THE AMENDMENT OF CHINA'S ANTI-MONOPOLY LAW

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On June 24, 2022, China's legislature enacted the revision of the Anti-Monopoly Law ("AML"), the country's main antitrust statute. The revised AML entered into force on August 1, 2022. In this paper, we examine a number of key takeaways from the AML revision – ranging from an expansion of the cartel prohibition; a potential liberalization in the resale price maintenance area; a number of rule tweaks for platform operators; minor changes to the AML's "administrative monopoly" chapter; incorporation of the fair competition review system into the AML; stronger procedural powers for China's antitrust authority; and heavier and broader sanctions for antitrust infringements. Although the plan for the AML revision was to make a "small amendment," its impact on businesses, government bodies and other stakeholders in the Chinese antitrust community is profound.

I. INTRODUCTION

On June 24, 2022, China's legislature passed the amendment of the Anti-Monopoly Law ("Revised AML"), originally promulgated in August 2007. The Revised AML entered into force a few days ago, on August 1, 2022.

The AML amendment is a response to the problems that have arisen in administrative and judicial law enforcement in practice. At the same time, the Revised AML aims to address novel issues – in particular conduct by Internet players – which have emerged over recent years.

In this paper, we highlight a number of key takeaways from the Revised AML. We will go through these takeaways mainly in the order they appear in the Revised AML.

II. RESHAPING THE AML'S GOALS

There has long been a discussion on the ultimate goals of antitrust laws on a global level.[2] In China, this discussion had a specific "legal basis" insofar as the pre-2022 reform AML ("2007 AML") set out a broad range of goals. According to Article 1 of the Revised Law:

> "This law is enacted for the purposes of preventing and prohibiting monopolistic conduct, protecting fair market competition, *encouraging innovation*, enhancing efficiency of economic operations, safeguarding consumer interests and the public interest, and promoting the healthy development of the socialist market economy."[3]

As the text shows, the AML is not aimed at a single goal, but pursues a number of goals. The Revised AML added a further goal – "encouraging innovation."

In essence, the 2007 AML pursued three key goals – competition, efficiency, and consumer welfare.[4] However, rather than all pulling in the same direction, these goals can be in conflict, and when the conflict occurs, some goals need to take precedence over others. Rather than being three goals at the same level (juxtaposition), the goals may be deemed as being in progression – in the order indicated in Article 1: ensuring competition in the marketplace would lead to an efficient outcome. In turn, promoting efficiency would result in consumers' welfare being protected.[5] In other words, the protection of competition is meant to promote efficiency, and the promotion of efficiency is in turn aimed at protecting consumer welfare. The progressive relationship would then be: competition → efficiency → consumer welfare.

Now, as if the multiple goals of the 2007 AML were not complicated enough, the AML revision adds another goal – "encouraging innovation" – rather than simplifying Article 1 or explaining the relationship between the various goals.

It is difficult to identify a clear relationship between competition, innovation, efficiency, and consumer welfare. We think the best would be for AML implementing rules to be enacted to clarify the relationship between goals. However, the current SAMR draft regulations do not address this point.

So if we were to use the progressive relationship between the AML's goal identified through the interpretation made above, where would "encouraging innovation" fit in?

In fact, it may be possible to interpret "encouraging innovation" into the progressive relationship between AML goals. Innovation could be put on the same level as efficiency. Economic literature suggests there are two types of efficiencies – static efficiency and dynamic efficiency.[6]

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2 John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, Notre Dame Law Review, 2008, p.191-244; Maurice E. Stucke, *Reconsidering Antitrust's Goals*, Boston College Law Review, 2012, p.551-630; or Ye Weiping, *The Value Structure of Antitrust law*, China Legal Science (03), 2012, p.135-146 (in Chinese).

3 AML, art. 1 (emphasis added to highlight the change compared to the 2007 AML).

4 For this analysis, we focus on the more directly economic concepts, leaving aside the goals of safeguarding the public interest and promoting the healthy development of the socialist market economy.

5 *See* Xu Guangyao, *Substantive Amendment or Formal Amendment? The Main Content of the Revised Anti-Monopoly Law and Commentary* (2022), available on Wechat at https://mp.weixin.qq.com/s/AAQgxxnKBf0c-N-D4LI--w (in Chinese).

6 Static efficiency – also: output efficiency – refers to an increase in output without a change in operational productivity. Dynamic efficiency – also: innovation efficiency – refers to an increase in operational productivity. *See* Xu Guangyao, *Economic Analysis on Antitrust Law*, Price: Theory & Practice, 2015, p. 26-29 (in Chinese).

Against this background, post-revised AML, the progressive relationship for the goals would be competition → innovation/efficiency → consumer welfare.

III. HORIZONTAL AGREEMENTS – CARTEL PROHIBITION EXTENDED TO "ORGANIZERS"

The "monopoly agreements" chapter in the Revised AML starts with a new provision, Article 16, defining the term "monopoly agreement" as an agreement, decision or other concerted practice which eliminates or restricts competition. The novelty of this provision is not its content – which remains unchanged – but its location in the AML chapter. Its new place indicates its function as a general definition applying to all kinds of agreements. In the 2007 AML, the same provision was in the second paragraph of a provision which applied to horizontal agreements only.

Articles and 17 and 18 contain prohibitions of horizontal and vertical monopoly agreements respectively. The horizontal agreements provision remains unchanged relative to the 2007 AML.

In contrast, Article 19 is brand-new. Although its scope is not explicitly limited to horizontal agreements, its focus lies clearly on them. It reads:

> "Business operators are prohibited from organizing the conclusion of a monopoly agreement by other business operators or providing other business operators with substantial assistance for concluding a monopoly agreement."

This provision responds to the concern that there can be third parties which are not part of an anti-competitive agreement but play a supporting role in the conclusion of the agreement. Under the 2007 AML, such third parties were not caught by the horizontal agreements provision, which only prohibited anti-competitive agreements between "business operators in a relationship of competition."

Now the draft Regulation Prohibiting Monopoly Agreements ("Agreements Regulation") – which implements the Revised AML in the monopoly agreements area – puts forward additional guidance on what is to be understood by "organizing" or "providing substantial assistance" to the members of an anti-competitive agreement.[7]

In particular, a company is deemed to "organize" an anti-competitive agreement if it plays a leading role for the scope, the content, or the implementation of the agreement.[8] Beyond this general description, the draft Agreements Regulation puts forward a specific scenario of "organizing" an anti-competitive agreement – namely, a typical "hub and spoke" situation – where a company (most often, a supplier) signs agreements with trading partners (most often, its distributors) and intentionally facilitates a "meeting of minds" or information exchange between them.

The draft Agreements Regulation also provides some guidance on what "providing substantial assistance" means. This may be the case where a company provides support for the conclusion or implementation of an anti-competitive agreement; which has a "cause effect relationship;" and the company's role is evident.[9]

If a company is found to "organize" or "provide substantial assistance" to the parties to an anti-competitive agreement, then Article 56(2) of the Revised AML provides for clear sanctions: they are subject to the same penalties as the parties to the agreement themselves.

From the above description it becomes clear that Articles 19 and 56(2) apply to a broad range of situations where a third party organizes or facilitates an anti-competitive agreement for others. "Hub and spoke" between a supplier and its distributors is just one of the possible scenarios. Many others are possible, like a consultancy organizing a cartel for a number of its clients. In that sense, the 2007 AML's rules applicable to the conduct of trade associations are quite similar.[10] Of course, "hub and spoke" is not itself an unlawful constellation. Only if the "hub and spoke" situation leads to the conclusion and implementation of an anti-competitive agreement does the AML kick in.

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7 SAMR, *Announcement of the State Administration for Market Regulation on Public Consultation on the Draft Regulation Prohibiting Monopoly Agreements*, June 27, 2022, available at https://www.samr.gov.cn/jzxts/tzgg/zqyj/202206/t20220627_348157.html.

8 *Id.* art. 17.

9 *Id.*

10 AML, art. 21.

The scope of Articles 19 and 56(2) is quite broad – theoretically, they could even cover vertical agreements. As noted above, Article 19 is inserted after the horizontal and vertical agreements prohibitions. This means that a third party like a consultancy could also be deemed to have organized an illegal resale price maintenance agreement for a company.

IV. VERTICAL AGREEMENTS – THE INTRODUCTION OF A "SAFE HARBOR"

Article 14 of the 2007 AML targeted anti-competitive vertical agreements. However, only one type of agreement – resale price maintenance ("RPM") – was listed as a prohibited vertical agreement, while a catch-all clause allowed the antitrust authorities to find other types of anti-competitive vertical agreements. In 14 years of enforcement of the 2007 AML, the authorities never used this catch-all clause as a legal basis to sanction a company.

The main content of this prohibition has been taken over into the Revised AML in Article 18. Therefore, RPM remains the only explicitly outlawed vertical agreement, and the catch-all clauses is left untouched.

However, two additional paragraphs have been added to Article 18 (as compared to the 2007 AML) which could significantly change the approach towards RPM in China:

· According to Article 18(2), RPM is not prohibited if the company in question is able to prove that the agreement does not restrict competition.

· According to Article 18(3), RPM is not prohibited if the company is able to prove that its market share is below the threshold and fulfils the other conditions stipulated by the antitrust authority, the State Administration for Market Regulation ("SAMR").

To an extent, the AML revision brings the law in line with the requirements established by the judiciary. In the *Yutai* judgment, the Supreme People's Court basically ruled that RPM should be subject to a "rule of reason" standard (even if the antitrust authority can presume anti-competitive effects to exist).[11]

Unfortunately, there is no specific guidance in the AML or the draft Agreements Regulation on how to evaluate what a restriction to competition is. For example, it is not clear whether the prevention of "free-riding" conduct justifies an RPM arrangement. In contrast, similar to antitrust cases and academic research internationally, rules in China suggest that this could be a valid defense for a company accused of RPM.[12]

Beyond the lack of detailed guidance, there is even a discussion among academics in China on the basic principles – i.e. as to whether the safe harbor option can apply to RPM at all or whether it is merely meant to guide enforcement of the catch-all clause (if and when this happens).[13]

Paragraphs (2) and (3) of Article 18 of the Revised AML may be intended to give smaller companies an opportunity to defend themselves against allegations of illegal RPM conduct.

Low market shares would indicate a lower likelihood that the RPM practice has an anti-competitive effect. In contrast, if the initiative to have an RPM arrangement in place comes from distributors, there could be horizontal aspects to the RPM arrangement and the above-mentioned "hub and spoke" rule may come into play.

The draft Agreements Regulation provides some additional guidance on how to interpret Articles 18(2) and (3) of the Revised AML.

11 Supreme People's Court, *Yutai v. Hainan Price Bureau*, December 18, 2018, [2018] Xing Shen No. 4675.

12 *See*, for example, Anti-Monopoly Guidelines for the Automotive Sector of the Anti-Monopoly Commission under the State Council, [2019] Guo Fan Long Fa No. 2, art. 6(2)(1).

13 For a view that it applies to RPM: Shi Jianzhong, *A Comprehensive Explanation on the Revised Anti-Monopoly Law* (2022), available at https://mp.weixin.qq.com/s/7M-LM9MqSxUaLid4k0M3lxA (in Chinese); for a view that it only applies to the catch-all clause, Wang Xiaoye, *Revised Anti-Monopoly Law Completed: Encouraging Innovation as Goal, Safe Harbor and Fair Competition Review Incorporated* (2022), available at https://m.mp.oeeee.com/a/BAAFRD0000202206256971 28.html?wxuid=ogVRcdKuXpk10m-clkX-5C1YFsgzI&wxsalt=b01923 (in Chinese).

First, the market share threshold is set at 15 percent.[14] This seems is quite low compared to the 30 percent market share benchmarks for safe harbors for vertical agreements in the Anti-Monopoly Guidelines for the Automotive Sector and the prior IPR regulation.[15]

Second, a company wanting to avail itself of the market share safe harbor as a defense (when investigated by SAMR) will not only need to prove that its market share is below the threshold but also that "the agreement will not eliminate or restrict competition in the relevant market."[16]

This requirement may respond to the possibility in Article 18(3) of the Revised AML for SAMR to stipulate "other conditions" for exempting RPM. However, if companies need to prove the absence of restriction to competition, then this seems to be quite an onerous requirement. For example, it is not clear what a restriction to competition is in this context. Is this concept focused on inter-brand competition only? If it were also focused on intra-brand competition, then it would be a very high burden of proof for the company, as RPM by definition eliminates intra-brand price competition (but not intra-brand competition based on other parameters of competition).

Unless there is specific guidance by SAMR on how to apply the market share safe harbor and the "other conditions" – for example, which factors to consider – companies may decide it is safer not to rely on the safe harbor due to the high uncertainty. In our view, this would be a pity, as the Revised AML provides for a possibility of taking a different, potentially more liberal, approach to RPM, which would then be left unused by companies.

V. NEW RULES FOR PLATFORM OPERATORS

Two new provisions related to platform operators were added to the Revised AML.

First, Article 9 states that companies "shall not use data and algorithms, technology, capital advantages and platform rules to engage in monopolistic conduct prohibited by this law."

Second, Article 22(1) prohibits dominant enterprises from engaging in abusive conduct and provides a non-exhaustive list of the main types of abusive conduct. Now, with the AML reform, a second paragraph was added to Article 22:

> "A business operator in a dominant market position shall not use data and algorithms, technology, and platform rules to engage in conduct abusing a dominant market position as stipulated in the preceding paragraph."

The content of this paragraph is already included in Article 9, and is repeated here (except for the reference to "capital advantages") for abuse of dominance conduct in particular. The likely reason for the repetition is that many investigations in the Internet field take the form of abuse of dominance cases (as for example the *Alibaba* and *Meituan* cases attest[17]).

Both Articles 9 and 22 refer to other rules – i.e."monopolistic conduct prohibited by this law" and abuse of dominance "as stipulated in the preceding paragraph." In that sense, Articles 9 and 22 do not change the substance of the AML provisions. The provisions' main effect is to draw the attention to the use of big data and other high tech-related parameters of competition. Indirectly, they indicate a sector enforcement priority.

VI. CHANGES TO THE "ADMINISTRATIVE MONOPOLY" CHAPTER

There are relatively minor changes to the AML's "administrative monopoly" chapter. To recall, this chapter prohibits government bodies and bodies which were entrusted with public authority powers from adopting decisions and engaging in activities which distort competition in the marketplace.

14 Draft Agreements Regulation, *supra* note 8, art. 15.

15 Anti-Monopoly Guidelines for the Automotive Sector, *supra* note 13, art. 4; and Anti-Monopoly Guidelines in the Field of Intellectual Property Rights of the Anti-Monopoly Commission under the State Council, [2019] Guo Fan Long Fa No. 2, art. 13.

16 Draft Agreements Regulation, *supra* note 8, art. 16(1)(3).

17 *Alibaba*, SAMR Administrative Penalty Decision [2021] Guo Shi Jian Chu No. 28, April 10, 2021; and *Meituan*, SAMR Administrative Penalty Decision [2021] Guo Shi Jian Chu No. 74, October 8, 2021.

In academia, research in the past mainly focused on "regional administrative monopolies" – where the government action prevents non-local companies to compete on equal footing with local companies. Indeed, historically, legislation and enforcement has long focused on "regional administrative monopolies." When the AML was enacted in 2007, geographical discrimination may have been relatively prevalent, so the attention of the legislature was on this issue. Indeed, the focus on distortions of competition based on the location/residence (within Mainland China) of the business can be traced back to the very origins of Chinese competition law.[18]

In the 2007 AML, the heavy focus on location was exemplified by Articles 33-35, which prohibited administrative bodies and other organizations endowed with administrative powers from discriminating against non-local companies, including in terms of sale of products, bidding processes, and establishment of branches.

Now, Article 40 of the Revised AML appears to acknowledge that discrimination can be more diverse than criteria merely based on location. The Revised AML shows that, today, the concept of discrimination must be interpreted more broadly, including possible discrimination based on ownership, tax capacity, etc.

Article 40 thus helps to re-focus the discrimination prohibition away from the local v. non-local dichotomy to catch a broader concept of discrimination.

This new provision prohibits government bodies from obstructing market entry or implementing unfair treatment in general. To an extent, this provision enshrined an obligation of "competitive neutrality" on government bodies.[19]

VII. INCORPORATION OF THE FAIR COMPETITION REVIEW SYSTEM INTO THE AML FRAMEWORK

When the AML was enacted in 2007, the fair competition review system ("FCRS") was not yet on the table.

The FCRS was established only in 2016 through a separate policy adopted by the State Council – the Opinions on the Establishment of a Fair Competition Review System in the Building of the Market System.[20]

The FCRS is a mechanism to require all governmental bodies in China to self-screen their own rules and practices which relate to economic activities, for their compatibility with the principle of competition.

At the same time, Chapter 5 of the AML on "administrative monopoly" conduct contains other rules applicable to government bodies in China. This chapter features a number of specific prohibitions on government or quasi-government bodies from abusing their administrative powers to distort competition. In general, with the exception of Article 45 of the Revised AML, the prohibitions in Chapter 5 are more focused on "specific administrative acts" (i.e. acts applicable to an identified number of addressees), not "abstract administrative acts" (i.e. acts which apply generally to an unidentified number of addresses).

Article 45 applies to abstract administrative conduct, as government or quasi-government bodies are prohibited from abusing their administrative powers "to set rules with content eliminating or restricting competition."

In contrast, the FCRS seems more focused on generally applicable rules (that is, "abstract administrative acts").

In that sense, the AML's Chapter 5 and the FCRS are complementary.

18 See State Council Interim Regulation on the Development and Protection of Socialist Competition, October 17, 1980; and State Council Regulation on Prohibiting Regional Blockade in Market Economic Activities, [2001] State Council Order No. 303, April 21, 2001.

19 Other amendments in the AML's administrative monopoly chapter include the (slight) changes to the wording. In particular, there is a prohibition on government entities to adopt discriminatory rules or actions in "disguised" form. This confirms that – as in other areas of the AML – the analysis of the restrictive conduct looks at the substance – at the effect – not the form.

20 State Council Opinions on the Establishment of a Fair Competition Review System in the Building of the Market System, [2016] Guo Fa No.34, June 1, 2016.

In addition, there are other differences. Procedurally, the obvious difference is that the FCRS is based on a self-assessment, while the enforcement of Chapter 5 is done through investigation by SAMR. The Revised AML actually confers more powers on SAMR in this respect.[21]

Even from a substantive perspective, there are differences between Chapter 5 and the FCRS. In particular, Chapter 5 does not seem to contain any possibility to "exempt" government conduct distorting competition, while the FCRS contains a list of justifications: to safeguard national economic security, cultural security or involved in the building of national defense, or to achieve social objectives such as poverty alleviation and development, disaster relief and assistance, saving energy, or protecting the environment).[22]

At the same time, economic efficiencies are not one of the justification reasons listed in the FCRS.

Of course, government bodies have regulatory and other administrative functions, and their mandate goes beyond achieving efficiencies in the marketplace. For this reason, we do not question that some of their potentially anti-competitive measures may be duly justified for other (e.g. social) reasons.[23]

That said, we find that Chapter 5 and the FCRS are drafted differently, and we are not sure that the different approach is due to a deliberate strategy, rather than reflecting different authors and different moments of drafting the legal texts.

VIII. STRONGER PROCEDURAL POWERS FOR SAMR

Under the 2007 AML, SAMR already had very far-reaching investigative powers, including the power to conduct a "dawn raid" at companies' premises. The Revised AML keeps the list of SAMR's investigative powers intact, and strengthens them on a number of limited points.

As far as investigations against companies are concerned, the Revised AML raises the maximum fine on companies for obstructing an investigation from RMB 1 million (around USD 150,000) to 1 percent of the company's annual revenues.

In addition, the Revised AML empowers SAMR to request meetings with a company's legal representative or "responsible person" to discuss potential rectification measures.[24] The idea may be to hold these discussions before SAMR has launched a full-blown investigation. At present, however, it is not clear from the Revised AML and the draft implementing regulations on how this provision relates to the general principle that a company can choose its representative/interlocutor with government.

As far as investigations against government entities for possible breaches of the AML's "administrative monopoly" provisions are concerned, the Revised AML makes a breakthrough change: as noted, it explicitly provides a legal basis for SAMR to conduct an investigation.[25]

Of course, other government bodies are reluctant to be the target in an intergovernmental investigation. As a result, in the past, SAMR faced some resistance when investigating "administrative monopoly" breaches by other government bodies. The difficulties for SAMR were quite substantial, as the government entities under investigation did not necessarily take the view that SAMR had jurisdiction to conduct a proper investigation. The Revised AML now changes this.

IX. HEAVIER FINES FOR AML VIOLATIONS

The sanctioning regime has been significantly strengthened under the Revised AML. Many of the existing levels of fines on companies are increased. In addition, the Revised AML created new categories of sanctions.

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21 AML, art. 54. In particular, SAMR obtains formal powers to investigate other government bodies and confers it a co-decision right to accept "remedies" which the infringing government bodies propose. The investigative powers include the possibility to request the head of the respective government body and its hierarchically superior organ to appear for discussions/interview.

22 State Council Opinions on the Establishment of a Fair Competition Review System in the Building of the Market System, *supra* note 21, part 3(4).

23 The benchmark for assessing the legality of corporate behavior should be whether it restricts competition (and, by extension, reduces efficiency and harms consumer welfare). *See* section 1 of this paper. In contrast, the benchmark for assessing the legality of government conduct, arguably, is whether it impacts on the fairness of competition, not the competitive market structure itself.

24 AML, art. 55.

25 *Id.* art. 54.

A. Higher corporate fines

Fines are already very high for anti-competitive agreements and abuse of dominance under the prior AML – 1-10 percent of the annual revenues of the infringing company, and confiscation of illegal gains is also possible.[26]

The Revised AML tweaked some of the "supplementary" fines provision, in particular it raised the fine for concluding a monopoly agreement which is not implemented from RMB 500,000 to RMB 3 million (around USD 450,000). The same increase was made for fines on trade associations which organize cartels for their members.

In the merger control area, the corporate fines were noticeably increased. There are now two types of fines punishing a failure to file reportable transactions: if the transaction at issue does not have anti-competitive effects, the fine is increased from RMB 500,000 to RMB 5 million (around USD 750,000); if the transaction does have anti-competitive effects, then a fine of up to 10 percent of annual revenues can be imposed.

Most importantly, Article 63 creates a general "fine uplift mechanism" for particularly egregious antitrust offenses. The provision states that SAMR can apply a multiplier of 2 to 5 to the fines for anti-competitive agreements, abuse of dominance, anti-competitive mergers, and obstruction of the investigation "if the circumstances are especially serious, the impact is especially adverse, or the consequences are especially serious." This means that the maximum fine for a substantive infringement of the AML can be up to 50 percent of annual revenues and up to 5 percent of annual revenues if a company obstructs SAMR's investigation.

Therefore, compared to the 2007 AML, the maximum fine level is much higher, and the deterrent effect of the AML's sanctions much stronger. This amendment reflects the changed attitude of the legislator – and possibly a larger group of policymakers and stakeholders – that antitrust infringements need to be sanctioned more heavily.

At the same time, the circumstances are relatively unclear as to when the "fine uplift mechanism" applies, because the concepts used (especially serious circumstances, adverse impact, or serious consequences) remain vague without further guidance.

We understand that SAMR will likely want to use this mechanism cautiously. We agree that there must be clear standards and criteria to make this option work in practice. In our view, we believe SAMR could optimize its use of other sanctions provisions as a priority. For example, the range of fines between 1-10 percent revenue for anti-competitive agreements and abuse of dominance is already quite high – SAMR could provide more guidance on how it sets the fine within that range, as past practice has been relatively uneven. In addition, unlike other antitrust regulators (in Europe for example), the AML allows SAMR to confiscate the illegal gains of the infringing companies. Again, SAMR has not consistently sought to obtain repayment of such illegal gains in past cases – mainly due to the understandable challenges in calculating the amount of such gains.

In our view, however, further research and guidance on when illegal gains are confiscated and how they are calculated would be a more natural way for SAMR to step up its sanctioning practice, rather than to use the "fine uplift mechanism" to sanction companies.[27]

B. New Types of Sanctions

While the 2007 AML focused mainly on fines against corporations, the Revised AML provides for a broader spectrum of sanctions.

First, the Revised AML provides for fines of up to RMB 1 million (around USD 150,000) on the infringing company's legal representative, major responsible person, or the direct responsible person if they are found to have personal responsibility for the conclusion of an anti-competitive agreement. However, neither the revised AML nor the Agreements Regulation provides further guidance on the standard to judge if the employees have personal responsibility.[28] It is not clear whether the employees need to have been personally involved or at least have known about the illegal agreement, or if a simple omission (by negligence) for example can be enough.

On their face, the personal sanctions apply to any kind of anti-competitive agreements, potentially covering hardcore cartels, "hub and spoke" situations, resale price maintenance as much as other types of anti-competitive horizontal agreements (such as R&D cooperation etc.).

26 However, confiscation of illegal gains is not consistently implemented in practice in actual cases (see more below).

27 *See* also past attempts to provide further guidance on fine levels and streamline the illegal gains confiscation practice, in particular National Development and Reform Commission, *Guidelines on the Setting of Illegal Gains by Monopoly Conduct from Business Operators and the Determination of Fines (Consultation Draft)*, June 17, 2016, available at https://www.ndrc.gov.cn/hdjl/yjzq/201606/t20160617_1165959.html?code=&state=123.

28 Draft Agreements Regulation, *supra* note 8, art. 39.

Second, the Revised AML mandates registration in China's social credit system of any SAMR decision finding companies to have breached the AML as well as the publication of that registration decision.[29] Although the building of the social credit system is still a "work in progress," many companies take this issue very serious and would be concerned about any downgrading of their social credit ranking.

Third, according to a newly added provision in the Revised AML, criminal liability is to be sought if a violation of the AML constitutes a crime.[30] This provision works as a general reference, and does not create new law. At the moment, certain types of bid rigging are the only substantive antitrust offenses prohibited under the Criminal Law. That said, however, the new provision in the Revised AML hints at the possibility of future amendments to the Criminal Law to add other antitrust infringements. If so, this will further strengthen the AML's sanctioning regime.

X. CONCLUSIONS

The revision to the AML reflects a significant moment in China's still young antitrust history. The Revised AML provides a starting point for a new phase of antitrust enforcement in the country.

In this paper, we examined the key takeaways from the AML revision –an expansion of the cartel prohibition; a potential liberalization in the RPM analysis; a number of rule tweaks for platform operators; minor changes to the "administrative monopoly" chapter; incorporation of the FCRS; stronger SAMR procedural powers; and heavier and broader sanctions.

Although the plan for the AML revision was to make a "small amendment," its impact on businesses, government bodies and other stakeholders in the Chinese antitrust community is potentially very significant.

At the same time, many of the AML amendments need to be further clarified in order to ensure their precise meaning and prevent abuse – in particular (but not only), the criteria for applying the "fine uplift mechanism," which hangs over companies' heads, need to be laid out through implementing rules.

Looking forward, we can hopefully expect numerous implementing rules to further enrich the new scope of the revised Chinese antitrust regime.

29 AML, art. 64.

30 *Id.* art. 67.

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