



Shanghai Anti-Monopoly Compliance Guide for Undertakings



Shanghai Administration for Market Regulation

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1 About this Guide

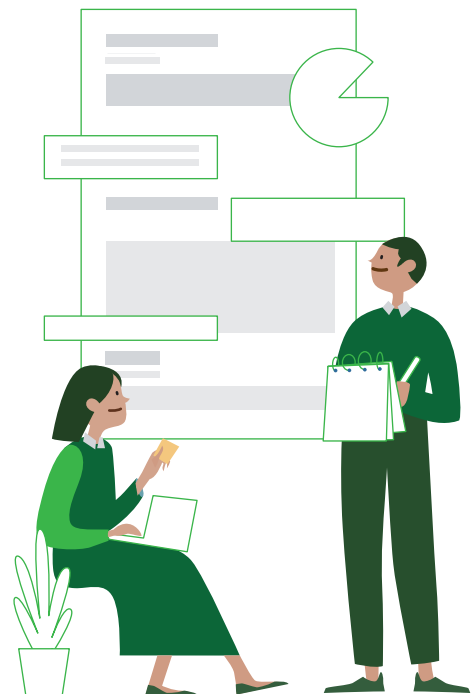
Shanghai Anti-monopoly Compliance Guide for Undertakings (“this Guide” or the “Compliance Guide”) aims to help undertakings in Shanghai ensure compliance with the Anti-monopoly Law of the People’s Republic of China (the “AML”), become aware of, prevent and control anti-monopoly risks, and establish a law-abiding corporate image. This Guide also aims to stimulate the creativity of companies and enhance their competitiveness.

This Guide is expected to create an interest in fair competition, optimize the market environment, support the implementation of competition policies, and improve the transparency of law enforcement in Shanghai, which will shape a unified, open and fair market system.

This Guide is a non-regulatory document. It only provides information for the purpose of general guidance and does not constitute any legal or other professional advice, nor any legal statement in any jurisdictions ▼

- This Guide is subject to the time limit, as laws, regulations and regulatory documents may be updated from time to time.
- For any specific issue, please seek advice from professionals.

This Guide can be used by industry associations as a guiding reference for anti-monopoly compliance.



2 About the Anti-monopoly Law of the People's Republic of China

Fair competition can inspire innovation, improve efficiency, and enable companies to provide better services and a wider range of choices at lower prices. In other words, efficiency and progress can be realized through fairer market competition. As competition intensifies in both the domestic and global markets, companies of all sizes should strive to improve efficiency as much as possible, rather than seek survival and development by anti-competitive means.

The competition law system is a fundamental legal construct in a market economy. China has enacted the AML in order to maintain market order, improve the efficiency of business operations, and prevent conspiracy between undertakings or the abuse of dominant market positions.

Under the AML, China's competition law system also includes the Interim Provisions on the Review of Concentrations of Undertakings, the Interim Provisions on Prohibition of Monopoly Agreements, and the Interim Provisions on Prohibiting Abuse of Dominant Market Positions.

The AML and its supporting regulations and provisions have equal statutory power. Any undertaking who fails to fulfill the obligations under the AML or engages in conducts prohibited by the AML will be penalized by the anti-monopoly enforcement authority (the "AMEA") unless their acts fall within specified exemptions. The maximum fine for AML violation is 10% of the undertaking's sales revenue of the previous year. A violating undertaking is also liable to civil litigation claims from other undertakings or customers.

3 Legal Liabilities

Any undertaking who fails to comply with the AML or fails to prevent or control anti-monopoly risks will be subject to legal liabilities.

Administrative liabilities

Any undertaking who reaches a monopoly agreement, abuses his dominant market positions, or implements concentration that eliminates or restricts competition in violation of the AML, unless there is a valid reason for exemption, or refuses or hinders anti-monopoly investigations, shall be investigated and penalized by the AMEA according to law.

Civil liabilities

Any undertaking who engages in monopolistic conducts and causes any loss to others shall assume civil liabilities.

Criminal liabilities

Any undertaking who refuses to cooperate with or hinders any anti-monopoly investigation to the extent that his misconducts constitute a crime shall be prosecuted for criminal liabilities.

Administrative liabilities under the AML

Where undertakings who reach monopoly agreements or abuse dominant market positions

The AMEA shall order them to cease doing so, confiscate their illegal gains, and impose a fine of 1% up to 10% of the total sales revenue (rather than sales revenue of relevant products) achieved in the previous year.

Where a guild helps the achievement of a monopoly agreement by undertakings in its own trade, a fine of less than 500,000 yuan shall be imposed thereupon by the AMEA.

Where undertakings implement concentration of undertakings

The AMEA shall order them to cease doing so, to dispose of shares or assets, transfer the business or take other necessary measures to restore the market condition within a time limit, and may impose a fine of less than 500,000 yuan.

Where undertakings refuse to cooperate with or obstruct anti-monopoly investigation

The AMEA shall order them to make rectification, impose a fine of less than 20,000 yuan on individuals, and a fine of less than 200,000 yuan on entities.

In serious cases, the AMEA may impose a fine of 20,000 yuan up to 100,000 yuan on individuals, and a fine of 200,000 yuan up to one million yuan on entities.

4 How to Ensure Compliance

Undertakings are encouraged to ensure their compliance with the AML, and will be appreciated for their pro-competition business conducts and their competitive corporate culture.

Still, there is no universal set of anti-monopoly compliance strategies suitable for all undertakings. Undertakings are recommended to formulate and implement compliance measures that suit their own conditions, including their business size, financial standing, and main sources of risks.

Based on previous experience, the following practices have been proved successful and therefore they are recommended for ensuring compliance with the AML:

- **Undertakings are advised to improve their internal AML compliance system, formulate compliance policies, and conduct regular assessments via an internal department or external professional agency. Undertakings may consider building:**

A reporting mechanism:

Reporting to the management and executives, covering detected risks and counter-measures.

A compliance culture:

Integrating honesty, trustworthiness, compliance, and fair competition into the corporate culture, and raising employees' awareness of competition and AML compliance.

An audit mechanism:

Conducting internal audits for major decisions and important agreements, and consulting internal legal counsellors, external lawyers, or other professional agencies on anti-monopoly risks.

A competition law compliance

consultation mechanism:

Including internal consultation, external expert consultation, and enforcement authority consultation.

A compliance commitment

mechanism: Getting directors, executives, managers, and supervisors to personally commit to competition law compliance in written statements.

A risk disposal mechanism:

Implementing proper control, timely mitigation, and appropriate solutions.

A training mechanism:

Offering continuous and regular trainings to employees to raise their awareness of prohibited acts and corresponding responses; Designing and implementing a more specific training program for employees on high-risk positions such as sales, procurement, sales network management, liaison with industry associations, and participation in industry, pricing and business decision making.

○ **Undertakings are advised to appoint a delegator to be responsible for AML compliance.**

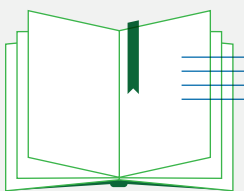
Where possible, undertakings may consider setting up positions such as legal specialists or competition compliance officers, and hiring professionals to fill the positions. Small undertakings may consider picking a director, executive, manager, or supervisor to take charge of this function.

At the same time, they are advised to clearly define the responsibilities of managers and competent departments, and coordinate measures and resources to prevent and control anti-competitive risks.

○ **Undertakings may consider formulating appropriate incentives and punishment systems to ensure the implementation of compliance policies.**

○ **Undertakings may consider seeking external professional support from law firms and economic analysts.**

○ **Undertakings must ensure the consistency of compliance efforts, make corrections as necessary and improve their practices based on the effectiveness of implementation.**



Any compliance effort made by undertakings must be meaningful. The top priority is substantive compliance with the AML. The effectiveness of compliance efforts shall be measured by how well anti-monopoly risks are prevented and controlled.

Superficial compliance cannot help undertakings prevent compliance risks. Any effective compliance arrangement must be based on a sound and complete managerial system and a healthy compliance culture which can be created in a top-down manner.

5 Identification and Prevention of Monopolistic Conducts

Four types of monopolistic conducts prohibited by the AML are ▼

Monopoly agreements reached between undertakings



Abuse of dominant market positions by undertakings

P12 ▼

Concentration of undertakings that lead, or may lead to elimination or restriction of competition

P17 ▼

Abuse of administrative power to eliminate or restrict competition

P19 ▼

Under the AML, “monopoly agreements” include **agreements, decisions and other concerted conducts** designed to eliminate or restrict competition.

For this purpose, “**agreements**” refer to written or oral agreements by which undertakings express an anti-competitive consensus.

“**Decision**” refers to the group consensus of undertakings which is executed by the group members. It is equivalent to an agreement reached by the members, considering the nature and consequences.

“**Concerted conducts**” refer to coordinated and consistent conducts of undertakings who have not entered into a written or oral agreement or taken a clear consensus-based decision, but may take coordinated actions to restrict competition, including market behaviors that are consistent but cannot be reasonably explained, intentional contacts and information exchange.

Monopoly agreements include two types

Monopoly agreement reached with actual or potential competitors
(Horizontal Monopoly Agreements)



Monopoly agreements entered into between two or more undertakings each of which operates at a different level of the production or distribution chain

(Vertical Monopoly Agreement)

> P10

Also called a “hard core cartel”, a horizontal monopoly agreement is equivalent to conspiracy or collusion.

A horizontal monopoly agreement is a conduct which is strictly forbidden and severely punished in almost every country, and is also the most important AML risk faced by undertakings.

All undertakings shall independently conduct sales and procurement and make independent decisions of relevant market behaviors.

Four types of monopolistic conducts prohibited by the AML 01

Monopoly agreements reached between undertakings

Horizontal Monopoly Agreements

Undertakings must avoid engaging in the following conducts with other undertakings:

Fixing or changing commodity prices

This includes directly maintaining or changing the price level, price change range, profit level, or other agreed discounts, commission, rebates, credit terms and other price factors, as well as the agreement to use a standard formula to calculate price or to limit the independent pricing power of parties to the agreement.

Restricting the amount of commodities manufactured or marketed

This includes restricting the output of commodities by restricting, maintaining or suspending production, or restricting the output of commodities of specific types and models, or restricting the sales volume of commodities by restricting their circulation in the market, including the sales of specific types and models.

Splitting the sales market or the purchasing market for raw and semi-finished materials

This includes the division of product sales by area, market share, sales target, sales revenue, sales profit or the type, quantity, and time of goods sold, and the division of purchase by area, type, quantity, time, or suppliers of raw materials, semi-finished products, parts, and related equipment.

Restricting the purchase of new technologies or equipment, or the development of new technologies or products

This includes the imposition of restrictions on purchase and use of new technologies and techniques, restrictions on purchase, lease and use of new equipment or products, or restrictions on investment, research and development of new technologies, techniques, and products, and refusal to use new technologies, techniques, equipment, and products.

Joint boycotting of transactions

This includes the joint refusal to supply or sell commodities to certain undertakings, the joint refusal to purchase or sell commodities from certain undertakings, and joint restrictions to bar specific undertakings from trading with their competitors.

Bid rigging

This includes secretly deciding the winning bidder, abandoning bidding, withdrawing from bidding, submitting high-price bids, or including unreasonable terms in the tender document in favor of the predetermined winning bidders.

Exchange of sensitive information

Sensitive information refers to any information related to undertakings and their competitors that may cause competitors to coordinate their production and operation conducts, excluding information that has been made publicly available.

For the purpose of the AML, “sensitive information” includes:

- Prices (including actual prices, price list or indicative prices);
- Discounts and discount policies;
- Bidding plan or strategy;
- Customers (including actual or potential customers and their identities and classification);
- Market areas (areas where actual or planned sales/non-sales of goods occur, or where services are provided or not provided);
- Suppliers (including actual or potential suppliers and their classification);
- Terms or conditions of sales;
- Policies or strategies for negotiation with customers;
- Earnings, profits, or profit margins;
- Market share;
- Strategies or costs of sales, marketing, advertisement, or promotion;
- Market, supply and demand, price trends and other data or opinions (including without limitation to whether the current market prices are too low, what is an appropriate level of prices, and how to reach a higher or more stable level of prices);
- Business expansion/contraction plan;
- R&D projects, strategies, or costs;
- Production capacity, output, or costs;
- Any information that can be exploited to reduce workable competition, such as data of production, sales, and inventory.

The AML also prohibits participation in or support for trade associations’ arrangements for undertakings within their respective trades to reach monopoly agreements, including rules, regulations, and recommendations for eliminating or restricting competition, or resolutions to fix prices, limit output, divide market areas, or jointly boycott or refuse transactions.

In addition, undertakings may also be requested to participate in other monopolistic arrangements.

Undertakings will inevitably come into contact with their competitors via business transactions or industry meetings. When other undertakings bring up any sensitive topic that may lead to violation of the AML, undertakings should immediately renounce and withdraw from the discussion.

Undertakings are advised to keep records of their renunciation and withdrawal from discussing any sensitive topic. If other undertakings finally reach an agreement and implement monopoly, such records may help prove their innocence.

Monopoly agreements reached between undertakings

Horizontal Monopoly Agreements

Illustrative cases

A business manager has kept close contact with seven major competitors in the industry for many years through office visits, dinners, and golfing, etc. In this process, the business manager reached an agreement with those competitors that they respect each other's existing market share and, based on this consensus, pre-determined the bidding prices for their respective bids to ensure that the agreed bidder wins the bid at the predetermined prices.

A gold jewelry association organized a meeting of gold shop managers to discuss the development of self-discipline rules to "stabilize" the prices of gold and platinum jewelry, and the participating shops agreed on the method and formula of calculation and range of the retail prices of gold and platinum jewelry. Accordingly, the participating gold shops set their retail prices within an agreed range and manipulate the prices of gold and platinum jewelry, damaging the legitimate interests of other competitors and customers. The trade association played a leading role in reaching the monopoly agreement. Given the severity of the case and its serious social influence, the trade association was fined 500,000 yuan by the AMEA. The gold shops in question actively stopped the said illegal conduct before the investigation, cooperated with the investigation, and rectified their wrong conduct. Therefore, their penalty was only a fine of 1% of the relevant sales achieved in the previous year.

A provincial cement industry association organized the cement producers in the province to "maintain a certain price level by output control". An agreement was reached between these businesses on shutdown schedule and maximum monthly output. To ensure the implementation of this agreement, mutual supervision and inspection were added as a clause in the agreement.

A provincial insurance association arranged for 23 property insurance companies operating in the province to negotiate and agree on the discount factor for new vehicle insurance and the commission rate for commercial vehicle insurance according to their market share.

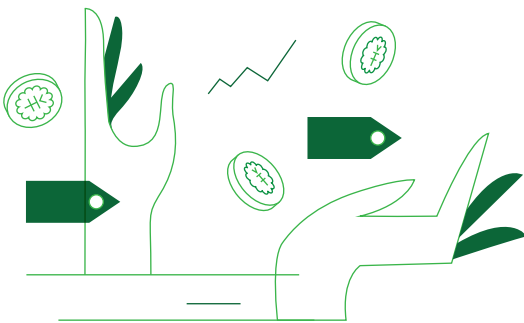
Four types of monopolistic conducts prohibited by the AML 01

Monopoly agreements reached between undertakings

Vertical Monopoly Agreements

When an undertaking reaches an agreement or decision with a trading counterparty, the agreement or decision should not constrain the other party's right to operate independently, especially its pricing right.

Resale price maintenance (RPM) is prohibited or restricted by competition laws worldwide. If the undertaking cannot prove that its RPM practices do not damage competition and can bring benefits to consumers, the AMEA shall conclude that the undertaking has engaged in monopoly.



RPM includes ▼

Fixing the prices of commodities resold to a third party; and Restricting the lowest prices for commodities resold to a third party.

Some non-price-fixing restrictions also have potential anti-monopoly risks.

- ★ For this purpose, "prices" refer to the price range, profit margin, calculation formula, and other price factors such as discounts, commission, rebates, and credit terms.

Some non-price-fixing restrictions also have potential anti-monopoly risks ▼

Exclusive sales

A supplier promises to a certain seller that it will only supply certain goods to the said seller in a certain market or a certain area of the market, for the purpose of reselling the goods. This restrictive practice most often happens between manufacturers and wholesalers, manufacturers and retailers, and wholesalers and retailers.

Exclusive purchase

A seller promises to a supplier that the seller cannot purchase the agreed product from any other supplier than the said supplier or a third party designated by the supplier.

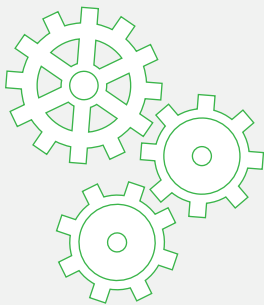
Geographic restrictions and client restrictions by passive sales and cross-supply

"Passive sales" refer to dealers selling goods at the request of customers. "Cross-supply" refers to the supply of goods between dealers of the same upstream undertaking. "Geographical restrictions" mean demanding dealers to or not to sell commodities in specific areas. "Customer restrictions" refer to demanding dealers to or not to sell commodities to specific customers.

Illustrative cases

A company, which is an automobile manufacturer, sells goods through authorized dealers in China. The company has regional managers over distributors, fixes the minimum resell price for each distributor, and recommends the working-hour rates for dealers who provide after-sales services. To ensure the implementation of the pricing policy, the company also divides the sales areas among distributors, and strictly prohibits channeling goods and cross-regional sales.

A company signs a distribution agreement with its distributors. Under the agreement, distributors should obtain approval from the company when they plan to carry out promotional activities, and the promotional prices must not fall below the recommended retail prices fixed by the company, and the distributors who violate the agreement will be subject to penalties of supply restriction, supply cutoff or disqualification.



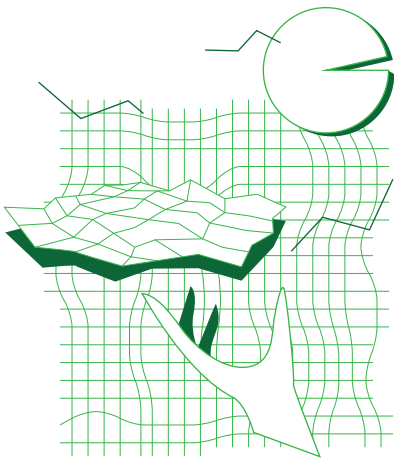
In addition to horizontal and vertical monopoly agreements, undertakings should pay close attention to new issues of suspected monopoly agreements, such as platform hub-and-spoke conspiracy. Platform hub-and-spoke conspiracy may take the form of a vertical agreement (competitors communicating or exchanging information or intention through an intermediary platform), but it is ultimately a form of horizontal monopoly agreements.

Network (e-commerce) platform operators are not allowed to organize or coordinate undertakings on the platform to reach any monopoly agreement prohibited by the AML.

Four types of monopolistic conducts prohibited by the AML 02

Abuse of dominant market positions by undertakings

A “dominant market position” is an indication of the market power of an undertaking. It refers to a market position held by undertakings that are capable of ▼



controlling the prices or quantities of commodities or other transaction terms (e. g. types and quality of goods, payment terms, delivery method, after-sales services, trading choices, technical constraints) in a relevant market

Preventing or exerting an influence on the access of other undertakings to the market (e. g., preventing other undertakings from entering the market, or delaying their entry into the market so that even if they enter the market, the market access threshold has risen significantly and workable competition is not available any more)

It is not illegal for businesses to possess a dominant market position. The AML does not oppose businesses to obtain dominant market positions by lawful operation, nor does it oppose businesses with certain market power to achieve greater success in the market by more advanced technology and higher efficiency.

In general, the dominant market position of an undertaking shall be determined through a comprehensive evaluation considering the factors below ▼

Its market share and the competitiveness in the market

Access of other undertakings to the relevant market

The undertaking's financial and technical strengths

Dependence of other undertakings on the undertaking in transaction

Its ability to control the sales market or the purchasing market for raw and semi-finished materials

Four types of monopolistic conducts prohibited by the AML 02

Abuse of dominant market positions by undertakings

The AML stipulates that an undertaking may be considered to hold a dominant market position in any one of the following circumstances (unless there is evidence to the contrary) ▼

1/2

The market share of one undertaking alone accounts for half of the total in a relevant market

2/3

The joint market share of two undertakings accounts for two-thirds of the total in a relevant market

3/4

The joint market share of three undertakings accounts for three-fourths of the total in a relevant market.

Certain practices of an undertaking with a dominant market position which have the potential of eliminating or restricting competition are deemed as abuse of market dominance ▼

Typical behaviors and illustrative cases of abuse of dominant market positions

Selling goods at unfairly high prices or buying goods at unfairly low prices

Fang (undertaking) established one company in each of two provinces to engage in drug sales. He managed, through contact and networking, to obtain the distribution right from all Chinese manufacturers of an API, signed the distribution contracts in the name of the two companies separately, and then raised the price from 300 yuan per kg to 30,000 yuan per kg.

Selling commodities at prices below cost without justifiable reason

A company holds a dominant position in the production and sales of a product in the Chinese market. The company implements a sales policy that offers rebate to incremental orders, under which incremental orders are subject to lower prices, while this gap is the margin for its competitors. This policy has pushed its competitors to slash prices and fill the gap of the rebate they could have received from the company and bear the cost to win new orders.

Refusing to enter into transactions with their trading counterparties without justifiable reasons

A pharmaceutical company signed a nationwide distribution contract of phenol API with another pharmaceutical company. After that, it stopped supplying the API to any other customer in the market in a certain period. Many Chinese pharmaceutical companies requested to buy this API, but all the purchase requests were rejected.

Allowing their trading counterparties to make transactions exclusively with themselves or with undertakings designated by them without justifiable reasons

A company, which is an online platform operator with a dominant market position, demands that any other company engaged in sales on the platform cannot run a store on other platforms offering the same services. Otherwise, the company will restrict their traffic, delay their payments, remove their entries, or even close their store. This behavior has the effect of restricting and eliminating competition between network platform operators.

Conducting tie-in sale of commodities or adding other unreasonable trading conditions to transactions without justifiable reasons

A company holds a standard-essential patent in the field of mobile communications. In the licensing contract, this company tied up other non-standard-essential patents with this standard-essential patent, requiring that the authorized company must license its own intellectual property rights to the company for free.

Applying differentiated prices and other transaction terms among their trading counterparties who are on an equal footing without justifiable reasons

A tobacco company supplied a cigarette product in short supply to three cigarettes retailers affiliated to a trading company far more than that other tobacco retailers. That means the tobacco company implements a differentiated policy towards trading counterparties in the quantity of cigarette in short supply.

Abuse of dominant market positions by undertakings

Industries essential to the national economy and national security (including public utilities such as water supply, power supply, gas supply, telecommunications and cable TV) and industries that are exclusively franchised in accordance with applicable laws are likely to be presumed to possess a dominant position in the relevant market, and present high anti-monopoly law risks.

Undertakings in these industries should operate in compliance with applicable laws, be honest, trustworthy, strictly self-disciplined, and accept the supervision of the public. Precautions should be taken to avoid the abuse of dominant market positions that harms the interest of customers. In specific, they should avoid restrictive transactions, additional unreasonable transaction terms, and differential treatment.

It must be noted that not all the above-said behaviors of undertakings with dominant market positions violate the AML. Generally, anti-monopoly authorities will make a reasonable analysis when evaluating the anti-competitive nature of such behaviors, conduct a comprehensive evaluation of the anti-competitive effect, and finally determine whether they are illegal or not.

If any behavior of an undertaking falls into the above-said categories of typical abusive behaviors and the undertaking has a dominant position in a relevant market, special attention must be paid to anti-monopoly risks.

Four types of monopolistic conducts prohibited by the AML 03

Concentration of undertakings that lead, or may lead to elimination or restriction of competition

“Concentration of undertakings” refers to: merger of undertakings; control over other undertakings gained by an undertaking through acquiring their shares or assets; or control over other undertakings or the ability to exert a decisive influence on the same gained by an undertaking by signing contracts or other means.

Concentration of undertakings may lead to excessive concentration of economic forces in a relevant market, thus impairing market competition.

Any intended concentration of undertakings should be judged whether it reaches the threshold level set out in the Provisions of the State Council on the Thresholds for Declaration of Concentration of Undertakings.

If it does, the undertakings shall declare in advance to the authority. Without declaration, the concentration shall be regarded as illegal and prohibited. Illegal concentration of undertakings shall result in economic penalties and the undertakings shall be required to restore the conditions before concentration.

Threshold for declaration

The worldwide business volume of all the undertakings involved in the concentration exceeds 10 billion yuan in the last accounting year and the business volume in China of at least two undertakings among them exceeds 400 million yuan in the last accounting year

The business volume in China of all the undertakings involved in the concentration exceeds 2 billion yuan in the last accounting year and the business volume in China of at least two undertakings among them exceeds 400 million yuan in the last accounting year (except in the banking, insurance, securities and futures industry)

Illustrative cases

Company A and Company B entered into a contract to establish a joint venture in a city. After the joint venture was registered, Company A held 51% of the equity, while Company B held 49%, and the combined business volume of the two companies in China in the previous year reached the threshold of declaration. However, neither company declared this intended concentration to the AMEA under the State Council before the implementation.

Procedure of declaration

1



Submitting documents and materials

To declare concentration, an undertaking shall submit documents and materials to the AMEA as required by relevant regulations or notices, and the AMEA shall issue the Receipt of Materials for Declaring Concentration of Undertakings. The AMEA shall check whether the submitted documents and materials are complete for declaration.

2



Supplementing documents and materials

If the submitted documents and materials are incomplete, the AMEA shall notify the declaring undertaking in writing of the need to supplement documents or materials within a time limit. If the declaring undertaking fails to do so, it shall be deemed to have made no declaration.

3



Notice of case filing

When submitted documents and materials are complete, the AMEA shall notify the declaring undertaking in writing that their case is filed.

4



Preliminary review

The AMEA shall make a preliminary review of the declared concentration within 30 days from the date it receives the documents or materials submitted in full, and decide whether to conduct a further review, and notify the declaring undertaking of its decision in writing.

Procedure of declaration

5



Further review

Where further review is deemed necessary, the AMEA shall complete the review within 90 days from the date it makes the decision, and decide whether to prohibit the declared concentration, and notify the declaring undertaking of its decision in writing.

6



Extended review

Under any of the following circumstances, the AMEA may extend the period for review on the condition that it notifies the declaring undertaking of the extension in writing, but the extension shall not exceed the maximum of 60 days:

- The undertaking agrees to the extension;
- The documents or materials submitted by the undertaking are inaccurate and therefore further verification is needed;
- Major changes have taken place after the undertaking made the declaration.

7



End of review

After the completion of the antitrust review, the AMEA shall notify the declaring undertaking of the decision in writing, and publish its decision to prohibit the concentration of undertakings or its decision to impose additional restrictive conditions on the implementation of such concentration.

Four types of monopolistic conducts prohibited by the AML 02

Abuse of administrative power to eliminate and restrict competition

While they try to prevent and control their anti-monopoly risks at their best, undertakings should be aware of the possibility of administrative organs authorized abusing their administrative power to eliminate and restrict competition while they exercise their power as authorized by law to perform public administration duties. Undertakings may be ordered, required, or required in disguise by administrative organs to engage in a monopolistic conduct prohibited by the AML, but the abuse of administrative power is not a ground for exemption.

Therefore, in this case, undertakings should explicitly refuse to engage in conducts as the administrative organs order or require, and report the case to the AMEA. The scenarios of abuse of administrative power include ▼

Requiring, or requiring in disguised form, entities or individuals to deal in, purchase or use only the commodities supplied by the undertakings designated by them

Compelling undertakings to engage in monopolistic conducts which are prohibited by the AML

Excluding non-local undertakings from making local investments or establishing local branches or offices

Impeding the free flow of goods between regions

Excluding non-local undertakings from participating in local invitation and tendering

Illustrative cases

An administrative organ of a Chinese province entered into a contract with a network seal technology company in the same province for building and maintaining an innovative anti-counterfeit seal information system, bypassing any necessary bidding process. Under the contract, the company would be responsible for providing software and upgrades, and supplying materials and chips to all seal-making companies in the region.

Later, the administrative organ issued an “implementation plan” to its subordinate agencies, announcing officially that the technology company was the bid winner and would be responsible for the development of the software, and requiring all local subordinate agencies to use the same contractor.

6 Investigation into Suspected Monopolistic Conducts

AML Enforcement Authorities

State Administration for Market Regulation

Responsibilities

SAMR is responsible for coordinating anti-monopoly enforcement in accordance with the AML.

Instruct companies to respond to anti-monopoly litigation overseas and work as the secretariat of the Anti-Monopoly Committee of the State Council (via the Anti-monopoly Bureau of SAMR)

Review the concentration and monopoly agreements of undertakings in accordance with law, abuse of dominant market positions and administrative power to eliminate and restrict competition

Shanghai Municipal Administration for Market Regulation

Responsibilities

Authorized by the SAMR, Shanghai AMR is responsible for AML enforcement over monopoly agreements, abuse of dominant market positions and administrative power to eliminate and restrict competition, and handle such cases in its own name as an anti-monopoly authority according to law.

Formulate antitrust policies, rules and guidelines, and implement them in Shanghai

Handle monopoly agreements of Shanghai and abuse of dominant market positions and administrative power to eliminate and restrict competition in Shanghai and any designated area over which it has jurisdiction, and review anti-monopoly cases

Supervise concentrations of undertakings in this city and carry out investigations according to law

Assist and instruct companies in Shanghai to respond to anti-monopoly litigation overseas (via the Office of Anti-Monopoly and Price Supervision)

Responding to anti-monopoly investigations

Undertakings suspected of monopoly should cooperate proactively with the AMEA in antitrust investigations, and perform their legal and social duties, which will be good for them.

STEP 1

Proactive reporting

Undertakings who are parties to any monopoly agreement should report the fact to the AMEA before it is discovered, which is the ground for exemption from penalties in part or in whole. Undertakings that find themselves engaging in other monopolistic conducts should immediately stop the illegal conducts.

If damage has been caused, undertakings should try to eliminate and mitigate the consequences. This will qualify them for leniency in accordance with Article 27 of the Law of the People's Republic of China on Administrative Penalty.

STEP 2

Actively cooperating with anti-monopoly investigators

Undertakings should inform every employee of the power of the AMEA and prevent any internal acts to deny or hinder AML investigations, mainly including:

- Preventing AML enforcement personnel from entering business premises (or offices) or delaying their entry
- Refusing to answer questions
- Covering up, destroying or transferring evidence
- Refusing to submit documents to the enforcement personnel, or delay the submission, or denying or delaying their access to documents
- Providing misleading information or false statements

Denying or impeding AML investigations will not help undertakings in any way. On the contrary, such acts may be punished in accordance with Article 52 of the AML, including a fine of 20,000 yuan up to 100,000 yuan for individuals, and 200,000 yuan up to 1 million yuan for entities. If such acts constitute a crime, the undertaking in question will assume criminal liabilities.

STEP 3

Responding actively to investigations

Undertakings responding actively to investigations in the following ways may qualify for fine reduction or exemption from economic penalties.

Application for leniency

To qualify for leniency, an undertaking suspected of monopoly must actively report evidence to the AMEA which the AMEA has not obtained but is substantial for initiating an investigation or determining the monopolistic nature (including the undertakings as parties to a monopoly agreement, the goods involved, the content of agreement, method of reaching the agreement, and the actual implementation of the agreement), and continue to cooperate with the AMEA until the end of investigation. This is an important way for an undertaking to handle and control anti-monopoly risks. It can mitigate or exempt penalties, but currently applies to monopoly agreements only.

The AMEA will decide whether to reduce or exempt the penalties according to the time sequence of self-reporting, the importance of evidence provided by undertakings, and according to the relevant circumstances of the monopoly agreements being reached or implemented.

In the same case, **the first applicant** may be exempted from all penalties or the penalties will be reduced by not less than 80%; for **the second applicant**, the penalties will be reduced by 30% to 50%; for **the third applicant**, the penalties will be reduced by 20% to 30%.

Application for suspending investigations by making commitments

To apply for suspending investigations, an undertaking suspected of monopoly must, during the investigation by the AMEA and before the AMEA has sufficient evidence to identify the illegal act, make a written commitment to adopt specific measures to eliminate the consequences of its conduct within a certain period of time which is accepted by the AMEA. The application for suspending investigations must be submitted in writing.

STEP 3

The AMEA will decide whether to suspend the investigation based on the undertaking's application and commitment and after considering the nature, duration, consequences and social impact of the suspected monopolistic conduct, the undertaking's committed measures and their expected effect.

Where the AMEA decides to suspend investigation, it shall oversee the fulfillment of the commitments made by the undertaking. Where the undertaking fulfills its commitments, the AMEA may decide to terminate the investigation, thereby freeing the undertaking from administrative penalties.

Where the undertaking fails to fulfill its commitments, or the basis for suspending the investigation has changed substantially, or the suspension of investigation is based on incomplete or false statements, the investigation may be resumed.

However, the commitment mechanism does not apply to cases of suspected monopoly agreements that fix prices, limit output, divide market areas.

Illustrative cases

A provincial anti-monopoly authority decided to investigate the suspected monopolistic conduct of a company. In order to verify the facts, it issued a Notice of Investigation that required the company to cooperate with the investigation within 10 working days and provide agreements, documents, accounting books, business documentations such a phone records, correspondence, and electronic data. By the expiration date, the company had not provided any of the required materials. After that, the AMEA issued a Notice of Demand for Cooperation with Investigation Before Deadline to the company, and required the company to cooperate with the investigation within 3 working days. By the expiration date, the company had only submitted a statement declaring that its act did not constitute monopoly, but had not provided any supporting materials as required.

The AMEA believed that the company should have cooperated with the investigation and performed its legal duties. The company should not have refused or impeded the investigation. The above-said conducts of the company constituted a refusal to provide relevant materials and therefore constituted a violation of the relevant provisions of the AML and the procedural provisions for investigation. Under this circumstance, the AMEA ordered the company to correct these conducts immediately, and imposed a fine of 200,000 yuan on the company.

7 Legal Documents

Part 1 Basic Law

Anti-monopoly Law of the People's Republic of China (2008.8.1)

Part 2 Concentration of Undertakings

Guidelines for the Anti-monopoly Review for Concentration of Undertakings (Revised on 2018.9.29)

Provisions of the State Council on the Thresholds for Declaration of Concentration of Undertakings (2008.8.3)

Guiding Opinions on Streamlined Declaration of Market Concentration Cases (Revised on 2018.9.29)

Guiding Opinions on Regulating the Titles of Cases on the Declaration of Concentration of Undertakings (Revised on 2018.9.29)

Guidance on Submission of Documents and Materials for Declaration of Concentration of Undertakings (Revised on 2018.9.29)

Part 3 Monopoly Agreements, Abuse of Dominant Market Positions and Intellectual Property

Interim Provisions on Prohibiting Monopoly Agreements (2019.9.1)

Interim Provisions on Prohibiting Abuse of Dominant Market Positions (2019.9.1)

Part 4 Administrative Monopoly

Interim Provisions on Prohibiting the Acts of Eliminating or Restricting Competition by Abuse of Administrative Power (2019.9.1)

Part 5 Anti-Monopoly Guide

Guide of the Anti-Monopoly Committee of the State Council for the Definition of the Relevant Market (2009.5.24)


Guiding Opinions of China (Shanghai) Pilot Free Trade Zone on the Exemption of Small and Medium-sized Enterprises from Monopoly Agreements (2017.10.25)


Part 6 Anti-Monopoly Claims

Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (2016.6.1)

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For more information, please seek advice from legal professionals.

Undertakings can also seek help from government agencies who will offer help in their capacity as authorized by law.