SAMR breaks new ground with book for antitrust guidelines

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On 6 August 2020, the lid was lifted on one of China's biggest antitrust secrets. On that day, news broke out that a new book authored by the State Administration for Market Regulation ("**SAMR**") featuring a compilation of antitrust rules had been launched. The compilation contains four previously unpublished texts: four out of six long-awaited antitrust guidelines are included in the book; two focus on substantive law – on the automotive sector, and on intellectual property rights ("**IPRs**") – while the other two focus on procedural matters – on leniency, and on commitments (together, "**Guidelines**"). In addition to providing the full texts of the four Guidelines, the book also provides some guidance in the form of explanations by SAMR ("**SAMR Explanations**").

Background to the Guidelines

A lengthy drafting period preceded the publication of the Guidelines. Based on the SAMR Explanations set out in the book, before the role was given to SAMR, the new super-regulator following a government restructuring, the Anti-Monopoly Commission (a non-permanent cross-ministerial consultation and coordination body directly under the State Council) tasked all three previous antitrust authorities – the National Development and Reform Commission ("**NDRC**"), the (now defunct) State Administration for Industry and Commerce ("**SAIC**") and the Ministry of Commerce ("**MOFCOM**") – with drafting guidelines for implementing the Anti-Monopoly Law ("**AML**") in certain sectors or on certain topics. The perception of outsiders was that the antitrust team at NDRC that had taken the lead in these efforts.

In addition to the four Guidelines that appear in the new book, the NDRC team also prepared two additional draft guidelines on how to calculate fines and on the procedures for exempting potentially anti-competitive agreements. However, it appears that these two draft guidelines have never been enacted, possibly because SAMR did not want to narrow down its wide margin of discretion in terms of fining and granting exemptions.

It appears that both the antitrust teams at NDRC and at SAIC prepared one draft of what was to become the Anti-Monopoly Guidelines in the Intellectual Property Rights Area ("**IPR Guidelines**"). Subsequently, while the secretariat for the AMC was hosted there, the MOFCOM antitrust team took over the drafting responsibilities for the IPR Guidelines. The enacted IPR Guidelines are, to a large extent, based on the prior MOFCOM draft.

Although the four enacted Guidelines are published in the SAMR book, they were in fact in the name of the Anti-Monopoly Commission, which is authorized by the AML to adopt antitrust guidelines. Even though they are formally only "guidelines" and strictly speaking do not have

force of law, the high standing and position of the Anti-Monopoly Commission may give the Guidelines substantial authority in practice.

Auto Guidelines

The Anti-Monopoly Guidelines on the Automotive Sector ("**Auto Guidelines**") comprise six chapters and 11 articles. As the name indicates, the Auto Guidelines only apply to the automotive sector, which is, however, defined very broadly. The Auto Guidelines cover various points including market definition, abuse of dominance, merger control and "administrative monopolies" (*i.e.*, anti-competitive government actions). However, probably the most interesting part of the Auto Guidelines is the chapter on anti-competitive agreements, in particular the guidance on vertical agreements.

In the AML itself, resale price maintenance ("**RPM**") is the only explicitly prohibited type of vertical agreement. However, the Auto Guidelines provide a significantly expanded list of potentially anti-competitive conduct:

- RPM;
- territorial and customer restrictions;
- quality assurance-related restrictions; and
- other restrictions in agreements between OEMs and distributors or repair shops.

The Auto Guidelines represent the first attempt to identify vertical agreements other than RPM as anti-competitive under the AML's "catch-all" clause for vertical agreements. Until now, vertical agreements not related to RPM, such as territorial/customer restrictions, bundling or exclusivity – were not sanctioned under the AML or its implementing rules.

Consistent with past NDRC and SAMR practice on cases, the Auto Guidelines appear to take the view that RPM is, in principle, illegal irrespective of the company's market position. However, the Auto Guidelines provide for new grounds for "individual case exemptions," which were not included in AML rules or cases until now. The grounds for exemption include RPM during a short promotional period, but this option is limited to new electric vehicles and the period is, in principle, limited to nine months.

Perhaps more importantly, the Auto Guidelines sketch out an exemption for RPM imposed on distributors which "only play an intermediary role" in the distribution process – *e.g.*, where the OEM agrees on the sales price directly with a certain group of customers, such as its own employees, key accounts or sponsors. In those circumstances, where its role is limited to delivery of the vehicles, receipt of payment or invoice issuance, the "distributor" is not a distributor in the classic or substantive sense. Although the Auto Guidelines did not express it in those terms, in that model, the distributor looks more like an agent of the OEM acting as principal. The Auto Guidelines contain two additional examples of grounds for an exemption, which follow a similar logic, whereby "distributors" play similar "intermediary roles" in government purchases or through e-commerce platforms.

These grounds for exemption laid out in the Auto Guidelines are important, with their impact potentially extending beyond the automotive sector, as they suggest a move away from the Chinese antitrust regulators' seemingly stringent interpretation of any RPM arrangement. If the Auto Guidelines were to lead to a loosening up of the RPM rules, then OEMs may gain more flexibility in designing their distribution pricing models in China.

For territorial and customer restrictions, the Auto Guidelines follow a somewhat distinct approach: rather than listing which types of vertical agreements are deemed unlawful, they set up a new system which appears to be largely inspired by European Union ("**EU**") antitrust rules in the motor vehicle area. Similar to the EU concept of "block exemption", the Auto Guidelines

introduce a concept of a "presumption of exemption." If a company cannot benefit from a presumption of exemption, then it can still attempt to argue for an "individual case exemption."

Under the Auto Guidelines, certain territorial and customer restrictions are subject to a presumption of exemption if the company in question has no "significant market power." The Auto Guidelines state that, generally speaking, a company with a market share below 30% is presumed not to have significant market power, turning the 30% benchmark into a sort of "safe harbor."

However, although the Auto Guidelines put forward a list of conduct-related territorial and customer restrictions which can benefit from a "presumption of exemption", there are exceptions to the exemption list. This approach again seems largely inspired by EU competition law, reflected for example by the fact that the Auto Guidelines introduce the concepts of territorial restrictions on "active" and "passive" sales. The net result is a complex set of exemptions and counter-exceptions, meaning OEMs will probably need to re-evaluate their entire distribution models.

For quality assurance-related restrictions, the Auto Guidelines put forward other types of potentially anti-competitive clauses in vertical agreements related to using the warranty (which is essentially what "quality assurance" appears to refer to) as leverage to limit competition from independent repair shops, maintenance service providers or spare parts manufacturers.

For other restrictions in agreements between OEMs and distributors or repair shops, the Auto Guidelines feature a broad array of additional potentially illegal vertical restraints: bundling sales of vehicles with sales of other items such as spare parts; unreasonable sales targets or storage requirements; forced participation in promotions; imposing designers or design services; brand exclusivity; refusal to deal/early termination of distribution agreements (as sanctions).

Interestingly, other than the territorial and customer restrictions identified above, there are no market share safe harbors for the remaining types of potentially anti-competitive conduct identified in the Auto Guidelines.

In short, the Auto Guidelines provide a substantive set of additional antitrust rules for the automotive industry, which will impose additional compliance burdens on OEMs – as well as potentially even prompting a re-think of their arrangements with distributors, repair shops and other partner organizations.

Looking beyond the automotive sector, the biggest unanswered question is whether and if so in what form these new rules will be applied to other sectors. For instance, what about distributors which "only play an intermediary role" in the distribution process in other industries? Will the same exemption grounds apply to them? Conversely, will territorial or customer restrictions imposed by suppliers become vulnerable to regulatory intervention in sectors other than automotive?

IPR Guidelines

The IPR Guidelines comprise five chapters and 28 articles. Their structure and approach differ from those of the Auto Guidelines.

The IPR Guidelines are less prescriptive compared to the Auto Guidelines, but instead provide more of a framework on how to analyze antitrust problems in the IPR field. In other words, rather than determining that specific types of conduct can be illegal, the IPR Guidelines put forward the factors that should be considered in the analysis (often recognizing that conduct can be pro- or anti-competitive, depending on the underlying circumstances).

Against this background, several articles in the IPR Guidelines provide general guidance on the analytical approach and on the categories of anti-competitive conduct such as anti-competitive agreements, abuse of dominance, and merger control. By way of example, in a relatively more normative fashion than many of its other provisions, the IPR Guidelines put forward market share-based safe harbors. Like the Auto Guidelines, the IPR Guidelines have a 30% market share safe harbor for vertical agreements. At the same time, in contrast to the Auto Guidelines, the IPR Guidelines also put forward a 20% market share safe harbor for horizontal agreements. It should, however, be noted, that both safe harbors only apply to conduct not specifically prohibited by the AML, hence cartel-types of agreements and RPM cannot benefit from the safe harbors. The scope of the safe harbors in the IPR Guidelines is much broader (applying to all but the AML-listed type of conduct), while the "safe harbor" in the Auto Guidelines (named the "presumption of exemption") only applies to territorial and customer restrictions.

The IPR Guidelines also contain specific guidance on more narrowly defined types of conduct. In the agreements area, these types include joint R&D; cross-licensing; exclusive grant-backs; no-challenge clauses; standard setting; and other clauses. Under this catch-all title of "other clauses," there is guidance on frequently seen licensing practices, such as restrictions on the field of use, sales, dissemination channel, scope and counterparty, or product output, and non-compete obligations. In the abuse of dominance area, the listed types of conduct include excessive royalties; refusal to license; bundling; unreasonable conditions; and discriminatory licensing practices. In the merger control area, a key focus of the IPR Guidelines is on IPR-related remedies, which to a large extent codify existing and past authority practice.

Beyond anti-competitive agreements, abuse of dominance and merger control, the IPR Guidelines do not provide specific guidance on administrative monopoly conduct (like the Auto Guidelines do), but have a chapter on "other circumstances." In that chapter, the IPR Guidelines discuss patent pools, specific problems in relation to standard-essential patents, and collective copyright management (in Europe generally referred to under the heading "collecting societies").

Overall, as mentioned, the IPR Guidelines are less prescriptive than the Auto Guidelines. The SAMR Explanations note that the IPR Guidelines are drafted deliberately in a way that avoids imposing overly-prescriptive rules so that SAMR has flexibility and retains the ability to issue more detailed rules based on how China develops more technology giants and SAMR's enforcement experience in the future. In a way, this feature could also be interpreted as creating more confusion for market players: while the IPR Guidelines recognize that certain types of listed conduct can be pro-competitive under given circumstances, they also state that the same conduct can have anti-competitive effects under other circumstances (if the safe harbors are exceeded), without however providing clear-cut guidance. This confusion may translate into uncertainty and the need for additional legal advice, even for frequently-seen licensing practices such as, say, field of use restrictions or prohibitions on challenging the validity of the licensed IPR.

Leniency Guidelines

The Guidelines on the Use of the Leniency System for Horizontal Monopoly Agreements ("**Leniency Guidelines**") comprise 16 articles. They are not organized into chapters.

There are basic provisions on leniency in the AML and some, but very limited, guidance in other AML implementing rules. However, there is a general recognition that the leniency rules need to be more detailed and the process more transparent in order to be effective. Indeed, according to the SAMR Explanations, one of the reasons why there have been only few leniency applications in China in the past may have been due to the absence of a fully-fledged leniency program with concrete and practical rules. The Leniency Guidelines aim to fill this relative vacuum left by the sparse prior rules and insufficient guidance through case practice.

The leniency regime in place now is largely in line with international practice. To kick-start the process, a whistle-blower needs to file a leniency application with the following information and "important evidence" on these points:

- basic information on the parties to the anti-competitive agreement (including their name, address, contact details and representatives);
- situation underlying the anti-competitive agreement (including duration, location, content and specific persons);
- main content of the anti-competitive agreement (including products/services, price and quantity) and the circumstances of its conclusion and implementation;
- impacted geographic scope and market scale;
- duration of the implementation of the anti-competitive agreement;
- explanations on the evidence material;
- information on whether leniency applications have been made with overseas authorities; and
- other relevant documents or materials.

A leniency application can be filed with SAMR (seemingly not with its provincial offices) any time during the procedure before SAMR has issued the upfront notice of administrative penalty, even if the case at hand has already been registered on file and an in-depth investigation has started. Anonymous or upfront consultations with SAMR are possible before filing, but the Leniency Guidelines do not state if the authority would reveal to an anonymous inquirer about its possible ranking in the leniency application order.

Importantly, the application can be made both orally or in writing. An oral application can be made at SAMR's office where the statements are recorded and put in writing, for the applicant to sign.

After receiving the leniency application, SAMR will check it for completeness and, if satisfied, issue a notice of receipt indicating the time of the application. If the above-mentioned categories of information are provided in the application but SAMR finds the evidence to be still incomplete, the applicant will be granted a "grace period" of 30 days (potentially extended to a maximum of 60 days) to complement the application.

As long as it provides sufficient important evidence (allowing SAMR to open an investigation or otherwise adding substantial value to SAMR's investigation) and complies with the Leniency Guidelines' cooperation requirements, the whistle-blower ranked first in priority order can get immunity or a reduction in the fine of at least 80%. If the leniency application is made before case acceptance or the start of the investigation procedure, the applicant can benefit from immunity. A "ringleader" organizing the cartel cannot benefit from full immunity. The second and third whistle-blowers in line can obtain reductions of between 30-50% and 20-30% of the fines respectively. Generally speaking, SAMR will grant immunity and fine reductions to a maximum of three companies per case, but retains discretion to enlarge the beneficiary group in special circumstances. If additional companies' leniency applications are accepted, the maximum reduction in the amount of the fine will be 20%.

In addition to fines, companies breaching the AML can also be sanctioned by way of disgorgement of "illegal gains" (*e.g.*, overcharging in price-fixing cartels). Interestingly, the Leniency Guidelines allow (but do not oblige) SAMR to give the same treatment (*i.e.*, immunity or reduction of penalty) for the "illegal gains" obtained by the leniency applicant.

Overall, the Leniency Guidelines provide more details on the procedure and the criteria for a successful leniency application, and thereby give more certainty to potential applicants. At the same time, there are certain discretionary elements still built into the system which could have a deterrent effect on companies thinking about whether to blow the whistle.

The key item that may deter potential whistleblowers is, perhaps, the provision in the Leniency Guidelines that seems to require SAMR to publish its decisions on leniency applications. Recently, arguably there has been a trend for leniency programs becoming less popular on a global basis, due to the increased use of information provided within the context of these programs in private litigation. Given that a leniency application by definition comprises an admission of guilt, if an antitrust authority's decision publicly discusses details of any leniency application, then there is a distinct risk that customers or other third parties may use the decision in private lawsuits against the whistle-blower. Therefore, this provision in the Leniency Guidelines may have the effect of discouraging whistle-blowers from coming forward. In addition, the requirement to identify the leniency application(s) filed in other jurisdictions may affect a company's strategy as to whether and if so where to file for leniency.

Commitments Guidelines

The Guidelines on Commitments by Business Operators in Monopoly Cases ("**Commitments Guidelines**") comprise 18 articles. Like the Leniency Guidelines, they are not structured into chapters.

The Commitments Guidelines implement the procedural option for a case to end with commitments given by the company under investigation for suspected anti-competitive acts, without a finding of illegality. The basic scope of this option is already sketched out in the AML. The Commitments Guidelines now attempts to flesh out the process in more detail.

The Commitments Guidelines read in a quite technical (procedural) way. The basic framework is that either the company under investigation or SAMR (again, not its provincial branches) can propose using commitments to close the procedure. The commitments process cannot be used in cartel cases.

As a first step after the initial launch of a commitments discussion, the company needs to submit a proposal for commitments – whose requirements the Commitments Guidelines describe in some detail. In terms of the moment of submission, the proposal can no longer be made after the company has received the upfront notice of administrative penalty or after SAMR believes the conduct is anti-competitive.

After receiving the commitments proposal, SAMR will launch a public consultation process (of at least 30 days) if the underlying conduct under investigation is found to have already affected a large number of unspecified companies or consumers. Following the consultation process, SAMR may ask the company under investigation to amend its commitments proposal. More generally, SAMR will review and assess the proposal. If it finds the commitments satisfactorily address the perceived competition problems, then it will suspend the investigation as a first step.

After the suspension decision, the company will need to report about its compliance with the commitments and SAMR will monitor in that respect. If SAMR is satisfied with the company's compliance, it can adopt the decision to close the procedure as a last step.

Both the suspension and closure decisions are to be published.

Overall, the Commitments Guidelines are a useful, if somewhat technical, document.

Takeaways

The four Guidelines were first released in a book launched at the beginning of August 2020. However, the date of their enactment is indicated to be 4 January 2019. Although this is not the first time that new rules have been released "in book form" first, it is, to say the least, an unusual way of proceeding.

China's Legislation Law's requires administrative law and ministerial rules to be published in the relevant government gazette or designated newspaper. Given this, these Guidelines are not law with immediate binding effect. In a way, this is not surprising. After all, the Guidelines are just that: guidelines.

However, the SAMR Explanations indicate that these Guidelines are meant to guide antitrust enforcers as much as market players. Against this background, the question on the Guidelines' promulgation and effectiveness may become moot if and when SAMR launches an investigation against a company based on the new rules. Several cases in the past 12 years since the AML came into force have shown that Chinese courts also refer to antitrust guidelines adopted by or for the antitrust authorities. In short, market players need to be prepared to comply with the new rules under the four Guidelines as soon as practicable.

Unfortunately, the scope of the substantive Guidelines – the Auto Guidelines and the IPR Guidelines – is not entirely clear. In particular, it is not clear whether SAMR and the courts will apply the new rules in the Auto Guidelines (in particular those related to vertical agreements) to other sectors of the economy. In addition, the IPR Guidelines set out a framework to analyze IPR-related antitrust issues, but fail to provide clear guidance on what is allowed and what is not. The accompanying SAMR Explanations do not sufficiently resolve that ambiguity.

In short, the four Guidelines will need further clarification, through additional rules or through a period of practical implementation. Perhaps that is what the Guidelines are intended to do: essentially to mark a new era in Chinese antitrust enforcement, with broader and more detailed rules and, by extension, obligations on market players.

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