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China

CARTELS

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This country-specific Q&A provides an overview of cartels laws and regulations applicable in China.

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CHINA CARTELS



1. What is the relevant legislative framework?

The Anti-Monopoly Law (AML) provides clear and detailed provisions for cartels (the definition of cartels in this article adopts the view that it includes both horizontal and vertical monopoly agreements, hereinafter referred to as “cartels”). The Interim Provisions on Prohibition of Monopoly Agreements (Interim Provisions) further refine the regulation rules for cartels. In the meantime, the Price Law, the Law on Tendering and Bidding and other laws are also applicable to special types of cartels. The Law on Tendering and Bidding stipulates criminal acts such as collusive bidding. Prior to 2017, the Anti-Unfair Competition Law also contained provisions relating to cartels, but these provisions were deleted in the 2017 revision.

On October 23, 2021, the Anti-Monopoly Law of the People’s Republic of China (Draft Amendment) (hereinafter referred to as “Draft Amendment of the AML”) was released to public upon deliberation at the 31st Session of the Standing Committee of the 13th National People’s Congress. The Draft Amendment of the AML revises the relevant provisions regarding cartels in the current AML.

In addition to the above-mentioned laws and regulations, the four Anti-Monopoly Guidelines on the Automobile Industry, on the Abuses of Intellectual Property Rights, on the Leniency System and on the Commitments were formulated by the Anti-Monopoly Commission (AMC) of the State Council on January 4th, 2019 and officially released to the public in June 2020. In addition, the State Administration for Market Regulation (SAMR) issued the Anti-Monopoly Compliance Guidance for Undertakings on September 18th, 2020, the Anti-Monopoly Guidelines on the Platform Economy on February 7th, 2021, the Anti-Monopoly Compliance Guidelines on Companies’ Overseas Operation and the Anti-Monopoly Guidelines in the Field of APIs on November 18th, 2021. Additionally, at the local level, many provinces, cities and regions, including Beijing Municipality, Shanghai Municipality,

Jiangsu Province, Tianjin Municipality, Hebei Province and Shandong Province, have also released anti-monopoly compliance guidelines. Although these anti-monopoly guidelines or guidebooks are not legally enforceable, the provisions on cartels contained therein have important reference value for the law enforcement agencies in their cartel enforcement activities and for enterprises in their compliance efforts.

2. To establish an infringement, does there need to have been an effect on the market?

The AML stipulates that ‘monopoly agreement refers to an agreement, decision or other coordinated action that eliminates or restricts competition.’ According to previous cases, AML enforcement authorities (AMEA) tend to consider any conduct listed in Article 13 and Article 14 of the AML causes damage to the market and is illegal *per se*, but at the same time allows it to be exempted if it meets certain conditions presented in Article 15. However, in view of the definition of a monopoly agreement (cartels) in the AML, the courts tend to analyze the illegality of cartels, i.e., whether it has the effect of eliminating or restricting the competition case by case.

The Draft Amendment of the AML adds a second paragraph to Article 17, which emphasizes the anti-competitive effects of vertical monopoly agreements. It also provides that vertical monopoly agreements maintaining resale prices or restricting minimum resale prices “shall not be prohibited as long as they do not have the effect of eliminating or restricting competition”. This provision makes clear that in order to determine a vertical monopoly agreement, the effect of eliminating or restricting competition shall be assessed.

In 2019, in the retrial ruling for the case between Hainan Yutai Technology Feed Company and Hainan Price Bureau in respect of the administrative penalty towards RPM, the Supreme Court finally supported the decision of Hainan Price Bureau, which hold that the AMEAs

currently do not need to bear the burden of proof for the effect of eliminating or restricting competition in RPM cases in the enforcement activity considering the efficiency of AML enforcement. But the Supreme court also emphasized that the court system should follow the standard of taking into consideration the effect of eliminating or restricting competition of the vertical monopoly agreement in civil cases.

3. Does the law apply to conduct that occurs outside the jurisdiction?

Article 2 of the AML stipulates jurisdiction over extraterritorial monopolistic conducts, but only if it eliminates or restricts the market competition within China. In the past decade, there have been a large number of cases showing that despite the conducts happened outside the territory of China, it is still subject to the regulation of Chinese AMEA.

4. Which authorities can investigate cartels?

Before 2018, the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) took charge of price-related cartels and non-price-related cartels respectively. After the implementation of the Chinese government's institutional reform in 2018, SAMR is responsible for AML enforcement, which is specifically assumed by its anti-monopoly bureau.

At the local level, according to Interim Provisions, provincial Administrations for Market Regulation (AMRs) are authorized to take charge of the cartels enforcement work within their administrative regions and deal with it in the name of their own authority. The Interim Provisions also requires that the provincial AMRs report to SAMR within 7 working days after a case is initiated. Before the decisions made in regard to the suspension of an investigation, termination of an investigation or before the notice of administrative penalty, provincial AMRs shall report to the SAMR. Provincial AMRs shall file the relevant documents to SAMR for record within 7 working days after serving their decision of suspending the investigation, terminating the investigation or decision on administrative penalty to undertakings under investigation. SAMR may commission provincial AMRs to conduct case investigations. Similarly, provincial AMRs may also entrust other provincial or subordinate AMRs to conduct case investigations. The entrusted authorities can only conduct investigations in the name of the entrusting authority, and cannot investigate and handle the case in its own name.

On November 18, 2021, China inaugurated the State Anti-Monopoly Bureau under the SAMR to replace the former Anti-Monopoly Bureau. Meanwhile, SAMR also established three new departments, namely the Anti-Monopoly Enforcement Department I, the Anti-Monopoly Enforcement Department II and the Department of Competition Policy Coordination. Such institutional adjustment is an important measure to strengthen China's anti-monopoly regulation and law enforcement. Among the three departments mentioned above, the Anti-Monopoly Enforcement Department I is in charge of anti-monopoly law enforcement against monopoly agreements.

5. What are the key steps in a cartel investigation?

The investigation of a cartel case mainly includes steps as finding clues, initiating a case, investigating, making preliminary conclusions, and making final conclusions.

Firstly, an AMEA searches for clues of the monopolistic conduct *ex officio*, through people's reports, assignment by higher authorities or case transferring from other agencies. After necessary investigation, it will decide whether to initiate the case.

Secondly, the AMEA conducts investigations according to law, and the investigated parties have the obligation to cooperate with the investigation.

Thirdly, the AMEA makes a preliminary conclusion based on the evidence obtained from the investigation, and issues an Administrative Penalty Prior Notice (Statement of Objection) to the investigated party. The investigated party has the right to state opinions, make defenses, and apply for a public hearing if necessary.

Lastly, after considering the facts of the case and the opinions of the investigated party, the AMEA makes a final punishment decision and issues an Administrative Punishment Decision (Final Decision) to the investigated party.

6. What are the key investigative powers that are available to the relevant authorities?

According to Article 39 of the AML, the AMEA have following investigative powers:

1. conducting on-premise inspections of the place of business of the investigated undertakings or other relevant places;
2. questioning the undertakings, interested

- parties or other relevant entities or individuals, and asking for information about the situation;
3. inspecting and duplicating related documents, contracts, account books, business correspondences, electronic data and other relevant documents or materials of the undertakings, interested parties or other relevant entities or individuals under investigation;
 4. sealing up and detaining relevant evidence;
 5. enquiring bank accounts of the undertakings.

In case the investigated party refuses to provide relevant materials, information, or provide false materials, information, or conceal, destroy, transfer evidence, or other refusing or obstructing conduct with respect to the investigation conducted by the AMEA, the AMEA may require corrections, and impose a fine up to 20,000 yuan to individuals and up to 200,000 yuan to entities. In case of serious circumstance, the individual shall be fined not less than 20,000 yuan but not more than 100,000 yuan, and an entity shall be fined no less than 200,000 yuan but no more than 1 million yuan; if criminal violation occurs, they would be subject to investigation and prosecution according to law.

Article 62 of the Draft Amendment of the AML, released on October 23, 2021, significantly increases the legal liabilities of investigated parties for refusing to cooperate with anti-monopoly investigations. For a company, a fine of up to 1% of the sales of the previous year may be imposed; if there is no sales of the previous year or it is difficult to calculate the sales of the previous year, a fine of up to 5 million yuan may be imposed; for an individual, a fine of up to 500,000 yuan may be imposed. If a crime is constituted, criminal liability shall be pursued in accordance with the law. In addition, the Draft Amendment of the AML also established a new multiple penalties mechanism for investigated parties who refuse to cooperate with the anti-monopoly investigation. Under Article 63, for those who refuse to cooperate with the anti-monopoly investigation and result an exceptional pernicious impact and exceptional grave consequences, the anti-monopoly enforcement authorities may impose a fine of not less than two times but not more than five times the amount of the fine prescribed in Article 62.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

The investigated party has a duty to cooperate with the

AMEA, unless the AMEA have procedural defects in the investigation process, such as less than two law enforcement officers are presented, or the law enforcement officer cannot verify his identity. In addition, the investigated party may require registering and copying documents obtained by the AMEA. For some documents that are not suitable for submission, they have the right to submit legitimate copies or request the AMEA to return the pieces when necessary.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

According to Interim Provisions, the undertakings who aim to be exempted from a penalty must: (1) proactively provide the relevant information on the monopoly agreement; (2) provide important evidence. Evidence is important if it is essential in initiating the investigation by the AMEA or essential in determining the monopoly conduct, including the identities of other involved undertakings, the scope of goods involved, the content of such an agreement, the method of reaching the agreement, specific implementation status of the agreement and so on.

According to Article 6 of the Guidelines on the Application of the Leniency Program to Cases Involving Horizontal Monopoly Agreements (the "Guidelines on Leniency"), the first undertaking that submits a report concerning monopoly agreements and important evidence thereof to the law enforcement authority may apply for exemption from punishment. Here, important evidence includes: (1) Evidence that is sufficient for the law enforcement authorities to initiate an investigation, in cases where the law enforcement authorities have not yet obtained clues or evidence of the case before; and (2) Evidence that is not yet obtained by the law enforcement authorities before and would be sufficient for the authorities to make an affirmative determination of monopoly agreement as provided in Article 13 of the Anti-monopoly Law (i.e., horizontal monopoly agreements), in cases where the authorities have already initiated the investigation.

In addition, the Guidelines on Leniency also sets out more detailed provisions on exemption of penalties for the first ordinal undertaking: (1) for the first ordinal undertaking, the law enforcement authorities may exempt all fines or mitigate fines to the extent of not less than 80%; (2) the undertaking that applies for leniency before investigation procedures are initiated by the law enforcement authorities and that is determined as the first ordinal undertaking will be exempted from

the full amount of fines by the law enforcement authorities. However, for those undertakings that coerce or organize other undertakings to participate in reaching or implementing monopoly agreements or hinder other undertakings to stop the aforesaid illegal practice, the law enforcement authorities will not exempt them from a penalty but may impose a mitigated penalty against them accordingly.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

According to Interim Provisions, for the undertaking with the first proactive report on the relevant situation of the monopoly agreement and who provides important evidence, the penalty may be mitigated from 80% to 100%; for the second reporter who provides the relevant situation of the monopoly agreement and provides important evidence, the penalty can be reduced from 30% to 50%; for the third reporter, the penalty can be reduced from 20% to 30%. In addition, for the subsequent undertaking, the law enforcement authorities may mitigate not more than 20% fines according to the Guidelines on Leniency.

10. Are markers available and, if so, in what circumstances?

Article 7 of the Guidelines on Leniency has established a clear and transparent marker system:

1. If the first undertaking to apply for exemption from penalty submits a report and important evidence on the monopoly agreement to the AMEA, the AMEA shall issue a written receipt to the undertaking, specifying the time of receipt and a list of materials.
2. If the report submitted to the AMEA by the first undertaking to apply for exemption from penalty does not meet the requirements, the AMEA will not issue a written receipt.
3. If the report submitted to the AMEA by the first undertaking to apply for exemption from penalty meets the requirements, but no evidence is provided or the evidence is incomplete, the AMEA may register and issue the written receipt in (1) above, and require the undertaking to supplement relevant evidence within the prescribed time limit. If the undertaking submits relevant evidence within the time limit required by the AMEA, the AMEA will regard the time it receives the report as the time of applying for leniency; if

the undertaking fails to submit relevant evidence as required within the time limit, the AMEA will cancel its registration.

4. After being disqualified from registration, the first undertaking who applied for exemption from penalty can still complete relevant evidence and apply to the AMEA for exemption as long as no other undertakings have applied for leniency; if other undertakings have applied for leniency before the first undertaking applies for exemption again, the disqualified undertaking can apply for mitigating the penalty.
5. If the undertaking applying for the exemption from the penalty is disqualified from registration, the first undertaking who has applied for mitigating the penalty will automatically be adjusted to the applicant for the exemption from the penalty.

11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

According to the Guidelines on Leniency, undertakings could obtain leniency only if they submit reports and evidence in accordance with the requirements from the guideline and meet all the following conditions: (1) immediately cease the alleged violation after applying for leniency, but exception applies to the situation that the law enforcement authorities require the undertakings to continuously implement the aforesaid practice in order to ensure the smooth progress of the investigation. The undertakings who have applied for leniency to overseas law enforcement authorities and are required to continue to implement the aforesaid practice shall report to the law enforcement authorities; (2) cooperate with the law enforcement authorities in investigation in a prompt, sustainable, comprehensive and sincere manner; (3) properly preserve and provide the evidence and information and shall not conceal, destroy or transfer evidence or provide false materials or information; (4) shall not disclose their application to the law enforcement authorities for leniency without the approval of the law enforcement authorities; and (5) shall not have any other practice that affects the anti-monopoly law enforcement investigation.

12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

Until now, the AML does not provide criminal liability

(neither individuals nor undertakings) for cartels, so there is no criminal exemption for individuals. However, according to Article 67 of the Draft Amendment of the AML released on October 23, 2021, where a violation of this Law constitutes a criminal offense, criminal liability shall be prosecuted pursuant to the law. It seems to imply that China may consider establishing criminal liabilities against other cartels in addition to bid rigging in the future. However, whether the aforesaid leniency or exemption system can apply to such criminal liability is still to be clarified by corresponding provisions provided by China.

13. Is there an ‘amnesty plus’ programme?

According to relevant law and previous cases, there is no ‘amnesty plus’ programme.

14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

In China, there is no settlement or plea-bargaining system equivalent to those in the European Union and the United States. However, under the PRC law, the AMEA may suspend the investigation upon acceptance of commitments of the undertaking under investigation, and may thereafter terminate the investigation after the undertaking fulfilled the commitments.

Article 45 of the AML provided the legal basis for the anti-monopoly enforcement agencies to accept commitments made by companies. In addition, it should be noted that although it may be applied to both monopoly agreements and abuse of dominant market position, the commitment system, in practice, is mainly used in cases of abuse of dominant market position. In this respect, the Guidelines on Commitments of Undertakings in Anti-Monopoly Cases (Guidelines on Commitments) provides that in cases of horizontal monopoly agreements to fix or change prices, to limit the number of goods produced or sold, or divide sales markets or the raw material procurement markets, the AMEA shall not accept commitments.

To date, the vast majority of measures committed are behavioural measures, while it cannot be ruled out that the AMEA may require the structural measures to be committed in the future. The Guidelines on Commitments stipulates that ‘The measures committed by undertakings can be behavioural, structural or a hybrid of the two. Behavioural measures include adjusting pricing strategies, cancelling or changing

various transaction restrictions and opening up infrastructure such as networks or platforms, licensing patents, technical secrets or other intellectual property rights. Structural measures include divesting tangible assets, intangible assets including intellectual property rights, or related rights and interests.’

Finally, the decisions of suspension and termination of investigation do not require approvals from courts. Accordingly, the said decisions may not impede other undertakings or consumers from filing civil suits upon the suspected monopoly conducts, and should not serve as evidence to demonstrate the existence of monopoly conducts. This is also stipulated in Article 3 of the Guidelines on Commitments.

15. What are the key pros and cons for a party that is considering entering into settlement?

The benefits for undertakings to voluntarily make commitments to the AMEA include:

1. avoiding administrative penalties: the decision on suspension of investigation is not an administrative penalty decision, so the undertaking under investigation can temporarily avoid the economic penalty stipulated in Article 46 of the AML. If the undertaking fulfils its commitments, the AMEA may decide to terminate the investigation, and the undertaking will thus avoid administrative penalty definitely.
2. ending the investigation procedure as quickly as possible: in cases where it is controversial as to the existence of monopolistic conducts and the consequence caused by such conducts, commitments made by the undertaking may suspend and terminate the investigation procedure soon, so as to reduce the uncertainty and avoid the continuous impact on the operation and management of the undertaking, or even its contemplating mergers and acquisitions or capital market operation.
3. tailoring to undertakings’ own capabilities: the committed measures are proposed by the undertaking itself according to its own conditions, which would be more practicable.

Depending on the circumstances of individual cases, the possible disadvantages may include:

1. the application for suspension of investigation and the decision to suspend the investigation

shall set forth the facts of suspected monopoly conducts and the possible effects thereof. Notwithstanding Article 3 of the Guidelines on Commitment intends to clarify that none of the decisions to suspend or terminate investigation serves as the determination on whether or not the conducts of undertaking constitute monopolistic conducts nor be taken as evidence for making such a determination, the commitment, in which the undertaking admit the existence of suspected monopoly conducts, may trigger or inspire other undertakings or consumers to lodge a civil lawsuit.

2. the AMEA's acceptance of the commitments and decisions to suspend and terminate the investigation shall not serve as the determination on whether or not the conducts of undertaking constitute monopolistic conducts. The AMEA may conduct investigations as to other similar conducts of the said undertakings and impose administrative penalties according to law.
3. the application for suspending the investigation is voluntarily submitted by the undertaking. Therefore, the undertaking cannot apply for administrative reconsideration or file administrative litigation against the specific measures it proposed in the application and committed thereafter.
4. the decision to suspend the investigation, including the contents of the commitment, will be made public. The undertaking will thus be subject to public supervision in addition to the supervision of the AMEA.

16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

1. Cooperation between domestic administrative agencies

Firstly, at the level of decision-making on competition policy, the Anti-Monopoly Commission of the State Council consists of senior officials from 14 departments of the State Council. The Anti-Monopoly Commission formulates policies and guidelines, and coordinates and directs the anti-monopoly administrative law enforcement work.

Secondly, at the level of law enforcement, other government agencies which find clues or receive materials about suspected monopoly conducts should

transfer the clues or materials to the AMEA, and evidence and materials collected by these agencies can be used by the AMEA as evidence. For example, in the section of "case source and investigation process", the administrative penalty decision on the monopoly agreement case of Fengcheng Premixed Concrete Association and its member enterprises in 2021 clearly states that the investigation was conducted "based on the clues referred by the public security organ". And in this case, the competent authority, Jiangxi Provincial Administration for Market Regulation, used the evidence and materials collected by the public security organ, such as the interrogation records, as evidence to prove the conclusion and implementation of the monopoly agreement.

In addition, during investigations, the AMEA may seek opinions from relevant authorities in charge of the industry concerned, such as the Ministry of Industry and Information Technology, the Ministry of Transportation, the People's Bank of China, China National Intellectual Property Administration, China Banking and Insurance Regulatory Commission.

2. Cooperation with investigating authorities from other jurisdictions

Since the entry into force of the AML in 2008, China has entered into more than 50 cooperation agreements or memorandums of understanding ('MOUs') with competition regulatory authorities of about 30 countries and regions, including the US, the EU, the UK, Singapore, Russia. For example, on December 29, 2021, China and Singapore signed the Memorandum of Understanding regarding Understanding and Cooperation in the Field of Competition Law; on February 4, 2022, China and Russia signed the Agreement on Cooperation between the Government of the People's Republic of China and the Government of the Russian Federation in the Area of Antimonopoly Enforcement and Competition Policy.

Article 2 of the AML stipulates that "this Law shall apply to monopolistic acts outside the People's Republic of China that have the effect of eliminating or restricting competition in the domestic market." The investigation and penalties imposed by the AMEA are independent from foreign authorities. An enterprise who has submitted leniency applications or reached settlement agreements outside China would not automatically be exempted from investigations or punishment in China. It should submit leniency applications or propose to make commitments to the AMEA separately.

17. What are the potential civil and

criminal sanctions if cartel activity is established?

Firstly, on the administrative liability of cartels, the first paragraph of Article 46 of the AML provides, “where an enterprise, in violation of the provisions of this Law, concludes and implements a monopoly agreement, the authority for enforcement of the AML shall order it to discontinue the violation, confiscate its unlawful gains, and, in addition, impose on it a fine of not less than 1% but not more than 10% of its sales achieved in the previous year. If such monopoly agreement has not been implemented, it may be fined no more than 500,000 yuan.” The above administrative penalties are imposed on the enterprise under investigation rather than the management team or the persons directly responsible for the conclusion and/or implementation of monopoly agreements.

According to the aforesaid provisions, the administrative penalties imposed on cartels under the AML include 1. confiscation of illegal gains, and 2. administrative fines.

In addition, the Draft Amendment of the AML released on October 23, 2021 strengthens the penalties on the above illegal acts.

	Current Law	Revised Draft	
Conclusion and Implementation of Monopoly Agreements	Confiscation of illegal gains; a fine ranging from 1% to 10% of the sales of the previous year	Confiscation of illegal gains; a fine ranging from 1% to 10% of the sales of the previous year (If it is difficult to calculate the illegal gains accurately, the anti-monopoly enforcement authority shall take the illegal gains into consideration when determining the specific amount of the fine); in the absence of sales in the previous year , a fine no more than RMB 5 million	In the case of a particularly grave violation of the AML with an exceptional pernicious impact and exceptional grave consequences, a fine no less than two times but no more than five times of the amount of the fine specified on the left may be imposed.
Reached but not yet implemented monopoly agreements	No more than RMB 500,000	No more than RMB 3 million	
Individuals liable (legal representative, person in charge and directly responsible persons) for reaching monopoly agreements	N/A	No more than RMB 1 million	
The undertaking organize other undertakings to reach monopoly agreements or provide substantive assistance for other undertaking to reach monopoly agreements	N/A	Application of the aforesaid provision	

Secondly, on the criminal liability of cartels, monopoly agreements which are reached through collusion bidding would also be subject to sanctions under the Law on Tendering and Bidding and the Criminal Law. Specifically, according to Article 53 of the Law on Tendering and Bidding, the collusion bidder shall be fined not less than 0.5% but not more than 1% of the value of the bid it won, and the persons who are directly in charge and other persons who are directly responsible shall be fined not less than 5% but not more than 10% of the fine imposed on the bidder. In serious situations, the

bidder may be disqualified from bidding for a project subject to bidding as required by law for one to two years and the disqualification shall be announced, or the business license of the entity may be revoked by the AIC. Further, according to Article 223 of the Criminal Law, bidders who act in collusion with one another may be sentenced to a fixed-term of imprisonment of not more than three years or criminal detention, and/or be imposed a fine.

Lastly, on the civil liability of cartels, Article 50 of the AML provides that “undertakings shall assume the civil liability in accordance with the law for the losses caused to others due to their monopolistic conduct.” Therefore, the parties who suffer losses due to the cartel may request the cartelists to assume the corresponding civil liability. The Draft Amendment of the AML released on October 23, 2021 further specifies that such civil liability may take the form of cessation of infringement, restoration to the original state, compensation for losses, etc.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

As mentioned above, whether the monopoly agreement has been implemented would significantly impact the amount of fines. According to the AML, if the monopoly agreement has been implemented, the enterprise may be fined not less than 1% but not more than 10% of its sales achieved in the previous year. If such monopoly agreement has not been implemented, it may be fined not more than 500,000 yuan (increased to less than RMB 3 million in the Draft Amendment of the AML).

Meanwhile, according to the AML, to determine the specific amount of the fine, the AMEA shall take into account such factors as the duration, extent and nature of the violation. According to the Draft Amendment of the AML, the AMEA shall also regard the status of the elimination of the consequences of the violation and the illegal earnings (where it is difficult to accurately calculate the illegal earnings) as factors to consider when determining the specific amount of the fine. In addition, NDRC published a draft of Guidelines on Calculation of Illegal Gains and Penalties for Monopoly Conducts (Draft Guidelines on Calculation) in June 2016, with an aim to provide specific guidance on how to determine the amount of fines. It is, however, reported that the legislative process of the Draft Guidelines on Calculation has been slow given the existence of certain divergence.

For foreign enterprises, the highest percentage of sales revenue that has been imposed as fine for implementation of a horizontal monopoly agreement is 9%, in a case where eight international ro-ro cargo shipping companies implemented a monopoly agreement by collusion bidding in 2015. Considering, inter alia, that the monopoly agreement lasted for a long time (no less than four years), and resulted in a wide range of influence (covering various main ship routes including North America-China, Europe-China and South America-China), NDRC imposed fines ranging from 4% to 9% of the sales of international shipping services of ro-ro cargo related to the Chinese market in 2014, amounting to 407 million yuan in total, on 8 foreign companies, such as Mitsui O.S.K. Lines, Ltd., Vic Co., Ltd., and Chile South American Steamship Co., Ltd.

While in vertical monopoly agreement cases, no foreign enterprises were directly subject to administrative penalties. Instead, penalties were only imposed on the subsidiaries of foreign enterprises in China, such as Medtronic (Shanghai) Investment Management Co., Ltd., Eastman (China) Investment Management Co., Ltd., Geistlich Trading (Beijing) Co., Ltd., and the base for the aforesaid administrative fine was the sales revenue of the subsidiaries within China, rather than worldwide.

For domestic enterprises, the highest percentage of sales revenue that has been imposed as fine for implementation of a horizontal monopoly agreement is 8%, in cases where Chongqing Qingyang Pharmaceutical Co., Ltd. and four pharmaceutical distribution companies reached monopoly agreement in 2016, Shaanxi Motor Vehicle Testing Association Xi'an Branch reached monopoly agreement with 30 automobile comprehensive testing service companies, and Fengcheng Premixed Concrete Association and its member companies in 2021. In addition, in the price fixing case of Mercedes-Benz in Jiangsu Province in 2015, Beijing Mercedes-Benz Sales & Service Co., Ltd., Mercedes-Benz (China) Automobile Sale Co., Ltd. and Beijing Benz Automobile Co., Ltd. were fined 7% of their sales revenue of the previous year¹ which is the highest percentage of sales revenue that has been imposed as fine for implementation of a vertical monopoly agreement.

19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

No existing law explicitly requires parent companies to bear joint liability for their subsidiaries' monopolistic practice. But Article 19 of the Guidelines on the Identification of Illegal Proceeds Derived by Operators from Monopolistic Practices and the Determination of

Fines (Draft for Comment), promulgated by NDRC in 2016, stipulates that, normally, the AMEA takes an operator that directly implements the monopolistic practices as the object of administrative penalty. Where the parent company of such operator has decisive influence on such operator's implementation of the monopolistic practices, the parent company may be taken as the object of penalty. In practice, in the Yangtze River Pharmaceutical Group case in 2021, the written decision on administrative penalty mentions that the Yangtze River Pharmaceutical Group Co., Ltd. is the core and center of the Yangtze River Pharmaceutical Group (the Yangtze River Pharmaceutical Group together with the Yangtze River Pharmaceutical Group's subsidiaries), and acts as the decision-maker, implementer and supervisor in the conclusion and implementation of the monopoly agreement. The pharmaceutical manufacturing and sales subsidiaries of the Yangtze River Pharmaceutical Group Co., Ltd. participate in the monopolistic practice to varying degrees, follow the unified leadership and deployment of the Yangtze River Pharmaceutical Group Co., Ltd. with respect to the decision-making and implementation of the monopolistic practice, having no independent will ... This well confirms that the will of the subsidiaries participating in the monopolistic practice is of subordinate nature. Therefore, the AMEA regards the parent company as the party that commits the violation, and regards the subsidiaries' monopolistic practice as the practice of the parent company. This shows that if the AMEA has evidence to prove the parent company participates in the relevant monopolistic practice and has decisive influence on the aforesaid monopolistic practice, the parent company will be held liable, and the sales revenue of the parent company will be used as the base amount of fines for calculation.

Article 19 of the Draft Guidelines on Calculation provides that, "although as a rule the AMEA shall impose punishment against the enterprise that directly carries out monopolistic acts, it may punish the parent company of the enterprise if the parent company has a decisive influence on the implementation of monopolistic acts by the enterprise." It remains unclear whether the foregoing provisions will be retained in the final text.

20. Are private actions and/or class actions available for infringement of the cartel rules?

It is provided in Article 50 of the AML that the enterprises which commit cartels and cause losses to others shall bear civil liability according to law. The first paragraph of Article 60 of the Draft Amendment of the AML also provides that where any monopolistic practice carried

out by a business operator causes loss to another person, the business operator shall assume civil liabilities pursuant to the law, including cessation of infringement, restoration to the original state and compensation for losses. According to the revised Regulations of the Supreme People's Court Concerning the Application of Law in Civil Disputes Relating to Monopoly Conducts (Judicial Interpretation Concerning Monopoly Disputes), which was implemented on Jan. 1st, 2021, a natural person, legal person, or unincorporated association that suffers from losses caused by monopoly acts or is involved in disputes due to the contents of a contract or articles of association of an industry association that violates the AML may bring a civil lawsuit in court.

In 2014, Shuangjing store of Carrefour Beijing Co., Ltd. and Abbott Trading (Shanghai) Co., Ltd. were suspected of being involved in a monopoly agreement, and were sued by the consumer Tian Junwei. In 2018, Wuhan Hanyang Sunshine Trading Co., Ltd. brought a lawsuit against Shanghai Hantai Tyre Selling Co., Ltd. for a suspected monopoly agreement and market dominance abuses. In 2020, DENNIS Parker, a dental device manufacturer, was sued by its former distributor, Kangjianmiaomiao, for infringement. Cause of action was that although DENNIS Parker did not fix the minimum resale price expressly, it had reached a vertical monopoly agreement with its distributors to fix the minimum resale price through other channels. Three e-commerce platforms including Kangjianmiaomiao, DENNIS Parker's former distributors, once sold DENNIS Parker's dental device at the price lower than DENNIS Parker's expectation. As a result, DENNIS Parker issued rules to its distributors that "DENNIS Parker strictly prohibited all authorized DENNIS distributors (including their sub-distributors) from allocating and selling any DENNIS Parker clinical products to the three e-commerce platforms including Kangjianmiaomiao. If any distributor was found to continue supplying goods in violation of such regulations, DENNIS Parker would strictly pursue the matter, and cancel its qualification as a DENNIS Parker's distributor." Plaintiffs failed in all three cases above.

The Representative Action System of China stipulated in the Civil Procedure Law of China is relatively similar to the class action system in the United States of America. However, there are great differences between the two systems in terms of the appointment and scope of authority of the litigation representative, and whether or not the judgment rendered by courts is binding on the parties.

According to the Civil Procedure Law of China, institutions and relevant organizations appointed by law

may initiate legal actions in court when environmental pollution, customers' rights infringement or harms to public interests occurs. While the Law on the Protection of the Rights and Interests of Consumers also provides that China Consumers Association and its branches at provincial level may file a lawsuit at court against conducts that harm mass consumers' legitimate interests and rights. Besides, the second paragraph of Article 60 of the Draft Amendment of the AML also provides that where a monopolistic practice carried out by a business operator infringes the public interest of the society, the people's procuratorate may file a civil public interest lawsuit in the people's court pursuant to the law.

Yet, neither anti-monopoly class action nor anti-monopoly civil public interest action have been brought in China.

21. What type of damages can be recovered by claimants and how are they quantified?

According to Article 50 of the AML and the Judicial Interpretation Concerning Monopoly Disputes, where a defendant commits monopoly conducts and causes losses to the plaintiff, the court may order the defendant to assume civil liabilities such as ceasing the infringing act and making compensation on the basis of the claims made by the plaintiff. The AML formulates a compensatory compensation system. No law nor regulation empowers the infringed party with legal rights to claim a reward beyond its actual damage.

According to the Judicial Interpretation Concerning Monopoly Disputes, courts may credit the reasonable costs arising from investigation and prevention of monopoly conducts in the scope of loss compensation. For example, in a dispute over vertical monopoly agreement between Beijing Ruibang Yonghe Technology & Trade Co., Ltd. (Rui Bang) and Johnson & Johnson Medical (China) Co., Ltd. (Johnson & Johnson) in 2013, the court of appeal held that Johnson & Johnson should compensate Rui Bang for the economic losses directly arising from the monopoly agreement.

22. On what grounds can a decision of the relevant authority be appealed?

According to the AML, where a party thinks the administrative penalty decision made by the AMLA concerning monopoly agreement infringes upon its legitimate rights and interests, he may apply for administrative reconsideration or file an administrative

litigation. However, implementation of the administrative penalty decision shall continue during the administrative reconsideration or administrative litigation.

23. What is the process for filing an appeal?

As for the penalty decision with regard to the monopoly agreement made by the AMEA, a party shall submit an administrative reconsideration application within 60 days after receiving the administrative penalty decision rendered by the AMEA. The administrative reconsideration authority must render decisions within 60 days after accepting the application. The term may be extended up to 30 days upon approval. The party still has the opportunity to file an administrative litigation if it is unsatisfied with the decision made by administrative reconsideration authority.

At present, the AMEA for monopoly agreement cases is the SAMR and its authorized provincial AMRs. The provincial AMRs is responsible for the anti-monopoly law enforcement within its administrative regions and cases authorized by the SAMR. The party challenging an administrative penalty decision made by SAMR must submit the application for administrative reconsideration to SAMR, which shall act as the administrative reconsideration authority. If the challenged administrative penalty decision is made by provincial AMRs, the application for administrative reconsideration may be submitted to the provincial people's government or to SAMR, subject to the discretion of the applicant.

In 2016, Shaanxi Provincial Price Bureau made administrative penalties to the Shaanxi Vehicle Inspection Association and more than 30 vehicle inspection agencies for concluding and implementing price monopoly agreements. Some of the agencies involved challenged the decision and made application for administrative reconsideration to Shaanxi provincial's people's government. The administrative reconsideration authority heard the case and upheld the original administrative penalty decisions.

As for administrative litigation, the party may file an administrative suit in court within six months after receiving the administrative penalty decision. If the party apply for administrative reconsideration at first but disagrees with the administrative reconsideration decision, the party may file a suit in court within 15 days after receiving the decision. In case the administrative reconsideration authority affirms the original administrative penalty decision, the party may bring a lawsuit, listing the AMEA making the previous penalty decision concerning monopoly agreement and the

administrative reconsideration authority as co-defendants.

When applying ordinary procedures to hear an administrative case at first instance, the court must make judgment within six months after the case is filed. If the time limit for trial needs to be extended under special circumstances, the extension shall be approved by the high people's court; if the high people's court needs to extend the time limit for trial of an administrative case of first instance, the extension shall be approved by the Supreme People's Court. If the summary procedure is applied to an administrative case of first instance, the court shall conclude the case within 45 days of the date of filing the case. The time limit for trial through summary procedure shall not be extended.

When challenging the first instance judgment rendered by court which has not come into force, the party shall appeal to the upper level court within 15 days after receiving the judgment; and the time limit for appealing to the upper level court against a first instance ruling made by court which has not become effective shall be 10 days after receiving the written ruling. According to the Provisions of the Supreme People's Court on Several Issues concerning the Intellectual Property Tribunal which was implemented on Jan. 1st, 2019, cases on appeals filed against the judgments of first-instance civil cases concerning monopoly and first-instance administrative cases involving administrative penalties imposed on monopoly will all be tried by the Intellectual Property Tribunal of the Supreme People's Court. When hearing administrative appeal case, the court shall make final judgment within three months after receiving the appeal, which is also extendable following similar procedures aforementioned under special circumstances.

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

With regard to the horizontal monopoly agreements, three competing business operators, including Tianjin Tianyao Pharmaceutical Co., Ltd. ("Tianjin Tianyao Pharmaceutical"), divided the sales market of fluoroacetate active pharmaceutical ingredients ("API") by agreement, changed and fixed the price of fluoroacetate active pharmaceutical ingredients ("API"), thus eliminating and restricting competition in the sales of fluoroacetate active pharmaceutical ingredients ("API"). On April 25, 2021, due to the three enterprises' monopolistic practice of reaching and implementing the horizontal monopoly agreement in the sales market of

fluoroacetate active pharmaceutical ingredients (“API”), Tianjin market supervision and Administration Commission respectively fined the three enterprises 35.1247 million yuan, 2.4705 million yuan and 1.3909 million yuan, and confiscated 8.8979 million yuan, 2.743 million yuan and 151200 yuan from them.

With regard to the vertical monopoly agreements, the Yangtze River Pharmaceutical Group Co., Ltd. (hereinafter referred to as “Yangtze River Pharmaceuticals”), substantially reached the monopoly agreement with its national distributors, including primary dealers, secondary dealers, chain pharmacies and other retail pharmacies, to fix and restrict the minimum resale price by signing cooperation agreement, issuing price adjustment letter, oral notice, etc. It turned out that the monopoly agreement had been effectively implemented in all links of the retail channels. On April 15, 2021, the SAMR announced the decision of administrative penalty, ordering Yangtze River Pharmaceutical to stop its illegal conduct and imposing a fine of 3% of its sales revenue of 2018, i.e. RMB764 million, which refreshed the record of the highest fine for antitrust and vertical monopoly agreements cases in the pharmaceutical industry. In addition, the case of Gongniu Group Co., Ltd., which reached and implemented the monopoly agreement, and the case of Geistlich Trading (Beijing) Co., Ltd., which fixed minimum resale prices, have also attracted much attention recently.

25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, impact of COVID-19 in enforcement practice etc.)?

Public utilities, medicines (especially active pharmaceutical ingredients), construction materials, day-to-day consumer goods, and other areas which affect people’s livelihood and national economy, remain the focus of AML enforcement.

In 2021, pharmaceutical industry is the focus of Monopoly Agreement Enforcement. In respect to the enforcement of horizontal monopoly agreements, as mentioned above, on April 25, 2021, the Tianjin AMR imposed fines of 35.1247 million yuan, 2.4705 million yuan and 1.3909 million yuan respectively on Tianjin Tianyao Pharmaceutical Co., Ltd. and other two companies for entering into and implementing horizontal monopoly agreements on the production and sale of Fluocinolone Acetonide APIs. In addition, in June 2021, the Jiangsu Provincial AMR imposed fines of 2.7208 million yuan, 1.2084 million yuan and 3.1931 million

yuan respectively on Wuzhou Huangpu Chemical Pharmaceutical Co., Ltd. and other two companies for entering into and implementing horizontal monopoly agreements on the sale of pharmaceutical camphor APIs. Regarding the enforcement of vertical monopoly agreements, in April 2021, SAMR imposed a fine of 764 million yuan on Yangtze River Pharmaceutical Group Co., Ltd. for entering into and implementing a vertical monopoly agreement on the sale of pharmaceutical products.

Secondly, construction material is another important sector of SAMR enforcement. For example, in July 2021, the Jiangxi Provincial AMR imposed a total fine of 28.0931 million yuan on Fengcheng Premixed Concrete Association and its member companies for entering into and implementing a horizontal monopoly agreement on concrete sales. In addition, in January 2021, the Shandong Provincial AMR imposed a total fine of 141.72 million yuan on Zibo United Cement Enterprise Management Co., Ltd. and other seven companies for entering into and implementing a horizontal monopoly agreement on cement sales.

In addition, in the case of cartels, recent regulation has shown the following trends:

1. The AMEA “handle the complaint immediately upon acceptance” and will take immediate action for investigation if there are any cartel-related reports. Many of the recent high-profile cartel cases are originated from reports;
2. In the process of cartel investigations, joint law enforcement has been strengthened between the central and local governments, as well as between local regions. For example, the Administrative Penalty Decision in the vertical monopoly case of Yangtze River Pharmaceutical Group Co., Ltd. in 2021 states that “this authority (i.e. the SAMR) conducted on-site inspection, inquired and entrusted 27 provincial AMRs to investigate the implementation of the parties’ monopoly agreement”.
3. Based on the background of “strengthening law enforcement” and “multi-dimensional regulation” at the present stage, when AMEA supervise the cartels of enterprises, there is still the possibility of multi-pronged supervision of enterprises from the dimensions of anti-unfair competition supervision, data compliance, and tax compliance in the fields of anti-commercial bribery, advertising, and marketing.
4. Attention has been paid to the cartel in the

field of the platform economy, especially to the hub-and-spoke conspiracy that are easy to reach in this field.

5. The proportion of civil litigation cases in cartel disputes, especially horizontal monopoly agreement cases, has increased. On February 28, 2022, the Annual Report of the Intellectual Property Tribunal of the Supreme People's Court (2021) (the "Report") was released. The Supreme People's Court introduces in the Report that, the proportion of civil cases of monopoly agreement disputes, especially horizontal monopoly agreement cases, has increased. The industries involved in horizontal monopoly agreements include information and communication technology, driving training services, fire detection services, etc., and some of the monopoly agreements involve industry associations.

26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

1. Adoption of the Draft Amendment of the AML

The Draft Amendment of the AML is expected to come into force this year, in 2022. According to the Draft Amendment of the AML released on October 23, 2021, the deterrence effect of the AML will be greatly enhanced, the cost of violating the AML will be significantly increased, and enterprises will face unprecedented pressure of compliance. For example, Article 56 of the Draft Amendment of the AML stipulates that where an enterprise enters into and implements a monopoly agreement in violation of the provisions of this Law, the AMEA shall order it to stop the illegal practice, confiscate its illegal income, and impose a fine ranging from 1% to 10% of the sales amount of the preceding year, or if the enterprise has no sales in the preceding year, a fine of not more than 5 million yuan would be imposed; If the enterprise has not implemented the monopoly agreement, a fine of not more than 3 million yuan may be imposed. If the legal representative, the principal person(s)-in-charge or other directly

accountable personnel is personally responsible for the conclusion of the monopoly agreement, a fine of not more than 1 million yuan may be imposed on the individual. The preceding provisions shall apply to those which organize or provide substantial assistance to enterprises in entering into a monopoly agreement.

2. Revision and promulgation of laws, regulations and guidelines, etc.

As the Draft Amendment of the AML comes into effect, it is expected that the accompanying regulations and guidelines such as the Interim Provisions on Prohibition of Monopoly Agreements, the Guidelines on Leniency, etc. will be revised accordingly. Additionally, it is expected that in the future, corresponding regulations on big data, algorithms, and other aspects will be issued to provide more specific guidance. The revision or promulgation of the above-mentioned laws, regulations and guidelines provides assurance for better application and strengthened enforcement of the AML in the era of Internet big data.

3. Enforcement of the AML will be further Strengthened

At present, the State Anti-Monopoly Bureau has been established, which echoes the provisions of Article 10 of the Draft Amendment of the AML that "enriching anti-monopoly regulatory forces and enhancing the AML enforcement". It makes the AMEA an important step forward a high-level, authoritative and independent direction, which can alleviate the shortage of the AML enforcement personnel to a certain extent, help to integrate and optimize the existing AML enforcement resources, realize the whole chain of supervision before, during and after event, and all fields, and promote high-quality development with efficient supervision. At the same time, the Central Political Bureau meeting and the Central Economic Work Conference held in December 2020, as well as the Government Work Report and the Ninth Meeting of the Central Finance and Economics Commission in 2021, all emphasized "strengthening anti-monopoly and preventing the disorderly expansion of capital". This means that China's AML enforcement will be further strengthened in the future, especially in the field of the platform economy, and cartels in the platform economy, including the Hub-and-spoke conspiracy, will be the focus of attention in the next 12 months.

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