



# Getting ready for the big reset of Chinese antitrust – highlights and implications of the amendments to China’s Anti-Monopoly Law

## Introduction

On 24 June 2022, the Standing Committee of the National People’s Congress – China’s top legislature – published the amended Anti-Monopoly Law (the New AML), bringing sweeping changes to the law. Key provisions under the New AML include:

- introduction of a ‘stop-the-clock’ mechanism in merger reviews and a new classification system for mergers in certain ‘categories and levels’ to improve the quality and efficiency of the merger review process;
- introduction of potential justifications for otherwise illegal resale price maintenance (RPM) practices;
- empowering the State Administration for Market Regulation (SAMR) to create safe harbours for vertical agreements, but not horizontal ones; and
- harsher penalties, including significantly higher fines for failure to notify a reportable merger, even harsher penalties for extremely severe AML violations and the introduction of fines for individuals responsible for entering into anticompetitive agreements.

These amendments, including their potential impact on business and antitrust enforcement in China, are discussed below. They follow two rounds of public consultation on earlier draft amendments published in 2020 and 2021 (our client briefings on the earlier draft amendments can be found [here](#) and [here](#)). The New AML will come into effect on 1 August 2022.

Following adoption of the New AML, SAMR published several draft implementing regulations for public consultation on merger control, anticompetitive agreements and abuse of market dominance, amongst others. The most significant proposal concerns merger control: the draft regulations propose to increase the current turnover thresholds significantly and to introduce a new threshold for transactions involving mega-corporations.

## 1. Revamped merger control regime

- **Stop-the-clock in merger review.** The New AML introduces a ‘stop-the-clock’ mechanism that will enable SAMR to suspend the review period (with written notice) if any of the following conditions apply:
  - the notifying party fails to submit requested information in a timely manner, preventing the review from progressing;

- new facts emerge that materially impact the review and prevent the review from progressing without verifying the facts first; or
- the notifying party applies to suspend the review to allow sufficient time for remedy discussions.

The stop-the-clock mechanism is welcome, particularly for complex transactions where SAMR currently requires parties to pull-and-refile such transactions if parties are unable to conclude remedy discussions with SAMR within the prescribed timeframe. However, the New AML makes clear that suspending the review clock at the notifying party’s request is available only where further assessment of proposed remedies is required. In other cases, the decision to suspend the clock is at SAMR’s sole discretion. It is unclear how this mechanism will play out in practice and how it may affect the merger review process. It is expected that SAMR will publish measures to provide more detail on the stop-the-clock mechanism.

- **‘Call-in’ transactions that fall below the turnover thresholds.** The New AML allows SAMR to ‘call in’ a transaction that falls below the filing thresholds and to require parties to file if that transaction is likely to eliminate or restrict competition. This amendment is targeted at enabling SAMR to review (and, if necessary, intervene in) ‘killer acquisitions’ that do not meet the turnover thresholds. The turnover thresholds are expected to increase in the near term. Under the proposed Draft Amended Merger Filing Thresholds published on 27 June 2022 for public consultation, SAMR could increase the turnover thresholds to:
  - the total global turnover in the preceding financial year of the undertakings concerned to RMB 12 billion (approx. USD 1.8 billion) or Chinese turnover to RMB 4 billion (approx. USD 600 million); and
  - the Chinese turnover in the preceding year of each of at least two undertakings concerned to RMB 800 million (approx. USD 120 million).
- **New classification system for merger reviews.** As part of the drive to improve the quality and efficiency of the merger control regime, the New AML requires SAMR to classify mergers into different ‘categories and levels.’ This new system may result in the introduction of specific filing thresholds or alternative turnover calculation methods for certain sectors (such as the one that already exists for financial institutions). For example, the Draft Amended Merger Filing Thresholds published on 27 June



2022 for public consultation, contemplates the introduction of a new filing threshold for transactions that involve a mega-corporation (ie whose Chinese turnover in the preceding year exceeds RMB 100 billion, approx. USD 15 billion). It is also expected that further efforts will be made to streamline the review process for transactions with no substantive concerns. A pilot programme delegating merger review to certain SAMR local bureaus (likely starting with Shanghai) may be part of this new classification system to enhance the regime's efficiency.

- **Priority sectors for merger review.** The New AML adds a provision mandating SAMR to strengthen its scrutiny of deals related to, amongst others, people's livelihood. Finance, media, technology, and those involving people's livelihood, start-ups, new business models or labour-intensive industries could be amongst the priority sectors subject to strict scrutiny given these sectors are specifically called out as areas for enhanced merger control review in the State Council's Opinion on Accelerating the Building of a Unified and Nationwide Market published in April.

## 2. Further guidance on substantive rules governing anti-competitive conduct

- **Potential to defend against RPM practices.** Since the AML came into effect, RPM has been presumed to be illegal and has been an enforcement priority. The New AML makes clear that RPM is generally problematic. At the same time, it appears to open the door, albeit only slightly, to a more relaxed approach, by giving companies the opportunity to rebut the presumption of anticompetitive effects. This approach reconciles the historically strict stance taken by SAMR (and its predecessors) to RPM and the effects-based approach adopted by Chinese courts. This mirrors SAMR's approach in its automobile sector guidance adopted in 2020 (The Anti-Monopoly Guidelines in the Automobile Industry), which identifies circumstances where RPM can be justified. However, past practice suggests that SAMR is likely to set a very high bar for companies (particularly those with market power) to defend RPM practices. Given the likely continuing risk of enforcement, companies should still proceed with caution in this area and seek legal advice.
- **Safe harbours for anticompetitive agreements.** The New AML empowers SAMR to establish safe harbours for vertical agreements. This will create a presumption of legality for certain types of vertical agreements where the parties' market share(s) are below thresholds to be set by SAMR (likely to be 15% according to the draft regulations published for public consultation). In principle, the New AML limits the application of safe harbours to vertical agreements, but this may not necessarily preclude SAMR from introducing safe harbours for horizontal agreements in the future (eg non-binding guidelines). Indeed, the Anti-Monopoly Guidelines in the Intellectual Property Industry already provide safe harbours for both horizontal and vertical agreements and these non-binding safe harbours will continue to provide valuable guidance to businesses (unless they are novated). In addition, while the New AML does not explicitly exclude hard-core restrictions (such as RPM) from benefiting from a safe harbour, it is

likely that such restrictions will be carved out – as is the case under EU competition law.

- **New provision against 'hub-and-spoke' conspiracies.** The New AML includes a separate prohibition on organising or assisting others to enter into anticompetitive agreements. This prohibition could be used against 'hub-and-spoke' type conspiracies where the 'hub' is not a member of the cartel but facilitates the conduct of the cartel members. Fines for this type of 'facilitation' violation would be the same as those for parties to anticompetitive agreements.
- **Warning against abuse of market dominance in the digital sector.** Digital platforms have been the subject of intense scrutiny in China in the recent past. The New AML draws particular attention to the role of data and digital platforms, a warning to dominant players in the digital economy sector not to abuse their market position via use of data, algorithms, technology and platform rules. In addition, the New AML underlines 'encouraging innovation' as a competition policy objective. In principle, this requires SAMR to factor the effects on innovation in its assessment. It may also afford businesses more room to make innovation-related arguments when defending certain commercial practices. This twin-approach reflects the government's message that both 'green lights' and 'red lights' are necessary to ensure the healthy and stable development of the platform economy and is consistent with signs of easing the crackdown on digital platforms in recent months. Going forward, SAMR is expected to carefully balance the delicate line between encouraging digital innovation and preventing anticompetitive conduct. Interestingly, according to the draft regulations published for public consultation, self-preferencing is identified as a stand-alone violation, indicating the authority's heightened interest in such conduct.

## 3. Higher penalties for violations

- **Personal liability for concluding anticompetitive agreements.** In a major shift, the New AML has introduced personal liability for anticompetitive agreements. This attaches to the infringing corporation's legal representatives, the 'persons-in-charge' or individuals directly responsible for the agreement who could face fines of up to RMB 1 million (approx. USD 150,000). The New AML does not provide guidance on the circumstances in which individuals would be liable and/or fined. The expectation is that personal liability would only be imposed in the case of hard-core violations (ie not in all cases). Guidance from SAMR will be needed in this area both to provide companies and individuals legal certainty and to guide local authorities in enforcing this.
- **Harsher penalties for violations, particularly in relation to failure to notify.** The New AML seeks to reinforce the deterrence effect of the law by substantially increasing the level of fines for several violations (see Annex for details). Most striking amongst these is the significant increase in the maximum fines for failure to notify reportable transactions - a maximum of 10% of the infringing party's turnover in the last year if that transaction has anticompetitive effects or RMB 5 million (approx. USD 750,000) for all other cases (ten times the current cap of RMB 500,000). SAMR considers failure to



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notify to be a continuous conduct, meaning that the new fining powers could have retroactive effect.

- **‘Superfine’ for extreme cases.** The New AML also adds a provision to allow SAMR to multiply the amount of a fine by two to five times if the violation is ‘extremely severe’, its impact is ‘extremely bad’ and the consequence is ‘particularly serious.’ There is no guidance on the definition of these terms, which makes fine calculation and determination considerably uncertain. Taken literally, these amendments would mean that the maximum fine for cartel conduct, abuse of market dominance, or a failure to notify could reach 50% of the infringing company’s turnover in the preceding year. Further guidance from SAMR in this area would be welcomed.
- **Reference to criminal sanctions.** The New AML opens up, for the first time, the possibility of criminal liability where the antitrust infringement constitutes a crime. Currently, antitrust violations are not criminal offences in China except that obstructing an investigation may amount to a crime under China’s Criminal Law. The New AML does not create new criminal offences, but it

suggests that the Chinese government is contemplating the introduction of criminal sanctions for antitrust violations. In our view, this would require subsequent amendments to China’s Criminal Law.

- **Social credit records.** The New AML also indicates that AML sanctions could be recorded in the infringing company’s social credit system. As the government is continuing to take measures to build and improve the social credit system, the power to publish social credit records will pose reputational risks for companies.
- **Public interest-based litigation.** Finally, the New AML introduces an enforcement mechanism that allows the People’s Procuratorates (China’s public prosecution body) to bring public interest civil lawsuits. This is expected to help address the difficulties often encountered in private actions against anticompetitive conduct (eg collection of evidence for satisfying the burden of proof). It remains to be seen whether this will accelerate the growth of the currently limited number of antitrust private actions in China.

### Annex – Summary of Increased Monetary Fines under the New AML

Violation	Maximum fines under the current AML	Maximum fines under the New AML
<b>Failure to notify notifiable transactions</b>	RMB 500,000 (approx. USD 75,000)	<ul style="list-style-type: none"> <li>• RMB 5 million (approx. USD 750,000) if the transaction has no anticompetitive effects; or</li> <li>• 10% of turnover in the preceding year if the transaction has anticompetitive effects.</li> </ul>
<b>Personal liability for concluding anticompetitive agreements</b>	Not provided	RMB 1 million (approx. USD 150,000)
<b>Organising or assisting others to enter into anticompetitive agreements</b>	Not provided	10% of turnover in the preceding year
<b>Trade associations that organise anticompetitive conduct</b>	RMB 500,000 (approx. USD 75,000)	RMB 3 million (approx. USD 450,000)
<b>Concluding an anticompetitive agreement, but not implementing it</b>	RMB 500,000 (approx. USD 75,000)	RMB 3 million (approx. USD 450,000)
<b>An undertaking that concludes an anticompetitive agreement, which had no turnover in the preceding year</b>	Not provided	RMB 5 million (approx. USD 750,000)
<b>Obstructing an investigation, refusing to provide required information, destroying evidence, providing false information</b>	<ul style="list-style-type: none"> <li>• <b>Fines for individuals:</b> RMB 100,000 (approx. USD 15,000)</li> <li>• <b>Fines for companies:</b> RMB 1 million (approx. USD 150,000)</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Fines for individuals:</b> RMB 500,000 (approx. USD 75,000)</li> <li>• <b>Fines for companies:</b> 1% of turnover in the preceding year; or RMB 5 million (approx. USD 750,000) if the company did not generate turnover in the preceding year.</li> </ul>



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