

China Insight



New Regulations on Monopoly Agreements

Dear Sir or Madam,

Please find our update on the New Regulations on Monopoly Agreements.

Kind regards,

CMS, China

On 26 June 2019, the State Administration for Market Regulation (the "**SAMR**") issued the *Interim Provisions on the Prohibition of Monopoly Agreements* (the "**Interim Provisions**"), together with two other interim provisions, i.e. the *Interim Provisions on the Prohibition of the Abuse of Administrative Power to Eliminate or Restrict Competition* and the *Interim Provisions on the Prohibition of Abuse of Dominant Market Position* (collectively, the "**Three Sets of Provisions**"). All Three Sets of Provisions will come into force on 1 September 2019.

Upon the effectiveness of the Interim Provisions on 1 September 2019, both, the *Provisions on the Procedures for the Industry and Commerce Administration to Investigate and Handle Cases of Monopoly Agreement and Abuse of Dominant Market Position* and the *Provisions of the Industry and Commerce Administration on Prohibition of Monopoly Agreements*, which were previously issued by the former State Administration for Industry and Commerce (the "**SAIC**") will become invalid.

On 2 July 2019 the China Market Regulation News published the interpretations by the Head of the Legal Department of the SAMR regarding the major contents and "highlights" of the Three Sets of Provisions in the form of Q&As (the "**Interpretations**").

Below are the major contents and "highlights" of the Interim Provisions.

1. PRC Competition Law Enforcement Authorities

The SAMR shall be responsible for the anti-monopoly law enforcement relating to monopoly agreements. Upon the authorization granted by the SAMR, the administration for market supervision on the provincial level under the supervision of the SAMR shall also have anti-monopoly enforcement rights relating to monopoly agreements (collectively, the "**PRC Competition Authorities**").

2. Illegal *per se* or Rule of Reason on Monopoly Agreements

Both price-related monopoly agreements and non-price-related monopoly agreements shall be governed by the Interim Provisions.

a) The Prohibition + Exemption Principle

According to the Interim Provisions, both, horizontal monopoly agreements (i.e. agreements between competing undertakings which contain clauses of price fixing, output restrictions, market divisions and customer allocation, restricting new technology as well as collective boycott) as listed in Article 13 of the *PRC Anti-Monopoly Law* and vertical monopoly agreements (i.e. agreements between an undertaking and its trading partners which contain clauses of resale price maintenance and minimum price fixing) as listed in Article 14 of the *PRC Anti-Monopoly Law* are illegal *per se* unless the concerned undertakings can prove that the exemption requirements as listed in Article 15 of the *PRC Anti-Monopoly Law* are met (the “**Hardcore Monopoly Agreements**”).

According to Article 15 of the *PRC Anti-Monopoly Law*, an exemption situation exists when undertakings can demonstrate that the monopoly agreements they entered into are for the purposes of improving technology or research and development, enhancing product quality, reducing costs, improving product efficiency or unifying product specifications or standards, enhancing overall competitiveness of small and medium sized enterprises and aiming at achieving public interests such as environmental protection or energy conservation, etc.

However, based on the publicly available decisional practices by the PRC Competition Authorities, so far there are no Hardcore Monopoly Agreements which have been exempted according to Article 15 of the *PRC Anti-Monopoly Law*. Therefore, it seems that it has been difficult if not impossible for undertakings to the Hardcore Monopoly Agreements to provide evidence that the relevant agreements can be exempted according to Article 15 of the *PRC Anti-Monopoly Law*.

In addition to the Hardcore Monopoly Agreements which are illegal *per se* and the Prohibition + Exemption Principle applies, the Interim Provisions also provide for “catch-all” clauses, which grant discretionary powers to the PRC Authorities in deciding whether the Prohibition + Exemption Principle should also be applied to other types of monopoly agreements which are not expressly specified in the Interim Provisions.

b) Rule of Reason Analysis

The rule of reason analysis will be adopted on monopoly agreements which are not Hardcore Monopoly Agreements. To apply the rule of reason analysis, the factors to be considered include the following, among others:

- (1) the fact whether the undertaking has reached and implemented the agreement;
- (2) the market competition status;
- (3) the market share of the undertaking in the relevant market and its control over the market;
- (4) the impact of the agreement on the price, volume and quality of commodities;
- (5) the impact of the agreement on market access, technological progress, etc.; and
- (6) the impact of the agreement on consumers and other undertakings, etc.

3. No Safe Harbor System

Before the promulgation of the Interim Provisions on 26 June 2019, the SAMR had published on 3 January 2019 the *Provisions on the Prohibition of Monopoly Agreements* (Draft for Comment) (the “**Draft Interim Provisions**”) for public comments.

a) The Draft Interim Provisions contained a Safe Harbor System. Such Safe Harbor System in the Draft Interim Provisions did not apply to Hardcore Monopoly Agreements but only to other agreements.

- (1) In respect of horizontal monopoly agreements, should other legal requirements be also met, it is in line with PRC competition law in case the combined market shares of the competing undertakings in the horizontal agreements are less than 15% on the relevant market;
- (2) In respect of vertical agreements, should other legal requirements be also met, it is in line with PRC competition law if the market share held by the supplier does not exceed 25% of the relevant market on which it sells the products and the market share held by the distributor does not exceed 25% of the relevant market on which it purchases the products.

As such, for both horizontal and vertical agreements (except Hardcore Monopoly Agreements) concluded and/or implemented by undertakings which have insignificant market powers as listed in 3. a) above,

the Safe Harbor System would apply. If an agreement falls in the scope of the Safe Harbor System, it is considered to be legal and it will not be subject to further scrutiny by the PRC Competition Authorities.

- b) However, unfortunately, the Safe Harbor System did not make it from the Draft Interim Provisions into the actually enacted Interim Provisions.

According to the Interpretations by the SAMR, due to the fact that there are no legal provisions regarding market shares for the Safe Harbor System under the *PRC Anti-Monopoly Law*, the relevant clauses in this regard were taken out from the finally enacted Interim Provisions. Thus, the undertakings to monopoly agreements under investigation shall continue to bear the burden of proof that the exemption requirements of Article 15 of the *PRC Anti-Monopoly Law* are met.

When a PRC Competition Authority determines whether a monopoly agreement under investigation falls under any of the "circumstances" as listed in Article 15 in the *PRC Anti-Monopoly Law*, the following factors shall be considered:

- (1) the specific form and effect of the agreement to satisfy the circumstances;
- (2) the causal link between the agreement and the satisfaction of the circumstances;
- (3) whether the agreement is a necessary condition for the satisfaction of the circumstances; and
- (4) any other factor proving that the agreement falls under the scope of the circumstances.

Further, to determine whether consumers can share the benefits arising from an agreement, the PRC Competition Authorities shall consider whether consumers obtain benefits in terms of commodity prices, commodity quality, and commodity categories because of the conclusion and implementation of the agreement.

4. Commitment Program and Leniency Program

In addition to the "exemption" requirements mentioned in the above Item 3 b), the Interim Provisions also provide for a Commitment Program and a Leniency Program.

a) Commitment Program

According to the Commitment Program, during the investigation process, the undertaking under the suspected monopoly agreement may apply for the suspension of the investigation and undertake to take specific measures to eliminate the influence of the behavior within the time limit approved by the PRC Competition Authorities.

The application in writing for suspension of the investigation shall specify:

- (1) the facts in respect of the suspected monopoly agreement;
- (2) specific measures the undertaking commits to adopt to eliminate the consequences of the behavior;
- (3) time limit for fulfilling the commitment; and
- (4) other content that needs to be committed.

The PRC Competition Authorities shall investigate and verify the suspected monopoly agreement. If it constitutes a monopoly agreement, the PRC Competition Authorities shall no longer accept the application for the suspension of the investigation proposed by the undertaking. Instead, they shall make a decision in accordance with the law.

According to the Commitment Program in the Interim Provisions, firstly, the undertaking under the suspected monopoly agreement shall submit the application in writing before the decision is made by the PRC Competition Authorities that the suspected monopoly agreement constitutes the monopoly agreement. Secondly, for horizontal monopoly agreements containing clauses of price fixing, output restrictions and market divisions and customer allocation, the Commitment Program is not applicable.

b) Leniency Program

- (1) Provision of Material Evidence

According to the Leniency Program, where an undertaking as a party to a monopoly agreement voluntarily reports the relevant circumstances for the conclusion of the monopoly agreement and provides "material evidence", an application for mitigated punishment or exemption from punishment may be filed in accordance with the law.

The term "material evidence" refers to evidences which play a critical role for the PRC Competition Authorities to launch an investigation of a suspected monopoly agreement or to identify the existence of a monopoly agreement. The scope of evidences includes, among others, the undertakings as parties to the monopoly agreement, the scope of the concerned commodities, the content and method of the concluded monopoly agreement, as well as the actual implementation status of the monopoly agreement.

There is no time limit for the undertakings to submit the application for the Leniency Program according to the Interim Provisions.

(2) Grant of Leniency

The PRC Competition Authorities shall decide whether to give a mitigated punishment or exempt the undertaking from punishment by considering such factors as the time sequence of the voluntary reporting by the undertaking, the degree of importance of the evidence provided, as well as the relevant information on the conclusion or implementation of the concerned monopoly agreement.

For the first undertaking applying for the Leniency Program in an investigation case, the punishment may be exempted or the amount of fines may be reduced by the PRC Competition Authorities by not less than 80%. For the second applicant, the amount of fines may be reduced by 30% to 50%. For the third applicant, the amount of fines may be reduced by 20% to 30%.

5. Disclosure of the Decisions of the PRC Competition Authorities

The PRC Competition Authorities shall make public announcement in accordance with the law after making decisions on administrative handling. The administrative punishment information shall be disclosed to the public through the National Enterprise Credit Information Publicity System in accordance with the law.

Therefore, in addition to the fines possibly imposed by the PRC Competition Authorities, the concerned undertaking also suffer huge reputational damage due to the conclusion and/or the implementation of monopoly agreements.

In summary, by combining the relevant provisions in respect of monopoly agreements previously issued by the SAIC, the Interim Provisions issued by the SAMR include both substantial and procedural aspects, with the aim to increase law enforcement transparency and to enhance a predictable law enforcement environment. As such, the Interim Provisions have provided theoretically a uniform guidance for undertakings for monopoly agreements under the unified competition law enforcement system in the PRC.

However, due to the lack of detailed requirements or specific compliance standards (the lack of the Safe Harbor System, for example) in the Interim Provisions, it might as well be that in practice it will continue to be difficult for undertakings to ensure how to be compliant with PRC competition law. According to recently available news, the SAMR is in the middle of drafting interpretations for the Three Sets of Provisions, which will hopefully provide a more practical and clearer compliance guidance in practice for the undertakings in terms of monopoly agreements and other relevant matters under the Three Sets of Provisions.

In case you have questions or for further information, please contact the author of this newsletter:



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