SLAUGHTER AND MAY

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Consultation launched on proposed changes to China's Anti-monopoly Law and new Merger Review Rules

The Chinese competition regulator started the New Year with a flurry of activity on the policy development front. Key among these were the public consultations released in early January on proposed amendments to China's 12-year-old **Anti-monopoly Law** (AML) and the **draft 'Interim Provisions on Undertaking Concentration Review'** (Merger Review Rules). These proposals signal important changes coming to China's antitrust and merger control regime in 2020.

Proposed amendments to the AML

New focus on the internet sector

In line with the global trend of increasing scrutiny over big tech and big data, SAMR is proposing to add to its arsenal enforcement tools specifically designed for analysing competition concerns in the tech sector.

At a high level, "encouragement of innovation" has been added as a new objective of the AML. A non-exhaustive list of factors to be considered in assessing dominance in the internet sector is also added, including network effects, economies of scale, lock-in effects, and the ability to access and process data. Although no additional obligations have been imposed on technology companies in the draft, the proposed changes signal potential greater scrutiny of the tech industry in China.

Stricter penalties

As was widely anticipated, the proposed amendments to the AML introduce stricter penalties for violations of the AML, particularly in relation to merger control.

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

- First, where an undertaking commits any one of four specified violations, including failure to notify a transaction, gun-jumping, breach of a requirement in a conditional clearance decision and breach of a prohibition decision, SAMR may impose a fine of up to 10% of the undertaking's sales (without specifying whether this refers to global or Chinese sales) in the preceding year.

- Second, under the proposed amendments, undertakings will be "held accountable" for the truthfulness of the notification and relevant materials, but without further clarification on what this means and the potential consequences.

- Third, where undertakings reach monopoly agreements (e.g. price-fixing) which have not yet been implemented, it is proposed that the penalty will increase from the current RMB 500,000 (approximately £56,000) to a maximum of RMB 50 million (approximately £5.6 million).

- Finally, the draft amendments also state that criminal consequences will be pursued if the monopolistic conduct amounts to a criminal offence. Contraventions of the AML are not criminal offences, but the proposed amendment makes it clear that the Chinese Criminal Law will apply to anti-competitive behaviour that is also criminal in nature, even if the AML (generally carrying civil liability) applies. In addition, any potential future revisions of China's Criminal Law could also have an impact on antitrust enforcement.

While these changes are clearly intended to increase deterrence against breaches of the AML, how SAMR interprets and applies these provisions will prove to be key. The proposed changes give much greater discretion to SAMR in deciding the level of fines and, with it, increased uncertainty to companies under investigation. It may also give companies greater incentive to defend their position and challenge SAMR's approach in finding a breach or determining the level of fines, as there is potentially much more at stake.

Introduction of a "stop-the-clock" system in merger review

Under the AML amendment proposals, the merger review procedure may now be suspended under three specific circumstances: (1) if the notifying party files for or agrees to a suspension; (2) if a party needs to submit supplementary documents or information as requested by SAMR; and (3) if SAMR and the notifying parties are negotiating remedies.

On the one hand, this could bring more flexibility for the notifying parties and SAMR without the need to "withdraw and re-file" (as is currently the case when SAMR does not have sufficient time to complete its review within the three statutory phases set out in the AML); on the other hand, the new system also has the potential to incentivise SAMR case handlers to request further information as a means of having more time to review the merger in question.

Powers to stop or unwind mergers not meeting the jurisdictional thresholds

The proposed amendments to the AML include a new article which confers powers on SAMR to stop or unwind transactions even when the jurisdictional thresholds are not met. While the current **Provisions of**

the State Council on Thresholds for Prior Notification of Concentrations of Undertakings already provide for review of transactions falling below the jurisdictional thresholds, the proposed new article 'elevates' its status by including it in the AML itself, and expands the scope to allow SAMR to stop and unwind any such transaction. This introduces a high degree of potential uncertainty, but the key lies in how often SAMR will exercise this power. It has been very rarely used to date and there is nothing to suggest that the introduction of this new article to the AML should change that.

New prohibition of coordinating or assisting other undertakings in reaching monopoly agreements

Under the current AML, parties who coordinate or assist others in reaching monopoly agreements, but are not participants to the monopoly agreements, are not caught under the prohibition on monopoly agreements. The proposed draft revised AML introduces a new article which addresses this loophole in the law, such that these organising/assisting parties can also be caught by the AML.

New Merger Review Rules

Following the release of proposed amendments to the AML, SAMR launched a public consultation on the new draft Merger Review Rules. Notably, the draft consolidates various existing measures, provisions, guidelines and regulations related to merger review. The draft Merger Review Rules also set out certain positions that SAMR has been adopting in practice, and thus helps to give more certainty to notifying parties.

One example is in the application of the simplified notification procedure. The current rules state that the simplified procedure is available where there is a change from joint to sole control in a joint venture. However, in practice, if the resulting sole controller competes with the joint venture, SAMR would apply an additional test and allow the simplified procedure only if the combined market share of the joint venture and the sole controller does not exceed 15%. This position is now explicitly specified in the draft Merger Review Rules.

Conclusion and future outlook

The proposed changes to the AML and the draft Merger Review Rules are a reflection of past Chinese competition law enforcement experience and future challenges anticipated by SAMR. These changes, if finalised into law, will herald more robust antitrust enforcement in China. While the codification and increased clarity of SAMR's practices are positive developments, the proposed changes may also entail a

certain degree of uncertainty and discretion in future enforcement by SAMR. Changes to the Chinese antitrust regime will be an area to look out for in 2020.

Other developments

Merger control

Advent International/Cobham merger: Secretary of State accepts undertakings to address national security concerns

On 20 December 2019 the UK Department for Business, Energy & Industrial Strategy (BEIS) announced that the Secretary of State for BEIS **decided** to accept the final undertakings to address the national security concerns identified in the proposed acquisition by Advent International, a US private equity firm, of Cobham plc, a UK defence company. As such, the proposed acquisition will not be referred to the Competition and Markets Authority (CMA) for a Phase 2 investigation.

The Secretary of State is of the view that the final undertakings mitigate the national security risks identified to an acceptable level. The **final undertakings** include the following key requirements: Cobham's new owners must maintain capability and continue to honour the terms of existing contracts, and notify the UK Government if there is a material change to the ability to supply key services; Cobham and its new owners must continue to protect sensitive Government information, and notify the UK Government if there are plans to sell the whole, or elements of, Cobham's business.

On 17 September 2019 the Secretary of State intervened in the proposed acquisition by issuing a European Intervention Notice to the CMA on the public interest ground relating to national security. In response, the CMA investigated and produced a report summarising the representations it had received relating to the national security concerns over the proposed acquisition. The parties then offered undertakings, which were out for public consultation from 19 November 2019 until 17 December.[1] The Secretary of State accepted the proposed undertakings (including some non-material amendments) on 20 December 2019.

On 20 December 2019 the Secretary of State also **issued** a Public Interest Intervention Notice on the grounds of national security, confirming her intervention in the proposed acquisition of Mettis Aerospace, a UK aerospace company, by Aerostar, a fund established in China. The CMA will investigate and report back to the Secretary of State on the jurisdictional, competition and national security issues involved by 17 March 2020. In addition, an order was made to prevent the companies from taking actions which might raise national security concerns while the transaction is being investigated. The order also prevents the completion of the transaction and any steps to be taken by Mettis to integrate its business with Aerostar's.

[1] Please see our previous **newsletter** for coverage of the launch of the public consultation.

Illumina/Pacific Biosciences merger collapses amid regulatory uncertainty

On 6 January 2020 the CMA **cancelled** its inquiry into the proposed acquisition by Illumina, Inc. of Pacific Biosciences of California, Inc., after being informed by the parties that the proposed acquisition had been abandoned.

The CMA opened an in-depth review into the transaction on 27 June 2019, and in December the U.S. Federal Trade Commission also authorised an action to block the deal. In calling off the deal the parties **cited** the *"lengthy regulatory approval process the transaction has already been subject to and continued uncertainty of the ultimate outcome"*.

Both parties are global suppliers of DNA sequencing systems to organisations across the world, including UK universities, laboratories and research institutes. The CMA was **concerned** that the proposed acquisition would remove a *"significant competitive threat to Illumina"*, which holds a 90 per cent market share in the relevant UK market, and that the loss of competition would reduce overall levels of innovation in the market. To address the competition concerns identified by the CMA, Illumina **offered** a "perpetual, royalty-free, irrevocable" licence of both parties' patents to *"any interested third-party undertaking for use in the field of single molecule, native long read sequencing systems and associated sequencing chemistries"*. However the CMA **considered** prohibition of the deal as the only effective remedy to address the competition issues identified.

Antitrust

CJ upholds three power cable cartel fines

On 19 December 2019 the European Court of Justice (CJ) dismissed appeals by three members of a power cable cartel (**Viscas**, **Furukawa Electric** and **Fujikura**) against **fines** imposed by the European Commission in April 2014.

Under the terms of the cartel, the Japanese and Korean members (including the appellants) did not compete for projects within Europe. European markets were then further allocated among the European cartel members. The appellants therefore argued that, given the greater extent of the European members' participation in the cartel, the Commission had breached the principle of equal treatment by applying the Fining Guidelines in the same way to all cartel members.

The CJ acknowledged that the Japanese and Korean producers were not in the same situation as the European producers, but held that in applying the Fining Guidelines equally to both types of producer, the Commission had not breached the principle of equal treatment. The Commission is able to take different situations into account at various stages of the fine calculation. In this case, the Commission had taken the greater participation of the European producers into account by applying a higher gravity multiplier when calculating the fines of the European cartel members.

An appeal by fellow cartelist Silec Cable SAS was previously **dismissed** on 14 November 2019. On 28 November the CJ partially accepted the appeal by cartelist ABB, whilst dismissing appeals by Brugg Kabel and LS Cable & System in their entirety (as reported in a previous edition of our **Newsletter**). Appeals by other members of the cartel, NKT, Nexans, Prysmian and Pirelli were heard between July and November 2019.

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