

2022 Antitrust Annual Report

The Brattle Group
Greater China Team

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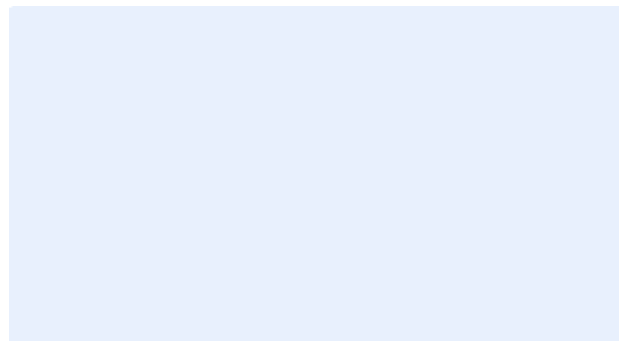


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Executive Summary

In 2022, China made significant progress in its antitrust work and fair competition policy, with notable achievements in several areas.

The Anti-Monopoly Law (AML) was amended for the first time since its promulgation 15 years ago, improving the anti-monopoly legal system and highlighting the significance of competition policies. Meanwhile, China's antitrust enforcement agencies played an increasingly important regulatory role in key industries, enhanced the efficiencies of the review of concentrations of undertakings, and continued improving antitrust enforcement capabilities.

In terms of legislation, the State Administration for Market Regulation (SAMR) – prompted by the newly-amended AML – promulgated six amended supporting regulations for public comments in 2022. The amended supporting regulations improve the laws and regulations in areas including concentrations of undertakings, monopoly agreements, abuse of dominant market position, abuse of intellectual property (IP) rights, and abuse of administrative power.

Additionally, 16 provincial Administrations for Market Regulation (AMRs) issued 24 local anti-monopoly compliance guidelines in coordination with the amendment of the AML. This included the Guidelines for Anti-Monopoly Compliance in the Digital Economy, which – released by Jiangxi AMR – is China's first digital-economy-related anti-monopoly compliance guidelines. To facilitate fair competition in the digital economy, China revised the Anti-Unfair Competition Law for the second time and solicited public opinion.

In terms of antitrust enforcement, there was an increase in the in-depth regulation of the platform economy in 2022. SAMR adopted a categorical and hierarchical review system to close cases of concentrations of undertakings with greater efficiencies. In 2022, provincial AMRs focused on market monopoly conduct in fields such as construction materials, medicine, and agriculture.

In terms of judicial litigations, cases in 2022 were in a wide range of industries, demonstrating that the AML has become an effective tool for both individuals and corporate bodies in various industries to protect their legitimate rights and interests.

Updates on China's Antitrust Legislation in 2022

China's antitrust legal system saw many changes and improvements in 2022, including the first-ever revision of the Anti-Monopoly Law (AML), the introduction of several draft supporting regulations for public comments, the draft revision of the Anti-Unfair Competition Law for public comments, the release of numerous anti-monopoly compliance guidelines, and more.

The Amended Anti-Monopoly Law

On June 24, 2022, the 35th meeting of the Standing Committee of the 13th National People's Congress approved the amendment of the AML, which is the first revision since its implementation in 2008.¹ The new law went into effect on August 1, 2022.²

The amended AML improves China's anti-monopoly legal system and promotes more effective implementation of competition policies through six key aspects. The new AML:

- 1. Highlights competition policies as the foundation of China's antitrust legal system and stresses the significance of the fair competition review system.** It also adds "encouraging innovation" as a legislative purpose.
- 2. Requires China's antitrust enforcement agencies to tighten anti-monopoly regulations on the platform economy.** The amended AML stipulates that business operators shall not engage in monopolistic conduct using data, algorithms, technology, capital advantages, platform rules, etc. The amendment provides a legal basis for anti-monopoly supervision in the era of the new platform economy.
- 3. Clarifies the rules for identifying monopoly agreements and the analysis procedure concerning vertical monopoly agreements.** The amended law introduces the "safe harbor" mechanism for vertical monopoly agreements, which stipulates that agreements reached between operators and counterparties shall not be prohibited if 1) the market share of the business operator and the counterparty in the relevant market is lower than the standard, and 2) there is no evidence that their conduct may eliminate market competition.

¹ National People's Congress Online, "Decision of the Standing Committee of the National People's Congress on Amending the Anti-Monopoly Law of the People's Republic of China," June 24, 2022, <http://www.npc.gov.cn/npc/c30834/202206/e42c256faf7049449cdfaafb374a3595.shtml>.

² Anti-Monopoly Law of the People's Republic of China, June 24, 2022, https://gkml.samr.gov.cn/nsjg/fgs/202211/t20221102_351257.html.

4. **Improves the filing system of concentrations of undertakings and introduces the “stop the clock” mechanism.** The anti-monopoly enforcement agencies may suspend the fixed timeline of review procedures if 1) the undertakings do not reply to SAMR’s requests for information by the given deadline, 2) new circumstances and facts emerge that have significant impacts on the concentrations, or 3) the agencies need more time to evaluate the remedies and the undertakings apply for a suspension.
5. **Requires China’s antitrust enforcement agencies to review concentrations of undertakings that may eliminate and restrict competition, even if the concentration does not meet the criteria.** The agencies are also encouraged to pay more attention to various theories of harm in competition cases.
6. **Elaborates on legal liability and enhances the deterrent effect of the AML through multiple aspects, including the subject of behavior, behavior type, fine amount, and liability type.**

Regulations and Guidance

In coordination with the promulgation of the new AML, on June 27, 2022, SAMR issued six draft regulations for public comments, which improve the laws and regulations in multiple areas, including in concentrations of undertakings, monopoly agreements, abuse of market dominance, abuse of intellectual property rights, and abuse of administrative power. These include:

1. **Provisions on Thresholds for Prior Notification of Concentrations of Undertakings (Draft for Public Comments).** This draft raises turnover thresholds – including the combined worldwide turnover, the combined nationwide turnover, and the nationwide turnover of one operator involved – for concentrations of undertakings. The draft provisions raised thresholds from RMB 10 billion, RMB 2 billion, and RMB 400 million to RMB 12 billion, RMB 4 billion, and RMB 800 million, respectively. Concentrations below the corresponding thresholds do not need to be filed. The draft regulation improves the accuracy of reviews of business operators’ concentrations, and reduces enterprises’ institutional transaction costs.³
2. **Provisions on Prohibition of Monopoly Agreements (Draft for Public Comments).** This draft clarifies the specific threshold of the safe harbor system. It specifies that if the combined market share of a business operator and its counterparty in the relevant

³ SAMR, “Announcement of the State Administration for Market Regulation on Publicly Soliciting Opinions on the State Council’s Provisions on Thresholds for Prior Notification of Concentrations of Undertakings (Revised Draft for Public Comments),” June 27, 2022, https://www.samr.gov.cn/jzxts/tzgg/zqyj/202206/t20220625_348150.html.

market is less than 15% and there is no evidence that the concentration eliminates or restricts market competition, agreements reached between the operator and the counterparty on the transaction are not prohibited. The draft regulation puts forth specific procedures for the application of the safe harbor system, providing business operators with concrete compliance guidelines and enhancing market expectations.⁴

- 3. Provisions on Prohibition of Abuse of Dominant Market Position (Draft for Public Comments).** In this draft, SAMR specifically includes platforms’ “self-preferencing” behaviors in the category of abuse of market dominance. Self-preferencing includes prioritizing a platform’s own products when displaying or ranking products and using non-public data of platform operators in the platform’s own product development or its decision-making process.⁵
- 4. Provisions on Prohibition of Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (Draft for Public Comments).** This draft improves the antitrust system by clarifying monopolistic behavior in the IP field and elaborating on the rules for abuse of market dominance. It also adds detailed regulations on the declaration, review, and additional restrictive conditions of concentrations of undertakings involving IP rights.⁶
- 5. Provisions on Review of Concentrations of Undertakings (Draft for Public Comments).** This draft introduces the “stop the clock” mechanism and formulates the details of its activation conditions, resume conditions, and application procedures. The draft regulation also elaborates on the review and investigation procedure of concentrations of undertakings beyond the filing threshold and the substantive standards, such as identifying business operators and fiscal years that should be reviewed.⁷
- 6. Provisions on Prohibition of Abuse of Administrative Power to Eliminate or Restrict Competition (Draft for Public Comments).** This draft revises the manifestation of illegal

⁴ SAMR, “Notice of the State Administration for Market Regulation on Publicly Soliciting Opinions on the Provisions on Prohibition of Monopoly Agreements (Draft for Public Comments),” June 27, 2022, https://www.samr.gov.cn/jzxts/tzgg/zqyj/202206/t20220627_348157.html.

⁵ SAMR, “Notice of the State Administration for Market Regulation on Publicly Soliciting Opinions on the Provisions on Prohibition of Abuse of Dominant Market Position (Draft for Public Comments),” June 27, 2022, https://www.samr.gov.cn/jzxts/tzgg/zqyj/202206/t20220627_348153.html.

⁶ SAMR, “Notice of the State Administration for Market Regulation on Publicly Soliciting Opinions on the Provisions on Prohibition of Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (Draft for Public Comments),” June 27, 2022, https://www.samr.gov.cn/jzxts/tzgg/zqyj/202206/t20220627_348158.html.

⁷ SAMR, “Announcement of the State Administration for Market Regulation on Publicly Soliciting Opinions on the Provisions on Review of Concentrations of Undertakings (Draft for Public Comments),” June 27, 2022, https://www.samr.gov.cn/jzxts/tzgg/zqyj/202206/t20220624_348145.html.

behaviors according to the amended AML and adds new content to the fair competition review system.⁸

Also in coordination with the amendment of the AML, 16 provincial Administrations for Market Regulation (AMRs) issued 24 local anti-monopoly compliance guidelines in 2022. Among them, Shanghai AMR issued seven guidelines, Shandong and Henan AMRs each issued two, and several other authorities – in Sichuan, Jiangxi, Hunan, Inner Mongolia Autonomous Region, Shanxi, Jiangsu, Tianjin, Hebei, Shaanxi, Guizhou, Hubei, Heilongjiang, and Zhejiang – each issued one guideline.

Of these, Jiangxi AMR's release of the Guidelines for Anti-Monopoly Compliance in the Digital Economy is particularly notable, as they are China's first digital economy-related anti-monopoly compliance guidelines.⁹ The guidelines elaborate on the boundaries and bottom lines of business operators' behaviors in the digital economy and clarify the manifestations of various illegal agreements or behaviors. This includes illegal horizontal monopoly agreements, illegal vertical monopoly agreements, high-risk monopoly agreements, high-risk abuse of market dominance, and high-risk concentrations of undertakings. Overall, the guidelines provide general instructions for anti-monopoly compliance in the digital economy in Jiangxi Province.¹⁰

Additionally, SAMR released the revised draft of the Anti-Unfair Competition Law for public comments on November 22, 2022, its third revision over the past five years.¹¹ In light of new economic forms and business models, the revision focuses on improving fair competition regulation in the digital economy and aims to restrict new types of unfair competition conduct through the application of data, algorithms, and platform rules. The law explicitly bans such behavior, with new rules on the misconduct of platform operators in the digital economy. It also introduces regulations on the abuse of comparative advantage, lowering and generalizing the threshold for abuse of comparative advantage.

⁸ SAMR, "Notice of the State Administration for Market Regulation on Publicly Soliciting Opinions on the Provisions on Prohibition of Abuse of Administrative Power to Eliminate or Restrict Competition (Draft for Public Comments)," June 27, 2022, https://www.samr.gov.cn/jzxts/tzgg/zqyj/202206/t20220627_348162.html.

⁹ Jiangxi AMR, "Antitrust Compliance Guidelines for Digital Economy in Jiangxi Province," November 27, 2022, <http://www.xunwu.gov.cn/xwxrmzf/c103810/202211/cb1e6de2ea104727b6c96df1741646b0.shtml>.

¹⁰ Antitrust Division I, State Administration for Market Regulation, "Jiangxi Issues Antitrust Compliance Guidelines for the Digital Economy," November 24, 2022, https://www.samr.gov.cn/fldys/sjdt/dfdt/202211/t20221124_351887.html.

¹¹ SAMR, "Announcement of the State Administration for Market Regulation on Publicly Soliciting Opinions on the Anti-Unfair Competition Law of the People's Republic of China (Revised Draft for Public Comments)," November 22, 2022, https://www.samr.gov.cn/hd/zjdc/202211/t20221121_351812.html.

China's Antitrust Enforcement in 2022

In 2022, China's anti-monopoly law enforcement widened its scope of focus, with regular and consistent supervision over various industries and monopolistic behaviors. This widened scope is in contrast to 2021, when law enforcement focused primarily on the platform economy.¹²

Among various antitrust enforcement achievements in 2022, SAMR piloted a categorical and hierarchical review system to deal with filings of concentrations of undertakings more efficiently, and – in addition to providing more in-depth regulation on the platform economy, as evidenced by fining CNKI RMB 87.6 million for abuse of market dominance – provided severe scrutiny to monopolistic conduct in the fields of people's livelihoods. Provincial AMRs investigated and dealt with notable monopoly agreement cases such as those involving the Zhejiang Civil Explosive Equipment Industry Association, Shaanxi Cement Association, Straumann (Beijing) Medical Device Trading Co., Ltd., and Jiangsu Sheyang County Rice Association.¹³

Concentrations of Undertakings

Overview of Law Enforcement

In 2022, SAMR reviewed 794 merger review cases, setting the highest annual record of reviewed transactions since the promulgation of the Anti-Monopoly Law in 2008. SAMR approved five cases with additional restrictive conditions and imposed administrative penalties on 32 cases for failure to file before the regulatory authorities.¹⁴

Among the unconditionally approved cases by SAMR, 677 were reviewed under the simplified procedure, while 91 were reviewed under the ordinary procedure.¹⁵ The concentrations of undertakings mainly came from a wide range of fields, including energy, technology and media,

¹² The Beijing News, "New Requirements for the Digital Economy: 'Going Global,' 'Normalized Supervision,'" December 19, 2020, http://epaper.bjnews.com.cn/html/2022-12/19/content_826281.htm.

¹³ People's Daily Online, "Anti-monopoly Work Conference of the National Market Supervision System Held to Deploy Five Major Work Priorities in 2023," February 9, 2023, <http://finance.people.com.cn/n1/2023/0209/c1004-32620763.html>.

¹⁴ SAMR, "Anti-Monopoly Work Conference of the National Market Supervision System and Anti-Monopoly Law Enforcement Deployment Meeting for People's Livelihood Held in Qingdao, Shandong Province," February 9, 2023, https://www.samr.gov.cn/xw/zj/202302/t20230209_353198.html.

¹⁵ Source: Analysis of public information released by SAMR.

real estate and construction engineering, automobiles, and several others. A large proportion of the cases concerned the real economy.

Three of the five concentrations with conditional approvals involved the semiconductor industry, while the other two cases involved air transport. Among them, the joint venture case between Shanghai Airport Group (SAG) and China Eastern Airlines Logistics (EAL) was the first conditionally approved case where both parties were domestic state-owned enterprises.

On July 8, 2022, SAMR issued the Announcement on the Pilot Delegation of Anti-Monopoly Review of Concentrations of Undertakings. In the pilot program, SAMR entrusted the anti-monopoly review of certain simple cases to the local Administrations for Market Regulation (AMRs) in Beijing, Shanghai, Guangdong, Chongqing, and Shaanxi.¹⁶ In 2022, the five provincial-level AMRs released 103 simple cases of concentrations of undertakings, among which 88 were granted unconditional approvals.¹⁷

Economic Analysis of Conditionally Approved Concentrations of Undertakings

In 2022, SAMR granted five cases of concentrations of undertakings with conditional approvals. As four of them involved horizontal overlap in the relevant markets, SAMR highlighted the analysis of market share and concentration ratios in their competition analysis, using indicators – such as the Herfindahl-Hirschman Index (HHI), concentration ratio (CR_n), and others – to analyze the changes of concentration ratios in the relevant markets before and after the transaction. Structural and behavioral remedies were adopted for the two horizontal merger cases.

¹⁶ SAMR, “Announcement of the State Administration for Market Regulation on Deploying Pilot Anti-Monopoly Reviews of Certain Concentration Cases,” July 8, 2022, https://gkml.samr.gov.cn/nsjg/fldes/202207/t20220715_348645.html.

¹⁷ Source: Analysis of public information released by SAMR.

Table 1. Conditionally Approved Concentrations of Undertakings in 2022

TRADING PARTIES	APPROVAL DATE	INDUSTRY	TRANSACTION TYPE	ADDITIONAL CONDITIONS
GlobalWafers/Siltronic ¹⁸	1/20/2022	Semiconductor	Horizontal	Structural and Behavioral Remedies
AMD/Xilinx ¹⁹	1/27/2022	Semiconductor	Conglomerate	Behavioral Remedy
II-VI/Coherent ²⁰	6/28/2022	Semiconductor	Horizontal and Vertical	Behavioral Remedy
Shanghai Airport Group/China Eastern Airlines Logistics ²¹	9/13/2022	Air Transport	Horizontal and Vertical	Behavioral Remedy
Korean Air/Asiana Airlines ²²	12/26/2022	Air Transport	Horizontal	Structural and Behavioral Remedies

Source: SAMR

GlobalWafers/Siltronic

In the case of GlobalWafers’ acquisition of Siltronic, the combined share in the global 8-inch float-zone wafer market after the concentration would exceed 55%, and the post-merger entity would gain stronger market control. The HHI index would increase from 3,296 to 4,019, indicating that the relevant market would be highly concentrated. The transaction would lower the coordination cost between the competitors, granting them greater incentives and the ability to coordinate prices, which could eliminate or restrict effective competition.

¹⁸ SAMR, “Announcement of the State Administration for Market Regulation on Approving the Decision on the Anti-monopoly Review of GlobalWafers Co., Ltd.’s Acquisition of Equity in Siltronic AG with Additional Restrictive Conditions,” January 20, 2022, https://www.samr.gov.cn/fldys/tzgg/ftj/202204/t20220424_342163.html.

¹⁹ SAMR, “Announcement of the State Administration for Market Regulation on Approving the Decision on the Anti-monopoly Review of AMD Semiconductor’s Acquisition of Xilinx with Additional Restrictive Conditions,” January 21, 2022, https://www.samr.gov.cn/fldys/tzgg/ftj/202204/t20220424_342165.html.

²⁰ SAMR, “Announcement of the State Administration for Market Regulation on the Anti-Monopoly Review Decision on the Approval of II-IV’s Acquisition of Coherent with Additional Restrictive Conditions,” June 28, 2022, https://www.samr.gov.cn/fldes/tzgg/ftj/202206/t20220628_348220.html.

²¹ SAMR, “Announcement of the State Administration for Market Regulation on the Anti-monopoly Review Decision on Approving the New Joint Venture between Shanghai Airport (Group) Co., Ltd. and China Eastern Airlines Logistics Co., Ltd. with Additional Restrictive Conditions,” September 13, 2022, https://www.samr.gov.cn/fldes/tzgg/ftj/202209/t20220914_350009.html.

²² SAMR, “Announcement of the State Administration for Market Regulation on Approving the Anti-monopoly Review Decision on Korean Air’s Acquisition of Asiana Airlines Co., Ltd. with Additional Restrictive Conditions,” January 20, 2022, https://www.samr.gov.cn/fldys/tzgg/ftj/202204/t20220424_342163.html.

Therefore, SAMR approved the concentration with several common behavioral remedies in place. The post-merger entity must continue to supply all types of wafer products to customers in China under fair, reasonable, and non-discriminatory principles and shall not implement differential treatment. After the expiration of contracts, if customers in China want to renew an agreement, the post-merger entity shall not refuse to do so without valid reasons, and the renewal terms shall not be inferior to the original contracts.²³

Advanced Micro Devices (AMD)/Xilinx

SAMR adopted a three-step analysis method when reviewing the non-horizontal acquisition of Xilinx Technology Beijing Limited (Xilinx) by Advanced Micro Devices, Inc. (AMD), analyzing the ability, incentive, and effect of the post-merger entity to eliminate and restrict competition in the relevant markets. According to the analysis, SAMR determined that the concentration may have the effect of eliminating or restricting competition in the central processing unit (CPU), graphics processing unit (GPU), and field-programmable gate array (FPGA) markets through behaviors such as bundling, refusal to deal, and degrading interoperability.

Based on these competition concerns, SAMR decided to approve the concentration with additional restrictive conditions, requiring the combined entity to fulfill obligations including no bundled sales; no prohibition, restriction, or discrimination against customers from purchasing or using one type of individual product; supplying products according to fair, reasonable, and non-discriminatory principles; protecting third-party manufacturer information; and maintaining interoperability between AMD CPUs, AMD GPUs, Xilinx FPGAs, and third-parties' CPUs, GPUs, and FPGAs.²⁴

II-VI/Coherent

SAMR also imposed behavioral remedies on the acquisition case between II-VI and Coherent, which was identified as a horizontal and a vertical transaction. Although II-VI and Coherent overlap horizontally in the relevant markets, SAMR held that the transaction raises no competitive concern in the horizontal market.

SAMR adopted the three-step analysis method to analyze the transaction's implications on the vertical markets, including the ability, incentive, and effect of the post-merger entity to eliminate and restrict competition in the downstream high-power CO₂ laser optics market, the

²³ SAMR, "Announcement of the State Administration for Market Regulation on Approving the Decision on the Anti-monopoly Review of GlobalWafers Co., Ltd.'s Acquisition of Equity in Siltronic AG with Additional Restrictive Conditions," January 20, 2022, https://www.samr.gov.cn/fldys/tzgg/ftj/202204/t20220424_342163.html.

²⁴ SAMR, "Announcement of the State Administration for Market Regulation on Approving the Decision on the Anti-monopoly Review of AMD Semiconductor's Acquisition of Xilinx with Additional Restrictive Conditions," January 21, 2022, https://www.samr.gov.cn/fldys/tzgg/ftj/202204/t20220424_342165.html.

downstream low-power CO₂ laser optics market, and the upstream glass-based laser optics market for excimer lasers. According to the analysis, SAMR believed that the post-merger entity could foreclose its downstream competitors by refusing to supply raw materials and devices, imposing discriminatory treatment, or charging unreasonably high prices (“input foreclosure”). The entity could also foreclose its upstream competitors through refusal to deal (“customer foreclosure”).

Based on these competitive concerns, SAMR approved the transaction with additional conditions. First, the combined entity must continue to perform the corresponding supply and purchase contracts after the concentration. Second, the post-merger entity must supply CO₂ laser optical devices to customers under fair, reasonable, and non-discriminatory principles. Lastly, it should purchase CO₂ laser optical devices from multiple sources.²⁵

Shanghai Airport Group/China Eastern Airlines Logistics

Like with the II-VI and Coherent transaction, SAMR identified the joint venture between Shanghai Airport Group (SAG) and China Eastern Airlines Logistics (EAL) as a horizontal and a vertical transaction. The joint venture would hold a share of over 70% in the upstream Shanghai Pudong International Airport cargo terminal service market and gain market dominance. The concentration could eliminate close competition in the cargo terminal service market in the airport, and other incumbent competitors would be unable to impose effective competition constraints on the joint venture. As the concentration makes it more convenient for competitors to coordinate prices, the possibility of price synergy increases.

Considering that downstream customers’ demand for airport cargo terminal services is less elastic and difficult to transfer, the post-merger entity may raise prices and degrade its service after the concentration to eliminate competition in the upstream airport cargo terminal service market. In addition, airport cargo terminal service is the basis for air cargo services, which are more lucrative. The joint venture could eliminate competition in the downstream air cargo business by charging its competitors in the upstream airport cargo terminal service a higher price, degrading the quality of its airport cargo terminal service and limiting the services provided.

Based on the competitive analysis, SAMR put forward additional conditions. First, all parties involved in the concentration should keep their businesses independent from each other and should not exchange competitively sensitive information. Second, they should continue to

²⁵ SAMR, “Announcement of the State Administration for Market Regulation on the Anti-Monopoly Review Decision on the Approval of II-IV’s Acquisition of Coherent with Additional Restrictive Conditions,” June 28, 2022, https://www.samr.gov.cn/fldes/tzgg/ftj/202206/t20220628_348220.html.

abide by the agreements set forth in signed contracts. Third, they should provide airport cargo terminal services at Shanghai Pudong International Airport under fair, reasonable, and non-discriminatory principles.²⁶

Korean Air/Asiana Airlines

In the acquisition case between Korean Air Co., Ltd (Korean Air) and Asiana Airlines Inc. (Asiana Airlines), SAMR compared the market concentration ratios in all relevant geographical markets before and after the transaction. The regulator concluded that the transaction would increase market concentration, strengthen the market control of the post-merger entity, and eliminate competition between the two closely-connected competitors, leading to their higher incentive and abilities in price synergy. The air transport industry is highly regulated, and there are high barriers to economies of scale in entering the relevant markets. There are also restrictions on air traffic rights and flight slots. After the transaction, incumbent market competitors cannot exert competitive constraints on the post-merger entity through additional flights, and potential competitors face a high entry barrier into the relevant market.

Based on the competitive concerns, SAMR required the post-merger entity to return the flight slots of nine routes between China and South Korea and part of the air rights on four routes to the relevant airports to ensure sufficient competition on the corresponding routes. SAMR also imposed behavioral remedies. First, the post-merger entity must ensure stable supply on two routes. Second, without justified reasons, the entity cannot refuse to sign intermodal, special prorate, or code-sharing agreements with new entrants on 15 routes. Third, the entity must guarantee the provision of air passenger ground services at the airports in South Korea to new Chinese entrants on 15 routes under fair, reasonable, and non-discriminatory principles.²⁷ The case is considered typical as the air transport field has very significant industry characteristics, and the relevant market definition and competition analysis are complicated.

²⁶ SAMR, “Announcement of the State Administration for Market Regulation on the Anti-monopoly Review Decision on Approving the New Joint Venture between Shanghai Airport (Group) Co., Ltd. and China Eastern Airlines Logistics Co., Ltd. with Additional Restrictive Conditions,” September 13, 2022, https://www.samr.gov.cn/fldes/tzgg/ftj/202209/t20220914_350009.html.

²⁷ SAMR, “Announcement of the State Administration for Market Regulation on Approving the Anti-monopoly Review Decision on Korean Air’s Acquisition of Asiana Airlines Co., Ltd. with Additional Restrictive Conditions,” January 20, 2022, https://www.samr.gov.cn/fldys/tzgg/ftj/202204/t20220424_342163.html.

Investigation of Monopoly Agreement Cases

In 2022, SAMR published 16 administrative penalty decisions on monopoly agreement cases, all of which were investigated and dealt with by provincial AMRs. Among these cases, 11 involved horizontal monopoly agreements, with illegal conduct such as price fixing, market segmentation, and restriction of production quantity. Five cases involved vertical monopoly agreements with illegal conduct including resale price maintenance and setting minimum resale prices. One case involved both vertical and horizontal monopoly agreements.

The antitrust enforcement agencies strengthened antitrust enforcement on motor vehicle services, building materials, and medicine. In 2022, there were four investigation cases on motor vehicle services and two cases each in the building materials and medicine industries. The remaining cases were in various sectors, including education and training, financial services, seal engraving, civil blasting equipment, agriculture, public utilities, and others.²⁸

China's antitrust enforcement has long focused on the pharmaceutical industry. In 2022, two medical device monopoly agreement cases and one drug monopoly agreement case involved resale price maintenance. Strengthening supervision of the pharmaceutical industry is conducive to solving the problems of inflated prices of drugs and medical consumables and high medical costs for the masses.

In the monopoly agreement case of Straumann (Beijing) Medical Device Trading Co., Ltd., Beijing AMR analyzed how Straumann and its counterparties implemented resale price fixing and minimum price monopoly agreements, formulating market guide prices for products. The company also stabilized market prices to prevent terminal clinics from reaching lower prices and formulated low-price punishment measures for distributors.

Straumann has substantial market power as it holds a large market share in China's dental implants market and a high degree of user dependence. Dealers could not freely set prices according to market conditions due to Straumann's resale and minimum price fixing, which reduced market competition. Without price restrictions, dealers would have shared price benefits with consumers to increase market share and operating efficiency. Therefore, the price limit increased the possibility of price synergy among dealers, and a higher product price would damage the interests of consumers and the public. After its investigation, Beijing AMR imposed

²⁸ SAMR, Administrative Penalty Cases, July 2022, https://www.samr.gov.cn/fldys/tzgg/xzcf/index_1.html.

an administrative penalty of RMB 34.39 million on Straumann for reaching and implementing monopoly agreements.²⁹

In the monopoly agreement case of Geistlich Trading (Beijing) Co., Ltd. (Geistlich) involving minimum resale price, Beijing AMR determined that the relevant products comprised materials used in dental implants, including bone substitutes, filling materials, and absorbable biofilm. Geistlich and its products hold a relatively advantageous position in the relevant markets, and the dealers depend on the parties and their products and lack bargaining power. The parties in effect forced dealers to follow their price limit policies, which eliminated and restricted intra-brand competition and led to the lack of motivation for inter-brand price competition. Beijing AMR imposed a fine of 3% of Geistlich's China sales in 2020, which amounted to RMB 9.12 million.³⁰

In 2022, Beijing AMR dealt with the first monopoly agreement case in the education and training industry, which was also the first anti-monopoly case in the franchise industry. Beijing AMR believed that the price control system that Beijing Kairui Alliance Education Technology Co., Ltd. (Kairui Alliance) imposed on downstream franchisees constituted a vertical monopoly agreement. The agreement deprived the franchisees of their rights to price their services independently, and eliminated the intra-brand competition between franchisees and inter-brand competition with other brand operators. A fine of RMB 942,386.47 was imposed on Kairui Alliance for its illegal conduct.³¹

In this case, Beijing AMR adopted a more inclusive interpretation of “resale price maintenance” and administered an administrative penalty on Kairui Alliance for imposing resale price restrictions on sub-licenses, meaning that the “transfer of ownership” is not a prerequisite when determining whether the conduct constitutes “resale price maintenance.” This is consistent with the relevant provisions in the European Commission's (EC's) Guidelines on Vertical Restraints. The EC guidelines point out that, under the franchise model, the licensor may impose vertical restrictions on franchisees to maintain a unified business model.³²

²⁹ SAMR, “Administrative Penalty Decision on the Monopoly Agreement Case of Straumann (Beijing) Medical Device Trading Co., Ltd. issued by the State Administration for Market Regulation,” *Jing Shi Jian Long Fa* [2022] No. 06003, December 30, 2022, https://www.samr.gov.cn/fldys/tzgg/xzcf/202212/t20221230_352562.html.

³⁰ SAMR, “The State Administration for Market Regulation Issues the Administrative Punishment Decision on the Monopoly Agreement Case of Limiting the Minimum Resale Price of Geistlich Trading (Beijing) Co., Ltd.” *Jing Shi Jian Long Fa* [2022] No. 06001, February 9, 2022, https://www.samr.gov.cn/fldys/tzgg/xzcf/202204/t20220424_341747.html.

³¹ SAMR, “The State Administration for Market Regulation Issues the Administrative Punishment Decision on the Monopoly Agreement Case of Beijing Kairui Alliance Education Technology Co., Ltd.” *Jing Shi Jian Long Fa* [2022] No. 06002, July 27, 2022, https://www.samr.gov.cn/fldys/tzgg/xzcf/202207/t20220727_348944.html.

³² European Commission, “Guidelines on Vertical Restraints,” C(2022) 3006, para. 165.

Investigation of Abuse of Market Dominance Cases

In 2022, China's antitrust enforcement agencies investigated and dealt with a total of nine cases of abuse of market dominance. Of these, one was handled by SAMR; provincial-level AMRs dealt with the remaining eight cases.

Industries involved in the abuse of market dominance cases included public utilities (seven cases, comprising five cases involving water supply and two involving gas), transportation (one case), and the platform economy (one case). In terms of the illegal conduct involved, eight cases involved restricting trade, one involved tying without justifiable reasons, four involved attaching unreasonable trading conditions, and one involved selling goods at unfairly excessive prices.³³ The percentages of fines imposed in the nine cases fluctuated between 2% and 5%; only the case involving CNKI adopted a fine ratio of 5%.

In 2022, law enforcement agencies continued to focus on abuse of market dominance in the platform economy. On December 26, 2022, SAMR issued the administrative penalty decision regarding CNKI's abuse of market dominance, imposing a fine of 5% of its 2021 domestic turnover in China, totaling RMB 87.6 million.³⁴

CNKI is China's largest domestic network database of Chinese academic literature. SAMR considered the characteristics of the multi-sided market and the cross-side network effects of network database services when determining the relevant market for the case. Having analyzed the correlation and influence between users on all sides, SAMR defined the relevant market as the network database service market of Chinese academic literature in China, which – according to SAMR's calculation of the Herfindahl-Hirschman Index (HHI) – is highly concentrated.

When analyzing CNKI's abuse of dominance, SAMR pointed out that the demand for online database services for Chinese academic literature has low elasticity. CNKI continued to raise prices significantly despite the stable cost, forcing users to passively accept the price increase. When analyzing CNKI's price increase, SAMR referred to the price increases of its competitors in the same industry and believed that the price increase of CNKI was significantly higher than

³³ Source: Analysis of public information released by SAMR.

³⁴ SAMR, "Administrative Punishment Decision on CNKI's Abuse of Market Dominant Position Issued by the State Administration for Market Regulation," Guo Shi Jian Chu Fa [2022] No. 87, December 26, 2022, https://www.samr.gov.cn/fldys/tzgg/xzcf/202212/t20221226_352400.html.

that of its competitors, even though there was no significant difference in the cost and the content provided. CNKI has achieved high profits by increasing the database prices each year. In addition, CNKI also pushed up the price of its database services through unfair means such as splitting products, having a policy of high prices with high discounts, and sales incentives aimed at unreasonable price increases to obtain improper monopoly profits. In the case of CNKI, SAMR thoroughly considered the platform's characteristics and adopted various economic analysis methods such as two-sided market share analysis, price elasticity analysis, and determination of the HHI to evaluate the competitive effects of this case.

Antitrust-Related Judicial Litigations in 2022

Many improvements were made in China's anti-monopoly litigation field in 2022. The Supreme People's Court (SPC) publicly solicited opinions on the draft judicial interpretation of civil monopoly disputes, which is the second revision of the 2012 Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Caused by Monopolistic Behaviors. The revised provisions provide clearer guidance for courts on hearing civil monopoly disputes and for companies' antitrust compliance risk management and litigation response. In practice, anti-monopoly litigation has gradually become an effective tool for both individuals and corporate bodies in various industries to protect their legitimate rights and interests.

Improvement of Relevant Judicial Interpretation

On November 18, 2022, the SPC announced the Provisions on Several Issues Concerning the Application of Law in Hearing Monopoly Civil Disputes (Draft for Public Comments) (the New Anti-Monopoly Judicial Interpretation (Draft for Public Comments)).³⁵

Based on the new AML and the development of new economic models like the digital economy, the New Anti-Monopoly Judicial Interpretation (Draft for Public Comments) adds criteria for the review of anti-monopoly entities – including the definition of relevant markets, identification of monopoly agreements, and identification of abuse of market dominance – and regulation on the conduct of online platforms. Regarding the definition of the relevant market, the draft points out that market definition can be determined according to the case's specific circumstances by conducting demand substitution analysis, supply substitution analysis, or a hypothetical monopolist test. Given the characteristics of online platforms, the New Anti-Monopoly Judicial Interpretation (Draft for Public Comments) adds that the relevant product market can be determined by selecting the products most relevant to the alleged monopolistic behavior of the platform on one or two sides of the platform.

In response to technological development in the era of big data, the New Anti-Monopoly Judicial Interpretation (Draft for Public Comments) finds that intention liaison, information exchange, and achievement of relative behavioral consistency between market competitors

³⁵ Intellectual Property Court of the Supreme People's Court, "Announcement on Soliciting Public Opinions on the Provisions on Several Issued Concerning the Application of Law in Hearing Monopoly Civil Disputes," November 18, 2022, <https://ipc.court.gov.cn/zh-cn/news/view-2104.html>.

through the use of data, algorithms, technology, and other means constitutes reaching and implementing illegal monopolistic agreements.

The New Anti-Monopoly Judicial Interpretation (Draft for Public Comments) also elaborates on the analysis of anticompetitive effects in behaviors involving monopoly agreements and abuse of market dominance. When determining whether an alleged vertical monopoly agreement has the effect of eliminating or restricting competition, the draft lists considerations such as whether the defendant has significant market power, whether the agreement has the effect of raising market entry barriers and reducing inter-brand competition, and whether it helps to prohibit free riding. In determining abuse of market dominance, the draft lists specific factors for determining each conduct mentioned in the AML, such as unfairly excessive prices, refusal to deal, restricting trade, differential treatment, and bundled sales.

In addition, the New Anti-Monopoly Judicial Interpretation (Draft for Public Comments) clarifies for the first time that parties can apply for “personnel with expertise in economics” to appear in court to explain the specific issues of the case, which underlines the recognition of economic analysis in the judicial field.

Summary of Anti-Monopoly Lawsuits

In 2022, the SPC published 14 anti-monopoly judgments, including 12 civil litigation cases and two administrative litigation cases. The disputes in the civil litigation cases focused on abuse of market dominance and monopoly agreements. The nine civil lawsuits related to abuse of market dominance mainly involved the audio-visual, communication, public water supply, and sports entertainment industries. The three civil lawsuits concerning monopoly agreements involved kindergartens, electric equipment, and the commercial industry.³⁶

In 2022, the SPC clarified the principles, considerations, and value objectives for determining the invalidity of civil conduct involving horizontal monopoly agreements in the case between Shanghai Huaming Power Equipment Manufacturing Co., Ltd. and Wuhan Taipu Transformer Switch Co., Ltd. On February 22, 2022, the SPC reached a civil judgment in the case, holding that the two parties involved have a competitive relationship in the off-load tap changer market, and that the mediation agreement that they reached divided the market and restricted the sales price, production quantity, sales quantities, sales category, and sales area in the off-load tap changer market. Such an agreement went beyond the scope of patent protection and

³⁶ Based on the online statistics of *China Judgment Documents Network*.

constituted a horizontal monopoly agreement, eliminating effective competition. Therefore, the SPC ruled that all the settlement agreements involved in the case were invalid.³⁷

In 2022, the SPC ruled for the first time in support of a follow-up compensation lawsuit for anti-monopoly administrative punishment, which could be regarded as a milestone in China's antitrust work. In 2016, the Shanghai Municipal Price Bureau imposed administrative penalties on SAIC General Motors Sales Co., Ltd. (SAIC-GM) and its counterparty for reaching and implementing a monopoly agreement to restrict the minimum resale price. SAIC-GM adopted minimum resale prices for some vehicle models and monitored dealers' resale prices through secret visits by third-party companies, online supervision, and other means. If dealers did not comply with the price limit, they would face penalties such as fines, deduction of sales rebates, and suspension of supply of popular models. The Shanghai Municipal Price Bureau held that the monopolistic conduct of SAIC-GM eliminated market price competition.³⁸

Based on the administrative penalty decision, Miao Chong, who owned an SAIC-GM vehicle, sued SAIC General Motors Sales Co., Ltd. and its distributor Shanghai Yilong Automobile Sales and Service Co., Ltd. in the Shanghai Intellectual Property Court, demanding compensation for monopoly losses, which was dismissed. However, on December 15, 2022, the SPC revoked the first-instance judgment of the Shanghai Intellectual Property Court and ordered subsequent civil compensation for administrative penalties. The court elaborated on the allocation of the burden of proof in litigation, the subject of civil compensation in litigation involving resale price maintenance, and the determination of the amount of compensation.

The SPC ruled that, if the plaintiff claims that the relevant monopolistic behavior is established based on the effective punishment decision of the anti-monopoly law enforcement agency, no further proof is required. In addition, in civil compensation lawsuits regarding vertical monopoly agreements involving minimum resale price, the amount of compensation should be the difference between the non-competitive minimum resale price and the competitive price defined between business operators.³⁹

In 2022, the SPC ruled that the arbitration clause agreed upon by the parties cannot exclude the court's jurisdiction over monopoly agreement disputes. On August 19, the SPC made a civil ruling on the vertical monopoly agreement disputes between Beijing Longsheng Xingye

³⁷ Civil Judgment of the Supreme People's Court of the People's Republic of China, (2021) Zui Gao Fa Zhi Min Zhong No. 1298, February 22, 2022.

³⁸ "Shanghai Development and Reform Commission: SAIC-GM fined 201 million for price monopoly," The Observer, December 23, 2016, https://www.guancha.cn/economy/2016_12_23_385783.shtml.

³⁹ "Subsequent Claims Litigation of SAIC-GM RPM Case Receives Supreme Court Support," Intellectual Property Frontier, January 5, 2023, https://www.sohu.com/a/625143000_120133310.

Technology Development Co., Ltd. and Yushidu Intelligent Equipment (Tianjin) Co., Ltd. Although Longsheng and Yushidu had an arbitration agreement, Longsheng claimed that Yushidu implemented vertical monopoly behavior through the “distribution agreement” and “reconciliation agreement” to fix prices and limit the minimum price. The court held that the civil dispute over a monopoly should be subject to the AML. The act of infringement stems from the part of the contract involving monopolies, which is beyond the scope of the arbitration clause. Therefore, the arbitration clause cannot exclude the court’s jurisdiction over monopoly agreement disputes.⁴⁰

⁴⁰ Civil Ruling of the Supreme People’s Court of the People’s Republic of China, (2022) Supreme People’s Court Intellectual Property Tribunal, (2022) Zui Gao Fa Zhi Min Zhong No. 1276, August 19, 2022.

Conclusion

Remarkable progress was made in China's antitrust efforts in 2022. The implementation of the new Anti-Monopoly Law, the revisions of the supporting regulations, and the promulgation of the local compliance guidelines jointly improved the antitrust legal system in China. Antitrust enforcement agencies continued to play a significant role in key industries, focusing on anti-monopoly conduct in the platform economy and medicine and vigorously rectifying market monopoly behaviors in the fields of people's livelihoods to ensure the healthy and regulated development of industries.

In antitrust litigation, the New Anti-Monopoly Judicial Interpretation (Draft for Public Comments) issued by the SPC provides clear and specific guidelines for the trial of anti-monopoly cases. Typical anti-monopoly law enforcement and justice cases also provide important guidance for companies' anti-monopoly compliance. China's antitrust enforcement agencies have been proficient in using economic analysis methods and introduced the clause regarding economic expert witnesses in the New Anti-Monopoly Judicial Interpretation (Draft for Public Comments), which shows that economics plays a vital role in assisting the review of antitrust cases. The role of economic analysis will be further strengthened as China continues to improve its anti-monopoly framework.

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