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A Review of Monopoly Agreement Prohibition Tentative Measures

By David Pan | Nigel Zhu

In 2018, the State Administration for Market Regulation ("**SAMR**") was established according to the *State Council Organization Reform Plan*, which consolidated the anti-monopoly powers of three government agencies into a unified law enforcement body. A senior official of the SAMR in the press conference for the tenth anniversary of the enactment of the Anti-monopoly Law ("**AML**") expressed that "an antimonopoly law enforcement scheme with Chinese characteristics will be further refined". In this context, new regulations of implementing the AML have been well anticipated. On June 26, 2019, the SAMR issued *Monopoly Agreement Prohibition Tentative Measures* (the "**Tentative Measures**") with SAMR Order No.10, simultaneously issued were *Abuse of Dominance Prohibition Tentative Measures and Restricting and Eliminating Competition by Administrative Power Prohibition Tentative Measures.*

Monopoly agreements have been the major focus of China's enforcement of the AML. In this Article, the authors will interpret the Tentative Measures based on their understanding of the AML and their experience in practicing the AML.

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A Review of Monopoly Agreement Prohibition Tentative Measures

1. Background

Prior to the "Three-in-one" Reform, monopoly agreements concerning price were regulated by the National Development and Reform Committee ("**NDRC**"), and other monopoly agreements were regulated by the former State Administration of Industry and Commerce ("**SAIC**"). Such division of the AML enforcement system was to an extent problematic. First, the AML does not differentiate monopoly agreements based on whether they concern price, therefore such division of the AML enforcement lacks solid legal basis; second, most monopolistic activities cannot be categorized as solely "pricing-concerning" or "non-price-concerning", but usually consist of both factors. The gap between the law and reality led to confusion among law enforcement agencies; last, the fact that monopoly agreements are regulated by two agencies will give rise to different interpretations and criteria of law enforcement, which affects the efficiency and authoritative power of the AML enforcement. As a result of the "Three-in-one" Reform, the AML enforcement powers were integrated to the SAMR, thus eliminating the necessity to divide law enforcement powers based on the "price" factor and solving the conflicting regulation in the AML enforcement.

Because the two governmental agencies exercised law enforcement of monopoly agreements, regulations on monopoly agreements were also formulated by the two agencies. The NDRC promulgated *Price-related Monopoly Prohibition Measures* and *Price-related Monopoly Administrative Enforcement Procedural Measures*; and the former SAIC promulgated *Monopoly Agreement Prohibition Measures* and *Monopoly Agreement and Abuse of Dominance Law Enforcement Procedural Measures*. Both the NDRC and the former SAIC regulated monopoly agreements, abuse of dominance and monopolistic abuse of administrative power in the same regulation, while dividing substantive and procedural provisions in different regulations. In the new norm of unified power of the SAMR, the Tentative Measures regulate monopoly agreements, separating them from abuse of power and monopolistic abuse of administrative power. At the same time, the Tentative Measures set forth both substantive and procedural provisions related to monopoly agreements. The new norm will help the AML enforcement agencies as well as undertakings better understand the substance and procedures of the monopolistic activity.

2. Identification of Monopoly Agreements

The Tentative Measures succeeded the definition of monopoly agreements in the AML and the Monopoly Agreement Prohibition Measures, which provides that monopoly agreements are "agreements, decisions or other concerted practices that eliminate or restrict competition".

The AML lays out the principle provisions governing monopoly agreements between competitors (horizontal monopoly agreements) and monopoly agreements between an undertaking and its transaction counterparties (vertical monopoly agreement). The Tentative Measures, in Articles 7 through 12, further provide each type of the monopoly agreement in the AML, and also add a "catch-all" provision to each type of monopoly agreement. These new provisions make the AML more predictable to undertakings, and at the same time enable the AML enforcement agencies to identify new types of monopoly agreements through the "catch-all" provisions.

One key feature of the Tentative Measures is Article 13's definition of monopoly agreements not identified under Articles 7 through 12, which nonetheless can be proven to be anti-competitive. Also, the Tentative Measures articulate on the factors that the AML enforcement agencies shall consider in identifying such non-typical monopoly agreements. Such provisions not only restrict law enforcement agencies' discretion in practice, but also provide useful guidance to undertakings' self-evaluation of whether their agreements constitute monopoly agreement, which therefore enhance the predictability of the compliance and enforcement of the AML.

2.1. Per se Violation vs Rule of Reasonableness

As mentioned above, the Tentative Measures succeeded the definitions of monopoly agreements in the AML and the *Monopoly Agreement Prohibition Measures*. According to this definition, monopoly agreements must have the effect of "restricting and eliminating competition". Therefore, to constitute monopoly agreements, the agreements between undertakings must conform to the formality requirements listed in the AML and must also have the effect of restricting and eliminating competition. Comparing Articles 7 to 12 and Article 13 of the Tentative Measures, it can be inferred that Article 13 clearly stipulates that a non-typical monopoly agreement should have the effect of "eliminating and restricting competition", but such effect is not required under Articles 7 to 12 regarding a typical monopoly agreement. This begs interesting questions whether it is safe to conclude that the typical monopoly agreements listed in Articles 7 to 12 of the Tentative Measures are analogical to the "per se violations" under the US antitrust laws (that is, as long as the monopoly agreement falls within the types listed in Articles 7 to 12 of the Tentative Measures, the law enforcement agencies may directly identify them as monopoly agreements without proving the effect of restriction or exclusion of competition); and that in contrast, for the non-typical monopoly agreements listed in Article 13 of the Tentative Measures, the principles similar to rule of reasonableness under the US antitrust laws shall be applied (that is, anti-monopoly law enforcement agencies must prove an effect of restricting or eliminating competition, in order to determine an act constituting a monopoly agreement). The answers to these questions will remain to be seen in the follow-up anti-monopoly legislation and law enforcement practices.

To clarify, whether monopoly agreements have the effect of restricting and eliminating competition is not determined by its actual effects, and the mere possibility is sufficient to identify a monopoly agreement. This means the implementation of a monopoly agreement is not a precondition to determine a monopoly agreement. If a monopoly agreement is executed but not performed, it still constitutes a "monopoly agreement" under the AML, with more lenient penalties though. Therefore, before entering into an agreement (as opposed to the actual implementation), the parties to the agreement must consider whether the agreement may constitute a monopoly agreement. Not only the typical monopoly agreement stipulated in Articles 7 to 12 of the Tentative Measures shall be taken into consideration, the factors listed in Article 13 shall also be analyzed for determination of a non-typical monopoly agreement.

2.2. Safe Harbor

Compared to the draft of the *Monopoly Agreements Prohibition Measures* (the “**Draft**”) released in the January of 2019 by the SAMR, an important mechanism is absent in the Tentative Measures---the “Safe Harbor” rules.

Article 14 of the Draft stipulates that where the agreements reached by competing undertakings do not fall within the scope of Articles 7 to 11 hereof and the relevant market share of the undertakings participating in the agreements does not exceed 15% in aggregate, or the agreements between the undertakings and the transaction counterparties do not fall within the scope of Article 12 hereof and the relevant market share of each of the undertakings participating in the agreements does not exceed 25%, it can be presumed that the agreements will not eliminate or restrict competition, unless otherwise proven with evidence.

Considering the difference between typical monopoly agreements and non-typical monopoly agreements analyzed above, it is clear that the “Safe Harbor” rules stipulated in the Draft do not apply to (per se illegal) typical monopoly agreement behaviors, but are intended for application to non-typical monopoly agreements. The underlying logic is that, if the market position of the business undertaking is not significant and the agreement between the undertakings has limited restraining effect, putting such a monopoly agreement into a “safe harbor” can help the anti-monopoly law enforcement agencies filter those monopoly agreements that do not obviously restrict and eliminate competition, thereby saving administrative and judicial resources and easing the compliance burden of business undertakings.

The Safe Harbor rules are adopted in major jurisdictions worldwide. For example, the “Notice on agreement of minor importance which do not appreciably restrict competition under Article 101 (1) of the Treaty on the Functioning of the European Union” (“**De Minis Notice**”) of the European Union provides that, if the aggregate market share of competitors in any of the relevant markets covered by the agreement does not exceed 10%; or if non-competitor’s total market share in any of the relevant markets covered by the agreement does not exceed 15%, then the agreement between the undertakings is presumed to not restrict competition. In terms of the amount of market share, the market share specified in the Draft is larger than the De Minis Notice, which shows that the Chinese anti-monopoly law is more tolerant towards non-typical monopoly agreements.

SAMR officials pointed out in an interpretation of the Tentative Measures that, since the AML does not provide for the Safe Harbor rules, for prudent reason, such rules were not included in the Tentative Measures, leaving them for future research and discussion. Past anti-monopoly cases demonstrated that anti-monopoly law enforcement agencies took typical monopoly agreements as a priority, while the identification of non-typical monopoly agreements was less frequent. For agreements between competitors who do not have a significant position in the market, in fact, it is difficult to identify a monopoly agreement because such agreement could barely carry the effect of restriction of elimination of competition. We expect law enforcement agencies to introduce the Safe Harbor rules in a timely manner after having accumulated experience in non-typical monopoly agreements enforcement.

3. Law Enforcement on Monopoly Agreements

As mentioned above, the Tentative Measures contain not only substantive provisions of the AML, but also procedural provisions, which include the initiation, investigation, exemption, suspension and resumption of the AML enforcement cases, as well as penalties, the leniency program and relevant case publication rules. In the following sections, the authors will focus on three important mechanisms: the block exemption, the commitment decisions, and the leniency program.

3.1. Block Exemptions

Article 15 of the AML stipulates the exemptions applicable to monopoly agreements. That is, an agreement that satisfies the circumstances in Article 15 of the AML will not constitute a monopoly agreement.

1) where the objective is technological improvement or research and development of new products;

2) where the objective is to raise product quality, lower costs, improve efficiency, standardise product specifications and standards or implement specialisation;

3) where the objective is to raise business efficiency of small and medium undertakings and to strengthen the competitiveness of small and medium undertakings;

4) where the objective is to fulfill public interest such as energy conservation, environmental protection and disaster relief etc;

5) where the objective is to alleviate serious drop in sale quantity or obvious over-production in times of recession;

6) where the objective is to protect the legitimate interests in foreign trade and economic cooperation; or

7) any other circumstances stipulated by the laws and the State Council.

The Tentative Measures refine the exemptions provided by the AML and clarify the factors that need to be considered in applying the exemptions, namely:

1) the specific form and effect of the agreement to realize the exempted circumstances;

2) the causation between the agreement and the realization of the exempted circumstances;

3) whether the agreement is a necessary condition precedent to realizing the exempted circumstances.

These standards clarify and refine the provisions of the AML, which provide guidance for law enforcement agencies in law enforcement and for undertakings in their anti-monopoly compliance. However, the exemptions provided in the AML have a high threshold for application, and the "additional conditions" in the Tentative Measures make the application of the exemptions even more difficult. The authors' research reveals no single case in publicly available information in which undertakings of a monopolistic act successfully argued for exemptions. Therefore, companies must be very cautious in assessing the applicability of the exemptions, and shall, ex-ante, try not to engage in any monopoly agreements, rather than placing a hope of the exemptions.

3.2. Commitment Decisions

It is possible to "seek a deal" in the AML enforcement process. Article 45 of the AML sets forth the commitment decision mechanism, which means, if the undertakings under investigation commit to take certain measures within the time limit prescribed by the AML enforcement agencies, the AML enforcement agencies may decide to suspend the investigation. In practice, the AML enforcement agencies will, based on the commitments made by undertakings with regard to the cessation or rectification of monopolistic activities concerned, decide to suspend the anti-monopoly investigation, allow and supervise the undertakings to fulfill their commitments, and decide to terminate or resume the anti-monopoly investigation according to the undertakings' fulfillment of their commitments.

The Tentative Measures refine the provisions of the AML, clarify the procedural requirements on suspension, termination and resumption of investigations, and provide more operational guidance to undertakings under investigation who wish to offer a commitment.

Article 24 of the Tentative Measures provides that undertakings shall report their fulfillment of the undertakings in writing to the AML enforcement agencies within the prescribed time limit. At the same time, the Tentative Measures specify that the deadline for accepting the application for a commitment decision is before the law enforcement agency determines that a monopoly agreement has been constituted. The Tentative Measures also clarify that accepting a commitment offer is not an obligation of the AML enforcement agency --- if the AML enforcement agencies conclude that the activity under investigation constitutes a monopoly agreement, the AML enforcement agencies shall make decisions on the monopoly behavior according to law, and shall not accept the application for a commitment decision by the undertakings.

It should be noted that the commitment decisions do not apply to all types of monopoly agreements. The AML enforcement agencies shall not accept applications for commitment decisions for the three types of horizontal monopoly agreements that are "per se violations" as stipulated in Articles 7 to 9 of the Tentative Measures, i.e. price fixing, production restraints, and market segmentation.

3.3. Leniency Program

Another feature of the Tentative Measures on the procedures of the AML enforcement is the improvement of the leniency program provided by the AML. Article 33 of the Tentative Measures stipulates that competitors participating in a monopoly agreement who voluntarily report the monopoly agreement and provide important evidence may apply for the leniency program.

Monopoly agreements are usually known only to undertakings who participate in the agreements and are highly concealed and technical. It is difficult for the law enforcement authorities to discover monopoly agreements on their own. Especially in the era of Internet and big data, information exchange and monopoly "consensus" between undertakings are also far more convenient than in the past. Therefore, the reporting from undertakings, especially from the undertakings who participate in monopoly agreements has always been an important source of information for the AML enforcement authorities to investigate monopoly agreements.

Article 46 of the AML sets forth the framework of the leniency program. Thereafter, the NDRC's *Price-related Monopoly Administrative Enforcement Procedural Measures* and the former SAIC's *Monopoly Agreement and Abuse of Dominance Law Enforcement Procedural Measures* refined the leniency program; however, they have inconsistent provisions. The *Price-related Monopoly Administrative Enforcement Procedural Measures* provide that the first reporter may be "exempted from penalties”, the second reporter “may be imposed a penalty not more than 50% of the full penalty”, and other reporters “may be imposed a penalty not less than 50% of the full penalty”. However, the *Monopoly Agreement and Abuse of Dominance Law Enforcement Procedural Measures* only provide that “penalties may be reduced or exempted”, and that the leniency program “does not apply to the organizers of monopoly agreements”. The Tentative Measures supersede the two measures and provide that the first reporter may be exempted from punishment or be imposed a penalty not more than 20% of the full penalty; the second reporter of not more than 50% but not less than 30%; and the third reporter of not more than 80%.

Another major refinement to the leniency program in the Tentative Measures is the “important evidence” that needs to be provided by the reporting undertakings. According to the Tentative Measures, important evidence means “evidence that plays a key role in the initiation of an investigation or the identification of monopoly agreements by the AML enforcement authorities, including undertakings participating in the monopoly agreement, scope of products involved, contents and methods of reaching the agreement, specific implementation of the agreement, etc.”. This stipulation provides clear guidance for undertakings who expect to apply for the leniency program and also helps the AML law enforcement authorities improve law enforcement efficiency.

It is noteworthy that the Tentative Measures have deleted the time limit for application for the leniency program in the Draft. The Draft provides that the time limit for the application for the leniency program shall be “before the initiation of a case by the competent anti-monopoly law enforcement authority or after the filing of a case but before the notification of administrative penalty is made”. The deletion of the time limit in the Tentative Provisions seems to allow undertakings to apply for leniency at different stages, with an aim to facilitate case investigations. Of course, this understanding remains to be verified in law enforcement practices.

In addition, the NDRC promulgated the exposure draft of the *Guidance to the Application of the Leniency Program in Horizontal Monopoly Agreement Cases* in 2016, which contains more detailed provisions on the leniency program. Specific rules of the leniency program will be finalized until these guidelines are officially promulgated.

4. Conclusion

The promulgation of the Tentative Measures is the natural flow of the “Three-in-one” Reform of the AML enforcement authorities. The Tentative Measures refine the identification of monopoly agreements and expressly lay out the procedural requirements for enforcement authorities to investigate and penalize monopoly agreements. The Tentative Measures help improve the predictability and authoritative power of anti-monopoly law enforcement. Also, the Tentative Measures clarify the requirements on corporate compliance of monopoly agreements, which can effectively reduce companies' compliance burdens. Nonetheless, there is still room for improvement in the Tentative Measures. We hope that the subsequent amendments to the AML, as well as the official drafts of the guidance rules for the application of the AML, will supplement the Tentative Measures and other anti-monopoly laws, so as to improve the anti-monopoly law system of China.

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