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Top developments and predictions for Anti-Trust in China

2018 - 2019



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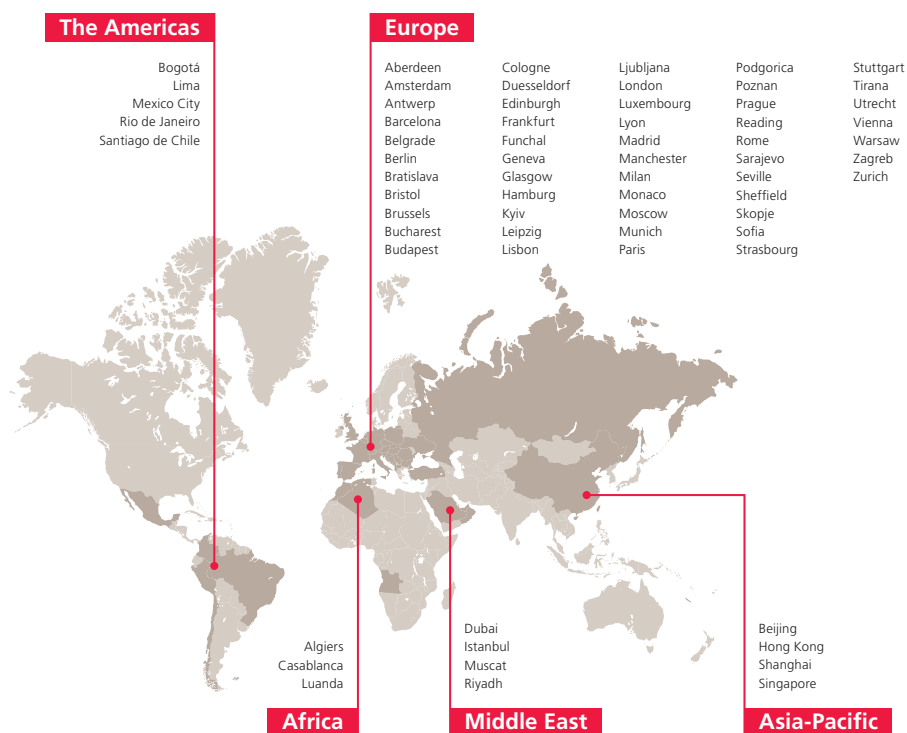
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Overview

As we enter the Year of the Pig, we take a look back at the top 10 developments of 2018 and towards what lies ahead with our top 10 predictions of 2019, for you and your business operating in China.

A key development in 2018 has been the re-structuring of the competition authoritative bodies to form SAMR, which has ultimately led to stricter enforcement on merger filings and the largest fine on horizontal anti-trust agreements to-date. Ultimately, we expect to see greater scrutiny by SAMR and other competition authorities on the digital economy, especially in relation to the dominant positions of Baidu, Alibaba and Tencent, and we shall be keeping a watchful eye on the anticipated result of the anti-trust investigation on the Didi-Uber merger.

As always, we will be closely monitoring these ongoing developments and predictions during the course of the year, providing you with regular updates and analysis as they happen through our various free know-how platforms: our eAlert service, Law-Now, LinkedIn at 'CMS Asia Pacific' and WeChat at 'CMSAsia'.

For now, we hope you find our reflections and predictions of interest and help to your business as you plan for the year ahead.

If you would like to discuss any of the developments with us, please do let me know.



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Top 10 developments of 2018



The establishment and structure of SAMR: Previously, China's competition laws have been enforced by three separate authorities, namely MOFCOM, NDRC and SAIC, each with complete autonomy as to their respective areas of enforcement, under the supervision of the Anti-trust Commission of the State Council. In 2018, these three anti-trust authorities merged into one newly established authority, the State Administration for Market Regulation (SAMR). SAMR is split into 27 different bureaus, the most important bureau for anti-trust purposes being the Anti-monopoly Bureau. Before SAMR was established, the previous power-sharing structure between the three authorities had caused inconsistency and inefficiency in the creation and enforcement of anti-trust legislation. The integration of the enforcement powers into one single authority is expected to resolve the ambiguity in anti-trust rules and guidelines, formulate a more robust and professional workforce and eventually improve the efficiency, predictability and transparency of anti-trust enforcement and legislation in China.



Strict enforcement on merger control filings by SAMR: SAMR continued the strict attitude towards merger control filing cases filed in 2018. Last year, SAMR issued conditional clearances to only four merger control filings, containing complicated behavioural and structural remedies. The investigations had taken more than 365 days on average for each case. In addition, SAMR has shown stricter enforcement of the *Anti-monopoly Law of the People's Republic of China* (PRC) by imposing greater and heavier penalties on "gun-jumping"; last year, SAMR published 13 administrative penalties for gun-jumping, which marked 2018 as the year of the highest number of penalties for gun-jumping. Among these 13 penalties, seven penalties were issued for acquisitions and six were issued for the set-up of joint ventures. It is worth noting that five of the penalties were in relation to activities that had occurred over six years ago, between 2009 and 2012. SAMR has not commented on why it had initiated investigations on old gun-jumping activities, but it is interesting to note that investigations regarding some of the cases were initiated during the review of subsequent, and more influential, merger control filings made by the same group.



SAMR continued anti-trust investigation on Didi-Uber Merger: The merger between Didi, China's leading ride-sharing mobile platform, and Uber's China business in August 2016 had sparked concerns over a potential monopoly due to the fact that no merger control filing was made with the regulatory authority at the time. In November 2018, the head of the Anti-monopoly Bureau of SAMR revealed to the public in a press conference that SAMR is still comprehensively assessing the deal's impact on competition and development within the industry. The complicated VIE structure, the scope of the relevant market and turnover thresholds are suspected to be the most challenging points of the investigation. Although no conclusion has yet been issued, the on-going investigation over this deal indicates that the Chinese government is focusing greater attention on competition in the new economy.



WeChat held to not be abusing a dominant market position in the "emojis" market: In 2016, a Shenzhen lawyer named Mr. Xu had created several "emojis" to promote and market his legal services, with the intention to publish these emojis via WeChat. WeChat refused to approve and publish these emojis since containing marketing materials that may negatively affect general user experiences on the platform. This resulted in a legal battle between Mr. Xu and WeChat on whether WeChat had abused its dominant market position by rejecting his emojis. After several appeals, the Supreme People's Court finally ruled this year that WeChat did not hold a dominant market position in the relevant market, which was determined to be the "Internet emoji promotion services market". WeChat was therefore entitled to establish and implement its own reasonable rules, and WeChat's rejection of Mr. Xu's emojis did not cause any substantial harm to competitors and therefore did not constitute an abuse of a dominant market position. In addition, the Supreme People's Court also pointed out that these types of disputes with an obviously minimal substantial impact upon competition should be resolved by way of other legal regimes in the first instance, instead of under anti-trust law.

5



Three API manufacturing enterprises fined over RMB 12 million for entering into horizontal anti-trust agreements:

The pharmaceuticals industry remained under heavy anti-trust scrutiny in China last year. Following the publication of the *Guidelines on Pricing Behaviours in relation to Drugs that are in Short Supply and Active Pharmaceutical Ingredients* (API) in November 2017, SAMR had issued its largest fine to date of RMB 12,833,800 to three API manufacturing enterprises for entering horizontal anti-trust agreements in 2018. The three API manufacturing enterprises are the only manufacturing enterprises of glacial acetic acid, an ingredient of haemodialysis concentrate. Following discussions, the enterprises entered into a number of horizontal anti-trust agreements to raise the price of glacial acetic acid substantially. Following its decision, SAMR stated that the behaviours of the three enterprises had severely damaged the order of the market, increased the burden of downstream enterprises and injured the treatment of patients. We anticipate that the API market will continue to be a key focus of anti-trust enforcement in the future.

6



17 Tianjin Port related companies fined over RMB 45 million for entering into horizontal anti-trust agreements:

Monopolistic behaviour happens frequently in the ports industry. In 2017, NDRC had announced that many port-related enterprises in Shanghai and Tianjin were found to have violated anti-trust laws and regulations, and it had instructed the local competent authorities to strengthen anti-trust enforcement of infringing companies. In December 2018, the Tianjin competent authority imposed fines of more than RMB 45,100,000 on 17 Tianjin Port-related companies for entering into horizontal anti-trust agreements. The authority found that the 17 enterprises had communicated and conspired to enter into horizontal anti-trust agreements to add charging items and increase prices since 2010. During the investigation, the authority conducted dawn raids on several enterprises simultaneously and the enterprises have since admitted to and stopped their monopolistic behaviours, with the aim to improve their respective services.

7



Two subordinate companies of CNPC fined over RMB 84 million for entering into vertical anti-trust agreements:

In January 2018, two subordinate companies of China National Petroleum Corporation (CNPC) in Daqing City, Heilongjiang Province were fined RMB 84,060,000 by SAMR for entering into vertical anti-trust agreements with 13 downstream compressed natural gas parent stations, in order to fix a floor price for resale of compressed natural gas to subsidiary stations. SAMR stated that the two companies had severely restricted and excluded competition within the natural gases market and had damaged the legitimate rights and interests of end users and consumers. Compared with horizontal anti-trust agreements, vertical anti-trust agreements are rare and this is the first case of vertical anti-trust agreement enforcement in the natural gases industry.

8



Two API enterprises fined over RMB 12 million for abusing its dominant market position:

In January 2019, SAMR issued fines of RMB 12,430,000 to two chlorphenamine maleate companies for abusing their dominant market positions. Chlorphenamine maleate is widely used as an API for cold medicines. One of the enterprises is the biggest manufacturing company of chlorphenamine maleate in China, whilst the other is the only qualified import agent of chlorphenamine maleate in China since 2018. SAMR believed that the two companies held dominant market positions in the chlorphenamine maleate market, and stated that they had colluded to abuse such positions to treat downstream enterprises unfairly.

9



Newly issued PRC E-Commerce Law touches upon anti-trust aspects: The *PRC E-Commerce Law* came into effect on 1 January 2019 and addressed the growing concerns of competition issues in the e-commerce sector. The *PRC E-Commerce Law* differentiates between three types of e-commerce players, a necessary distinction for scoping the relevant market and market shares. In comparison to the *PRC Anti-monopoly Law*, the *PRC E-Commerce Law* has provided more specific considerations when determining whether an e-commerce player holds a dominant position or not; the *PRC E-Commerce Law* also addressed concerns on abuse of dominance by platform operators, including prohibiting platform operators from imposing upon its operators on platform unreasonable restrictions or conditions regarding any transactions or prices, or collection of unreasonable fees from its operators on platform. The allocation of liability between a platform operator and its operators on platform is also introduced under the new law.

10



First individual to be penalised for impeding a NDRC investigation: On 22 August 2018, the NDRC's competent branch in Guangdong issued a penalty to Mr Xilian Ye, the General Manager of one of the distributors for Toyota Automobile, for impeding an investigation over the distributor in 2017. Mr Ye had pulled out the U-Key used by NDRC's official to collect evidence, removed cables and battery chargers, refused to provide the necessary materials required by officials, and refused to sign and receive legal documents. Mr Ye was fined RMB 8,000 for his misconduct. Although the amount of the penalty was minimal, it was the first time an individual has been penalised for impeding a NDRC investigation.

Top 10 predictions of 2019

1



Internet: In China, the three Internet giants - Baidu, Alibaba and Tencent (BAT) - have all gained control in many sectors, including both online and offline markets. Although there is some competition from the West, due to the “Great Chinese Fire Wall” and the growing Chinese market, BAT have extended their dominant positions overseas. The rapid development of the BAT companies sparks huge concerns of anti-trust and anti-unfair competition issues. With the *PRC E-Commerce Law* already in force since the New Year, we expect further regulations and enforcement actions to be in place to address specific competition concerns in the Internet sector in the foreseeable future.

2



Sharing economy: Following SAMR anti-trust investigation of the Didi-Uber merger, anti-trust investigations into the sharing economy continue to be a hot topic in 2019. Whilst 2017 saw the insolvency of many second-tier bike-sharing companies, 2018 witnessed significant financial difficulty for ofo, one of the two first-tier bike-sharing companies in China. The market speculates that ofo may enter bankruptcy soon and Mobike may obtain a de-facto monopoly in the domestic bike-sharing market. If Mobike continues to dominate the market without any strong competitors, the authorities may draw from their experiences in other industries to establish a framework to regulate Mobike and other de-facto monopolists in the overall sharing economy.

3



Automobiles: After a lengthy legislative process that lasted for several years, in November 2018, Mr. Lu Wangli, vice-director of Anti-trust Bureau of SAMR, announced at an automobiles-related conference that draft anti-trust guidelines for the automobiles sector had entered the final stage. In accordance with Mr. Lu’s statement, the draft will provide detailed assessment methods for the legality of competition behaviour and automobile enterprises can check against the draft to ensure that their competition behaviours comply with the relevant laws and regulations. The draft is expected to be solicited for comments later this year.

4



Pharmaceuticals: Pharmaceuticals, especially APIs, have been on the anti-trust regulator’s agenda and will continue to be a priority for 2019. In 2018, pharmaceuticals had also been one of the main enforcement targets of SAMR. Following its issuance of the biggest fine in the API field at the end of 2018, SAMR has just punished another two API companies on the second day of 2019. These actions could be an indicator of stricter enforcements and higher fines to come in the future.

5



Amendments to the *PRC Anti-monopoly Law*: After 10 years in force, a revision to the *PRC Anti-monopoly Law* may finally kick off in 2019. In November 2018, a top anti-trust official at SAMR stated that the draft revision of the *PRC Anti-monopoly Law* has been finished. The draft shall be submitted to the State Council’s legislative office for review, after which the office may publicise it for public comment. The official also stated that the revision may reflect the 10 years of experience from the implementation of the *PRC Anti-monopoly Law* and will use Western anti-trust achievements for reference. It is expected that some outdated areas will be addressed in the revision of the *PRC Anti-monopoly Law* to fit in with new developments of the anti-trust regime in China, one of which being the rise in penalties for gun-jumping activities.

6



Public utilities: Abuse of administrative powers happen frequently in the public utilities fields, such as the supply of municipal electricity, heating, public transportation and water. At the beginning of 2018, NDRC publicised various cases regarding improper competition in the public utilities field. NDRC states that these fields will continue to be a priority in 2019 and will strengthen inspections and enforcements in these fields. In addition, NDRC intends to establish several power trade centres to encourage competition and breakdown the natural monopoly trend in the power supplier industry.

7



AI and big data: In a data driven economy, it is only a matter of time before China begins to regulate competition in AI and big data. As e-commerce enterprises have been developing for many years, these enterprises have now accumulated a considerable amount of big data. These big data controllers now possess strong market competitive powers and are likely to be considered as dominant market players in the future. In addition, controlling big data may create algorithms to facilitate horizontal and vertical anti-trust agreements. These kinds of new pricing behaviours had come to the attention of European Union regulators and are expected to be put on the Chinese regulators' agenda in the future.

8



IP and anti-trust interaction: Tensions between anti-trust and intellectual property (IP) law have been identified as an area of concern for a long time and will continue to be on the radar of the authorities this year. The most eye-catching IP-related anti-trust case is still the series of disputes in relation to *Apple vs Qualcomm* globally. In November 2018, one of the top anti-trust officials at SAMR stated that an anti-trust guideline on IP will be issued soon to combat the complexity and difficulty of IP-related anti-trust cases. The guideline is expected to be finalised in 2019 and will provide detailed instructions on IP-related cases.

9



Further legislation progress: Further regulations are expected to be finalised in 2019. In 2017, MOFCOM issued the revised *Measures for Examination of the Concentrations of Undertakings* (Measures) for public comment. Despite MOFCOM no longer being in charge of the concentrations of undertakings examinations, the revised Measures may be formally issued by SAMR in 2019. We also expect that further pricing guidelines in various sectors may be issued. In addition, SAMR issued the draft *Provisions on the Prohibition of Monopoly Agreements* in January 2019. The draft further defines "monopoly agreements" under anti-trust law and provides safe harbour principles for certain agreements. We expect the draft to come into effect in 2019.

10



More investigations on transactions in the TMT sector: The long-awaited result of the two-year investigation into the Didi-Uber merger is expected this year. We anticipate clarification on the common questions asked in respect of transactions within the TMT sector, such as the scope of relevant markets, the turnover thresholds and the usage of complicated VIE structures. The result of the investigation is predicted to have a significant impact on activities within the TMT sector, as there had been a few such transactions over the past years without any merger control filings being made. It is advisable to take a prudent and cautious approach regarding merger control filings in order to avoid gun-jumping for transactions by TMT giants in 2019.



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