may be challenging.

- **Enhancing the approach to determining "collective dominance" under AML and SAMR's guidelines**: The AML outlines that, if the combined market share of two undertakings exceeds two-thirds, or that of three undertakings exceeds three-quarters, it can be presumed that these businesses hold a collective dominant market position. The Provisions on Prohibiting Abuse of Dominant Market Positions have refined the basis in determining collective dominance, prioritizing "consistency of behavior" as the primary condition for recognizing that two or more undertakings possess dominance. This aligns with the approach outlined in the draft judicial interpretation by the Supreme People's Court ("**SPC**") in 2022 regarding the determination of "collective dominance". However, these judicial rules have not yet been formally implemented, with expectations that they will be introduced in 2024.

- **Traditional analysis prevails for assessing the market power of digital platforms**: Platform enterprises are particularly at risk of infringing antitrust regulations due to unilateral actions that may be interpreted as abusing a dominant market position. The distinctive features of these companies, such as operating within two-sided markets and benefiting from indirect network effects, complicate the technical process of defining their relevant markets. Despite some calls to forgo market definition and to assess dominance

without undergoing a complex market definition exercise, the Provisions on Prohibiting Abuse of Dominant Market Positions retain the requirement for market definition. This approach insists on a thorough identification and definition of the relevant market for platform enterprises, a practice that is consistent with recent enforcement cases targeting platform-based abuse of dominance.

- **Strengthening the practicality of the merger control regime**: The new merger control regulations reflect improvements based on past enforcement experiences, aiming to create a more effective and practical framework.
    - **Clarifying "gun-jumping" in merger control**: Post-AML revision, SAMR has stipulated higher penalties for gun-jumping (including both failure to notify and premature implementation of transactions before clearance), with fines scaling up to RMB5 million (approx. US$710,000) or 10% of the previous year's sales, depending on the impact on competition. Under the Provisions on the Review of Concentration of Undertakings, SAMR now clearly defines what constitutes "gun-jumping" to help undertakings comply with the regulations. The non-exclusive list covers, (i) completing the registration of changes in shareholders or rights; (ii) appointing senior management personnel; (iii) participating in business decision-making and management; (iv) exchanging sensitive information with other operators; and (v) business integration.
    - **Reviewing transactions below reporting thresholds that harm competition**: SAMR has the authority to review transactions that may not meet reporting criteria but could still harm competition. New rules under the Provisions on the Review of Concentration of Undertakings require undertakings, upon receipt of SAMR's notice, to make a notification within 120 days of notice and, if the transaction is already implemented, to suspend the transaction. SAMR's active stance on reviewing such transactions reflects a commitment to a robust merger review, as further discussed in Chapter 05.

2. Establishing the "Three Notices and One Letter" System for Antitrust Enforcement

In December 2023, the State Council's Office of the Anti-Monopoly and Anti-Unfair Competition Commission and SAMR announced the implementation of the "three notices and one letter" system. This initiative enhances the toolkit for antitrust enforcement by introducing a progressive enforcement mechanism consisting of reminders, interviews, and formal investigation processes. By fostering proactive compliance, the system streamlines antitrust enforcement in China, providing a structured yet flexible approach to regulation and enabling central oversight of local enforcement.

The components of the "Three Notices and One Letter" system are as follows:

- **Letter of reminder and urging**: In the "risk prevention stage", this serves as a proactive measure, alerting businesses and authorities to comply with the AML and rectify issues promptly upon risk identification.
- **Notice of interview**: Should initial remedial efforts falter, or suspicions of anticompetitive conduct arise, parties are called in for a dialogue to address potential violations and encourage compliance.
- **Notice of case initiation and investigation**: Triggered by substantial indications of anticompetitive actions, insufficient rectifications post-interview, or recurrent issues, this notice marks the onset of a formal inquiry into the suspected antitrust behavior.

- **Notice of administrative penalty/administrative suggestion**: After concluding an investigation, SAMR (or its local branches) issues a penalty to businesses found to have violated the AML, or an administrative suggestion to government bodies, depending on the entity involved.

Application of the "Three Notices and One Letter" system

	Letter of reminder and urging	Notice of interview	Notice of case initiation and investigation
Applicable stage	In the risk prevention stage, enterprises and administrative authorities are urged to make timely rectifications after discovering risks.	If efforts to make corrections fail or if anticompetitive behavior is suspected, the parties may be interviewed.	There is preliminary evidence proving the existence of anticompetitive behavior; or rectification has not been made within the time limit after the interview, the problem has not been adequately rectified, or the problem reoccurs after rectification.
Applicable situations	• Engaging in risks related to anticompetitive agreements or, abuse of dominance, or the risk of trade associations organizing undertakings in the industry to reach anticompetitive agreements. • Risks associated with not notifying concentrations of undertakings according to the law or implementing concentrations of undertakings in violation of review decisions. • Risks of failing to fully comply with the commitments in exchange for an investigation to be ceased or to comply with the requirements of an administrative penalty rectification. • Risks of abusing administrative power to exclude or restrict competition or inadequacies in implementing the fair competition review system. • Relevant units or individuals not actively cooperating with SAMR in their review and investigation process. • Local market regulatory authorities are not fully performing their duties of antitrust and fair competition reviews or slow progress in their work.	• Cases where reminders and prompts for rectification are overdue, or the rectification is inadequate. • Undertakings are suspected of engaging in anticompetitive agreements or abuse of dominance, or trade associations are suspected of organizing industry undertakings to reach anticompetitive agreements, which trigger public opinion or cause adverse effects, or there is a need for them to propose improvement measures. • Relevant units or individuals suspected of refusing or obstructing the review and investigation carried out by SAMR. • Suspicions of engaging in the abuse of administrative power to exclude or restrict competition or inadequacies in implementing the fair competition review system, which triggers public opinion or causes adverse effects. • Local market regulatory authorities do not adequately perform their duties in antitrust and fair competition reviews or slow progress in their work, leading to public opinion or other adverse effects.	• Engaging in anticompetitive agreements, abuse of dominance, or industry associations organizing undertakings within the industry to reach anticompetitive agreements, and such cases are within the legal time limit for administrative penalties. • Engaging in concentrations of undertakings without lawful notifications or in violation of review decisions. • Relevant units or individuals who refuse or obstruct the review and investigation carried out by SAMR • Administrative authorities that engage in the abuse of administrative power to exclude or restrict competition.
Feedback required	Submission of rectification measures in writing	Submission of improvement measures	Cooperation in antitrust investigations

In fact, after the AML amendments clarified the administrative interview system for the first time in 2022, the antitrust authorities have already started to use administrative interviews in practice in 2023. For example, in June 2023, SAMR interviewed four pig breeding enterprises for initiating the "Mutual No-Poaching Convention". For further discussion of this case, please see Chapter 10.

3. SAMR and its Local Branches Enhance Antitrust Compliance with New Guidelines

In 2023, SAMR led the creation and publication of antitrust compliance guidelines for concentrations of undertakings, while also drafting guidelines for industry associations, the field of standard-essential patents and horizontal mergers.

Similarly, many of SAMR's local branches introduced antitrust compliance guidelines tailored to their respective province/city. For example, in a move to strengthen antitrust enforcement, SAMR's Shanghai branch released its "Internet Platform Enterprise Competition Compliance Evaluation Guidelines" in October 2023, following a public consultation period. These guidelines serve as a blueprint for internet companies to construct robust compliance frameworks, featuring innovative elements such as routine communication protocols and a grading system that assesses a range of business operations. While not mandatory, these guidelines aim to bolster businesses' risk management and compliance strategies, with the added possibility that SAMR might take a company's compliance track record into account during investigations. This initiative is mirrored by other regions, including Heilongjiang and Guangdong, which have also introduced similar guidelines, contributing to a broader effort to promote a compliant, competitive marketplace.

4. Anticipated Updates: "Missing Pieces" in Current Regulations

China's antitrust authorities are making notable strides in reforming the antitrust framework to keep pace with the global shift towards stringent digital antitrust regulation. By assimilating the sophisticated practices of international jurisdictions, China is laying the groundwork for a more advanced antitrust landscape through its 2022-2023 legislation.

- **Safe harbor for vertical restraints remains pending**: The AML Amendments introduced a generic safe harbor provision for vertical restraints based on market share. While the 2022 draft version of the Provisions on Prohibiting Anticompetitive Agreements proposed a threshold of 15% market share in both the upstream and downstream markets, the final version removed such references. To date, the precise safe harbor for vertical restraints remains pending.

- **Potential reintroduction of the concept of "superior bargaining power"**: In November 2022, SAMR called for public feedback on the AUCL's draft amendments, which reintroduced the regulation of actions exploiting "superior bargaining power". The draft law prohibits undertakings with such "superior bargaining power" from engaging in six specified types of unfair competition, such as "either-or" clauses and forced bundling, without proper justifications. Should these provisions be officially adopted, companies yet to achieve a dominant position in the market might fall outside the scope of the AML but could still fall under the purview of the AUCL. However, the draft has attracted debates, particularly on how to define and regulate "superior bargaining power", and the need for clear guidance on how similar behaviors are treated under both the AML and the AUCL.

- **Platform enterprises and the question of self-preference**: The Provisions on Prohibition of Abuse of Dominant Market Position finalized in 2023 notably omitted the clause addressing "self-preferential treatment" by platform enterprises. This raises questions about the categorization of such behavior under the new regulations. Will these

actions be considered unfair or anticompetitive within the network sphere? Antitrust experts and businesses alike are attentive to how this aspect will be addressed in the final version of the legislation.

02 Antitrust Enforcement: A Strategic Shift to Measured Enforcement

Outlook for 2024

Looking ahead to 2024, we anticipate that sectors closely related to public welfare, such as pharmaceuticals and utilities, will remain under the spotlight for antitrust enforcement. Under the overarching theme of "regular supervision", businesses can expect to encounter softer enforcement measures such as interviews and warnings, with a heightened emphasis on corporate compliance requirements. Businesses will likely have greater opportunities to make proactive "rectifications" instead of facing direct penalties.

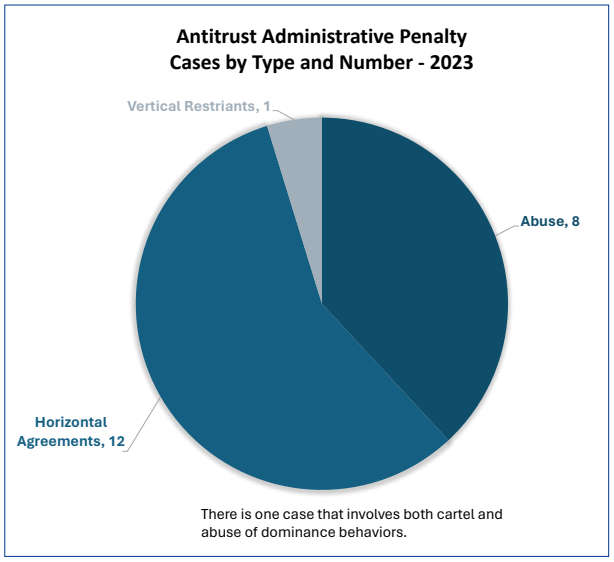
Furthermore, as governments at various levels continue to express encouragement for businesses' establishment of compliance systems, we also expect that the presence of robust compliance processes within enterprises will become a significant factor for antitrust authorities when deciding whether or not to initiate cases or impose penalties.

In 2023, the trend of regular supervision remained the overarching theme in antitrust enforcement, with the authorities focusing on anticompetitive activities in sectors that significantly affect the national economy and people's livelihoods, such as healthcare and public utilities. The overall objective was to safeguard public welfare and promote economic development.

While actively enforcing against those engaged in anticompetitive practices in these livelihood-related sectors, antitrust authorities have been vigorously promoting soft enforcement methods, integrating prevention and cessation of anticompetitive activities into their enforcement goals, and encouraging and supervising enterprises to proactively comply with antitrust regulations.

1. Continuing the Trend of "Regular Supervision"

In 2023, the Chinese antitrust authorities issued a total of 20 administrative penalty decisions for various non-merger anticompetitive actions, including 12 cases of horizontal anticompetitive agreements, one case of vertical anticompetitive agreement, and eight cases of abuse of dominance (one case involved both horizontal anticompetitive agreements and abuse of dominance). The number of penalty decisions was down on the 2022 numbers (25 cases), reflecting a more cautious approach by the antitrust authorities in issuing penalty decisions.



The antitrust authorities remained active in enforcing various types of anticompetitive behaviors in 2023. Of the 20 anticompetitive cases which led to administrative penalties, 19 were made by local authorities. There was a significant variance in the penalty amounts for different cases, with fines ranging from 1% to 8% of the annual turnover (with some cases not disclosing the penalty level). In six of these cases, the authorities also confiscated the illegal gains. As the illegal activities mainly occurred before the implementation of the new law, the old regulations were applied to determine and punish the involved enterprises.

Since the introduction of the administrative interview system in the new AML in 2022 (as discussed in Chapter 01), authorities have started using this system in 2023 practices:

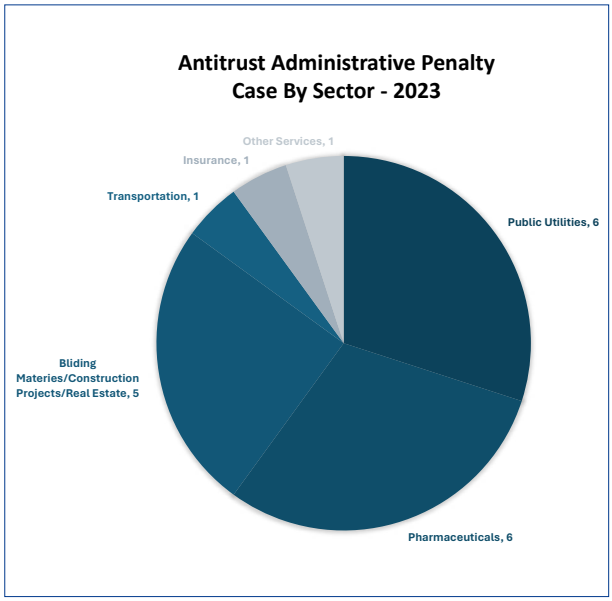
- In June 2023, four pig breeding companies were interviewed by SAMR for initiating a "no-poaching agreement", which was seen as contrary to the spirit of the AML and detrimental to the establishment of a unified national market. The companies were required to take immediate and effective measures to rectify their anticompetitive activities and to check for antitrust compliance risks.

- In August 2023, Didi and Gaode, two popular ride-hailing platforms in China, were jointly interviewed by governmental departments in Shenzhen, including the Transportation Bureau and SAMR's local branch in Shenzhen. The platforms were suspected of alleged anticompetitive practices and were urged to address and eliminate such alleged non-compliances promptly.

Future antitrust enforcement will emphasize the prevention and cessation of anticompetitive practices, with fines being only one of the means to achieve this goal. Enterprises will have more opportunities to eliminate anticompetitive risks through self-inspection and correcting their illegal behavior to avoid penalties.

2. Championing Public Welfare through Antitrust Enforcement

The antitrust authorities have remained resolute in bolstering enforcement within sectors integral to public welfare. Their concerted efforts have been particularly notable in addressing antitrust issues that affect everyday life, such as tackling abuses of dominance within the pharmaceutical ingredients sector, disrupting price-fixing cartels in public utilities, and scrutinizing the construction materials industry for anticompetitive practices.



(1) Horizontal Anticompetitive Agreements

In 2023, China's antitrust enforcement authorities continued to focus on combating core illegal activities that are widely considered to have severe restrictions on competition. These core violations often involve artificially inflating prices and restricting competition, leading to waste of social resources and inefficiency in allocation, and are broadly seen as "no-go zones" in business practices. Such core illegal activities are explicitly listed in Article 17 of the AML, which addresses horizontal anticompetitive agreements, including (i) price-fixing, (ii) market division, (iii) joint restrictions on production and sales volumes, (iv) joint restrictions on technology development, and (v) joint boycotts.

For instance, in August 2023, the case involving "Yuan Da New Environmental Building Materials Co., Ltd. and three other companies" was announced. SAMR identified that these companies had fixed prices and divided the market by establishing a joint production operation, pursuant to which they controlled the price of ready-mixed concrete and allocated sales profits.

Beyond these core violations, other horizontal agreements not explicitly listed in the AML but which have anticompetitive effects have also come under scrutiny. The Grand Pharmaceutical case is one example, where the authorities penalized a "non-compete arrangement" between competitors as a horizontal anticompetitive agreement that restricted the production and sales quantities. The case is discussed further in Chapter 03.

The sectors covered by the enforcement cases of horizontal anticompetitive agreements in 2023 included public utilities, pharmaceuticals and healthcare services, building materials/construction, real estate, insurance, chemical products, and cultural entertainment. This demonstrates the enforcement authorities' broadening scope, ensuring a competitive order across diverse industries and sectors.

Enforcement against industry associations: Industry associations, serving as bridges between the government and businesses, have a vital role in providing policy consultation, strengthening industry self-discipline, promoting industry development and protecting corporate rights. However, some associations have organized anticompetitive activities under the guise of maintaining industry interests with the potential effect of distorting the market and having a negative impact on consumer rights. In 2023, punishments were meted out to associations such as the Fujian Province Explosive Materials Industry Association, the Chengdu Engineering Cost

Association, and the Beijing Go Association.

(2) Vertical Anticompetitive Agreements

In 2023, there were far fewer vertical anticompetitive agreement cases, with only one case –the Beijing Purple Bamboo Pharmaceutical case – being prosecuted. This reduction, against the backdrop of an overall decline in the number of penalized cases, could signify a shift in the enforcement direction for vertical agreements, likely influenced by revised analysis approaches to RPM and the introduction of vertical safe harbor exemptions.

(3) Abuse of Dominance

The focus on abusive practices in 2023 continued along the lines of previous years, with attention being paid to unfair high pricing, unreasonable trading conditions, limiting transactions and differential treatment. The pharmaceuticals sector, closely related to public health and welfare, and the public utilities sector remained a priority for abuse of dominance enforcement.

The enforcement actions taken in 2023 reflect a commitment to maintaining market competitiveness and protecting consumer interests across a range of industries, with a particular focus on core illegal activities and an expanding scope of attention to include a wider array of sectors.

Case study: Two public utility companies faced penalties for abusing dominance

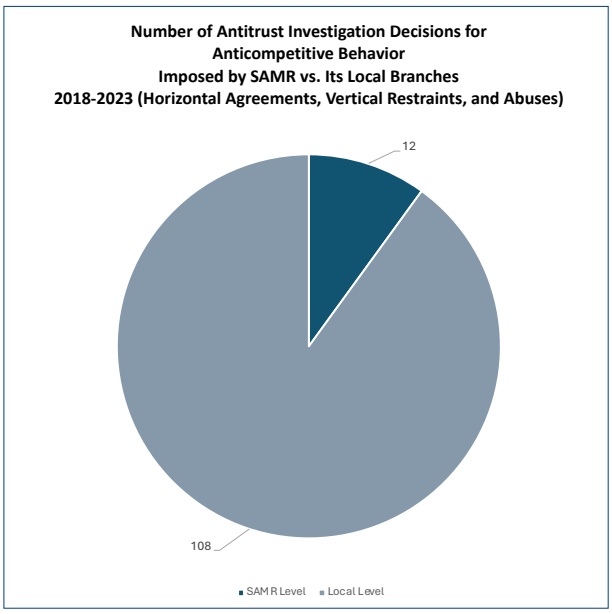
On January 18, 2023, the Jiangsu Provincial Administration for Market Regulation imposed a fine of RMB50.4 million (approx. US$7.15 million) on **Nanjing Zhongran City Gas Development Co., Ltd.** for abusing its dominance. The fine included RMB20.8 million (approx. US$2.95 million, equivalent to 2% of its 2018 sales and the confiscation of RMB29.6 million (approx. US$4.20 million) in illegal gains. From 2016, Nanjing Gas had mandated the purchase of gas insurance, alarms, appliances and metal corrugated pipes as necessary conditions for gas installations in new residential developments, coercing developers to buy these products. If a developer objected, Nanjing Gas would resort to delaying the project or cutting off the gas supply to force acceptance of these terms. The Jiangsu Authority concluded that Nanjing Gas imposed unreasonable installation fees on developers for ancillary projects and non-residential gas pipelines, which amounted to "bundling and attaching unreasonable trading conditions".

On April 3, 2023, the Shandong Provincial Market Supervision Administration issued a penalty decision against **Huaneng Rizhao Thermal Power Co., Ltd.**, fining it 1% of its 2019 sales amounting to RMB42.6 million (approx. US$6.05 million). Since 2019, the company had abused its dominant market position without valid reasons, requiring residential developers to purchase its heat metering devices; failure to comply would result in a refusal of heat supply. Meanwhile, without justification, the company changed the billing method for some enterprises and institutions within its heating range from metered heat consumption to area-based charging, while still billing other similar entities on a heat consumption basis, leading

to excessive heating costs for those charged by area. It was found that the company abused its dominance by imposing restrictions on which entities it could do business with by applying differential treatment in transaction prices and other conditions without legitimate reasons.

3. Local Antitrust Enforcement Remains Robust

Local antitrust enforcement agencies have once again proven to be the cornerstone of antitrust enforcement. 19 out of the 20 penalty decisions issued this year were executed by local market supervision departments, underscoring their key role in the enforcement of China's competition laws.



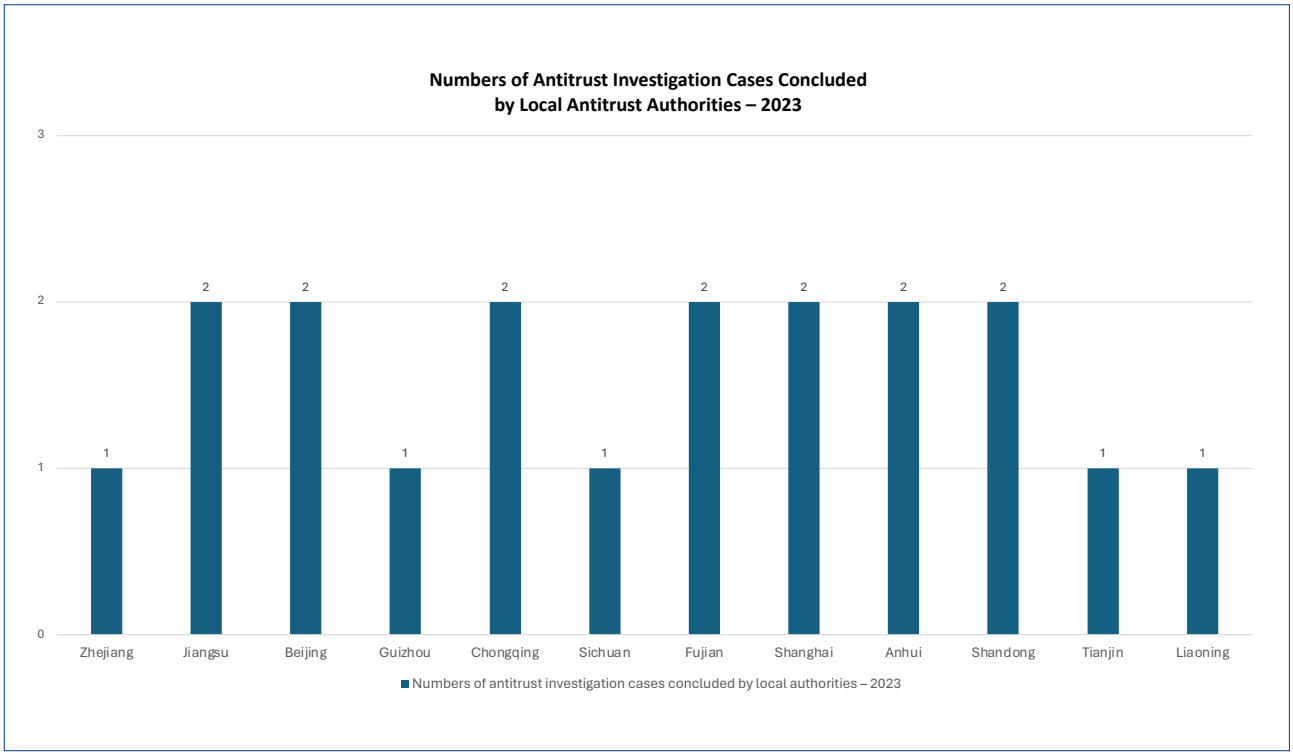
4. Digital Economy: A Shift Towards Measured Antitrust Oversight

In a notable shift, there was a significant decline in antitrust enforcement in the digital sector in 2023. Following a spate of high-profile cases relating to internet companies in recent years, antitrust authorities have redirected their focus towards a more comprehensive approach to competition enforcement, emphasizing education and cooperation with businesses to enhance regulatory efficiency. This change reflects a response to the lingering uncertainties arising from the pandemic, and complex global dynamics. A vital challenge for regulators has been to stimulate growth while ensuring the digital economy remains a catalyst for broader economic growth.

This year, the evolution of competition policies towards "regular supervision" of digital enterprises is evident, with policy directives indicating a future trajectory of regular, structured, and comprehensive antitrust regulation in this sphere.

Despite this calmer enforcement landscape, the digital sector remains under vigilant scrutiny, especially when social events ignite public interest. High-profile cases, such as the "lowest-price controversy" arising from a prominent Chinese influencer's live stream prior to the 2023 "Double Eleven" shopping festival, have propelled issues like "most-favored-nation" clauses and "either-or" clauses into the public discourse and regulatory spotlight. In a swift response, the Hangzhou Municipal Bureau of Justice introduced the Live Streaming E-commerce Industry Compliance Guidelines (Draft for Comment) to provide clearer guidance for live streaming businesses, notably prohibiting coercive "best price agreements" requested by certain key influencers, as this may hinder competition.

The outcome of this case and the potential for subsequent regulatory action remains to be seen, but it clearly indicates a regulatory environment that is attentive and responsive to both the market's evolution and public sentiment.


Numbers of Antitrust Investigation Cases Concluded by Local Antitrust Authorities – 2023
3
2
1
0
1
2
2
1
2
1
2
2
2
2
1
1
Zhejiang
Jiangsu
Beijing
Guizhou
Chongqing
Sichuan
Fujian
Shanghai
Anhui
Shandong
Tianjin
Liaoning
Numbers of antitrust investigation cases concluded by local authorities – 2023

03 Industry Focus: Pharmaceutical Sector Remains in High Antitrust Alert

Outlook for 2024

The pharmaceutical industry faced an unprecedented anti-corruption drive in 2023, accompanied by unrelenting antitrust scrutiny. The sector remained under a regulatory spotlight with a high count of penalized instances and record-breaking fines for a spectrum of antitrust violations.

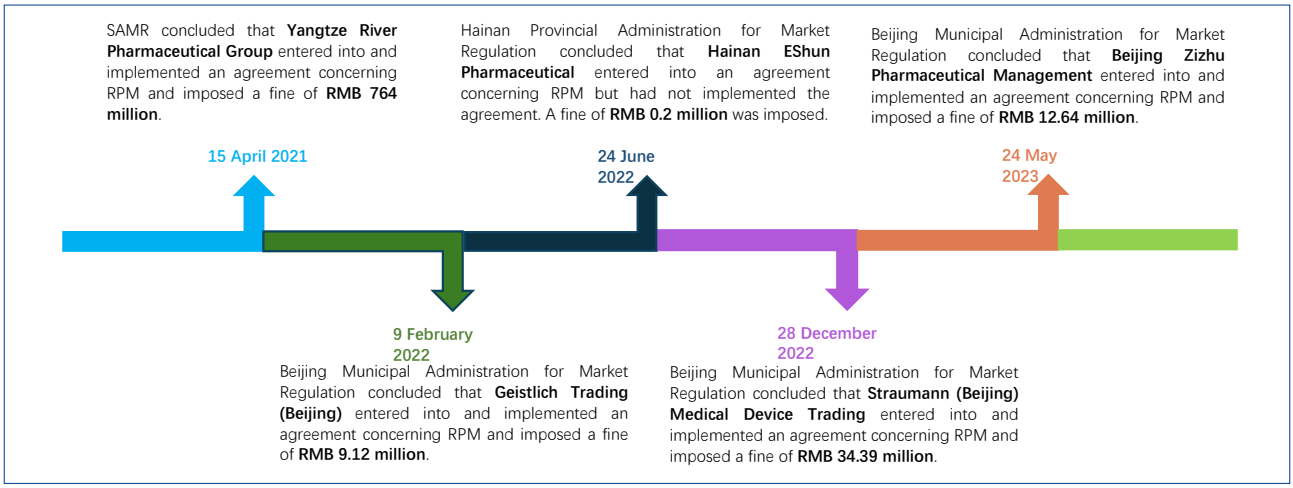
This trend is expected to persist in 2024 as antitrust authorities aim to protect public welfare and reduce medication costs. Beyond traditional enforcement tactics, regulatory bodies may increasingly utilize softer approaches, including administrative warnings and regulatory interviews, to encourage more robust internal compliance protocols within pharmaceutical companies.

In recent years, the pharmaceutical industry has been subject to vigorous antitrust enforcement as SAMR took intense and frequent actions against anticompetitive practices. It specifically targeted issues such as API shortages, shortages of drug products and excessive drug prices. The drugs involved in these cases include critical medications for the treatment of serious illnesses such as cancer and myocardial infarction. In 2023, eight pharmaceutical companies were penalized for anticompetitive practices, with fines of up to billions of RMB being imposed. Since the dawn of China's antitrust regime in 2008, around 50 pharmaceutical companies (including medical device companies) have been penalized.

In addition to regulatory enforcement, the pharmaceutical sector also remains a prominent area of focus in both merger control and antitrust litigation. Please refer to Chapter 05 for insights on merger control and Chapter 08 for detailed discussions on antitrust litigation.

1. Control of Distributor Prices (i.e., RPM) Remains a Key Enforcement Focus

Pharmaceutical companies have been penalized for RPM practices every year since 2021:



In 2023, the vertical price restraint case of Beijing Zizhu Pharmaceutical Management ("**Zizhu Pharmaceutical**"), which was the first vertical restraint case involving the pharmaceutical industry after the revised AML became effective in August 2022, once again bringing RPM issues to the forefront of public's attention.

Case study: Beijing Zizhu pharmaceutical management vertical price restraint case

It was found that, from 2015 to 2021, Zizhu Pharmaceutical entered into agreements with its nationwide distributors regarding the distribution of Levonorgestrel Tablets, namely "Commercial Distribution Agreements" with its primary distributors, and "Secondary Distributors Tripartite Agreements" with both primary and secondary distributors. Through these agreements, it engaged in RPM to control the resale prices of distributors at various levels by means of issuing price adjustment letters and

price maintenance notices. Additionally, Zizhu Pharmaceutical engaged in RPM by establishing sales management systems, entrusting data companies to monitor distributors' sales prices and implementing internal incentive and penalty measures to ensure compliance with its pricing policy.

The Beijing Administration for Market Regulation concluded that Zizhu Pharmaceutical implemented RPM.

Since the AML amendments, businesses engaging distributors have been paying close attention, particularly regarding whether there will be changes in the assessment of RPM and the application of the safe harbor exemption rules under new penalty decisions. Unfortunately, Zizhu Pharmaceutical's penalty decision provided limited guidance for the determination of vertical anticompetitive conduct under the amended AML. It merely stated that the former set of law remained applicable without clarifying whether the safe harbor exemption introduced under the AML amendments applies to conduct that took place before the amendments became effective (whether or not this was applicable to the Zizhu Pharmaceutical case itself). The decision also fell short of offering a more informed analysis of the exclusionary and restrictive effects on competition caused by the impugned conduct which would have been helpful for future reference. It is hoped that regulations and enforcement cases in 2024 will provide clearer guidance on SAMR's stance and thinking towards RPM.

2. Typical Cartel Conduct in The Pharmaceutical Industry Remains a Priority

In 2023, China saw a wave of law enforcement against corruption and non-compliance in the pharmaceutical sector, covering the entire production chain. In this context, efforts to address horizontal anticompetitive conduct such as price-fixing, bid-rigging and allocation of customers and markets among pharmaceutical companies have continued to strengthen.

- **Price collusion, market allocation and bid-rigging**: In the penalty decisions against Shanghai Xudong Haipu Pharmaceutical ("**XDHP**") and Tianjin Tianyao Pharmaceutical Technology ("**Tianjin Tianyao**"), the Shanghai Administration for Market Regulation determined that the two companies, which were competitors in the field of fluorouracil injection, held "multiple meetings" and "discussions on cooperation regarding fluorouracil injection" and reached an agreement to "communicate pricing with each other, avoid price wars, and link their prices" which resulted in an increase of winning bids prices and supply prices to companies in various regions. Meanwhile, the two companies also agreed to divide the national market in accordance with their respective strengths and cooperate in bidding to ensure that the other party would win the bid, for example, placing higher bids or not submitting bids when participating in tenders located in the other party's sales territory.

- **Non-compete arrangement amounting to output limitation**: In the penalty decisions against Grand Pharmaceutical ("**GP**") and Wuhan Healcare Pharmaceuticals ("**Healcare**"), SAMR found that the two companies, which were competitors in the market for epinephrine active pharmaceutical ingredients ("**APIs**") and norepinephrine APIs, entered into and implemented a non-compete arrangement by agreeing that Healcare would cease the sales of these APIs, in return for certain compensation from GP. This strengthened GP's market power and prevented drug producers from obtaining APIs from other sources. Such a non-compete arrangement was found to be anticompetitive. In the same case, SAMR also penalized GP for abuse of dominance (see the "case study" below).

Conduct such as collusion to increase prices, customer and market allocation, production and sales quantity

restrictions and bid-rigging between competitors are considered practices that severely restrict competition in many jurisdictions, including China. When engaging in cooperation with competitors, pharmaceutical companies should be vigilant about the risks of horizontal anticompetitive agreements and proactively conduct compliance assessments and risk mitigation measures.

3. Unjustifiable High Prices of Critical Drugs and Other Forms of Abuse Are Key Enforcement Focus

In 2023, various companies producing APIs, such as levocarnitine APIs, epinephrine APIs and norepinephrine APIs, were penalized for abusive practices. The end drug products corresponding to these APIs were all critical medications such as essential drugs, medical insurance drugs and clinical emergency drugs. Hence, any artificially inflated prices on the part of API manufacturers or drug producers would severely harm the interests of patients, let alone going against the objectives of the AML, which aim to safeguard consumers' rights and protect public interests.

In 2023, both SAMR and its local branches imposed penalties against pharmaceutical companies involved in unfair pricing practices amounting to abuse of their dominance. The cases include:

- **Northeast Pharmaceutical Group** was fined approximately RMB133 million (approx. US$18.87 million and 2% of its Chinese revenue in 2018) by the Liaoning Administration for Market Regulation for abusing its dominant position in the levocarnitine API market and engaging in unfair pricing practices.

- **Tianjin Jinyao Pharmaceutical** was fined approximately RMB27 million (approx. US$3.83 million and 2% of its Chinese revenue in 2019) by the Tianjin Administration for Market Regulation for abusing its dominant position in the camostat injection market and engaging in unfair pricing practices.

- **GP** abused its dominant position in the norepinephrine API and epinephrine API markets by imposing unreasonable trading conditions, in addition to engaging in horizontal anticompetitive agreements. For both offenses, it was fined a total of RMB136 million (approx. US$19.30 million and 3% of its Chinese revenue in 2019) by SAMR and had approximately RMB149 million (approx. US$21.14 million) of illegal gains confiscated, amounting to RMB285 million (approx. US$40.44 million) in aggregate.

- **Healcare** and other pharmaceutical companies were found to have abused their dominance in the sales of injection-grade polymyxin B sulfate APIs and formulations at unfairly high prices. The companies involved were fined a total of over RMB91 million (approx. US$12.91 million and 3-8% of the involved companies' Chinese revenue in 2022) and had over RMB666 million (approx. US$94.51 million) of illegal gains confiscated by the Shanghai Administration for Market Regulation.

Case study: Abuse of dominance by imposing unreasonable trading conditions by GP and horizontal anticompetitive agreement between GP and Healcare

In this case, GP was penalized for abuse of dominance and entering into a horizontal anticompetitive agreement with a competitor Healcare, resulting in a hefty fine and confiscation of illegal gains totaling RMB321 million (approx. US$45.55 million) by SAMR for both businesses.

Abuse of dominance

The penalty decision pointed out that, before the implementation of the "two invoices system" (i.e., the sales from the manufacturer to the distributors in one transaction and the sales from the distributors to end purchasers such as hospitals in another transaction), GP monopolized

the distribution and sales of downstream formulations by threatening to interrupt or delay the supply of APIs, forcing formulation producers to sell injections to them at low prices, thereby squeezing the profits of the formulation producers.

After the implementation of the "two-invoice system" in the pharmaceutical sector in China, GP changed its strategy and demanded rebates from formulation producers to maintain its monopolistic profits. Since 2010, GP had also controlled the sales territories, prices and quantities of formulation producers through agreements and verbally, with the aim to control market supply and achieving monopolistic prices.

SAMR considered that these conduct weakened the ability of formulation producers to compete with GP and restricted their commercial autonomy, which resulted in insufficient competition in the market, price increases and eliminated or restricted competition in the market for norepinephrine injection and epinephrine hydrochloride injection, thereby harming the interests of the relevant formulation producers, consumers and the public.

Due to GP having control over the supply of APIs, SAMR, for the first time, recognized that the requirement for formulation producers to sell norepinephrine injection and epinephrine hydrochloride injection back to GP at low prices, and the demand for rebates, constituted abuse of dominance through "imposing unfair trading conditions".

Horizontal anticompetitive agreement

In addition, this case also examined the non-compete arrangement between GP and Healcare. From 2016 to 2019, the two companies verbally reached and implemented an agreement to cease the sale of norepinephrine API and epinephrine API. It was agreed that Healcare would stop selling the relevant APIs, and GP would compensate Healcare. SAMR concluded that this non-compete arrangement brought clear anticompetitive effects as the provision and sharing of benefits caused Healcare to stop selling API, which further consolidated GP's dominance by enabling GP to increase prices and obtain monopolistic profits in the downstream injection sector.

4. Adoption of Ex-Ante Regulatory Tools such as Administrative Guidance and Regularization of Supervision

Beyond regulatory enforcement, as an important aspect of regularized supervision, antitrust authorities employ what are called "ex-ante" measures, such as administrative guidance to caution pharmaceutical companies on the need to adhere to compliance requirements and refrain from engaging in anticompetitive behavior. In June 2023, SAMR, in conjunction with industry associations, held an administrative guidance meeting to discuss anticompetitive practices in the pharmaceutical industry. Pharmaceutical companies were urged to pay attention to potential antitrust compliance issues, conduct comprehensive self-assessment, proactively implement "rectification" measures, strengthen compliance management, and promptly address emerging potential issues.

There is no doubt that pharmaceutical companies can only safeguard public health and address Chinese citizens' concerns by ensuring their own "well-being". Amidst enforcement scrutiny, it is crucial for companies to minimize potential legal and business risks by observing recent trends in antitrust enforcement and judicial practices involving the pharmaceutical industry and carefully examining their internal compliance systems and commercial activities.

Insights for pharmaceutical businesses active in China

Following the regulatory developments observed this year, below is a set of compliance guidelines tailored for pharmaceutical businesses active in China:

- **Companies involved in the production and supply of scarce drugs and APIs should pay particular attention to the risks of abusive behavior**. In light of recent regulatory developments in China, pharmaceutical companies, particularly those engaged in the production and supply of scarce drugs and APIs, should be aware of the heightened scrutiny on abusive behaviors. Given the industry's propensity for high market concentration and the critical nature of such products, these companies are more susceptible to being considered dominant in the market. Consequently, there is a need for careful antitrust risk assessment in pricing strategies, supply terms, and trading conditions.

- **Multiple anticompetitive behaviors can be subject to concurrent penalties**. Firms may face concurrent penalties for different forms of anticompetitive infringements, as seen in cases where companies were penalized for both abuse of dominance and entering into horizontal anticompetitive agreements. SAMR's discretion in imposing penalties underscores the importance of strict compliance.

- **Careful planning in M&A/investment activities**: SAMR monitors the pharmaceutical sector closely – the first case in China in which SAMR imposed conditions to a transaction that was voluntarily notified (as it did not meet the merger notification threshold) concerned pharmaceutical companies (Simcere Pharmaceutical's acquisition of Beijing Tobishi Pharmaceutical). For further discussion, please see Chapter 05.

- **Litigation risks**: Given that pharmaceutical companies in possession of APIs are prone to be considered dominant in the market, they must exercise heightened vigilance with respect to antitrust litigation. Such companies should be aware that they are at a higher risk of claimants seeking damages for alleged abuses of market dominance. For further discussion, please see Chapter 08.

- **Navigating administrative monopolies**: Pharmaceutical companies active in China should be cautious of administrative monopolies. In a notable case from 2022, the Hunan Administration for Market Regulation addressed the Yueyang Municipal Health Commission's practice of favoring certain biopharmaceutical companies. It was found that the health commission had influenced local health institutions to preferentially purchase from these companies. This was considered by the antitrust authority as an instance of abusing its administrative monopoly, and the special privileges enjoyed by the biopharmaceutical companies concerned were revoked. A key takeaway is that companies should monitor typical administrative monopolistic practices such as territorial discrimination, conditional transactions, or restrictive bidding process. Businesses may wish to take precautionary measures to maintain lawful boundaries with public authorities.

04 Intellectual Property Rights and Antitrust: Enhanced Antitrust Regulations Amid Rising Litigation Activity

Outlook for 2024

Looking ahead to 2024, the imperative to streamline China's antitrust regulations in the intellectual property ("**IP**") arena aligns with the country's goals for high-level international trade and enhancing its global industrial competitiveness. A key issue is the fine-tuning of enforcement and judicial precision while ensuring a balance between the interests of intellectual property rights ("**IPR**") holders and users.

In a landmark move in 2023, the Supreme People's Court of China (the "**SPC**") reaffirmed the jurisdiction of Chinese courts over global licensing rates, including a pioneering ruling on global rates for standard-essential patents ("**SEPs**"). This positions China as a pivotal legal arena for global SEP disputes. Simultaneously, IP users are increasingly leveraging antitrust litigation as a strategic tool in licensing negotiations to secure beneficial terms. This trend suggests that IP-related antitrust cases will continue to rise in 2024, posing new challenges for rights holders in managing such disputes.

In 2023, China's updated antitrust regulation relating to IPR struck a balance between safeguarding IPR and fostering innovation within a competitive market framework:

- In June 2023, SAMR introduced the updated "Regulations on Prohibiting the Abuse of Intellectual Property Rights to Exclude or Restrict Competition" (the "**Abuse of IPR Regulations**"), offering clearer guidance for navigating IP-related antitrust issues.

- In July 2023, the draft "Anti-Monopoly Guidelines in the Field of Standard Essential Patents" (the **Draft "SEP Guidelines"**) was released, emphasizing the importance of "good faith" negotiations in SEP licensing. This principle was reinforced by the SPC, which confirmed an SEP holder's entitlement to injunctions and damages in the absence of misconduct and highlighted the implementer's failure to negotiate in good faith. Throughout the year, the use of antitrust litigation by IP implementers became a more prominent strategy to challenge IP owners and negotiate IPR, marking a dynamic intersection between IPR enforcement and antitrust law.

1. Updating IPR-related Antitrust Rules

(1) The Abuse of IPR Regulations

In 2023, China implemented its revised Abuse of IPR Regulations, aligning with the updates in the AML. Effective from August 1, 2023, these provisions refine antitrust enforcement in IP to support innovation and address modern regulatory requirements. They provide clarity on the limits of IPR to prevent anticompetitive behavior while maintaining a fair playing field for both IPR owners and users. Key aspects covered include:

- **Abuse of Dominance:**

  - The provisions offer detailed criteria to identify and address abuse of dominance, including actions like setting unfairly high prices for IP licensing or IP-inclusive products that harm competition. They include considerations for assessing excessive pricing, incorporating factors such as R&D investment, recovery time, licensing fee structures and historical pricing benchmarks.

  - The concept of "substitutability" is central to determining dominance. The provisions now define this in the context of IP as the ability and cost for market participants to switch to alternative technologies or products. This nuanced approach to market definition makes it more complex to establish a rights holder's dominance, as both technological and product substitutability are considered.

- **Anticompetitive Agreements:**

  - IPR must not be employed to form or aid in creating anticompetitive agreements. The rules are now explicit in preventing "hub-and-spoke" arrangements where IPR serves as a means to facilitate or significantly contribute to anticompetitive collaborations.

  - The provisions also clarify the applicability of safe harbor principles to vertical agreements involving IP. In essence, parties exercising IPR within such agreements may be exempt from antitrust violations if they fulfill specified conditions outlined in the "Anticompetitive Guidelines in the Field of Intellectual Property Rights" previously issued by the State Council. The thresholds are set out below. For vertical agreements, the safe harbor thresholds apply when a party does not have a market share exceeding 30% in any relevant market; however, if it is challenging to calculate market shares or if these shares do not accurately reflect the parties' market position, the safe harbor will be applicable if there are at least four substitutable technologies available. Nevertheless, this

scope of application does not extend to agreements that can be demonstrated to have anticompetitive effects.

- **IP-related Transactions**: The provisions clarify that the transfer and exclusive licensing of IPR can constitute a concentration of undertakings, potentially triggering merger filing obligations. In situations where IP transactions could impact competition, SAMR may impose conditions, including structural changes like divestitures or behavioral mandates such as compulsory licensing and operation independence.

- **Patent Pooling Regulations**: Patent pooling refers to the practice where two or more businesses license their patents collectively to members of the pool or to third parties. Patent pools must avoid anticompetitive practices. The provisions specifically outline prohibited actions by patent pools or their members that constitute anticompetitive agreements or abuse of dominance, ensuring closer regulatory scrutiny.

- **Legitimate exercise of IPR**: The provisions also clarify situations that constitute the legitimate exercise of IPR. These include promoting innovation, fostering fair competition, safeguarding IPR, ensuring product safety and functionality, and meeting the genuine needs of transaction parties according to established industry practices. These regulations aim to align the exercise of IPR with the overarching objectives of market fairness and innovation.

(2) Imminent Revision to the SEP Framework

In response to the growing importance of SEPs in the global market, particularly with the advent of 5G technology, China has joined other major jurisdictions in establishing a framework for regulating SEPs. In its pursuit to balance innovation, IP protection, and fair competition, SAMR released the Draft SEP Guidelines in June 2023.

The key points of the Draft SEP Guidelines include:

(i) Focusing on antitrust issues throughout the standard-setting process, requiring SEP holders and applicants disclose their patents promptly and according to organizational rules. It underscores the significance of fair, reasonable and non-discriminatory ("**FRAND**") principles during SEP licensing negotiations and highlights that these principles are instrumental in assessing potential anticompetitive behavior.

(ii) Refining the specific scenarios of SEP abuse, and explicitly identifying the abuse of litigation rights as one form of such abuse. On the one hand, by providing detailed regulations on various types of SEP abuses and limiting the SEP holders' ability to seek injunctive relief, the guidelines set higher compliance requirements on the behaviors of SEP holders. At the same time, they also offer concrete guidance for implementers of SEPs on how to actively protect their rights. On the other hand, the draft SEP guidelines also consider the position of patent holders, offering a reasonable defense for certain licensing behaviors, thereby encouraging innovation in the field of standard-essential patents.

(iii) Emphasizing good faith negotiations as pivotal in upholding FRAND commitments. The draft views the willingness of both SEP holders and implementers to engage in good faith discussions about licensing terms as a major factor when determining if abusive practices (e.g., unfairly high prices, refusal to deal, tying/bundling, imposing unreasonable trading conditions, discriminatory treatment) are at play. The importance of good faith negotiations before seeking injunctions is also addressed, i.e., a SEP holder's readiness to negotiate in good faith prior to seeking injunctive relief will be considered when assessing the appropriateness of such action.

Negotiation process: duty of good faith for SEP licensing

Negotiation process	Party	The obligation to negotiate in good faith
Step 1	Duty of the SEP holder	The SEP holder **must present a clear licensing offer**, which includes providing a list of SEPs, a comparison table of SEPs with the standards, and a reasonable feedback deadline, among other specific details.
Step 2	Duty of the SEP licensee	The SEP licensee **must express a good-faith willingness to obtain a license within a reasonable period**, without maliciously delaying or unreasonably refusing to engage in licensing negotiations.
Step 3	Duty of the SEP holder	The SEP holder **must propose licensing terms that comply with the FRAND commitment**, including the method of calculating the licensing fee and the rationale for its reasonableness, the protection duration of the essential patents, and the transfer status, along with other necessary information and actual conditions directly related to the license.
Step 4	Duty of the SEP licensee	The SEP licensee **must accept the licensing terms within a reasonable time frame**. If the terms are not accepted, they should make a counter proposal that they believe comply with the FRAND principles (including licensing rates, grant-backs, and other licensing terms) within a reasonable period.

The Draft SEP Guidelines mirror global efforts to regulate the interplay between technological advancement and the protection of competition, ensuring that SEP frameworks support both patent holders and implementers fairly.

2. Judicial Developments Affecting IPR in the Antitrust Realm

(1) Chinese courts' assertion of jurisdiction over global SEP rates disputes

In a landmark ruling by the Chongqing First Intermediate People's Court on November 28, 2023, in Oppo v. Nokia, a substantive decision was made on the global rates for Nokia's 2G, 3G, 4G, and 5G SEP portfolio. Following the Chinese courts' ongoing clarification and emphasis on their jurisdiction over global licensing fee disputes of SEPs, including in this case, this judgment represents the first time a Chinese court has made a substantive ruling on the global rates of a specific patent holder's SEPs (in this case, Nokia).

Even though the finality of this judgment depends on the subsequent appeal process, the Chinese court's findings are expected to provide an important reference for future disputes over SEP patent licensing fees. Crucially, the implications of this decision may extend beyond China, as the global industry pays close attention to how this case may affect parallel litigation in other jurisdictions, such as the UK and India. Questions arise regarding how different courts will coordinate and address potential conflicts, and how parties involved in multinational disputes will navigate varying procedural and substantive rulings.

(2) Judicial Clarification on the Boundary Between IP Protection and the AML

The SPC has been instrumental in defining the delicate boundary between IPR and anti-anticompetitive regulations. Through a series of judgments, the Chinese judiciary has sought to clarify the extent to which IPR can be exercised without infringing the principles of fair competition mandated by the AML.

In two 2022 decisions[1], the Chinese courts determined that certain patent settlement agreements might exceed the limitations of IP protection and result in anticompetitive practices, thereby attracting liabilities under the AML. The court previously emphasized that proactive intervention was necessary when IP-related commercial arrangements display anticompetitive effects. 2023 saw the SPC pivoted to adopting a stance that places greater emphasis on the protection of the rights of IP holders.

- **"Loratadine" API case**:[2] The court recognized that the exclusivity granted by a patent is a legal right. It ruled that a patent holder's choice not to license an API is not inherently anticompetitive. Such restrictions are seen as acceptable as long as they do not exceed the boundaries of legal rights.

- **"Chinese Super League Image" case**:[3] The SPC differentiated between exclusivity from IPR and anticompetitive abuses. The League's exclusive licensing to Yingmai Company, obtained through competitive bidding, was not deemed to thwart competition. The SPC stressed that antitrust laws target improper exploitation of rights, not the exclusivity itself.

(3) Licensees Leveraging Antitrust Litigation to Secure Advantage in IP Licensing Arrangements

The landscape of antitrust litigation in the realm of IP is evolving, with licensees more frequently invoking antitrust laws to contest IP licensing agreements. Initially, the focus was on SEPs. A significant development occurred in 2021 when the Ningbo Intermediate People's Court ruled against Hitachi Metals, recognizing the refusal to license SEPs as an antitrust violation. This ruling set a precedent and has since empowered licensees to leverage antitrust claims as a strategy to secure better licensing conditions. In 2023, however, the scope has broadened to include non-SEP IP disputes across various sectors, such as *Yoozoo v. Disney*.

1. See: (i) Shanghai Huaming v. Wuhan Taipu, (2021) SPC Zhi Min Final No. 1298 and (ii) AstraZeneca v. Jiangsu Aosaikang, (2021) SPC Zhi Min Final No. 388

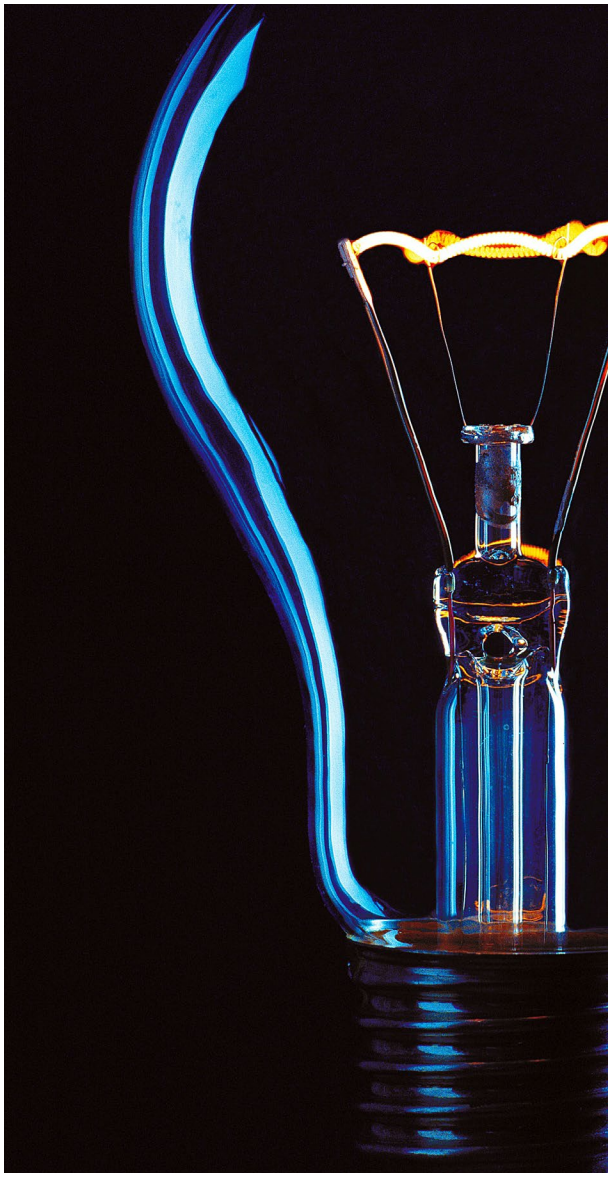
2. See: "Loratadine API abuse of dominance case" (Yangtze River Pharmaceutical Group Guangzhou Hairui Pharmaceutical Co., Ltd., Yangtze River Pharmaceutical Group Co., Ltd. v. Hefei Meigong Pharmaceutical Co., Ltd., Hefei Enrui Pharmaceutical Co., Ltd., Nanjing Haichen Pharmaceutical Co., Ltd. abuse of dominance case, (2020) Supreme Court Zhi Min Final No. 1140) and 1790).

3. See: "Chinese Super League Image" abuse of dominance case (Ti Yu (Beijing) Culture Media Co., Ltd. v. Chinese Super League Co., Ltd., Shanghai Yingmai Culture Communication Co., Ltd. abuse of dominance case dispute, (2021) Supreme Court Zhi Min Final No. 1790).

Highlights of IP-related antitrust civil litigation in 2023

Case	Alleged anticompetitive conduct	Status
TCL v. Dolby	TCL initiated litigation regarding disputes over the licensing fees for Dolby's SEPs.	The parties reached a settlement. On April 24, 2023, the SPC ruled to allow Dolby to withdraw its appeal against jurisdictional objections.
Yoozoo v. Disney	Yoozoo, a game developer, contended that Disney had an absolute dominant position within China's licensing market for "Star Wars" games. Disney was accused of imposing numerous restrictive conditions in licensing contracts, engaging in discriminatory practices against licensees, and attaching other unreasonable conditions to transactions, which amounted to an abuse of dominance.	The claimant, Shanghai Yoozoo, filed for a lawsuit withdrawal on May 29, 2023. The Shanghai Intellectual Property Court issued a ruling approving the withdrawal on June 29, 2023.

The intersection of antitrust laws and IPR is becoming a critical consideration for businesses. Licensees recognize antitrust litigation as a strategic tool to protect their commercial interests in IP disputes, particularly when challenging potentially abusive practices by licensors, such as excessive fees or unjustified injunctions. Conversely, IPR holders now face heightened risks of antitrust claims and must exercise caution in licensing, ensuring adherence to FRAND commitments and good faith negotiations. It is imperative for them to proactively evaluate anticompetitive risks and develop strategic compliance and litigation responses to navigate this complex legal field.



05 Merger Control: Consistent Trends in Timeline and Remedies

Outlook for 2024

SAMR has recently revised its merger notification thresholds. By elevating the thresholds, it is expected that fewer transactions will become notifiable, which would lessen the burden for transactions of a smaller scale while ensuring larger transactions are appropriately regulated.

Approaching 2024, we predict the following trends in merger control reviews:

- The higher notification thresholds will likely reduce the volume of merger filings, potentially expediting reviews for uncomplicated cases. SAMR's delegation of offshore transaction reviews to local branches may also enable faster regional processing. However, the lack of limits on the "stop the clock" mechanism may still prolong timelines for conditional reviews.

- Merger filings have increasingly become a strategic tool against hostile takeovers, as seen in the acquisition of Tobixi Pharmaceutical Co., Ltd. ("**Tobixi**") by Simcere Pharmaceutical Co., Ltd. ("**Simcere**"), where an antitrust review was triggered despite the deal being below-threshold, ultimately leading to remedies being imposed for the clearance of the case. Going forward, acquirers must thoroughly evaluate potential competition concerns that could arise, even in transactions not meeting notification thresholds, and proactively determine the need for voluntary filings.

- Despite the absence of gun-jumping penalties in 2023, heightened compliance awareness and stiffer fines under the updated AML mean transaction parties are now more diligent about filing obligations. Transaction parties are advised to integrate filing considerations into early deal planning and carefully design the transaction mechanics and interim actions to avoid non-compliance.

The 2022 amendments to the AML brought important changes to merger control, such as significantly increasing penalties for implementing concentration of undertakings without obtaining prior approval from SAMR (i.e., failure to notify), and introducing a "stop the clock" mechanism in the process of merger control review, as well as clarifying SAMR's authority to review below-threshold transactions that may give rise to competition concerns.

2023 saw the introduction of detailed regulations and guidelines enhancing the merger control framework in line with the AML reforms, addressing the review process, substantive criteria, and penalties.

Increased antitrust law awareness has kept the number of merger filings high in 2023. The authorities reviewed 797 transactions and cleared 786 cases (11 cases were withdrawn by the parties), comprising 707 simple cases, 75 unconditional normal cases, and four conditionally approved cases.[4]

Potentially influenced by the tightening of foreign direct investment ("**FDI**") and national security review ("**NSR**"), SAMR's statistics also revealed a slowdown in cross-border transactions. Of the 786 cases cleared, 56% were domestic transactions; 32% were purely offshore transactions; and only 12% were cross-border deals. For further discussions on the impact of FDI/NSR on cross-border transactions, please see Chapter 9.

1. Revised merger notification thresholds

In light of economic growth, SAMR issued the "Provisions of the State Council on the Standard for Notification of Concentration of Undertakings (Amendments) (Draft for Consultation)" in 2022, which proposed to increase the turnover thresholds for merger filing. The revised thresholds have finally become effective on January 26, 2024, marking the first amendment to the turnover threshold since the AML was introduced in 2008.

	Previous thresholds for notification	New thresholds for notification
Threshold 1	(i) The worldwide turnover of all the undertakings involved in the concentration exceeded RMB10 billion (approx. US$1.42 billion) in the preceding financial year, and (ii) the Chinese turnover of at least two undertakings each exceeded RMB400 million (approx. US$56.76 million) in the preceding financial year.	(i) The worldwide turnover of all the undertakings involved in the concentration exceeded RMB12 billion (approx. US$1.70 billion) in the preceding financial year, and (ii) the Chinese turnover of at least two undertakings each exceeded RMB800 million (approx. US$113.53 million) in the preceding financial year.
Threshold 2	(i) The Chinese turnover of all the undertakings involved in the concentration exceeded RMB2 billion (approx. US$283.82 million) in the preceding financial year, and (ii) the Chinese turnover of at least two undertakings each exceeded RMB400 million (approx. US$56.76 million) in the preceding financial year.	(i) The Chinese turnover of all the undertakings involved in the concentration exceeded RMB4 billion (approx. US$567.64 million) in the preceding financial year, and (ii) the Chinese turnover of at least two undertakings each exceeded RMB800 million (approx. US$113.53 million) in the preceding financial year.

Notably, the alternative threshold, aimed at capturing "killer acquisitions"[5], proposed under the draft version, was not included. Under the draft provisions, a transaction would be notifiable if the Chinese turnover of one undertaking involved in the concentration exceeded RMB100 billion (approx. US$14.19 billion) in the preceding financial year, and (ii) the market value/valuation of another relevant party is no less than RMB800 million (approx. US$113.53 million), and the Chinese turnover of the relevant party exceeds one-third of its global turnover in the preceding financial year.

4. See: SAMR, "Review Status of Concentrations of Undertakings", available in Chinese at < https://mp.weixin.qq.com/s/zztXx4nxiMRBhMiC9Ezqhw >
5. Killer acquisitions refer to a situation in which an incumbent acquires an innovative target to stunt the target's development and preempt future competition. These are most commonly observed in the digital and pharmaceutical industries. Examples in China include the high-profile Didi/Uber merger (2015), which was not notifiable in China as Uber's Chinese turnover did not meet the relevant thresholds.

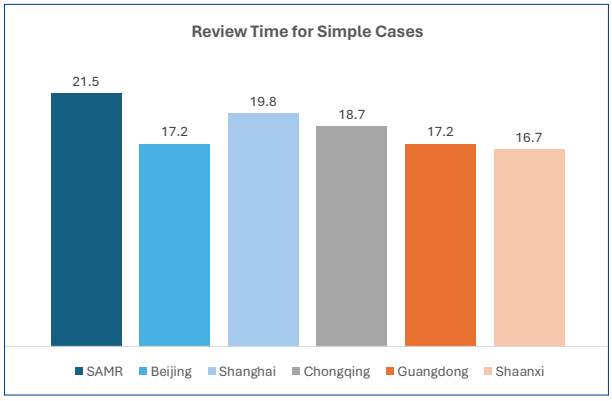
2. Review Timeline: Average Review Cycle Remained Consistent with Previous Years, Facilitated by Delegation of Simple Cases to Local Market Regulators

On August 1, 2022, SAMR began its pilot arrangement of entrusting its local branches in Beijing, Shanghai, Guangdong, Chongqing, and Shaanxi with the responsibility of carrying out merger control reviews. Among the simple cases unconditionally approved by SAMR in 2023, a total of 352 cases (out of 707 simple cases), close to 50%, were entrusted to local authorities for review, demonstrating a trend that provincial and municipal authorities are now reviewing a significant proportion of the merger filings.

In 2023, the average review time for simple cases was 20 days. Based on SAMR's official announcement, 98% (698 out of 707) of the simple cases were cleared within Phase 1 review (i.e., 30 days from case acceptance).

SAMR's local branches have become very efficient when reviewing merger control cases while maintaining close communication with SAMR. In particular, the average review cycle from filing to approval for simple cases handled by SAMR's five local branches under the pilot arrangement was 18 days. This compares with an average of 17 days in 2022, in other words, demonstrating the same level of efficiency.

Specifically, the review time for SAMR and each of SAMR's local branches under the pilot arrangement is detailed below:



Based on our observations:

- Among the five SAMR's local branches under the pilot arrangement, the Shanghai Administration for Market Regulation reviewed the largest number of cases (157), indicating that transactions involving Shanghai, Jiangsu, Zhejiang, Anhui, Fujian, Jiangxi and Shandong were relatively active. This is then followed by the Beijing (75 cases), Guangdong (61 cases), Chongqing (49 cases) and Shaanxi (10 cases).

- The Shaanxi Administration for Market Regulation has been entrusted with the review of offshore transactions since late 2023, but there are no public records of other SAMR's local branches starting to review offshore transactions. The fact that SAMR's local branches have begun reviewing international M&A cases reflects SAMR's confidence in their ability to review offshore cases.

For normal cases, based on our estimate, the clearance timeline was approximately 75 days since case acceptance in 2023.[6]

6. This is estimated based on SAMR's official statistics that the average review timeline of all 786 cases in 2023 was 25.7 days, compared against the average review timeline of the 707 simple cases (20 days).

3. Remedy Cases: Review Cycle Similar to Previous Years; High-Tech Industries and Industries Concerning Citizens' Livelihood Remained the Focus

(1) Conditional Cases: Continued Focus on the High-Tech Industries and Industries Concerning Citizens' Livelihood

In 2023, SAMR conditionally approved four high-profile mergers in high-tech sector and industries vital to daily life, areas that have historically attracted stringent oversight. The semiconductor industry, in particular, has been under regulatory scrutiny. For further discussion of the semiconductor industry, please see "06 Industry Spotlight: Supply chain security - key to the merger control review involving semiconductor industry".

Overview of conditional decisions in 2023

Transaction name (date of approval)	Relevant sector	Competition concerns	Summary of remedies	Review period from filing to approval	Whether unconditional approval was granted in other jurisdictions
Wanhua Chemical/ Yantai Juli Fine Chemical (April 7, 2023)	Biochemicals	Horizontal, Vertical	Behavioral remedies, valid for five years and subject to approval for lifting, include: • Keeping supply prices to Chinese customers at or below pre-transaction levels • Preserving or increasing production levels in China • Providing products to Chinese customers on FRAND terms • Prohibition on forcing exclusive purchases or unjustified tying and bundling on Chinese customers.	242 days (with "withdrawn and resubmit")	No public record of filings in other jurisdictions
MaxLinear/ Silicon Motion (July 26, 2023)	Technology (semiconductors)	The target company has a dominant market position	Behavioral remedies, effective for five years which will automatically expire afterwards, include: • Supplying products to China under FRAND conditions • Maintaining the target company's current business model and operations • Keeping the target company's R&D activities in Taiwan, China • Preserving the target company's application engineering support in China • Ensuring no malicious codes are embedded in products sold in China.	315 days (during which the clock is stopped for approximately six months)	Yes
Simcere/Tobixi (September 22, 2023)	Pharmaceuticals	Horizontal, Vertical	Structural remedies which mandated the divestiture of a downstream business and the provision of APIs to the entity acquiring the divestment. Behavioral remedies, valid for six years and subject to SAMR's approval for lifting, include: • Ending Simcere's exclusive API supply agreement with DSM (a vitamin manufacturer) in China • Reducing downstream product prices by at least 20% from the current list price, escalating to a reduction of at least 50% if certain conditions are not met (such as failure to terminate the exclusive agreement, not divesting the downstream business timely, or the divesting buyer not conducting R&D as scheduled); and • Ensuring sufficient supply to meet the downstream medication market's demand.	451 days[7] (during which the clock was stopped for approximately five months)	No public record of filings in other jurisdictions

7. In this case, Tobixi and Simcere submitted voluntarily filings to SAMR on June 29, 2022 and July 20, 2022, respectively. The earlier date is used for calculation here.

Overview of conditional decisions in 2023

Transaction name (date of approval)	Relevant sector	Competition concerns	Summary of remedies	Review period from filing to approval	Whether unconditional approval was granted in other jurisdictions
Broadcom/VMware (November 21, 2023)	Technology (semiconductors, computer service)	Horizontal, Neighboring	Behavioral remedies, with a ten-year duration which will automatically expire afterwards, include: • Prohibiting unjustified tying, bundling, or imposing unreasonable trading conditions • Ensuring customers are not hindered or restricted from purchasing or using individual products; and avoiding discrimination in service, price, or functionality against customers who buy products individually • Ensuring product interoperability • Implementing confidentiality protocols for competitively sensitive information from third-party manufacturers.	441 days (during which the clock was stopped for approximately two months)	The EU and South Korea imposed remedies. Other jurisdictions approved the transaction unconditionally

(2) Implementation of the "Stop-The-Clock" Mechanism

The 2022 AML amendment introduced a "stop the clock" provision in merger reviews allowing SAMR to suspend the review timeline under three conditions: (i) if the involved party fails to provide necessary documents, (ii) if new significant information arises, or (iii) if additional time is needed to assess remedies and the party requests for a suspension.

In 2023, SAMR deployed this mechanism in several cases, but the lack of detailed rules on the number of pauses and maximum suspension time has led to uncertainties in the review process. Out of four conditionally approved mergers, three invoked the "stop the clock" mechanism, while one followed the old method of withdrawal and resubmission. These cases exceeded the 180-day statutory review period, with an average review time of 363 days. Extensive reviews, including consultations and market tests for remedies, have prolonged and complicated timelines for mergers with potential competition concerns.

In the three instances where SAMR deployed the "stop the clock" mechanism, suspensions varied from around two months to half a year. It is worth noting that after these temporary suspensions, reviews resumed for only brief periods before SAMR eventually issued conditional approvals, without disclosing the reasons for the suspension.

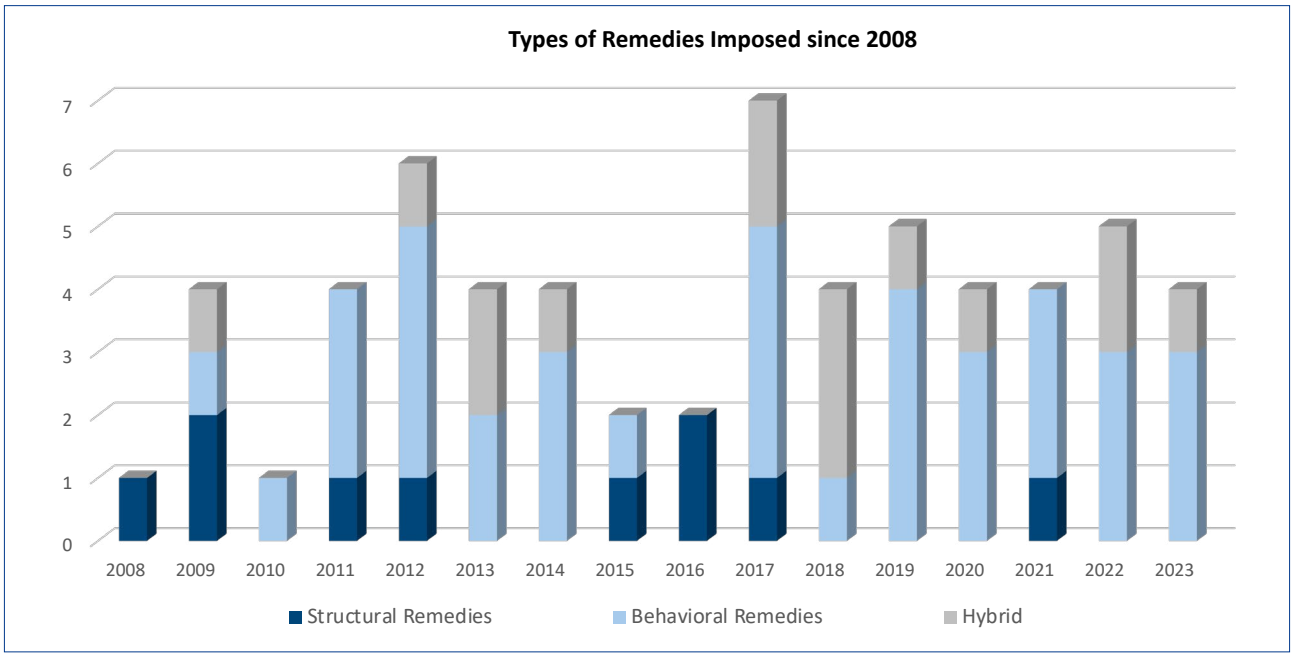
(3) Trends in the Review of Conditional Cases

Consistent with previous years, we observe the following trends in this year's conditional approvals:

- **Non-competition "industry concerns" continue to influence filing considerations**: As per SAMR's merger review regulations, SAMR may consider these alongside the views of government bodies, industry groups, businesses, consumers, and experts. In MaxLinear/Silicon Motion, despite an absence of direct competitive relationship, remedies were still imposed due to Silicon Motion's market influence and concerns about product supply stability post-transaction. The focus on non-competitive issues such as supply security, especially in sensitive sectors like semiconductors, highlights their significance in merger reviews. Beyond traditional competition considerations, stakeholder apprehensions (e.g., supply chain

stability) can influence the review outcome and the possibility of unconditional approval.

- **Behavioral remedies continue to be favored over structural remedies**: For those cases conditionally approved in 2023, SAMR continued its previous practice of favoring behavioral remedies to flexibly address competition issues and concerns within industries. This practice is in contrast to the European and American practice of favoring structural remedies that are less difficult to enforce and monitor. Out of the four conditionally approved cases this year, three cases were subject to behavioral remedies only. The remaining case, as it involved horizontal competition concerns, had both structural (divesture) and behavioral remedies imposed.



4. First Case of Remedies Imposed to Below-Threshold Transaction: Merger Filing Becoming a Strategic Tool in Hostile Takeovers

The 2022 AML amendment empowered SAMR to scrutinize transactions below notification thresholds if they give rise to competition concerns. On September 22, 2023, SAMR conditionally approved Simcere/Tobixi, a case reportedly involving a "hostile acquisition" that had previously escalated to arbitration between the parties.

Despite not meeting the notification thresholds, both Tobixi and Simcere filed for SAMR review in mid-2022, acknowledging potential competition issues. SAMR's review linked Simcere's past market abuse to the acquisition, suggesting the deal could eliminate competition in China's batroxobin (a snake venom enzyme) injection market. Based on the revised AML, SAMR could require for a filing of this transaction even if the parties did not make a voluntary filing.

Case study: equity acquisition of Tobixi by Simcere

Simcere is engaged in the sale of batroxobin APIs (upstream market). It owns the entire source of Batrozyme APIs in China and is actively developing its batroxobin injection product (downstream market). Tobixi is currently the only manufacturer of batroxobin injection in China. Upon review, SAMR's concerns are as follows:

- **Horizontal concerns**: Currently, Simcere is the only undertaking in China engaged in the research and development of batroxobin injection. If Simcere's generic drug succeeds in clinical trials and is approved to enter the market, it will bring competitive pressure on Tobixi's existing products. The concentration directly eliminates Tobixi as a potential competitor and consolidates Tobixi's dominant position in the market for batroxobin injection in China, which may have the effect of excluding or restricting competition.

- **Vertical concerns**: Through the exclusive cooperation and supply agreement with Swiss supplier DSM, Simcere has become the only undertaking that can sell batroxobin API in China and has enjoyed a 100% market share of batroxobin API sales in China. It is difficult for other undertakings to enter this market, and downstream manufacturers are highly dependent on Simcere. The concentrated entity may refuse to supply APIs, which will have the effect of excluding and restricting competition in the batroxobin injection market in China.

To address the above concerns, SAMR has imposed the following remedies:

- Simcere is required to terminate its agreement with DSM for the exclusive supply of batroxobin API in China.

- Simcere is required to divest its batroxobin injection research and development business in accordance with prescribed timeframes, provide the divested purchaser with the supply of batroxobin API, and assist the divested purchaser in entering into a direct supply relationship with DSM.

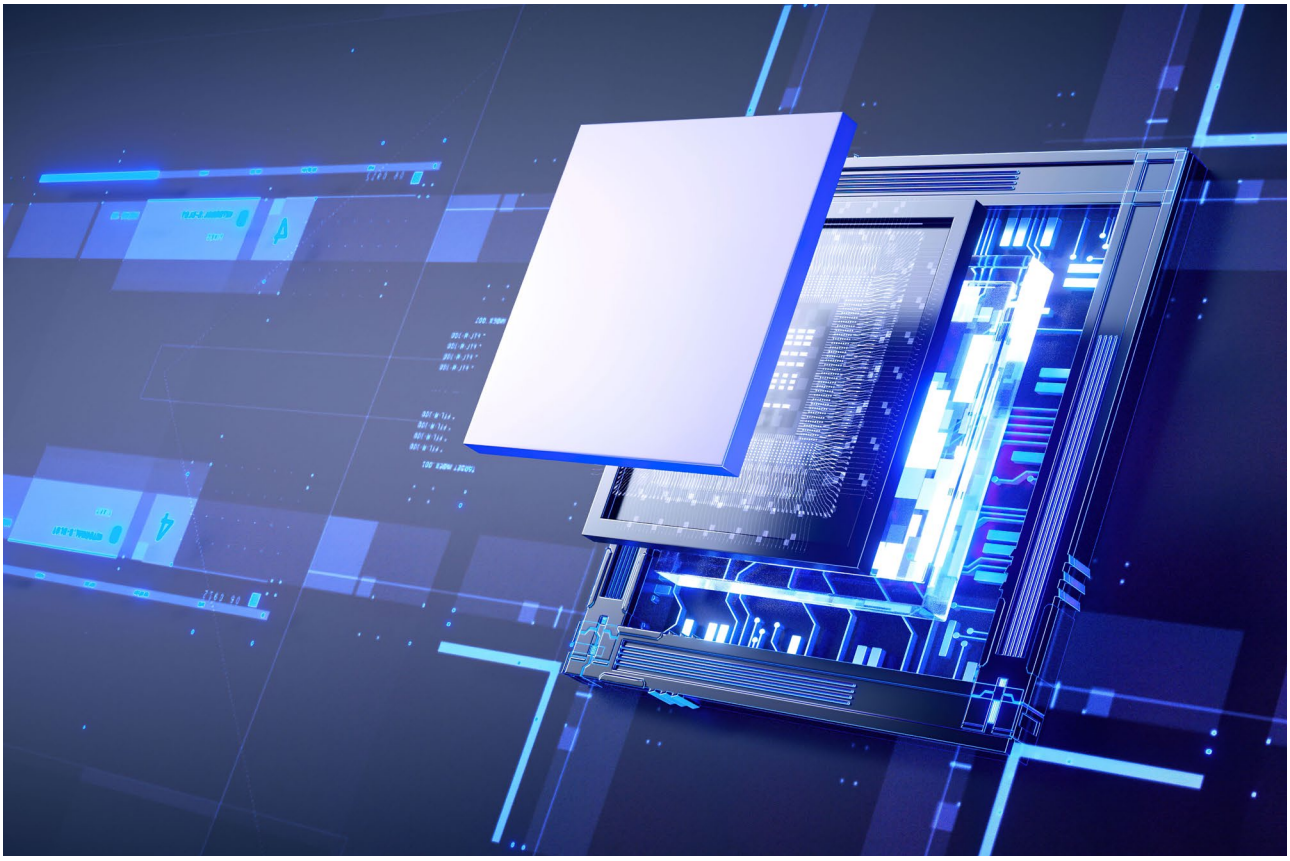
After implementing the concentration, Simcere is required to guarantee the supply of clinical batroxobin injection and is required to reduce the end (retail) price of clinical batroxobin injection by at least 20%. If Simcere fails to release the agreement on time, complete the divestment, or the divestiture purchaser fails to implement research and development on time, the concentrated entity will be required to reduce the end price of clinical batroxobin injection by at least 50% after implementing the concentration.

The case illustrates that target companies can use merger filings strategically to deter hostile takeovers. If a transaction could potentially hinder competition, SAMR has the authority to block it or demand remedies to mitigate competition issues. The transaction may be halted if the acquirer is unable or unwilling to provide satisfactory remedies. In conclusion, even for transactions below the notification thresholds, acquirers must diligently evaluate the transaction's impact on competition and the potential need to notify SAMR proactively.

06 Industry Spotlight: Supply Chain Security – Key to Merger Control Review Involving Semiconductor Industry

Outlook for 2024

Over the past year, the United States and other Western countries have been regularly introducing policy measures with the specific goal of thwarting China's access to key semiconductor products. This has hampered China's ability to supply customers with products containing semiconductors, of which there are many. Such damaging Western initiatives led to China reviewing the country's semiconductor industry to ensure China's security of supply. The focus on the security of semiconductor supply is now key to obtaining antitrust clearance for semiconductor transactions in China. As global trade tensions continue, we expect reviews of semiconductor deals to continue to face delays and challenges in the foreseeable future.



1. Protecting Local Customers' Interests

As China pushed towards being self-sufficient in its semiconductor supply chain in 2023, SAMR has focused on ensuring security of supply to China's customers as a key factor during the merger control review process. The imposition of remedies by SAMR on semiconductor transactions in 2023 can help facilitate China's role as a production hub for semiconductors and critical technologies and respond to actions by foreign governments that aim to limit access to key technologies.

Despite increased fears and anxieties by transaction parties about roadblocks in securing successful clearance, a number of major semiconductor transactions have still been approved by China's competition authority. These include MaxLinear/ Silicon Motion and Broadcom/ VMware, both cleared with conditions this year. Another example is the US$8.2 billion acquisition of National Instruments by Emerson Electric which was approved under the simplified review procedure, despite reportedly encountering complaints during the review process.[8]

Only in a few instances have transactions failed. In August 2023, Intel announced its decision to abandon its US$5.4 billion acquisition of Tower Semiconductor. The deal had not received SAMR's approval at the time it was aborted. It was reported that many stakeholders had expressed concerns about the impact of the deal on the Chinese semiconductor supply chain. Despite the parties reportedly actively engaging with regulators and authorities in China, negotiations ultimately fell short after a protracted 18-month review, which, we understand, included certain conditions requested by SAMR during the final round of meetings that the deal parties could not meet.[9]

After the Intel/Tower Semiconductor fallout, there was much coverage in the media suggesting that the Chinese antitrust authorities should scrutinize global M&A chip deals even more carefully, paying particular attention to the risks faced by Chinese companies. A key concern is that foreign chipmakers have been able to extend their influence through cross-border mergers while Chinese counterparts have been prevented from doing so by the United States and its Western allies. For example, UK authorities cleared US chipmaker Broadcom's US$69 billion purchase of VMware but ordered Chinese-owned technology company Nexperia to sell at least 86% of Britain's biggest microchip factory, Newport Wafer Fab, following a national security assessment.

2. Evolving Remedy Design

In last year's annual report, we predicted that SAMR would become more active and imaginative in 2023, in the face of increasing geopolitical sensitivities surrounding semiconductor and tech deals. We were right. In 2023, we have seen more creative remedies to address potential supply disruptions. Following a wave of decisions involving the imposition of remedies in the semiconductor sectors over the last few years, SAMR has, by now, developed a review framework and assessment that is unique to semiconductors.

- **Security of supply**. A standard outcome of almost every semiconductor deal in the last four years is the security of supply guarantee. The remedy is simple in that it typically requires the merging parties to commit to continuous supply on FRAND terms. In addition, if the transaction products are subject to foreign export control rules (or are possible candidates for future restrictions), then additional remedies are often required to address

8. See: PaRR, "National Instruments/Emerson: SAMR receives third-party complaint; implications uncertain", (August 16, 2023); PaRR, "National Instruments/Emerson approved by SAMR after simplified review", (September 4, 2023).

9. See: PaRR, "SAMR Watch: …Tower Semi and Intel struggle…", (July 3, 2023) and; PaRR, "SAMR Watch: … Tower/Intel give up…", (August 31, 2023).

potential supply disruptions in the future. This could involve more creative solutions, such as facilitating third-party entry/expansion in China. Notably, confidential remedies were imposed in both MaxLinear/ Silicon Motion and Broadcom/ VMware.

- **Absence of competitive overlaps**. In all semiconductor deals cleared with remedies over the last couple of years, SAMR raised concerns about competitive relationships even where no such relationships were identified by overseas competition authorities. In 2023, SAMR deviated from this approach in MaxLinear/ Silicon Motion and imposed remedies purely on the basis of the target entity's strong market position in NAND flash controllers - despite a lack of any competitive overlap between the parties. It remains uncertain whether SAMR will continue to adopt this expansive approach in the future to tackle supply chain security.

There have also been discussions about embedding SAMR's thinking on export controls into China's merger control guidelines. SAMR has been seeking comments and engaging in consultations on its Guidelines on Antitrust Review of Horizontal Concentrations of Undertakings, which will include finding paths to help mitigate the impact of restrictive US trade policies as part of China's merger control framework.[10] The rationale for this response is that ongoing foreign export control regulations and policies may result in transaction parties being unable to meet their obligations under security of supply commitments.

Case study: Maxlinear/Silicon Motion

The deal. In 2022, MaxLinear proposed acquiring memory chip maker Silicon Motion Technology Corporation for US$3.8 billion. MaxLinear is a fabless semiconductor company making chips for use in various types of electronics, such as digital cameras, smartphones, and the new technologically sophisticated "smart" cars. Silicon Motion is a Taiwan-based memory flash controller developer for solid-stage storage devices.

The concerns. Silicon Motion is the largest supplier of NAND flash controllers globally. A NAND Flash controller manages data stored on the flash memory (usually NAND flash) and communicates with a computer or electronic device. Stakeholders were generally concerned about the potential implications of a change in control of a Taiwanese entity into American hands, given the possibility of further US export control restrictions. SAMR was particularly focused on the "dependence" of Chinese customers on the memory flash products developed by Silicon Motion, including its high market share globally and in China.

The outcome. SAMR approved the deal in 2023 subject to a range of remedies. Crucially, SAMR's assessment found no competitive (horizontal, vertical or adjacent) relationships between MaxLinear and Silicon Motion. Accordingly, based on traditional theories of harm, the transaction did not alter the "status quo" of the competitive landscape. The decision marks the first time SAMR identified "concerns" solely based on the target's high market share and imposed remedies - despite the absence of any horizontal, vertical or adjacent relationships. The outcome also serves as a reminder to transaction parties that obtaining approvals in China is possible even during times of heightened trade tensions.

10. See: PaRR, "China's SAMR explores solutions to geopolitics-linked trade policies in upcoming guidelines, official says - CIIAI Webinar", December 7, 2023.

Case study: Broadcom/Vmware

The deal. In 2022, Broadcom proposed the acquisition of software producer VMware for approximately US$61 billion. Broadcom is a semiconductor manufacturer that provides network devices and software applications for wireless and broadband communication. VMware is a software producer and a technological service provider that provides software solutions for data centers and cloud computing.

The concerns. Broadcom and VMware are both leading suppliers of their respective lines of products in global and Chinese markets. SAMR identified adjacent markets between the product offerings of the parties, and expressed concerns about the possibility of tying/bundling and limiting product interoperability (VMware's software is only compatible with specific hardware). Reports also suggested that stakeholders raised concerns about potential export restrictions in connection with the products.

The outcome. The deal was approved by SAMR with conditions in 2023. To eliminate the competition concerns identified, SAMR imposed a range of behavioral remedies such as prohibiting unreasonable and discriminatory tie-in sales, ensuring the continued compatibility of VMware's software with third-party hardware, and enforcing protective measures to protect commercially sensitive information of third-party hardware manufacturers. Two other conditions were kept confidential and were redacted from the decision, but reportedly endeavored to address state-owned stakeholder concerns.[11]

Going forward, the review of semiconductor sector transactions by China's competition authorities will be further influenced by a combination of technological innovation, trade tensions and export control measures.

3. The Next Frontier? Artificial Intelligence and Automotive Semiconductors

Future scrutiny of semiconductor deals may be contingent on technological developments and breakthroughs and the extent to which such advances become the subject to trade tensions and further export control restrictions. Recent national priorities in developing and increasing China's competitiveness in AI and electric vehicles serve as a preview of future developments:

- **Artificial intelligence ("AI")**. AI remains a fierce battleground between China and the rest of the world, with the United States imposing broad export sanctions on advanced chips and high-end semiconductor equipment (such as lithography machines) that can be used to manufacture high-level AI systems. In response to these sanctions, China has increased its efforts to achieve fundamental technological breakthroughs in AI, including accelerating the development of homegrown advanced chips and exploring ways to work around its limited access to high-end semiconductor equipment by procuring relatively less-advanced equipment not covered by sanctions. Chinese developers are also aggressively pitching their AI chips as alternatives to established US-based chip designers if the US export restrictions for customers are maintained. In line with these priorities, we expect SAMR to focus its review efforts on deals that involve advanced chip designs or semiconductor equipment used for AI.

11. See: PaRR, "Asia Desk: China's 'politically timed' approval of VMware's sale to Broadcom", (November 24, 2023).

- **Automotive semiconductors**. The growing complexity of electric vehicles has demanded increasingly advanced automotive components such as power semiconductors and sophisticated chips. Power semiconductors, which control the flow of electric current, are critical components affecting the driving range of electric vehicles, while sophisticated chips are used to enhance overall data processing performance and are fundamental in enabling autonomous driving. In recent years, China has placed particular focus on developing its domestic capabilities to innovate and produce power semiconductors and sophisticated chips. While China aims rapidly to step up its self-sufficiency in producing these components, it still has to rely heavily on foreign manufacturers to supply the majority of its power semiconductors and sophisticated chips. In addition, US export restrictions have targeted sophisticated chips used in automotive applications. In Europe, the European Commission has formally launched anti-subsidy investigations into electric vehicles from China. As a result, deals involving automotive semiconductors will likely be reviewed with caution.

07 Judicial Practice: Increased Interaction between Judiciary and Administrative Authorities

Outlook for 2024

Despite the Judicial Interpretation on antitrust disputes issued by the SPC (the "**Judicial Interpretation**") at the end of 2022 has yet to become effective, its procedural guidance has been proactively adopted in antitrust litigation throughout 2023. Courts have started to recognize administrative penalty decisions, thereby lightening the burden of proof for claimants. Additionally, 2023 witnessed the emergence of collaborative frameworks between local courts and enforcement agencies, in line with the suggestions of the Judicial Interpretation. However, there are ongoing debates over the appropriateness and potential effects on judicial independence when cases are transferred to administrative authorities. The SPC is anticipated to further refine the Judicial Interpretation and publish the definitive version in due course, in response to feedback. The aim is to ensure a harmonious balance between judicial-administrative cooperation and the preservation of judicial independence, while maintaining the judiciary's crucial role in supervising administrative enforcement actions.

As the number of antitrust cases grows, judicial interpretations from various courts have provided guidance on the AML, aiding businesses in making sure they operate within the law. Antitrust litigation has evolved into a strategic instrument for resolving commercial disputes. In light of this, companies need to carefully assess the antitrust litigation risks associated with their business practices and the potential damages, in addition to regulatory enforcement risks.

In 2023, the SPC provided antitrust guidance by detailing the methodology for market definition, the concept of dominance and abuse, as well as procedural rules in key rulings. Additionally, the SPC has further pushed for the formulation of the Judicial Interpretation, which will provide more guidance for antitrust litigations.

Following *Miao Chong v. SAIC-GM* (commonly known as the General Motor case) at the end of 2022, which clarified the potential use and reliance of administrative penalty decisions in follow-on litigations, follow-on antitrust litigations have surged, a trend that is expected to persist. Concurrently, courts are forming collaborative frameworks with SAMR and its local branches, the effects of which on businesses' antitrust compliance are yet to be fully explored.

1. The Rise of Follow-on Litigation: Recognition of Administrative Penalty Decision as Evidence of Anticompetitive Conduct

"Follow-on litigation" in the antitrust context refers to civil cases filed by victims of anticompetitive behavior after an administrative penalty has been issued by competition authorities. In the US, such cases are common due to class actions and the potential for punitive damages, making them a significant deterrent alongside regulatory enforcement.

In China, however, the high burden of proof for claimants has made follow-on litigation less common. That changed in 2022 with the SPC's ruling in the General Motors case, which recognized that administrative penalties could support claimants' claims in follow-on cases, unless evidence suggests otherwise. This landmark decision lowers the proof barrier for victims in China and signals support for follow-on antitrust litigation as a complementary enforcement tool.

In 2023, courts increasingly relied on competition authorities' penalty decisions as key evidence for proving anticompetitive conduct and awarding damages in antitrust litigation, indicating a growing trust in regulatory findings within the judicial process. For example, in the contractual dispute and horizontal anticompetitive agreement dispute involving a Yanan concrete undertaking[12], the administrative penalty decision was accepted as evidence of anticompetitive behavior, unless the defendant could disprove such anticompetitive behavior. The move led to an increase in antitrust follow-on actions, with claimants ranging from direct competitors to end consumers.

In November 2023, a notable step was taken when SAMR and the Beijing Intellectual Property Court created a process for daily communications. This development, a first of its kind, signaled stronger synergies between administrative and judicial bodies in tackling antitrust issues. While there are still questions about how smoothly evidence and case information can be transferred between the judiciary and antitrust authorities, the ongoing adoption of these cooperative measures suggests a growing trend towards a more unified approach in enforcing China's AML.

Businesses, particularly those engaged in IP or commercial disputes with potential AML implications, should closely monitor these regulatory and judicial developments. They need to be vigilant about how the AML is interpreted in court decisions and stay prepared to adjust their litigation and settlement strategies accordingly to navigate antitrust risks effectively.

2. Judicial Clarification on Assessing Abuse of Dominance Cases

In 2023, courts scrutinized anticompetitive behaviors and competition harm in various antitrust cases, offering detailed rulings on market definition, dominance and abuse, and thus guiding the

12. See: Shan 01 Zhi Min Chu No. 509 (2020)

application of the AML's substantive rules.

In recent years, the SPC has ruled on a number of cases involving abuse of dominant market position. The SPC's recent rulings have provided a clearer framework for assessing abuse of dominance in the following aspects:

- **In terms of defining the relevant market**, in the desloratadine API case[13], the claimant argued that the inability to switch from the defendant's repeatedly price-hiked API affirmed its unique market via the hypothetical monopolist test. However, the SPC noted this test has limitations in markets with exclusive supplier-buyer relationships and low-end-consumer price sensitivity. Full consideration of indirect competition in such markets is necessary. Despite this, the SPC upheld the initial ruling of a distinct market for the API due to the defendant's failure to demonstrate sufficient indirect competitive pressure, affirming the API's non-substitutability.

- **In terms of determining dominance:**

  - In the case of abuse of dominance involving Beijing Lianjia Real Estate Agency Co., Ltd.[14], the SPC ruled that transaction volume is a valid metric to determine market share for dominance, while organizational size indicates financial and technical capacity.

  - In the case of abuse of dominance involving China Mobile[15], the SPC elaborated for the first time on the factors and standard of proof when determining collective dominance and held that, in addition to examining the market shares of multiple undertakings, factors such as the consistency of the undertakings' behavior should be taken into account when reaching the conclusion that multiple undertakings have collective dominance. The China Mobile case marked the SPC's first detailed discussion of "collective dominance", stating that consistencies in the behaviors of the firms, alongside their market shares, must be considered to prove a collective dominant position.

- **In terms of determining abusive behavior**, in the case involving desloratadine API, the SPC also provided clarification on the determination of qualified transactions within the context of exercising patent rights, as well as clarifying the basic rules for the determination of unfairly high prices and the imposition of unreasonable trading conditions.

Selected cases involving abuse of dominance heard by the SPC in 2023

Case	Alleged abusive conduct	The ruling
Desloratadine API case	Restrictive dealing	The SPC noted that a patentee's requirement for downstream buyers to exclusively purchase patented products is typically lawful patent use, not "market exclusion" regulated under the AML.
	Unfairly high pricing	When assessing the impact of price increases on the competition for patented products, the analysis should cover competition in the market and innovation risks, economic and competitive effects and consumer welfare. Moreover, the potential chilling effect of price increases must be carefully considered in determining if prices are unfairly high.
	Unreasonable trading conditions	To establish that a firm has abused its dominance by imposing unreasonable trading conditions, evidence of both intent (explicit or implicit) to enforce such conditions and the consequence of the firm gaining undue benefits or harming the transaction counterparties' interests must be present.

13. See: Zui Gao Fa Zhi Min Zhong No. 1140 (2020)
14. See: Zui Gao Fa Zhi Min Zhong No. 1463 (2020)
15. See: Zui Gao Fa Zhi Min Zhong No. 1977 (2021)

- **In terms of calculation of damage compensation**, in the case involving trading restrictions imposed by a dominant water utility , the SPC stated that calculations of loss should be compared based on actual expenses under the restriction and those in a counterfactual competitive market. Also, the claimant bears the burden of proof for determining compensation for these losses.

3. The Court's Navigation of Procedural and Jurisdictional Issues

So far as procedure is concerned, courts in 2023 have provided further clarity on antitrust litigation by addressing jurisdictional disputes in several cases. Despite the absence of a formal Judicial Interpretation, these rulings showcased reasoning aligned with what is expected in the Judicial Interpretation, signaling the courts' proactive stance in exercising jurisdiction over antitrust issues.

Overview of antitrust jurisdictional dispute rulings in 2023

1. Beijing Longsheng Xingye v. Resideo Technologies[17]

- **The issue**. Can an arbitration agreement prevent court jurisdiction over antitrust disputes?
- **The ruling**. Arbitration clauses cannot exclude court jurisdiction when anticompetitive conduct extends beyond the contractual relationship.
- **The rationale**. The draft Judicial Interpretation suggests that antitrust actions filed in court should proceed despite an existing arbitration agreement regarding contractual disputes.

2: Refusal to Deal Case Involving Batrozyme API[18]

- **The issue**. In a "refusal to deal" dispute, can the location of the factory that has ceased operations due to the defendant's refusal to transact be considered as the place where the infringement occurred?
- **The ruling**. The location of the infringement resulting from a refusal to deal should be where the direct consequences of the refusal emerged, that is, the location of the claimant's factory that ceased operations due to the defendant's refusal to transact.
- **The rationale**. The draft Judicial Interpretation directs that territorial jurisdiction should follow the Civil Procedure Law and related judicial interpretations for antitrust litigations.

Case 3: Haidong Huaze v. Qinghai Minhe Chuanzhong[19]

- **The issue**. Should cases not initially filed as an antitrust dispute but which appears to have an antitrust issue as the essence be handled as an antitrust case?
- **The ruling**. Upon review, it was decided that, if the dispute is rooted in anticompetitive behavior, the case should be transferred to a court with antitrust jurisdiction.
- **The rationale**. The draft Judicial Interpretation states that where a case is found to involve antitrust issues after filing, it must be handled in accordance with the AML and be transferred to a competent antitrust court if the original court lacks antitrust jurisdiction.

16. See: Zui Gao Fa Zhi Min Zhong No. 395 (2022)
17. See: Zui Gao Fa Zhi Min Zhong No. 1276 (2022)
18. See: Jing 73 Min Chu No. 1136 (2022)
19. See: Qing 0222 Min Chu No. 1204 (2022)

08 Greater Bay Area: Hong Kong's Booming Development in Competition Enforcement

Outlook for 2024

We expect that, in 2024, cartel behaviors in areas relating to people's livelihoods will remain the focal point of enforcement by the Hong Kong Competition Commission (the "**HKCC**"). Enterprises active in Hong Kong will need to pay particular attention to ensure they comply with Hong Kong regulations, especially the stringent regulations applicable when dealing with competitors.

In addition, the HKCC continues to strengthen its competition enforcement in the digital economy. In recent years, increasing numbers of mainland internet enterprises have been developing their operations in Hong Kong, and the HKCC has started to turn its attention to whether unilateral behaviors of some mainland Chinese Internet enterprises may be considered abusive. Enterprises active in Hong Kong will need to ensure they have set up their own robust internal compliance systems with a clear and good understanding of the competition regulations in Hong Kong.

In July 2023, the HKCC signed a memorandum of understanding with the Guangdong Provincial Administration for Market Regulation on enhancing cooperation on competition matters in the Greater Bay Area. In the future, we will likely see more cooperation and exchanges between the Mainland and Hong Kong on competition enforcement.

Hong Kong is increasingly becoming an active jurisdiction in terms of antitrust enforcement, contrasting the trend in Chinese mainland where antitrust enforcement has entered a period of relatively mild and normalized regulation.

1. Overview of Hong Kong's Competition Law Enforcement Regime

Under the "one country, two systems" principle, Hong Kong has an independent framework of competition law that is different from that of the Chinese mainland. As compared to the PRC's AML, which came into effect in 2008, Hong Kong's first cross-sector competition law, the Competition Ordinance, only came into full force at the end of 2015. Hong Kong is, therefore, a much "younger" jurisdiction in this area.

Unlike the AML, which is built around SAMR as the center of enforcement, Hong Kong's antitrust enforcement system follows the common law tradition with a two-tiered enforcement structure and procedure. The different structural approach also reflects China's "one country, two systems" principle. Hong Kong's competition enforcement structure is as follows:

- **Tier One: The investigation phase of the HKCC.** The HKCC is responsible for carrying out antitrust enforcement activities and has developed a series of guidelines and policy papers around the Competition Ordinance. The Competition Ordinance gives the HKCC the power to terminate an investigation by accepting commitments from undertakings if they wish to reduce the negative impact of their behavior during the course of the investigation. On the other hand, if the HKCC, after investigation, ultimately finds that an undertaking has acted unlawfully, it cannot directly impose penalties such as fines on the offending undertaking. Instead, it needs to refer the infringement in question to the Competition Tribunal (the "**Tribunal**") for adjudication and imposition of penalties.
- **Tier Two: Adjudication by the Tribunal.** If the HKCC considers that there is sufficient evidence to prove that an undertaking has committed an offence under the Competition Ordinance, it will formally refer the case to the Tribunal and initiate the adjudication process. The Tribunal is established under the Competition Ordinance as a court at a level equivalent to the Court of First Instance of the High Court of Hong Kong. It is responsible for handling legal proceedings relating to competition matters and is empowered to adjudicate on the imposition of penalties (such as fines on businesses). The adjudication process of the Tribunal is similar to a court hearing: that is, to some extent, adversarial, with both parties involved and the HKCC having the right to raise claims and adduce evidence. The Tribunal will adjudicate cases in accordance with its procedural guidelines, namely the Competition Tribunal Rules, to ensure fairness and justice for all parties concerned.

In terms of substantive behavior, the Competition Ordinance is similar to the AML in that it prohibits agreements that harm competition (including horizontal and vertical agreements), as well as conduct that abuses dominance (including predatory pricing, tying and bundling, refusal to deal and exclusive dealing, among others). In addition, the Merger Rules of the Competition Ordinance also regulates concentrations of undertakings. However, it should be noted that this merger control regime operates on the basis of voluntary notifications made by undertakings and is currently only applicable to Hong Kong's telecommunications sector.

2. "Conspiring among Competitors": Continued and Strengthened Enforcement against Cartel Behavior

Since its establishment, the HKCC has prioritized cartel behavior as the key enforcement focus, with such cases being regularly featured in Tribunal rulings. The focus on these offenses also highlights the HKCC's strategy when allocating its resources. By giving priority to conduct that can easily be determined as

being unlawful, the HKCC is able to strengthen the deterrent effect of such cases and enhance public understanding of the competition law.

The HKCC has been very active in competition advocacy against cartel behavior. In 2023, the HKCC produced a TV drama series named "Cartel Hunters", which was written based on the first actual cartel case handled by the HKCC since the introduction of the Competition Ordinance. The drama series aimed at giving the public a better understanding of the application of Hong Kong's competition law.

Since the Competition Ordinance came into effect, and up to December 31, 2023, the HKCC has referred a total of 15 investigation cases to the Tribunal, of which 13 cases involved cartel behavior. In terms of the sectors involved in these cases, the HKCC prioritized sectors and areas that affect the daily lives of the Hong Kong people, including construction work, repair and renovation, information technology service and the sale of literature and educational books.

Such an approach is aligned with SAMR's recent focus on people's livelihood. It is also in line with the three overall enforcement priorities of the HKCC, which are (i) anticompetitive behavior affecting people's livelihood, (ii) collusive behavior to defraud government funding, and (iii) conduct affecting the digital market.

In addition to cartel behavior, the HKCC has to date referred to the Tribunal a case involving RPM in the food processing industry and a case involving abuse of substantial market power by an undertaking in a medical gas supply market in Hong Kong.

In 2023, the HKCC continued to maintain a high level of interest in cartel behavior, submitting two high-profile cartel cases to the Tribunal, with one case involving government funding in science and technology and the other case involving a real estate agency (see the "case studies" below).

Case study: Cartel involving a government-funded program

Background. On March 22, 2023, the HKCC commenced legal proceedings before the Tribunal against four business undertakings and three individuals. The case surrounded the government's initiative to promote doing business remotely launched in 2020 during the pandemic, under which undertakings could apply for government funding to procure IT solutions. The HKCC alleged that, in submitting their offers for the program, the undertakings and individuals concerned had engaged in the practice of "covered (collusive) bidding", i.e., certain bidders had intentionally bid higher than the pre-determined successful bidder or had offered less attractive terms to induce the pre-determined successful bidder to win the tender.

The allegations. The HKCC, after investigation, had good reasons to believe that the collusive tendering behavior described above constituted a serious anticompetitive agreement involving price-fixing, market segmentation of customers, collusive tendering and/or exchange of competitively sensitive information, in contravention of the First Conduct Rule under the Competition Ordinance.

Developments. The HKCC applied to the Tribunal for an order that includes a declaration that the parties concerned have breached the First Conduct Rule, the imposition of pecuniary penalties on the parties concerned, and a director disqualification order. The case is still at the hearing stage before the Tribunal.

Case study: Real estate agencies cartel

Background. On November 14, 2023, the HKCC commenced proceedings in the Tribunal against Midland Realty International Limited, its affiliates Hong Kong Property Services (Agency) Limited and Midland Holdings Limited (collectively, "**Midland Group**") and five of Midland Group's senior management.

The allegations. After investigation, the HKCC found that Midland Group, as a real estate agency, had agreed with its competitor, Centaline Property Agency Limited and its affiliate, Ricacorp Properties Limited (collectively, "**Centaline Group**"), to charge a minimum 2% fee for the sale of first-hand residential properties in Hong Kong. This practice has, in effect, fixed or limited the maximum commission that an agent can receive from property purchasers. The agreement may result in purchasers paying higher prices when purchasing properties, even if the actual price of properties remains unchanged. The HKCC is of the view that such behavior constitutes a serious anticompetitive agreement to fix prices and/or exchange competitively sensitive information in breach of the First Conduct Rule.

Developments. The HKCC applied to the Tribunal for an order that includes an imposition of fines and penalties on Midland Group and five of Midland Group's senior management, a director disqualification order and the requirement for Midland Group to implement an effective compliance program as deemed appropriate by the Tribunal. Centaline Group provided information to assist the HKCC in its investigation and entered into a leniency agreement under the HKCC's leniency policy; therefore, it was not charged in the case. The case is still at the hearing stage before the Tribunal.

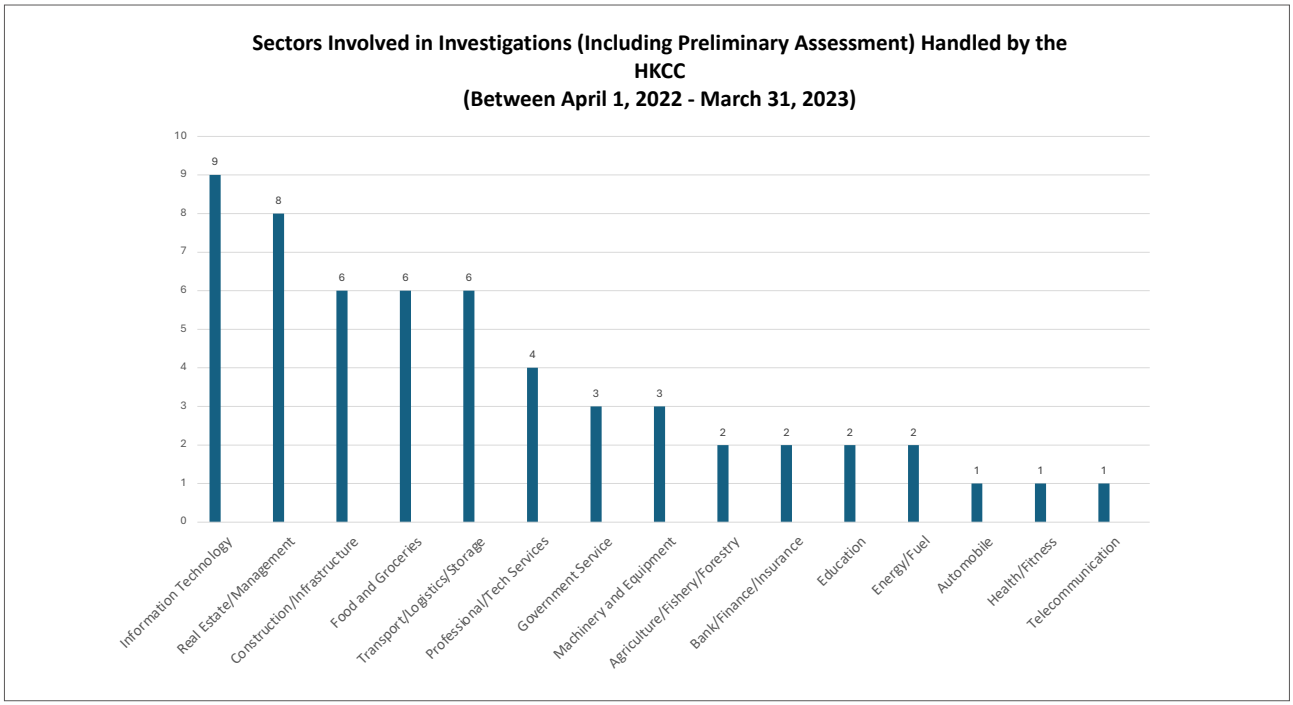
3. Strengthening Competition Regulation in the Digital Economy

The rapid development of the digital economy in the Greater Bay Area has brought new opportunities and momentum to Hong Kong's economic development. The HKCC has, in recent years, demonstrated its willingness to deal with complex cases such as those in the digital economy, as well as demonstrating its enforcement flexibility by negotiating solutions with the investigated party (such as requiring the investigated party to commit to certain remedial practices). This flexible form of enforcement allows the HKCC to address competition concerns without formally bringing a case to the Tribunal for adjudication. It also provides a clear path for businesses to achieve compliance by maintaining close cooperation with the authorities.

The digital economy is currently one of the hottest enforcement areas for jurisdictions around the world; this also applies to Hong Kong. The rapid growth of the digital economy in Hong Kong has also given some enterprises a sufficiently large market share and the opportunity to engage in anticompetitive behavior. According to the HKCC's Annual Report 2022-23, information technology accounted for the largest proportion of cases handled by the HKCC, including those that are at the preliminary assessment stage.[20]

In 2023, the HKCC's investigation into two local food delivery platforms drew public attention. According to public announcements, the HKCC's investigation focused on whether these food delivery platforms had entered into vertical agreements with merchants on their platforms, including exclusive dealing, most favored nation clauses and tying and bundling practices. According to the HKCC's announcement, it has accepted the commitments submitted by the two food delivery platforms on December 29, 2023, which put an end to the HKCC's investigation.

20. See: Hong Kong Competition Commission Annual Report 2022-23, available at < https://www.compcomm.hk/en/media/reports_publications/files/2022_23_HKCC_Annual_Report.pdf>, p.34



4. Merger Control: Is It Possible to Introduce an Economy-wide Regime?

Under the Competition Ordinance, the relevant regulatory authorities are only empowered to review transactions in the telecommunications sector and then only after voluntary notifications by the parties. The HKCC shares jurisdiction with the Communication Authority of Hong Kong in this regard. As early as the legislative stage of the Competition Ordinance, there were voices expressing the view that Hong Kong should implement a general review system for merger control covering all sectors of the economy. However, such voices were met with resistance from some sections of the Hong Kong business community, who were inclined to maintain the principle of a free market economy in Hong Kong. In recent years, the telecommunications sector in Hong Kong has undergone substantial consolidation, and the number of mergers has been minimal. According to the Communications Authority Gazette, it has only approved three transactions (two unconditionally and one conditionally) since 2018.

Moving into 2024, the continued call for the expansion of Hong Kong's merger control regime to cover a wider range of industries seems to indicate the authorities' interest in having a more extensive regime regulating merger activities in Hong Kong. Despite these pressures, there is currently no legislative agenda or formal announcement, and there is still a wait-and-see approach to this legislative development. It remains to be seen whether the push for a more industry-inclusive merger control regime will turn into concrete legislative action or whether the status quo will be maintained.

09 National Security/Foreign Investment Review: Further Inclination Towards Politicization and Stricter Scrutiny of Cross-Border Investments

Outlook for 2024

In recent years, an increasing number of countries have placed a greater emphasis on national security when reviewing foreign investments, often refusing inbound investments on national security grounds. This trend continued in 2023, and, if anything, intensified, with governments globally introducing new rules to strengthen regulation and oversight of foreign investment.

In 2024, we anticipate that China will further open its doors to foreign investment across many sectors, chiefly by reducing the scope of the foreign investment "negative list" (which refers to special administrative measures for the access of foreign investment in certain industries or areas). At the same time, we also expect that China's national security review ("**NSR**") framework will become increasingly significant, where foreign investments in strategic and sensitive sectors within China, including technology, critical minerals, data processing and internet and financial services will be meticulously examined. Regarding outbound transactions, cross-border investments by Chinese firms are expected to face intensified scrutiny amid a global economic slowdown and rising trade protectionism.

Businesses will likely need expert guidance to understand and navigate newly implemented investment rules. Additionally, more countries are poised to bolster their review mechanisms for transactions to protect domestic interests, leading to stricter governmental oversight for cross-border deals.

To avoid disruptions to transactions, parties involved in cross-border investments should proactively conduct comprehensive foreign investment review risk assessments, particularly when the transaction involves sensitive industries or factors. Sufficient time should be reserved in the transaction timetable to accommodate the review process. Additionally, it is recommended that parties consider incorporating elements related to foreign investment review when discussing transaction terms, such as making the review approval a pre-condition for completion, introducing a compensation clause in case a transaction cannot be completed, and establishing a reasonable mechanism for the termination of the transaction.

1. Inbound Transactions: Developments in China Foreign Investment National Security Review

In 2023, more foreign investors began to pay attention to the impact of China's NSR process on their investment and merger and acquisition transactions involving Chinese businesses. They proactively conducted NSR screening assessments at the initial stage of the transaction to eliminate or reduce regulatory uncertainty.

Under China's Measures on Foreign Investment Security Review, a mandatory NSR filing will be trigged if: (i) a transaction involves foreign investment in Chinese businesses in the defense-related sectors or within areas adjacent to military sites; or (ii) the transaction results in the acquisition of effective control over Chinese businesses in any of the "sensitive sectors" specified by the NSR Measures.

Considering that current NSR measures merely provide a broad description of the industries falling within the scope of foreign investment national security review, the parties involved in a transaction can, in practice, engage in enquiries with the National Development and Reform Commission ("**NDRC**") in order to get a clearer picture of what they need to do in order to proceed with the transaction. Based on our experience, the NDRC is generally willing to consider and respond to enquiries with foreign investors regarding whether a specific transaction would attract a review, which has been proven to be helpful in addressing some of the uncertainties of the regime. The parties should, however, reserve sufficient time for this purpose as the enquiry process may be lengthy (1.5-2 months or even longer).

2. Outbound Transactions: Recent Developments in Global Foreign Investment Review Regimes

In recent years, the catalysts that have led to the recent proliferation of foreign investment review regimes in major jurisdictions include, among others:

- Changing circumstances in national security risks and challenges posed by technology: on the one hand, investment transactions involving state-owned enterprises and investors can be greeted with suspicion by foreign governments over concerns of hostile intentions. These concerns encompass activities deemed as espionage, geopolitical influence, leveraging government influence and technological acquisition or theft. On the other hand, technologies present challenges to national security, including cyber-terrorism, hacker attacks, and financial crimes such as ransomware.

- Rising economic nationalism due to the pandemic: the global outbreak of the COVID-19 pandemic has led to a surge in economic nationalism as governments worldwide take measures to protect domestic businesses, especially those in strategic industries, from potentially predatory foreign investors. At the same time, various governments have prioritized the protection of medical and other critical infrastructure and the supply of key input as part of their foreign investment review legislative efforts.

Overview of the development of foreign investment/subsidies review regimes in major jurisdictions in 2023

The United States		On August 9, 2023, US President Joe Biden signed the "Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern", which restricts investments in China and restricts or prohibits investments by US entities in China's high-technology sectors, which currently include semiconductors and microelectronics, quantum information technology and AI.
The United Kingdom		On April 27, 2023, the U.K. government published the second edition of its "Market Guidance on the National Security and Investment Act 2021", to provide businesses with greater transparency and predictability over the foreign investment regime.
The European Union		On October 12, 2023, the mandatory notification obligation under the Foreign Subsidies Regulation ("**FSR**") became effective. From October 12, 2023, merger and acquisitions and public procurement projects taking place in the EU must be notified if they meet the notification thresholds.
Belgium		On July 1, 2023, Belgium introduced a mandatory foreign investment review regime to review and assess the impact of foreign transactions on national security, public order and national strategic interests.
The Netherlands		On June 1, 2023, the Dutch Security Screening of Investment, Mergers and Acquisitions Act became effective, introducing a mandatory notification regime and requiring prior notification of foreign investments involving "sensitive technologies" and "key suppliers".
Spain		On July 4, 2023, Spain enacted a new version of its foreign investment regime providing clarifications to key concepts in its current law on foreign investment, including investments, investors and key industry sectors (including critical infrastructure, dual-use technologies, etc.) that would fall within the scope of foreign investment review. The updated foreign investment review regime became effective on September 1, 2023.

While the foreign investment/subsidies review regime of overseas countries generally applies to all foreign investments and does not specifically target Chinese companies, enforcement reports published by foreign antitrust agencies in recent years indicate that Chinese investments in high-technology and critical resources are major targets for foreign investment scrutiny in Western countries.

For example, the EU's FSR could significantly affect Chinese investments in Europe, particularly those industries that are highly reliant on subsidies. Due to China's perceived provision of substantial subsidies to industries such as steel, aluminum, semiconductors, biotechnology and electric vehicles, businesses in these industries may face a higher risk of anti-subsidy investigations in the EU. On September 13, 2023, EC President Ursula von der Leyen announced an investigation into China's subsidies for electric vehicles. Although this investigation is conducted under the EU's existing anti-subsidy regulations, the EC could theoretically also initiate investigations based on the new FSR. Additionally, the EU may also launch investigations into China's subsidies to steel, solar and wind power industries.

3. Addressing the Impact of Foreign Investment Regulatory Regimes on Cross-Border Investment

Businesses should pay extra attention to governmental control over cross-border investment activities as countries globally continue to strengthen regulations and review such activities. In particular, cross-border investments in high-tech and strategically sensitive industries such as semiconductors, microelectronics, quantum information technology, AI, critical infrastructure, telecommunications, energy, satellites, military technology will likely be subject to stringent governmental scrutiny or even be prohibited due to concerns related to national security and supply chain security.

For all parties involved in transactions, planning the transaction carefully and fully considering the impact of investment regulations in the respective countries during the planning process is essential. This includes conducting due diligence on the target company and counterparties to examine whether they engage in sensitive sectors and receive financial support from another country. A comprehensive assessment helps evaluate the possibility of regulatory review and risks arising from the proposed transaction.

In addition, when formulating the transaction process and timeline and preparing transaction documents, it is crucial to fully consider the applicability of foreign investment review regimes in different countries and their potential impact, and appropriately address these considerations in the transaction document – for instance in the form of conditions precedent to completion, obligations and cooperation clauses of the parties, transaction milestones, representations and warranties, termination fees, and so on.

Chinese companies planning to list abroad should pay particular attention to specific industrial regulations and national security review requirements that must be met for overseas listings, such as network security review, foreign investment national security review and data security review.

10 Emerging Trends in Global Antitrust and Future Enforcement Directions in China

Outlook for 2024

Economic globalization has brought an international perspective to antitrust law, and the focus and attention of enforcement in different jurisdictions have been influenced by the increasing contact between antitrust authorities. In 2023, we observed that SAMR actively engaged in discussions on novel antitrust issues, indicating its commitment to participate in the global antitrust landscape and articulate China's perspective.

For 2024, several areas may emerge as key points of emphasis in Chinese antitrust enforcement and regulation:

- **Deepening regulations in the labor market**: The labor market has garnered significant attention from antitrust authorities globally, and China is no exception. SAMR's intervention in the poultry industry's no-poaching proposal suggests that labor market practices could become a more pronounced target for antitrust scrutiny in China. Businesses are keen to see if SAMR elevates labor market issues as a focal point of enforcement, particularly where "livelihood" matters are concerned.

- **Application of antitrust law in the AI realm**: The rapid advancement of big data and AI technologies is reshaping market dynamics. Antitrust authorities around the world are exploring how to apply antitrust laws within these cutting-edge domains. SAMR is likely to closely monitor these developments to align China's regulatory approach with international standards and to safeguard fair competition and innovation within its burgeoning AI industry.

- **Antitrust issues arising from ESG (Environmental, Social, and Governance) collaborations**: As companies increasingly collaborate to meet ESG objectives, such as reducing carbon emissions, there is potential for antitrust concerns related to horizontal anticompetitive agreements. SAMR may introduce regulations and guidance to balance the pursuit of ESG targets with the maintenance of fair competition in the market.

The changing landscape of antitrust law and enforcement worldwide is being shaped by new economic, social, technological, and environmental challenges. These developments abroad may increasingly resonate with Chinese antitrust authorities, as evidenced in 2023 when SAMR scrutinized four Chinese firms over no-poaching agreements in the labor market, reflecting a broader trend of vigorous antitrust oversight in employment practices seen in other jurisdictions. Given this context, businesses active in China should stay informed about global antitrust trends and proactively manage compliance risks.

1. Risks of Horizontal Anticompetitive Agreement in the Labor Market

In recent years, protection of labor rights has led many jurisdictions, including the US, the EU, the UK and Canada, to enforce strict rules against anticompetitive labor practices, with a focus on:

- No-poaching agreements, also known as non-solicitation agreements, involving companies agreeing not to hire each other's employees, which can be anticompetitive as it divides the labor market among businesses.

- Remuneration-fixing agreements, where companies set uniform employee wages and/or benefits, which can be seen as a form of price-fixing.

- Exchanging sensitive information about labor terms between competitors can, while not necessarily illegal, encourage anticompetitive practices. These actions are gaining increased regulatory attention for potentially undermining competition.

Reflecting a broader trend of enforcing labor-related antitrust laws, SAMR addressed an emerging no-poaching agreement among four pig breeding companies on July 31, 2023. SAMR identified this planned agreement as a violation of the spirit of the AML. SAMR demanded that the companies involved to cease their no-poaching arrangement and take corrective measures to align with antitrust regulations.

Based on the latest enforcement trends and guidelines from overseas antitrust authorities, remuneration-fixing agreements and no-poaching agreements are considered core restrictions in jurisdictions such as the US, Canada, and the United Kingdom. These are the most hardcore types of antitrust agreements and are subject to the presumption of illegality or "by object" restriction. However, there may be limited circumstances where there are justifiable explanations or defenses, such as:

- **Ancillary restraints**: Ancillary restraints are provisions within broader commercial agreements that, while potentially restrictive, are deemed necessary and directly related to the execution of the primary transaction. These restraints don't inherently negate antitrust concerns but are often permitted if they are subordinated to the main deal, and their scope is proportionate to the legitimate objectives of the primary agreement. For instance, non-solicitation clauses in merger contracts are typical ancillary restraints to facilitate the deal's completion. The Competition Bureau of Canada specified three conditions for an ancillary restraint defense: the restraint must be integral to a larger independent agreement (i.e., the "main agreement"), is directly related and necessary to the main agreement's goals, and the main agreement itself must comply with competition law.[21]

- **Collective bargaining procedures**: Employers may engage in collective bargaining with employee organizations, such as labor unions, to

21. See: The public consultation of "Enforcement guidance on wage-fixing and no-poaching agreements" in Canada: available at <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/enforcement-guidance-wage-fixing-and-no-poaching-agreements>

negotiate better employment conditions for their employees in the future. In such cases, there may be room for defense or application of exemptions.

Although Article 17 of the AML does not explicitly prohibit agreements or arrangements relating to human resources, there is a risk that these actions may be regarded as constituting horizontal anticompetitive agreements in light of overseas precedents and the recent close attention paid by the Chinese antitrust authorities to such conduct. For example, no-poaching agreements may constitute "market allocation in the procurement of inputs (labor)" or "collective refusal to deal". In addition, high-tech companies should be particularly mindful as agreements that restrict talent mobility may also involve restrictions on technology development, posing a risk of being agreements that "restrict the development of new technologies and products".

In China, the issue of anticompetitive agreements was also underscored in a judicial case involving a group of driving training centers. In Taizhou City, Zhejiang Province, 15 centers formed a joint venture (SPC (2021) No. 1722) and agreed to standardize prices for driving courses and restrict the movement of vehicles and instructors. The SPC ruled that these actions limited the supply of driving training services and constituted a horizontal anticompetitive agreement. The Court invalidated the joint venture and its conventions, emphasizing the illegality of such practices that restrict production and sales in the market.

2. Global Hot Topic: Antitrust Risks in the Era of AI

The US Federal Trade Commission:

"The rising importance of AI to the economy may further lock in the market dominance of large incumbent technology firms. These powerful, vertically integrated incumbents control many of the inputs necessary for the effective development and deployment of AI tools, including cloud-based or local computing power and access to large stores of training data. These dominant technology companies may have the incentive to use their control over these inputs to unlawfully entrench their market positions in AI and related markets, including digital content markets. In addition, AI tools can be used to facilitate collusive behavior that unfairly inflates prices, precisely target price discrimination, or otherwise manipulate outputs." [22]

In the wake of ChatGPT's introduction in 2022, AI advancements have significantly impacted society and industries, prompting legislative and policy responses worldwide. In antitrust, AI's advanced technical capabilities and large data pools have raised concerns about reinforcing the market power of dominant tech companies and increasing anticompetitive risks. Jurisdictions like the US, EU, UK, Australia, and Japan have responded with proactive antitrust legislation targeting AI. China, too, has responded, implementing the "Interim Measures for the Management of Generative AI Services" to curb anticompetitive behavior in AI services.

Based on the development in various jurisdictions worldwide, the main antitrust issues concerning AI include:

- **Algorithm collusion**: Algorithms can facilitate tacit coordination between competitors, acting as modern-day tools for hub-and-spoke cartels. By analyzing market data, algorithms may enable firms to align prices without explicit communication. The risk is amplified in generative AI, which depends on critical resources such as data and computational power. Control over these resources

22. See: The U.S. Federal Trade Commission, "Comments of the United States Federal Trade Commission" (October 30, 2023), available at <https://www.ftc.gov/system/files/ftc_gov/pdf/p241200_ftc_comment_to_copyright_office.pdf>

by a few players could lead to market distortion. When competitors use a shared generative AI tool for pricing, it challenges antitrust authorities to determine whether their behavior constitutes a collusive practice and how to prove the traditional antitrust elements such as intent and consistency.

- **Discriminatory practices**: AI systems, leveraging vast amounts of proprietary data, can lead to self-preferencing where platforms prioritize their own services over competitors'. This self-preferencing, along with the potential for big-data-driven price discrimination, offers tailored prices or service conditions to consumers based on their profiles. Such strategies could infringe on consumer rights and create unfair market conditions, potentially qualifying as an abuse of dominance.

- **Bundling/Tying**: Generative AI's potential for enhancing quality of life and productivity opens up opportunities for its integration into existing digital products. However, dominant companies might exploit this by bundling generative AI with their primary offerings or tying AI applications to the purchase of other products, thereby limiting competition. For instance, a company might bundle its office software with an AI assistant, creating a competitive moat that's difficult for others to cross.

China's enactment of the "Interim Measures for the Management of Generative AI Services" illustrates its resolve to take the lead in shaping an antitrust environment that can adapt to the transformative nature of AI. This regulatory initiative signals China's dedication to cultivating a competitive marketplace that supports both technological advancement and fair market practices, positioning it as a pioneer in the intersection of AI regulation and antitrust enforcement.

3. Overseas Antitrust Trend: ESG Collaborations VS. Antitrust

As discussions on sustainable development continue globally, ESG has become a major topic reshaping the business models of many businesses. The balance between environmental interests, labor interests, and economic interests (efficiency and low prices) may potentially become an inevitable issue in antitrust law.

Antitrust authorities in various jurisdictions such as the US, the EU, the United Kingdom, the Netherlands, Japan, Germany, Greece, and Indonesia have begun to look at whether collaborations between companies in achieving ESG goals may give rise to anticompetitive issues such as horizontal collusion. These issues include:

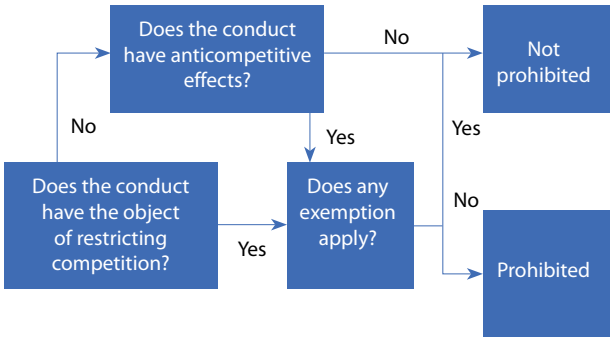
- **The risk of ESG collaborations constituting horizontal anticompetitive agreements**: Collaborative efforts among competitors to achieve ESG goals (such as net-zero emissions targets) may involve the risk of engaging in horizontal anticompetitive agreements. For example, conduct that can potentially trigger the existence of horizontal cartels includes the setting of standards associated with product prices or features, joint boycotts of standards, the establishment of mandatory standards or qualification requirements, joint purchasing agreements or the exchange of competitively sensitive information.

- **The possibility of exempting ESG collaborations from the scope of anticompetitive conduct**: There are inherent positive effects arising from cooperative or coordinated actions undertaken to achieve ESG goals, such as energy conservation and environmental protection. Whether cooperation between competitors driven by ESG objectives can be exempted from the scope of anticompetitive conduct has sparked extensive discussions in various jurisdictions.

23. In June 2023, the EC revised its Horizontal Guidelines (available at https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2990), which added a section on "Sustainability Agreements" and noted that competition law does not hinder competitors from reaching agreements that have the objective of sustainable development.

Jurisdictions such as the EU[23], the United Kingdom[24], and Japan[25] have respectively issued specific antitrust guidelines concerning the environmental and social aspects. Among them, the EC has updated the "Guidelines on The Applicability of Article 101 Of The Treaty On The Functioning of The EU to Horizontal Co-Operation Agreements" to include a section on sustainability agreements. This addition clarifies that competition law is not a barrier to joint efforts aimed at sustainable development. The EC's framework for evaluating such ESG cooperation involves a three-step analysis:

(i) assessing if the cooperation is intended to restrict competition;
(ii) evaluating its potential anticompetitive effects; and
(iii) considering if the cooperation can be exempt from antitrust rules.



What types of ESG collaborations are less likely to raise competition concerns?

The EC outlined scenarios where sustainability agreements might not trigger competition concerns, including compliance with international treaties, internal corporate practices not affecting market activity, creating databases on sustainability without purchasing obligations, and coordinating non-product-specific environmental awareness campaigns.

The CMA's Draft Guidance suggests that cooperative actions which do not adversely impact core competitive aspects are typically permissible, such as those necessitated by technical limitations, legally required collaboration, collecting sustainability data, establishing voluntary industry standards, gradual phasing out of unsustainable practices, and setting non-binding industry-wide environmental goals.

These guidelines reflect a trend towards accommodating ESG-focused collaborations under competition law. In contrast, the antitrust authorities of the US have reiterated that collusion remains illegal even when linked to ESG objectives.[26]

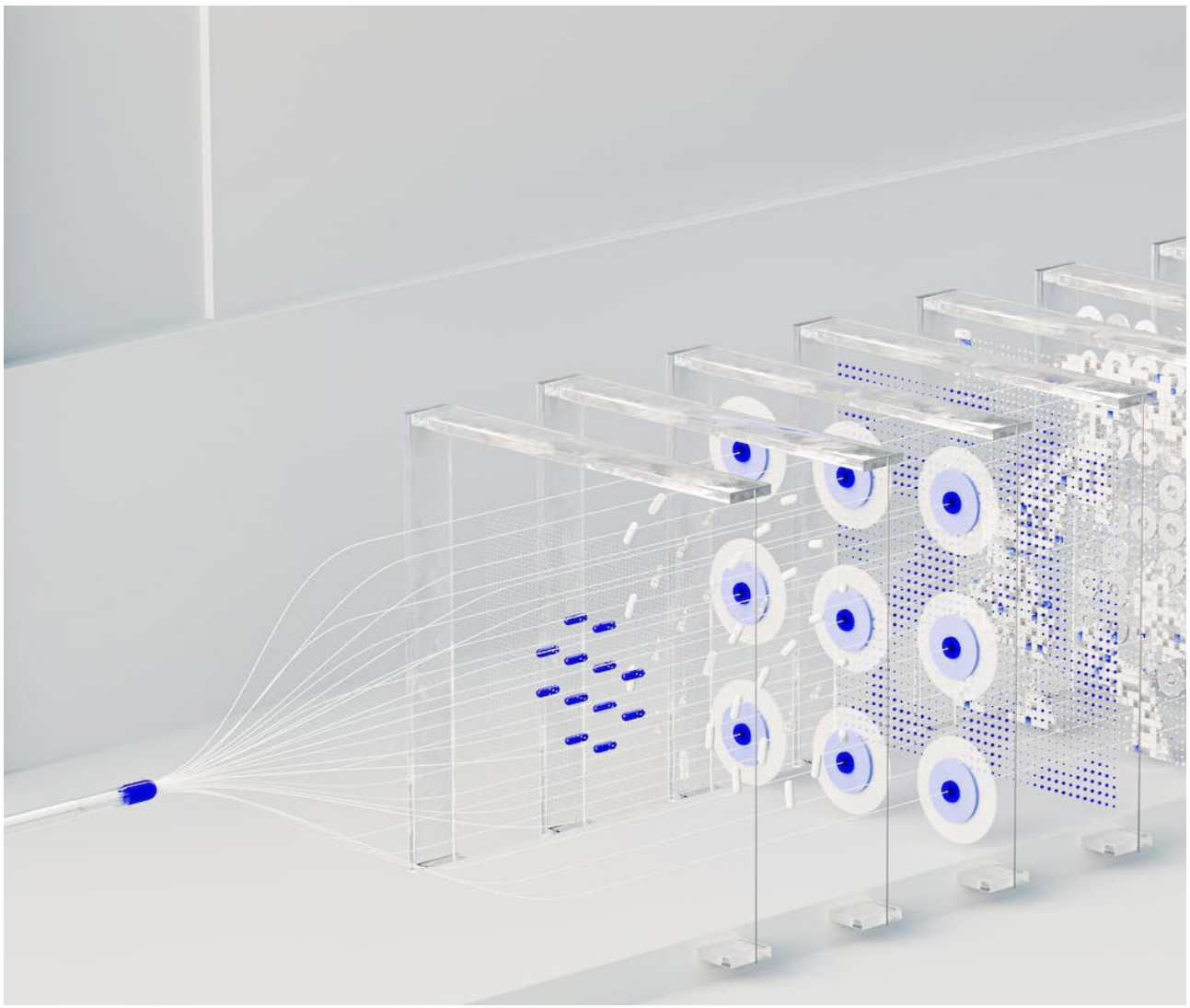
24. In October 2023, the Competition and Markets Authority ("**CMA**") published the Green Agreements Guidance (available at: https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf). In particular, the CMA places emphasis on climate change agreements, making it easier for parties to demonstrate the benefits of the agreements to combat climate change. In addition, the CMA states that it will adopt an "open-door policy" for businesses to request informal guidance on their environmental sustainability initiatives.

25. In March 2023, the Japan Fair Trade Commission issued Guidelines on Businesses Activities for Realization of a Green Society under the Anti-Monopoly Act (available at https://www.jftc.go.jp/en/pressreleases/yearly-2023/March/230331.html) and took the position that most activities seeking environmental sustainability are unlikely to restrict competition.

26. For example, Federal Trade Commission Chairlady Lina Khan and Assistant Attorney General for the Department of Justice Jonathan Kanter explicitly stated during the hearing of the Subcommittee on Competition Policy, Antitrust, and Consumer Rights of the U.S. Senate Committee on the Judiciary in September 2022 that collusive conduct is illegal and cannot be exempted simply because it is related to ESG.

As China aims to peak carbon emissions by 2030 and achieve carbon neutrality by 2060, it has launched various initiatives such as green finance measures thereby igniting debates on clean energy and sustainable development. ESG considerations are becoming central, with companies in China increasingly embedding these objectives into their strategies, which in turn raises the importance of navigating ESG collaborations in line with antitrust laws.

Article 20 of the AML allows for certain collaborative agreements that serve the public interest, such as those with the purpose of environmental conservation, to be excluded from anticompetitive conduct, provided that these agreements do not significantly limit competition and should provide consumer benefits. However, clear precedents for successful application of this exemption are limited, and guidance is vague on whether activities that are generally prohibited, such as price-fixing, can be excused under ESG considerations. Companies engaging in ESG-focused partnerships should be careful not to exchange sensitive competitive information, especially regarding prices, production quantities or sales volume. If there is a genuine need to reach agreements on pricing, production volumes or customer aspects, it is recommended to seek advice from external legal counsel or engage in discussions with the antitrust authorities in advance to assess potential antitrust risks and the prospect of seeking exemptions.



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