

Hot Issues in Anti-Monopoly Law

A Review of the Three New Anti-Monopoly Regulations of SAMR

On July 1, 2019, the State Administration of Market Regulation (SAMR) published three new anti-monopoly regulations: the *Interim Provisions on the Prohibition of Monopoly Agreements* (the “**Monopoly Agreement Provisions**”), the *Interim Provisions on the Prohibition of the Abuse of Market Dominant Status* (the “**Market Domination Provisions**”), and the *Interim Provisions on Prevention of the Abuse of Administrative Power to Exclude or Restrict Competition* (the “**Administrative Power Provisions**”), and all three together, the “**Three New Regulations**”). The Three New Regulations have been developed to assist in the enforcement of the *Anti-Monopoly Law of the People's Republic of China* (the “**AML**”), and will be officially implemented on September 1, 2019.

Over in the course of the past ten years since the AML was implemented, the AML enforcement departments have successively issued a number of auxiliary AML rules/ regulations. However, recent development and changes in the nature of the economy have led to some problems in the practical enforcement of these rules and regulations. The recent issuing of Three New Regulations integrates many of the previous rules and regulations, and also serves to ensure that the AML is able to respond to various situations that would have previously been unforeseen. When combined with the ten years of practical

experience implementing the AML, the Three New Regulations should provide for a clearer and more specific enforcement of the AML.

Following the 2018 reform of state institutions, the agencies and departments that previously held the main responsibility for AML enforcement, i.e. the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC) and the State Administration of Industry and Commerce (SAIC), were integrated into the SAMR, providing an indication that AML enforcement in China was about to enter a new era. Against this setting, it has become increasingly important to issue unified AML implementing regulations and to clarify the law enforcement functions, authorities and levels of enforcement within the SAMR.

This article sets out to interpret the structural framework and content of the Three New Regulations by highlighting key content of the new regulations and by drawing a comparison between the various old and new regulations.

I. The structural framework of the Three New Regulations

1. Structural overview

1) The full text of the Monopoly Agreement Provisions comprises 36 articles, of which 12 are

substantive provisions and 24 are procedural. The substantive provisions mainly include the definition of the concept of monopoly agreement, the specific consideration factors of the cooperative behavior, the specific types and the terms of the horizontal monopoly agreement and its catch-all provision, the specific types of the vertical monopoly agreement and its catch-all provision, the specific terms of the atypical monopoly agreement, and the specific types of the industry association violation and its catch-all provision, and the specific considerations of the exemption of the monopoly agreement under Article 15 of the AML. The procedural regulations in the Monopoly Agreements Provisions address basic principles of law enforcement for monopoly agreements, the delegation of duties of law enforcement entities and law enforcement agencies at all levels, law enforcement assistance, the basic procedures for administrative law enforcement, reporting systems, the processes for suspending and terminating an investigation, and the "leniency" system.

Compared with the earlier regulations, i.e. *the Provisions on the Procedures for the Administrative Departments for Industry and Commerce to Investigate Cases of Monopoly Agreements and the Abuse of Dominant Market Position* (issued by the former SAIC in 2009), and *the Provisions for the Industry and Commerce Administrations on the Prohibition of Monopoly Agreements* (published in 2011), the Monopoly Agreement Provision provides more details on the specifics of the types of monopoly agreements listed in the AML, but no longer includes substantive provisions distinguishing between price and non-price monopoly agreements. In terms of procedural provisions, this new regulation clarifies the jurisdiction scope and jurisdiction mode of the AML enforcement agencies for specific cases, clarifies the procedural requirements for suspension of investigation, and details the application conditions for exemption in accordance with the law and considerations for

the exemption determined by law enforcement agencies. In addition, the new regulation also refines the AML leniency system.

1) The Market Domination Provisions comprises 39 articles, of which 18 are substantive provisions and 21 are procedural. The substantive provisions mainly include the definition of the concept of market dominance, the specific factors in determining the market dominance of the operators stipulated in the provisions of Article 18 of the AML, additional considerations to identify the new economic operators or the operators in the intellectual property field having a dominant market position, and additional considerations for determining common market dominance; clarify the specific factors to be considered for the "without any justifiable causes", "unfair low prices" or "unfair high prices" of the abuse activities stipulated in article 17 of the AML; identify other considerations for abuse behaviors. The procedural regulations mainly include the basic principles of law enforcement on abuse of dominant market position, the delegation of duties of law enforcement entities and law enforcement agencies at all levels, law enforcement assistance, basic procedures of administrative law enforcement, reporting systems, suspension of investigation systems, termination of investigation system.

Compared with *the Provisions on the Procedures for the Administrative Departments for Industry and Commerce to Investigate Cases of Monopoly Agreements and Abuse of Dominant Market Position* issued by the former SAIC in 2009, and *the Provisions for the Industry and Commerce Administrations on the Prohibition of Abuse of Dominant Market Position* by SAIC in 2011, new Market Domination Provisions takes into consideration the nature of the modern economy, and also provides for the types of factors to be taken into consideration when determining the dominance of operators in the internet and intellectual property sectors. The specifics of what constitutes abuse/abusive behavior are further

provided with more details on the basis of the past regulations, and special provisions are also made for the operation of public utilities. In terms of procedural provisions, this new regulation also refines the procedures for suspension of investigation and clarifies the procedural requirements for suspension of investigation.

2) The Administrative Power Provisions consists of 25 articles, of which 8 are substantive provisions and 17 are procedural. The substantive provisions are primarily focused on the main types of monopolistic behaviors used by administrative powers to exclude or restrict competition. The procedural provisions include those relating to the delegation of duties of law enforcement entities and law enforcement agencies at all levels within the SAMR, law enforcement assistance, the basic procedures for administrative law enforcement, reporting systems, and the protection system for whistleblowers. Besides, the suggestion power of the AML enforcement agencies is also detailed.

Compared with the provisions of the former SAIC, the Provisions on *the Interim Provisions on Prevention of the Abuse of Administrative Power to Exclude or Restrict Competition* in 2009 and the substantive regulations in 2011, the Administrative Power Provisions provides the AML enforcement agencies with the right to investigate and to make suggestions, and further clarifies the scope and mode of jurisdiction of law enforcement agencies, the specific reporting and investigation procedures of administrative monopoly, and clarifies the rights and obligations of persons under investigation. Moreover, a series of specific provisions are made on the principle of administrative openness in order to enhance the transparency and operability of administrative monopoly law enforcement.

2. Main features

1) The Three New Regulations adopt a legislative structure that combines substantive rules with procedural ones

Prior to the release of the Three New Regulations, the various previous auxiliary AML rules and regulations issued by the AML enforcement departments had either stipulated substantive law alone or specified procedural rules only. For example, *the 2009 Provisions on the Procedures for the Administrative Departments for Industry and Commerce to Investigate Cases of Monopoly Agreements and the Abuse of Dominant Market Position* and *the Provisions on the Procedure for the Industrial and Commercial Administrations on Prevention of the Abuse of Administrative Power to Exclude or Restrict Competition* both only addressed procedures, while *the Provisions for the Industry and Commerce Administrations on the Prohibition of Monopoly Agreements*, *the Provisions for the Industry and Commerce Administrations on the Prohibition of Abuse of Dominant Market Position* and *the Provisions for the Industry and Commerce Administrations on Prevention of the Abuse of Administrative Power to Exclude or Restrict Competition* all stipulated the substantive contents of various anti-monopoly behaviors. The NDRC's 2011 *Provisions on the Administrative Procedures for Law Enforcement against Price Monopoly* and *the Provisions of Anti-Price Monopoly* also followed a format in which the substantive rules and procedures were provided separately. By contrast, the SAMR's Three New Regulations adopt a structure that combines substantive elements with procedural rules. By contrast, the SAMR's Three New Regulations adopt a structure that combines substantive elements with procedural rules. The integration of these two types of law is in alignment with the recent institutional reform, and helps to clarify the enforcement authority and the enforcement procedures of the SAMR in relation to anti-monopoly legislation, and its administrative functions across all levels. In their first few articles, each of the Three New Regulations unifies the regulations and specifies the relevant anti-monopoly enforcement authority, and the various levels and authorizations.

Prior to the introduction of the Three New Regulations, the SAMR had issued the *Interim Provisions for Market Supervision and Administration on the Procedures for Administrative Punishments*, the *Interim Measures for Market Supervision and Administration on the Hearings for Administrative Punishments*, and the *Circular of SAMR on the Authorization of Anti-monopoly Law Enforcement*, and other uniform regulatory documents. By combining both substantive law and procedural law, the Three New Regulations are in closer alignment with these procedural regulatory documents, and thereby should reduce unnecessary legislative costs.

2) The Three New Regulations have unified law enforcement procedures

There are various respects in which the Three New Regulations have unified law enforcement procedures in addition to their respective special systems. Firstly, the Three New Regulations all stipulate unified law enforcement levels and specify the jurisdiction scope and jurisdiction mode of law enforcement agencies. Specifically, the SAMR is responsible for investigating and dealing with cases that involve more than one provinces and in those autonomous regions and municipalities directly under the central government, as well as high-profile, national cases and others which the SAMR deems necessary to directly investigate and handle. The provincial market supervision and administration departments have primary responsibility for cases within their respective administrative areas, though they are required to accept the supervision of the SAMR and report to it in a timely manner. Secondly, the Three New Regulations reflect the principle of equality of law enforcement. For example, in the Monopoly Agreement Provisions and the Market Domination Provisions, it is required that the AML enforcement agencies “should treat all operators equally.” However, while the behavior of the operators is addressed in the Administrative Power Provisions, the principle of

equality of law enforcement is not explicitly stated. This regulation does, however, clearly stipulate the need for a confidential system to protect the rights and interests of whistle-blowers, and to refine what constitutes the abuse of administrative power by administrative agencies. In these respects, it can be said that this regulation does require equal treatment between the operators and the administrative agencies has been achieved to a certain extent. Finally, all of the Three New Regulations stipulate a more uniform approach to the enforcement of anti-monopoly legislation, from case acceptance to investigation to final administrative punishment. They include uniform provisions on the channels to be used for identifying violations of anti-monopoly legislation, and the specific requirements for written reports, cooperation during law enforcement, investigation delegation and information disclosure. For example, the agencies responsible for enforcing anti-monopoly legislation are required to identify illegal activities by executing their powers, or through reports from or assignments by higher authorities, transfers from other agencies, reports by lower-level agencies, or through active reporting by operators. The Three New Regulations also stipulate that relevant provincial market supervision departments should provide assistance in investigations as required.

3) The Three New Regulations provide detailed refinements to the AML

As well as unifying the provisions on procedures, the Three New Regulations have made significant improvements to the substantive elements of anti-monopoly legislation.

The Monopoly Agreement Provisions incorporates the rules on the horizontal price monopoly agreements from the *Provisions of Anti-Price Monopoly* as promulgated by NDRC, and compared with the *Provisions for the Industry and Commerce Administrations on the Prohibition of Monopoly Agreements* previously promulgated by SAIC in 2011), it also includes the broad

interpretations of what constitute horizontal monopoly agreements and vertical monopoly agreements as set forth in Articles 13 and 14 of the AML, and clarifies some of the criteria used to identify monopoly agreements. The Monopoly Agreement Provisions regulation further refines the exemption provisions outlined in Article 15 of the AML, and the provisions relating to violations of industry associations included under Article 16.

While taking the same approach as the AML, the Market Domination Provisions improves the provisions on abuse behaviors under Article 17 and the provisions that define what is meant by a dominant market position under Article 18, and in particular clarifies some of the AML's more abstract elements. In addition, the Market Domination Provisions suggests some further factors for consideration, integrates the *Provisions on Prohibiting the Abuse of Intellectual Property Rights to Exclude and Restrict Competition* (issued by the SAIC in 2015) and introduces items to help determine whether operators in the 'new economy' or intellectual property field hold a dominant market position.

Finally, the substantive provisions of the Administrative Power Provisions correspond exactly with the Articles in Chapter 5 of the AML. The various types of behavior outlined under Article 32 to 37 of the AML are further elaborated, such as specific abstract descriptions on administrative activities under Article 36, and the specific circumstances that impinge upon the free circulation of commodities under Article 33. It includes improvements on the anti-monopoly enforcement agencies' power of suggestion and production of administrative proposals after discovering the abuse of administrative power, which represent a certain improvement on Article 55 of the AML. These improvements should help the anti-monopoly enforcement agencies to be able to better investigate and deal with any abuse of administrative power and with other related illegal activities.

II. Highlights of substances of the Three New Regulations

1. Define types of monopoly agreements and catch-all provisions

Article 13 of the AML defines the types of horizontal monopoly agreements that are prohibited between competing operators, and Article 14 defines the types of vertical monopoly agreements that are prohibited between operators and their counterparts. Compared with earlier regulations, the most significant aspect of the Monopoly Agreement Provisions is that it provides further detail of the various monopoly agreements already stipulated under the AML, and also stipulate a broader definition of "specific behavior plus a catch-all clause". For example, Articles 7, 8, 9, 10 and 11 of the Monopoly Agreement Provisions stipulate: fixed price monopoly agreements, limitation of quantity and production, market division, restriction on purchase of new technologies and equipment or restriction on the development of new technology, new product monopoly agreements and the boycott transaction monopoly agreement, and their catch-call provisions. In addition, the Monopoly Agreement Provisions also stipulates how to identify whether an agreement that lies outside the typical monopoly agreements specified in the AML is an atypical monopoly agreement, and sets forth the following factors to be taken into consideration in doing so: whether operators have reached and/or implemented the agreement; the market competition situation; the operators' shares in the relevant market and their control over the market; the impact of the agreement on the price, quantity and quality of the commodity; the impact of the agreement on market entry and technological progress; the impact of the agreement on consumers, and so on. In refining the AML, these provisions provide a framework to solve law enforcement problems that might arise due to the increasingly complex forms of monopoly agreement.

2. Improving the opportunity for leniency for monopoly participants

The anti-monopoly legislation provides for some leniency, enabling for any operators involved in monopoly agreements to actively inform the law enforcement agencies their illegal activities to obtain corresponding punishment exemption/reductions. Monopoly agreements are often concealed, making it difficult for law enforcement agencies to identify anti-competitive behavior before it occurs. The leniency program should be of assistance to the AML enforcement agencies in detecting and cracking down on illegal activities in a timely manner, thereby helping to maintain fair market competition.

The principle underlying the leniency system is already reflected in the second paragraph of Article 46 of the AML, though in this form it lacks maneuverability. In 2011, the SAIC's *Provisions for the Industry and Commerce Administrations on the Prohibition of Monopoly Agreements* included details of the leniency program. In 2016, detailed regulations regarding the opportunity for leniency in horizontal monopolies were addressed in the NDRC-issued *Guidelines for the Application of the Leniency System in Horizontal Monopoly Agreements (Draft for Comment)*, including specific content such as the applicable entities and procedures.

The Three New Regulations appear to follow the intention of the *Provisions for the Industry and Commerce Administrations on the Prohibition of Monopoly Agreements*, with the clarification that operators who voluntarily report illegal acts may be mitigated or exempted from administrative fines according to law and with an additional explanation of the meaning of "important evidence". The Three New Regulations do not include any specific time requirement for the application for leniency to be submitted, which reflects the law enforcement agencies goal for operators to "confess" to their anti-monopolistic activities.

The Three New Regulations also integrate the contents of the *Guidelines for the Application of the Leniency System of Horizontal Monopoly Agreements (Draft for Comment)*, and provide for a sliding scale of penalty for voluntary reports depending on the order in which they are made. Hence, for the first applicant, the anti-monopoly enforcement agencies may grant an exemption from punishment or reduce the fine by not less than 80%; for the second applicant, the fine may be reduced by 30% to 50%; for the third applicants, the fine may be reduced by 20% to 30%.

3. Defining the dominant market position of new economic operators

As well as providing refinements to the existing provision of the AML, the Market Domination Provisions recognizes the need to take into consideration the market dominance of "new economic operators".

Article 11 of the Market Domination Provisions stipulates that, in determination as to whether new economic operators (such as internet operators) hold a market dominant position under Article 18 of the AML. According to Articles 6 to 10 of these interim provisions, factors that may be taken into consideration include the level of competition in the industry, the business model, number of users, network effect, locking-in, technical characteristics and market innovation, the ability of controlling/processing related data and market power of operators in correlative market, and so on. In addition, when determining whether operators are abusing their dominant market position to sell goods below cost price, the Market Domination Provisions indicates that "When it comes to the free mode of new economic formats such as the internet business, all free goods and charged goods provided by operators should be taken into consideration."

The ongoing development of emerging economic industries, and the increasingly fierce competition among network data providers, has challenged

traditional definitions of dominant market position. In emerging industries, it may be difficult to accurately evaluate the dominant position of operators simply on the basis of their market share. Operators are more likely to be in a dominant position if they own key facilities, have access to user data information or have innovative technologies. Furthermore, free services provided by internet enterprises may lead to two-sided network market problems, and the nature of an operator's behavior cannot be assessed purely on the basis of their pricing strategy and their provision of free services. Hence, it is hoped that the provisions included in the Market Domination Provisions would enhance the operability of the AML enforcement in the new economy.

4. Improving the system for suspending an investigation

Article 45 of the AML regulates the system for suspending an investigation. If during the process of anti-monopoly investigation or enforcement, the operator under investigation agrees to take specific measures to eliminate the negative consequences of the suspected monopolistic conduct within the time limit approved by the relevant anti-monopoly enforcement agency, that enforcement agency may take the decision to suspend the investigation. When the operator has fulfilled the agreement, the enforcement agency may take the decision to terminate the investigation, thereby drawing to a close of that anti-monopoly enforcement procedure. The system of suspension of investigation provides the dual benefits of minimizing law enforcement resources and improving the overall efficiency of law enforcement.

The suspension system is further refined in the Monopoly Agreement Provisions and the Market Domination Provisions, primarily in terms of their procedural content, for example the applicable conditions and specific scope of investigation. The new regulations make it clear that the operator under investigation may, during the course of an

investigation, file a request in writing for suspension of the investigation. If the relevant law enforcement agency has not yet determined that the operator's conduct constitutes a monopoly agreement or an abuse of its dominant market position, it shall accept the application for a suspension of investigation and conduct a review, mainly focusing on the specific circumstances of the nature, duration, consequences and social impact of the alleged conduct, the corrective measures that the operator has committed to undertake, and their expected effects. Having taken a law enforcement decision, the law enforcement agencies are required to monitor the execution of the operator's commitments, and the operator should report on its execution in writing. In the Monopoly Agreement Provisions, it is specifically stipulated that the system of the suspension of investigation does not apply to "hard core" cartel behavior, such as price fixing, restricting the number of goods produced and sold, and dividing up markets between competitors, which reflects the firm position of law enforcement agencies to crack down on hard core cartel behaviors. The Market Domination Provisions provides no list of the special circumstances in which the system of suspension of investigation does not apply.

5. Further improving the predictability of procedural law enforcement

The Three New Regulations further regulate and enhance the predictability of anti-monopoly enforcement agencies in conducting investigations on relevant anti-monopolistic behaviors by stipulating a unified law enforcement authorization mechanism, refining the anti-monopoly enforcement procedures, and clarifying the requirements of procedural documents. To some extent, the Three New Regulations weaken the discretionary powers of the various anti-monopoly enforcement agencies during the investigation process. The improvements to the system of the suspension of investigation, the unification of law enforcement procedures, and

the refinement of procedural document requirements serve to enhance the predictability of law enforcement procedures. The unification of the three former anti-monopoly enforcement agencies is supported through the introduction of

uniform identification and discretion standards in practical law enforcement. The release of the Three New Regulations, further strengthens and supports AML legislation and law enforcement in China.

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