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The Brief Analysis: The Amended AML

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On June 24, 2022, the 35th Session of the Standing Committee of the 13th National People's Congress adopted the amendment to the Anti-Monopoly Law (hereinafter referred to as "***AML***"). The amended *AML* will come into effect on August 1, 2022. The Antitrust and Compliance Team of Lifang & Partners thoroughly reviewed the amended *AML* and provided below their comments on the key provisions of the amended *AML*:

I. Significant increase of punishment standards and further increase of illegality cost

1. Penalties for monopoly agreements have been greatly increased

According to Article 56 of the amended *AML*, a maximum fine of **CNY 3 million** can be imposed if the monopoly agreement entered into has not been implemented, whereas the maximum fine for the aforementioned situation is only CNY 500,000 by the previous version of *AML*. That is to say, after this revision of *AML*, the penalty for "monopoly agreement entered into has not been implemented" is increased by **five times** than before. In addition, the amended *AML* further clarifies the penalties for a company that "does not generate turnover in the preceding year". According to Article 56 of the amended *AML*, a fine of not more than **CNY 5 million** shall be imposed if no turnover was generated in the preceding year. In addition, for the frequently occurred cases of "industry association organizing business operators to reach monopoly agreements", the corresponding penalties have been significantly increased, from "a fine of not more than CNY 500,000" to "a fine of not more than **CNY 3 million**."

2. Personal liabilities for monopoly agreements have been clarified

According to Article 56 of the amended *AML*, a fine of not more than **CNY 1 million** will be imposed if the legal representative, person (s) -in-charge or directly responsible person (s) of a business operator is personally liable for the conclusion of a monopoly agreement. Compared to the previous lack of provisions on personal liability, the amended *AML* specifically provides that if the legal representative, person (s) -in-charge or directly responsible person (s) of a business operator bears personal liability for the conclusion of a monopoly agreement, he/she may also face a huge financial penalty. In view of this, business operators should arrange antitrust compliance education and training in a top-to-bottom way so as to reduce the possibility of facing antitrust risk to the greatest extent.

3. The standard of penalties against illegal concentration of business operators has been increased significantly

The revision to the *AML* also imposes stricter penalties on operators engaging in illegal concentrations. According to Article 58 of the amended *AML*, where the illegal concentration of business operators has or may have the effect of eliminating or restricting competition, a fine of **no more than 10% of the turnover** of the previous year may be imposed (the lower limit is not specified), and if the concentration does not have the effect of eliminating or restricting competition, a fine of no more than **CNY5 million** may be imposed, whereas the maximum fine for the aforementioned situation is only CNY 500,000 by the previous version of *AML*, regardless whether the illegal concentration has the effect of eliminating or restricting competition. According to the recent data disclosed by the State Administration for Market Regulation (hereinafter referred to as "**SAMR**"), there have been 107 public penalties for illegal concentration in 2022. The low cost of illegalities is often the main reason for such high figures of violations. However, when the cost of illegalities is increased by ten times, the number of violations may fall significantly in 2022. At the same time, the further increase in the costs of operators' illegal concentration also means that operators shall be more prudent in assessing whether the relevant transactions need to be notified before carrying out such transactions. In addition, it is worth noting that the obligation of operators to notify the concerned transactions has been further increased in the amended *AML*. Article 26 of the amended *AML* clearly stipulates that "Where a concentration of operators does not reach the threshold for notification set by the State Council, but there is **evidence** that the concentration has or may have the effect of excluding or limiting competition, the State Council's antitrust enforcement authority may require the business operators involved to make a notification."

4. Penalties for obstruction of antitrust investigation have been significantly increased

According to Article 62 of the amended *AML*, antitrust enforcement authorities have the power to impose a fine of up to 1% of the turnover of the previous year on entities that refuse or obstruct antitrust investigations; if no turnover was generated in the previous year or was difficult to calculate, a fine of up to **CNY 5 million** may be imposed. In addition, the amount of fines imposed on liable individuals has been increased to a maximum of **CNY 500,000**. In the case of calcium gluconate API (Active Pharmaceutical Ingredients) enterprises abusing dominant market position, 16 subjects concerned (2 enterprises and 14 natural persons) were fined a total of CNY2.53 million due to obstruction of the investigation by law enforcement authorities, among which two enterprises were each imposed a maximum fine of CNY1 million. If the penalties are imposed under the amended *AML*, the two enterprises involved in the obstruction of the investigation may be imposed a maximum penalty of **CNY 14.38 million** and **CNY 5.37 million,** respectively (1% of the previous year's turnover), which is an increase of 13 times and 4 times compared to the actual penalties. It can be seen that the amended *AML* has increased the legal liability for resisting or obstructing law enforcement, and further enhanced its deterrent power. It also indicates that enterprises need to be more cautious in responding to potential antitrust investigations in the future and actively co-

operate with investigations in order to avoid causing additional financial losses.

5. Establishing a "punitive punishment system"

According to Article 63 of amended *AML*, for monopolistic conduct (monopoly agreement + abuse of dominant market position + illegal implementation of concentration of business operators) of particularly grave illegality with an exceptional pernicious impact and exceptional grave consequences or conduct obstructing investigations, the antitrust enforcement authorities may impose a specific fine of more than two times but less than five times of the original amount. This provision indicates that the fines imposed on enterprises violating laws may exceed the original 10% cap on turnover for the previous year. As a result, enterprises may face a significant cost of violating the *AML*.

6. Adding follow-up regulations such as public interest litigation, social credit system, etc.

According to relevant provisions of the amended *AML*, procuratorates may file civil public interest litigations against monopolistic practices, and the relevant records of administrative penalties imposed on business operators will be included in the social credit system and disclosed to the public. In addition, if an illegal practice constitutes a crime, criminal liability will be imposed. This means that the amended *AML*, once implemented, will be fully applicable to civil litigation, social credit system and even criminal litigation. The costs and liabilities for violations of *AML* have been further increased, and enterprises need to consider the possible impact of the relevant conduct on subsequent company operations and strengthen their construction of antitrust compliance.

II. Further improve the principles for regulating vertical monopoly agreements

According to Paragraph 2 of Article 18 of the amended *AML*, a vertical resale price maintenance ("RPM") agreement may not be prohibited if business operators can prove that it does not have the effect of eliminating or restricting competition. This means that the amended *AML*, on top of the previous in-principle prohibition of RPM agreements (*per se illegal rule*), leaves some legal room for companies to defend the reasonableness of the relevant agreements. Compared with previous provisions, the regulations and rules on vertical monopoly agreements are relatively relaxed. However, since there are no precedents of vertical agreements being successfully exempted by arguing that the conduct does not have an effect of eliminating or restricting competition, business operators should still carefully evaluate the antitrust risks of implementing such vertical monopoly agreements.

In addition, the amended *AML* establishes a safe harbor system which aroused intense discussions in the past in Paragraph 3 of Article 18. Currently, regulations on the safe harbor system in China can only be found in the *Anti-Monopoly Guidelines of the Anti-Monopoly Committee of the State Council in the Automobile Industry* and *Anti-Monopoly Guidelines of the Anti-Monopoly Committee of the State Council in the Intellectual Property Industry*. According to the safe har-

bor system established this time, if an operator can prove that its market share in the relevant market is lower than the threshold prescribed by the antitrust enforcement authorities under the State Council, and it meets other prescribed condition, the enforcement authorities shall not prohibit the relevant agreement. It is worth noting that, taken together with the report issued by the Constitution and Law Committee of the National People's Congress on this amendment, it can be seen that the amended *AML* intends to limit the application scope of the safe harbor rule to vertical monopoly agreements, and will not cover horizontal monopoly agreements that have the consequences of severely restricting competition. This implies that the antitrust enforcement authorities will still adopt a relatively strict attitude toward horizontal monopoly agreements in the following period of time. Meanwhile, compared to the two *Guidelines* which have established the safe harbor system, the amended *AML* does not further clarify the specific application standards and conditions of the safe harbor system. Therefore, the improvement of the safe harbor system is one of the key areas of work for the relevant legislative and enforcement bodies. We will continue to focus on this topical issue.

III. Strengthen the regulation on platform operators' monopolistic conducts

According to Articles 9 and 22 of the amended *AML*, platform operators shall not utilize data, algorithms, capital advantages, platform rules, etc., to engage in monopolistic conducts. This special provision reflects the legislative authority's concern for the digital economy. According to the *2022 Annual Report on Anti-Monopoly Enforcement in China* published by SAMR, in 2022, SAMR strictly investigated and punished the illegal conducts of Internet platform companies Alibaba and Meituan, respectively, reviewed 40 merger filing cases involving platform companies, and filed and investigated nearly 200 gun-jumping cases implemented by platform companies. Once the amended *AML* is implemented, the antitrust enforcement authorities will certainly further strengthen the investigation and punishment of platform companies implementing monopolistic conducts by leveraging platform advantages such as algorithms and technologies.

IV. Establish the "stop-the-clock mechanism" and a classification-and-categorization review system for merger filings

The amended *AML* explicitly introduces the so-called "stop-the-clock" system. Article 32 specifies three circumstances that may trigger the suspension of the review period for a concentration of undertakings, i.e., (1) The business operators fail to submit any document or material as required, resulting in the review being unable to proceed; (2) Any new circumstance or new fact emerges which has a material impact on the review of the concentration of undertakings, and if it is not verified, the review will not be able to proceed; and (3) The restrictive conditions to be imposed on the concentration need to be further evaluated, and a request for suspension is made by the business operators. This means that in complicated merger filing cases (especially the cases involving conditional approvals), the "stop-the-clock" system can be adapted to obtain a longer review period so as to properly review the

relevant competition issues and avoid falling into the previous model of "complicated case – insufficient review timeframe – repeated withdrawal and refiling" which will lead to waste and unnecessary review cost, further optimizing the review process.

Meanwhile, the amended *AML* proposes to improve the classification-and-categorization review system, and strengthen the review for important areas which have impacts on national economy and people's livelihood. This means, on the one hand, the review process for simple concentration cases without competition concerns may be further accelerated, and on the other hand, the antitrust enforcement authorities may further strengthen the review of merger filing cases in areas which have been frequently mentioned before, such as finance, technology, people's livelihood, and media. Future transactions in such areas may face the risk of uncertainty brought about by stricter anti-monopoly reviews.

In addition, as mentioned above, Article 26 of the amended *AML* provides that the antitrust enforcement authorities may voluntarily require operators to notify "a concentration of undertakings that does not meet the notification standards but has or may have the effect of eliminating or restricting competition." Based on the above-mentioned provisions on the classification-and-categorization review system and the emphasis on innovation under the amended *AML*, we believe that transactions from key areas such as finance, technology, people's livelihood, media, and innovation-related knowledge-intensive industries are more likely to attract the attention of antitrust enforcement authorities. Therefore, companies should also consider potential anti-monopoly compliance obligations when making relevant transactions.

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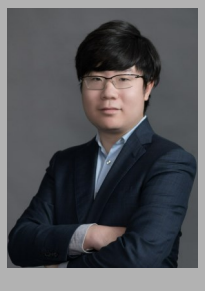

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要点速递：修订后的《反垄断法》

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2022年6月24日，第十三届全国人民代表大会常务委员会第三十五次会议通过关于修改《反垄断法》的决定，修订后的《反垄断法》将于2022年8月1日起正式施行。立方反垄断与合规团队在第一时间对修订后的《反垄断法》进行了全面梳理并对本次修订的重点内容进行了评析：

一、处罚标准大幅提升、违法成本进一步提高

1.针对垄断协议的处罚标准大幅提升

根据修改后的《反垄断法》第五十六条规定，如果经营者尚未实施达成的垄断协议，则最高可以处**300万元**的罚款。而根据此前的规定，在“达成但未实施垄断协议”的情境下，顶格处罚的金额仅为50万元。因此在此次《反垄断法》修订之后，针对“达成但未实施垄断协议”这一违法行为的处罚标准较之前提升了**5倍**。不仅如此，修改后的《反垄断法》还进一步明确了“上一年度无销售额”情况下的处罚标准。根据第五十六条的规定，“上一年度没有销售额的，处**500万元**以下的罚款”。此外，针对近年来频发的“行业协会组织经营者达成垄断协议”的情形，相应的处罚标准也得到了显著提升，由此前的“处50万元以下罚款”提升为“处**300万元**以下罚款”。

2. 明确垄断协议的个人责任

根据修订后《反垄断法》第五十六条的规定，经营者的法定代表人、主要负责人和直接责任人员对达成垄断协议负有个人责任的，可以处**100万元**以下的罚款。相比于此前针对个人责任的相关规定的空白，修订后的《反垄断法》特别明确了如果法定代表人、主要负责人和直接责任人员就达成垄断协议负有个人责任，则其个人也会面临巨额的经济处罚。鉴于此，经营者应“由上至下”全方位地进行反垄断合规意识的宣贯以及培训，从而最大程度地减少面临反垄断风险的可能性。

3. 针对违法实施经营者集中的处罚标准大幅提升

此次《反垄断法》的修订同样也大幅提升了针对违法实施经营者集中的处罚力度。根据修订后的《反垄断法》第五十八条的规定，如果经营者违法实施的经营者集中行为具有或者可能具有排除、限制竞争的效果，则可处以**上一年度销售额10%以下**的罚款（未规定下限），如果不具有排除、限制竞争的效果，则最高可罚款**500万元**。而根据此前的规定，无论违法实施的经营者集中是否具有排除、限制竞争的效果，顶格处罚金额

仅为50万元。根据近期国家市场监督管理总局（以下简称“**市场监管总局**”）披露的数据，2022年全年公开处罚了107起未依法申报案。违法成本偏低往往是这一数据居高不下的主要原因。但是在违法成本提升至之前的十倍之后，2022年的这一数据可能会有较大幅度的回落。同时，经营者违法实施集中的成本进一步增加也意味着经营者在进行相关交易之前需更加审慎评估相关交易是否需要申报。此外，特别值得经营者注意的是，经营者对于相关交易进行申报的义务在修订后的《反垄断法》中又得到了进一步的增加，修订后的《反垄断法》第二十六条明确规定“经营者集中未达到国务院规定的申报标准，但**有证据证明**该经营者集中具有或者可能具有排除、限制竞争效果的，国务院反垄断执法机构可以要求经营者申报”。

4. 针对阻碍反垄断调查的处罚标准大幅提升

根据修订后的《反垄断法》第六十二条规定，反垄断执法机构有权对存在拒绝、阻碍反垄断调查行为的单位处以上一年度销售额1%以下的罚款，上一年度销售额难以计算或不存在的，可以处**500万元**以下的罚款。此外，对负有责任的个体的罚款额度提升至最高**50万元**。此前，在葡萄糖酸钙原料药企业滥用市场支配地位案中，就有16个主体（2家企业和14名自然人）因阻碍执法机构调查而被共计罚款253万元，其中两家阻碍调查的企业分别被处以100万元的顶格罚款。如果根据修订后的《反垄断法》进行处罚，则两家阻碍调查的企业可能分别将面临**1438万**和**537万**的顶格处罚（上一年度销售额1%），相比于之前的处罚分别提升了13倍和4倍。由此可见，修订后的《反垄断法》将抗拒、阻碍执法的法律责任调高，进一步增强了《反垄断法》的威慑力，这也意味着企业未来需要更加谨慎应对任何可能的反垄断调查，积极配合调查从而避免造成额外的经济损失。

5. 设置“惩罚性处罚制度”

根据修订后的《反垄断法》第六十三条规定，对于**情节特别严重、影响特别恶劣、造成特别严重后果**的垄断行为（垄断协议+滥用市场支配地位+违法实施经营者集中）以及阻碍调查行为，反垄断执法机构可在原本罚款数额的2倍以上5倍以下确定具体罚款数额。这一规定意味着对违法企业的罚款可能会突破原有的上一年度销售额10%的上限，因此企业可能面临巨大的反垄断违法成本。

6. 新增公益诉讼、社会信用等后续规制

根据修订后的《反垄断法》相关规定，人民检察院可对垄断行为提起民事公益诉讼并且经营者的相关行政处罚记录将会被纳入社会信用系统，并向社会公示，此外，对构成犯罪的违法行为，将追究刑事责任。这意味着修订后的《反垄断法》实施后，将全面对接民事诉讼、社会信用制度甚至是刑事诉讼。违反《反垄断法》的违法成本和责任后果进一步加强，企业需要考虑相关行为可能造成的对后续经营的影响，加强反垄断合规建设。

二、进一步完善纵向垄断协议的规制原则

根据修订后的《反垄断法》第十八条第二款规定，如果经营者能够证明维持转售价格的纵向协议不具有排除、限制竞争的效果，则可不予禁止。这意味着修订后的《反垄断法》在此前原则上禁止维持转售价格协议（推定违法原则）的基础上，为企业就相关协议的合理性进行抗辩留出了一定的法律空间，较此前而言，相对放松了对纵向垄断协议的规制。但考虑到目前尚未出现通过主张行为不具有排除、限制竞争效果而成功得以豁免的纵向协议先例，经营者仍应谨慎评估实施纵向垄断协议行为的反垄断风险。

此外，修订后的《反垄断法》在第十八条第三款中设置了此前热议的安全港制度。目前，国内对安全港制度的规定只见于关于《国务院反垄断委员会关于汽车业的反垄断指南》和《国务院反垄断委员会关于知识产权领域的反垄断指南》。根据本次设置的安全港制度，如果经营者能够证明其在相关市场的市场份额低于国务院反垄断执法机构规定的标准，并符合国务院反垄断执法机构规定的其他条件的，则执法机构对相关协议则不予禁止。值得注意的是，结合全国人大宪法和法律委员会对此次修法的报告，可以看出此次修法有意将安全港原则的适用范围限制在纵向垄断协议范围内，而对存在严重限制竞争后果的横向垄断协议不予考虑，这意味着未来一段时间内，反垄断执法机构仍将对横向垄断协议行为采取相对严格的执法态度。与此同时，相比于设置了安全港制度的两部指南，修订后的《反垄断法》并未对安全港的具体适用标准、适用条件等内容作出进一步的明确。因此，对于安全港制度的完善是接下来相关立法、执法机构的一个重点工作方向。我们也将对于这一热点问题进行持续关注。

三、加强对平台经营者垄断行为的规制

根据修订后的《反垄断法》第九条和第二十二条的规定，平台经营者不得利用数据、算法、资本优势、平台规则等从事垄断行为，这一特别规定足见立法机构对数字经济的关注。根据市场监管总局发布的2022年《中国反垄断执法年度报告》，市场监管总局在2022年依法严格查处了互联网平台企业阿里巴巴和美团“二选一”行为垄断案，审查了40件涉平台企业的经营者集中申报案件，并对近200件平台企业未依法申报实施经营者集中案件进行立案调查。在修订后的《反垄断法》实施之后，反垄断执法机构势必将进一步加强查处平台企业利用算法、技术等平台优势实施垄断行为。

四、经营者集中设置“停表制度”和分级分类审查制度

修订后的《反垄断法》明确引入了所谓的“停钟制度”，第三十二条规定明确了可以触发中止计算经营者集中审限的三种情

况，即（1）经营者未按照规定提交文件、资料，导致审查工作无法进行；（2）出现对经营者集中审查具有重大影响的新情况、新事实，不经核实将导致审查工作无法进行；（3）需要对经营者集中附加的限制性条件进一步评估，且经营者提出中止请求。这意味着在复杂的经营者集中申报案件中（特别是涉及附条件批准的案件），可以通过适用“停表”制度争取更长审查期限以妥善对相关竞争问题进行审查，从而免于陷入既往“案情复杂-审查时限不足-反复撤回重报”模式中而导致虚耗不必要的审查成本，进一步优化了审查流程。

与此同时，修订后的《反垄断法》提出要健全分类分级审查制度，加强对涉及国计民生等重要领域的集中审查。这意味着一方面，不涉及重要竞争影响的简易集中案件的审查流程可能进一步加快，另一方面，针对此前被频繁提及的金融、科技、民生、媒体等领域，反垄断执法机构可能会进一步加强对相关领域经营者集中案件的审查，未来交易可能面临更严格的反垄断审查所带来的不确定性风险。

此外，正如上文提及的，修订后的《反垄断法》第二十六条中规定了国务院反垄断执法机构可以主动要求经营者对“未达申报标准但具有或可能具有排除、限制竞争效果的经营者集中”进行经营者申报，结合上述对分级分类审查制度的规定以及新法对创新的重视，我们认为涉足金融、科技、民生、媒体等重点领域和与创新相关的知识密集型产业的交易更有可能成为受到反垄断执法机构重点关注的潜在对象，因此企业在进行相关交易时也需要考虑潜在的反垄断合规义务。

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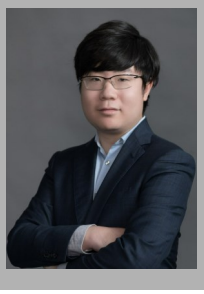

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