Comments on the Draft Amendments to the Anti-Monopoly Law ("AML") of the People's Republic of China ("PRC")

Jointly submitted by ICC and ICC China

The International Chamber of Commerce (ICC) Global Competition Commission and ICC China Competition Commission, (hereinafter "we") respectfully submit for the consideration of the Standing Committee of the National People's Congress (the "Standing Committee of NPC") our comments on the draft amendments to the Anti-Monopoly Law of the People's Republic of China (the "Draft AML Amendments") in the context of the revision of the PRC Anti-Monopoly Law.

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The ICC Global Competition Commission, as one of the leading voices of business in global competition policy, aims to provide a forum for businesses to engage in constructive discussions on practical/technical issues that could help enhance trade and investments across borders, and thereby preserve economic growth globally.

China Chamber of International Commerce, or CCOIC, is the official representative of ICC in China and upholds the value of Cooperation, Communication, Openness, Innovation and Coordination. ICC China contributes to the promotion of ICC's policy work at national level, including in competition policy while feeding experts' opinions on the domestic anti-monopoly law in the formulation and revision of rules and regulations in related fields and to the relevant domestic departments.

1. ***New Article 17 (2):*** *The resale price maintenance activities ("RPM") will not be prohibited if the undertakings concerned can demonstrate that the RPM arrangement does not have any anti-competitive effect (rule of reason).*

The New Article 17 (2) is welcomed as it promotes legal certainty by reconciling the diverging approaches between the PRC Courts and the State Administration for Market Regulation

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("SAMR") through the introduction of a unified "*by-effect"* standard. The New Article 17 (2) seems to suggest that any RPM arrangements by default would have anti-competitive effects, and the burden of proof lies on the investigated to show otherwise. As a result, the anti-monopoly enforcement authority and the courts will have considerable margin for interpretation and discretion when enforcing these provisions. It will be very difficult for companies to prove that the RPM had no anti-competitive effects.

We suggest that the New Article 17 (2) be drafted such that the burden of proof lies on the SAMR to show that the RPM has anti-competitive effects, then the burden of proof would be shifted to the investigated to show that the efficiencies generated by the RPM outweighs any anti-competitive effects. At the very least, there should be guidelines issued that indicate/contain examples of when the RPM could have anti-competitive effects and under which circumstances it typically does not bear such effects.

2. ***New Article 18:*** *Operators may not coordinate with other operators to reach monopoly agreements or provide substantive assistance to other operators in reaching monopoly agreements.*

We understand that the New Article 18 extends the scope of the AML such that third parties are now potentially liable for their role as facilitators. We recommend that the New Article 18 be limited to the facilitation of the classic horizontal "hub-and-spoke" cartel arrangements as opposed to any monopoly agreements in general.

3. ***New Article 19:*** *When the market share of the undertakings concerned is lower than the thresholds stipulated by the SAMR, that agreement will not constitute a violation of the AML, unless it is evidenced that the agreement has excluded or restricted competition.*

A safe harbour based on market share of the undertakings concerned will be introduced in the chapter relating to monopolistic agreements. We welcome this development as it will increase legal certainty for many companies considerably. However, the thresholds, application exemptions and other issues need to be further specified by the SAMR.

Specifically, we suggest that the threshold be set at a reasonable level in order for businesses to truly benefit from the safe harbour that the New Article 19 seeks to provide.

The New Article 19 says the safe harbour does not apply in *"cases where there is evidence showing parties have reached an agreement on eliminating or reducing competition"*. It would be helpful to get more clarification on what this phrase means, e.g. to clarify if the concept is similar to the concept of an *"by-object"* infringement or so-called black clauses, meaning that agreements between parties with a market share below a certain threshold are legitimate, unless they contain a black clause.

*4. **New Article 22:** When operators with dominant market positions use data, algorithms, technology, and platform rules to set up obstacles to impose unreasonable restrictions on other operators, such a conduct will constitute an abuse of a dominant market position as defined in the preceding paragraph.*

We understand that the New Article 22 provides those dominant undertakings imposing restrictions on other undertakings by use of *"data and algorithm, technology and platform rules"* may now amount to an abusive conduct. We recommend that the issuance of a policy or guidance document that would provide more clarity as to what the use of *"data and algorithm, technology and platform rules"* mean in practice given that these terms are broad and vague.

*5. **New Article 32:** The SAMR may decide to suspend the merger review clock when 1) the review cannot be conducted because of the undertakings' failure to submit materials as required, or 2) there are new situations and facts with a significant impact on the review of business concentration that need to be verified, or 3) the additional restrictive conditions on business concentration, to which the undertakings have consented, need to be further evaluated. There are two conditions needed to be satisfied simultaneously for suspending the merger review clock under this scenario: 1) the specific remedies or the details of such remedies need to be further evaluated; and 2) the filing parties agree with the suspension.*

The ability to "stop the clock" is welcomed as this is likely to result in a more efficient review process (in particular, if it involves a complex transaction) compared to a withdrawal/refiling approach. Nonetheless, the current drafting of New Article 32 (1) appears to be a bit broad and vague on what *"failure to submit materials as required"* means. If possible, the New Article 32 (1) should consider clarifying/limiting this to only material and/or substantive information (e.g. information that is likely to be crucial to the competitive analysis of the impact of the proposed transaction on the relevant markets). In addition, it is suggested to change it into "failure to submit materials as required within a reasonable time", so as to reasonably limit its application. Similarly, *"significant impact"* is a broad term, which may reduce the certainty and prolong the merger review process. It would be welcomed if the SAMR could provide further guidance and clarify the situations and facts it considers giving rise to such *"significant impact"*. We also suggest that the following wording in **bold** be included in the legislation: ***"there are new situations and facts in relation to the relevant market or business with a significant impact on the review of the competitive impact of the business concentration that need to be verified"***.

*6. **New Article 37:** The SAMR shall enhance the review of business concentrations in certain industry sectors such as people's livelihoods, finance, technology, and media.*

While the proposed New Article 37 highlights the SAMR enforcement priorities, it might be helpful for the SAMR to retain its flexibility in setting its enforcement priorities as these priorities may change over time. Many competition authorities set and change their priorities annually and this has given flexibility to the regulators. As such, we would recommend that

the proposed New Article 37 be removed, and instead, the SAMR should consider including it in a policy or guidance document. Alternatively, it can be stated that the SAMR shall set its enforcement priorities with the aim to review them from time to time. This would provide the SAMR with more flexibility to change its priorities review in the future rather than having them set in stone. Additionally, as some of terms may be quite broad (e.g. people's livelihood), it would be welcomed to give more details on what they mean, so as to achieve its purpose of informing the public about these priorities.

7. ***New Article 56:*** *Where undertakings violate the AML to reach and/or implement monopoly agreements, 1) a fine of between 1% and 10% of their sales in the preceding year may be imposed; 2) a fine of no greater than CNY 5 million (USD 782 717) may be imposed if there are no sales in the preceding year; 3) a fine of up to CNY 3 million (USD 469 630) may be imposed if the monopoly agreement has not been implemented; 4) the legal representative, major responsible persons, and directly responsible persons who shall be held personally accountable may be subject to a fine of no greater than CNY 1 million (USD 156 543).*

Regarding the punishment of anti-competitive arrangements, the Draft AML Amendments provide for new sanctions that may now be imposed upon individuals. In the future, the legal representative of undertakings involved in anti-competitive arrangements or the individuals who are "major responsible persons" or "directly responsible" will face the risk of being fined.

The introduction of personal liability is a fundamental and serious change to the AML. We suggest further clarification on how to determine "major responsible persons, and directly responsible persons" under Article 56.

Specifically, we recommend that a detailed accompanying guidance document setting out the key considerations/principles for the finding of personal liability be consulted and introduced first, before implementing the New Article 56. It would be helpful to clarify what this means in a context of a large organisation where there are multiple layers e.g. people that were actually involved, should have known, or turned a blind eye to a misconduct, or grossly negligent. If individuals that can be implicated in the context of large organisations can potentially include those that have no knowledge of the conduct, it should be considered whether the SAMR would accept any mitigating factors (e.g. an effective competition compliance program, the fact that the infringement is a one-off incident by a "rogue employee" etc.) when implementing or considering the level of fine to be implemented. Furthermore, we suggest limiting the scope of any individual liability to only the most egregious anti-competitive conduct (*i.e.* cartel behavior) as opposed to simply any violation of the AML. In addition, how to calculate the sales in the preceding year, including the product scope and geographical scope may also need to be specified. Lastly, it is suggested to provide in the appropriate section of the law that individuals can apply for leniency too, so as to keep a consistent approach with the liability to businesses.

8. ***New Article 58:*** *For a business concentration violating AML, 1) if the business concentration has an anti-competitive effect, the SAMR may impose a fine no greater than 10% of their sales in the preceding year; 2) if the business concentration has no anti-competitive effect, a fine of up to CNY 5 million will be imposed.*

The draft highly increases the penalty applicable for gun-jumping while stipulating distinct penalty based on whether there is anti-competitive effect from the business concentration. We suggest further clarification on the scope of the penalty object in this article: including whether all the undertakings that participate the concentrations are subject to the penalty, or only the party that has the obligation to notify with the SAMR is subject to the penalty. In addition, we suggest to further clarify whether the fine is calculated based on the undertakings' global sales or domestic sales in China, and whether the fine is calculated based on the sales of the whole company group or just the sales of the products affected by the concentration.

In addition, the New Article 58 does not provide whether the burden of proof lies on the SAMR to show that the violation had led to an anti-competitive effect. We would recommend that the New Article 58 be amended to clarify this point. It should be made clear that any new penalties imposed under the amendments will not have any retrospective effect, and should only come into force once the new AML is passed. A transition period should also be provided for undertakings to recognise and implement any changes as necessary as a result of the new amendments.

9. ***New Article 63:*** *Where the violation of this AML involves extremely significant circumstances, an adverse influence, and serious consequences, antitrust authority may impose a fine of between two times and five times the amount of penalties.*

The New Article 63 means that the theoretical maximum fine is now 50% of the undertaking's revenue, making China one of the most severe/aggressive jurisdictions in terms of the level of penalties. It is worth considering whether this level of fine is proportionate, necessary and/or reasonable, especially when compared with fines imposed by other antitrust regulators globally. This may have an unintended chilling effect on businesses operating in China so that they may need to take very conservative measures when compared to their overseas counterparts or competitors. In the event that a violation involves extremely significant circumstances, this should have been already reflected as part of the penalty (e.g. SAMR may choose to impose the maximum 10% penalty on the relevant undertaking).

In addition, the terms "extremely significant circumstances", "adverse influence", and "serious consequence" are ambiguous and broad. In the event that it is intended to keep the proposed amendments, we suggest to provide further clarity on the above terms such that legal certainty could be provided to businesses. We are also of the view that such a multiplier should (i) have a lower and more reasonable cap; and (ii) its applicability be limited only to the most egregious anti-competitive conduct where such conduct has significant adverse effects on the market (*i.e.* deliberate, recidivist cartel conduct which is devoid of commercial

rationale and committed by undertakings with a substantial market presence and for a significant duration of time) as opposed to any violation of the AML.

10. ***Overall evaluation***

The draft does not address much on matters of Intellectual Property (IP). We can see some gaps of conflict which could arise over the tension between the need to protect IP and antitrust. We suggest that further provisions be added in that regard.