

Antitrust and Competition Law

——Experience of China

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4th November 2021



Overview of Anti-monopoly Law in China

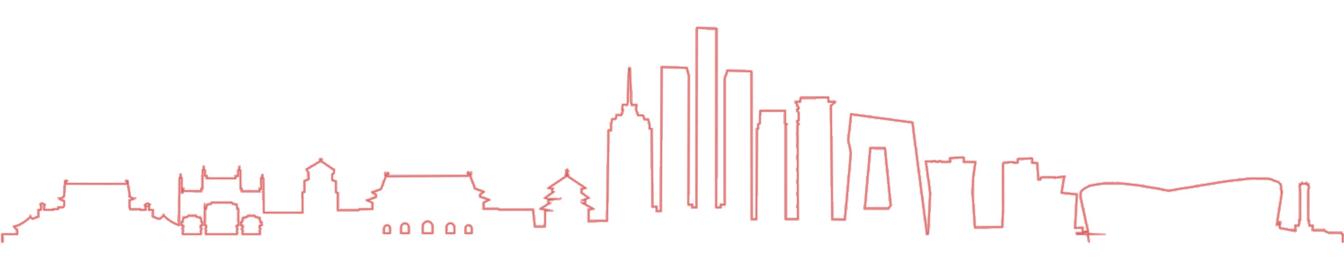
Horizontal Monopoly Agreements

Vertical Monopoly Agreements

Abuse of Market Dominance

Merger Filing

I. Overview of Anti-monopoly Law in China



Review of China Anti-monopoly Law legislation: Keeping Pace with the Times

Learning stage

Breakthrough stage

Localization stage

Establishment of legal basis

The Anti-monopoly Law of PRC ("AML") took effect on August 1, 2008

- The first comprehensive law dealing with competition
- <u>Economic constitution</u>: prevent monopoly agreements, protect fair market competition, raise economic efficiency, promote steady development of the economy.....

Relevant regulations and guidelines conform to national realities

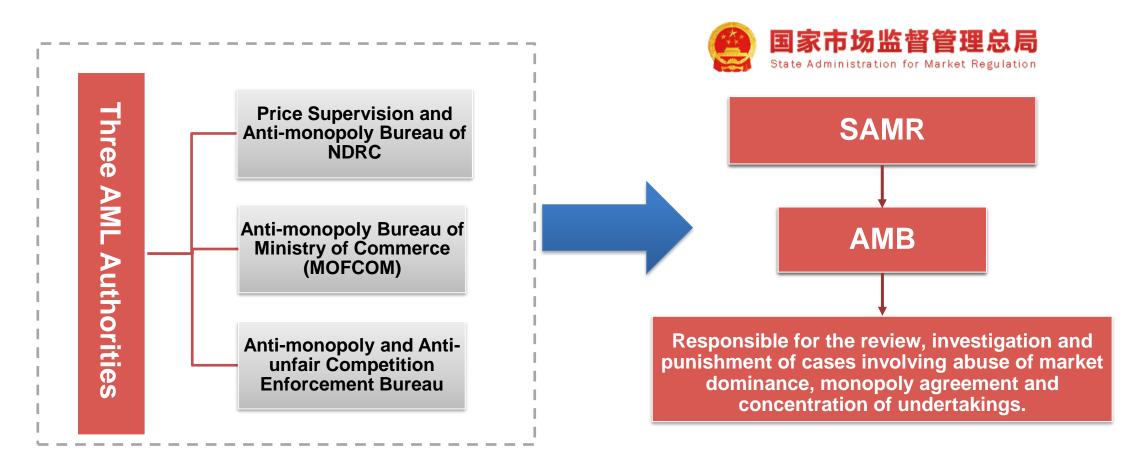
- Regulations on Administrative Abuse: fair competition review system for administrative abuse
- Automobile Antitrust Guidelines: targeting at the chaos in the automobile industry
- A series of supporting regulations and guidance: monopoly agreements, abuses, merger filings

To safeguard economic development and national development

- Guidelines for IP rights: FRAND (fair, reasonable and non-discriminatory)
- The AML Revised Draft for Public Comments: adapt to the AML enforcements
- Guidelines for Platform Economy: in response to rapid development of the platform economy

AML Authorities in China

After the reform in March 2018, the original three AML authorities were consolidated into SAMR AMB for more efficient and enhanced AML enforcement in China.



AML Authorities in China

The consolidation of AML authorities in 2018 has caused a number of far-reaching consequences

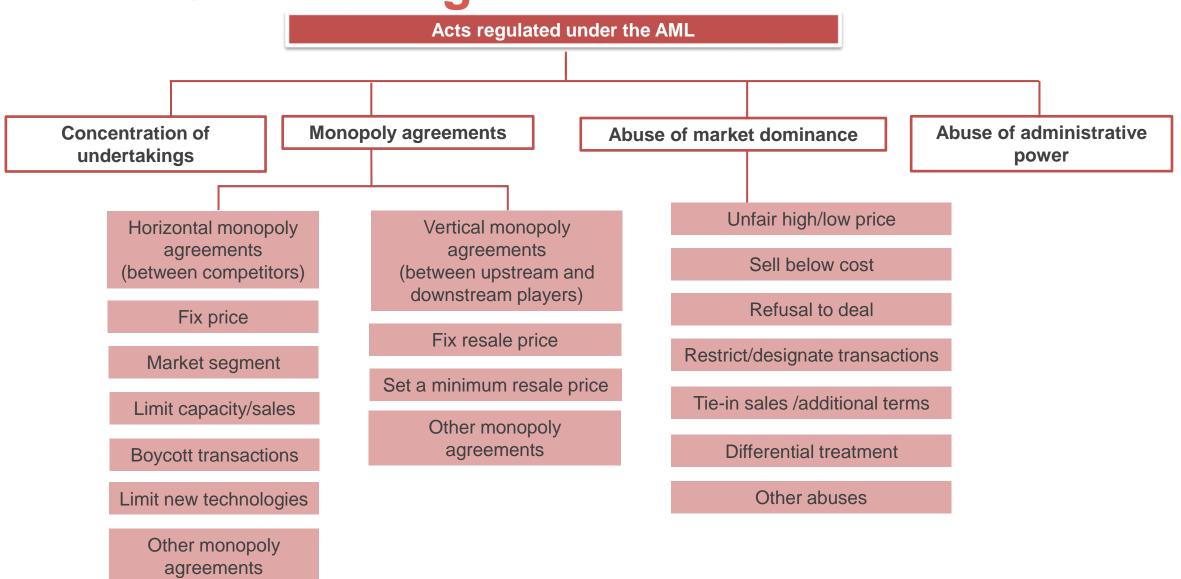
Law enforcement standards have been unified.

The issue of concurrence of applicable laws has been solved.

More illegal clues were grasped, and the ability to jointly handle cases was improved.

With fewer constraints, law enforcement resources were concentrated on handling major and new cases.

The PRC AML - Regulated Acts



Legal Liability and Other Consequences

Legal Liabilities

Fine of 1%-10% of the turnovers in the preceding year

If the monopoly agreement is concluded but not implemented, a fine of less than **RMB 500** thousand can still be imposed

Confiscation of illegal income

Civil damage

Other losses

Clauses violating the AML are **voided**

Extensive and long-running antitrust **investigations**

Reputation and image of the company will be damaged.

Business disruption



II. Horizontal Monopoly Agreements



Horizontal Monopoly Agreements



Horizontal relationship, i.e. competitive relationship

Horizontal Monopoly Agreements

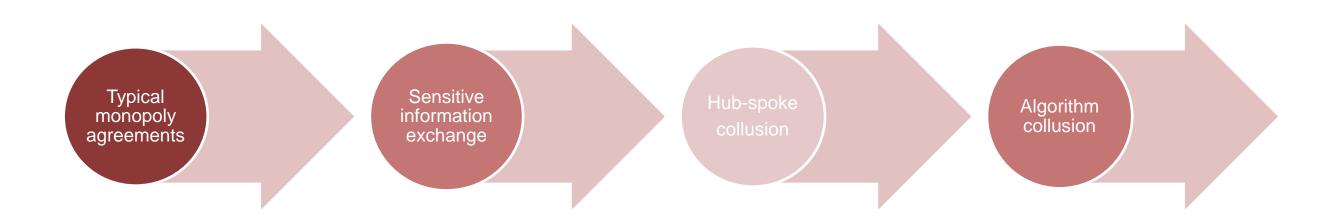
- written agreements
- oral agreements
- concerted behavior (sensitive information exchange)
- no relation to the market share

Regulated acts
Article 13 of the AML

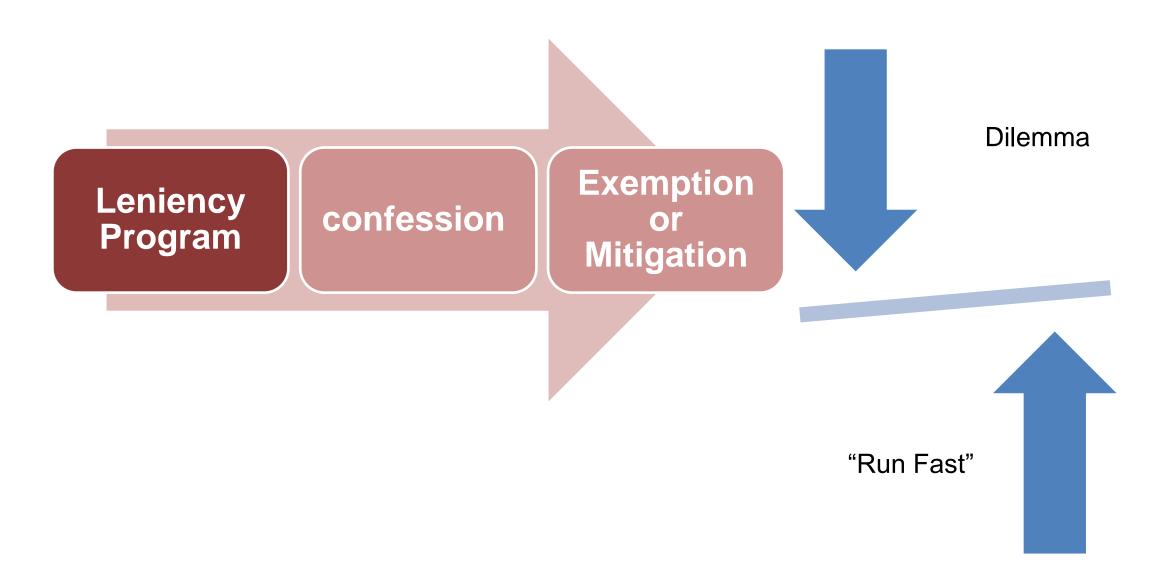


Development of Horizontal Monopoly Agreements

From "regularity" to "maturity": law enforcement authorities show strong expertise in the investigations of monopoly agreements.



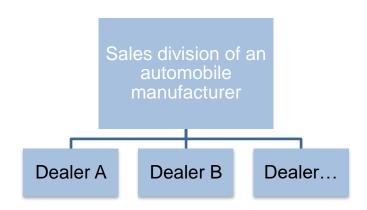
Typical Monopoly Agreements—Leniency Program



Hub-and-Spoke Conspiracy

 Hub-and-spoke conspiracy: appears to be a "vertical agreement", but is actually an illegal <u>"horizontal</u> <u>monopoly"</u>.

- Article 17 of the AML (2020 Revised Draft for Comment), Article 18 of the AML (2021 Revised Draft): adds a clause of hub-and-spoke conspiracy.
- Guidelines of Shanghai on Anti-monopoly (2020): also explicitly mention the hub-and-spoke conspiracy.



<u>The manufacturer "leads and facilitates"</u> an agreement among downstream dealers on <u>fixing or changing prices</u> by signing price limits table, letter of guarantee, issuing uniform notice on price system, etc.

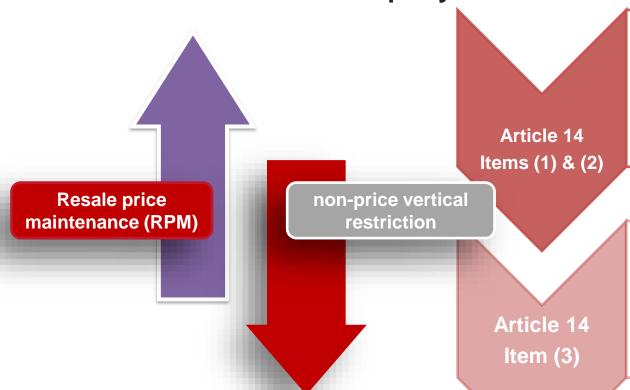
III. Vertical Monopoly Agreements



Vertical Monopoly Agreements

Vertical monopoly agreement - a monopoly agreement between an operator and

its transactional counterparty.

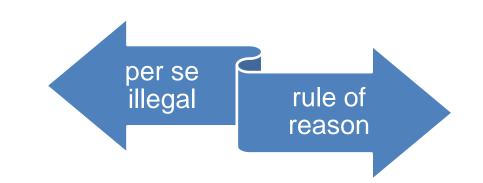


• **RPM**: fixing the price of products to be resold; or setting the minimum price of products to be resold.

• non-price related vertical monopoly: exclusive purchases, exclusive sales, territory and customer restrictions.

PRM—Your Technology Case

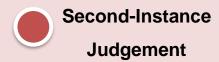
The Supreme People's Court supported the enforcement of Hainan Price Bureau ("HPB"): the <u>first administrative</u> <u>litigation case</u> of vertical monopoly agreement.



HPB investigated Your Technology for reaching a vertical monopoly agreement. HPB filed an appeal to the Hainan High People's Court, who held that the competitive harm is not a constituent condition for the RPM agreement.





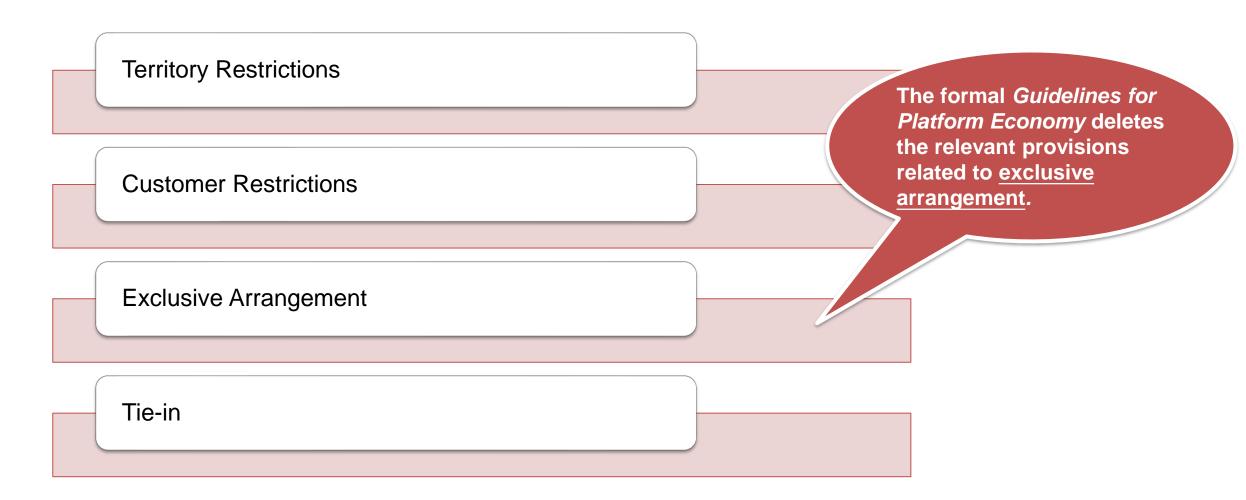




Your Technology filed an administrative lawsuit, claiming the vertical monopoly agreement does **NOT** have the competitive harm.

Your Technology petitioned for retrial to the Supreme Court, who held that AML enforcement authorities only need to identify the illegal behaviors but do not have to prove the existence of the competitive harm.

Vertical Non-price Monopoly

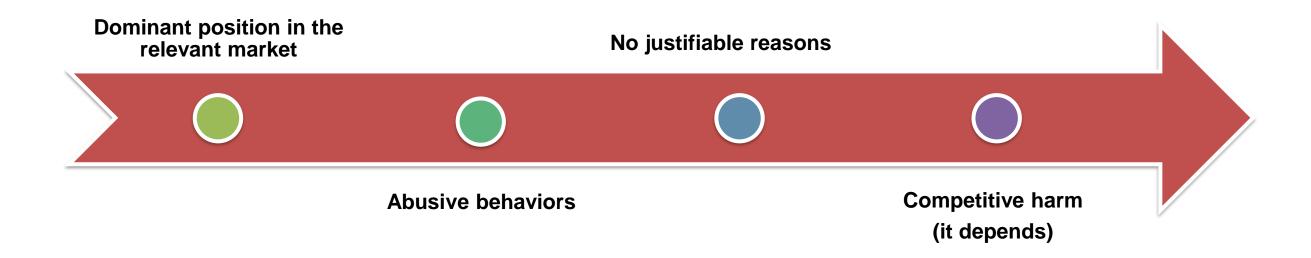


IV. Abuse of Dominance



Determination of Abuse of Market Dominance

In accordance with the AML, the constituent conditions to determine the abuse of market dominance include:



Prohibited Abuses—Types



Article 17 of the AML:

Business operators with a **dominant market position** are prohibited from committing any of the following acts of **abusing** the dominant market position:

- Selling products at unfairly high prices or buying products at unfairly low prices;
- Selling products at prices below cost without any justifiable causes;
- Refusing to trade with a trading party without any justifiable causes;
- Restricting their trading party so that it may conduct deals exclusively with themselves or with the designated business operators without any justifiable causes;
- Implementing tying sales or imposing other unreasonable trading conditions at the time of trading without any justifiable causes;
- Applying discriminatory treatments on trading prices or other trading conditions to their trading parties with equal standing without any justifiable causes; or
- Other forms of abuse of dominant market position as determined by the AML Authorities.

AML Enforcement on Platform Economy

Three penalty decisions regarding "choosing one from two":

- SAMR punished Alibaba Group for abusing its dominant market position in the "market of online retail platform services in China" and committing "choosing one from two". Alibaba was imposed a fine of RMB 18.2 billion.
- Shanghai AMR punished Shanghai Sherpa's for abusing its dominant market position in the "market of online food delivery platform offering English services in Shanghai" and committing "choosing one from two".
- SAMR punished Meituan for its "choosing one from two", and a fined with RMB 3.44 billion for its "choosing one from two".

VIE structure-related concentration was included into the scope of merger filing review:

 SAMR blocked Tencent Holdings' plan to merge Douyu and Huya, two video game live-streaming websites it controls.



Source: Shutterstock



Antitrust & Digital Economy

Relevant Market

- ✓ Relevant Product Market: Online retail platform service market;
- ✓ Relevant Geographic Market: China market.

Dominant Position

- ✓ High market share;
- ✓ High HHI and CR4;
- ✓ Strong power to control the relevant market (control pricing and sales channels);
- Strong financial resources and advanced technical capability;
- ✓ Other business operators highly depend on Alibaba;
- √ High entrance barriers in the market;
- ✓ Advantages in related markets.



Alibaba Case

Abusive Conducts

- ✓ Prohibit business operators using Alibaba's platform from opening stores on competing platforms;
- ✓ Prohibit business operators using Alibaba's platform from participating in promotions by competing platforms; and
- ✓ Take various reward and punitive measures to ensure the implementation of the "choosing one from two".

Decision

✓ SAMR imposed a RMB 18.228 billion (approximately USD 2.83 billion) fine on Alibaba, which accounts for about 4% of its domestic sales in 2019.

V. Merger Filing



Merger Filing

AML enforcement authorities gradually become mature, directly facing the characteristics of China's economy, the historical problems, and the difficulty in the emerging economy.

There had been merger filing cases before the AML took effect.

Fedex acquiring Kinko's

Laws and regulations were gradually improved

Simplified procedure, normal procedure, filing thresholds and filing documents Positive law enforcement

Conditionally approved merger filing; prohibited merger filing; failures to file Facing the characteristics and difficulties of the new economy

Notifiability of VIE structures confirmed; special types of transactions were investigated.

Merger Filing

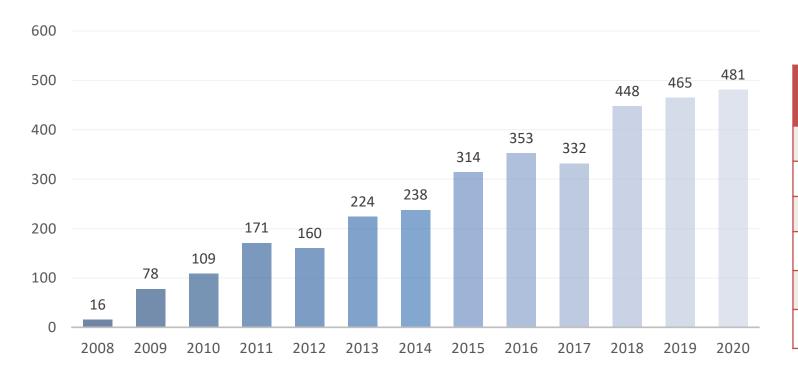
Filing Thresholds/Standards

Concentration of **Turnover Thresholds** undertakings The total amount of global turnover of all business operators involved in such concentration has exceeded RMB 10 billion **Change of Control / Acquisition of Control** + Worldwide OR Within China: At least 2 business operators' + Within China turnover in China has respectively exceeded RMB 400 The total turnover in China of million in the last fiscal year all business operators involved in such concentration

has exceeded RMB 2 billion

Merger Filing—Statistics

Merger filings increased year by year



Year	The number of the cases punished for failure to notify
2021Q1	15
2020	16
2019	16
2018	14
2017	6
2016	6

The Merger Filing in Platform Economy

Guidelines for Platform Economy

For any concentration fails to reach the filing thresholds but may have competitive harm, the AML enforcement authorities shall carry out the investigation.

start-up enterprises or emerging platforms the platform operation mode of free or low-price

highly concentrated market or limited number of competitors

other circumstances that may harm competition

Thank You For Listening!

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