CPI Columns
Asia

January 2025

The Latest Legislative Development and Enforcement Trends of the PRC Anti-Monopoly Law

By Susan Ning & Chai Zhifeng

Edited by Elizabeth Xiao-Ru Wang & Kun Huang

The Latest Legislative Development and Enforcement Trends of the PRC Anti-Monopoly Law

By Susan Ning & Chai Zhifeng

I. INTRODUCTION

China is experiencing a period of robust and steady antitrust enforcement and policy development. In terms of enforcement, we have witnessed an intensified focus on sectors vital to public welfare, notably pharmaceuticals. In terms of legislation, there has been a persistent effort to enhance the efficiency and transparency of both public and private enforcement measures across the board, with a particular emphasis on the process of merger review and antitrust civil litigation.

In this article, we will take stock of recent antitrust enforcement and policy developments in China and provide our insights on the future direction of China's antitrust regime.

II. 2023 ENFORCEMENT DATA IN REVIEW

A. Monopoly Agreement

A total of 16 cases related to monopoly agreements were concluded by national and local antitrust authorities in 2023, resulting in fines and confiscations amounting to RMB 294 million ($41.6 million). These cases demonstrated the antitrust authorities' ongoing commitment to combating cartel activities, especially those orchestrated by trade organizations, to protecting consumer interests, and fostering market competition within crucial sectors.

B. Abuse of Market Dominance

There were 11 cases of abuse of market dominance accumulating to fines and confiscations of RMB 1.869 billion. The emphasis was particularly on the pharmaceutical industry and public utilities like water and gas, with five and four cases respectively. These enforcement actions underscored the antitrust authorities' dedication to preventing the exploitative practices of leading market entities, especially in areas such as pharmaceuticals and public utilities, where competition is less vigorous and the welfare of the public is directly impacted.

C. Merger Control

A significant number of 797 merger cases were reviewed, with the majority being granted approval without conditions. The typical duration for assessment decreased marginally to a span of 25.7 days. This trend suggests that merger review authorities have been making efforts at making the merger review process more efficient while also paying attention to the potential competition effects of certain transactions in key sectors.

III. RECENT LEGISLATIVE DEVELOPMENTS

There have been several important legislative developments related to antitrust in China as summarized below:

- On April 26, 2024, the State Administration for Market Regulation ("SAMR") of the People's Republic of China issued the *Guidelines for Enterprise Antitrust Compliance* ("the Compliance Guideline"). The Compliance Guidelines elaborate on key points and requirements for setting up an antitrust compliance

management system and proposes a more universal antitrust compliance incentive regime.

- On 17 June 2024, SAMR issued the *Horizontal Merger Review Guidelines (Draft for Comment)*, signaling a move towards enhancing transparency in merger filing reviews.

- On 24 June 2024, the Supreme People's Court released *the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Anti-Monopoly Law to Civil Disputes* ("Judicial Interpretation of Antitrust Civil Disputes"), which provides crucial guidance for antitrust civil litigation, covering both procedural and substantive aspects.

A. Guidelines for Enterprise Antitrust Compliance

The following is a summary of the key points of the Compliance Guidelines.

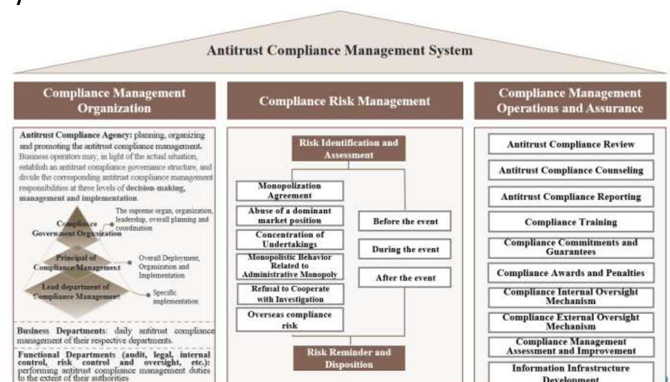
Key Point 1: Clarifying Under What Circumstances an Enterprise Can Obtain Compliance Incentives and What the Compliance Incentives Are

The Compliance Guidelines expand the use of compliance incentives, making it applicable to different industries and different types of monopolistic practices. Meanwhile, The Compliance Guidelines divide these incentives into the following specific scenarios based on the enforcement procedures:

Scenarios	Compliance incentives
Before an investigation	If an operator has already **terminated the suspected monopolistic behavior before the antitrust enforcement agency investigates the suspected monopolistic behavior**, and the suspected monopolistic behavior is **minor and has not caused competitive harm**, the enforcement agency may consider the construction and implementation of the operator's antitrust compliance management system as a factor in determining whether the operator has corrected the behavior in a timely manner or has subjective fault, and may at their discretion decide **not to impose administrative penalties** in accordance with Article 33 of the "Administrative Penalty Law" of the People's Republic of China.
During the commitment phase	If an operator promises to take specific measures to eliminate the consequences of suspected monopolistic behavior within a period recognized by the antitrust enforcement agency, the agency may consider the construction of the operator's antitrust compliance management system as a factor in **deciding whether to suspend the investigation**, and assess the implementation of the antitrust compliance management system when determining whether to terminate the investigation.
During the leniency phase	If an operator proactively reports an anti-competitive agreement and provides significant evidence, and if it can be proven that the operator has actively **established or improved an antitrust compliance management system and effectively implemented** it, and it has played **a significant role in mitigating or eliminating the consequences of the illegal behavior, a greater reduction** may be applied to any penalty within the range established for leniency.
During the phase of penalty determination	If an operator actively establishes or improves an antitrust compliance management system and effectively implements it **before the antitrust enforcement agency makes an administrative penalty decision**, and it has played a significant role in mitigating or eliminating the consequences of the illegal behavior, the antitrust enforcement agency **may at their discretion consider a lighter or reduced administrative penalty** in accordance with Article 32 of the "Administrative Penalty Law" and Article 59 of the "Antitrust Law" of the People's Republic of China.

Key Point 2: Elaborating on the Necessary Components Within an Effective Antitrust Compliance Management System

The Compliance Guidelines elaborate on the necessary components of an antitrust compliance management, which includes the organization, operation, and maintenance of compliance management systems as follows:



The specific requirements of the antitrust compliance management system set out in

the Compliance Guidelines can be understood as "best practices" references. Enterprises still need to customize their antitrust compliance management systems based on their own particular situations.

Key Point 3: How to Apply for Antitrust Compliance Incentives

According to the Compliance Guidelines, applications for compliance incentives by the undertakings shall undergo a substantive review. The antitrust enforcement agencies will conduct a review of the undertaking's antitrust compliance management system in terms of its completeness, authenticity, and effectiveness. The key points of the substantive review include:

- Whether the undertaking's antitrust compliance management system contains a systematic management system, an independent compliance management organization, a commensurate compliance risk management mechanism, and a stable compliance guarantee mechanism, etc.;
- Whether the undertaking has truly fulfilled its antitrust compliance commitments, invested the necessary resources in establishing the compliance management system, and strictly implemented the compliance management system;
- Whether the undertaking has established a sound and comprehensive investigation mechanism for violations, whether the undertaking can promptly detect violations, whether the operator can effectively control the implementation of violations and the expansion of risk, whether the operator is able to pursue accountability for violations, and whether the operator has an after-the-event remedial mechanism to eliminate or mitigate the consequences of violations.

Merely superficial compliance is insufficient to meet the rigorous demands of substantive reviews. A robust and practical antitrust compliance management system is essential for a company to successfully pass such examinations and potentially access the corresponding compliance incentives.

Summary

In summary, the Compliance Guidelines once again echo the recently promoted regulatory approach of "flexible enforcement". While providing enterprises with more extensive rule-based guidance, the antitrust enforcement agencies are introducing a comprehensive compliance incentive mechanism, thereby offering enterprises more options and infusing significant impetus into their antitrust compliance efforts.

IV. HORIZONTAL MERGER REVIEW GUIDELINES

The key points of the Draft Guidelines are summarized below:

Key Point 1: Internal Documents Relevant to the Transaction Are Subject to Review to Determine Market Effects

In the current regulatory approach, the enforcement agency has on some occasions required parties to submit internal documents generated during the deal-making process. The relevant provision highlights that the agency regards internal documents as important and sometimes conclusive for the analysis of market effects.

Key Point 2: Specify the Criteria for the Enforcement Agency to Require Companies to Define the Relevant Markets Encompassing All Their Business Activities.

Under the current regulatory approach, there have been instances where the enforcement agency has demanded the relevant market definitions to include non-transaction-specific businesses of the parties. The relevant provision identifies two key criteria for the enforcement agency to require companies to define the relevant markets encompassing all their business activities: revenue ratio and competitive effects.

Key Point 3: Specify the Criteria for Simplifying Relevant Market Definition and Competitive Analysis

In the current regulatory approach, the enforcement agency may, in certain instances, request a detailed breakdown of a company's various businesses and their respective contributions to total revenue. The relevant provision clarifies that for non-primary business activities with a revenue contribution of less than 5% and a market share under 5% in a reasonably-defined relevant markets, there is no mandatory requirement for a precise market definition or competitive analysis.

Key Point 4: Specify a "Left Open" Approach in Defining Relevant Markets in Some Cases

Under the current regulatory approach, the enforcement agency typically arrives at a definitive conclusion regarding the definition of the relevant market. The relevant provision introduces a "left open" approach, which offers a more adaptable framework for market definition when multiple plausible interpretations exist. This approach prioritizes addressing competition concerns over strictly defining the market, providing the enforcement agency with greater flexibility in its decision-making process. Although similar approaches have been adopted by competition authorities in the European Union and other jurisdictions, there are uncertainties about how the "left open" method will be applied by SAMR in practice.

Key Point 5: Propose Numerical Metrics for Assessing Competitive Impact Based on Market Share and Market Concentration.

The relevant provision provides that market share and market concentration are crucial metrics for evaluating the impact on competition. Previously, the standards for determining competitive impact were not well-defined. By providing clear numerical standards, the Draft Guidelines can enhance the predictability of the review process. It also provides companies with a clearer framework to assess the competitive impact of their transactions and engage with

regulatory authorities in a more informed manner.

Key Point 6: Provide Clarifications on Competition Harms from Horizontal Mergers

Under the current regulatory approach, enforcement agencies have focused on analyzing unilateral effects and coordinated effects when assessing competitive harms in a horizontal merger and acquisition. The relevant provisions offer a more detailed framework for analyzing these two types of harm, providing clearer guidance on how the enforcement agencies will assess them.

Key Point 7: Government Subsidies May Be Scrutinized

Under the current regulatory approach, enforcement agencies have seldom asked the parties to provide information on government subsidies. The relevant provision is designed to tackle market distortions caused by government subsidies, ensuring a level playing field for all companies operating within China. However, there are many uncertainties regarding how the relevant provision will be applied in practice, including the conditions that would trigger a review of government subsidies, how this review on subsidies will interface with the merger process, and how to address competition issues arising from government subsidies, etc.

Key Point 8: Privacy Protection is Taken Into Account When Analyzing Competitive Concerns

Under the current regulatory approach, the enforcement agencies have seldom asked the parties to provide information on privacy protection as part of the merger review process. Nevertheless, the relevant provision reflects the growing recognition of data privacy as a critical component of product quality, especially in industries heavily reliant on data processing and management. It also further underscores the integration between data protection laws and antitrust laws in today's digital economy.

Summary

In summary, the draft of the Horizontal Merger Review Guidelines, which in total consists of 12 chapters and 87 provisions in its current form, provides a detailed outline of SAMR’s enforcement policy and analytical framework for horizontal mergers and acquisitions. As the Guidelines are currently in draft form and open for public comment, the Guidelines are expected to undergo revisions based on feedback received.

V. THE INTERPRETATION OF THE SUPREME PEOPLE'S COURT ON SEVERAL ISSUES CONCERNING THE APPLICATION OF ANTI-MONOPOLY LAW TO CIVIL DISPUTES

The following is a summary of the key points of Judicial Interpretation of Antitrust Civil Disputes:

Key Point 1: Claims Solely for the Confirmation of Monopolistic Behavior Will Not Be Accepted

Article 2(2) states that a claim solely for the confirmation of monopolistic behavior, without accompanying it with a claim

requesting the defendant to assume civil liability, will not be accepted by the court. In other words, simply asking for a declaration that the defendant's actions constitute a monopolistic behavior is not sufficient for the court to accept the case.

Key Point 2: Clarifying The Effects of Prior Administrative or Judicial Decisions

Paragraph 1 of Article 10 clarifies the probative effects of prior administrative decisions of the enforcement agency and the prior decisions of courts, that is, courts of the subsequent litigation will recognize the basic facts found by the enforcement agency or courts of the previous litigation in accordance with the principle of "truthfulness" in the absence of evidence to the contrary.

Key Point 3: Suspension of Civil Proceedings

Article 13 stipulates that where an enforcement agency has filed a case for investigation of the alleged monopolistic behavior, courts may, depending on the specific circumstances of the case, decide to suspend litigation. Therefore, the aggrieved party should carefully choose between filing a civil antitrust lawsuit and filing an antitrust complaint to an enforcement agency, taking into account the specific circumstances of each case.

Key Point 4: Breaking Down the Information Barrier Between Enforcement Agencies and Courts

The Judicial Interpretation of Antitrust Civil Disputes establishes a mechanism for the sharing of information between public and private enforcement. For example, Article 10(2) stipulates that, if necessary, courts may require the enforcement agency that made the administrative decision to explain the relevant circumstances of the decision.

Key Point 5: Flexibility on the Burden of Proof for the Definition of Relevant Markets

Article 14 clarifies the burden of proof in defining the relevant market:

- Firstly, the plaintiff shall bear the burden of proof for the relevant market definition in general;

- Secondly, if the plaintiff claims that the alleged monopolistic behavior results from the kind of horizontal monopoly agreement or vertical price monopoly agreement explicitly enumerated in Article 17 (1) to (5) and Article 18 (1) (1) and (2) of the Anti-Monopoly Law, the plaintiff may not need to provide evidence on the relevant market definition;

- As an exception, Paragraph 3 provides for three circumstances in which the plaintiff does not bear the burden of proof on the definition of relevant markets: (1) the evidence provided by the plaintiff is sufficient to directly prove that the operator of the monopoly agreement being sued has significant market power;(2) the operator being sued for abuse of a dominant position of market power has a dominant position of market power; (3) the monopolistic conduct in question has the effect of excluding or restricting competition.

The relevant provisions reduce the plaintiff's burden of proof for the definition of the relevant markets to some extent. However, in cases of abuse of dominant market position, how to prove that "the operator sued for abuse of dominant

market position has a dominant market position" without clearly defining the relevant market remains to be explored.

Key Point 6: Flexible Definition of Relevant Markets in the Platform Economy

Article 16 clarifies there may be multiple ways of defining the relevant market when referring to the platform economy and courts may, depending on the specific facts of each case – such as the alleged monopoly conducts, network effects, and other factors – define several relevant markets or a single relevant market.

Key Point 7: Clarifying the Allocation of the Burden of Proof for Other Concerted Acts

Article 18 clarifies the allocation of the burden of proof between plaintiff and defendant in the litigation of monopoly agreements for other concerted acts, that is, after the plaintiff provides *prima facie* evidence of concerted behavior and exchange of information between the operators, the burden of proof is shifted and the defendant shall provide evidence or sufficient explanation to give a reasonable explanation for its behavior.

The relevant provision to some extent reduces the plaintiff's burden of proof. Enterprises are recommended to properly preserve relevant supporting materials or records sufficient to prove that pricing or other business decisions are made independently.

Key Point 8: Proposing the Concept of a Single Economic Entity

Article 19(2) explicitly introduces the concept of "single economic entity" for the first time: *"If a particular operator obtains control over or is able to exercise a decisive influence on other operators, or if two or more operators are controlled or exercised a decisive influence by the same third party, they should be regarded as a single economic entity and do not constitute operators with a competitive relationship."*

However, there are still some ambiguities in the wording of the Article regarding the determination of a "single economic entity", which are expected to be further clarified in future cases and court decisions.

Key Point 9: Reverse Payment Agreements for Pharmaceuticals

Article 20 provides that if the patentee promises to compensate the generic applicant with obviously unreasonable benefits, and the generic applicant promises not to question the validity of the patent or delay entry into the relevant market, courts will preliminarily find that the agreement between the patentee and the generic applicant constitutes a monopoly agreement.
In practice, the patentee and the generic applicant should prudently assess whether the payment of the relevant compensation in the settlement agreement is a reasonable and legitimate consideration, in order to avoid triggering antitrust compliance risks.

Key Point 10: Burden of Proof for Vertical Price Monopoly Agreements

Article 21 provides that the parties to a vertical price monopoly agreement shall bear the burden of proof that their agreement does not have the effect of excluding or restricting competition. This provision makes the juridical practices aligned with the practices of administrative enforcement.

Key Point 11: Criteria for Assessing the Effects of Vertical Monopoly Agreements to Market Competition

Article 22 clarifies how to prove that a vertical monopoly agreement does not have anti-competitive effects, stipulating that where the evidence is sufficient to prove that pro-competitive effects significantly outweigh the unfavorable competitive effects, the courts shall determine that the agreement does not have the effect of excluding or restricting competition.

Key Point 12: Agency Agreements Do Not Constitute Vertical Monopoly Agreements

Article 23(1) stipulates that if the agreement is an agency agreement between the operator and the counterparty, and if the agent does not bear any substantial commercial or business risks, rules against vertical monopoly agreements do not apply.

Key Point 13: Treatment of Most Favored Nation ("MFN") Clauses

Article 25 clarifies that MFN clauses may give rise to horizontal competition concerns as well as vertical integration or abuse of dominance issues in some cases. This provision is consistent with the analytical framework used by enforcement agencies.

Key Point 14: Joint and Several Liability for Organizers and Facilitators in the Formation and Implementation of Monopoly Agreements.

Article 26 stipulates joint and several liability for organizers and facilitators in the formation and implementation of monopoly agreements.

Key Point 15: The Burden of Proof for the Application of Exemptions

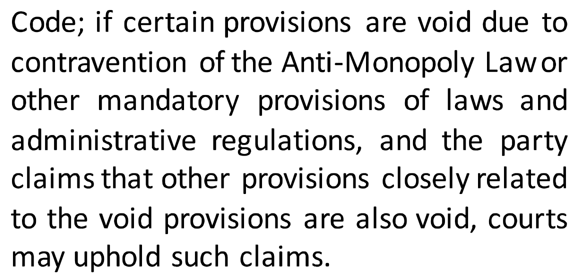
Article 27 stipulates that where a defendant raises a defense to apply for exemption of a monopoly agreement pursuant to Article 20(1)(1) to (5) of the Anti-Monopoly Law, the defendant shall provide evidence to prove that the following facts are true: (a) the monopoly agreement in question is capable of realizing the relevant purpose or effect; (b) the monopoly agreement in question is necessary for the realization of the relevant purpose or effect; (c) the monopoly agreement in question does not seriously restrict competition in the relevant market; (d) consumers will be able to share in the resulting benefits.

Key Point 16: Judicial Interpretation of Abusive Behavior

Articles 28 to 42 are related to the issue of abuse of market dominance. These provisions provide for the determination of a dominant position, the identification of platform operators' dominance, the assessment of the market dominance of operators accused of misusing intellectual property rights, the constitutive elements of market dominance abuse, and the evidentiary requirements and justifiable reasons for various typical abusive behaviors.

Key Point 17: Validity of Contracts and Agreements Involving in Alleged Monopolistic Actions.

Article 48 offers an interpretation on the validity of contracts, agreements, decisions, or related documents involved in alleged monopolistic actions. If a party argues that the entire document is void, the court should review and determine in accordance with Article 153 of the Civil



Code; if certain provisions are void due to contravention of the Anti-Monopoly Law or other mandatory provisions of laws and administrative regulations, and the party claims that other provisions closely related to the void provisions are also void, courts may uphold such claims.

Summary

In summary, the introduction of the Judicial Interpretation of Antitrust Civil Disputes marks a new stage in the antitrust judicial practices in China. The relevant substantive provisions in the Judicial Interpretation of Antitrust Civil Disputes may also provide useful reference for enterprises in assessing the antitrust compliance risks of their business arrangements, strengthening their daily compliance work, and cooperating with the antitrust administrative investigations.

VI. LOOKING FORWARD

Moving forward, it is anticipated that there will be ongoing vigorous enforcement in sectors like healthcare, utilities, and the digital economy. Following the introduction of the Compliance Guideline, we expect to see regulatory authorities placing greater emphasis on a company's compliance programs during investigative processes. Finally, with the rise of artificial intelligence, we will likely see an increase in enforcement cases, including those related to merger reviews, that involve artificial intelligence and big data.