

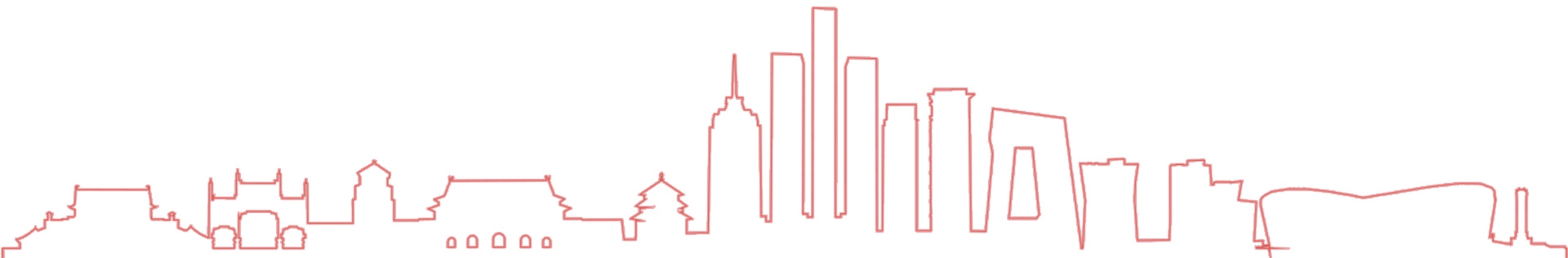
Antitrust and Competition Law

——Experience of China

Susan Ning

King & Wood Mallesons, China

4th November 2021





I

Overview of Anti-monopoly Law in China

II

Horizontal Monopoly Agreements

III

Vertical Monopoly Agreements

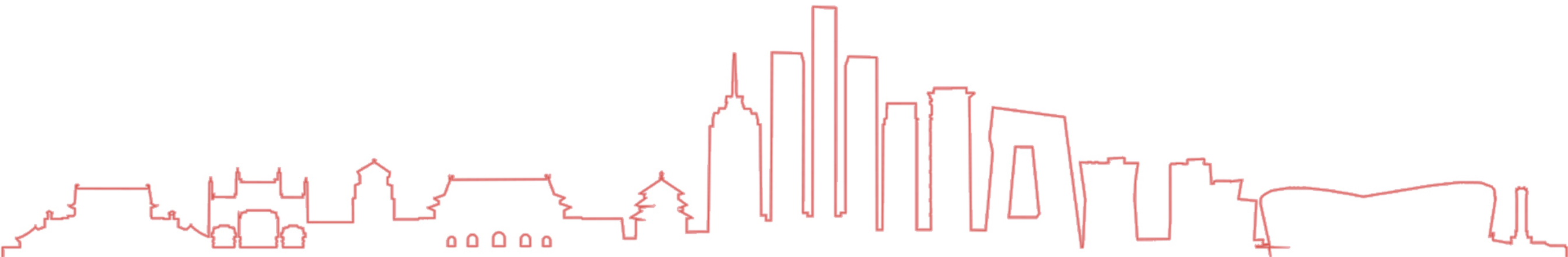
IV

Abuse of Market Dominance

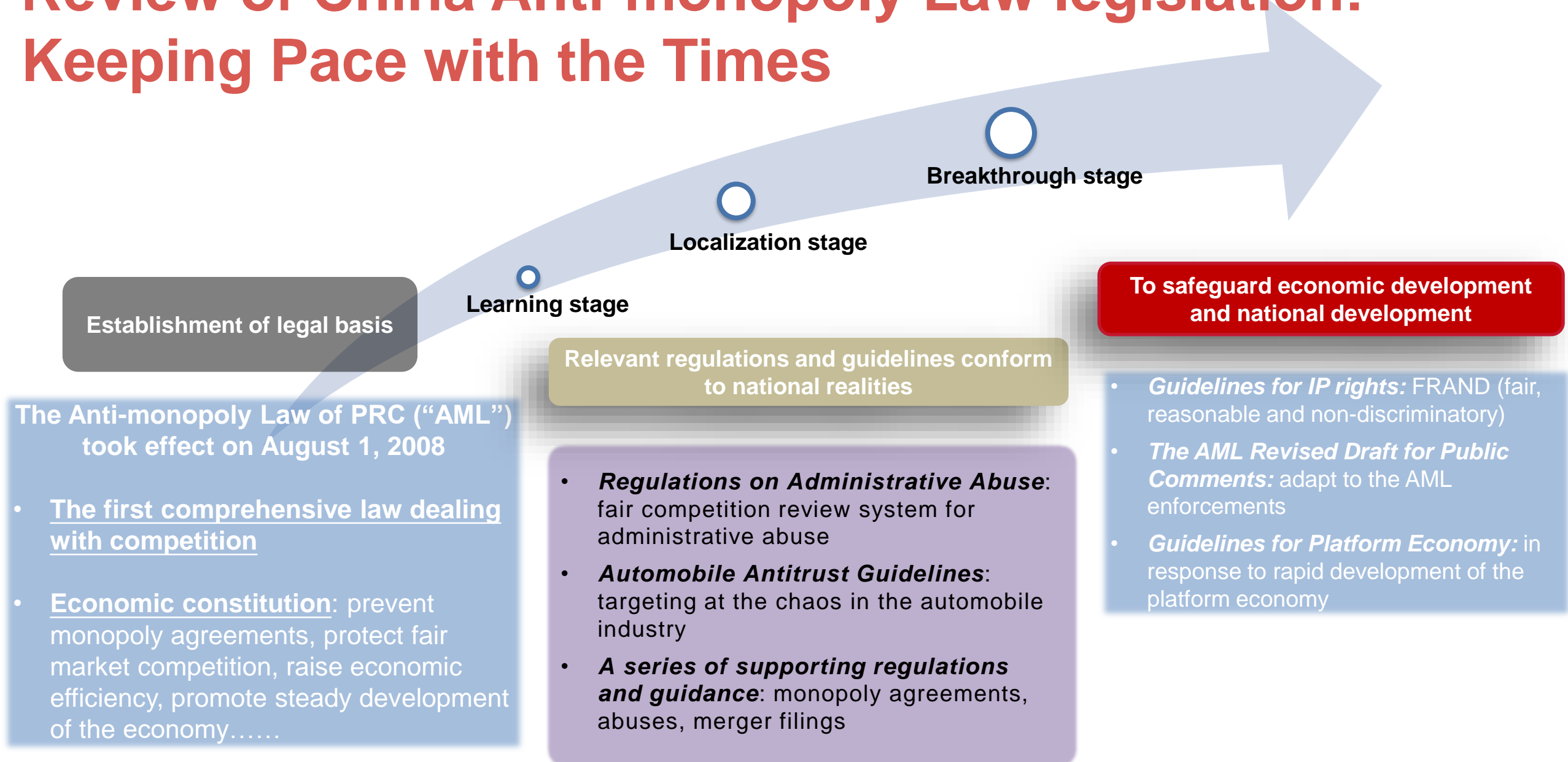
V

Merger Filing

I. Overview of Anti-monopoly Law in China

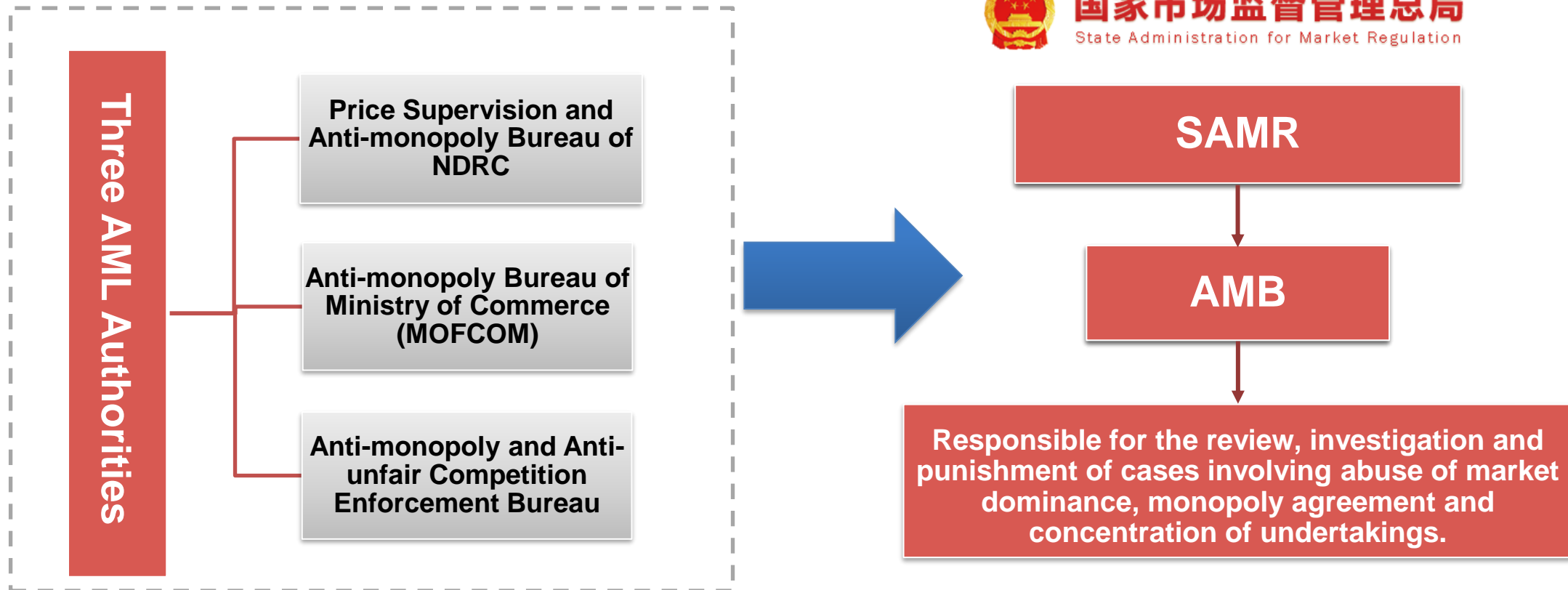


Review of China Anti-monopoly Law legislation: Keeping Pace with the Times



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



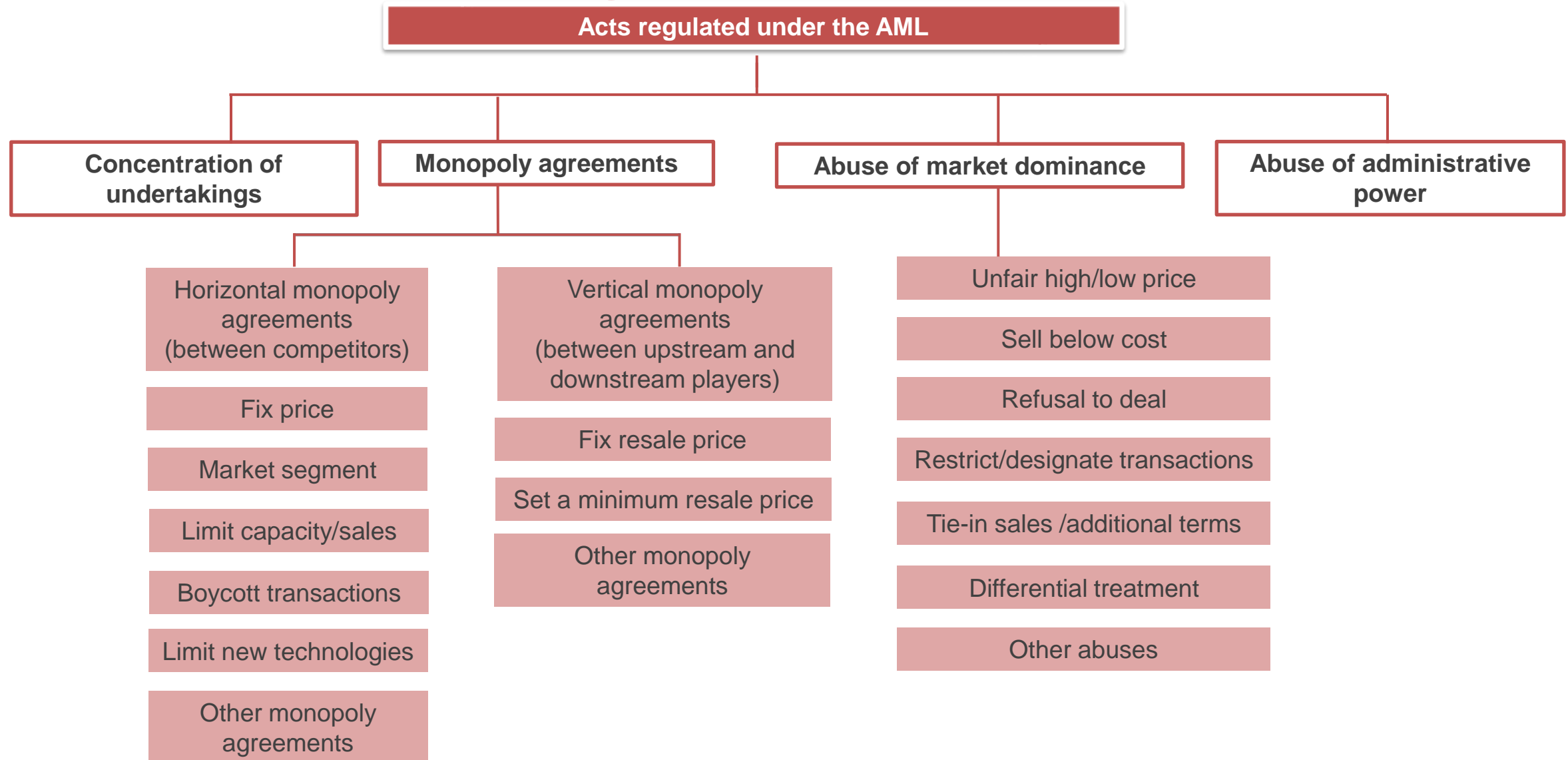
Law enforcement standards have been unified.

The issue of concurrence of applicable laws has been solved.

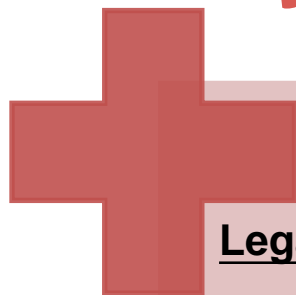
More illegal clues were grasped, and the ability to jointly handle cases was improved.

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**

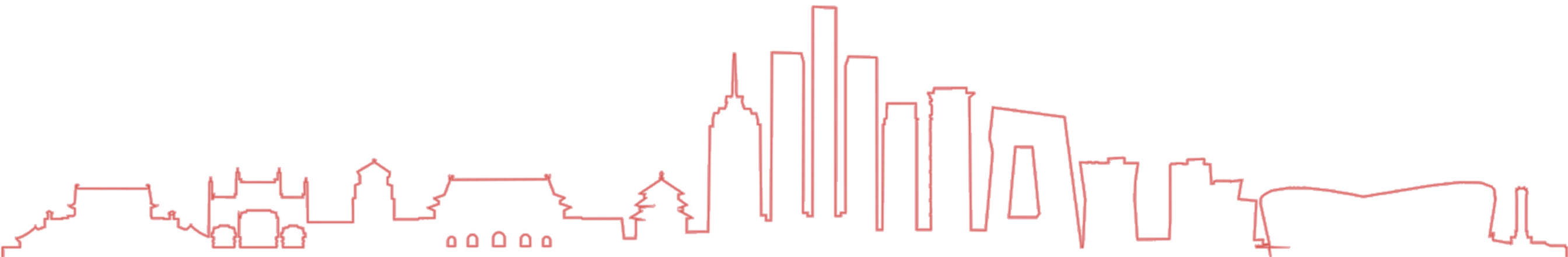
Extensive and long-running antitrust **investigations**

Reputation and image of the company will be damaged.

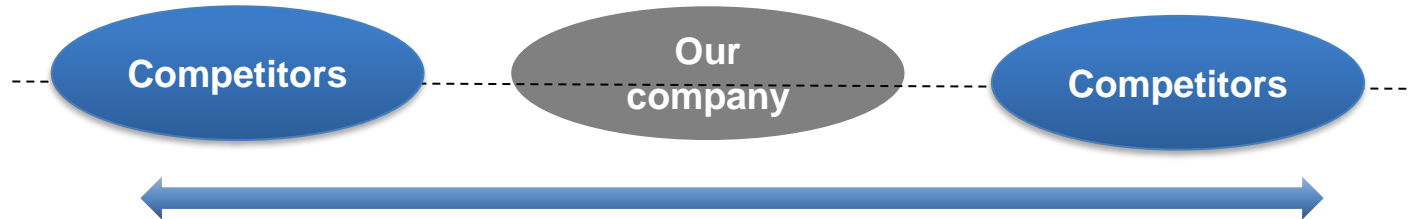
Business disruption



II. Horizontal Monopoly Agreements



Horizontal Monopoly Agreements

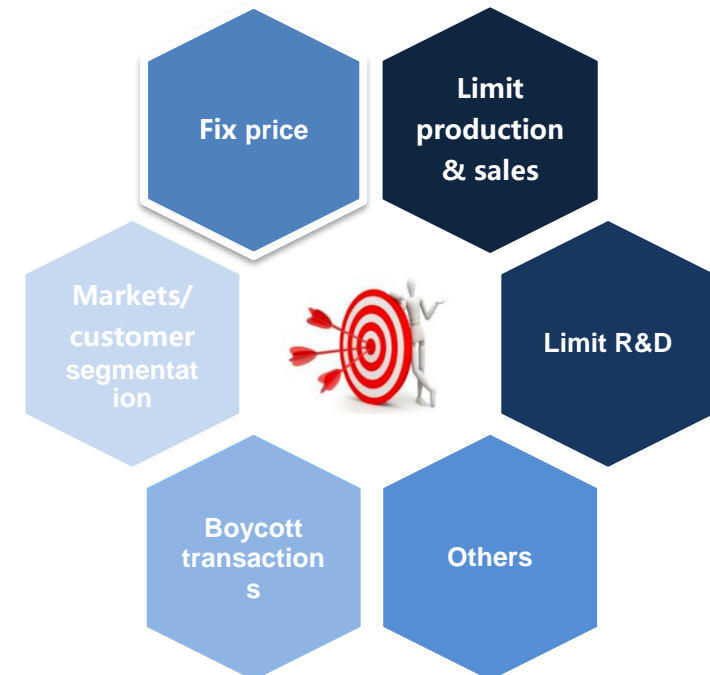


- Horizontal relationship, i.e. competitive relationship

Horizontal Monopoly Agreements

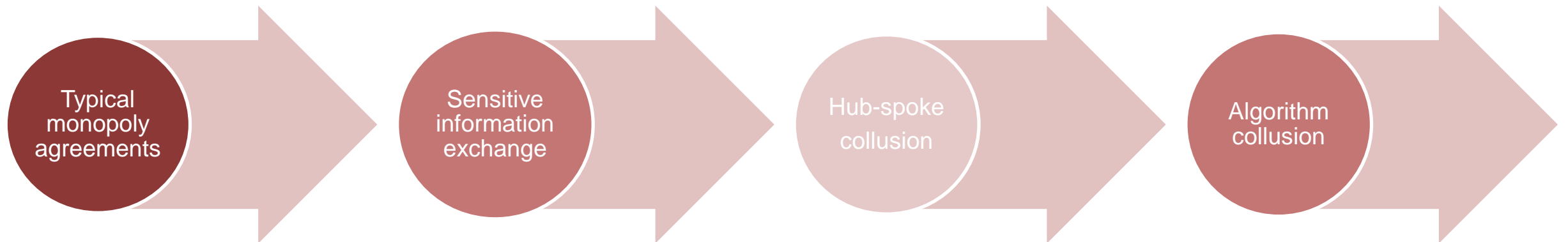
- written agreements
- oral agreements
- concerted behavior (sensitive information exchange)
- no relation to the market share

Regulated acts
Article 13 of the AML

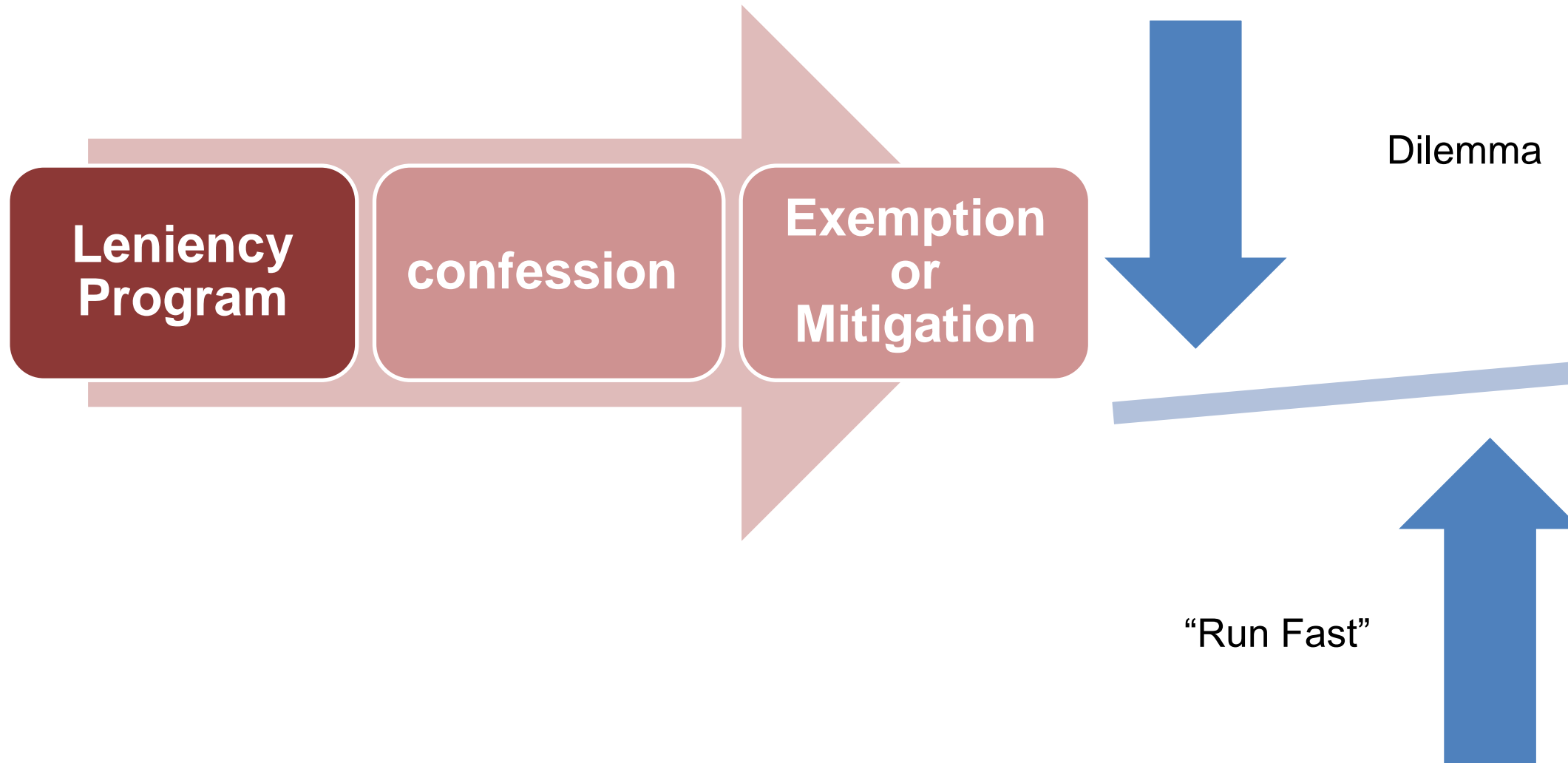


Development of Horizontal Monopoly Agreements

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



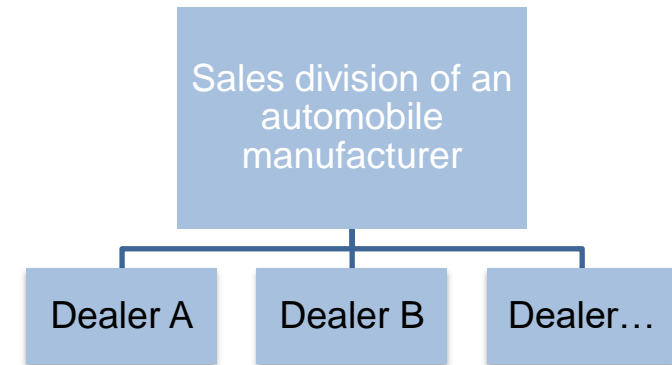
Typical Monopoly Agreements—Leniency Program



Hub-and-Spoke Conspiracy

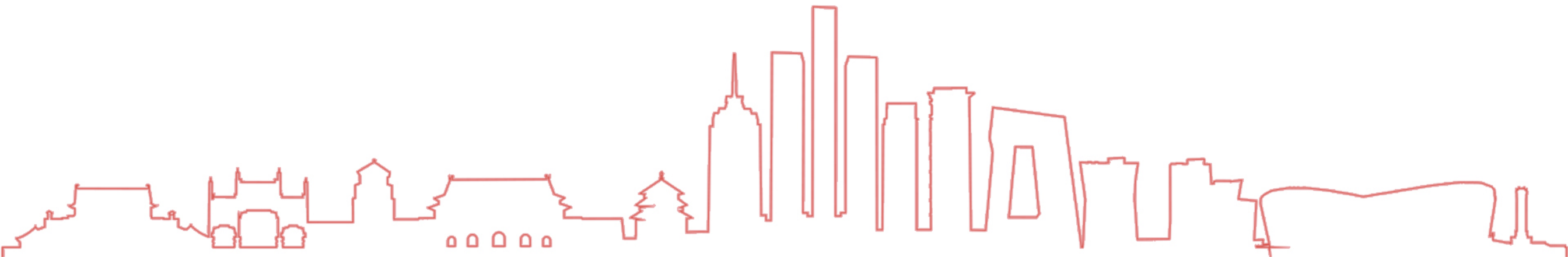
- Hub-and-spoke conspiracy: appears to be a "vertical agreement", but is actually an illegal "horizontal monopoly".

- *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.



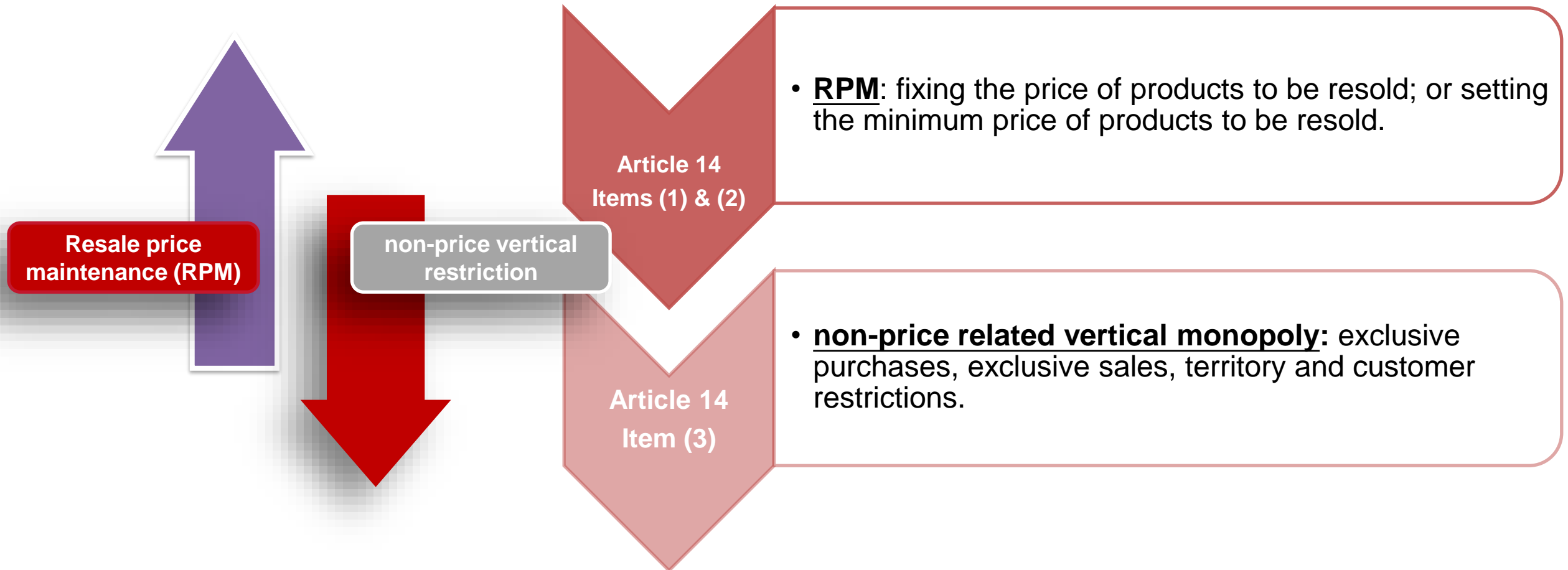
The manufacturer “leads and facilitates” an agreement among downstream dealers on fixing or changing prices by signing price limits table, letter of guarantee, issuing uniform notice on price system, etc.

III. Vertical Monopoly Agreements



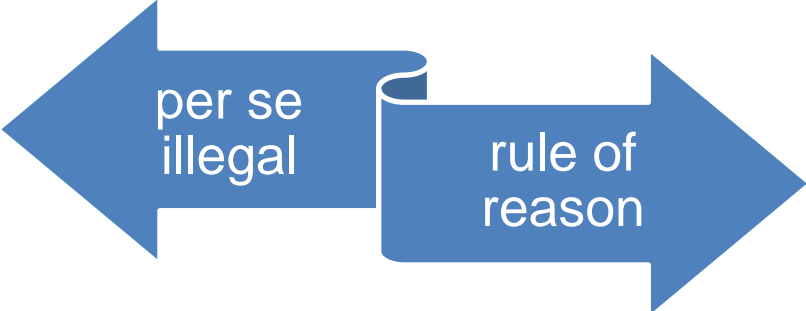
Vertical Monopoly Agreements

Vertical monopoly agreement - a monopoly agreement between an operator and its transactional counterparty.



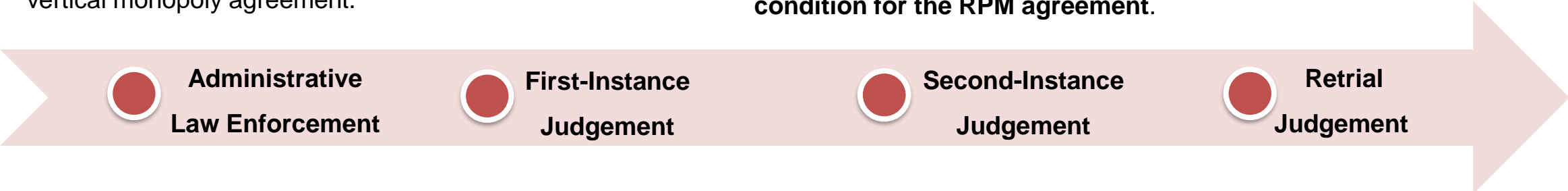
PRM—Your Technology Case

The Supreme People’s Court supported the enforcement of Hainan Price Bureau (“HPB”): the first administrative litigation case 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

Territory Restrictions

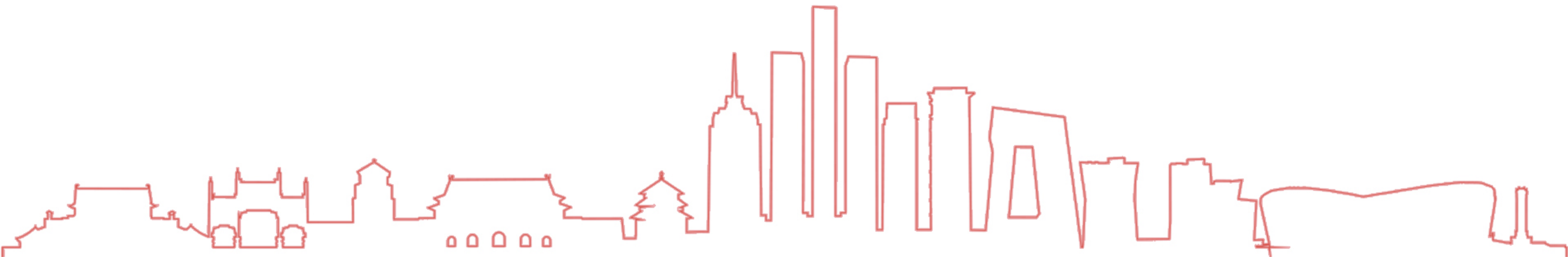
Customer Restrictions

Exclusive Arrangement

Tie-in

The formal *Guidelines for Platform Economy* deletes the relevant provisions related to exclusive arrangement.

IV. Abuse of Dominance

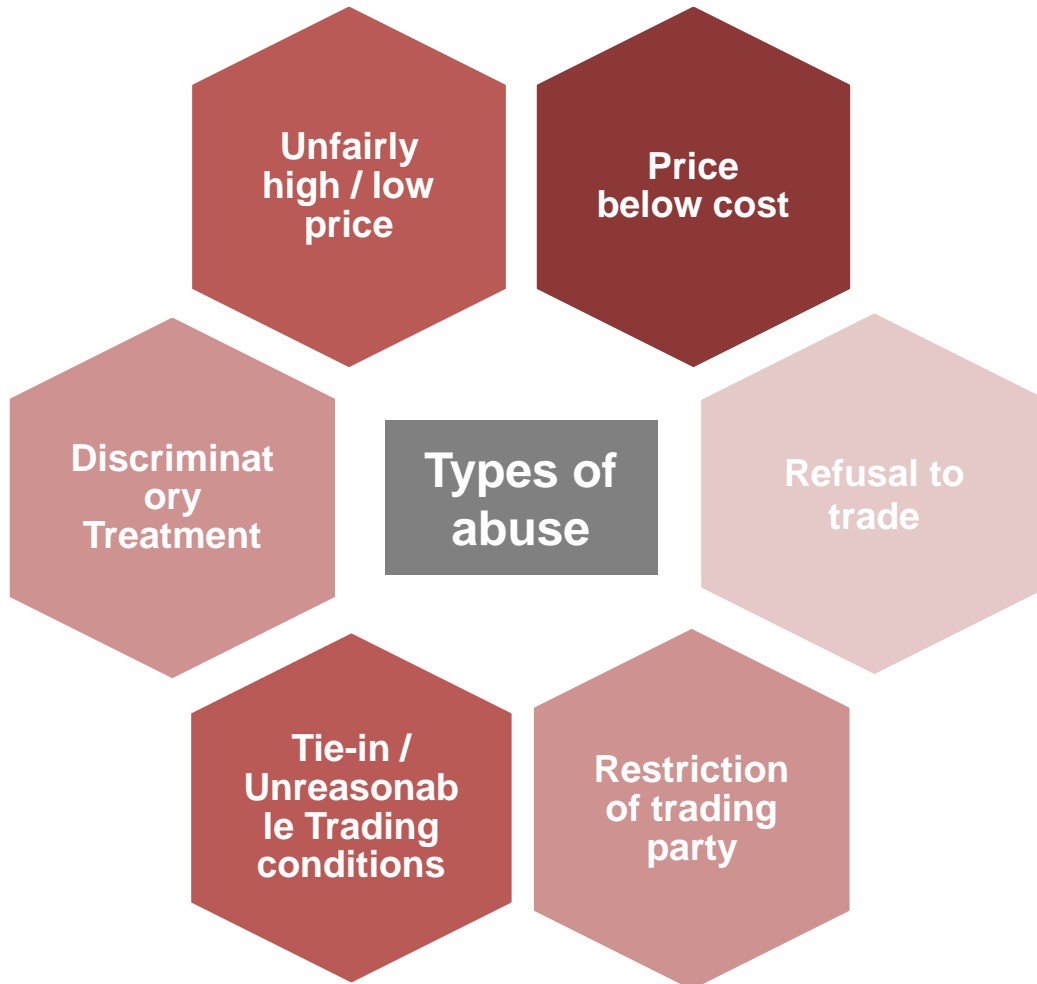


Determination of Abuse of Market Dominance

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



Source: Tech in China

Antitrust & Digital Economy

Alibaba Case

➤ 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.



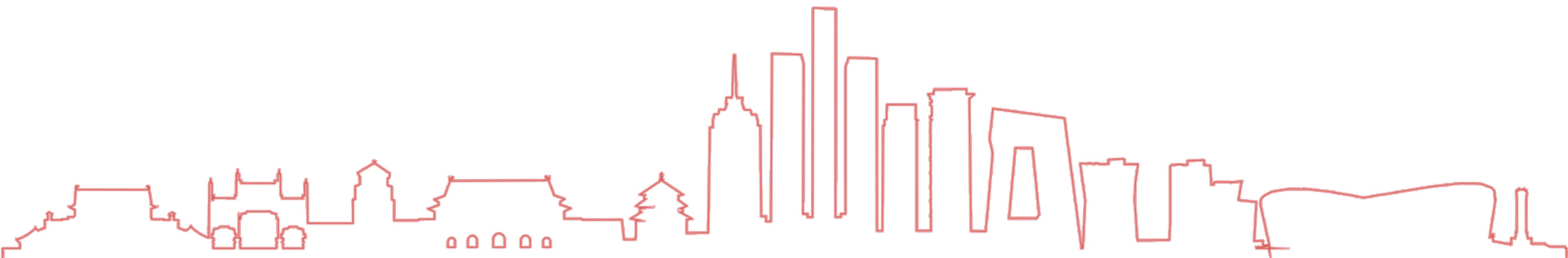
➤ Abusive Conducts

- ✓ 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

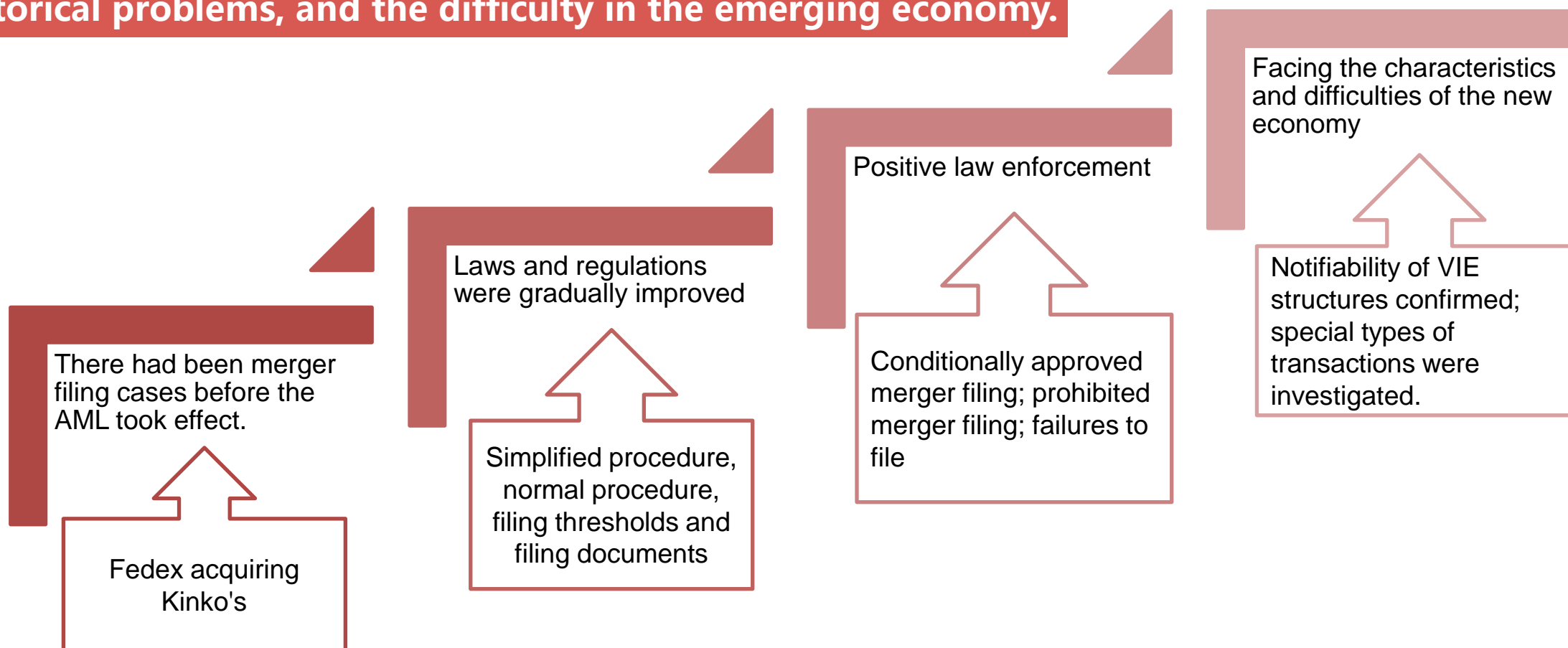
- ✓ SAMR imposed a **RMB 18.228 billion** (approximately USD 2.83 billion) fine on Alibaba, which accounts for about **4%** of its domestic sales in 2019.

V. Merger Filing



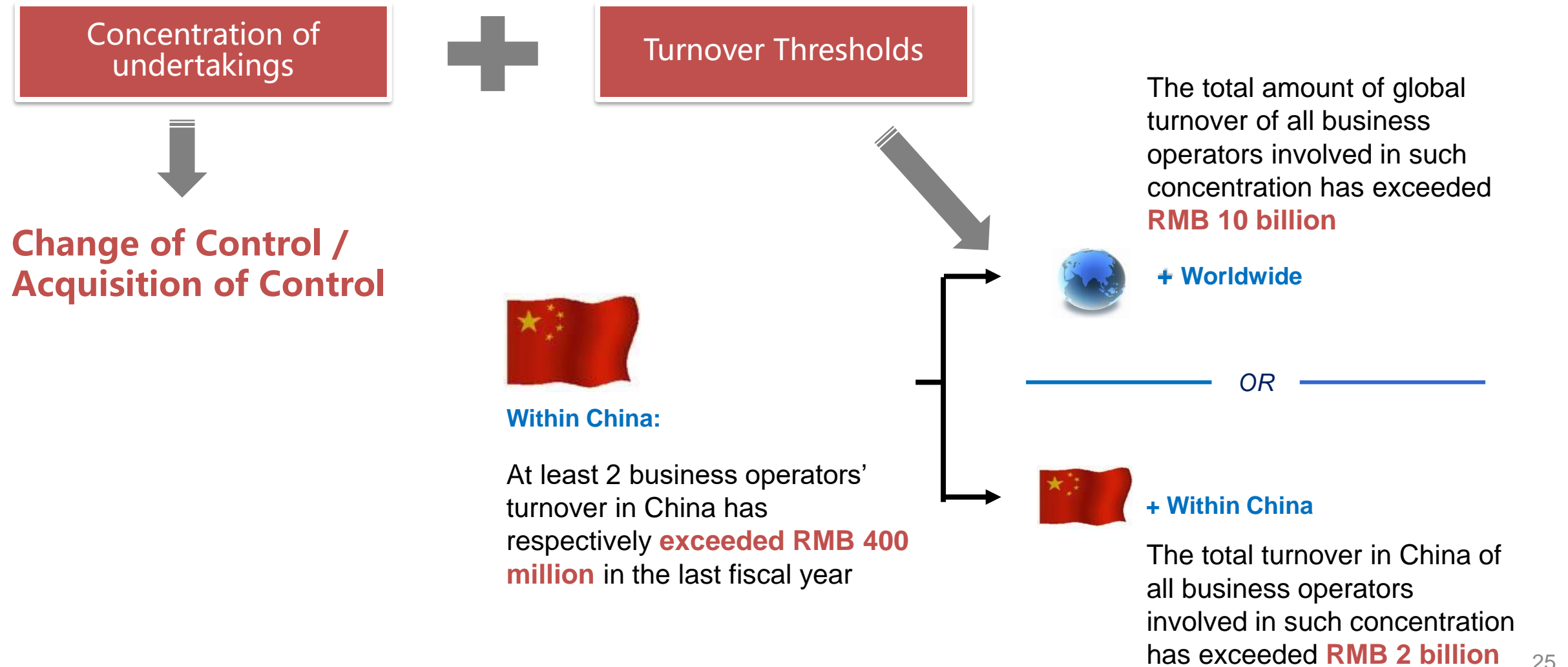
Merger Filing

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



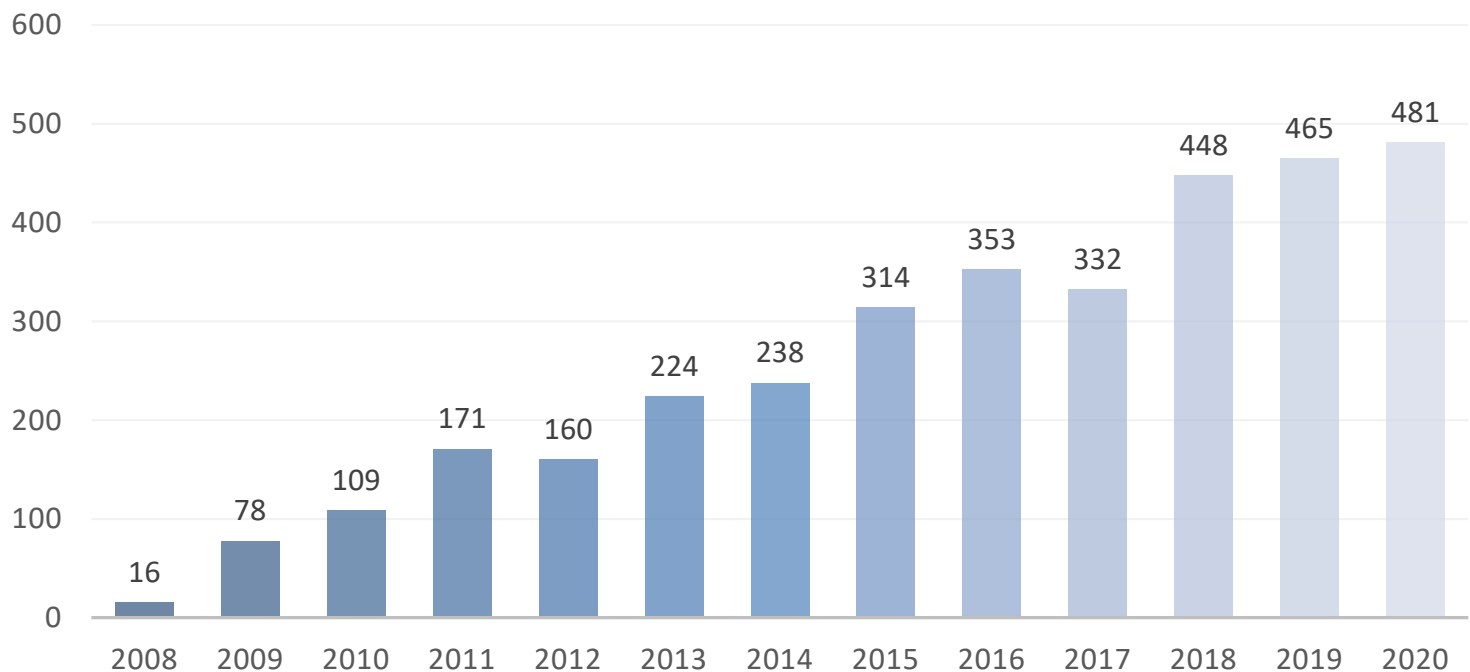
Merger Filing

➤ Filing Thresholds/Standards



Merger Filing—Statistics

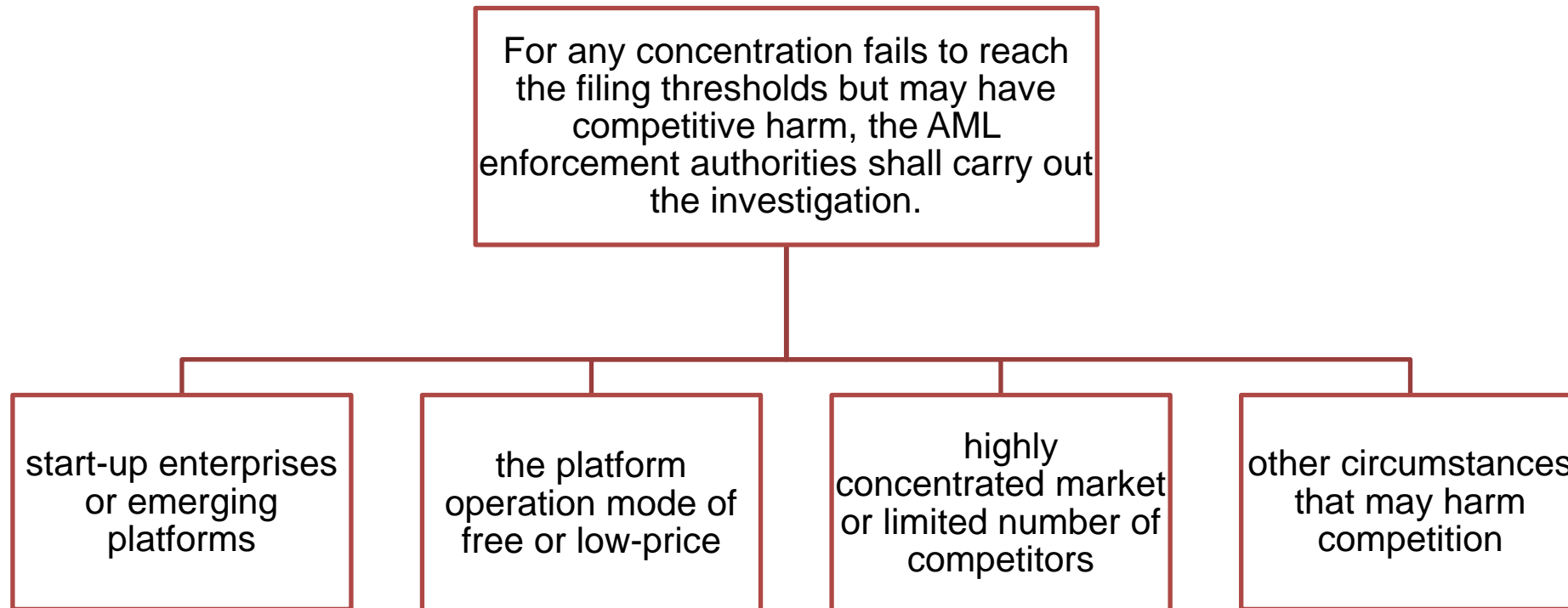
Merger filings increased year by year



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



Thank You For Listening!

Email: susan.ning@cn.kwm.com

Website: www.kwm.com

