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On October 23, 2021, the draft amendment of the Anti-Monopoly Law of the People's Republic of China ("The AML Amendment Draft") was published after going through a major overhaul. The AML Amendment Draft has included a series of new rules and modifications in several key areas. This Article intends to shed light on the key changes in the AML Amendment Draft and provide analysis on what these changes mean from a compliance perspective.

1. Safe Harbor

(a) The Introduction of "Safe Harbor"

Article 19 of the AML Amendment Draft introduces a safe harbor rule for the first time, stating that when a firm who has reached a monopoly agreement can prove that its market share in the relevant market is lower than the standard set by the anti-monopoly law enforcement agencies, the monopoly agreements qualify for a rebuttable presumption of exemption from antitrust scrutiny, absent evidence of competitive harm.

Several elements of the prescribed safe harbor rule are worth-noting. First of all, the safe harbor rule applies to both horizontal and vertical monopoly agreements. Secondly, the introduction of the safe harbor rule may conceivably exempt a large number of monopoly agreements, such as agreements on fixing the resale prices, that are currently unlawful *per se*. Thirdly, the presumption of exemption is rebuttable with evidence of anticompetitive harm. It is unclear from the plain language of Article 19 who bears the burden of proof for the existence of anticompetitive harm. Fourthly, it still remains to be seen what the market share threshold for the safe harbor rule would be. It is unclear whether there will be a uniform threshold for all markets or if the enforcement agency will set different market share thresholds for different industries.

(b) China's Initial Attempt at "Safe Harbor" Rules

Safe harbor rules are not new in China's antitrust regime. However, this was the first time a safe harbor rule has been proposed to cover hardcore restrictions. *The Interim Provisions on Prohibition of Monopoly Agreements (Draft for Comments)* (Provisions on Monopoly Agreements)[2] published by the State Administration for Market Regulation ("SAMR") in early 2019 stipulated that when the total market shares of competing operators in the relevant markets do not exceed 15 percent, and the market shares of the operators and their trading counterparts do not exceed 25 percent, it can be presumed that the agreement will not exclude or restrict competition. Nevertheless, this provision was not retained in the formal draft of *the Interim Provisions on Prohibition of Monopoly Agreements*. *The Guide of the Anti-Monopoly Committee of the State Council for Countering Monopolization in the Field of Intellectual Property Rights* ("Antitrust Guide on IP Rights)[3] which came into effect in 2019 stipulates that if the total market share of horizontal market operators does not exceed 20 percent and that of vertical market operators does not exceed 30 percent in any relevant market, then agreements related to IP reached by these entities will not be regarded as monopoly agreements[4]. It is worth noting that the "safe harbor" rule in the *Provisions on Monopoly Agreements* and *the Antitrust Guide in the IP Rights* is only applicable to "other monopoly agreements recognized by the Anti-monopoly Law Enforcement Agency of the State Council." In other words, the safe harbor rule in those regulations does not include hardcore restrictions. On the contrary, the AML

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[2] http://www.samr.gov.cn/hd/zjdc/201902/P020190103596624223444.pdf.
[3] http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321857.html.
[4] This provision is limited to IP-related agreements.

Amendment Draft extends the scope for the application of the safe harbor rule to all monopoly agreements.

2. Legal Liability Arising from Monopoly Agreements

(a) How the Legal Liability System Has Changed

Another significant aspect of the AML Amendment Draft lies in the improvements to the liability system. In response to the problem of under-deterrence, the AML Amendment Draft has greatly increased the amount of fines levied against companies for related illegal acts. In addition, for the first time, it has included personal liabilities.

(b) Corporate Liabilities

Since the AML came into effect in 2008, the calculation of sales revenue for the purpose of determining a fine has been a difficult problem. The AML Amendment Draft specifies that in cases where there is no sales revenue or there is a difficulty in calculating the sales revenue, the enforcement agency may impose a fine of less than RMB 5 million, which to a certain extent provides a clearer guidance in terms of calculating the fine.

In addition, the AML Amendment Draft simultaneously stipulates legal liability for hub-and-spoke agreements, that is, an entity who provides material in helping other companies reach monopoly agreements shall also be penalized.

(c) Personal Liabilities

Under the current AML regime, senior executives of enterprises who are found guilty of monopoly agreements are not required to bear legal responsibilities. The AML Amendment Draft stipulates that those who are personally responsible for monopoly agreements, such as the legal representatives or principally responsible persons, will face a maximum penalty of RMB 1 million, further enhancing the punitive function and deterrent force of the AML.

In contrast, most major jurisdictions around the world have imposed fines or even criminal punishment on individuals who are responsible for monopoly agreements. Specifically:

- In the United States, employees of enterprises who violate the Sherman Act may face individual criminal sanctions including fines and imprisonment. For individuals involved in cartel activities, the maximum penalty is a fine of USD 1 million and 10 years' imprisonment. According to statistics, 45 people in the United States faced imprisonment for violating the Sherman Act in 2012.[5]
- At the EU member state level, most countries impose individual responsibility for acts violating competition laws. For example, France can impose a maximum fine of EUR 50,000 and four years' imprisonment on individuals for acts violating competition laws.[6] Ireland can impose a maximum of EUR 5 million (or 10 percent of the turnover of the previous fiscal year) and 10 years' imprisonment on individuals.[7] Denmark can impose a maximum penalty of DKr 200,000 (about 200,000 RMB) and 18 months' imprisonment on individuals.[8]

The AML Amendment Draft currently does not provide clear guidelines on how to define "principally responsible person" and "directly responsible person." Therefore, it remains to be seen how the enforcement agency will interpret the provisions on personal liabilities in practice.

3. Stop-the-clock on Merger Review

Under the current rules on the review period for business concentrations, which are stipulated in

[5] https://www.law.cornell.edu/uscode/text/15/2.

[6] https://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/france_en.

[7] https://uk.practicallaw.thomsonreuters.com/w-028-2056?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default).

[8] https://www.en.kfst.dk/competition/regarding-competition-matters/penalties-for-infringing-the-danish-competition-act/.

Articles 25 and 26 of the AML, if a case involves a complicated competition evaluation or restrictive condition negotiation, the statutory review period is often insufficient. Thus, the applicant would have to withdraw and refile the case.

To avoid said withdrawing and refiling procedure, the AML Amendment Draft adds a "stop-the-clock" mechanism. Article 32 of the AML Amendment Draft stipulates that the review enforcement agency may suspend the running of the statutory review period when (i) the business operators fail to submit documents and materials, (□) new circumstances and new facts emerge that have a significant impact on the examination, and (□) the restrictive conditions attached to the concentration of business operators need to be further evaluated.

Based on our experiences, the current statuary review period is sufficient for simplified cases and most normal cases without competition concerns. Therefore, in practice, the stop-the-clock mechanism will be applicable to a very limited number of cases that give rise to competition concerns.

4. Amendment on the Punishment for Failure to File

Currently, the punishment for failure to file is relatively low compared with other jurisdictions. Many experts have argued that the highest penalty of RMB 500,000 is not a sufficient deterrent for enterprises. As a result, some enterprises often ignore the filing obligation or decide to jump the gun. In summary, the AML Amendment Draft modifies the punishment for failure to file in the following ways:

(a) Penalties for Failure to File Related to Transactions that Have or May Have the Effect of Eliminating or Restricting Competition

Article 58 of the AML Amendment Draft stipulates that the enforcement agency can impose a penalty for an amount less than 10 percent of sales revenue in the latest previous year, and order the parties to restore the competitive status. As of now, there has been only one case where the enforcement agency has blocked the transaction and ordered the parties to restore the competitive status following this failure to file procedure.

(b) Penalties for Failure to File Related to Transactions that Do Not Have the Effect of Eliminating or restricting competition

The AML currently imposes a maximum fine of RMB 500,000 on violators for failure to file, regardless of whether the unreported transaction would impact market competition or not. To provide a more significant deterrence, the AML Amendment Draft raised the maximum penalty for failure to file for a transaction without competition concerns up to RMB 5 million.

(c) Notification Requirement for Transactions that Fall Below the Notification Thresholds

Article 26 of the AML Amendment Draft holds that "if the concentration of business operators does not meet the notification standards prescribed by the State Council, but there is evidence that the concentration of business operators has or may have the effect of excluding or restricting competition, the AML enforcement agency shall investigate according to law." This article gives the AML enforcement agencies the statuary right to initiate investigations on transactions that do not meet the notification threshold. The addition of Article 26 in the AML Amendment Draft also echoes Article 19 of the *Anti-monopoly Guidelines of the Anti-monopoly Commission of the State Council on Platform Economy*.

The introduction of Article 26 of the AML Amendment Draft is mainly intended to tackle the acquisition of nascent business by established firms, in other words, the "killer acquisitions" that have attracted so much attention in recent years.

The "killer acquisition" mainly refers to the behavior of existing enterprises who attempt to “kill” the business of targeted emerging enterprises in order to seize or maintain their competitive advantage. One of the parties participating in the "killer acquisition" often is a start-up enterprise or a new platform, which

means the turnover threshold may not be met even though the relevant market may be highly concentrated. Antitrust experts have argued that killer acquisitions may hinder innovation and suppress the growth of start-ups. A large-scale "killer acquisition" may lead to a winner-take-all situation considering Internet enterprises may take full advantage of their capital and scale.

5. The Retroactive Effect Regarding Failure to File Violations

Enterprises who have had unreported transactions should be extremely concerned about the retroactive effects of the AML Amendment Draft after it is enacted. According to Article 36 of the Administrative Penalty Law, if an illegal act is not discovered within two years of its commission, no administrative penalty shall be imposed on the offender. The period prescribed shall be counted from the date on which the illegal act is committed; if the illegal act is of a continual or continuous nature, it shall be counted from the date the act is terminated.

In principle, the statute of limitations for administrative punishments is two years. However, the AML enforcement agencies usually regard failure to file as continuous illegal acts. So, the statute of limitations would not run for as long as the illegal acts remain. Therefore, past transactions that are unreported will be subject to the punishment prescribed in the AML Amendment Draft.

6. Key Areas for Merger Review for the Future

Article 37 of the AML Amendment Draft explicitly mentions that the enforcement agency should strengthen the merger review process in the financial and media fields. Concerning anti-monopoly in the financial field, Guo Shuqing, secretary of the Party Committee of the People's Republic of China's Banks, said in an interview that China's banking, insurance and securities industries may have monopolies and unfair competition, and that a fair and competitive financial market should be maintained in accordance with the law. Yi Gang, President of the People's Republic of China's Banks, also mentioned in his speech at the International Conference on Supervision of Large Technology Companies held by Bank for International Settlements (“BIS”) that some domestic platform companies have seized the market through cross-subsidies and other means, and have implemented exclusive policies in order to maintain a dominant position in the market. Thus, we believe that merger review in the financial and media fields will be a top priority going forward.